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REFORMING NEW ZEALAND'S CLASS ACTION PROCEDURES TO ENHANCE EFFICIENCY AND IMPROVE ACCESS TO JUSTICE

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Contents

Abstract

This thesis addresses the question of whether New Zealand should reform its class action procedures in order to better meet the class action objectives of efficiency and access to justice. Class actions are a mechanism whereby groups of claimants with the same or similar claims can band together and bring proceedings. The ability for groups of similarly affected claimants to bring proceedings together provides certain advantages, including efficiency (both judicial efficiency and cost efficiency) and access to justice (where there may otherwise be none). The existence of a class action mechanism can also have a regulatory effect and serve to discourage illegal or inappropriate conduct.

Currently, New Zealand does not have a dedicated class actions regime, and instead operates a class action type procedure under r 4.24 of the High Court Rules (known as a representative action). A review of the New Zealand position in relation to r 4.24 indicates that while there is a substantial body of law relating to the use of the representative action procedure, the objectives of the representative action procedure are not being met. The lack of legislative guidance in relation to the representative action has created significant difficulties for claimants in New Zealand.

Reforming the New Zealand class action procedure through legislative reform would provide a more efficient procedure and enhance access to justice. Wholesale legislative reform in the form of a dedicated class actions statute would be the best way forward for New Zealand. Legislative reform would need to address particular issues that have arisen in Australia and Ontario, including issues associated with the same interest requirement, opt-in and opt-out mechanisms, settlement requirements and limitation periods. The experience in Ontario and Australia illustrates the importance of ensuring the legislation is as clear as possible, and learning from the experience in those jurisdictions is vital if the objectives of the class action procedure are to be met.

Word Length

The text of this paper comprises approximately 49,985 words.

Subjects and topics

Class actions; access to justice; efficiency; reform.

I Introduction

In 2006, Feltex Carpets Limited was placed into liquidation following a significant downturn in the company's financial situation and share value. After liquidation, shareholders were left owed $30M - $40M. Many shareholders later claimed they had purchased their shares in reliance on a share prospectus which contained allegedly false and misleading statements. In 2008, a number of shareholders came together to pursue legal action against the former directors, promoter of the share issue, vendor of the issued shares, organising participants and joint lead managers of the share issue.[1]

By joining together these shareholders with similar claims were able to pursue recovery of their losses in a more cost effective and economic way. This type of litigation is typically referred to as a class action. For the purposes of this thesis, the phrase class action is used to describe litigation where one plaintiff (often referred to as the representative plaintiff) brings an action on behalf of others who are similarly affected.

The 21st century has seen a significant rise in the use of class action procedures. Class actions have become a phenomenon in the United States, with an entire industry built on mass tort claims, product liability claims, and shareholder claims. Australia and Canada equally have legislation allowing class actions. New Zealand does not have formal class actions legislation but has equally seen significant growth in the use of group litigation in recent years, but the lack of legislative guidance is now causing problems for claimants.

While the United States, Canada and Australia each have distinct features to their class action legislation, the fundamental concept behind the legislation and the regimes created remains the same. These fundamental concepts are also reflected in the New Zealand class action equivalent, despite not being enshrined in formal 'class actions' legislation.

Central to class action proceedings is the way in which they aggregate the claims of a wide group of claimants and resolve all their claims at the same time. The two key features that distinguish a class action from individual litigation are that they are a single proceeding on behalf of a group of others who are not parties to the litigation, and that all class members are bound by the outcome of any determination of common issues, despite not being parties to the

[1] See *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [4] – [16].

litigation.[2] Deborah Hensler describes the difference between class actions and 'ordinary' litigation as being that class actions: [3]

> "…allow one or a few persons or entities to represent a large number of similarly suited claimants in a legal action seeking a substantive remedy. This procedural form differs sharply from traditional court-based dispute resolution, involving one or a few claimants suiting one or a few defendants for relief. It also differs from traditional joinder, in which multiple parties are before the court. Typically, in a representative class action, save for the class representative, the class members are "absent parties"."

When used correctly, class action proceedings have three potential key benefits.[4] First, the potential to provide access to justice for potential claimants where it may not otherwise be possible to bring a claim. Second, provision of judicial efficiency by allowing multiple claims to be dealt with at once. Finally, class actions are considered to have a behaviour modification effect by deterring actual or potential wrongdoers and encouraging regulatory compliance.

In today's global economy where many civil wrongs are committed by large, powerful and often multinational entities, the availability of class actions to provide remedies has increasing importance.[5] Where the defendants in class or representative action claims are large corporations with deep pockets and experience in litigation, claimants are often inexperienced in litigation and do not have the resources to take on a large corporation, meaning an uneven playing field may be created. Class actions can therefore provide potential claimants with an opportunity to bring a claim where they otherwise may not have that opportunity.

Unlike many other jurisdictions, New Zealand does not have formal class actions legislation. Despite this, over the last 30 years there has been a significant increase in class action type claims in New Zealand.[6] The New Zealand group litigation sphere has developed more slowly than in other jurisdictions, possibly in part due to the existence of our Accident Compensation Corporation scheme which bars most claims for personal injury,[7] along with the fact that New Zealand courts are typically more conservative with their damages awards than other countries,

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[2] Vicki Waye "Advantages and Disadvantages of Class Action Litigation (and its Alternatives)" (2018) 24 NZBLQ 109 at 109.
[3] Deborah R. Hensler "From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally" (2017) 65 Kansas Law Review 965 at 966.
[4] *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46; [2001] 2 SCR 534 at [19] – [25] [*Western Canadian*].
[5] Bernard Murphy and Camille Cameron "Access to Justice and the Evolution of Class Action Litigation in Australia" (2006) 30(2) Melbourne University Law Review 399 at 402.
[6] Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24(2) NZBLQ 132 at 143.
[7] Accident Compensation Act 2001.

such as the United States.[8] It may also be relevant that until relatively recently, litigation funding was not available, which may have rendered it impossible for some claimants with potentially worthy claims to issue proceedings.[9]

The recent increase in class action type claims means it is now timely to give consideration to the best way to provide for these types of claims in the New Zealand context.

Class action-type claims are currently permitted in New Zealand in certain circumstances under r 4.24 of the High Court Rules, which permits a plaintiff to represent other plaintiffs who have the same interest in the subject matter of the litigation. These claims are widely known as representative actions (reflecting the wording of r 4.24), though in some cases are also referred to as class actions.

This thesis addresses the question of whether the New Zealand should reform the r 4.24 representative action procedure in order to better meet the objectives of the class action procedure, including efficiency and access to justice. What constitutes access to justice has not been defined in the context of representative actions in New Zealand. However, s 27(1) of the New Zealand Bill of Rights Act 1990 provides a starting point:[10]

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

The focus of s 27(1) is largely on ensuring that people are provided with access to the courts.[11] A detailed analysis of what constitutes access to justice is beyond the scope of this paper, so for the purposes of this thesis, access to justice is taken to mean an ability for potential claimants to access the court system, and have their claim heard in the most cost effective manner possible. There is therefore, a certain extent of overlap between the class action objectives of access to justice and efficiency.

This thesis assesses whether reform of the current r 4.24 representative action would enhance access to the court system for claimants, and if so, how the reform could be drafted in a way that best meets the objectives of access to justice and efficiency.

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[8] Rachel Dunning "All for one and one for all: Class Action Litigation and Arbitration in New Zealand" (2016) 3 PILJNZ 68 at 70.
[9] Chamberlain "Class Actions in New Zealand: An Empirical Study", above n 6, at 151.
[10] Bill of Rights Act 1990, s 27(1).
[11] Petra Butler and Campbell Herbert "Access to Justice vs Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty" (2014) 26 NZULR 186 at 195.

Chapter II of this thesis reviews the current New Zealand position, including the historical development of r 4.24 and the principles currently applied by the courts. Given that many of the principles applied by the courts are relatively settled, this chapter does not adopt a fully chronological structure, but rather focusses on outlining each of the relevant principles.

With these principles in mind, chapter III of the thesis goes on to consider whether reform of the New Zealand representative action is necessary, by reference to aspects of the current New Zealand position which have caused difficulties for potential claimants. A key focus of this section is analysis of the *Houghton v Saunders* (*Feltex*) litigation. This long running litigation saga commenced in 2007 and as at March 2020 had not yet been fully resolved.

The experience of the plaintiffs in the *Feltex* proceeding illustrates several shortcomings in the current law and indicates where legislative reform would assist. These illustrations are supplemented by observations from other key representative actions, including *Ross v Southern Response* and *Cridge v Studorp Limited*. Chapter III concludes that there are aspects of the current New Zealand position which would benefit from legislative clarification.

Having concluded that New Zealand would benefit from legislative reform in respect of the current representative action, chapter IV goes on to assess what form the suggested reform should take. After concluding that the preferred option would be wholesale legislative reform, chapter IV identifies those aspects of the class action procedure which would most benefit from reform and outlines the key features that should be included in any reform. As part of identifying the key features for the reform, this chapter assesses certain aspects of the class action regimes which currently exist in Australia and Ontario in order to identify what lessons New Zealand could take from those regimes, and how the legislation in those regimes could be improved on in order to maximise efficiency in New Zealand.

II The current New Zealand position – Representative Actions

New Zealand does not currently have a dedicated class actions statute. Instead, r 4.24 of the High Court Rules (HCR) is used to facilitate what are known as representative actions, which essentially operate as class actions but without the formality of a dedicated class actions statute. For the purposes of this chapter, the phrase 'representative action' is used to describe the current New Zealand position as it reflects the wording of r 4.24 and is the phrase commonly used by the courts when describing claims under r 4.24.[12]

As outlined above, the purpose of this thesis is to address the question of whether class action legislation is necessary in New Zealand, and if so, what reform to the current legal position is necessary. These questions are addressed through analysis of the objectives of the current representative action procedure and the traditional purposes of class action regimes, and whether these objectives are met by the current model. To assess whether reform is necessary, and if so, what form any reform should take, the starting point is a review and analysis of the current New Zealand position.

This chapter discusses the development of r 4.24 and summarises the leading case law on representative actions. Through a review of the leading case law, this chapter provides a platform for analysis of the shortcomings in the current New Zealand position, which forms the basis of the later discussion on the nature of reform recommended.

This chapter does not purport to be an exhaustive examination of every decision in New Zealand relating to representative actions. While there has been an abundance of case law in the last 15 years regarding representative actions, many of the principles, in particular relating to the granting of representative orders, have been well settled since 1987, the year in which the leading case of *RJ Flowers v Burns*[13] was decided. Thus, this chapter summarises the key principles without including a chronological examination of all developments in this area.

A The primary advantages of a representative or class action

Before embarking on a review of the current New Zealand position, it is useful to understand the key advantages that a representative or class proceeding offers. There are three primary advantages, being improved access to justice, efficient use of judicial resources, and additional

[12]It should be noted that the case law in New Zealand does on occasion use the phrase 'class action' interchangeably with the phrase 'representative action'.
[13] *RJ Flowers v Burns* [1987] 1 NZLR 260 (HC).

incentives on potential wrongdoers to comply with the law.[14] The Court of Appeal has observed that it considers access to justice to be "far and away the most important" of these three principles.[15] These three objectives will be expanded on and analysed later in this thesis.

These principles are also often cited in other jurisdictions, meaning they provide a common basis from which cross-jurisdictional analysis can be carried out. The discussion later in this thesis regarding possible reform in New Zealand is done with these principles in mind and reflects the importance of these principles.

B Rule 4.24 of the High Court Rules

Rule 4.24 of the HCR allows persons with the same interest in the subject matter of a proceeding to sue (or be sued) on behalf of others.[16] The use of this rule has resulted in a procedure that has been developed by the courts in such a way that, in the absence of formal class action legislation, it fulfils the role of a class action.[17] While the rule allows claims against a group of defendants, it is predominantly used to facilitate claims by groups of plaintiffs against one or more defendants.

Rule 4.24 states:

> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding –
>
> (a) with the consent of the other persons who have the same interest; or
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

A claim on behalf of others who have the same interest in the subject matter of the proceeding can be brought by the representative claimant either with the consent of the persons who have the same interest,[18] or as directed by the court.[19]

Under r 4.24(a), if the consent of each group member has been given, a representative claim may be filed as of right. Rule 4.24(a) has not been widely used. One of the reasons is likely that even if all group members consent to being represented there is still no guarantee of being able to proceed as a representative claim, as the defendant(s) may still elect to challenge

[14] *Ross v Southern Response Earthquake Services* [2019] NZCA 431 at [52] [*Ross v Southern Response*].
[15] *Ross v Southern Response,* above n 14 at [54].
[16] High Court Rules 2016, r 4.24.
[17] Chamberlain "Class Actions in New Zealand: An Empirical Study", above n 6 at 138.
[18] Rule 4.24(a).
[19] Rule 4.24(b).

whether the group members have the 'same interest', as required by r 4.24.[20] Another is that if a representative statement of claim is filed under r 4.24(a) with consent of the group members, the group members would not be able to seek an opt-in or opt-out period allowing additional claimants to join the claim (or take steps to opt-out), because r 4.24(a) requires the consent of all group members to have been obtained, which cannot be the case if a further opt-in or opt-out period is sought.[21]

Under the more commonly used r 4.24(b), representative plaintiffs can apply to the court for orders allowing them to represent others who have the same interest in the subject matter of the proceeding, and consent of all participants is not required. Applications for representative orders in accordance with r 4.24(b) have given rise to a significant body of case law regarding representative actions, which is expanded on below.

The New Zealand courts traditionally apply r 4.24 in a flexible manner in order to achieve the overall objective of the HCR, which is "to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application".[22] Consistent with this, one of the key principles underpinning the application of r 4.24 is efficiency, both in terms of time and cost.[23]

C Historical development of r 4.24

Rule 4.24 derives from a change in practice in the Chancery Courts in the United Kingdom in the late 17th and early 18th centuries.[24] At the time, the courts of equity required all those interested in the subject matter of the dispute to be joined as parties, both in order to ensure that justice could be done appropriately and to avoid potential duplication of proceedings.[25] This rule proved to be difficult to work in practice, and was eventually relaxed allowing parties to represent other parties who had the same interest.[26] In *Chancey v May* the Court observed that "it would be impractical to make them all parties by name, and there would be … no coming at justice, if all were to be made parties".[27] The relaxation of the rule has been described

[20] *Cridge v Studorp Ltd* [2017] NZCA 376 at [67].
[21] *T J Cridge and M A Unwin v Studorp Limited* [2015] NZHC 3065 at [56]. This finding was not overturned on appeal.
[22] High Court Rules 2016, r 1.2.
[23] *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37 at [152] [*Credit Suisse*].
[24] *Ross v Southern Response,* above n 14, at [40].
[25] *Western Canadian,* above n 4 at [19].
[26] *Western Canadian,* above n 4 at [20]. See also *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111 at [13] [*P Dawson v Multiplex*].
[27] *Chancey v May* (1722) 24 ER 265 at 265, as cited in *Western Canadian* at [20].

as allowing a representative suit "if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent".[28] This historical development was originally designed as a relaxation of the strict court rules for efficiency and convenience,[29] and has always required a common interest between the group members.[30]

This practice developed into r 10 of the Supreme Court of Judicature Act 1873 (UK), which stated:[31]

> Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf of or for the benefit of all parties so interested.

Since the enactment of r 10 the United Kingdom rule has largely remained the same, although it has been interpreted increasingly liberally, with the rule being described as "a flexible tool of convenience in the administration of justice",[32] a principle which is often cited by the New Zealand courts.[33]

The first New Zealand provision allowing for a representative action was s 79 of the Supreme Court Act 1882 (NZ). This provision was modelled on and largely replicated the wording of r 10 of the United Kingdom Supreme Court of Judicature Act 1873. This provision eventually evolved into r 4.24 of the High Court Rules with minimal change.

Since the enactment of the rule, one of its key objectives has consistently been to avoid the multiplicity of legal proceedings.[34] However, it has always been clear that the rule should not be used to facilitate baseless claims or shut out defences that may otherwise be available to a defendant.[35] These key principles continue to underpin the application of the rule today.

The first substantive judicial discussion of the representative proceeding and r 78 (now r 4.24) in New Zealand was by McGechan J in *R J Flowers v Burns*, where his Honour undertook a review of the history and general approach to representative actions in New Zealand, noting that at that time there was relatively little authority on the application of the rule.[36] After

[28] *Duke of Bedford v Ellis* [1901] AC 1.
[29] *Duke of Bedford v Ellis*, above n 28.
[30] *Western Canadian*, above n 4 at [22].
[31] Supreme Court of Judicature Act 1873 (UK), r 10.
[32] *John v Rees* [1970] Ch 345 at 370.
[33] See for example, *Houghton v Saunders*, above n 1 at [100]; *Ross v Southern* Response, above n 14 at [49].
[34] *R J Flowers Ltd v Burns*, above n 13, at 267.
[35] *R J Flowers Ltd v Burns*, above n 13, at 267.
[36] At 266.

reviewing the relevant authorities, his Honour concluded that prior to the enactment of r 78, the basic principles to be applied were that:[37]

> (i) Members of the class to be represented were required to have a common interest in the proceeding, and in particular must all have been able to claim as plaintiffs in separate actions in respect of the event concerned, with no defences available applicable to some only of the class;
>
> (ii) The representative action must have been beneficial to all of that class;
>
> (iii) A representative action for damages was possible if both the above requirements were met, the action covered the whole or virtually the whole of the class of potential plaintiffs, and the consent of all represented members to payment of global damages to the representative plaintiff was given. Mere difficulty on the part of a class member in establishing individual loss was not a barrier (despite the common interest doctrine) provided such consent was established and global loss of all representative members was established.

McGechan J held that "if injustice can be avoided, the rule can and should be applied to serve the interests of expedition and economy, both indeed the underlying reasons for its existence", and that the rule should be applied liberally.[38] These principles, in combination with the rules set out above, underly the present day application of r 4.24.

Over time, the rule has been interpreted increasingly liberally by the courts, and is now being used for modern, large scale complex commercial litigation, which is arguably well outside the purpose it was designed for.[39] The rule is now being used in claims which would be complex and difficult to argue on an individual level, let alone when brought as a representative proceeding with the added procedural difficulties of a representative claim and the need to determine common issues in isolation from individual issues. The types of claims that have been brought under r 4.24 are varied, and include claims against the government, commercial contract and tort claims, statutory liability, product liability, bank fees, insurance, and investor/shareholder claims.[40]

There are a number of aspects of a representative procedure which are not dealt with by r 4.24, with the Court of Appeal in *Ross v Southern Response Earthquake Services Limited* (*Ross v*

[37] At 271-272.
[38] At 271.
[39] *Credit Suisse*, above n 23 at [49].
[40] For a full breakdown, refer to Chamberlain "Class Actions in New Zealand: An Empirical Study", above n 6, at 143 – 146.

Southern Response) observing that "it falls to the courts to determine the many practical issues that arise in the context of representative claims under r 4.24".[41] As a result, as the rule became more widely used over the last 30 years,[42] the courts have had to determine substantive questions, including the effect of limitation provisions and constitution of the group, and procedural questions such as discovery obligations.

While there have been increasing numbers of cases run under r 4.24, the core principles which determine whether a case is appropriate for a representative proceeding remain the same. In *Cridge v Studorp* (*Cridge*), the Court of Appeal summarised the basic principles which guide the application of r 4.24 as follows:[43]

> (a) The rule should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
> (b) Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.
> (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
> (d) The words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.
> (e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.
> (f) It must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.
> (g) The court should take a liberal and flexible approach in determining whether there is a common interest.
> (h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action father than being facilitative of it.

[41] *Ross v Southern Response*, above n 14, at [39].
[42] *Ross v Southern Response*, above n 14, at [48].
[43] *Cridge v Studorp Limited*, above n 20, at [11] (footnotes omitted). These principles were adopted again by the Court of Appeal in *Ross v Southern Response*, above n 14, at [51].

(i) A representative action should not be allowed in circumstances that would deprive a defendant of a defence it could have relied on in a separate proceeding against one or more members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.

A brief examination of each of the principles above, their origin and application is set out below.

1 The rule should be applied to serve the interests of expedition and judicial economy

The first principle set out by the Court of Appeal in *Cridge* is that the rule must be applied in such a way that the proceeding is more efficient than it would be if the representative action procedure was not used.[44] While there are many factors which will influence a decision under r 4.24, the overriding consideration will always be whether the objectives of r 1.2 are met and whether the representative action is the most efficient way to resolve the claims before the court.[45] Allowing claims to proceed as a representative action avoids the need for the filing of multiple claims which have the same basis, and also avoids the risk of inconsistent findings between those claims.[46] The representative action procedure can also prevent unnecessary duplication of work, in particular in relation to discovery, where it is likely that all group members would, if they filed individual proceedings, seek much of the same material from the defendants on discovery.[47]

The High Court has warned that close examination of the efficiency of a representative proceeding is particularly necessary in cases where the representative order is limited to part of the proceeding, and some issues are left to be determined separately.[48] This is on the basis that it can sometimes be difficult to determine issues in a proceeding discretely, and the complications of separating the common issues from the individual issues may mean the representative action is not the most efficient way to proceed.[49]

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[44] At [11(a)].
[45] *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Limited* [2016] NZHC 245 at [78] [*Southern Response (No 1)*]; *Saunders v Houghton (No 1)* [2009] NZCA 610 at [17]; *Cridge v Studorp Limited* [2016] NZHC 2451 at [34].
[46] *Cridge v Studorp Limited* (CA), above n 20 at [11].
[47] *Smith v Claims Resolution Services Limited* [2019] NZHC 127 at [39]; see also *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [52].
[48] See for example *Cridge v Studorp Limited* [2016] NZHC 2451 at [68] where the High Court recorded that the finding of common issues does not necessarily lead to representative orders being granted because efficiency, justice and cost must also be considered.
[49] *Cridge v Studorp Limited*, above n 48 at [35].

The *Cridge* proceeding concerns allegations of product failure in relation to a cladding product (Harditex) used widely in New Zealand from the late 1980s to the mid 2000s.[50] In *Cridge*, when defending the application for representative orders, the defendants advocated a 'test case' procedure and proposed that one plaintiff's claim should be run through to completion, with the findings used to guide the resolution of other claims, but not bind the other claimants.[51] One of the bases for the defendants' argument was that each of the elements of the negligence and Fair Trading Act causes of action overlapped, and therefore could not be fully separated for the purpose of determination of any alleged common issues.[52]

The High Court and Court of Appeal both rejected this argument, holding that issues of duty of care and breach of that duty were common issues, along with whether certain alleged statements by the defendants were false and misleading. The efficiency objective could be met in that case by determining the common issues, with issues of causation and loss to be determined separately.[53] In the Court of Appeal, French J observed that a test case would require the same amount of work as the representative action but would not result in findings that were binding on all claimants,[54] and that "to require the same evidence to be given in respect of each claim would clearly be a wasteful duplication".[55] The principles of efficiency were paramount in the findings of both the High Court and Court of Appeal.

In addition to providing a clear espousal of the importance of efficiency, *Cridge* also illustrates how inefficiencies can arise when there is uncertainty regarding the application of r 4.24. As an illustration, the 15 year longstop provision in s 23B of the Limitation Act 2010 came into force on 1 January 2016, and would have barred many individual group members' claims in *Cridge* if the proceedings commenced after that date. The application for representative orders could not be heard before the longstop provision came into force, so the plaintiffs applied to the High Court for precautionary orders that would have stopped time for limitation purposes for all those who consented to join the claim before the limitation period expired, even if the representative orders were declined and they were then later required to file statements of claim.[56]

[50] As at March 2020 the proceeding is yet to have a substantive hearing.
[51] *Cridge v Studorp Limited*, above n 48 at [6].
[52] At [48].
[53] At [72].
[54] *Cridge v Studorp Limited* (CA), above n 20 at [39].
[55] At [32].
[56] *T J Cridge and M A Unwin v Studorp Limited*, above n 21.

The plaintiffs' application was made in reliance on the judgment of the Supreme Court in *Credit Suisse Private Equity v Houghton* (*Credit Suisse*), where the majority held that the filing of the representative statement of claim stopped the clock for limitation purposes for both the representative plaintiffs and the named and unnamed represented class members.[57]

After hearing the application, Thomas J declined to make the orders sought, which resulted in approximately 55 individual claimants filing statements of claim in the Wellington High Court under urgency, with a number of other owners also filing claims in the Auckland High Court.[58] Counsel for the plaintiffs noted at the time that they had hoped to "avoid the need for property owners to file multiple individual claims but consider this now needs to be done to avoid any potential limitation risk."[59] While the judgment of Thomas J was later overturned on appeal,[60] a number of homeowners had already gone to the trouble of filing individual proceedings to preserve their limitation position.[61] The key objective of economic and judicial efficiency was clearly not met in that situation and resulted in needless duplication of proceedings due to uncertainty in the application of r 4.24 in relation to limitation provisions.

2 Access to justice

The Court of Appeal in *Cridge* also noted that when considering whether to grant representative orders, the Court will be mindful of the fact that representative orders are designed to provide access to justice to claimants.[62] The Court of Appeal later observed in *Ross v Southern Response* that "access to justice is far and away the most important" of the advantages offered by representative actions.[63] By allowing claimants to come together and bring claims in groups, the representative action procedure provides a means for claimants to have their claim heard in a more cost effective way than traditional litigation. Many claims that are brought as representative proceedings would be untenable if brought on an individual basis for a variety of reasons, including the cost of litigation.

Often, cases that are well suited to be run as a representative action will require significant legal and expert resources to run, and thus are not feasible for one claimant to fund on their

[57] *Credit Suisse*, above n 23 at [125] – [130].
[58] As outlined in *Cridge v Studorp Limited*, above n 48 at [2].
[59] Parker & Associates "High Court ruling means leaky building owners urged to file individual claims against James Hardie before December deadline" (press release, 8 December 2015). See also *Cridge v Studorp Limited*, above n 48 at [2].
[60] See *Cridge v Studorp Limited* (CA), above n 20.
[61] *Cridge v Studorp Limited* (HC), above n 48 at [2].
[62] *Cridge v Studorp Limited* (CA), above n 20, at [11(b)].
[63] *Ross v Southern Response*, above n 14 at [54].

own as the risk, upfront costs to be paid and unrecoverable costs could far outweigh the benefits of bringing a claim. In addition, unless the losses suffered are extremely significant litigation is not a cost-effective option due to the level of unrecoverable legal costs faced by successful parties in accordance with the general principle that costs to be awarded should normally be two-thirds of the actual costs incurred.[64]

However, by allowing claimants to come together and share costs, representative proceedings enable proceedings that would otherwise have been too expensive, thereby facilitating access to justice. By way of example, in *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* (*Southern Response Unresolved Claims Group*), one of the arguments put forward by the plaintiff group in support of their application for representative orders was that the claimants could not individually afford to bring proceedings.[65] A similar argument was also raised in *Smith v Claims Resolution Service Ltd*, with the claimants putting forward affidavit evidence that bringing individual proceedings would be beyond their means.[66]

3 The same (or common) interest requirement

Requirements (c), (d), (g) and (h) set out by the Court of Appeal in *Cridge* all reflect the question of whether the parties that the plaintiff purports to represent have the "same interest in the subject matter of the proceeding", as required by r 4.24.[67] On this basis, all four requirements can be dealt with together in discussion.

The courts typically find that the same interest requirement is met as long as there is common interest in "the determination of some substantial issue of law or fact"[68], a question which is determined on a case by case basis. This is generally approached broadly, and the inclusion of the phrase 'in the subject matter of the proceeding' in r 4.24 (contrasted with the phrase 'in the proceeding') means that representative orders can be made even if the causes of action and/or remedies to be awarded differ between plaintiffs.[69]

[64] High Court Rules 2016, r 14.2(1)(d).
[65] *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd*, above n 45 at [50]. These claimants subsequently secured access to litigation funding: see [5].
[66] *Smith v Claims Resolution Service Ltd*, above n 47 at [12].
[67] *Cridge v Studorp Ltd*, above n 20, at [11].
[68] See *Credit Suisse*, above n 23 at [51] (referring to *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 408 and 430).
[69] *Credit Suisse,* above n 23 at [51].

The threshold for determining whether a common interest exists is low,[70] and the court will take a liberal and flexible approach.[71] While the threshold for finding the requisite commonality of interest is low, the court may be influenced by other factors in the litigation. For example, the Court of Appeal noted in *Saunders v Houghton (No 1)* that where there is also a litigation funder involved, the orders sought should be viewed:[72]

> … as a stool supported by four legs, each essential to its stability:
>
> (a) the order for representation (considered along with its funding element);
> (b) the court's approval of the funder and the funding arrangement;
> (c) the application for security (which may include consideration of the final leg); and
> (d) the provisional appraisal of the merits. An erroneous decision on any element may either wrongly exclude worth plaintiffs from access to the court, or wrongly impose on defendants who have committed no fault such burden of costs and distraction from their other affairs so as to pressure them to yield to a baseless demand and settle.

In *Saunders v Houghton (No 1)* the Court of Appeal also noted that "'[t]he same interest' must mean that, subject to other considerations, the more the parties have in common, the more the strength of that facet of the application".[73]

To put it another way, the common issue should not be a peripheral issue but should form the "spine" of the proceedings and the represented group members should be united by the presence of the common issue.[74] In *Jones v Attorney-General*, the High Court granted an application for representative orders where the plaintiffs were not in identical positions.[75] The allegation in that case was that a 'similar' process was used when addressing applications for special benefits made by the plaintiffs, and this was sufficient for the grant of representative orders.

In many decisions regarding r 4.24 the common interest identified underpins the determination of liability, and without a finding in favour of the plaintiffs on that common issue the claims cannot succeed. For example, in negligence claims such as *Cridge v Studorp Limited* or *Strathboss*, if the first common issue (being whether a duty of care is owed) cannot be made

[70] *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, [2015] BCL 293 at [6] [*Strathboss*].
[71] *Cridge v Studorp Ltd*, above n 20, at [11].
[72] *Saunders v Houghton (No 1)*, above n 45 at [38].
[73] At [19].
[74] *Southern Response (No 1)*, above n 45 at [74].
[75] *Jones v Attorney-General* HC Wellington CP No. 175/02, 8 July 2003.

out, the overall claim in negligence cannot succeed, and the plaintiffs' claims therefore stand and fall with the common issues. Prior to the decision in *Southern Response Unresolved Claims Group,* there had not been a successful application for representative orders under r 4.24 where the common issues to be determined did not have any final bearing on the liability of the defendant to the plaintiffs.[76]

In *Southern Response Unresolved Claims Group*, the first application for leave to bring the proceeding as a representative proceeding was declined by the High Court on the basis that there was not a sufficient common interest. In that case, Mander J was unable to identify from the pleadings a common interest that, if determined, would have findings which affected all group members. It was not apparent from the pleadings and the argument before the Court how the resolution of the pleaded common issues would advance the claims of the group as a whole,[77] and in particular how resolution of those issues would be applicable to other group members.

In the initial judgment, Mander J acknowledged that issues which went to the interpretation and application of the insurance policies were an integral part of resolving any claim by the plaintiffs, and if correctly pleaded, determination of the questions of interpretation and application may form the basis of a common issue which would assist the group to advance the resolution of their claim.[78]

While the orders sought were not initially granted, his Honour's observations regarding the nature of the common issues suggested that there may be room for some development and further flexibility in the common interest requirement.

The High Court directed that the plaintiff group could return with a further application and an amended claim for reconsideration,[79] and the second application was successful. The reformulated statement of claim alleged that Southern Response used in an improper strategy to minimise its exposure, and that the use of this strategy was a breach of good faith obligations and obligations under the insurance policies.[80] Gendall J held that the reformulated claim established a common issue, but only by a "rather fine margin".[81] In comparison to other cases

[76] Refer to *Southern Response (No 1)*, above n 45 [72].
[77] *Southern Response (No 1)*, above n 45 at [41].
[78] *Southern Response (No 1)*, above n 45 at [71].
[79] *Southern Response (No 1)*, above n 45 at [109].
[80] *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105 at [28] [*Southern Response (No 2)*].
[81] *Southern Response (No 2)*, above n 80 at [46].

where common issues have been identified, the common issue in this case was less clearly an issue which would significantly advance the claims, and in this way, while the principles applied were the same as in other cases, the case can be seen as pushing the boundaries of the same interest requirement. Gendall J's decision was influenced by the Supreme Court decision in *Credit Suisse*, in which the Court encouraged a more flexible and liberal approach to the application of r 4.24.[82]

In a subsequent High Court decision (*Smith v Claims Resolution Services Limited* (*Smith*)), Gendall J continued the liberal trend being applied to r 4.24 by the courts. That claim concerned allegations by a number of insured homeowners against the Claims Resolution Services (CRS) in respect of alleged mishandling by the CRS and a firm of solicitors in insurance claims arising from the Christchurch earthquakes. The alleged result of the defendants' conduct was that the claimants had settled their insurance claims for significantly less than they were worth.[83]

The finding in *Smith* was that the similar circumstances in which the group members had entered into a relationship with the defendants was sufficient to warrant orders being made under r 4.24 in order to avoid duplication of proceedings. The Court acknowledged that there may be factual differences as to the way each group member entered into their contracts with the defendants, but that those differences were not sufficient to prevent the claim from proceeding as a representative proceeding[84] and the factual differences could be dealt with as necessary once the legal issues had been determined.

The Court was also conscious that the alleged pattern of behaviour of the defendants would require a significant body of evidence, which would be difficult for an individual claimant to adduce on grounds of relevance. Gendall J noted that "there is a risk that, if there was a joint venture operating improperly with possible actionable consequences, having the claims brought separately might mask its existence".[85] This is consistent with the finding of the Court of Appeal in *Southern Response Unresolved Claims Group* where the Court noted that it would be a far less onerous task for the group to establish the existence of the strategy than it would be for each individual to establish the strategy existed and that it was applied to them.[86]

[82] *Southern Response (No 2)*, above n 80 at [62].
[83] *Smith v Claims Resolution Services*, above n 47 at [11].
[84] At [33].
[85] At [35].
[86] *Southern Response Earthquake Services v Southern Response Unresolved Claims Group*, above n 47 at [45].

The finding in *Smith* appears to reflect a willingness of the Court to expand the application of r 4.24 to claims where the common issues will not necessarily resolve the claim but that there may be factual questions which would be common to all class members and would need to be determined for each class member as part of any liability assessment.

The approach taken in both *Southern Response Unresolved Claims Group* and *Smith* is consistent with observations made by Dobson J in *Strathboss v Attorney General* (*Strathboss*) to the effect that the court should focus on efficiency and ways to facilitate representative actions, rather than looking for a reason not to allow the action.[87] When considering the question of whether there is sufficient common interest, Gendall J reiterated in *Smith* that "the correct approach is to focus on what unites the class, not how it may be divided".[88]

A related question when assessing whether the same interest requirement is met is whether there are any restrictions on the remedies that can be claimed in a representative action. Previously, the English courts had precluded the use of representative actions in cases where there was a claim for damages.[89]

However, in more recent cases the courts have taken the view that it is possible to claim damages in a representative action. In *Houghton v Saunders* the High Court identified that the difficulties posed by claims which rely on individual losses could be worked around in three possible ways.[90] First, plaintiffs could obtain a declaration of liability on issues other than damages, with separate individual issues of loss to be determined separately. This mechanism has been favoured in recent cases, many of which involve negligence claims that include claims for individual losses.[91] Second, plaintiffs could seek an inquiry into damages. This was the approach originally taken by the plaintiff group in *Houghton v Saunders,* but French J took the view that this was not necessarily the best approach to use in that proceeding where the damages were simply based on the price paid for the shares. [92] Finally, plaintiffs could consent to an award of damages which is common across the group.

The principles outlined above in respect of the same interest requirement have developed over a number of years, and it has taken a substantial body of litigation to settle on these principles.

[87] *Strathboss v Attorney-General*, above n 70 at [6].
[88] *Smith v Claims Resolution Services*, above n 47 at [23].
[89] *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA).
[90] *Houghton v Saunders*, above n 1.
[91] For example, *Strathboss,* above n 70, and *Cridge v Studorp Limited*, above n 48.
[92] *Houghton v Saunders,* above n 1 at [148].

Given the time taken to develop these principles, they should be used as the starting point for any reform. This is expanded on further in Chapter IV.

4 Not all issues in the case must be common

The fifth principle identified by the Court of Appeal in *Cridge* (identified as item (e) in the judgment) was that not all issues in the proceeding must be common to all parties.[93] The Supreme Court observed in *Credit Suisse* that it is not necessary that a resolution of the common issues resolve the case fully, or even determine any questions of liability. If representative orders are granted in respect of some but not all issues, the court must closely assess whether the representative action is the most efficient way to proceed.

In a number of cases the New Zealand courts have granted representative orders where only some of the issues in the case are common issues, on the basis that determination of the common issues advances the claim and will enable more efficient resolution of the remaining aspects of the claim.

For example, in some negligence cases the courts have held that questions of whether a duty of care was owed and whether that duty was breached can be dealt with as common issues because they require examination of a common factual matrix. Once findings are made on those issues, questions as to causation and loss can be determined separately in relation to each class member.[94]

Where there are questions to be dealt with on an individual level, or on a level which involves a subset of the group, the existence of a range of subsets or subclasses will not generally be sufficient to deny the representative orders.[95] Further, any issues which need to be determined on an individual level need not be the subject of separate further proceedings once the common issues are determined.[96]

5 The representative action must be for the benefit of class members

The Court of Appeal in *Cridge* identified as the sixth general principle (identified as item (f) in the judgment) that for representative orders to be granted, the claim must be for the benefit

[93] *Cridge v Studorp Ltd*, above n 20, at [11(e)].
[94] See for example *Strathboss*, above n 70 and *Cridge v Studorp Limited*, above n 20. See also *Southern Response (No 1)*, above n 47 at [46] where the claimants acknowledged that their claims would eventually need to be assessed individually in relation to damage and rebuild or repair cost.
[95] *Strathboss*, above n 70 at [60].
[96] *Southern Response (No 1)*, above n 47 at [13].

of the group members.[97] This has not been challenged in any decisions to date. However, when considering the benefit to the group members, there is likely to be some overlap with considerations such as access to justice, efficiency and judicial economy.

It is difficult to anticipate a situation where the same interest requirement is met, yet the representative action is not for the benefit of all class members. It is possible that this criterion requires consideration of the broader benefit to the group. This could involve questions of whether it is in their best interests to enter into what will potentially be long-running and expensive litigation, and whether it is in their interests to have details made public through the court process, though this has not yet been tested.

6 Success where it otherwise would not have been possible

The final requirement recognised by the Court of Appeal in *Cridge* was that the use of the representative proceeding must not result in success for plaintiffs where they would not otherwise have been able to succeed in an individual proceeding.[98] The courts have long recognised that the use of representative actions could be oppressive, and may cause injustice to defendants.[99] This is on the basis that a representative claim may be a significant burden for a defendant and if not adequately monitored could allow claimants with weaker claims to succeed. In order to avoid this potential injustice the courts will not grant representative orders if the order would "confer a right of action on a member of the represented class who would not otherwise have been able to assert a claim in separate proceedings".[100] Similarly, the representative action cannot be granted if the order would deprive the defendant of a defence that would otherwise have been available if separate proceedings had been brought by one or more represented plaintiffs.[101]

Defendants in representative actions often argue that the variations in circumstances between the plaintiffs mean there is a risk that a plaintiff might be able to 'hide behind' a representative plaintiff who has a stronger case, or one with different factual circumstances.[102] As outlined above, recent High Court decisions have illustrated a trend towards accommodating these

[97] *Cridge v Studorp Limited*, above n 20 at [11(f)].
[98] *Cridge v Studorp Limited*, above n 20, at [11(i)].
[99] See for example the 1901 decision in *Duke of Bedford v Ellis*, above n 28.
[100] *Saunders v Houghton (No 1)*, above n 45 at [13(a)].
[101] *Saunders v Houghton (No 1)*, above n 45 at [13(a)]. See also *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 at [182].
[102] See for example *Strathboss*, above n 70, *Cridge v Studorp Limited*, above n 20.

differences between plaintiffs, rather than allowing the differences to preclude the representative claim.[103]

This can be accommodated by determining common issues first, with individual issues being determined separately. By staging the trial, the court can deal with concerns that defendants might have about those with weak claims succeeding when they should not have succeeded individually, because it allows scope for defendants to test or challenge claims on an individual level at the second stage, while also keeping with the guiding principles for representative actions of access to justice and efficiency.

For example, in *Strathboss*, the defendant asserted that a range of factors including location, size and orchard practise might impact on the policy factors that lead to an imposition of a duty of care, and whether that duty was breached.[104] The Court observed that these differences between the plaintiffs went to the quantum aspects of the claim, rather than the duty of care, and that questions of whether a duty of care was owed, and if so, whether that duty was breached could be determined in common, with the individual issues determined separately.[105]

The *Southern Response* claim provides another illustration of the principle that the granting of the representative orders should not confer rights on claimants that would not otherwise exist. At first instance, Mander J initially held that the claim would have conferred rights on group members who would not otherwise be able to assert a claim.[106] However, after repleading the claim and the alleged common issues, Gendall J found that the alleged strategy engaged in by Southern Response provided sufficient common interest for the claim to proceed as a representative action, in the context of assertions by the claimants of their right to cancel their policies as a result of the existence of the strategy.[107]

As a practical matter, in order to mitigate any arguments that there are no common issues, or that the claim will allow success to those who might not otherwise succeed, solicitors acting for plaintiffs or potential representative groups must take care with the way any common elements of the claim are pleaded. While the claim will still need to be sufficiently particularised to avoid being struck out, it is essential that any common issue, for example

[103] See for example *Smith v Claims Resolution Services*, above n 47 at [23].
[104] *Strathboss*, above n 70 at [55].
[105] *Strathboss*, above n 70 at [59].
[106] Southern Response No 1 at [42].
[107] *Southern Response (No 2)*, above n 80, at [61].

whether a duty of care was owed, is pleaded in a sufficiently general manner that determination of that issue can be applied to all group members.[108]

D Are there any other possible restrictions on r 4.24?

In *Cridge*, the defendants argued that the representative orders sought should not be granted because the rule should be limited to 'single source' cases, or cases where the claim relates to one event.[109] This argument was made in reliance on a number of American and Canadian decisions, which were made in the context of statutory rules for class actions that are worded in a more restrictive manner than r 4.24, and often include a requirement that the common issues predominate over the individual issues.[110]

The Court of Appeal rejected this contention, finding that "there is no rule that a representative order is limited to cases involving a single event or single source"[111] and that the correct approach is to assess each claim on a case by case basis. This is consistent with the finding of the Supreme Court in *Credit Suisse* where Elias CJ noted that:[112]

> [R]epresentative claims are appropriately made under r 4.24 where some substantial question is common to a number of litigants *or* the claims of a number of potential litigants arise out of the same transaction or series of transactions.

There is nothing in the wording of r 4.24 that suggests it should be limited to single source claims, so to import such a requirement would be reading restrictions into the rule which were not intended by Parliament.

E Dealing with limitation periods in representative actions

Rule 4.24 does not address how limitation periods should be dealt with in the context of a representative action. As identified by the Supreme Court in *Credit Suisse*, the limitation issues need to be sufficiently clear because one of the requirements for the granting of representative orders is that the proceedings cannot "bar a defence which might have been available to the defendant in such separate proceeding", such as a limitation defence.[113] This is of particular importance as limitation defences are generally conclusive of the entire claim.

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[108] See for example *Strathboss*, above n 70 at [22] regarding the general pleading of the duty of care.
[109] *Cridge v Studorp Limited*, above n 48 at [39] (HC), and *Cridge v Studorp Limited*, above n 20 at [21] (CA).
[110] *Cridge v Studorp Limited*, above n 20 at [21].
[111] *Cridge v Studorp Limited*, above n 20 at [36].
[112] *Credit Suisse*, above n 23 at [8], emphasis added.
[113] At [65], citing with approval the judgment of the Court of Appeal in *Saunders v Houghton (No 1)*, above n 45 at [13].

The *Feltex* litigation raised two important limitation questions. First, whether the representative order is limited to common issues, meaning separate proceedings would need to be filed to deal with individual issues (including limitation). Second, whether time stops for limitation purposes for all plaintiffs when the claim is filed or when the plaintiff opts-in to the proceedings.

The defendants in that litigation alleged that the representative claim should be confined to the common issues only, and that any individual issues should be dealt with in separate proceedings, which would have been time barred in that litigation. The entire Supreme Court (including the minority) concluded that requiring separate proceedings in relation to the individual issues was not necessary, on the basis that it was inconsistent with settled authority regarding r 4.24, and in particular with r 1.2 and the need for "just, speedy and inexpensive determination" of the proceedings.[114]

In relation to the second question as to when time stops for a represented plaintiff, the majority and minority of the Supreme Court reached different views. The question to be determined was whether time stopped for a represented plaintiff when the representative statement of claim is filed, or whether time does not stop until the plaintiff opts in or consents to the proceeding. The answer to this question turned on when the claim is treated as being "brought" for the purposes of r 4.24.

In the High Court, French J had held that time stopped for all qualifying shareholders when the proceedings and the application for representative orders were filed,[115] and that for limitation purposes, the claims of all qualifying shareholders would stand and fall with the representative plaintiff.[116]

The majority in the Supreme Court concluded that when a representative statement of claim is filed, it is brought not only by the representative plaintiff, but also by all those that they represent.[117] If the representative order is not made at the time the application for representative orders and/or statement of claim is filed, the Court may backdate the representative order to ensure that if "the limitation period end[s] in the period between filing and when the

[114] *Credit Suisse*, above n 23 at [8] and [9] (for the minority) and [132] (for the majority).
[115] *Houghton v Saunders* HC Christchurch CIV-2008-409-000348, 8 June 2011 Houghton v Saunders at [128] [*Houghton v Saunders Strike Out*].
[116] *Houghton v Saunders Strike Out*, above n 115 at [130].
[117] *Credit Suisse*, above n 23 at [127].

representative order is made" claimants are not disadvantaged by any time delay required to determine the application.[118]

Although the backdating of representative orders or suspension of the limitation period was argued to be contrary to the basic principles of limitation provisions, the majority concluded that the defendants would not be disadvantaged by backdating the orders because in this case the defendants would have been fully aware from the date the claim was filed of the nature and potential extent of the claims.[119] Rather, the backdating the orders can be seen to advance the objective of the High Court Rules and representative orders by preventing a multiplicity of actions that would otherwise be required.[120]

The application of the Supreme Court's judgment was before the High Court and Court of Appeal in *Cridge v Studorp*. As outlined above, the plaintiffs in that case had sought clarification from the High Court as to the limitation position that would apply if the group were not successful in obtaining the representative orders sought.[121] Thomas J in the High Court declined to grant the orders sough, holding that the filing of the representative statement of claim did not stop time for the represented plaintiffs if the representative orders sought were not granted.[122] This decision was overturned by the Court of Appeal who held that if the representative orders were not granted there was simply a procedural defect in the way the proceedings were issued which could be cured by plaintiffs later filing individual claims.[123] French J for the Court of Appeal observed that:[124]

> …having the clock stop when representative proceedings are filed removes uncertainty and so avoids the filing of what may well turn out to be needless individual joinder applications or separate individual proceedings.

The current position therefore is that at the time the statement of claim is filed, time stops for all those that the representative plaintiff purports to represent, whether or not the representative order is later granted.[125]

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[118] *Credit Suisse*, above n 23 at [128].
[119] *Credit Suisse*, above n 23 at [157].
[120] *Credit Suisse*, above n 23 at [158].
[121] *T J Cridge and M A Unwin v Studorp Limited*, above n 21.
[122] At [88].
[123] *Cridge v Studorp Limited*, above n 20 at [79].
[124] At [84].
[125] *Cridge v Studorp Limited* (CA), above n 20 at [86]. The judgment of the Court of Appeal was the subject of an application for leave to appeal to the Supreme Court, which was declined: *Studorp Limited v Cridge and Ors* [2017] NZSC 178.

F The role of case management

To date the courts have consistently taken the view that complex representative actions can be managed by careful and active case management from the court through the court's inherent jurisdiction,[126] and that in some cases the trial Judge must be "flexible and creative"[127] when dealing with novel or uniquely formulated proceedings. This view has been expressed on multiple occasions, including by the Court of Appeal in *Cridge*, where the Court noted that counsel for the defendant had "underestimated the Court's powers of case management and its ability to be creative".[128] In *Houghton v Saunders*, French J observed that "intensive case management" was appropriate to ensure "a claim of this sort does not become bogged down in procedural arguments".[129]

Case management also has an important role to play in ensuring that any substantive hearings in relation to representative orders are efficiently run. For example, the court needs to deal with questions of whether the substantive hearing should be split into two stages.

In *Feltex* it was common ground that the most effective way to manage representative proceedings on a large scale is to split the hearing into two stages.[130] In that case, stage 1 would deal with the common issues, and the findings in relation to those common issues would be binding as between the defendants and all members of the represented class.[131] A similar approach was taken by the High Court in *Strathboss*[132], *Cridge*[133] and *Ross v Southern Response*[134], with individual issues (including in particular quantum) left to a stage two hearing for both of those claims.

This illustrates that the case management decisions of the courts are over time building a body of jurisprudence to deal with areas of the law which r 4.24 does not deal with.

G The Feltex litigation

The *Feltex* litigation is the longest running representative action in New Zealand to date. The litigation has resulted in approximately 45 judgments to March 2020, and as of March 2020 has been running for over 12 years and has not yet been resolved. An in-depth analysis of the

[126] See for example *Southern Response (No 1)*, above n 45 at [14].
[127] *Houghton v Saunders* [2012] NZHC 1828 at [34] [*Houghton v Saunders Split Trial*].
[128] *Cridge v Studorp Limited* (CA), above n 20 at [25].
[129] *Houghton v Saunders*, above n 1 at [229].
[130] *Houghton v Saunders Split Trial*, above n 127 at [3].
[131] *Houghton v Saunders Split Trial*, above n 127 at [9].
[132] *Strathboss v Attorney-General* [2018] NZHC 1559 at [10].
[133] *Cridge v Studorp Limited*, above n 48 HC at [86] – [87].
[134] *Ross v Southern Response*, above n 14 at [30].

Feltex proceedings and related issues is included in Chapter III as part of the analysis of whether reform of the representative action procedure is necessary. However, given the importance of the *Feltex* litigation in the New Zealand representative action sphere, several of the key points should be noted here.

From the start, the litigation was fraught with difficulty, and the parties encountered a number of issues with the representative action procedure. The claimants faced multiple challenges to the use of r 4.24 and the scope of the orders granted, multiple appeals to the Court of Appeal, and an appeal to the Supreme Court regarding limitation issues. These, and other procedural questions, including regarding discovery created significant difficulties for the parties.

It should also be noted that while the *Feltex* litigation has arguably created a good body of guidance and precedent for parties wishing to apply r 4.24, aspects of the jurisprudence have been either mis-applied or overturned. For example, the decision of the Supreme Court in *Credit Suisse* was not correctly followed by the High Court in *Cridge*, which resulted in a further appeal to the Court of Appeal, and the statements of French J in relation to the use of the opt-in or opt-out mechanisms were overturned by the decision of the Court of Appeal in *Ross v Southern Response*.

H Opt-in and opt-out orders

Under the current law, one of the questions that the court often needs to determine when it makes a representative order is whether the order should be made on an opt-in or opt-out basis. Under an opt-in order, claimants who fall within the representative class as defined by the representative order need to take the positive step of opting in if they wish to be part of the proceedings. Under an opt-out order, claimants who fall within the class defined are automatically deemed to be part of the claim, unless they take steps to opt-out of the claim.

Rule 4.24 does not specify whether either or both of opt-in and/or opt-out orders should be permitted in relation to representative actions. Despite this, until the September 2019 decision of the Court of Appeal in *Ross v Southern Response,* New Zealand courts had proceeded on the basis that representative actions in New Zealand should be brought on an opt-in basis.

The opt-in procedure previously adopted in New Zealand derives from a decision of French J in *Houghton v Saunders*.[135] There, the plaintiffs' without notice application for opt-out orders was initially granted by Associate Judge Christiansen. However, the defendants later applied

[135] *Houghton v Saunders*, above n 1.

to have the orders rescinded and replaced by opt-in orders. Having concluded that representative orders could be appropriate in this case if the pleadings were sufficiently amended,[136] French J moved on to assess the appropriateness of the opt-out orders.

Her Honour concluded that opt-out orders were "too radical a departure from the existing Rules" and ordered that the opt-out order be replaced with an opt-in order.[137] The basis for her Honour's conclusion was that the High Court Rules did not expressly provide for an opt-out order,[138] and that other jurisdictions which have adopted an opt-out procedure have accompanied the rule with detailed legislation, including safeguards to protect members of the class and the defendants.[139] French J was also mindful of the fact that the Rules Committee felt that legislative change was necessary to introduce an opt-out procedure.[140]

One of the primary concerns expressed by French J was that "[t]he notion that someone can become a party to a Court proceeding without their consent is somewhat alien to our way of thinking".[141] However, her Honour later rightly pointed out that those parties "have everything to gain and nothing to lose" as a represented plaintiff does not have any costs exposure.[142] Despite this, her Honour still concluded that the opt-out procedure was not appropriate in New Zealand.

The factual circumstances of the *Feltex* proceeding were also relevant to her Honour's conclusion, where she observed that given the nature of the class it was possible for the representative plaintiffs and their solicitors to identify every member of the class from a share register and contact them directly.[143]

Following the decision of French J in *Houghton v Saunders*, opt-in orders have been granted in a number of subsequent cases, including *Strathboss* and *Cridge*. However, in *Ross v Southern Response* the claimants challenged the appropriateness of opt-in orders and applied to the Court of Appeal to have the opt-in orders replaced by opt-out orders.[144]

The Court of Appeal in *Ross v Southern Response* reached a drastically different conclusion to that of French J in *Houghton v Saunders*, concluding that opt-out orders were appropriate and

[136] At [155].
[137] At [165].
[138] At [160].
[139] At [162].
[140] At [162].
[141] At [157].
[142] At [165].
[143] At [166].
[144] *Ross v Southern Response*, above n 14.

that the court had jurisdiction to make such orders.[145] This conclusion was at odds with the way representative actions had proceeded to that point, and will have significant impact on representative actions moving forward.

In reaching this conclusion, the Court of Appeal relied on observations from the Supreme Court in *Credit Suisse*, where the Supreme Court appeared to proceed on the basis that either opt-in or opt-out orders were possible,[146] including noting that the change from opt-out to opt-in orders in that case did not affect the limitation conclusion, and that:[147]

> [t]he function of both procedures is to reduce the class represented. If, by the relevant date, a person has opted out (in the case of an opt-out procedure) or failed to opt-in (in the case of an opt-in procedure), that person will, however, be subject to limitation periods in relation to any separate action.

Also relevant to the Court of Appeal's decision was the fact that the Supreme Court in *Credit Suisse* and the Court of Appeal in *Cridge* had confirmed that when the representative claim was filed it was filed on behalf of all claimants within the class definition.[148]

The Court of Appeal fundamentally changed the approach taken since 2008 in class action procedures in New Zealand with its landmark ruling that "there is no jurisdictional barrier to the making of an opt out order under r 4.24".[149] This conclusion was fortified by the fact that r 4.24 does not require consent of all parties before an order can be made, and that r 4.24 is a longstanding exception to the general requirement that a plaintiff must consent before being made a party to litigation.[150] The Court also observed that in several previous cases, representative orders had been granted where not all members had consented to being represented.[151]

The Court also relied on the inclusion of the phrase "as directed by the court" in r 4.24(b) to expressly provide the court with power to determine the way in which the representative action should proceed,[152] and that any later questions are purely questions of case management.[153]

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[145] Leave was granted by the Supreme Court to appeal this decision, but as of March 2020 the appeal had not yet been determined: *Southern Response Earthquake Services Ltd v Ross* [2019] NZSC 140.
[146] *Ross v Southern Response*, above n 14, at [65]. Refer to *Credit Suisse*, above n 23 at [163].
[147] *Credit Suisse*, above n 23 at [171].
[148] *Ross v Southern Response*, above n 14, at [68].
[149] At [81].
[150] At [81].
[151] *Ross v Southern* Response, above n 14 at [82].
[152] At [83].
[153] At [84].

The primary argument relied on by French J (that opt-out orders are not appropriate without legislative intervention) was rejected by the Court of Appeal on the basis that opt-out orders had been permitted in both Australia and Canada had both at various times, despite there being no express legislative provision allowing those orders.[154] The Court of Appeal held that the liberal and flexible approach adopted by the High Court of Australia and Supreme Court of Canada should be adopted in New Zealand, and the absence of legislation expressly permitting opt-out orders is not a sufficient reason to decline such orders, provided those orders best serve the purposes of the representative action procedure.[155]

The Court of Appeal concluded that in most cases, an opt-out order would be more appropriate.[156] The decision of the Court of Appeal therefore leaves it open to parties to elect to seek either opt-in or opt-out orders. It is likely that this possibility will result in further jurisprudence and argument regarding the appropriateness of each type of order in certain fact situations. The merits and various policy reasons for adopting an opt-out provision will be discussed in more detail in chapter IV, as part of the discussion regarding what, if any, reform is needed in New Zealand.

In addition to granting opt-in orders, the courts have generally, where sought, granted an opt-in period to allow claimants additional time after the orders are made to decide whether they wish to participate in the proceedings. The rationale for such opt-in periods is that until the representative orders are made, there is no certainty for potential claimants as to the terms on which the claim will go ahead, and potential claimants should be allowed time to take independent advice as to their position once the orders are made.[157] Consideration should also be given as to whether the opt-in period sought would unduly prolong the proceedings.[158]

There is no set procedure for determining the length of an opt-in period, as the setting of an opt-in (or indeed opt-out) date is a function of case management.[159] On appeal, the Court of Appeal in *Cridge*, observed that "the purpose of an opt-in period is not to enforce the limitation period [as the High Court had purported to do] but rather to reduce the original class to those who take the positive step of opting in".[160] An opt-in period is determined by considering what a reasonable time period is for class members to be made aware of the proceeding and to take

[154] At [86] – [96].
[155] At [97].
[156] At [97].
[157] *Strathboss*, above n 70 at [77].
[158] *Smith v Claims Resolution Services*, above n 47 at [43].
[159] *Saunders v Houghton (No 2)* [2012] NZCA 545 at [72], [75].
[160] *Cridge v Studorp Limited* (CA), above n 20 at [54].

any advice necessary and/or make investigations to determine whether they fall into the affected class.[161]

As of March 2020 there has not yet been any judicial discussion in New Zealand regarding the appropriate length of time for an opt-out period. The Court of Appeal in *Ross v Southern Response* left it to the High Court to determine an opt-out date, and as at the time of writing (March 2020) this had not yet occurred.

The Court of Appeal decision in *Ross v Southern Response* has potentially opened the gates to larger or higher value class actions through the opt-out mechanism and has the potential to dramatically change the class action landscape in New Zealand. However, it should be noted that the Supreme Court has granted leave to appeal, so it remains to be seen whether the opt-out procedure will be upheld.[162]

I Use of a litigation funder

Litigation funders are increasingly being used in New Zealand to fund representative actions due to the high legal and expert costs associated with these claims. Litigation funders generally provide the funds needed for the litigation, but when a recovery is achieved (either through a settlement or judgment), they will recover the funds they have expended, and also take a percentage of the amounts recovered as profit.[163] A full discussion of the use of litigation funders in New Zealand is beyond the scope of this paper, as the use of litigation funders is not restricted to representative actions.

Traditionally, the courts did not allow funding of litigation for profit unless there was specific legislation permitting this. This was on the basis that it was an abuse of process and offended the rules against maintenance and champerty, as the funding arrangements may result in claims with no merit being used to exploit defendants.[164] However, the New Zealand courts have recently analysed this position, and now allow litigation funding of representative actions in certain circumstances. French J observed that litigation funding can provide access to justice:[165]

[161] *Cridge v Studorp Limited* (CA), above n 20 at [54].
[162] *Southern Response Earthquake Services Ltd v Ross*, above n 145.
[163] See for example *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, above n 47 at [89].
[164] *Houghton v Saunders*, above n 1 at [175].
[165] *Houghton v Saunders*, above n 1 at [177].

> Where the costs of litigation are beyond the means of many people, professional funders undoubtedly have an increasingly important role to play in ensuring that legal obligations and rights are enforced and vindicated.

If the rules would prevent claimants from bringing an otherwise legitimate claim because they cannot afford to fund it themselves there may be a failure of justice,[166] with Baragwanath J observing that the Australian High Court had previously held that:[167]

> … the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights.

In *Feltex*, the defendants accepted that there must be "something more than the core components of maintenance and profit sharing before it can be said the arrangement involves an abuse of process".[168] Factors that may point towards a litigation funding arrangement falling foul of the rules against champerty and maintenance (which are still actionable torts in New Zealand) include a high level of control over the litigation by the funder, the possibility of the funder gaining a disproportionate profit, or if the funder is seeking to instigate the claim purely for the purpose of making a profit.[169]

The court will assess each funding agreement on a case by case basis, in the context of the facts of each claim. A full review and assessment of the relevant facts and findings in each case where a funding arrangement has been challenged is beyond the scope of this thesis and extends well beyond the context of representative actions. However, in the context of representative actions, both the High Court and Court of Appeal have reviewed and considered whether the involvement of a litigation funder has any impact on the application of r 4.24. Both courts concluded that where a litigation funder is involved, the question of whether representative orders should be granted under r 4.24 must also involve considerations beyond the assessment of the same interest requirement.[170] The involvement of a funder alters the dynamic between the plaintiffs and defendants, and as such the courts will ensure that careful focus is given to the question of ensuring that the ability to bring a funded representative action is not an abuse of process.[171]

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[166] *Saunders v Houghton (No 1)*, above n 45 at [28].
[167] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; (2006) 229 ALR 58 at [120].
[168] *Houghton v Saunders*, above n 1 at [179].
[169] *Houghton v Saunders*, above n 1 at [180] and [181].
[170] See for example *Saunders v Houghton (No 1)*, above n 45, *Strathboss*, above n 70.
[171] *Strathboss*, above n 70 at [9].

In order to ensure the funded representative action is not an abuse of process, the courts generally require the litigation funder to disclose the funding agreement.[172] This allows the court to make an assessment of the reasonableness of the funding terms and the control exerted by the funder over the litigation, which is one of the traditional concerns in relation to the rules against maintenance and champerty. The court will be mindful to assess whether the funding arrangement allows the funders to have such control that they are pursuing and determining the claim in their own interest, rather than the interests of the plaintiff group.[173]

As outlined above, the Court of Appeal also noted in *Saunders v Houghton (No 1)* that in cases involving a litigation funder, the courts should undertake a provisional appraisal of the merits of the claim.[174] This is not an opportunity for the court to make any factual findings, but rather the court will assume that the facts pleaded by the plaintiffs can be made out, and then assess whether, if those facts are established, the causes of action can be sustained. This has been held to be a reasonably low threshold.[175]

If the court is doubtful as to whether the claims are tenable, they may be more reluctant to approve the funding arrangements, on the basis that the presence of a funder may be used to pressure a defendant to settle unmeritorious claims.[176] The level of scrutiny applied by the court when carrying out this assessment will vary, depending on the nature and circumstances of the claims.[177] The courts will often also make an order for security for costs in order to discourage the funding of unmeritorious claims.[178]

The approval of funding arrangements can assist in furthering the objectives of the representative action procedure by improving access to justice for claimants who may not otherwise have the funding to bring a claim. The involvement of a litigation funder is a trade-off for claimants, in that part of their recovery will be taken by the funder, meaning claimants' overall recovery will be reduced, but where there is no other option, it at least provides the ability to have their claim heard and (hopefully) recover something. The need for reform of litigation funding rules will be discussed in more detail in chapter III.

[172] *Strathboss*, above n 70 at [63].
[173] *Strathboss*, above n 70 at [65].
[174] *Saunders v Houghton (No 1)*, above n 45, at [38].
[175] *Smith v Claims Resolution Services Ltd*, above n 47 at [32].
[176] *Strathboss*, above n 70 at [29] – [30].
[177] *Saunders v Houghton (No 1)*, above n 45 at [37].
[178] *Saunders v Houghton (No 1)*, above n 45 at [31].

J Costs

The usual position in relation to costs is that the unsuccessful party will pay costs. This means that in representative actions where there is a group of represented claimants being represented by a representative plaintiff, the usual position will result in the representative plaintiff having significant costs exposure.

In *Strathboss*, the plaintiffs requested that the Court exempt the named plaintiffs from any liability for adverse costs.[179] Dobson J declined to exempt the named plaintiffs from their liability for costs, observing that "it is for the plaintiffs to obtain indemnity as a matter of contract, and for them to be satisfied with the creditworthiness of those standing behind indemnities".[180] Thus, a representative plaintiff remains liable for costs in the usual sense, even though they are representing a number of other represented plaintiffs, whose claims may succeed or fall with that of the lead plaintiff(s). A similar argument was also made and rejected in an early stage of the *Feltex* litigation.[181]

K Security for costs

As set out above, orders for security for costs are one tool available to the court to ensure that the representative procedure is not abused and that the procedure is not unduly oppressive on a defendant. Under HCR 5.45, if a Judge is satisfied that the plaintiff is a resident out of New Zealand or is incorporated out of New Zealand, or there is reason to believe the plaintiff would be unable to pay a costs award if one was ordered, the Judge may order that security for costs is paid.

In representative actions which are funded by a litigation funder, New Zealand courts have taken the position that security for costs should be ordered. This is on the basis that the funder has no personal interest in the claim, they take part of the proceeds of the claim and are motivated by financial considerations.[182]

The New Zealand position in relation to security for costs in representative actions in cases not funded by a litigation funder has not been tested, but on the face of it there is no reason why the usual principles in r 5.45 would not apply. Any order for security for costs in a non-funded representative action would need to be assessed on a case by case basis, considering whether

[179] *Strathboss*, above n 70 at [83].
[180] At [84].
[181] *Houghton v Saunders*, above n 1 at [219].
[182] *Saunders v Houghton (No 1)*, above n 45 at [36].

the plaintiff can pay an order for costs. Given that a lead plaintiff remains liable for costs awards, it may be appropriate in the case of a non-funded representative action for the Court to assess whether the plaintiff group has provided any indemnities to the plaintiff, and if so, whether they would be sufficient to ensure the costs order could be met. This however, remains untested in the current New Zealand case law.

L Current alternatives to representative actions

Recent 'leaky building' litigation in New Zealand has illustrated that applying for representative orders and proceeding under r 4.24 is not the only option for large scale litigation of this nature to be conducted. *White v James Hardie New Zealand*[183] involves a similar claim to *Cridge*, being a claim regarding allegations of product failure in respect of cladding products. That claim was brought by approximately 1,246 property owners and all property owners are listed as named plaintiffs. As far as can be seen from the judgments available in the proceeding, orders for the claim to proceed under r 4.24 were not sought. A further separate claim against a cladding manufacturer (Carter Holt Harvey) in relation to the 'leaky schools' litigation is also being run without orders under r 4.24, with the Minister of Education bringing the proceedings in relation to a number of schools owned or administered by the Ministry of Education.[184]

In *White*, the plaintiffs applied to the High Court for orders staging the hearing to address common issues at stage 1 and remaining individual issues at stage 2. The primary focus of the Court in that case was to ensure the case management process was used to meet the requirements of r 1.2, being the just, speedy and inexpensive determination of the proceedings.[185] The approach taken was similar to that taken in applications under r 4.24, and indeed the Court in *White* recognised that the High Court and Court of Appeal decisions in relation to the *Cridge* claim provided useful guidance, despite the different procedural background of the cases.[186]

The issues identified for a stage 1 trial in the *White* proceeding (not yet heard) are largely similar to the stage 1 issues confirmed by the Court of Appeal in *Cridge* as being suitable for determination as common issues.

Both the *Cridge* and the *White* proceedings are (as at March 2020) still before the courts, with stage 1 hearings scheduled for 2020 and 2021 respectively. However, the plaintiffs in *White*

[183] *White v James Hardie New Zealand Limited* [2018] NZHC 1627.
[184] *Minister of Education v Carter Holt Harvey* [2014] NZHC 681 at [1].
[185] At [6].
[186] At [9].

had to seek separate directions from the Court in relation to a staged hearing, while the *Cridge* claim received directions from the Court regarding the staging of the hearing as part of the granting of the representative orders.

The parallels between the way in which these two claims are now being run illustrate that there is an alternative to an application under r 4.24 which may provide a similar result procedurally. The main difference in result between using these two procedures is that r 4.24 allows opt-in (or opt-out) orders to be made so that if the class was not fully formed when the proceedings were filed there would be time for people to join the claim. However, as illustrated by the *White* case, if opt-in orders are not sought or required, claimants may reach the same result by naming all claimants as plaintiffs rather than seeking orders under r 4.24, which can be a costly and lengthy exercise. The primary risk with this approach is that such proceedings could be challenged for a lack of particularisation in relation to each individual plaintiff.

The ability for these two types of procedure to occur in parallel has the potential to create significant confusion and uncertainty in the legal system.

There are several other statutes which also provide for class action type proceedings to be brought on behalf of a group in certain circumstances. For example, the Human Rights Commissioner can bring actions on behalf of persons who are affected by alleged discriminatory practises under the Human Rights Act 1993[187] and a director of proceedings can also commence proceedings on behalf of a class for a breach of the Code of Health and Disability Services Consumers' Rights under the Health and Disability Commissioner Act 1994.[188] The Companies Act 1993 also provides for a shareholder bringing proceedings against a director or the company to represent all or some of the shareholders who have the same or substantially the same interest.[189] Finally, the Fair Trading Act 1986 also permits variations of class actions if all members of the class can be identified.[190] A full discussion of these provisions is beyond the scope of this paper. However, their existence indicates that there are certain circumstances in which the legislature has considered it appropriate for claims to be brought as representative actions. Any reform to r 4.24 should be done with these provisions in mind to ensure consistency in the way in which representative actions are run, which will enhance efficiency.

[187] Section 92B(2).
[188] Section 50(3).
[189] Section 173.
[190] Fair Trading Act 1986 Parts 1 and 5.

III Is Class Action Reform Needed in New Zealand?

Chapter II of this paper reviewed and analysed the current New Zealand legal position in relation to representative actions. In the light of the current New Zealand position, chapter III will discuss whether reform of the representative action procedure is necessary. By considering the key objectives of the representative action procedure and assessing whether those objectives are met on the law as it stands, this chapter builds on the analysis and discussion in chapter II to consider what justification there might be for either reform of the representative action rule or introduction of a statutory class actions regime.

The key question addressed in this chapter is whether the current representative action procedure meets the stated aims of the representative procedure, in particular efficiency and access to justice. While regulatory deterrence is equally an important aspect of the class action regime, it is not a topic which has received significant attention in the New Zealand context and is one which is very difficult to assess.

This assessment of the current representative procedure necessarily also includes consideration of the way in which representative actions have proceeded beyond the granting of the representative orders through steps such as discovery, applications for further and better particulars, substantive hearings and settlement. Currently, representative actions are reliant on the High Court Rules and case management when dealing with these steps, so this chapter assesses whether there would be benefit in providing legislative guidance specific to representative actions for these (and other) steps.

A significant component of this chapter is devoted to the *Feltex* litigation, which is the largest representative proceeding dealt with to date in New Zealand, and one of the few that has made it through to a substantive hearing. By considering the litigation as a whole rather than considering the granting of orders under r 4.24 in isolation, any shortcomings in the current regime will be able to be identified and assessed.

With this assessment in mind, chapter IV will then go on to assess what reform would be best suited to New Zealand, including assessment of what form the reform should take and what lessons can be learned from the position in Ontario and Australia following introduction of statutory regimes for class actions in those jurisdictions. As part of this, Chapter IV will make some recommendations as to the nature and scope of any reform.

A What are the objectives of the representative action procedure?

In order to assess whether reform is needed, this chapter will analyse whether the objectives of the representative action procedure are currently being met in New Zealand. As outlined in chapter II, these are efficiency, access to justice and holding potential wrongdoers to account and deterring them from conduct that could potentially be damaging. [191]

The efficiency objective reflects the desire of the courts to have judicial economy by avoiding a multiplicity of proceedings, which was the original purpose of allowing claimants to be represented.[192] In order for the representative action procedure to be justified, the procedure must be more efficient and economic than bringing of individual proceedings, in relation to both judicial economy, the time required to bring and resolve a claim and cost effectiveness.[193]

Access to justice is a term that is often used by the courts when discussing the objectives and benefits of class actions, but is a phrase that lacks key definition.[194] When considering access to justice, the courts tend to focus on the ability of representative claims to make otherwise unaffordable claims affordable for people.[195] However, access to justice also includes broader considerations of simply providing affected claimants with an ability to bring a claim. While this inevitably involves cost considerations, it also involves ensuring that there is a procedural mechanism for affected claimants to have their claim heard, and that the procedural mechanism is as user friendly as possible. Further access to justice considerations suggested by overseas literature include procedural fairness, a transparent process, and substantive justice.[196]

Finally, the representative procedure is also designed to increase regulatory compliance and act as a preventative measure to deter actual or potential wrongdoers from conduct that may cause loss. This preventative mechanism works, in theory, on the basis that small scale wrongdoing would not be economic for one person to action, but may be rendered economic in a representative or class action context.[197] Thus, potential defendants are deterred from conduct that may only cause relatively small losses to an individual, because they face the risk of a representative or class action.

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[191] See *Cridge v Studorp* (CA), above n 20 at [11]; *Western Canadian*, above n 4 at [29]; *Smith v Claims Resolution Services Ltd*, above n 47 at [38].
[192] See *Western Canadian*, above n 4 at [19].
[193] *RJ Flowers v Burns*, above n 13 at 271.
[194] This lack of definition was discussed in detail in Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (1st ed, UBC Press, Vancouver, 2018).
[195] See for example *Cridge v Studorp* (CA), above n 20 at [11].
[196] See for example Kalajdzic, above n 194 at 11.
[197] *Cridge v Studorp Limited*, above n 20 at [11].

B Background to the Feltex Litigation

The *Feltex* litigation is one of the longest running pieces of commercial litigation in New Zealand. The proceedings concerned alleged misleading statements in a share prospectus issued by Feltex following a significant drop in share price and liquidation of the company. Approximately 8,000 investors were left out of pocket.[198] The proceedings were issued in February 2008, but a final judgment on the substantive questions of liability in respect of stage 1 of the litigation was not issued by the Supreme Court until August 2018. Following the Supreme Court decision in August 2018, there have been a further 13 judgments as at March 2020 (including judgments of both the High Court and Court of Appeal) dealing with procedural matters and steps leading up to the determination of stage 2 issues.

To date, the claim has been fraught with procedural difficulties and challenges. There are at least 45 judgments in the litigation as of March 2020. In litigation of this scale there will likely be countless other minutes and directions which have been provided by the Court in relation to case management. Approximately 15 of the judgments (if not more) relate to procedural matters other than the application of r 4.24, while at least 5 relate to issues directly relating to the use of r 4.24 (though it is noted that a number of the procedural questions are closely related to the use of the representative proceeding). 26 of the 43 judgments were heard before the High Court, while 10 were before the Court of Appeal and 7 before the Supreme Court. Only 3 of the judgments in this proceeding relate to the substantive hearing (one in each of the High Court, Court of Appeal and Supreme Court), while 7 relate exclusively to decisions on costs.

C Lack of efficiency in the current regime

One of the primary objectives of a class action (or representative action) is to increase efficiency in litigation and allow for swifter resolution of issues that affect a large group of people. In order to assess whether the current New Zealand representative action regime needs reform, the current regime should be assessed against this objective of efficiency, which will be done on a stage by stage basis.

First, this section will consider whether the requirement to obtain orders under r 4.24, and the process for obtaining those orders is efficient. The section will then go on to consider other factors impacting the efficiency of representative orders, including time delays, interlocutory applications, and other steps following the grant of the representative orders.

[198] *Houghton v Saunders*, above n 1 at [9].

As the *Feltex* litigation is one of the few representative actions to have gone through to a substantive stage 1 judgment, much of the analysis in this section will focus on the experience of the claimants in that case.

1 Efficiency in the grant of representative orders

The *Feltex* proceeding illustrates how the lack of legislative clarity around the use of r 4.24 created inefficiencies for the claimants in that case, which suggests that the efficiency purpose of the representative action procedure could be better met through statutory reform.

The *Feltex* claim was filed on 26 February 2008 and on that same date Associate Judge Christiansen made a without notice order that Mr Houghton was suing as representative of all members in the defined class, and that Mr Houghton would represent all those shareholders unless they elected to opt-out by a certain date.[199]

As outlined above, this opt-out order was later rescinded by French J and replaced with an opt-in order on 7 October 2008.[200] Her Honour also concluded that at that stage of the proceedings, the representative orders sought could not be justified on the pleadings as they stood. However, the flexibility afforded to judges under the current procedural rules allowed her Honour to direct that the plaintiffs should re-plead their claim and make a further application for representative orders.[201]

French J's decision regarding the granting of the representative orders and approval of the funding arrangements was appealed to the Court of Appeal, and upheld by that Court.[202] The orders approved by the Court of Appeal were subject to confirmation from the High Court once the amended claim was filed and the stay of proceedings lifted.[203] The status of the representative orders was then subject to further appeals, including to the Supreme Court after the required amendments were made.

For the claimants in *Feltex*, it appears that the key efficiency objective was not met. Having to go to the Court of Appeal twice to confirm the scope and content of the representative orders, obtain multiple High Court judgments on the topic, and also deal with an appeal to the Supreme Court regarding the application of r 4.24 and limitation periods meant that the application for representative orders was an inefficient process and could have been assisted by legislation.

[199] *Saunders v Houghton (No 2)*, above n 159 at [7].
[200] *Houghton v Saunders*, above n 1 at [224].
[201] *Houghton v Saunders*, above n 1 at [224].
[202] *Saunders v Houghton (No 1)*, above n 45.
[203] *Saunders v Houghton (No 1)*, above n 45 at [43].

Indeed, the Court of Appeal in its first decision observed that draft class action legislation would "likely… provide a framework that will be useful to the judiciary".[204]

To a certain extent, appeals on the application of principles should be anticipated. An unsuccessful party has a right to appeal a judgment against them, and in representative actions where the quantum of the claim and amount to be gained (or lost) is significantly higher than a standalone claim, appeals are expected. This is particularly so in the context of an application for representative orders, where a successful defendant can prevent the claim from proceeding as a representative action at all. Despite this, the fact that the *Feltex* litigation required at least three High Court judgments and two Court of Appeal judgments regarding the representative orders, illustrates that it is not the right to appeal that caused the inefficiencies, but rather, uncertainty in relation to the use and application of r 4.24.

Many of the principles underlying the application of r 4.24 are now relatively settled, as was illustrated by the Court of Appeal decisions in *Cridge v Studorp Ltd*[205] and *Ross v Southern Response*[206]. To a certain extent, legislative interpretation and application of principles will always be needed. However, there are certain areas in which some legislative clarity would provide greater efficiency.

For example, legislative guidance setting out how limitation periods apply to a representative claim may have prevented a need to have the Supreme Court decide the issue in *Feltex*, which of course added additional cost and delay to the claimants in that proceeding. If the application of limitation periods was clear from the outset, the legal argument regarding limitation rules could have been avoided, and the only issue remaining for the court to deal with in the substantive hearing would have been the factual application of the limitation dates.

The *Cridge* proceedings provide a further illustration of the inefficiencies which were caused by the lack of legislative guidance in relation to limitation provisions. In that case, three High Court hearings[207] and one Court of Appeal[208] hearing were required before the final form of the representative orders was confirmed approximately two years after the claim was filed. The defendants in that case also applied for leave to appeal to the Supreme Court, which was

[204] *Saunders v Houghton (No 1)*, above n 45, at [15].
[205] Above n 20.
[206] Above n 14.
[207] *T J Cridge and M A Unwin v Studorp Limited*, above n 21; *Cridge v Studorp Limited* (HC), above n 48; *Cridge v Studorp Limited* [2017] NZHC 528 [*Cridge v Studorp Limited (Stay)*].
[208] *Cridge v Studorp Limited* (CA), above n 20.

dismissed.[209] Significant delay in scheduling a substantive hearing occurred as a result of the need to determine the representative status of the group before the proceedings could continue further.

As outlined above, the claimants in *Cridge* experienced significant inefficiency in relation to the representative orders, with the precautionary orders sought in respect of the limitation position being declined by the High Court. While the Court of Appeal later overturned the decision, the inefficiency had already occurred and a number of potential group members had incurred significant costs to file individual proceedings in the High Court in order to preserve their position in respect of limitation.[210]

Arguably, legislative guidance as to the limitation position following filing a representative claim would have assisted in reaching the aims of the representative action procedure. This would have avoided the significant additional expense and duplication of proceedings which later turned out to be redundant.

The plaintiffs in *Southern Response Unresolved Claims Group* also experienced some delays and difficulty with obtaining their representative orders, with the final form of the representative orders not being settled until approximately 2 years after the claim was filed. In that case, the plaintiffs' original application for representative orders under r 4.24 was dismissed by Mander J on the basis that the same interest requirement had not been met.[211] This decision was appealed and a fresh application for representative orders was also made after the claim had been amended, meaning two High Court hearings and one Court of Appeal hearing took place before the final representative orders were confirmed.

While it appears on the face of it that the application for representative orders is causing significant time delays for plaintiff groups due to the need to go to the High Court and often also the Court of Appeal and Supreme Court in order to confirm the status of the group as a representative claim, there may also be other factors affecting the apparent efficiency of the representative action procedure. The nature and size of the claim, and the strategy of the defendants may impact on what, if any, appeals are brought in relation to the grant of the representative orders. The way in which the claim is pleaded will also impact on any possible

[209] *Studorp Limited v Cridge*, above n 125.
[210] *Cridge v Studorp Limited* (HC), above n 48 at [80].
[211] *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Limited*, above n 45.

time delays, as was illustrated in *Feltex* and *Southern Response*, where the plaintiffs were required to amend the pleadings before the requisite same interest could be found.

It is likely that the delays experienced in the grant of representative orders are as a result of a combination of uncertainty in the representative action procedure and principles, strategic decisions by defendants, the nature of the claims and way in which the pleadings are framed, and other complicating factors that may be present such as the involvement of a litigation funder or questions of limitation and/or stay of proceedings.

2 Time Delays

Several claims also illustrate the time delays which can result from an application for representative orders and any subsequent appeals.

The *Feltex* proceeding has taken over 10 years to reach a final substantive judgment in respect of the stage 1 issues, and the stage 2 issues are yet to be determined. This is a significant time delay, much of which was taken up by interlocutory and procedural matters. The substantive hearing in the High Court did not commence until over six years after the proceedings were first filed. The question of the application of r 4.24 and the final form of the orders was not resolved until April 2014, being around six years after the claim was originally filed.

It is likely that the significant time delays experienced in that case prior to hearing are as a result of both the complexity of the litigation and the difficulties the plaintiffs experienced when trying to navigate the representative action procedure.[212] In particular, there were questions as to the applicability of r 4.24 to these proceedings, application of limitation periods, and the type of orders that could be granted (opt-in or opt-out) which needed to be determined.[213] Delay in that case were also caused by deficiencies in the pleadings which required the plaintiffs to replead the claim in order to qualify for representative status[214].

While the experience of the claimants in the *Feltex* case does not necessarily reflect the experience in every single application for orders under r 4.24, it illustrates the broader issue that where there are questions which have not been dealt with before by the courts, significant delay can be caused as a result. When determining the issues which arose in the *Feltex* litigation the courts had very minimal guidance on the use of r 4.24 with which to work. This

[212] However, it should be noted that there are other factors which impact on the time to reach a resolution, including the complexity of the litigation, the nature of the pleadings and any amendments required, and other procedural matters which need to be dealt with as part of the litigation.
[213] *Houghton v Saunders*, above n 1.
[214] *Houghton v Saunders*, above n 1 at [170].

meant that there was uncertainty in relation to the application of the rule, and the lack of precedent also meant the decisions would likely have been considered to be more capable of appeal, as there was a lack of appellate authority on the topic.

The length of time taken to resolve the application for representative orders and associated limitation periods could have been reduced had there been legislation in place setting out the key principles regarding the constitution of the class, common issues, and limitation. While the introduction of legislation or further guidance in the High Court Rules will never resolve all questions and prevent the need for applications to the court, if the guidance is clear in the rules (which it currently is not) it may serve to limit the length and complexity of hearings on procedural matters, allow agreement to be reached by the parties or reduce the number of appeals required, all of which would reduce the cost and time involved. The guidance provided by the courts is not binding, and will always be open to challenge, as occurred in *Ross v Southern Response*. This creates an inherently uncertain environment, which would benefit from additional certainty.

Subsequent proceedings have benefitted from the decisions in *Feltex* regarding the application of r 4.24. For example, the application for representative orders in *Strathboss* was dealt with by the High Court in only one judgment and was not appealed, which is significantly more efficient than the events which unfolded in *Feltex*. However, as outlined above, this difference in time delay could also be attributed to difference in strategies by defendants, the nature and content of the pleadings, and other procedural factors.

To a certain extent, some time delay in a representative proceeding is inevitable, regardless of whether there are statutory guidelines or not. The prospect of either party requiring judicial input is not entirely unexpected in high value litigation. Thus, any reform is not going to necessarily remove all time delays caused by a representative or class action procedure, but rather, should focus on minimising the uncertainty regarding the application of the rules in order to streamline the application process and avoid the need for multiple appeals or multiple High Court hearings. This will ensure the efficiency objective is met to the greatest possible extent.

3 Other Interlocutory Applications

In addition to delays and inefficiency caused by the representative action procedure, the *Feltex* claim illustrates the way in which other interlocutory applications can also add significant delay. In that case, a number of other interlocutory hearings and processes took place in tandem

with the determination of the representative orders. The interlocutory applications included applications to strike out parts of the proceeding,[215] to transfer the proceeding to the commercial list in Auckland,[216] applications in respect of disclosure of documents,[217] application for split trial and determination of preliminary questions,[218] applications for further and better particulars,[219] and applications in respect of discovery.[220]

On hearing the application to transfer the proceeding to Auckland and place it on the commercial list, Potter J observed that by 30 September 2011 (being approximately three years after proceedings were first filed) there had been "15 days of hearing leading to three substantive interlocutory judgments", "14 telephone conferences with French J", and 6 sets of interlocutory applications had been made.[221] These interlocutory steps all took place prior to a discovery order being made and took a substantial amount of time to resolve. At that stage, Potter J noted that matters relating to discovery would "likely involve novel issues" and that "This type of action is without precedent in New Zealand and lacks the benefit of rules to assist the Court".[222]

The volume of hearing time required before reaching a point where a discovery order could be made was significant. In more straightforward litigation, the discovery order is generally made early in the proceedings, and often at the first case management conference.[223] The three year gap between issuing of proceedings and a discovery order being made illustrates that significant delays occurred, which can likely be attributed to both the representative nature of the claim, the complexity of the claim, and deficiencies in the pleadings.

As the claim moved further through the interlocutory proceedings, French J observed in the context of an application for a split trial and determination of preliminary questions that "the absence of class action rules is creating difficulties for the parties in this case".[224] The Supreme Court later stated that French J was "justified in [that] remark".[225]

[215] *Houghton v Saunders*, above n 1.
[216] *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 7 October 2011.
[217] *Houghton v Saunders* [2013] NZHC 1824.
[218] *Houghton v Saunders* (Split Trial), above n 127.
[219] *Houghton v Saunders* [2013] NZHC 1980.
[220] *Houghton v Saunders*, above n 217.
[221] *Houghton v Saunders* (Split Trial), above n 127 at [39].
[222] *Houghton v Saunders* (Split Trial), above n 127 at [52].
[223] High Court Rules, r 8.5(2).
[224] *Houghton v Saunders* (Split Trial), above n 127 at [45].
[225] *Credit Suisse*, above n 23, at [49].

Some of the interlocutory steps which occurred in *Feltex* could have been resolved or sped up through assistance from legislation. For example, debate regarding the level of particularisation in respect of the individual claims could be resolved by legislative guidance as to the pleading required in respect of group members. The defendants in *Feltex* sought "details of each shareholder claiming loss, including their names, the number of shares purchased in the IPO and the date and price achieved on any subsequent sales".[226] The Court held that these particulars would not be required until the stage 2 hearing, but that summary information taken from the opt-in forms should be provided.[227]

Similarly, questions as to the scope of discovery are matters that the Court would benefit from guidance on in order to resolve the interlocutory stages of the proceeding more efficiently.

It would also be anticipated that in a proceeding of this complexity and scale there would be a number of interlocutory applications regardless of whether the proceeding was a representative action or not. However, a number of the interlocutory applications in *Feltex* were in relation to the use of the representative action procedure, including the application for representative orders itself, the splitting of the hearing, discovery, and the level of particularisation required in respect of the wider claimant group. On this basis, it appears that French J's observation as to the difficulties caused by the lack of class action rules accurately represented the state of the proceedings and the lack of efficiency.

These observations in respect of the *Feltex* claim must be tempered by the repeated observations from the bench in the first two years of the litigation about the "disarray"[228] of the plaintiffs, and the state of the pleadings, which required significant amendments before the representative orders could be granted. On this basis, some of the delays experienced in the proceedings would have likely occurred regardless of the presence or otherwise of class action legislation.

The above sections illustrate the difficulties in assessing the efficiency of the representative action procedure in a vacuum from other factors in the litigation, including the nature of the claim, the quality of the pleadings, and strategy of the parties. However, there are certain aspects of the representative procedure which could be made more efficient with clarification,

[226] *Houghton v Saunders*, above n 217 at [70].
[227] At [70].
[228] *Houghton v Saunders* 19 (2009) PRNZ 476 (HC) at [9].

including regarding limitation, application of pleadings and particularisation rules, and discovery rules.

D Access to justice

One principle objective of the representative action procedure is to increase access to justice for potential plaintiffs. The use of the representative action procedure is designed to make claims that would otherwise be unaffordable within reach for plaintiffs and is also designed to provide potential claimants with access to the court system. Many of the claims brought as representative proceedings under r 4.24 would be unaffordable to an individual plaintiff on the basis that the risk and unrecoverable costs could far outweigh the benefits of bringing a claim. However, when the costs can be shared or the support of a litigation funder obtained, the claims can become cost effective. Thus, when used effectively, the representative action procedure can be an effective tool for providing access to justice.

Questions of access to justice are closely related to efficiency, as the more efficient the procedure is the more cost effective it will be, thus providing greater access to justice. However, access to justice also includes considerations of the ability of the justice system to provide claimants with a mechanism through which they can access justice. The greatest access to justice will occur when the litigation is affordable, time efficient, and the procedure is user friendly and relatively simple for claimants to access.

When considering access to justice and the affordability of litigation, particularly representative actions, there are two primary considerations. First, the upfront costs required to fund a lengthy and complex claim, and second, the risk of a substantial adverse costs award.

1 Affordability of litigation – upfront costs

Lengthy and complex litigation such as representative actions inevitably come with significant legal and expert costs, in addition to court fees, security for costs and/or adverse costs insurance.[229]. As outlined above, the high cost of representative claims is illustrated by the fact that the claimants in *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Limited* stated on the record that those claims would not be affordable without the support of a litigation funder.[230]

[229] Waye "Advantages and Disadvantages of Class Action Litigation (and its Alternatives)", above n 2 at 127.
[230] *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Limited*, above n 45 at [5].

By way of illustration, the costs award made in respect of the *Feltex* substantive hearing illustrates the level of funding required for a complex representative claim. The costs award in that case (while later overturned) was originally in the region of $3M (comprising legal costs on scale, expert costs, and disbursements).[231] Costs on the interlocutory applications (of which there were a significant number) had been dealt with separately. As indemnity costs were not awarded,[232] it can be assumed that the actual costs incurred by the defendant in relation to the substantive hearing were greater than $3M. It is likely the plaintiffs' costs would have been similar.

An individual plaintiff wishing to pursue such a claim is unlikely to have the means to fund such significant costs. Even if they did have the means to fund a claim, a plaintiff is unlikely to pursue litigation unless the amount they stand to gain outweighs their outlay on legal and expert fees. However, where there are many claimants in the same position, a claim can be rendered cost effective by sharing the costs among a greater number of claimants, on the basis that the cost of proving a common issue is likely to be the same or similar no matter how many claimants the issue affects.

Despite the cost savings that can occur in a representative or class action, many claims do not proceed without the support of a litigation funder to pay the upfront costs. It is not clear whether this is due to the unaffordability of litigation, even in a representative or class action, or whether difficulties in arranging for claimants to pool resources and pay costs is also a factor. The majority of representative actions in New Zealand since *Feltex* have proceeded with the support of a litigation funder. The *Cridge* proceedings provide a rare example of a claim which is being run in a self-funded manner, with the claimants pooling resources to fund the claim.[233]

The fact that self-funding of representative actions is uncommon suggests that the costs of litigation remain out of reach for many, even with the added efficiencies of a representative action. On that basis, use of litigation funders can enhance access to justice, by providing access to the courts, even if the recovery is lower than it otherwise might be.

[231] *Houghton v Saunders* [2015] NZHC 548 at schedule 5 [*Houghton v Saunders* (Costs)].
[232] *Houghton v Saunders* (Costs), above n 231 at [15].
[233] Parker & Associates "Cladding Action Q&As" (undated) Parker & Associates <http://www.parkerandassociates.co.nz/cladding-action-q-as.html>.

2 Affordability of Litigation - Cost awards

In addition to concern about the upfront cost of litigation, access to justice may also be impeded by the application of standard costs principles. If the claim is not successful, the usual costs rules will apply and the representative plaintiff will be exposed to a substantial costs award. This potential exposure to costs award may deter potential representative plaintiffs from bringing proceedings, thus precluding any access to justice.

In *Feltex* a substantial costs award of over $3M was made against the plaintiffs after an unsuccessful stage 1 hearing in the High Court. While the High Court judgment was later overturned by the Supreme Court, the plaintiffs in that case had already had to front up with the funds to pay the costs award. The need for plaintiffs to have reserves of this level to pay any adverse costs award may be a significant deterrent for potential claimants in representative actions. While a litigation funder can mitigate against this by providing security for costs (and will generally be directed to do so[234]), if a litigation funder is not involved, the need to be able to provide for adverse costs may serve to further prevent access to justice for claimants who cannot afford to set aside funds.

In *Feltex*, the High Court dealt with an argument as to whether the fact the plaintiffs had a litigation funder meant the defendants should be entitled to indemnity costs. While the costs awarded were substantial, Dobson J was not prepared to award indemnity costs purely on the basis that the claim was funded by a litigation funder.[235]

His Honour was mindful of the importance of limiting cost exposure in order to ensure that potential plaintiffs have appropriate access to justice, holding that "the most important consideration here [when determining the costs award] is preventing the erosion of access to justice".[236]

It is relatively clear that the high litigation costs and cost risk provide significant barriers to access to justice for potential claimants, particularly in the context of a representative action. Any reform to the representative action procedure in New Zealand should be done in a way which will minimise the litigation cost and provide more incentive for plaintiffs to bring a claim. However, a balance must also be struck and ensure the procedure is not too 'plaintiff friendly' and that defendants are not limited in the way in which they defend a claim. At

[234] See for example *Strathboss*, above n 70 at [79].
[235] *Houghton v Saunders* (Costs), above n 231 at [15].
[236] *Houghton v Saunders* (Costs), above n 231 at [14].

present, this risk is managed by the imposition of requirements that the representative action should not provide a plaintiff with rights where they would not otherwise have been able to assert a claim, and should not deprive a defendant of defences that it may have against one or more group members.[237] This is discussed and expanded on in chapter IV.

3 Involvement of litigation funders in representative actions

As explained above, the involvement of litigation funders in representative actions is closely related to questions of cost and access to justice. While litigation funders do not operate solely in the domain of representative actions, the scale of representative actions makes them the ideal type of litigation for litigation funders.

The litigation funder traditionally takes a percentage of the damages recovered as profit, which means that if a litigation funder is used the claimant may recover less than they otherwise would.[238] In Australia, the litigation funding fees average 30.67% of settlement funds.[239] In that sense, the litigation funder can be seen to restrict the possible recovery of claimants by reducing the total amount recovered. However, if the options were to use a litigation funder, or not issue proceedings at all, the use of the litigation funder certainly provides claimants with the potential to access justice.

In *Feltex*, the Court of Appeal recognised that the introduction of litigation funding arrangements could impact on the grant of representative orders.[240] On that basis, given that litigation funding is commonly used in the context of representative orders, any reform of the representative action procedure should also address the use of litigation funding arrangements.

E The opt-in and opt-out debate

The question of whether an opt-in or opt-out mechanism should be used is one of the most controversial questions that would need to be dealt with as part of any reform, as the question is one which is now relatively unsettled in New Zealand following the Court of Appeal decision in *Ross v Southern Response*. The opt-in and opt-out debate has also received significant attention overseas and in literature. The question of whether to favour an opt-in or opt-out

[237] *Cridge v Studorp* (CA), above n 20 at [11].
[238] Waye "Advantages and Disadvantages of Class Action Litigation (and its Alternatives)" above n 2 at 128.
[239] Vince Morabito and Vicki Waye "Reining in Litigation Entrepreneurs: A New Zealand Proposal" [2011] NZLR 323 at 346.
[240] *Saunders v Houghton (No 1)*, above n 45 at [38].

mechanism will have flow on effects in respect of the objectives of efficiency and access to justice.

As outlined in chapter II, the Court of Appeal decision in *Ross v Southern Response* significantly changed the position in respect of opt-in and opt-out orders, concluding that there is nothing in the wording of r 4.24 that prevented the grant of opt-out orders.[241] On the basis of the Court of Appeal's decision, both opt-in and opt-out orders are now available to potential representative action claimants in New Zealand, but it is likely that opt-out will be favoured.

This uncertainty as to whether opt-in or opt-out is more appropriate has the potential to create inefficiencies. The ability for claimants to select which path to go down, and for defendants to argue, for example, that an opt-in approach is more appropriate may make the process of applying for orders under r 4.24 more lengthy and expensive. While it is likely that the form of the orders could be determined in the same hearing as the application for representative status, the need for the court to determine whether opt-in or opt-out is more appropriate has the potential to lengthen hearing time and thus increase costs.

Future representative action claimants would benefit from additional clarity regarding the use and availability of opt-in and opt-out mechanisms in order to enhance the efficiency of the proceedings.

The use of opt-in and opt-out periods to allow claimants time to determine whether they wish to participate in the proceedings (or not) also assists in providing access to justice. Potential group members may wish to wait until the court has formally made orders to determine whether they wish to participate in the proceedings or not. In this sense, allowing time after the orders are granted for claimants to opt-in or out provides access to justice by encouraging claimants to make a rational and reasoned decision and take appropriate advice before making a decision regarding participation in the claim.

Arguably, both opt-in and opt-out orders provide access to justice that otherwise might not be available. However, there is a question as to whether an opt-out mechanism provides better access to justice than an opt-in mechanism. This may depend on the nature of the claim and a number of other factors. Chapter IV will discuss in more detail what path New Zealand should go down with any reform, but for current purposes, it is clear that reform of the opt-in and opt-out mechanisms would provide better efficiency (and possibly also enhance access to justice).

[241] *Ross v Southern Response*, above n 14 at [81].

F Efficiency in steps after the granting of representative orders

As outlined above, the High Court rules do not provide the New Zealand courts with any guidance on how to handle a representative action once it proceeds beyond the grant of the representative orders, including matters such as discovery, the level of particularisation required, how individual issues would be determined and what level of proof is required from each individual claimant. This has created some uncertainty for claimants and for the courts when dealing with representative actions. Reform to deal with this uncertainty would provide certainty and efficiency which would be more consistent with the objectives of the representative action.

While it is now reasonably well established that representative claims can be most efficiently dealt with in two stages, [242] no guidance has been provided on other aspects. For example, there is a question as to what, if any, discovery would need to be provided by represented group members for a stage 1 hearing. The question of discovery has not yet been litigated, but there is potential for disagreement on the scope of documents to be provided by represented group members, particularly if the cost of providing discovery would be a significant burden on the group members.

The issue is one that Potter J was cognisant of in the *Feltex* litigation, where she observed that issues in respect of discovery were "likely to involve novel issues arising from this being a class action brought on behalf of some 1800 shareholders"[243].

Any reform to the representative action procedure should include additional guidance regarding discovery issues. While there have not yet been any significant disputes as to the scope of discovery to be provided by plaintiffs in representative actions, this is an area of potential uncertainty and would benefit from either reform or at least some guidance on the subject.

G Jurisdictional inefficiencies

The final aspect of the current representative action regime that would benefit from reform is the jurisdiction of the court to make orders in respect of representative actions, including in relation to opt-in and opt-out orders, opt-in periods, the form of notices in respect of opt-in and opt-out, and approval of settlement. It is far from clear on the wording of r 4.24 that the court has jurisdiction to make such orders. While the courts have to date used their inherent

[242] See for example *Strathboss v Attorney-General*, above n 70, *Cridge v Studorp Limited*, above n 48.
[243] *Houghton v Saunders*, above n 216 at [52].

jurisdiction to manage class actions,[244] the lack of jurisdiction for the court to manage some aspects of the representative action procedure caused difficulties for the parties in *Cooper v ANZ Bank Ltd*.[245] In *Cooper*, the plaintiffs sought an extension of the opt-in date previously set by Peters J, and also sought approval from the court of the form of the notice to potential class members and directions that the defendant distribute the opt-in notice (as they had contact details for potential class members readily available). In response to that application, her Honour expressed concern as to whether she had jurisdiction to approve the communications, and declined to answer the question of "whether this is a course that the Court should follow and, if so, in what circumstances".[246] Rather than endorsing the communications the Court simply reviewed and commented on them. The rules do not provide any guidance as to how the court should manage proceedings and to what extent the court can be involved. For the parties in *Cooper* this resulted in the additional cost and delay of a further interlocutory hearing.

There is also a question as to whether the court has the jurisdiction to make opt-in or opt-out orders.[247] While the making of such orders is now relatively commonplace in representative actions, a legislative basis for making such orders would provide additional certainty.

H Conclusion on whether reform is needed

It is apparent from the analysis above that while the case law on the principles of r 4.24 is now reasonably settled, aspects of the application of that rule are still being litigated, and that the decisions of the High Court and in some cases the Court of Appeal are being appealed regularly. Further, the claimants in the *Feltex* litigation experienced significant procedural delays, some of which were as a result of the lack of formal representative or class action procedures. The clearest illustration of the consequences of uncertainty in the representative action procedure arose in *Cridge*, where a number of homeowners filed individual proceedings to protect their position in respect of limitation. These proceedings were later held by the Court of Appeal to be unnecessary, but the inefficiency in the proceedings had already occurred and could not be undone. This suggests that there is room for some further legislation or at a minimum guidance in the form of practice notes that would assist parties in determining whether the representative procedure is appropriate, and how it should be applied.

[244] See for example *Southern Response* (No 1), above n 45 at [14].
[245] *Cooper v ANZ Bank Ltd* [2013] NZHC 3116.
[246] *Cooper v ANZ Bank Ltd*, above n 245 at [15].
[247] Anthony Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" (2015) NZ L Rev 73 at 105.

Analysis of the *Feltex* decisions in relation to costs also exposes access to justice issues with the current representative orders regime. Not only is the cost of litigation in many cases prohibitive, but as the law currently stands, the cost risk to potential representative plaintiffs is significant, and representative plaintiffs would be prudent to make provision for potential costs awards either by way of an indemnity from a litigation funder and/or indemnities from the group members. This risk and additional layer of protection required for representative plaintiffs could act as a potential deterrent for people who may not want to take on the risk of the entire litigation or risk having to test contractual indemnities before the court. Of course, a representative action cannot proceed without a representative plaintiff, so reform of the costs principles may assist in furthering access to justice.

Recent case law, including in the *Feltex* and *Strathboss* litigation, has also revealed a need for legislative guidance in relation to the use of litigation funders. While litigation funders are not exclusively used in relation to representative orders, they are used in the vast majority of claims which are brought under r 4.24. As a result, any regulation of litigation funders or reform of the law in relation to litigation funders should be done in conjunction with the representative action reform.

The inefficiencies that are present in the current procedure should be balanced against the right of the parties to challenge the application of the rule and appeal any decisions that have gone against them. The flexibility afforded to judges under the current procedure is also relevant, with the courts having the ability to manage each representative claim on a more tailored basis. This can provide advantages where the case managing judge is familiar with the matters at issue and can allow the proceedings to move forward in the most efficient way, which will not always be the same in each case.

On balance, there are a number of aspects of the current representative action procedure which would benefit from reform in order to further the purposes of the representative action procedure. The reform required should be in the form of wholesale legislative reform, which incorporates and codifies aspects of the law as it stands for clarity and efficiency. When determining the scope and nature of any reform, the primary difficulty will be in ensuring that legislation balances the need to provide access to justice to potential claimants against the risk that legislation which is too plaintiff friendly will potentially result in defendants being exposed to significant numbers of unmeritorious claims, which they are forced to spend money

defending or settling. Chapter IV of this thesis will discuss in more detail the nature of the reform required in order to best enhance the objectives of the representative action procedure.

IV What reform would New Zealand benefit from?

Chapter III of this thesis identified a number of areas of the New Zealand representative action framework that could benefit from reform. Given the development of the jurisprudence relating to r 4.24, New Zealand has now reached a point where r 4.24 is inadequate for its purpose, and wholesale reform is necessary. This reflects the Canadian experience, where the Supreme Court of Canada observed in *General Motors of Canada v Naken* that a rule which was in substance similar to r 4.24 was "entirely inadequate" for its task, which was administering class actions.[248]

If used correctly, the class action procedure could provide significant benefits to both the New Zealand public generally and to the judicial system. This chapter will assess how reform could be enacted in a way that provides the most benefit and is the most consistent with the objectives of class actions and makes recommendations as to the content of such reform. The recommendations made will draw on the experience in Australia and Ontario in order to identify areas that have been problematic in overseas jurisdictions and assess how these difficulties could be resolved in the New Zealand context to minimise uncertainty and provide reform that is long lasting and effective.

This chapter will first assess what form the New Zealand reform should take, and in particular whether that reform should be by way of a comprehensive class actions statute, or whether amendments to existing High Court Rules and the addition of new High Court rules would be sufficient. As part of this, the chapter will comment briefly on the Class Actions Bill proposed in 2008 and the changes proposed by the Rules Committee in 2018 and assess whether that type of reform would be appropriate.

The remainder of the chapter will be devoted to identification of areas that would benefit from reform and make recommendations as to principles that should be considered by the legislature when determining the content of any new class actions legislation.

As outlined in Chapter III, there are a number of aspects of the current r 4.24 regime which are not consistent with the objectives of the representative action procedure and would benefit from reform. Any reform to the representative action procedure should address each of these aspects in a comprehensive manner. When considering how each of these aspects could be reformed, this chapter will review and consider to what extent we can learn from the experience in

[248] *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72 at 93.

Australia and Ontario when enacting reform in order to avoid some of the issues which have arisen in those jurisdictions.

The primary issue identified in Chapter III is the lack of efficiency in the current regime. This lack of efficiency has arisen for a variety of reasons, including the lack of clarity in relation to the application of r 4.24, whether an opt-in or opt-out regime is appropriate, application of limitation periods, and procedural questions such as the level of detail required in pleadings, directions regarding staging of hearings, and rules regarding discovery.

Reform to the r 4.24 procedure should also take into account how access to justice can best be provided. This includes consideration of costs rules, security for costs, and use of litigation funders. As outlined earlier, detailed discussion of the regulation of litigation funders is beyond the scope of this thesis but is relevant to reform of representative actions and should be considered alongside any reform of representative action procedures.

It is noted that the questions of efficiency and access to justice are closely intertwined, as a more efficient point of view (at least in the sense of cost efficiency) will provide better access to justice by making the litigation more affordable. Given the close interrelation between these principles this chapter does not deal with them separately, and instead deals with them in tandem.

A What form should the reform take?

Reform of the representative action procedure could be done through two possible vehicles. First, New Zealand could introduce a comprehensive class actions statute, which deals with all aspects of the class action procedure and contains both substantive and procedural advice. Alternatively, reform could be done through amendments to the existing r 4.24 and supplementing the rule with additional rules and practice notes.

1 Previous proposals for Amended High Court Rules and Class Actions Statute

The existing r 4.24 could be supplemented with additional High Court Rules in order to provide the additional clarity that is needed. This is what was proposed by the Rules Committee in September 2018, when proposing draft amendments to the High Court Rules (the draft rules),[249] which were intended supplement and provide additional clarity to r 4.24.

[249] High Court Rules 2016 (Representative Proceedings) Amendment Rules 2018.

The draft rules addressing the question of when the rules will apply, when the representative proceeding will commence, the procedural requirements for filing a representative claim, and the principles to apply when applications are made in accordance with that subpart.

The draft rules proposed by the Rules Committee lack clear guidance in a number of respects and could be significantly improved in order to best meet the objectives of the class action procedure. There are also certain aspects of the representative procedure which are not addressed by the rules. It would be more efficient to adopt a wholesale reform, rather than reform in a piecemeal fashion which risks creating further efficiencies. If the legislature wished to pursue reform through the High Court Rules, it should do so in a more comprehensive manner.

Prior to the 2018 draft rules, the Rules Committee also proposed amendment to the representative action procedure through a draft Class Actions Bill[250] which would be accompanied by draft High Court Amendment (Class Actions) Rules.[251] The bill and rules never reached a first reading in Parliament, and as of March 2020 have not progressed beyond the status of drafts. The draft bill was lacking clarity in a number of key respects, including in relation to the definitions of the class, consistency with the existing case law, and the objectives of the class action procedure.

The High Court Rules typically include procedural guidance only. However, the draft High Court Rules (Class Actions) Amendment Rules 2008 included both substantive and procedural rules, which begs the question as to why two pieces of legislation would be necessary. It would be clearer to include all provisions relevant to class actions in one piece of legislation.

2 Should the reform take the form of a dedicated class actions statute?

As outlined above, the reforms proposed to date have involved amendment to the High Court Rules, rather than a dedicated class actions statute. Given that the High Court Rules typically contain procedural guidance only, this thesis argues that reform would best be done through a dedicated class actions statute. This would allow both procedural and substantive provisions to be contained in one place and avoid the risk that any key provisions are overlooked by parties, potentially creating further inefficiencies or injustice.

[250] Class Actions Bill 2008 (draft only).
[251] High Court Amendment (Class Actions) Rules (draft only).

Dedicated class actions legislation is the path that has been adopted in Canada, with all Canadian states enacting formal class actions legislation at various times, with Ontario enacting its Class Proceedings Act (CPA) in 1992. By contrast, Australia does not have a dedicated class actions statute, and instead has comprehensive class actions provisions included in Part IVA of the Federal Court of Australia Act 1976 (Part IVA).[252] Both of these avenues would be appropriate and open to the New Zealand legislature, but the primary focus should be on ensuring that the reform is comprehensive and located in once place. The easiest way to avoid confusion would be to enact a separate class actions statute in the way that the Canadian jurisdictions have done.

Clear legislative guidance will minimise the risk of uncertainty in the procedure and will increase efficiency by minimising the occasions on which judicial input is required or sought. A more efficient class action procedure will also serve to enhance access to justice by minimising costs, ensuring the procedure lacks the uncertainty that has created significant issues for claimants to date and making the procedure more accessible for potential claimants.

Having concluded that statutory reform is appropriate, the remainder of this chapter will be devoted to assessing how the reform could be enacted in order to ensure the objectives of the class action procedure are met. Before assessing how the reform should take place, a brief background to the relevant legislation in Ontario and Australia is necessary so that the experience in those jurisdictions can be applied to New Zealand.

B Background to the Australian Experience: Part IVA

Class actions are permitted in Australia by Part IVA of the Federal Court Act 1976 (FCA), which comprises sections 33A- 33ZJ. Part IVA is titled 'representative proceedings' but is largely treated in literature and jurisprudence as class actions legislation and is often referred to as such. For the purpose of this chapter, when discussing the Australian position, the phrases 'representative proceeding' and 'class action' are used interchangeably.[253]

Prior to the enactment of Part IVA, the Australian states' rules of court used representative procedure rules which derived from the United Kingdom,[254] similarly to the way in which r 4.24 is currently incorporated in the High Court Rules in New Zealand. However, the

[252] The Federal Court of Australia Act is the Australian equivalent of the Judicature Act 1908 in New Zealand.
[253] Noting that the case law uses these phrases interchangeably, so a distinction is difficult to draw.
[254] As outlined above in Chapter II.

Australian rules had largely fallen into disuse[255] because the rules had not been given the same liberal interpretation that the New Zealand rule has been given to date. Part IVA was enacted in 1991 following a report by the Law Reform Commission (now the ALRC).[256]

The Law Reform Commission stated that the purposes of the Part IVA amendments including "reducing the cost of enforcing legal remedies in cases of multiple wrongdoing", allowing claimants to "enforce their legal rights in a cost effective manner" and promoting efficiency "by enabling common issues to be dealt with together".[257] These objectives are relied on by the courts when considering how to interpret and apply Part IVA.

The key principles which underpin Part IVA and its application have been identified on a number of occasions and are generally referred to in a consistent manner.[258] These principles were described by Finkelstein J as being to:[259]

(1) promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue;
(2) provide a remedy in favour of persons who may not have the funds to bring a separate action or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and
(3) protect defendants from multiple suits and the risk of inconsistent findings.

The second reading speech which introduced what is now Part IVA to Parliament noted that the representative action procedure was necessary for two reasons. First, "to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions"[260] and thereby "give access to courts to those in the community who have effectively been denied justice because of the high cost of taking action."[261] Second, "to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual

[255] Murphy and Cameron "Access to Justice and the Evolution of Class Action Litigation in Australia", above n 5 at 401.
[256] Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC Report 46, 1988).
[257] Australian Law Reform Commission *Grouped Proceedings in the Federal Court*, above n 256 at [69].
[258] Murphy and Cameron "Access to Justice and the Evolution of Class Action Litigation in Australia" above n 5 at 400.
[259] *P Dawson Nominees v Multiplex Limited* [2007] FCA 1061; (2007) 242 ALR 111 at [22]. See also Finkelstein J's comments in *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 at 374, where his honour described the purpose of Part IVA as "the reduction of legal costs, the enhancement of access by individuals to legal remedies, the promotion of the efficient use of court resources, ensuring consistency in the determination of common issues, and making the law more enforceable and effective…".
[260] (14 November 1991) Australian House of Representatives Parliamentary Debates at 3174-5.
[261] (14 November 1991) Australian House of Representatives Parliamentary Debates at 3174-5.

actions and a large number of persons wish to sue the respondent"[262] and allow those claimants to obtain a remedy "more cheaply and efficiently" than if they initiated individual actions.

The Law Reform Commission also recognised the importance of the regulatory role of class actions, in encouraging compliance with the law due to a very real threat of litigation if the law is not complied with.[263] For example, the relatively recent rise of shareholder class actions provides shareholders with a means to obtain compensation from corporations that have breached relevant laws or regulations in a way that results in losses to shareholders. The shareholder class actions can therefore serve as an incentive to create a culture of good corporate governance and encourage corporations to act within the law.[264]

These principles parallel the objectives of the representative procedure under r 4.24 of the New Zealand High Court Rules. In light of the commonality of the underlying principles, this chapter will use the Australian experience with Part IVA to inform the analysis of how the New Zealand representative action procedure could be reformed.

The ALRC undertook a review of Part IVA in 2018, and released its report titled "Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" in December 2018 ("the 2018 Report").[265] The 2018 report made a number of recommendations regarding proposed amendments to Part IVA. This report and the recommendations made have been taken into account in this chapter when considering the Australian position and assessing what reform is appropriate in New Zealand.

C Background to the Ontario Experience: Class Proceedings Act 1992

The Ontario Class Proceedings Act 1992 (CPA) was enacted following a report prepared by the Ontario Law Reform Commission (now the Law Commission of Ontario (LCO)) in 1982 (the 1982 Report).[266] Prior to introduction of the CPA, class actions in Ontario proceeded in accordance with Rule 12.01 of the Rules of Civil Procedure. This Rule was similar to that used in Australia prior to the enactment of Part IVA and is also similar to r 4.24 of the New Zealand High Court Rules.

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[262] (14 November 1991) Australian House of Representatives Parliamentary Debates at 3174-5.
[263] Australian Law Reform Commission *Grouped Proceedings in the Federal Court*, above n 256 at 33.
[264] Murphy and Cameron "Access to Justice and the Evolution of Class Action Litigation in Australia" above n 5 at 404.
[265] Australian Law Reform Commission *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC Report 134, 2018).
[266] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms* (Toronto: July 2019).

The Supreme Court of Canada in *Western Canadian Shopping Centres v Dutton* (*Western Canadian*) observed that "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs" had contributed to the worldwide growth of class actions and the importance of class actions in dealing with these types of disputes.[267] The result of this growth in class actions and the increasing complexity of the litigation was the enactment of the CPA in Ontario and similar statutes in other Canadian states. In *Hollick v Toronto (City)* (*Hollick*) the Supreme Court of Canada observed that the CPA: [268]

> …was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

The objectives of class actions in Ontario were established in the 1982 Report as being access to justice, judicial economy and behaviour modification. These objectives were not included directly in the CPA, but when applying the CPA the courts have referred to the 1982 report and those objectives. In *Hollick* the Supreme Court of Canada outlined the three key advantages that a class action provides over a multiplicity of individual proceedings, being:[269]

(1) judicial economy, through avoiding unnecessary duplication in fact finding and analysis;

(2) increased access to justice as the distribution of litigation costs amongst a large group of class members can render claims economic and affordable where they would otherwise not be; and

(3) enhanced efficiency and justice by ensuring that actual and potential wrongdoers are held accountable and modify their behaviour appropriately to reflect the potential harm they could cause.

The Court then went on to note that the CPA must be interpreted broadly and in a way that "gives full effect to the benefits foreseen by the drafters."[270]

The LCO has recently completed a report on Class Actions and the CPA (the 2019 Report), with the aim of analysing the class action procedure from the perspective of the three main

[267] *Western Canadian*, above n 4 at [26].
[268] *Hollick v Toronto (City)* [2001] 3 SCR 158 at [14] [*Hollick*].
[269] *Hollick*, above n 268 at [15].
[270] *Hollick*, above n 268 at [15].

objectives of class actions in Ontario: access to justice, judicial economy, and behaviour modification.[271] The LCO did not reassess the objectives of class actions and whether these objectives remain appropriate, but rather, focussed on assessing whether the current CPA regime fulfils those objectives or whether reform is necessary for them to be met. The recommendations made in the 2019 Report have been considered in this chapter and where relevant have been incorporated into the discussion regarding the Ontario experience and what reform is needed in New Zealand.

As can be seen from the earlier analysis of the principles adopted by New Zealand courts in relation to the application of r 4.24, the principles applied in Ontario are consistent with the way in which New Zealand courts approach representative actions, and also reflect the principles identified by the ALRC and applied by the Australian Courts. The similarity in underlying principles in each of the three jurisdictions means the jurisprudence from both Ontario and Australia will assist in the analysis of what form any reform in New Zealand should take.

4 Delay and attrition tactics in Australia and Ontario

Before embarking on a close analysis of individual aspects of class action proceedings, it is relevant to note that one of the overarching difficulties faced by claimants in class actions in Ontario and Australia has been dealing with the delay and attrition tactics employed by defendants. These tactics are seen at every stage of the litigation and finding a way for claimants and courts to deal with these tactics while still ensuring a fair judicial process is a challenge faced by the courts in the context of many class action decisions.

These tactics are difficult to legislate against as defendants are entitled to defend any claim brought against them using the procedural rules available to them. Tactics often adopted by defendants in the class action context (where the amount a defendant stands to lose is much more significant than in an individual action) include attempts to delay the proceedings and cause attrition of the group through various procedural mechanisms.[272]

While many of these tactics are legitimate means through which a defendant can defend a claim, many of the challenges put forward by the defendants are designed as a means to delay and drive up cost in order to reduce the group size and thus reduce their exposure.

[271] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 1.
[272] Murphy and Cameron "Access to Justice and the Evolution of Class Actions in Australia", above n 5 at 412.

From a claimant's point of view, such tactics are at odds with the objectives of the representative action procedure, which are to provide more efficient and cost-effective means for resolution of claims.[273] It is also worth noting that if these tactics of delay and attrition are not successful, they drive up the costs for both parties, meaning there are inefficiencies for all involved. Finkelstein J in *Bright v Femcare* was wise to the tactics often employed by defendants in representative claims, and observed that the use of numerous interlocutory proceedings and subsequent appeals was a "disturbing trend" and "an intolerable situation… one which the court is under a duty to prevent, if at all possible".[274]

This trend and issue has also been seen in Ontario, and was one of the issues identified by the LCO in their recent review of the CPA. The 2019 Report observed that delay is a significant feature in all litigation, and that this can be compounded in the case of class actions.[275] As a result, the LCO recommended some changes to the CPA which were targeted at ensuring that the proceedings move along swiftly, and that there are consequences for parties who do not comply with those directions. For example, the LCO recommended that the CPA be amended to include a deadline of one year within which the certification motion must be scheduled and the plaintiffs' material in support filed.[276] They also recommended including automatic dismissal and costs provisions for cases that are not advanced by plaintiff firms in a sufficiently timely or appropriate manner.[277]

While these provisions may assist to proceedings to progress more quickly, the focus of these provisions is largely on the plaintiff parties (who are the ones who have the most control over the progress of the litigation and are responsible for bringing and progressing their claims). The provisions are not likely to provide substantial assistance in dealing with the conduct of defendants who are seeking to delay the proceedings.

The 2019 Report also emphasised the need for active and assertive case management.[278] This is a feature which has also been emphasised in Australia[279] and New Zealand[280] as being a means to ensure the proceedings are moved along in the most efficient manner possible and

[273] Murphy and Cameron "Access to Justice and the Evolution of Class Actions in Australia", above n 5 at 412.
[274] *Bright v Femcare* [2002] FCAFC 243; (2002) 195 ALR 574 at [160].
[275] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 5.
[276] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 95.
[277] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 95.
[278] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 21.
[279] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; (2016) 245 FCR 191 at [196].
[280] *Cridge v Studorp*, above n 20 at [25].

could be used as a means for the courts to deal with delay and attrition tactics adopted by defendants.

D Legislative Reform: What are the requirements to bring a claim as a class action?

One of the key issues to be addressed as part of any reform is what the requirements are for a claim to be brought as a class action. Currently, r 4.24 requires that all persons have "the same interest in the subject matter of the proceeding", and the rule applies to claims where one or more persons is either suing or being sued. The case law has developed a number of guiding principles relating to the application of r 4.24, including that not all issues in the case must be common, the representative action must be for the benefit of all class members, and that the representative action must not provide success where it would otherwise not have been possible.[281] As part of legislative reform, consideration must be given to the extent to which these principles should be enshrined in legislation.

1 Should a "same interest" requirement be included?

Rule 4.24 requires all persons to have "the same interest in the subject matter of the proceeding". This reflects one of the fundamental principles underlying class actions, which is that the claimants or group members must have claims with common underlying features which could be dealt with more efficiently by determining the issues together. The case law in New Zealand has determined that the same interest requirement requires determination of whether there is a common interest in "some substantial issue of law or fact".[282]

This is largely consistent with the position adopted in legislation in both Australia and Ontario. Both Part IVA (Australia) and the CPA (Ontario) include requirements that there be common issues between group members, with Part IVA requiring "a substantial common issue of law or fact",[283] and the CPA requiring the claims to raise "common issues".[284]

The centrality of the same interest or common issues requirement means that the question of commonality is one which has been litigated at length and is likely to arise in every jurisdiction. It is an important question, and should be dealt with in any reform.

[281] *Cridge v Studorp*, above n 20 at [11].
[282] *Credit Suisse*, above n 23 at [51].
[283] Section 33C(1)(c).
[284] Section 5(1)(c).

The phrase "common issues" is defined in the CPA as:[285]

> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

The common issues criteria has been described by the Ontario courts as "the most important criterion for the certification of a class action".[286]

In Ontario, the law is settled that the common issues do not need to be determinative of liability, they must simply be issues of fact or law which will move the litigation forward.[287] For an issue to be a common issue, it must be "a substantial ingredient of each Class Member's claim and its resolution must be necessary to the resolution of each Class Member's claim."[288] When the common issue is determined:[289]

> success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

Consideration of whether an issue is common essentially boils down to whether the findings can be extrapolated across the group to advance the claims of each group member.[290] The findings in relation to common issues must be able to be applied to each group member's claim without having to make any assessment of individual issues or make individual enquiries.[291] The requirement to establish a common issue is a low threshold, and an issue can be a common issue even if it makes up only a limited part of the overall liability equation.[292]

This assessment appears to be similar to the approach that is presently being taken in New Zealand, with the decisions in *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Limited* and *Smith v Claims Resolution Services Limited* both taking the slightly broader approach that there would be sufficient commonality if there were

[285] Section 1.
[286] *Fehr v Sun Life Assurance Co of Canada* [2015] ONSC 6931; [2015] OJ No 5891 at [17] [*Fehr v Sun Life*].
[287] *Fehr v Sun Life*, above n 286.
[288] *Fehr v Sun Life*, above n 286 at [38].
[289] *Western Canadian*, above n 4 at [40], cited with approval in *McCracken v Canadian National Railway Company* [2012] ONCA 445 at [83].
[290] *Fehr v Sun Life*, above n 286 at [40].
[291] *Fehringer v Sun Media Corp* [2003] OJ No 3918 at [3], [6].
[292] *Fehr v Sun Life*, above n 286 at [44].

common questions of fact which would move the litigation forward, regardless of whether those factual findings would resolve any questions of liability.[293]

The Australian courts have followed a similar path when determining whether there is a "substantial common issue of law or fact" in accordance with Part IVA. For the purposes of Part IVA, the common question is one which, when answered for the representative plaintiff, can also be answered for all group members. A question which needs to be answered for all group members, but involves assessment of each group member's individual circumstances, is not a common question.[294] For example, questions of causation will almost always be classed as individual issues.[295] The requirement of there being a common issue does not necessarily mean that there must be a common cause of action, and as in New Zealand and Ontario, it may be sufficient for there to be a common factual question.[296]

Given the centrality of these provisions to the class action procedure, it is essential that any reform to the New Zealand position includes a requirement that the claimants all have the same interest. To the greatest extent possible, the body of case law which has already developed (and is relatively settled) around the use of r 4.24 should be adopted as part of any legislative reform. This could be most efficiently achieved by ensuring that the legislation adopts the wording of r 4.24 which requires the "same interest in the subject matter of the proceedings". This will ensure the reasonably settled existing case law principles can be applied relatively seamlessly to the new provisions.

Analysis of whether the same interest requirement is met in any case is highly fact dependent, so any legislative reform will not necessarily 'solve' the difficulty of having to determine whether representative or class action rules will apply. However, there are some aspects of the same interest and common issues jurisprudence which could be incorporated into legislation in order to clarify the position, as outlined below. Incorporating each of these principles into legislation will provide additional clarity and reduce the need for judicial input regarding the application of the class action rules.

[293] *Southern Response (No 2),* above n 80; *Smith v Claims Resolution Services,* above n 47.
[294] Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Australia, 2018) at 4.24.
[295] See for example *Rod Investments (Vic) Pty Ltd v Clark* [2006] VSC 342 at [52]; *Bray v F Hoffman-La Roche Pty Ltd* (2003) ATPR 41-906 at 46,513.
[296] *Green v Barzen Pty Ltd* [2008] FCA 920 at [13].

The principles that could be incorporated into legislation are that not all issues in the case must be common, that the representative action must be for the benefit of the class members, that the representative procedure can be used regardless of the remedy sought, and that the action cannot provide success where it otherwise would not have been possible. These are all aspects of the current law in New Zealand, as developed by the courts.[297] These principles are consistent with the objectives of a class action and including them in legislation will create additional certainty regarding application of those principles.

The principles outlined above were identified for inclusion in the draft High Court Amendment Rules. However, the drafting of the rule in question[298] would create a narrow approach that does not allow any flexibility. A better approach would be for legislation to adopt a similar approach to that used in s 33C of Part IVA, which includes a same interest requirement but also clarifies that not all issues must be common and that the remedy sought does not restrict the use of the representative action procedure. Rather than including these requirements as principles to be considered when applying the representative action rules, they should be included in the legislation as requirements for commencing a class action, in order to provide maximum certainty.

2 Is it necessary that the common issues be 'substantial'?

In addition to codifying the present New Zealand position, any reform will also have to consider, as part of the same interest requirement, the question of whether the common issues must be 'substantial'. The current New Zealand position set out in *Credit Suisse v Houghton* is that there must be a common interest in "the determination of some substantial issue of law or fact".[299] Part IVA of the FCA also explicitly includes a requirement that the common issue be "substantial",[300] while the CPA does not.[301]

In Australia, the inclusion of the requirement that the common issue be substantial has caused some difficulty for the courts and resulted in litigation as to what the word 'substantial' means in this context. This was clarified by the High Court of Australia in *Wong v Silkfield* where the Court observed:[302]

[297] See *Cridge v Studorp*, above n 20 at [11].
[298] R 4.74.
[299] *Credit Suisse*, above n 23 at [51].
[300] Section 33C(1)(c).
[301] Refer s 5(1)(c).
[302] *Wong v Silkfield* [1999] HCA 48; (1999) 199 CLR 255 at [27]-[28] (emphasis added).

> The term 'substantial' may have various shades of meaning. Having regard to the context, it may mean 'large or weighty' or 'real or of substance as distinct from ephemeral or nominal'.
>
> …
>
> This suggests that, when used to identify the threshold requirements of s 33C(1), 'substantial' does not indicate that which is 'large' or 'of special significance' or would 'have a major impact on the … litigation' but, rather, is directed to issues which are 'real or of substance'.

The substantial common issue in Australia does not need to be a core issue in the case and will ultimately be a question of fact which will be determined by the court on a case by case basis.[303]

Inclusion of the phrase 'substantial' has also led to a body of litigation regarding whether that means that the common issues must predominate over the individual issues. The question of predominance has also been addressed in Ontario, but has been addressed in more detail in Australia, likely as a result of the incorporation of the phrase 'substantial' in the legislation.

In Ontario, a long line of authority has established that the question of whether the common issues predominate over individual issues is not relevant to the assessment of whether the claim should proceed as a representative action, with Winkler J summarising the position as:[304]

> In determining whether the class proceeding is the preferable procedure, the court does not inquire as to whether the common issues predominate the individual issues. The predominance test has been rejected by Ontario courts. Instead the proper approach is to weigh all of the relevant factors, including the common issues and the individual issues in the context of the goals of the Act.

The question of predominance has also arisen in Australia in the context of the application of ss 33C and 33N. The High Court concluded in *Wong v Silkfield* that "it was not necessary to show that litigation of this common issue would be likely to resolve wholly, or to any significant degree, the claims of all group members."[305] Despite this clear indication from the High Court that the common issues do not need to resolve most or all of the issues in the claim,

[303] *Guglielmin v Trescowthick (No 2)* [2005] FCA 138; (2005) 220 ALR 515 at [56].
[304] *Bywater v Toronto Transit Commission* [1998] OJ No 4913 at [26].
[305] *Wong v Silkfield*, above n 302 at [30].

there have since then been instances of defendants putting forward similar arguments.[306] In *Bright v Femcare* the Court heard argument about the question of causation, and whether the fact that causation would need to be proved in every case would render the representative procedure inefficient. The Federal Court of Appeals noted that while causation may need to be proven for every individual claimant, there are other matters which might be determined in common which assist in the resolution of the claims.[307]

Imposition of a predominance requirement would be contrary to the purposes and objectives of class actions. Arguably, the resolution of any common issues which advance the proceeding in any manner is more efficient than determination of that same issue in multiple different proceedings. In respect of broad assertions by counsel that the proceedings would be more efficiently run individually, Finkelstein J went so far as to say that "in the absence of a compelling explanation I would place no weight on such a statement because it is inherently unlikely to be true", and that "in any event I simply do not accept that one action can cost more than what may amount to hundreds of actions".[308]

In a similar vein to arguments about predominance and the level of common issues required, the Federal Court of Appeals has also noted that the number of common issues arising from a pleading should not be "particularly influential" in the consideration of whether orders for a discontinuance of the representative proceeding should be made under s 33N(1).[309] The more relevant question is what impact the resolution of the common issues will have on individual claims, and what level of work would be made redundant by resolving those issues as common issues, rather than individual issues.[310]

So, while neither Australia nor Ontario have a legislative provision regarding a predominance requirement, both jurisdictions have essentially reached the same position, which is that the common issues do not have to predominate over any individual issues. Given the volume of litigation which has arisen in relation to the predominance requirement, any reform in New Zealand should deal clearly with the question of whether the common issues have to predominate over individual issues.

[306] See for example *Bright v Femcare*, above n 274 at 577-578; *Rod Investments (vic) Pty Ltd v Clark*, above n 295.
[307] *Bright v Femcare*, above n 274 at [138].
[308] *Bright v Femcare*, above n 274 at [156].
[309] *Bright v Femcare*, above n 274 at [136].
[310] *Bright v Femcare*, above n 274 at [136].

Inclusion of the phrase 'substantial' has led to a significant body of litigation in Australia. In order to avoid the inefficiency of a similar situation arising in New Zealand, any reform should avoid the use of the phrase 'substantial' in respect of the common issue, as the CPA does.

It is not clear that the 'substantial' requirement advances the question of whether there is sufficient same interest to warrant a class action procedure being used. Arguably, if there are any common issues which would need to be determined across all group members, resolution of those issues through the class action procedure will be more efficient than resolving it through individual litigation, even if the common issue is not "real or of substance".[311]

Avoiding the requirement that the common issue be substantial would allow a reformed New Zealand procedure to better meet the efficiency objectives of the class action procedure by avoiding the potential for litigation regarding the meaning of substantial and by broadening the scope of what falls to be determined as a common issue.

In addition to avoiding the phrase 'substantial', any reform in New Zealand should also deal directly with the question of whether it is necessary that the common issues predominate over any individual issues. The Court of Appeal observed in *Cridge* that there is no predominance requirement in New Zealand.[312] Likewise, as outlined above, both Ontario and Australian courts have concluded that those jurisdictions also do not have a predominance requirement. However, the issue of predominance is one that has been litigated multiple times in Australia, with defendants attempting to argue in favour of a predominance requirement.

New Zealand could avoid this uncertainty and additional litigation (and the associated time and cost) by including a provision in legislation that the common issues do not have to predominate over the individual issues.

There are clear policy factors in favour of not including a requirement that the common issues predominate over individual issues. The primary reason for not including a predominance requirement is efficiency. As outlined above, a good argument can be made that determination of any common issues will advance the litigation in a way that is more efficient than individual determination of those issues. This view is reflected in the High Court decision in *Southern Response Unresolved Claims Group v Southern Response Earthquake Services*, where

[311] As required by the High Court of Australia in *Wong v Silkfield*, above n 302 at [27].
[312] *Cridge v Studorp*, above n 20 at [36].

representative orders were granted despite the common issues not having any final bearing on liability.[313]

3 Should claimants have the ability to replead their claim in order to find a sufficient common interest?

A further issue which has arisen in New Zealand in relation to the application of r 4.24 is the question of what happens if the common interest requirement is not sufficiently pleaded to warrant representative orders being granted. In both *Feltex* and *Southern Response Unresolved Claims Group* the Court allowed the plaintiffs an opportunity to amend their claim so that there would be a sufficient common issue to warrant granting representative orders.[314] Given that this has occurred twice in relatively recent times, any legislative reform should also provide an opportunity for the claim to be amended if the same interest threshold is not met. This opportunity to amend the claim could be permitted either through a specific provision following the same interest rules, or as part of a general power to the court to make orders it sees fit. This reflects the clear access to justice objective of the rules.

The primary downside of allowing claimants an ability to have a second attempt at pleading a sufficient common issue is the additional time and cost of a second interlocutory hearing. Defendants would also argue that allowing claimants the ability to replead their claim with guidance from the courts is unfair and will result in additional cost to them. However, the additional cost and delay of a second interlocutory hearing will likely be offset by the efficiencies gained in having the common issues dealt with as common issues, rather than as part of individual claims. Any additional cost to the defendant(s) as a result of inadequate pleading can also be taken into account when costs awards are determined.

F Legislative Reform: Should New Zealand adopt a certification requirement?

Any legislative reform in New Zealand will also need to consider whether a certification requirement is adopted. That is, whether it is necessary for a claim to be certified as a class action before it can proceed. As it stands, r 4.24 does not include any certification requirement, and if consent is obtained from those who have the same interest, a representative claim can be commenced as of right.[315]

[313] *Southern Response (No 2)*, above n 80 at [46].
[314] *Houghton v Saunders*, above n 1; *Southern Response (No 1)*, above n 45.
[315] High Court Rules 2016, r 4.24(a).

Certification requirements are somewhat controversial, so a close analysis of the pros and cons of a certification requirement is necessary, including review of the position in Ontario and Australia. Ontario has a certification requirement while Australia elected not to include a certification requirement and instead include an ability for defendants or a court to challenge the status of a class at any stage. As a result, all class actions in Ontario must go through a certification process whereby the court assesses whether the requirements for a class action are met, including in particular whether there is a sufficient same interest. By contrast in Australia, a representative claim can be commenced as of right, but a defendant or the court can challenge whether there is sufficient same interest to permit the claim to continue as a class action, which will not necessarily occur in every claim.

The contrasting positions in Australia and Ontario provide an ideal platform from which this thesis can assess whether a certification type requirement would be a useful reform for New Zealand. The following section outlines the key issues that have arisen in each of these jurisdictions in relation to the certification requirements, or lack thereof, before going on to assess whether New Zealand should include a certification requirement.

1 The certification requirement in Ontario

In Ontario, s 5(1) of the CPA sets up a clear certification requirement which must be met before the claim can proceed as a class action, as follows:

> (1) The court shall certify a class proceeding on a motion under s 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> i. would fairly and adequately represent the interests of the class,
>
> ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> iii. does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

The certification regime in Ontario is not designed to assess the merits of the claim, and purely focusses on whether the claim meets the requirements in s 5.[316] The threshold for certification is relatively low and the requirements of s 5 are interpreted liberally[317] in order to give effect to the stated aims of class actions – being access to justice, judicial efficiency and encouraging behaviour modification.[318] Section 6 provides that the court may not refuse to certify a proceeding purely because the claim includes a claim for damages that would need to be individually determined after the common issues were determined,[319] the relief sought relates to separate contracts involving different class members,[320] or different remedies are sought for different class members.[321] The fact that the number of class members and/or their identity may not be known,[322] or that there may be sub-classes will also not prevent certification.[323]

A certification order can be amended at any time, either on the motion of a party or class member,[324] or where the conditions for certification are no longer met, for example as a result in a change in circumstances.[325]

A significant amount of litigation has arisen in relation to the certification requirement in Ontario, which arises by virtue of the fact that the certification requirements must be dealt with in every case, and applications for certification are often strenuously challenged by defendants. While the majority of certification motions in Ontario are granted, there are a variety of reasons why the motion may not be granted, including a lack of common issue, failure to show the class action would be the preferable procedure, no cause of action, no identifiable class or an inadequate representative plaintiff.[326] The 2019 LCO Report estimated that 73% of class actions filed in Ontario since 1993 have been certified, either in whole or in part.[327]

With the high certification rate in mind, a proposal was made to introduce a preliminary merits assessment to the certification process. The LCO rejected this proposal, observing that such a

[316] *Hollick*, above n 268 at [16].
[317] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 37.
[318] *Western Canadian*, above n 4 at [26]-[29].
[319] Section 6(1).
[320] Section 6(2).
[321] Section 6(3).
[322] Section 6(4).
[323] Section 6(5).
[324] Section 8(3).
[325] Section 10(1).
[326] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 17.
[327] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 36.

merits assessment would likely significantly increase the costs of a certification application, and would "subvert the objectives of access to justice and judicial economy".[328]

The LCO concluded that "the debate is not about whether there is a need for a certification test, but rather what form that test should take".[329]

2 Absence of a certification requirement in Australia

In Australia, a certification requirement was not adopted as the ALRC stated that there was "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".[330] A conscious decision was therefore made to go down the path of having a relatively low threshold to commence a representative action, while having procedural mechanisms in place (such as s 33N) to later prevent this low threshold from permitting claims to proceed where they should not.[331] In theory, this mechanism should have reduced the amount of litigation as not all claims would be subject to challenge under s 33N. However, the volume of case law in this area shows that this has not necessarily been the case.

Section 33N of Part IVA permits the Australian courts to make orders that a proceeding no longer continue as a representative action, either on application of the respondent or of its own motion. The key difference between this procedure and a certification motion is that the certification motion is an essential step in the proceeding, while s 33N provides an optional mechanism for the court or respondents to challenge the status of the group and is not necessarily used in every claim.

Section 33N sets out relevant criteria for the court to consider when determining whether a claim can continue as a representative action, as follows:[332]

> (a) the costs that would be incurred if the proceeding were to continue as a representative action are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or

[328] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 36.
[329] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 38.
[330] Australian Law Reform Commission *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, above n 265 at 63-64.
[331] *Perera v GetSwift Limited* [2018] FCA 732 at [137].
[332] Federal Court of Australia Act 1976, s 33N.

(b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or

(c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

In order for s 33N to be invoked, the requirements for constitution of a representative claim in s 33C must be already satisfied. Section 33N sets up a two-step regime for dealing with questions of whether a proceeding should continue as a class action. First, the court will determine whether any of the conditions in s 33N(1)(a) – (d) are satisfied. If that is the case, the second step is to consider whether, on the basis of that condition, it is in the interests of justice that a discontinuance order be made.[333] One factor considered by the court in relation to whether it is in the interests of justice to make a discontinuance order is whether the public interest in the administration of justice is being met.[334] The administration of justice is one of the key factors in favour of use of a class action procedure, so the courts must factor this into any decision.

If the claim is to proceed as a representative action but the court considers that not all issues are common to all group members, the court may give directions to determine the remaining issues,[335] including directions to establish sub-groups with their own sub-group representative plaintiff.[336] The court may also permit individual issues to be determined as part of the hearing of the representative claim.[337]

Making an application under s 33N can have significant benefits to defendants, as if the claim is stopped and the claimants do not have the economies of group litigation the individual claims are unlikely to run.[338] Applications under s 33N are commonly made early in the proceedings by the defendants,[339] likely in an attempt to avoid ongoing costs.

[333] *P Dawson v Multiplex*, above n 26 at [20].
[334] *P Dawson v Multiplex*, above n 26 at [22].
[335] Federal Court of Australia Act 1976, s 33Q(1).
[336] Section 33Q(2).
[337] Section 33R(1).
[338] See for example the comments of Mansfield J in *Guglielmin v Trescowthick [No 2]*, above n 303 noting at [77] that "an order under s 33N at this stage would effectively put out of Court the group members".
[339] See for example *Bright v Femcare*, above n 274 at [18].

The key question for the court to determine in respect of a decision under s 33N of Part IVA is whether it is in the interests of justice for the matter to no longer continue as a representative action. As part of this, the court will balance the interests of justice in the matter not proceeding as a representative action against the stated legislative aims of efficiency and access to justice.[340] The balancing of these factors is a fact specific assessment, and one which will vary from case to case. However, the courts have noted that there are some types of claim which lend themselves more naturally to being resolved efficiently through the representative action procedure, for example, product liability cases.[341]

The assessment of whether it is in the interests of justice for the matter to proceed as a representative action involves an assessment of how the proposed representative procedure compares with other proceedings available to the applicant and group members as alternative means to resolve their claims.[342] This might involve consideration of whether bringing proceedings in one court is more efficient than bringing proceedings in several courts, whether there would be any change in process costs, and the benefit of having the evidence heard together.[343]

3 Should New Zealand adopt a certification requirement?

The inclusion in New Zealand of a certification requirement akin to that in Ontario would add an additional procedural hurdle that each class action claimant would have to overcome. This would add additional time and cost to each class action procedure, which can be seen as being contrary to the objectives of a class action, and in particular the efficiency objective.

However, the additional time and cost of a certification requirement that would have to be met in every case must be balanced against the right of a defendant to challenge the status of the class and whether there is sufficient common interest. Part IVA in Australia provides for defendants to challenge the status of the class or the common interest through s 33N. This provision has been widely used and there is a significant body of jurisprudence relating to its application.

While no studies have been done which confirm the percentage of class actions in Australia in which an application under s 33N is made, the significant body of jurisprudence suggests that

[340] *Bright v Femcare*, above n 274 at [128].
[341] See *Bright v Femcare*, above n 274 at [154].
[342] *Bright v Femcare*, above n 274 at [74].
[343] *Bright v Femcare*, above n 274 at [74].

applications are made in a vast number of cases and it is not immediately apparent whether there has been any reduction in litigation through adopting this procedure in place of a certification regime. If anything, s 33N has been the subject of criticism, with one commentator, Rachel Mulheron, stating in 2007 that:[344]

> As an experiment, it [the lack of a certification procedure] has been singularly unsuccessful. Litigation [under the federal class action regime] has been mired in numerous interlocutory applications about issues that could better have been addressed at a certification hearing… The omission of a certification hearing has hardly achieved the cost-efficient and streamlined process that the [Australian Law Reform Commission] hoped for when it recommended against certification.

Section 33N is broadly worded, and a number of commentators have suggested that the section should be reformed.[345] Despite the volume of litigation relating to s 33N and the fact that certification regimes remain popular in other jurisdictions, the ALRC did not recommend adopting a certification regime.[346]

This suggests that it would be worthwhile for the New Zealand legislature to closely assess whether the certification requirement adopted in Ontario would better suit the New Zealand reform. This is not a clear cut question. It is apparent from an assessment of the Australian case law in relation to ss 33C and 33N that many of the issues legislated for in s 5 of the CPA are issues that have also arisen in Australia, despite the absence of a certification requirement. This suggests that many issues which arise in the context of class actions may arise regardless of the form in which the legislation takes, and the presence or otherwise of a certification requirement many not necessarily add significant efficiency.

When assessing whether a certification regime would be of benefit in New Zealand, the certification process should be compared against the key objectives of the class action regime, in particular efficiency and access to justice. The Australian and Ontario experience illustrate that the practical difference between having a certification requirement and having the option

[344] Rachel Mulheron "Justice Enhanced: Framing an Opt-Out Class Action for England" (2007) 70 Mod L Rev 550 at 568.
[345] See for example *Murphy v Cameron* "Access to Justice and the Evolution of Class Actions in Australia", above n 5.
[346] Australian Law Reform Commission *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, above n 265 at 102.

to challenge the class status at a later date is not likely to be significant, and litigation is likely to result either way.

However, in a practical sense, the most efficient means for a proceeding to move forward is to have the class status (or otherwise) of the group determined at the outset and not left for challenge or determination once the claim has advanced through a number of stages of the litigation. It would be more efficient for the status of the group to be confirmed at the outset, before parties spend significant amounts of money and time on the litigation. In this sense, a certification regime would be of benefit. The reform proposed by the OLRC which would include a time limit on certification applications would assist in this regard, and including such a requirement in New Zealand would likely create additional efficiency.

From an access to justice point of view, neither option is likely to have significant implications. The primary focus of access to justice is ensuring that claimants have the opportunity to bring a claim, and have their claim heard in the most efficient and cost effective manner. The certification requirement, if used correctly, can ensure that the efficiency objective is maximised by minimising the risk that claimants will spend significant amounts of money and time, only to later find out that they do not have a claim.

Given this, it appears unlikely that a certification requirement would add an additional procedural step to many cases and would be just as efficient as inclusion of a provision to challenge the class action status at a later date. In cases where the defendant does not challenge the certification of the claim, the application for certification should be able to be dealt with swiftly and at reasonably low cost to the claimants.

4 Should the certification requirement include assessment of whether a class action is the preferable procedure?

In Ontario, in order for a class action to be certified the court must also confirm that the class proceeding is the preferable procedure for resolving common issues.[347] This involves assessment of whether a class proceeding would be an appropriate means for advancing the claims of the class members, and also whether the class proceeding would be a better means for resolving the claims than other means such as joinder, test cases and consolidation.[348] These

[347] Class Proceedings Act 1992, s 5(1)(d).
[348] *Markson v MBNA Canada Bank* (2007) 85 OR (3d) 321 at [69].

questions are addressed by reference to the objectives of the class action procedure, including access to justice, behaviour modification and judicial economy.[349]

For a class action to be appropriate, the procedure must be fair, efficient and manageable.[350] The nature of the common issues, what individual issues would remain to be determined, what other procedures might be available for resolution of the claims, the rights of the parties, and whether certification would advance the objectives of the CPA are all relevant factors to be assessed when determining if the class action is the preferable procedure and should be certified.[351]

As part of assessing whether a class actin is the preferable procedure, the court must assess the following questions:[352]

(1) Are there economic, psychological, social, or procedural barriers to access to justice in the case?;
(2) What is the potential of the class proceeding to address those barriers?;
(3) What are the alternatives to class proceedings?;
(4) To what extent do the alternatives address the relevant barriers?; and
(5) How do the two proceedings compare?

These questions are highly fact specific and will depend on the nature of the claims and the litigation and the type of remedy sought. Claimants in a personal injury claim are likely to have different needs to those suffering economic losses, so consideration ought to be given to the needs of the claimants and what is required to provide them access to justice. [353]

This question in Ontario parallels the question to be decided under s 33N of Part IVA of whether it is in the interests of justice for the matter to no longer continue as a representative action, which is outlined above.

Similarly to the assessment of whether a class action is the preferable procedure in Ontario, the assessment in Australia of whether it is in the interests of justice for the matter to proceed as a representative action involves an assessment of how the proposed representative action procedure compares with other proceedings available to the applicant and group members as

[349] *Fehr v Sun Life*, above n 286 at [48].
[350] *Fehr v Sun Life*, above n 286 at [47].
[351] *Fehr v Sun Life*, above n 286 at [49].
[352] *Fehr v Sun Life*, above n 286 at [52].
[353] *Fehr v Sun Life*, above n 286 at [53] and [54].

alternative means to resolve their claims.[354] This might involve consideration of whether bringing proceedings in one court is more efficient than bringing proceedings in several courts, whether there would be any change in process costs, and the benefit of having the evidence heard together.[355]

It must also be remembered that, based on the wording of s 33N, it is entirely possible that there may be common issues between the parties, yet the representative procedure under Part IVA is not appropriate because it is not in the interests of justice.[356] A proceeding may be validly commenced as a representative proceeding in accordance with the requirements of s 33C, yet it may still be appropriate for the proceedings to be discontinued as representative proceedings under s 33N. This was the approach taken at first instance in *Bright v Femcare Ltd*, where Stone J took the view that in that case, while there were common issues, it was not in the interests of justice for the proceedings to continue as representative proceedings. Her honour noted that:[357]

> Although there are issues of substance common to the claims of group members, in the main, they are either issues that are stated at such a level of generality that their resolution will not materially advance the determination of the claims of individual group members…

While the finding of her Honour was overturned by the Federal Court of Appeals on the basis that it was in the interests of justice to have the common issues heard together, the judgment at first instance illustrates the possibility of there being common issues but it not being in the interests of justice for the proceeding to continue as a representative action.

It is also possible that a proceeding could continue as a representative proceeding until the common issues are determined, with orders for discontinuance of the representative proceeding made under s 33N after the common issues were determined. This occurred in *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs*, where there was utility in having a representative proceeding for determining one threshold question, but once that was determined, a discontinuance under s 33N was ordered.[358]

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[354] *Bright v Femcare*, above n 274 at [74].
[355] *Bright v Femcare*, above n 274 at [74].
[356] *Bright v Femcare*, above n 274 at [115].
[357] *Bright v Femcare* [2001] FCA 1477; (2001) 188 ALR 633 at [78].
[358] *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384.

Assessment of whether a class action is the preferable procedure forms an important part of ensuring that the objectives of the class action are met. The fact that a claim has been commenced as a class action does not automatically render the class action procedure to be the preferable procedure, particularly if there are few (or no) common issues, or the individual issues far outweigh the benefit of having common findings. This assessment of the preferable procedure is one of the key ways in which the efficiency objective can be upheld, and any reform in New Zealand should closely consider the best way in which to incorporate consideration of the preferable procedure.

5 Should the certification requirement impose a numerosity requirement?

As it stands, there is no particular numerosity requirement in r 4.24, as the rule allows one or more persons to sue or be sued on behalf of others. By contrast, s 33C(1)(a) of Part IVA requires at least seven persons to have claims against the same person before a class action can proceed in Australia. Ontario simply requires two or more persons to be represented by the representative plaintiff (or defendant).[359]

Inclusion of a numerosity requirement could potentially create difficulties if an opt-out regime is adopted. In Australia, where there is an opt-out regime, there have been difficulties for some claimants in establishing at the outset that there will be at least seven group members.[360] The courts have taken the approach that in order for a claim to meet the requirements of s 33C they must be satisfied that there are likely to be at least seven class members.[361] This uncertainty would likely also arise if an opt-in approach was mandated, as it is likely that most (if not all) of the opt-ins would take place after the representative status of the claim was determined (as has traditionally happened in New Zealand with the opt-in periods).

It is not clear what the rationale was for adopting a requirement that there be seven group members, and whether this provides any efficiency or benefit to the class action regime. Given that one of the primary reasons for use of a class action procedure is to gain efficiency, it appears likely that the objective of a numerosity requirement is to ensure the group is large enough that the efficiency objective is met. However, given the high cost of litigation of this type, it is difficult to anticipate a situation where the losses are significant enough that a claim

[359] Class Proceedings Act 1992, s 5(1)(b).
[360] Vince Morabito "Lessons from Australia on Class Action Reform in New Zealand" 24(2) NZBLQ 178 at 186.
[361] *Tropical Shine Holdings Pty Ltd (trading as KC Country) v Lake Gesture Pty Ltd* (1993) 118 ALR 510 at 515.

would be economic to run with only a few group members. This provides some safeguard against the risk that a small group size could prevent the efficiency objective being met.

On balance, it is difficult to see what benefit a numerosity requirement would have, particularly when viewed in context of the uncertainty such a requirement may import. Any reform in New Zealand should not include a numerosity requirement.

G Legislative Reform: Opt-in or opt-out?

One of the most contentious questions any New Zealand reform will need to deal with is the question of whether to adopt an opt-in or opt-out regime, or have the ability for a claim to go down either path. As outlined in Chapter II, New Zealand has traditionally operated under an opt-in regime, though the 2019 Court of Appeal decision in *Ross v Southern Response Earthquake Services Limited* granting opt-out orders has substantially changed this to permit both opt-in and opt-out orders in New Zealand, while noting that an opt-out order is likely to be more appropriate in most cases.[362] This was a significant change from what had been a reasonably well established principle since the decision of French J in *Houghton v Saunders* that only opt-in orders would be appropriate under r 4.24.[363] By contrast, both Australia and Ontario operate under strict opt-out regimes. The following section will outline the opt-out regimes in force in both Australia and Ontario, and some of the difficulties faced in those jurisdictions in respect of opt-out.

It will then assess whether New Zealand should adopt an opt-in or opt-out model, or a hybrid that permits both.

1 The opt-out regime in Australia

The opt-out regime in Australia is created by ss 33E(1), 33J, 33X(1)(a) and s 33ZB of Part IVA. Section 33E states that "The consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person". The court will fix a date by which group members must opt-out of the proceedings,[364] and group members must be notified of this date and their rights to opt-out.[365] The group size must be determined before

[362] *Ross v Southern Response Earthquake Services Limited* [2019] NZCA 431.
[363] *Houghton v Saunders*, above n 1.
[364] Section 33J(1).
[365] Section 33X(1)(a).

the hearing of the claim takes place.[366] Any group members who fall within the defined class and do not take steps to opt-out will be bound by the outcome of the proceedings.[367]

The opt-out regime in Australia has caused some difficulties for claimants and the courts in situations where claimants have sought to use s 33C to restrict the membership of the group, for example only to those who are in agreement about the way in which the claim will be brought or funded. These arguments have been typically based on s 33C, which allows the representative plaintiff to represent "some or all" of the persons whose claims arise out of the same or similar circumstances.

In *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (*Dorajay*) the Federal Court of Australia was faced with a claim where the group to be represented was defined in the pleading as being those persons who had acquired the shares in question during the relevant time period, but who had also engaged the solicitor acting for the plaintiff and had signed a litigation funding agreement with the funder in question.[368] When assessing whether the claim could proceed as pleaded, the Court concluded that by imposing requirements about representation and funding on the membership of the group, the plaintiffs had essentially created an opt-in environment, which was in direct contravention to the opt-out regime established under ss 33E and 33J of Part IVA.[369]

The Supreme Court of Victoria faced a similar situation in *Rod Investments (Vic) Pty Ltd v Clark* (*Rod Investments*), where the court was also dealing with a shareholder action and membership was restricted to only those who had formed the initial group, engaged the same solicitors and entered into a funding agreement.[370] In that case, Hansen J reached the same decision as in *Dorajay*, noting that while it was understandable why plaintiffs may wish to proceed in this way (for the advantages of cost and efficiency) the arrangements in question amounted to an impermissible opt-in process.[371]

Despite this, the Full Federal Court in *Multiplex Funds Management v P Dawson Nominees Pty Ltd* (*Multiplex*) reached a contrary decision and permitted the represented class to be closed

[366] Section 33J(4).
[367] Section 33ZB.
[368] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483 [*Dorajay v Aristocrat*].
[369] At [125].
[370] *Rod Investments v Clark*, above n 295.
[371] *Rod Investments v Clark*, above n 295 at [41].

and comprise only those who entered into funding agreements.[372] This is despite the fact that s 33E means consent is not required to participate in representative proceedings and s 33J expressly contemplates that the proceedings will be on an opt-out basis.

In *Multiplex* the Court acknowledged that there was force in the argument that defining the group in a way which excludes those who do not sign funding agreements does not facilitate access to justice for all claimants.[373] However, while there were strong policy arguments in favour of preventing the group being so defined, the Court concluded that there was nothing in the legislation (in any of ss 33C, 33E or 33J) which prevented the group being defined by reference to a funding agreement.[374] Despite s 33E stating that consent is not required, the Court did not think this prevented the group from being more narrowly defined at the outset of the proceedings.

The basis for the Court's conclusion was that a class definition which would require positive steps to opt-in to the claim *after* the commencement of the proceeding would be inconsistent with Part IVA. However, because the class was defined in this case as including those who had signed a funding agreement at the time of commencement of the proceeding, the Court found that no such issue arose.[375]

While the conclusion reached in *Multiplex* does not accord directly with those in *Dorajay* and *Rod Investments*, Lindgren J noted that the outcome in *Dorajay* could be distinguished on the basis that the claimants in that case were also contemplating some type of opt-in mechanism after the proceeding commenced, which was not the case in *Multiplex*.[376]

The primary conceptual difficulty with the conclusion reached in *Multiplex* is that defining a group narrowly at the outset prevents an opportunity for those who were not aware of the proceeding when it was commenced from participating. By requiring participants to sign a funding agreement prior to the claim being filed, there is a risk that potential claimants who were not aware of the claim miss out on an opportunity to access justice.

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[372] *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200 at [141] [*Multiplex v P Dawson*].
[373] At [137].
[374] At [138] – [142].
[375] At [142].
[376] *Multiplex v P Dawson*, above n 372 at [31].

The Court in *Multiplex* also expressed some disquiet with the result achieved, which they felt was correct on the wording of the legislation but was not necessarily consistent with the objectives of Part IVA. Jacobson J noted:[377]

> It is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.

The decisions reached in *Dorajay*, *Rod Investments* and *Multiplex* indicate that there is a broader policy question in relation to the opt-out procedure which could have been (and arguably should be) dealt with more clearly by the legislation. The decision in *Multiplex* is difficult to reconcile with the clear intention at the time the legislation was enacted that representative actions should proceed on an opt-out basis.

However, there are a variety of factors which favour allowing claimants some ability to define the class as they see fit and thereby retain control over the litigation. In particular, a representative plaintiff who is bearing the costs risk and taking on the burden of the claim may wish to have some control over the terms on which the claim is put forward. By allowing the representative plaintiff to take these steps, an incentive is being created to use the class action procedure.[378]

If no representative plaintiff can be found because the opt-out rules effectively mean they will lose control over the group membership or funding of the claim, the objective of providing access to justice is plainly not met for any potential claim members. However, the objective of providing access to justice can also be used to favour the opt-out provisions being construed as broadly as possible in order to ensure the group is as big as possible and as many people as possible are given access to justice.

This uncertainty may also have implications from a funding point of view. As outlined above, the high cost of litigation and the associated litigation risk (both of which are magnified in the context of a class action) means that the use of litigation funders in class action litigation is becoming increasingly common. As explained in chapter II, there can be benefit in the use of litigation funders in that they can provide access to justice where there may otherwise be none.

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[377] *Multiplex v P Dawson*, above n 372 at [117].
[378] Murphy and Cameron, "Access to Justice and the Evolution of Class Actions in New Zealand", above n 5 at 420.

However, the uncertainty created by the *Dorajay/Rod Investments* and *Multiplex* decisions may create difficulties in relation to the use of litigation funders. If representative claimants wish to enter into funding arrangements but are not able to restrict the membership or size of the group they are representing, there is a potential for some group members to free-ride. That is, if not all group members sign the funding agreement, they may benefit from the outcome of the litigation but without having liability to contribute to the cost of the litigation, which is recovered by the funder when a successful result is reached.[379]

This concern regarding free-riding had to be addressed in the settlement agreement which was approved by Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* as required by s 33V(1) of Part IVA.[380]

In that case, the settlement was complicated by the fact that some of the group members were funded, and some were not. As a result the settlement agreement was drafted in a way which allowed both groups to recover similar proportions of their claims.[381] The result of this is that while the funded group had incurred additional costs which would need to be paid back to the funder, they were not disadvantaged on settlement, and the non-funded group did not obtain a higher recovery by virtue of the fact that they did not have any funds which needed to be repaid to the funder.

2 The opt-out regime in Ontario

The Ontario opt-out regime is created by s 9 of the CPA which states "Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order".[382] Any judgment in the proceedings given on common issues will be binding on all class members who have not opted out of the class proceeding.[383] The common issues in respect of which a judgment will bind class members include those which are set out in the certification order, relate to claims or defences described in the

[379] John Walker, Susanna Khouri and Wayne Attrill "Funding Criteria for Class Actions" (2009) 32(3) UNSW Law Journal 1036 at 1038.
[380] *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19 [*Dorajay v Aristocrat* (Settlement)]. Note that s 33V is discussed in more detail below in relation to settlement.
[381] *Dorajay v Aristocrat* (Settlement), above n 380 at [14].
[382] Note that s 8 of the CPA states that the manner in which class members may opt-out and the date after which they may not opt-out must be included in the certification order.
[383] Sections 27(2) and 27(3).

certification order, and relate to relief sought by or from the class or subclass as stated in the certification order.[384]

As in Australia, s 9 has also resulted in litigation where attempts have been made to use the definition of the class to restrict membership of the class. The Ontario courts have repeatedly refused to grant applications or orders sought which would have the effect of requiring group members to opt-in or take some positive step to participate.

In *Durling v Sunrise Propane Energy Group Inc* the Ontario Superior Court of Justice dealt with a proposed consent certification order which would have required each class member to register online within six months of the certification order, and included a claims bar which prevented any class members who failed to register from bringing any future actions relating to the same subject matter unless they had a further order from the court permitting them to do so.[385]

Both the plaintiff and defendant in *Durling* were of the view that the claims bar was in the best interests of the class and would enhance access to justice by motivating class members to register and participate, and it would also preserve evidence. The claims bar would also provide certainty about class size and damages, which would help facilitate settlement discussions.[386]

Despite the agreement of the parties, the Court reached the view that the claims bar proposed could not be supported by the CPA. The primary basis for this decision was that the claims bar essentially amounted to creating an opt-in environment, which was not permitted by the CPA.[387] The CPA does not include any provisions which extinguish the ability of group members to pursue a claim if they opt-out,[388] and while some provisions impose time limits on certain actions, they are time limits which relate to relief sought by each class member after determination of common issues.[389] Therefore, the claims bar was not consistent with the CPA.

Counsel argued that the general provision in s 12 provides the court with jurisdiction to make the orders sought. Section 12 states:

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[384] Section 27(3).
[385] *Durling v Sunrise Propane Energy Group Inc* (2011) ONSC 7506; [2011] OJ No 5806 at [4] [*Durling v Sunrise*].
[386] At [35].
[387] At [41].
[388] At [44].
[389] At [48].

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

The objectives of the broad discretion in s 12 have been described as including "the court's obligation to protect the interests of absent class members".[390] The Court in *Durling* took the view that excluding potential group members from bringing a claim because they did not register online would not be fair.[391] Horkins J also observed that any claims by counsel that the regime would improve access to justice "ignores the fact that the claims bar eliminates access to justice for any class member who does not register".[392]

The application in that case was declined. There are a number of other Ontario decisions where the court was faced with applications of varying forms which also sought to restrict the group membership to a particular group defined in the pleading, but these applications have each been unsuccessful.[393] A similar result to *Durling* was also reached in *Ramdath v George Brown College of Applied Arts and Technology,* where an application was made to separate the proceedings into two stages, which would have essentially required each class member to establish their entitlement to claim prior to resolution of the common issues.[394] The court determined that this essentially equated to an opt-in requirement, which Stathy J described as "stand[ing] class actions on their head".[395]

Finally, in *Silver v IMAX Corp* the Ontario Superior Court of Justice was faced with an application by the defendants to amend the class definition which arose out of the fact that there were overlapping class actions in both Ontario and the United States.[396]

In *IMAX*, the United States class action had reached a settlement which had been approved by the relevant United States Court but was subject to the class definition in the Ontario proceedings being amended to prevent claimants who had recovered in the United States from also recovering in the Ontario proceedings. The defendants therefore made an application to

[390] See for example *Bodnar v Cash Store Inc* 2011 BCCA 384 at [39]. A similar point was also made in *Fantl v Transamerica Life Canada* 2009 ONCA 377 at [39].
[391] *Durling v Sunrise,* above n 385 at [54].
[392] *Durling v Sunrise,* above n 385 at [55].
[393] See for example *Politzer v 170498 Canada Inc* [2005] OJ No 5224.
[394] *Ramdath v George Brown College of Applied Arts and Technology* [2010] ONSC 2019 at 150.
[395] At [150].
[396] *Silver v IMAX Corp* [2013] OJ No 1276.

amend the class definition in the Ontario proceedings. In response to the application, the plaintiffs argued that the application was essentially relitigating a certification motion which had already been determined, and that the motion was, in substance, an attempt to convert the action into an opt-in action, which is not available in Ontario.[397]

The basis for the plaintiffs' argument was that the proposed amendment of the class definition would require class members to take the positive step of excluding themselves from the United States action in order to remain in the Ontario claim. The Court noted that "[t]he opt out procedure is a cornerstone of our class proceedings regime, and serves to protect class members' litigation autonomy",[398] and that the rationale for adopting an opt-out regime was to enhance access to justice on the basis that an opt-in requirement generally results in small class sizes and reduces the effectiveness of the class action.[399]

While the conclusion reached in *IMAX* turned on the presence of the competing class action in the United States and the settlement of that claim, the principles discussed in the judgment are a useful illustration of the way in which the certification and opt-out regimes have some residual uncertainty in them.

The above analysis of the opt-out regimes in Australia and Ontario illustrates that despite the legislation in both jurisdictions seeming to be clear on the face of it that an opt-out regime was being created, additional litigation has arisen where claimants and defendants have felt that proceedings could be operated more efficiently under an opt-in regime. The courts have on occasion also observed that they could see merit and efficiency in operating under an opt-in type regime where the claimants could restrict the composition of their group but were unable to permit this due to the wording of the legislation.[400]

In its 2018 report, the ALRC recommended that all representative proceedings in Australia be initiated as open class actions, despite the number of attempts being made to restrict group membership and narrow class definitions which suggests that a one size fits all approach is not necessarily the most efficient way forward in this context. This recommendation has arisen

[397] *Silver v IMAX Corp*, above n 396 at [57].
[398] At [73].
[399] At [71].
[400] See for example the comments of Hansen J in *Rod Investments v Clark*, above n 295 at [41].

primarily out of concern that access to justice is not adequately met by a regime which allows closed classes, such as that in *Multiplex*.[401]

Any reform in New Zealand which addresses the opt-in or opt-out issue will need to consider closely the issues and inefficiencies that have arisen in Australia and Ontario, and perhaps consider a hybrid model which allows a claim to proceed down either path as appropriate, as the decisions illustrate that there are competing policy factors behind the regimes which may apply more appropriately in some claims than in others.

3 Has the opt-in regime in New Zealand been successful?

Unfortunately, in many cases it is difficult to know what level of success an opt-in period has had because the overall numbers of potential claimants are difficult to establish, meaning the overall percentage of potential claimants who joined the claim can be difficult to measure. There is also a lack of information available about class sizes, with much of the information about class sizes being made available prior to any opt-in period being completed.[402] However, it appears that the opt-in periods generally ordered by the courts (and the associated advertising) do work to increase the size of the group. In *Feltex*, the overall number of shareholders who purchased shares in Feltex is known, meaning the percentage of shareholders who joined the claim can be identified. Of the approximately 8,000 shareholders who purchased shares, only approximately 3,689 ultimately joined the claim.

Of the 8,000 shareholders in the class as defined, approximately 800 joined prior to the statement of claim being filed, while the remaining approximately 2,889 joined during the opt-in period. However, while the group size grew during the opt-in period it is difficult to say whether this was as a result of the opt-in procedure being effective. A significant number of shareholders elected not to join the claim, and thus there is a question as to whether the opt-in process could be altered in some way so that more people would join. There are also a number of other factors beyond the opt-in period and procedure which likely impacted on shareholders' decisions to join the claim or otherwise, including the amount they lost following the liquidation of Feltex, their willingness to participate in litigation which has no certain outcome

[401] Australian Law Reform Commission *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, above n 265 at 91

[402] In her 2018 article "Class Actions in New Zealand: An Empirical Study" (above n 6 at 148), Nikki Chamberlain concluded that the most common class size was 1 – 10 members, with the second most common class size being 11 – 50 members. However, much of the information relied on to conclude the class size was taken from judgments available prior to an opt-in period being concluded, so likely does not reflect the final group size.

and no time limit, whether they were aware of the claim, and whether they felt the claim would succeed. These factors mean that it is difficult to assess whether the use of opt-in periods is successful beyond an assessment of whether the group size increased during the opt-in period allocated.

4 Should New Zealand adopt an opt-in or opt-out regime?

As outlined above, both the Australian and Ontario opt-out regimes have resulted in litigation relating to applications which, if granted, would restrict the size or composition of the group to only those who meet certain additional criteria or take additional steps, such as signing a funding agreement or engaging the solicitors representing the representative plaintiff. This suggests that despite the legislation in those jurisdictions being relatively clear, there is still a desire from the claimants (and possibly solicitors) to have the ability to control group membership more closely. This is likely driven by a desire to minimise cost and maximise efficiency by ensuring the group is cohesive and agrees on the way in which the litigation should be run.

These applications have been defended and dealt with on the basis that they would, if allowed, effectively result in the creation of impermissible opt-in arrangements. A substantial body of litigation has resulted in relation to these types of arrangements, and there is significant uncertainty, in particular in Australia, regarding the shape of the opt-in regimes and what is permissible. This can be contrasted with the New Zealand regime, which until the 2019 Court of Appeal decision in *Ross v Southern Response* was a relatively settled opt-in regime, which had resulted in relatively little litigation.

There are clear advantages and disadvantages to both opt-out and opt-in regimes, and which regime will better meet the objectives of the class action procedure depends to a certain extent on the facts of each case.

One of the fundamental disadvantages to the current New Zealand position is that r 4.24 as it stands does not explicitly include either opt-in or opt-out provisions. The draft Class Actions Bill 2008 included provision for both opt-in and opt-out approaches to be used in New Zealand.[403] The Supreme Court in *Credit Suisse* appeared to take the view that both opt-in and opt-out approaches were permissible in New Zealand under r 4.24.[404] However, until the 2019

[403] Section 7(1).
[404] *Credit Suisse*, above n 23 at [171].

Court of Appeal decision in *Ross v Southern Response*, since the decision of French J in *Houghton v Saunders*[405] the majority of representative actions in New Zealand have proceeded on the basis that opt-in orders are appropriate.

An opt-in regime can have a number of benefits. By ensuring that the claim is confined only to those who wish to actively participate, it is likely that information gathering stages, discovery and quantification exercises will be much more straightforward. As the group only comprises members who have taken the positive step of participation, presumably with awareness of what participation entails, these processes and any others which might require interaction with the group will be much more straightforward. As an example, in claims where losses are individualised and depend on a number of factors (such as *Strathboss v Attorney-General* and *Cridge v Studorp*), having a claimant group that are actively participating will render the quantification exercise (for either settlement purposes or stage 2 resolutions) much more straightforward.

In addition to simplifying certain aspects of the claims, an opt-in proceeding also protects the rights of potential claimants. If consent is not required to participate in the claim, then any class members who are unaware of the proceedings and do not participate (but equally do not opt-out) will give up their rights to bring any individual claim at a later date.[406]

An opt-in regime also allows flexibility in how the claim is to be funded. If the claimants wished to pool their resources and fund proceedings without the assistance of a litigation funder, they could do this under an opt-in regime, as the group members would be identifiable. This occurred in the *Cridge* proceeding. This would provide those claimants with an opportunity to increase the amount recovered, as they would not need to pay any commission to the litigation funder.

However, there are also problems with an opt-in regime. One of the perceived problems with this type of regime is that it may freeze out potential claims which are of lower value. This is because when people have small claims they are far less likely to want to take active steps towards participating in a claim and obtaining a remedy, especially if they are unfamiliar with the legal system.[407]

[405] *Houghton v Saunders*, above n 1.
[406] Scott Dodson "An Opt-in Option for Class Actions" (2016) 115 Mich L Rev 171 at 186.
[407] Dodson, above n 406 at 179.

When this risk is viewed in tandem with the fact that opt-in classes have been statistically found to comprise a much smaller group of potential claimants than opt-out classes,[408] it can be seen that one of the risks of an opt-in proceeding is that it might inhibit access to justice by reducing group size. Empirical evidence from overseas suggests that the group size is larger when the opt-out mechanism is used, compared to an opt-in mechanism.[409] This is likely to be because the passive option of participating without taking active steps (in an opt-out environment) or not participating due to active steps required (in an opt-in environment) is easier than taking active steps in either directions.

The size of the group is of particular relevance when considering whether the claim is economically viable to run. One of the fundamental advantages of a class action is that it provides economies of scale, and claims that would otherwise not be feasible to run become feasible.[410] Therefore, it is possible, though not yet proven, that an opt-in mechanism could reduce the economic benefits provided by the class action regimes and in some cases mean the claim is not run at all if it is considered uneconomic.

Until the recent Court of Appeal decision in *Ross v Southern Response* New Zealand was one of the only jurisdictions to operate on an opt-in basis. By contrast opt-out mechanisms are popular and have been adopted in the United States, Canada, Australia and a number of other jurisdictions. However, they are also controversial, with one Federal Court of Australia judge observing extra judicially that s 33E (opt-out provisions) was "perhaps the most controversial provision in the new class action procedure".[411]

One of the principle advantages of the opt-out regime is that a much larger portion of potential claimants are likely to be included, thus enhancing access to justice.[412] In this way, opt-out proceedings are often said to be more plaintiff friendly than an opt-in mechanism, as the smaller the claim the less a defendant will have to pay out. The opt-out procedure in Australia was described by the Attorney-General in the following way:

> It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves

[408] Dodson, above n 406 at 173.
[409] Dodson, above n 406 at 173.
[410] *RJ Flowers v Burns*, above n 13, at 271.
[411] Justice D Ryan "The Development of Representative Proceedings in the Federal Court" (1993) 11 Australian Bar Review 131 at 138.
[412] Vince Morabito "Class Actions: The Right to Opt-out under Part IVA of the Federal Court of Australia Act 1976 (Cth)" (1994) 19 MULR 615 at 629. See also *Ross v Southern Response*, above n 14 at [98].

> included in the proceeding. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.

While opt-out regimes are said to be plaintiff friendly in that they increase the size of the group and enhance access to justice, there is also one primary benefit to defendants if the claim operates under an opt-out regime. That is, the defendant can be assured that all potential claimants are having their claims dealt with in one claim, rather than having the risk and additional cost of having to defend a number of separate proceedings, because any claimants who opt-out will be able to specifically identified and dealt with separately by the defendant, if they wish to do so. This was one of the primary drivers behind Ontario adopting an opt-out regime.[413]

In addition to enhancing access to justice, the Court of Appeal also identified in *Ross v Southern Response* that an opt-out procedure can further the objective of regulatory deterrence, as it would increase the prospect of a claim being brought, and would also increase the size of the claim.[414]

The primary criticism of opt-out regimes is that they are not consistent with the principle of freedom of choice, and the general principle that participating in proceedings is, in usual circumstances, a conscious decision by an individual.[415] Critics of the Australian opt-out regime noted that the proposed rule "goes against the philosophical basis of our legal system and affects the individual rights of people who make those decisions."[416] However, it is arguable that even the opt-in mechanism falls foul of this, as the very nature of a class action is that some level of individual control is passed up by group members in order to participate and obtain a remedy that might not otherwise be available.

An additional practical concern arises in relation to opt-out regimes, with there being a question of whether all group members have been appropriately notified of the claim and provided with an opportunity to opt-out. Australian courts have attempted to deal with this by imposing requirements of publication in newspapers and also by providing opt-out notices and notice of the date by which the opt-out must occur. However, in cases where it is not possible to identify

[413] Ontario Attorney General's Advisory Committee *Report on Class Actions* (1990) at 34.
[414] Ross v Southern Response, above n 14 at [98].
[415] Morabito "Class Actions: The Right to Opt-out under Part IVA of the Federal Court of Australia Act 1976 (Cth)", above n 412 at 620.
[416] Morabito "Class Actions: The Right to Opt-out under Part IVA of the Federal Court of Australia Act 1976 (Cth)", above n 412 at 620.

each individual potential group member there will always be a risk that some group members will not know about the claim and thus have no ability to opt-out, and will therefore be bound by a judgment that they are not aware of.

Given the advantages and disadvantages that attach to both opt-in and opt-out regimes, there is no clear-cut answer to whether New Zealand should adopt an opt-in or opt-out approach. Which option is preferred may depend on the facts of the case. Both the Australian and Ontario opt-out regimes have created a significant body of litigation, there are also examples in New Zealand of the opt-in regime creating difficulties for claimants. For example, the claimants in *Cridge* went through three High Court hearings[417], a Court of Appeal hearing,[418] and an application for leave to appeal to the Supreme Court[419] before the representative orders and corresponding opt-in period were settled. While much of this court time was devoted to the application of r 4.24 and limitation periods, questions were also raised regarding the availability of an opt-in period in light of the substantial publicity the claim had already received,[420] the length of the opt-in period,[421] and whether the opt-in period should be stayed pending appeal.[422] Unless they are legislated for, many these questions are also likely to arise in respect of opt-out proceedings.

In terms of cost and time, it is likely that there would be significant cost to the claimant group regardless of whether an opt-in or opt-out regime was used. Both regimes would likely end up requiring some input from the Court regarding the form of the opt-in or opt-out notice and the length of time for parties to opt-in or out, which of course brings with it additional time and cost.[423]

The rationale behind opt-in and opt-out periods is also the same. Both are simply a means by which the class size can be reduced from all those who fall within the defined group, to those who are participating.[424] So, a distinction cannot be drawn between opt-in and opt-out based on the purpose or function of the mechanism in question.

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[417] *T J Cridge & M A Unwin v Studorp Limited*, above n 21; *Cridge v Studorp Limited*, above n 48; *Cridge v Studorp Limited (Stay)*, above n 207.
[418] *Cridge v Studorp Limited*, above n 20.
[419] *Studorp Limited v Cridge*, above n 125.
[420] *Cridge v Studorp Limited*, above n 20 at [57].
[421] *Cridge v Studorp Limited*, above n 20 at [54] – [57].
[422] *Cridge v Studorp Limited (Stay)*, above n 207.
[423] *Ross v Southern Response*, above n 14 at [103].
[424] *Credit Suisse*, above n 23 at [165].

One commentator has suggested that a solution to assist in dealing with the upsides and downsides of each option would be to allow the representative plaintiffs and the class the ability to determine whether they would proceed with an opt-in or opt-out mechanism for the claim.[425] The primary advantage of allowing the representatives and the group to choose which mechanism they proceed by is that they can identify what is better suited to the particular claim. For example, in a claim where the claimants wish to self-fund and not involve a litigation funder, an opt-out mechanism would make it difficult for the group to source the required funding. However, if a litigation funder is involved or the claim is being run on a contingency fee basis, an opt-out option may be preferred. The examples from Australia also illustrate that there has been a desire for group membership to be restricted to those who have entered into a funding agreement, for example. An opt-in option would allow this to occur, and would avoid the significant body of litigation that has arisen in Australia in relation to closed classes.

The Supreme Court in *Credit Suisse v Houghton*, and the Court of Appeal in *Ross v Southern Response* both proceeded on the basis that opt-in and opt-out options should be available in New Zealand.[426] The draft Class Actions Bill and draft High Court Amendment Rules also provided for both options. Given that there is not a substantial volume of representative action before the courts, allowing claimants some flexibility in the way in which they run their claims would be of benefit. This would allow claimants the option of self-funding their claim if they wish to do so, which in turn would likely result in a better recovery for those claimants as there is no need to pay a commission to a funder. Prohibition of opt-in claims would likely force all class action claimants to use a litigation funder,[427] and thus would place restrictions on the amount a claimant can recover. Allowing flexibility is also consistent with the approach adopted by the courts to date, which is to use the representative procedure in a flexible manner.[428]

The primary disadvantage to allowing claimants to choose which option they prefer is that there is the potential for this decision to create additional litigation. Class actions are inherently expensive and time consuming, so adding an additional avenue for defendants to challenge would add to this and be contrary to the efficiency objective of a class action. One possible solution would be for the claimants' choice whether they proceed on an opt-in or opt-out basis

[425] Dodson, above n 406 at 174.
[426] *Credit Suisse*, above n 23 at [171]; *Ross v Southern Response*, above n 14 at [65] and [81].
[427] Unless the claim could be run on a contingency fee basis, which is not common in New Zealand.
[428] *John v Rees*, above n 32.

to only be subject to challenge by the defendant in narrow or specific circumstances in order to minimise challenges and provide the most certainty. This is the path that New Zealand should go down.

If New Zealand do go down a path of allowing both opt-in and opt-out actions, the legislation should be carefully worded in order to ensure that appropriate safeguards are in place to represent the interests of those who are absent, but within the class represented. This would need to include provision for opt-in or opt-out periods, the ability for the court to review and control communications with the group, and court supervision of settlements or discontinuances. The notice requirements would take on additional importance in opt-out claims, where claimants may be bound by a decision that they are not aware of.[429]

H Legislative Reform: Court approval of settlement

A further controversial question is whether the court should have powers (or obligations) to approve settlements in class actions. This is of course contrary to the usual position in litigation where settlements are outside the jurisdiction of the court. The justification for requiring judicial approval of settlements in class actions is that it will impose more responsibility on counsel who are proposing settlement, promote evidence-based best practise and improve settlement outcomes for class members.[430] Judicial approval of settlement takes on an additional level of importance in opt-out regimes, where there is a need to ensure that the interests of absent class members are also sufficiently protected.[431]

At present, there is no clear requirement in New Zealand that settlement of a representative action be supervised or approved by the court. However, the Court of Appeal observed in *Ross v Southern Response* that "whichever approach is adopted the court will need to ensure that any settlement does not involve unfairness to some subset of class members."[432] This suggests that as part of any reform close consideration should be given to whether a requirement is included regarding settlement approval.

While the New Zealand courts have not typically supervised settlements of representative claims, this is a common feature of overseas class action litigation. Ontario and Australia

[429] Morabito "Lessons from Australia on Class Action Reform in New Zealand" above n 360 at 199.
[430] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 7.
[431] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 53.
[432] *Ross v Southern Response*, above n 14 at [104].

include requirements regarding court approval of settlement in the CPA and Part IVA respectively.

1 Settlement approval in Ontario

The 1982 OLRC report noted that "there is a real possibility that, without the benefit of appropriate safeguards, parties and their counsel might be tempted to abuse the class action procedure in reaching a settlement."[433] The CPA as enacted included a provision in s 29(2) that "A settlement of a class proceeding is not binding unless approved by the court".

Section 29(2) does not set out any criteria to be considered by the court when approving a settlement, so the courts have developed their own criteria, namely that the settlement must be "fair, reasonable and in the best interests of the class".[434] Factors relevant to this assessment include the amount and nature of discovery evidence, settlement terms, the recommendations and experience of counsel, likely future expense and duration of the litigation, the position of any objectors, and whether the bargaining has been done in good faith and at arms' length.[435]

Of the factors relevant to assessment of a settlement in Ontario, none are more important than others, and the requirement underpinning the assessment of the proposed settlement is simply that the settlement falls within a zone of reasonableness.[436]

The lack of guidance in the CPA regarding the approval of settlements has resulted in the courts assessing and creating the principles to be applied. While these principles are now settled, some of the uncertainty could have been avoided had the CPA been more explicit as to relevant factors the court should take into account when assessing a proposed settlement.

The LCO identified when preparing its 2019 report that there was a lack of empirical data regarding the settlement approval process, which made it difficult to assess some aspects of the process and its efficiency.[437] The reforms suggested by the LCO include assessment of whether the proposed settlement is "fair, reasonable, and in the best interests of the class" and a duty on counsel to make full and frank disclosure of all material facts.[438]

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[433] Law Commission of Ontario *Report on Class Actions, Volume 2* (1982) at 806.
[434] *Dabbs v Sun Life Assurance Co of Canada* (1998) 40 OR (3d) 429 at [30] [*Dabbs v Sun Life*].
[435] *Dabbs v Sun Life*, above n 434 at [13].
[436] *Waldman v Thomson Reuters Canada Ltd* (2016) ONSC 2622 at [30].
[437] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 53.
[438] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 57.

2 Settlement approval in Australia

As with the Ontario provision, the Australian rule regarding settlement approval does not provide any guidance for the courts as to the principles to be applied when assessing whether a settlement should be approved. Section 33V simply states that "[A] representative proceeding may not be settled or discontinued without the approval of the court".[439]

The underlying purpose of s 33V is to ensure that the settlement is in the best interests of the group members as a whole, and not just the representative party and the respondent. [440] This parallels the concern in Ontario of making sure that all represented group members' interests are taken into consideration.[441] The court should also be mindful of the fact that it is possible that a settlement may be in the best interests of one party and not another, or that there may be conflicts of interest between sub-classes, represented and un-represented parties and funded and non-funded parties.[442]

Judicial approval of the settlement also ensures that the position of those who are heavily invested the claim, such as the representative parties and the solicitors, does not colour their view on whether a settlement is appropriate or not.[443]

The criteria for settlement approval is now relatively well settled, though as in Ontario, this has occurred after a significant body of litigation. The primary question is whether the proposed settlement is fair and reasonable and in the interests of group members as a whole.[444] The merits of a settlement must be considered in relation to the particular facts and circumstances of the case, and there is no set list of factors that must be taken into account,[445] though relevant factors may include the complexity and duration of the litigation, the stage of the proceedings, risks and prospects of success, and reasonableness of the settlement in the light of the "best case" recovery and general litigation risk.[446] While the court has a gatekeeper role in approving

[439] Section 33V(1).
[440] *Australian Competition and Consumer Commission (ACCC) v Chats House Investments Pty Ltd* [1996] FCA 1119; (1996) 142 ALR 177 at 184 [*ACCC v Chats House*].
[441] See for example the comments from the Court regarding the protection of unrepresented group members in *P Dawson Nominees v Multiplex* [2010] FCA 1029 at [23].
[442] *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 at [118] [*Stanford v DePuy*].
[443] See for example *Mercedes Holdings Pty Ltd v Waters (No 1)* [2010] FCA 124 at [9].
[444] *ACCC v Chats House*, above n 440 at 258C.
[445] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2*) [2006] FCA 1388 at [33]-[35].
[446] *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [19].

settlements, they should not second guess the strategic and tactical decisions of the parties and their representatives.[447]

Wigney J in *Stanford v DePuy International Ltd (No 6)* also observed that:[448]

> …the absence of any objection or opposition to the settlement by any group member or group members is a highly relevant consideration, at least where the Court is satisfied that all group members have bene given timely notice of the critical elements of the settlement.

The above overview of the Australian regime for approval of settlements parallels the principles adopted in Ontario.

3 Should New Zealand require judicial approval of settlements?

Any reform in New Zealand should follow the suggestion of the Court of Appeal in *Ross v Southern Response* that the court should ensure that settlements do not involve any unfairness to a subset of class members. The significant body of litigation relating to approval of settlement and the appropriate factors to consider when approving settlement agreements means that some efficiency could be gained if the principles, or at least some guidance was included in legislation.

In particular, the reform should include a requirement that the settlement be "fair, reasonable, and in the best interests of the class", including any sub-classes. This will ensure that the interests of the wider group are protected, including those who may not be represented in the proceeding. This is similar to the requirement included in the draft High Court Amendment (Class Actions) Rules 2008 that the settlement be "fair, reasonable and adequate". Given that the justification for approval of settlement is to ensure that the interests of the group are protected, the legislation should make this fact clear, as was included in the Ontario provision.

The reform should also adopt the recommendation by the LCO that a duty be imposed on counsel to make full and frank disclosure of all material facts.

As with the question of whether there is a sufficient same interest in the proceeding, approval of settlement will depend on the factors of each case and a level of litigation is inevitable.

[447] *Stanford v DePuy*, above n 442 at [115]; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6)* [2011] FCA 277 at [22].
[448] At [121].

However, by establishing some clear principles and duties on counsel, some litigation may be minimised or made more efficient as it would leave room for factual disputes only.

Given the potential variety in factors that could be relevant to settlement of a class action, any legislation enacted should not list the factors to be considered. The better approach would be for the legislation to leave the courts with relatively broad poweres to assess a settlement, provided it is fair, reasonable and adequately represents the best interests of all group members. If necessary, any guidance on the factors to be considered as part of settlement approval could be included in a practice note adopted by the courts.

I Legislative Reform: Minimising the number of interlocutory applications

As illustrated by the *Feltex* proceeding, significant delays can becaused in representative actions as a result of interlocutory applications. While a significant number of these occurred as a result of the lack of guidance relating to the representative action procedure, there would be benefit in minimising the number of interlocutory applications in order to ensure the procedure is as efficient as possible.

The Rules Committee changes in 2008 provided for the court to make any orders regarding the conduct of the class action, including to "ensure that it proceeds expeditiously, with a minimum of interlocutory applications".[449] This reflects the inclusion in s 15 of the Draft High Court Rules of a provision that allows the court to make an order prohibiting a defendant from making certain interlocutory applications if they would constitute an abuse of process or unnecessarily delay the proceeding.[450] While this is a good objective, particularly in light of the *Feltex* experience, it is not clear how such a rule would assist with progressing claims efficiently.

Allowing the court to prohibit the making of frivolous applications would be a useful means for the court to prevent a defendant from delaying proceedings if it was apparent that there were delay tactics. However, there is a risk that including such a provision may also create additional litigation if the defendant appealed against a decision preventing it from making an application. Given this risk, such a provision should not be included. Arguably, if the legislation included a provision allowing the court to make any other orders it sees fit the court would still have the ability to make orders preventing a defendant from making frivolous applications, so a specific provision would not be necessary.

[449] Rule 34.8(3)(f).
[450] Section 15.

J Legislative Reform: Limitation periods

As illustrated by the *Feltex* and *Cridge v Studorp* proceedings, the question of the application of relevant limitation periods to class actions is an important question, particularly for group members who have not technically initiated their own individual proceedings. The application of limitation periods in the context of a representative proceeding is one that has caused some uncertainty in New Zealand,[451] and would benefit from legislative certainty.

In Australia, under Part IVA any limitation periods that apply to a group member's claim are suspended upon commencement of a representative proceeding.[452] Once suspended, the limitation periods will not begin to run again unless the group member opts out of the proceeding or the claim and any appeals are determined and have finally disposed of the claim.[453] Similarly in Ontario, s 28(1) of the CPA suspends any limitation period in favour of a class member when the class proceeding is initiated, and will resume running again if the member opts-out, is excluded from the claim, the claim is de-certified, dismissed, abandoned or settled.[454]

The justification for introducing legislation which suspends relevant limitation periods is that an individual should not have to risk their claim being prejudiced simply because it falls within the scope of a class action.[455] This provides significant efficiency in class action proceedings, as it avoids the need for individuals to file proceedings before a relevant limitation period expires if there are class proceedings on foot that they can participate in.[456]

In Australia, s 33ZE confines the limitation periods which are tolled to those "to which the proceeding relates". This has the effect of only suspending those limitation periods which relate to the claim in question. In this context, the courts have had to deal with the question of whether the tolling of the limitation period in respect of one cause of action also tolls the limitation period in respect of another claim for relief which may be added at a later date. Sackville J in *Darcy v Medtel Pty Ltd (No 3)* observed "that section 33ZE… does not suspend the running of

[451] Refer to comments in chapter II above regarding *Credit Suisse v Houghton* and *Cridge v Studorp*.
[452] Section 33ZE(1).
[453] Section 33ZE(2).
[454] Section 28(1).
[455] *Bright v Femcare*, above n 274 at [8].
[456] This is a generally accepted proposition, but see for example *Coulson v Citigroup Global Markets Canada Inc* [2012] OJ No 717 at [11].

any limitation period that otherwise would not apply to the claims made in the proposed amendments".[457]

The limitation provisions have resulted in relatively little litigation by comparison to other aspects of class action legislation but are one of the areas that can significantly increase efficiency if legislation is correctly enacted. As outlined in Chapter II, the consequence of uncertainty regarding limitation can include the filing of a multiplicity of claims, which is the very inefficiency that class actions seek to avoid. Any New Zealand reform should include limitation provisions, in order to ensure the objectives of the class action procedure are met.

The draft High Court Amendment Rules 2018 included a provision which attempted to deal with the limitation position which was settled by the Court of Appeal in *Cridge*. However, there is a risk that when read literally, the provision would not have the desired effect. Some rewording of the draft provision is necessary in order to avoid any risk of a repeat of the inefficiencies which occurred in *Cridge*.

The key part of any limitation provision will be to ensure that if the representative orders are not granted, parties are not out of time for limitation purposes as a result of the time taken to determine the representative orders. The provisions in the CPA and Part IVA both provide for suspension of limitation periods when the proceeding is initiated, and time will resume running again either upon opt-out or final disposition of the claim. By contrast with other areas of the CPA and Part IVA, these provisions have not resulted in significant litigation. However, despite this, caution should be applied before adopting either of those provisions.

The effect of adopting the provisions from Ontario or Australia would be that if the proceedings were declassed and did not proceed as a class action, time may start running again for claimants who had otherwise stopped the clock when the representative proceeding was filed. This is contrary to the position reached by the Court of Appeal in *Cridge*, which was that if the representative order was not granted it was simply a procedural defect and individual proceedings could be filed.[458] This position was not clearly dealt with by the High Court Amendment Rules 2018, so some care needs to be taken in the drafting of a limitation provision.

[457] *Darcy v Medtel Pty Ltd (No 3)* [2004] FCA 807 at [24].
[458] *Cridge v Studorp Limited*, above n 20 at [79].

The limitation provision ultimately adopted needs to clearly reflect the position reached in *Cridge v Studorp*. If the Australian and Ontario approach is taken and the limitation period restarts if the claim is declassed, there is a risk of injustice to claimants as they may have very limited time in which to file individual proceedings following a declassing. For example, if the limitation clock was suspended by the filing of a representative claim one day before the limitation period expired, parties would have only one day after the proceeding was declassed in which to file an individual claim.

The better course would be for the limitation period to be stopped permanently when the claim is filed, regardless of whether the claim proceeds as a representative action or not, as was anticipated in *Cridge v Studorp*. A defendant would argue that this defeats the purpose of a limitation period and may result in a significant number of claimants having claims which are 'stale' but still within time as time stopped for the purposes of their claim. The defendant would then be facing the risk of an unknown number of claims for which time has stopped, and there would be no certainty. This risk could be mitigated by placing a time limit within which individual proceedings must be filed following the declassing of a proceeding. For example, the limitation provision could provide that if a proceeding is declassed, claimants must file individual actions within 6 months of the order declassing the proceeding, or prior to the expiry of the limitation period, whichever is later in time.

Such a provision would assuage any concerns the defendants have regarding stale claims and would also provide claimants with significant certainty in respect of their limitation provision. This would also avoid the risk of unnecessary duplication of claims, as occurred in *Cridge v Studorp*, where the limitation position was not clear.

K Legislative Reform: How to deal with competing class actions

A further question that any legislation will need to deal with is the question of how to deal with competing class actions, where multiple class actions are filed dealing with the same or similar subject matter. This issue has been increasingly common in both Ontario and Australia

1 Competing class actions in Australia

In Australia, as at July 2017 there had been at least 513 representative actions filed since the introduction of Part IVA. These actions were filed in relation to 335 legal disputes, which

suggests that a significant number of claims filed are in respect of the same disputes.[459] The rise of shareholder representative actions is likely a factor in the filing of multiple proceedings in respect of the same disputes, as the geographical and social spread of shareholders makes it easy for several people to have the same thought regarding proceedings at a similar time. A further factor that is likely encouraging the existence of competing representative actions is the way in which the law has developed to allow 'closed class' claims.[460] By allowing claims to restrict participation to a sub-group of potential claimants (eg, those who have signed a funding agreement), this leaves a multitude of other potential claimants with legitimate claims, who a different solicitor may be able to represent.[461]

In several decisions, the Australian courts have had to deal with questions of how to advance and resolve multiple actions which have been commenced against the same parties in relation to the same circumstances. While the decisions in relation to these claims and how they are dealt with procedurally do not all follow the same route, they indicate that despite the existence of substantial representative action legislation the courts still have a large case management function to fulfil in relation to representative actions.[462]

This development of competing class actions was not intended when Part IVA was enacted, and in fact the ALRC in its original 1988 report observed that "everyone with related claims should be involved in the proceedings and should be bound by the result".[463] Despite this, the courts have found themselves on a number of occasions dealing with instances of multiple claims filed in respect of the same losses. The resulting interlocutory proceedings to determine which claim should proceed are likely to add significant time and cost to the proceedings. For example, the Court in *Perera* observed that the nature of submissions and evidence required to determine the question of which claim would proceed would likely have required significant resource.[464]

The issue of competing claims has significant efficiency implications, both in the sense that determining how to deal with competing claims adds significant time and cost, but also from a judicial resources point of view, where multiple claims could take up additional judicial

[459] Vince Morabito "An Empirical Study of Australia's Class Actions Regimes: Fifth Report – The First Twenty-Five Years of Class Actions in Australia" (research report, July 2017) at 25.
[460] Following the decision in *Multiplex v P Dawson*, above n 372.
[461] See the discussion in *Perera v GetSwift*, above n 331 at [15] – [20].
[462] As observed by Lee J in *Perera v GetSwift*, above n 331 at [6].
[463] Australian Law Reform Commission *Grouped Proceedings in the Federal Court*, above n 256.
[464] *Perera v GetSwift*, above n 331 at [63].

resource that could be used elsewhere. Having competing class actions also creates a risk that if the common issues are litigated separately inconsistent results may be reached, particularly where there are contentious issues of law or fact. [465]

The question of how to deal with competing claims was first dealt with in *Johnson Tiles Pty Ltd v Esso Australia Ltd*, where Merkel J observed that it could be vexatious and oppressive to subject the respondent to more than one class action in respect of the same event. [466] This is particularly so where the proceedings, as they are in Australia, are opt-out, because in theory, each claim filed will represent the same (or a very similar) group of claimants. While the commencement of multiple proceedings is not in itself vexatious,[467] the claims must be dealt with in a way that ensures the respondent does not have to defend the same substantive allegations in multiple separate proceedings.

The Federal Court of Australia in *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd* identified five different possible solutions to the question of competing class actions, being consolidation,[468] declassing one of the proceedings, letting each proceeding play out separately, ordering a stay of one proceeding, or closing the class in one of the proceedings, and then went on to discuss each of these options.[469] A further option of using an independent litigation committee to evaluate the competing claims and determine which claim should proceed has also been examined by the courts.[470] The assessment of which approach should be taken and which of the competing claims should proceed depends largely on the facts of each individual case.

The overarching consideration for the court appears to be one of efficiency and the interests of justice, and whether with those factors in mind there are any substantial differences that would prevent the claims from being heard together in some way or staged to allow for efficiencies in judicial findings. Finkelstein J in *Kirby v Centro Properties Limited* went so far as to say that the best interests of the group members was "the only important factor".[471] Other factors which have been considered by the court were listed by Lee J in *Perera*, but included the

[465] *Kirby v Centro Properties Ltd* (2008) 253 ALR 65; [2008] FCA 1505 at [9] [*Kirby v Centro*].
[466] *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 [*Johnson v Esso*] [16].
[467] *Johnson v Esso*, above n 466 at [15] – [16].
[468] As occurred in *Johnson v Esso*, where two of the claims were consolidated.
[469] *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd* [2017] FCA 947 at [9].
[470] See *Smith v Australian Executor Trustees Ltd* [2016] NSWSC 17.
[471] *Kirby v Centro*, above n 465 at [37].

relevant experience of the solicitors, the preparatory work carried out in each proceeding, the respective funding positions, and the merits of the common issue cases.[472]

Dealing with competing claims through consolidation can be difficult, as each proceeding is likely to be represented by different solicitors who likely had different strategies or plans for pursuing the litigation. This option therefore requires some practical agreement between the applicant parties,[473] or some other means for permitting the claims to be heard together.

The question of how to deal with competing class actions overlaps with considerations under s 33N of whether the proceedings should be declassed because it is not in the interests of justice for the claim to proceed as a representative action because it would not be the most efficient or effective means to deal with the claims. The existence of another more efficient class action "could render a competing class action an inefficient and ineffective means of dealing with the same claims"[474] despite the fact that in isolation, that particular class action may have been an efficient means of resolving the claim.

2 Competing class actions in Ontario

Similar issues and means of resolving the question of competing class actions have arisen in Ontario. Motions brought in Ontario to deal with the question of competing class actions are known as carriage motions. These carriage motions have been dealt with under ss 12 and 13 of the CPA, largely, s 12. Section 12 permits the court to make "any order to ensure the fair and expeditious determination" of the proceeding. In the absence of specific legislative guidance on this topic, the LCO has proposed including dedicated provisions to deal with carriage motions.[475]

Carriage motions are practically speaking, proceedings determined between two sets of plaintiffs, with the common defendant(s) being a bystander. Carriage motions differ slightly from the way in which the question of competing class actions in Australia are dealt with, in that in Ontario it is purely a question of which claim should proceed and which should be stayed. By contrast, the question in Australia comes down to what the most efficient means to resolve the competing claims is and staying one of the proceedings is only one option that the courts will consider.

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[472] See *Perera v GetSwift*, above n 331 at [169] for the full list of factors considered.
[473] *Perera v GetSwift*, above n 331 at [106].
[474] *Perera v GetSwift*, above n 331 at [137].
[475] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 6.

In *Vitapharm v Hoffman-LaRoche* (one of the first carriage motions in Ontario) the Court set out the relevant factors to consider when determining which solicitor should have conduct of the claim. In that context the Court noted that the overall consideration should be one of what is in the best interests of all class members, while at the same time remaining fair to the defendants.[476] The list of factors identified in that case has subsequently been expanded, and includes funding, the definition of class membership, the definition of the class period, joinder of defendants, correlation between the plaintiff and defendant, prospects for certification, prospects for success at trial, and relationship (if any) with actions in other jurisdictions.[477]

While there are a number of relevant factors to the determination of a carriage motion in Ontario, the overall consideration and question is one of what is in the best interests of the class, while at the same time remaining fair to the defendants. [478] A focus on the objectives of class actions and the CPA is important, with access to justice, behaviour modification and judicial economy being relevant factors.[479] The decisions in Australia which deal with competing class actions also similarly can be seen as focussing on the best interests of the class, but through the lens of examining various alternative options.

The Ontario courts have emphasised that, while the carriage motion will essentially determine which counsel will represent the plaintiff and the group, the focus should not be on the expertise and experience of the counsel, but rather, to determine which action will advance the interests of the class.[480] This will not necessarily be the counsel with the most experience.[481]

The breadth and depth of factors that have been identified as relevant to Ontario carriage motions means that the cost and delay associated with these motions is significant. This is particularly so when aspects such as the prospects of success (both in relation to seeking certification and success in the overall claim) are relevant, as was required in *Kowalyshyn v Valeant Pharmaceuticals International Inc*. This aspect of the carriage question is one that is finely balanced, because any assessment of the merits of the claim in open court will potentially provide the defendants with an advantage when defending the certification motion and the

[476] *Vitapharm Canada Ltd v F Hoffman La-Roche Ltd* [2000] OJ No 4594 at [48] [*Vitapharm*].
[477] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at footnote 56.
[478] *Vitapharm*, above n 476 at [48].
[479] *Kowalyshyn v Valeant Pharmaceuticals International Inc* [2016] OJ No 3042 at [138] [*Kowalyshyn*].
[480] *Kowalyshyn*, above n 479 at [139].
[481] Interestingly, the focus on solicitors has not been a feature of Australian litigation, with the focus remaining on the interests of the group through the lens of funding, strategy, pleading of the claims and other matters.

substantive proceeding.[482] There are also questions of whether the courts can determine these types of issues on the basis of the limited material available in front of them in a carriage motion hearing.[483]

Assessment of the merits of the case in the context of a carriage motion must be narrow, and in that context the court should not reach any ultimate conclusion about the viability of the action. Consideration should only be given to the merits of the case if one of the claims is obviously "fanciful or frivolous".[484]

With the above comments and factors in mind, it is apparent that determining a carriage motion and applying the relevant factors (of which there can be up to 16[485]) can be difficult, time consuming and expensive.

The question of carriage of competing claims in Ontario has been described as a significant problem in the Ontario class action sphere. The LCO review included an assessment of the carriage motions and identified that the need to determine a carriage motion can add approximately a year to the time taken to resolve a class action, or more, if appeals are filed.[486] This is consistent with the experience in Australia where determination of interlocutory proceedings relating to multiple class actions causes significant additional cost and delay.

3 How should New Zealand deal with competing class actions?

Any reform of the New Zealand position should be mindful of the fact that resolving how to deal with competing class actions has caused significant additional cost and delay in Australia and Ontario. This has the potential to create results contrary to the efficiency objectives of the class action procedure.

Neither Australia or Ontario has legislation in place to deal with the question of competing class actions, and each jurisdiction has dealt with the question slightly differently. In Australia, the question generally asked is broader, and is a question of what the most efficient and practical means for advancing the claims is. By contrast, in Ontario there will be a carriage motion hearing, which essentially considers only which claim should be advanced and which

[482] *Kowalyshyn*, above n 479 at [147].
[483] *Kowalyshyn*, above n 479 at [148].
[484] *Setterington v Merck Frosst Canada Ltd* [2006] OJ No 376 at [19].
[485] As was the case in *Kowalyshyn*, above n 479.
[486] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 24.

should be stayed. There are no alternative options such as consolidation or declassing one of the proceedings.

Given that in resolving any question of competing class actions there will be a degree of factual assessment, the need to determine how to deal with competing class actions will always bring with it some level of potential time and cost. However, this could be minimised. If legislation was enacted which provided for carriage motion hearings, the process would be more streamlined than that in Australia, which has the potential for long drawn out hearings if the court has to consider 5 different options for how to proceed, rather than just assessing which claim should proceed first. The legislation should also make clear that the primary consideration is what is in the best interests of the class members and should place clear restrictions on the volume of evidence to be filed and the length of any submissions. By restricting the volume of evidence to be filed, costs will be able to be reduced significantly, as the filing of evidence in support of a carriage motion may include a significant volume of evidence relating to the substantive matter. This would also assuage any concerns that a carriage motion process might provide the defendants with an advantage as they are able to observe the plaintiffs' evidence in advance and have a chance to assess the strengths and weaknesses of the case early on.

L Legislative Reform: Costs and funding of class actions

As outlined in chapter III, cost is a significant factor in class actions, both in respect of the costs for funding a claim and the potential costs risk. Currently, New Zealand has a two-way csots rule in litigation, including representative actions, meaning costs will typically be awarded against the unsuccessful party.

The primary downside to a two-way costs regime is that the adverse costs risk may prevent some claimants from bringing proceedings due to the magnitude of the potential costs order. One solution to this, which has been adopted in British Columbia, is to make class actions no-cost. An alternative solution which was recently proposed by the LCO is to adopt a modified no-costs system, where costs can be awarded for some but not all steps.[487] A modified two-way costs rule akin to that proposed by the LCO would likely have only a minor impact on the access to justice concerns associated with the high cost of class actions. The *Feltex* proceeding

[487] The LCO proposed that costs would not be awarded in respect of certification motions and motions ancillary to those motions, but other steps in the proceedings would have usual costs rules. See Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 266 at 9.

illustrates that the most significant costs will be associated with the substantive hearing, meaning the LCO rule would only have minimal impact.

The best way to reduce the costs associated with class actions is to increase the efficiency of the proceedings by ensuring the broad reform is done in a way which maximises the efficiency.

As part of dealing with the costs questions the legislature should also simultaneously deal with questions of regulation of litigation funders. A detailed analysis of litigation funding regulation is beyond the scope of this thesis, but it should be noted that the New Zealand Law Commission review announced in December 2019 will include a review of the role of litigation funders.

The final question the legislature will need to deal with in relation to costs is whether common fund orders should be made available in order to ensure that all claimants receive the same proportion of their claim. Until December 2019, these common fund orders were made in Australia following the decision of the Full Federal Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*, which permitted the litigation funder to charge a funding commission to the whole class, not just those who had signed a funding agreement.[488] However, in *BMW Australia Ltd v Brewster* the High Court of Australia held that common fund orders were not available under the general powers in s 33ZF of Part IVA, largely because the order would be made in favour of a party that was not a party to the litigation (the litigation funder).[489]

Common fund orders were originally intended to facilitate access to justice by encouraging greater use of the class action procedure, to protect the interests of class members and ensure equal treatment (thus preventing 'free-riding' by those who did not sign a funding agreement), and reducing the occurrence of competing class actions.[490] Given that common fund orders appear to have some ability to advance the objectives of the class action regime by promoting access to justice and efficiency, serious consideration should be given by the New Zealand legislature to inclusion of a provision permitting such orders.

The Court of Appeal observed in *Ross v Southern Response* that it considered the court had the necessary powers to address any unfairness that may arise in the funding context, but refrained from making any comment on the availability of common fund orders.[491] Given the changes in opinion regarding common fund orders in Australia, significant efficiency could be gained by

[488] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 at [79].
[489] *BMW Australia Ltd v Brewster* [2019] HCA 45 at 47.
[490] Morabito "Lessons from Australia on Class Action Reform in New Zealand", above n 360 at 203.
[491] *Ross v Southern Response*, above n 14, at [110].

including a provision permitting common fund orders in New Zealand. This would prevent the need for judicial decision making on the subject and would also provide a clear jurisdictional basis for the court to make such orders (which would otherwise have to be made using the court's inherent jurisdiction).

VI Conclusion

When used correctly class actions can provide significant benefits. By allowing groups of potential claimants to bring proceedings together, represented by a lead plaintiff, significant efficiencies can be gained. The courts will not be clogged up with a multitude of claims which relate to the same or similar subject matter, and the risk of inconsistent findings as a result of those separate proceedings is minimised. There are also cost efficiencies for claimants, where the costs of the litigation can be shared among many, rather than borne by one individual.

Class actions also provide access to justice for claimants who otherwise might not have any recourse, either as a result of cost and economic efficiency, or who might not be aware of their rights until a claim is available to join. The threat of legal action by many may also serve as a deterrent to inappropriate behaviour and have some regulatory enforcement impact on government entities and large corporations.

The significance of these advantages means that careful consideration should be given to the best means for New Zealand to provide for class actions. Currently in New Zealand, representative actions are provided for by r 4.24 of the High Court Rules, but any guidance (substantive or procedural) beyond that has been left to the courts to determine. By contrast, both Australia and Ontario have dedicated class action statutes, which provide comprehensive rules and guidance for the courts when dealing with these types of claims.

The uncertainty created by the lack of legislative guidance relating to the use of r 4.24 has meant that the potential advantages of a representative action are not fully being met. Decisions of the High Court and Court of Appeal are being appealed regularly, and significant delays are being experienced by claimants as a result of a need to determine procedural and interlocutory questions. These additional appeals, interlocutory applications and time delays all cause additional cost to all parties involved.

The Court of Appeal stated in *Ross v Southern Response* that of the objectives of the representative action procedure, access to justice was the most important.[492] On the current procedure, access to justice (primarily, access to the courts) is not being sufficiently provided for, and could be enhanced by wholesale legislative reform.

[492] *Ross v Southern Response*, above n 14 at [54].

In order to allow the representative action procedure to best meet its objectives, wholesale reform of the procedure is needed. The Class Actions Bill 2008 and Draft High Court Amendment Rules 2018 do not go far enough towards the reform needed, and any reform should be comprehensive and address as many potential questions that may arise in future as possible, in order to avoid future uncertainty.

While it is inevitable that any new statutory provisions would have to be tested through the court system, legislation would provide more long-term certainty as precedent is created and established. By adopting the wording of r 4.24 into any legislative reform the need to test the statutory provisions can be minimised. Legislation will also provide more certainty by reducing the ability for judicial flexibility. While this may have its disadvantages by preventing the procedure from being tailored for each claim, the legislation can incorporate a broad provision allowing judicial flexibility where the legislation does not deal with particular questions that may arise.

The reform to be adopted in New Zealand should take the form of a dedicated class actions statute. The statute would need to deal with the requirements to bring a class action, including in particular a same interest requirement (which does not require the common issues to be substantial) and the ability to replead the claim if the same interest requirement is not clearly pleaded. In terms of the procedure for bringing a class action and determining if the requirements to bring a class action are met, New Zealand should adopt a certification requirement which will ensure maximum efficiency by making sure each claim meets the requirements for a class action and that questions about the status of the class are dealt with earlier in the proceeding, before significant costs are incurred.

As to whether claimants should have to opt-in or opt-out to participate, the advantages and disadvantages to both mechanisms and the difficulties created by the opt-out procedure in Australia and Ontario means New Zealand should be slow to go down a path which commits class actions to one of either opt-in or opt-out. Providing claimants with the choice of procedure, while limiting a defendant's ability to challenge that choice would be preferable.

The remaining matters to be addressed in the class actions statute include necessary court supervision of settlement agreements, clear limitation provisions, and inclusion of provisions to deal with carriage motions where there are competing class actions dealing with the same or similar subject matter. Reform should also address costs issues and litigation funding. While

there are inevitably other procedural matters which will need to be dealt with, these aspects of the class action procedure, which have all been litigated at length in Australia and Ontario, should be included in any class actions statute for New Zealand in order to maximise efficiency and provide better access to justice.

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