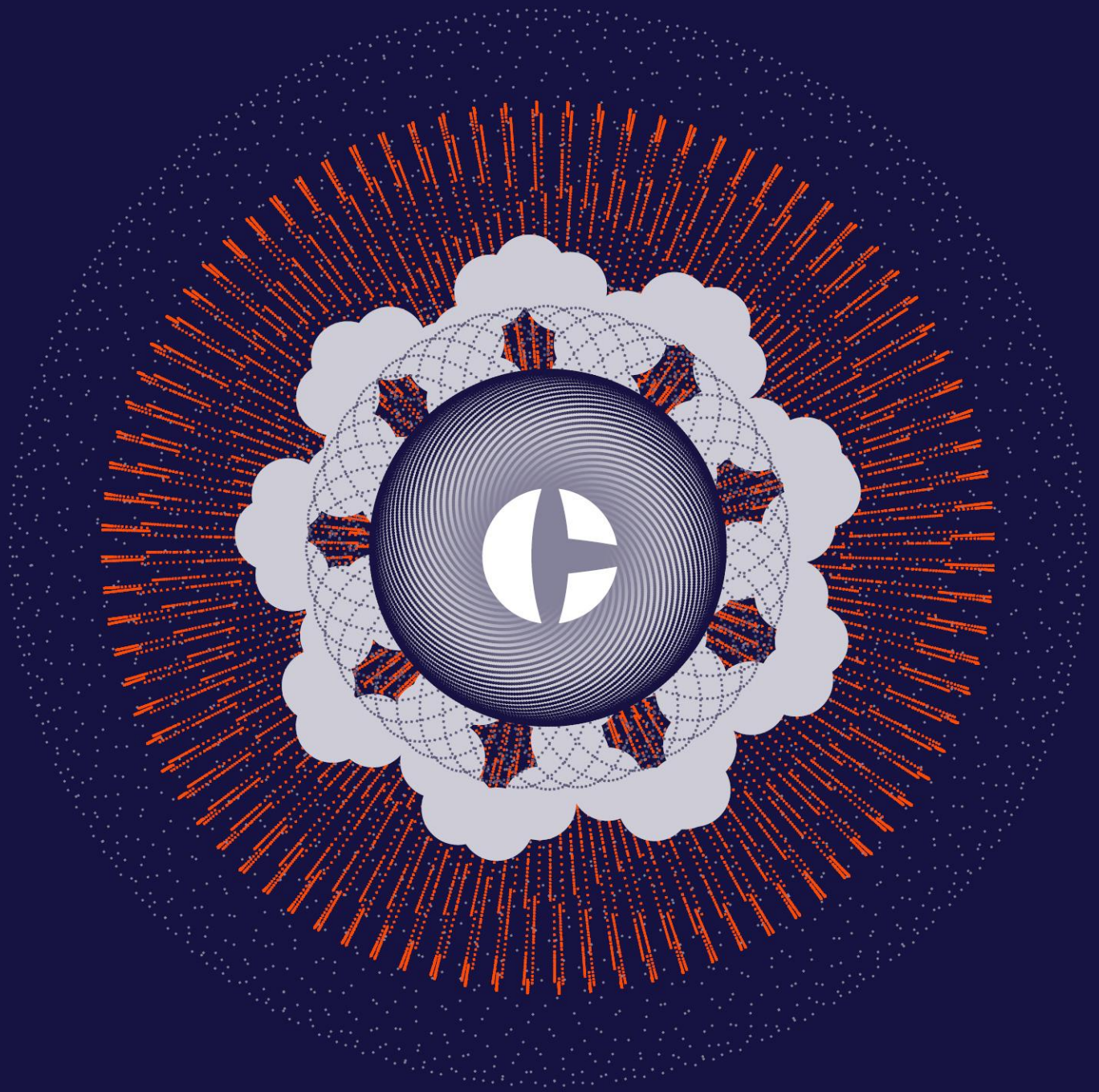
Submission to Law Commission Issues Paper 48

Class Actions and Litigation Funding: Supplementary Issues Paper

12/11/2021



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1 Chapman Tripp acts on Aotearoa New Zealand's most significant commercial disputes and has substantial experience across the full range of dispute resolution mechanisms, including international arbitration, arbitration and mediation. The firm's litigators have a strong track record before the High Court, Court of Appeal, the Supreme Court, and the Privy Council.

2 Chapman Tripp has acted on funded claims, both for and against funded parties, and on representative action proceedings, including:

2.1 *Cridge & Ors v Studorp Ltd & Anor*: we acted for the defendants in a representative action involving over 150 homeowners that went to trial in 2020

2.2 *White & Ors v James Hardie New Zealand & Ors*: we are acting for the defendants in a multi-plaintiff action involving over 1,200 homeowners that is due to go to trial in 2021.

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Summary of submission

Commencement and certification

We generally agree with the draft commencement and certification provisions. The certification stage provides a valuable opportunity for the Court to be informed about how the proceedings will be conducted to ensure the efficient administration of justice. That is important not only for Court resourcing, but also for parties' expectations. We also note the importance of early consideration of how the common issues will be defined, particularly in complex class actions.

The suspension of limitation periods pending certification should be no broader than it needs to be to avoid a mass of individual claims being filed on a precautionary basis.

Competing class actions

Multiple class actions about the same matter are plainly inefficient and have the potential to cause injustice to the defendant(s).

We consider that a time limit should be instituted within which any competing class action must be filed. We also consider that there should be a presumption that the court will select one class action to proceed and stay the other proceedings. The court should consider what approach would best allow the claims to be resolved in a way that is just and efficient for all parties.

Relationships with class members

It is important that the representative plaintiff understands the obligations of the role. We generally agree with the obligations set out in Issues Paper 48, and with them being specified in statute.

We also agree that the representative plaintiff's lawyer should be regarded as the lawyer for the class and should owe duties to the class as a whole, with the duties arising on certification. Given that some standard lawyer/client duties cannot easily be applied as a duty to a class, the existing Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 should be reviewed to group and confirm the duties owed by a representative plaintiff lawyer to the class.

During a class action

Good case management will be critical to the efficient conduct of class actions. While the court's usual rules and inherent jurisdiction will generally be sufficient, specific tools for class actions could assist, such as:

- providing for automatic dismissal of a class action not progressed within a certain time frame
- prescribed issues to be addressed in case management conferences, including regular review of definition of the class and common issues, as well as decisions around the management of communications with class members, updates on the size of the class, and the expected steps and timing of the litigation, and
- more frequent use of judicial settlement conferences for interlocutory applications.

We reiterate our view, from our submission responding to Issues Paper 45, that the costs regime merits review in relation to class actions.

Staged hearings, where the common issues are resolved separately from individual issues, should be the default position, but the court ought to have flexibility. The court should also have flexibility in how individual issues in a class action will be determined. The process for determining individual issues should be considered at an early stage in the proceeding, preferably as part of certification, and then revisited as needed. It remains important that individual issues are properly determined on appropriate evidence.

Specific rules for discovery are needed to facilitate discovery by class members where appropriate, in relation to both the common issues and individual issues.

The defendant(s) should be entitled to information about class members' claims, including lists of class members, or those who have opted out. This is important for the defendant(s) to better understand the claim against them and would enable more realistic consideration of settlement options.

Judgment, damages and appeals

It is important to have clarity about who will be bound by any judgment, and on what issues. If the certification order is used as the foundation of the binding effect of judgments, there would need to be provision to amend the certification order over time. The final determination of the binding effect of a class action judgment may best be dealt with in the judgment itself.

On damages, in most cases individual class members should still be required to substantiate their claims, including establishing loss at an individual level. However, where there are no individual issues that need to be determined to assess loss, it may be appropriate to assess damages in aggregate.

We agree with most of the draft provisions on monetary relief, but consider that there should be a default position that unclaimed damages are returned to the defendant. A court could have the power to adopt a different approach in exceptional circumstances.

In this context, we suggest that the overarching objectives in the legislation should refer to justice for all parties, to avoid undue weight being given to class members' interests.

Class members should be able to appeal a substantive judgment on the common issues with leave of the High Court, provided that they are substituted into the role of representative plaintiff for this purpose.

We do not consider that class members should be able to opt out of a settlement once approved. Instead, we consider that a class member should be able to appeal a settlement approval with the leave of the High Court, on the basis that: (a) they are substituted into the role of representative plaintiff for that purpose, and (b) that the appeal is limited to a judicial review of the discretion exercised by the court in approving the settlement rather than a full appeal of the merits.

Settlement

Court approval should be required for settlements in both opt-in and opt-out proceedings. But the approval process needs to be appropriately streamlined and efficient to be consistent with the aims of the class action regime.

There is particular need for efficiency in situations where a settlement may be struck mid-way through trial, where any delay in concluding settlement will have an adverse effect on all parties in terms of ongoing costs, not to mention court resources.

"Fair and reasonable" is an appropriate test for settlement approval. A range of fair and reasonable settlements may exist, and it should not be the court's role to determine whether a better outcome may be possible.

We generally agree with the proposed factors the court ought to consider in approving settlement. We add that the court should not be required to conclude that every factor supports a finding of fairness, and that some factors may be given greater weight than others. Ultimately it ought to be a discretionary exercise for the court.

We do not consider that class members should have the ability to opt out of a class action settlement once it has been approved. Opt-outs from settlement at a late stage may amount to free riding by those members opting out, and run the risk of jeopardising settlement to the detriment of all parties. If the Commission considers that an opt-out right at the settlement stage is appropriate, we consider that it should only be available in exceptional circumstances.

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Part A: Class Actions

Chapter 1 (Qs 1-6): Commencement and certification of a class action

Commencement

We generally agree with the draft commencement provisions.

Our main observation is that there may be groups of claimants whose claims are sufficiently closely related on either facts or legal issues for them to proceed as one class action, even if strictly there may not be a common issue across all of the sub-classes. It would be efficient for such claims to proceed as a class action through the creation of sub-classes, each represented by a different representative plaintiff. This is similar to the approach proposed by the Commission as an option for dealing with competing class actions.

Certification

We also generally agree with the draft certification provision, and the creation of a certification stage. We go on to make some further observations however.

We repeat our comment above in relation to commencement that sub-classes ought to be allowed where there are sub-groups with related issues (factual or legal), even if there is no common issue applying to all claims.

We consider the class action regime ought to be designed in a way that discourages meritless or speculative class actions. Mechanisms to achieve this might include:

- a merits review as part of the certification process, as set out in our submission on Issues Paper 45 (but we acknowledge the Commission does not support that), and
- the recognition of sub-classes, which can reduce the potential for artificially inflated class actions, which include meritless claims "hiding" amongst claims that may have more merit.

It would be important for the court at the certification stage to be informed, and able to assess, how the proceedings will be conducted to ensure the efficient administration of justice. This is particularly important given the resource commitment required for class action proceedings. In particular, we see value at the certification stage in the plaintiff(s) having to outline, for example, a litigation plan, and consideration of how to manage "stage 2"/individual issues. Other important issues to consider at an early stage will be how communications with class members will be conducted, particularly to resolve any conflict issues that may arise. Not all of these matters may need to be reflected in the certification orders, but we consider that the plaintiffs ought to be able to show the court that they have been considered.

That is important not only for court resourcing, but also for class members to see that justice is being done efficiently. Media regularly report plaintiffs in class actions lamenting the slow progress of their case towards trial. The reality of substantial class actions of course is that they can take long periods of time taking into account their tendency to include every claim which any member of the class wishes to include (including claims against additional defendants), interlocutory skirmishes, large-scale discovery and events at issue that date back many years. Appropriate expectation setting about process and likely timeframes through the requirements imposed on representative plaintiffs and their lawyers, and the court's comments at certification will assist in that regard.

As we note later in these submissions, the common issue(s) being determined ought to be revisited including at the final judgment. Nevertheless it is important that thought be applied at an early stage to defining the common issue(s). This will be particularly important – and can be very difficult – where there are many complex issues, or subclasses with different issues (see below regarding subclasses). While many class actions may have one or a few common issues (e.g. shareholder actions alleging particular misleading statements, or actions alleging defects in consumer products), the class actions

regime also needs to be designed to manage appropriately more complex class actions with multiple issues and sub-classes, and to provide clarity around what relief is being sought from the court.

We agree with the proposed list of matters to be included in the certification order. Clarity in particular on the common issues to be determined and the relief sought would have been of substantial assistance in class actions with which we have been involved.

Limitation periods

As a point of principle, we consider that allowing for a suspension of limitation periods in all proceedings that apply to be certified as a class action (not just those ultimately certified) is unjust to defendants, and undermines the policies of the Limitation Act 2010. That said, we acknowledge that inefficiencies may arise if claimants consider that they are required to file their own claims as a precaution before time expires, in the event that their class action is not certified.

The concept of suspension of limitation periods may be practical while it is uncertain whether a proceeding will be certified and who the class is, but it should not be any broader than it needs to be to achieve certainty and avoid a mass of individual claims being filed on a precautionary basis.

Any suspension should therefore only apply to people who were within the potential class when the class action was commenced but ultimately are not, whether because the proceeding was not certified, or because they opted out or did not opt in. The suspension is then not required beyond where it has become clear that proceedings have properly been brought, and on whose behalf they have been brought.

If, and when, limitation periods are suspended, we agree with most of the Commission's proposed list of events that would restart the limitation period running.

Consistent with our comment above on limits to any suspension of limitation period, the limitation period should not re-start when the representative plaintiff discontinues the proceeding. In that case, it is not a matter of a suspended limitation period. Rather, each of the class members at that stage has brought proceedings within the limitation period (being the class action) and should be bound by the result of those proceedings, including any decision of the representative plaintiff to discontinue. This is particularly the case given the proposal that the court be required to approve any discontinuance, as discussed below.

If a class member believes the representative plaintiff has not acted properly, they may be able to apply to become the representative plaintiff and themselves continue the class action as is contemplated in relation to appeals. However, their opportunity to pursue individual claims will have passed.

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Chapter 2 (Qs 7-13): Competing class actions

Managing competing class actions

We agree that competing class actions should be defined as two or more class actions with respect to the same or substantially similar issues filed against the same defendant(s) by different representative plaintiffs. Multiple class actions about the same matter are plainly inefficient and undesirable, and have the potential to cause injustice to the defendant(s).

Timing issues for competing class actions

We agree:

- with instituting a time limit of 90 days from the first class action being filed for any competing class actions to be filed. A lack of such a time limit would cause ongoing uncertainty. The court should have the power to grant leave to allow a competing class action to be filed outside of that period, but only in limited circumstances;
- that a register of class actions could be helpful. At this stage, we do not think any other communication to lawyers and funders is required given the substantial media attention class actions typically attract in Aotearoa New Zealand;
- that the issue of competing class actions should be considered at certification in the interests of efficiency.

Court's powers to manage competing class actions

We consider that there should be a presumption that the court will select one class action to proceed and stay the other proceedings. In rare cases, it may be appropriate to have multiple class actions heard together, for example where they are on similar issues but have a slightly different focus or class definition (similar to our comments above in relation to sub-classes and multiple representative plaintiffs). However, where class actions are essentially the same, we do not see that allowing more than one to proceed could be efficient. Similarly to what is suggested at the certification stage, it may be appropriate for the court to give the representative plaintiffs the opportunity to amend their claim and certification application, e.g. in terms of causes of action, common issues and the definition of the class.

Determination of how to manage competing class actions

When a court considers how to manage competing class actions, our view is that it should consider what approach would best allow the claims to be resolved in a way that is just and efficient for the parties. The "just and efficient" analysis should be viewed not just from the perspective of class members, but taking into account defendants' interests. Court resources should also be taken into account.

We consider that the four factors specified by the Commission should be relevant. However, consistent with our view of the utility of a merits review as part of certification, we consider that prospects of success would be an appropriate further consideration. Another factor to consider is the preferences of the defendants (and the reasons for those preferences), bearing in mind that all of the parties have an interest in the just and efficient resolution of the claims.

Involvement of the defendant

We consider that the defendants ought to be involved in any competing class action hearing, given that they will be impacted by which class action is ultimately permitted to proceed. Moreover, we anticipate that defendants will be able to present a helpful perspective to the court on relevant issues such as connection/commonality of issues, the practical utility of the relief sought on those issues, and evidence required.

Insofar as issues of confidentiality arise, we consider that the court's usual processes to manage confidentiality will be sufficient. Such confidentiality issues do not justify preventing the defendants from participating in the hearing.

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Chapter 3 (Qs 14-19): Relationships with class members

Representative plaintiff's obligations

We agree that the representative plaintiff should have obligations to:

- act in the best interests of the class
- ensure the case is properly prosecuted
- be liable for adverse costs, and
- make decisions on any settlement, including applying for court approval of settlement.

The representative plaintiff may choose to ensure that an indemnity is in place for adverse costs, but this should not affect the primary obligation of liability for adverse costs.

In addition, the representative plaintiff should have obligations to:

- ensure that the class is adequately informed as to the material facts and conduct of the proceedings. The scope of communications with the class, including the nature of information to be communicated and the method of communication, could be the subject of consideration and directions at certification
- be sufficiently appraised of the facts of the case and seek the appropriate legal and expert advice to be able to make the decisions required to instruct the representative plaintiff's lawyers on the conduct of the case, and
- not delegate the decision making required for the conduct of the case. The representative plaintiff may, and should, take relevant advice from legal counsel and suitable experts, but the decisions required to instruct the representative plaintiff's lawyers on the conduct of the case should be non-delegable. In our experience the interests of justice are not well served if the representative plaintiff is acting as a figurehead, with the decision making delegated to legal counsel or experts.

It is of primary importance that the representative plaintiff is both aware of, and understands, the obligations of the role. We agree with the two mechanisms proposed to ensure this, of a) compiling the representative plaintiff's obligations in the class actions statute (and confirming their priority over contractual commitments), and b) having the court actively consider whether the proposed representative plaintiff does in fact have a reasonable understanding of the obligations of the role.

We agree that a representative plaintiff may be supported by the formation of a litigation committee. We also agree that the establishment of a litigation committee does not remove or reduce a representative plaintiff's obligations.

We agree that it should be up to the representative plaintiff to decide whether a litigation committee is appropriate in each class action. We agree that the representative plaintiff is likely to be assisted by advice from their lawyers in making this decision. But we make the distinction that the decision itself rests with the representative plaintiff and not their lawyers.

We see the establishment of a litigation committee and its processes to be a matter for the representative plaintiff to determine without requiring specific rules in the class action legislation. That said, we consider that some minimum statutory requirements such as quarterly reporting by lawyers to, and quarterly meetings of, the litigation committee would be appropriate.

We agree that it might be appropriate for a representative plaintiff to be paid an honorarium, but this should not be paid as a lump sum at settlement because of the risk it might create a conflict of interest.

The representative plaintiff's lawyer and class members

We agree that:

- the representative plaintiff's lawyer should be regarded as the lawyer for the class and should owe duties to the class as a whole, with the duties arising on certification
- some standard lawyer/client duties cannot easily be applied as a duty to a class, and
- the existing Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 should be reviewed to group and confirm the duties owed by a representative plaintiff lawyer to the class.

We anticipate the duties owed to class members would include:

- a duty to act in the class members' best interests
- a duty not to act or continue to act if there is a conflict of interest
    - if a conflict of interest arises either between class members or between class members and the representative plaintiff, it may not serve the overall interests of justice for legal counsel to be prevented from acting for any parties in the proceeding. In those circumstances legal counsel should seek direction from the court
- a duty to promptly disclose all information that the lawyer has, or acquires, that is relevant to the matter in respect of which the lawyer is engaged
- a duty to keep the class members informed about the progress of the matter in respect of which the lawyer is engaged
- a duty to ensure that the representative plaintiff is and continues to be:
    - cognisant of the obligations of their role, and
    - sufficiently appraised of the facts of the case with appropriate legal and expert advice to provide informed instructions on the conduct of the case
- a duty to act on the instructions of the representative plaintiff, provided the instructions are consistent with the lawyer's other duties. Where there is a conflict, the lawyer should seek direction.

The defendant and class members

The plaintiff's lawyer should have a duty to disclose promptly all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged. This should include a duty to pass on communications from the defendant's lawyers. The defendant's lawyers can seek confirmation from the plaintiff's lawyers that communications have been passed on to class members.

Direction should be able to be sought from the court if required:

- The plaintiff's lawyers might seek direction if they object to the nature of the communication that is requested to be passed on to the class.
- The defendant's lawyers might seek direction if they have concerns as to whether the communication has been passed on, or the circumstances of the disclosure to the class.
- In some circumstances the court may direct that it is appropriate for the defendant's lawyers to communicate directly with members of the plaintiff class.

The traditional rule at the client level that the defendant may contact the plaintiff (and the class or members of the class) directly should continue to apply. We agree however that the court is required to review defendant communications with class members about individual settlements after certification.

Chapter 4 (Qs 20-28): During a class action

Notice to class members

We agree with the Commission's proposed list of events that should require notice to class members. We consider class members should also be notified of any appeal of a judgment on common issues. This is a logical corollary of the requirement to notify class members of a judgment determining common issues. If appeals are not notified, class members may be left with an inaccurate impression that the common issues have been finally determined.

We consider that the court should have the power to order the defendant to disclose names and contact details of potential class members, or to assist with giving notice directly to class members in appropriate cases. However, this power should be exercised only where required, and to the extent required, having regard to the circumstances in each case, including the views of the defendant. And any orders made may need to be on terms, such as relating to payment of the defendant's reasonable costs. In most cases, the defendant should not need to be involved in the process of identifying or contacting class members.

We agree that the proposed requirements for opt-in/opt-out notices provide an appropriate level of detail to enable class members to make an informed decision about whether to participate in the class action.

Case management

For most purposes, the court's usual rules and inherent jurisdiction ought to be sufficient for case management of class actions. However, specific tools for class actions could assist in setting expectations about how they are used. Ideally, class actions would be proactively managed by the same judge throughout the case, but this may not be realistic given the court's resourcing constraints.

Providing for automatic dismissal of a class action proceeding that is not progressed within a certain time frame would provide clear expectations for parties about progressing the class action, and discourage plaintiffs bringing speculative class actions that they are not ready to pursue.

Depending on the level of detail considered by the court at certification, it may be useful to have specific provisions for issues that should be addressed in case management conferences. These could also usefully include regular review of matters considered at certification, including the definition of the class and common issues, as well as decisions around the management of communications with class members, updates on the size of the class, and the expected steps and timing of the litigation going forward.

Procedurally, judicial settlement conferences could be used more frequently for interlocutory applications. We have had a judicial settlement conference allocated for this purpose under the High Court Rules as they stand, but understand this is not commonly done.

As we noted in our submission on Issues Paper 45, the costs regime merits review in the context of class actions. An effective adverse costs regime can help to discourage unmeritorious claims, and speculative claims brought to force settlements. They also encourage proportionality, discouraging claims that are low value and complex or otherwise expensive to progress. The costs of representative proceedings have been rising over many years with the burden of discovery and evidential costs often falling hardest on the defendants and this would continue were the current regime to be applied to class actions. It would be appropriate to have a different costs regime, or specific provision for increases to the existing scale costs, to address that additional cost burden.

More broadly we note that it is important that the parties' rights are not undermined by procedural measures taken for efficiency or other pragmatic reasons. The parties' substantive rights should not be compromised by the nature of the proceeding as a class action.

Managing individual issues

We agree that staged hearings, where the common issues are resolved separately from individual issues, will be sensible in most class actions and that it is appropriate to make this the default position. However, the court should have flexibility as to which issues are determined at each stage of a proceeding.

The court should also have flexibility in how individual issues in a class action will be determined, including using the options identified by the Commission. It remains important that individual issues are properly determined on appropriate evidence. The plaintiffs' decision to choose the class action procedure should not prejudice the defendants by causing them to lose rights they would otherwise have had in the event that individual claims had been brought. The defendant should not be put at risk of having to pay unsubstantiated claims if class members are not required to fully establish individual issues arising in their claim, including quantum.

The process for determining individual issues should be considered at an early stage in the proceeding, preferably as part of certification. The approach may be revisited as the proceedings progress – and ultimately some individual issues may not need to be determined at all. However, some early thought on what the individual issues will be and how they may be managed will give further clarity to parties about the potential costs, resources and timeframes that may be required to reach a final resolution. This in turn may enable parties more clearly to think about settlement options.

Discovery and other requirements to provide information

While the process required will vary in each case, we suggest explicit provision is made for appropriate discovery from class members in relation to individual issues.

Specific rules for discovery are needed to facilitate discovery by class members where appropriate, in relation to both the common issues and individual issues. Issues Paper 48 refers to the existing regime for non-party discovery. However those rules have been developed to recognise the burden of imposing discovery obligations on a party who has no role or interest in the litigation. This is not true of class members, who stand to benefit from the class action and who have either opted in or have the possibility of opting out. In particular, the party seeking discovery usually pays the reasonable costs of non-party discovery. We do not consider it is appropriate for a defendant to pay the costs of class members' discovery.

The defendant(s) should be entitled to information about class members' claims, including lists of class members, or those who have opted out. This is important for the defendant(s) to better understand the claim against them and would enable more realistic consideration of settlement options. We consider that it would be appropriate and useful for there to be an express requirement for a representative plaintiff to provide an estimate of the class size at certification, and an ongoing requirement to update this estimate as the case progresses. We have had experiences of plaintiff counsel delaying advising the defendant's counsel of plaintiffs or class members withdrawing from the proceedings.

Defendants should also be entitled to other information about class members' claims where available, such as information gathered during any opt in process. In a recent case with many individual plaintiffs, but where the majority of plaintiffs were not required to provide any discovery, it became clear that some of the plaintiffs' properties had not used the relevant product, and therefore they did not have valid claims. Not sharing information about class members' claims can lead to a claim, or a class, appearing much larger than it is in reality, changing the dynamics of appropriate case management and settlement considerations.

Providing information about class members' claims, including the differences between them, can also allow a more informed consideration of the appropriate framing of common issues, and discussion of any appropriate subclasses.

Funding orders

We agree that the court should have express power to make common fund orders and/or fund equalisation orders in appropriate cases. In our view, funding equalisation orders may be preferable in some cases to avoid the unfairness of a class action being funded by a small number of class members, but without the litigation funder potentially obtaining a windfall in receiving further commission from class members added at a later stage. If there are common fund orders, providing for a cap on the total fee should be considered.

We consider the court should have flexibility in any power to make common fund orders. However, as discussed below in relation to settlements, we suggest there be a presumption in favour of making the order, and setting the rate (including any cap on the total fee), at an early stage of the proceeding. This provides greater certainty for parties and litigation funders when considering settlement options.

Chapter 5 (Qs 29-35): Judgment, damages and appeals

Class action judgments

We agree it is important to have clarity on who is bound and on what issues, and agree with draft clause 5(2) in relation to class members who have opted out, or not opted in.

In relation to the focus on the certification order, there is a risk that this will not accurately reflect the evolution of the issues as the case progresses. We discussed above the importance and difficulty of defining the common issues in complex class actions.

If the certification order is used as the foundation of the binding effect of judgments, there would need to be provision to amend the certification order over time. We would suggest that the final determination of the binding effect of a class action judgment is better dealt with in the judgment itself. Procedurally, this could still be done by amending the certification order at that stage.

Damages in class actions

In most cases, individual class members should still be required to substantiate their claims, including establishing loss at an individual level. However, where there are no individual issues that need to be determined to assess loss, it may be appropriate to assess damages in aggregate.

We agree with the Commission's proposal that aggregated damages only be permitted where a *"reasonably accurate assessment"* of the total amount of damages can be made, and only where a more accurate assessment is not practicable.

We consider that cy-près damages should be available to the court, but would expect them to be used rarely – for example, where individual losses are very low and the administrative costs of paying those amounts to individual class members would absorb a significant portion of the damages award, or where class members are unlikely to participate in the process required to receive their portion of the damages awarded.

However, we note that in such cases, it may have been appropriate for the court to have declined certification because the likely time and cost of the proceeding was not proportionate to the remedies sought, which is included as a consideration in the Commission's draft provision for certification, clause 4(3)(d).

We agree with most of the draft provisions on monetary relief. However, we consider that there should be a default position that unclaimed damages are returned to the defendant, though a court could have flexibility for a different approach if required in exceptional circumstances.

At paragraph 5.39 of Issues Paper 48, the Commission has expressed a preference that unclaimed damages be distributed pro-rata to class members rather than reverting to the defendant on the basis that this is consistent with the objective of access to justice for class members. We disagree with this position. We agree that access to justice is an important objective of a class actions regime, but as discussed by the Commission in paragraphs 27 and 34(a) of the Introduction, the objective is access to justice for all parties. The objective of access to justice therefore does not give any basis on which to prefer class members over defendants in this context.

In this context, we note that we agree with the Commission's suggestion at paragraph 30 of the Introduction that the objectives of the class actions regime be expressly stated in the legislation. We would only add that the wording should expressly state that access to justice is for all parties, to ensure undue weight is not given to class members' interests.

The amount of damages awarded reflects the loss suffered by class members. If damages awarded to one class member are redistributed to other class members, those class members would be recovering more than their own loss, and therefore receiving a windfall. In the case of aggregated damages, these will still be based on the losses of individual class members, although we acknowledge the connection may be more conceptual for opt-out proceedings where the number of class members is not known.

While in practice, class members will often have also incurred legal costs (potentially through a commission to a litigation funder), legal costs are addressed by the costs

regime, court supervision of litigation funding agreements, and the Law Society costs review. Legal costs should therefore not be a consideration in the distribution of unclaimed damages.

On the other hand, a defendant should only be required to pay damages for the purpose of compensating class members. If some portion of the damages amount is not used to compensate class members, it should be returned to the defendant.

In some cases, particularly opt out proceedings where the number of class members is not known and depending on how the aggregated damages amount was assessed, a different approach to unclaimed damages may be warranted, but the default should be to return them to the defendant.

Appeals in class actions

We agree that parties to a class action should be able to appeal a decision on certification as of right, and a decision on settlement approval with leave. As discussed below in relation to appeals by class members, any appeal of a settlement approval should be limited in scope, in the style of a judicial review, as is appropriate for challenges to exercises of discretion, rather than a full appeal of the merits.

We are particularly concerned about the implications of allowing appeals relating to settlements in circumstances where settlement occurs immediately before, or even during, trial (bearing in mind that the trial of class actions can involve lengthy fixtures and the mobilisation and commitment of numerous witnesses and large resources).

We agree that class members should be able to appeal a substantive judgment on the common issues with leave of the High Court, provided that they are substituted into the role of representative plaintiff for this purpose, and therefore that the court is satisfied that they meet the usual requirements of a representative plaintiff.

The Commission proposes that class members not be given the ability to appeal settlement approvals, but on the basis that class members can opt out of the settlement. In our view, the opposite approach would better achieve the objectives of a class actions regime.

We therefore suggest that class members should be able to appeal a settlement approval with the leave of the High Court, and on the basis that: (a) they are substituted into the role of representative plaintiff for that purpose (and meet all the requirements of that role; and (b) that the appeal is limited to a judicial review of the discretion exercised by the court in approving the settlement rather than a full appeal of the merits.

Given the large incidence of appeals of settlement approvals overseas and the desire for certainty and finality, the ability to appeal could be further limited to class members who objected to the settlement when it was considered by the court.

As discussed further below, we do not agree that class members should have a further opportunity to opt out following approval of a settlement.

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Chapter 6 (Qs 36-54): Settlement

Court approval of settlements in class actions

We consider the court should be required to approve class action settlements in both opt-in and opt-out proceedings, for the reasons outlined in Issues Paper 48. However, as we go on to address below, the approval process needs to be appropriately streamlined and efficient to be consistent with the aims of the class action regime.

We agree with the Commission's view that court approval should be required for discontinuing any class action. Given that a discontinuance determines finally the rights of the class members, there is no substantive difference to the need for approval in respect of the settlement.

Process for Court approval of settlement

In broad terms, we agree with the list of information to be provided in support of an application to approve a class action settlement. In our view the decisive criterion for information to be provided to the court is whether it assists the court in determining whether the approval test is met. The other types of information should then be recorded as sub-sets of that.

In particular, we consider it important that class members are advised of the litigation funding fees to be deducted from any settlement sum before payments are made to class members.

We agree that it ought to be possible for each party to the settlement to provide information to the court on a confidential basis. That is particularly the case where there is a prospect of competing class actions or other types of claims against the same defendant.

We note that some procedural difficulties may arise in situations where one party seeks to provide material to the court that it does not wish the other party to see. This would be a highly unusual prospect in the context of the approval application being brought jointly by plaintiffs and defendants. However, it may be necessary to enable the court to determine that the settlement should be approved, and anticipates that the other party would not object to any confidentiality orders required to allow that to take place.

We would anticipate that any settlement approval process would be undertaken by a judicial officer that is not the trial judge. The approval process will require the review of evidence of the risks, costs and benefits of proceeding with the litigation, and it may not be appropriate for the allocated trial judge to see all such evidence.

We consider that it is in the interests of justice that notice be given to class members of both a proposed settlement and an approved settlement. That said, it is possible to envisage scenarios for specific types of class action where notice need not be given to every class member. This is particularly the case in class actions where every class member may not be known, and the process of bringing the settlement to the attention of every potential class member may be onerous. In this situation we consider that flexibility to apply to the court for an order that notice is not required is appropriate (in line with the Federal Court of Australia Act 1976 (Cth), s 33X(4)).

We generally agree with the information the Commission proposes should be contained in the Notices of Proposed and Approved Settlement.

We consider that class members ought to be given an opportunity to object to a proposed settlement, and that the court can take such objections into account in the settlement approval process (as well as taking into account any procedures the class members have agreed amongst themselves for trying to resolve such objections). The interests of efficient administration of justice, however, would require there to be a very short timeframe for any such objections ahead of a settlement approval hearing. Any class members would already have had significant exposure to the essential basis of the litigation so should not require a substantial amount of time to assess whether they wish to object to any settlement. There is particular need for efficiency in situations where a settlement may be struck mid-way through trial, where any delay in concluding settlement will have an adverse effect on all parties in terms of ongoing costs, not to mention court resources.

We agree in principle that the court ought to be able to appoint counsel or an expert to assist with settlement approval. Ultimately the court ought to be empowered to get the assistance it requires to be confident that it is making an appropriate decision. Such assistance may not be required in every case. It will be relevant whether such appointment would potentially delay the settlement process.

Insofar as the focus of such a proposal is the protection of the interests of the class members, the appointment of counsel to represent the interests of the class may be useful at an earlier stage of the proceeding.

We do not oppose the draft legislation permitting the court to make one or more of the parties meet the cost of such a process. However, we consider that there should be a presumption that the plaintiff ought to pay such costs. Ultimately the need for approval is based on protecting the interests of the class members and a defendant ought not be responsible for the costs of achieving that aim (other than costs voluntarily incurred in supporting such an application).

We agree that a specific provision allowing the court to grant a third party leave to intervene is not required, and generally we consider that excessive intervention in settlement evaluation is not desirable.

Test for approving a settlement

"Fair and reasonable" is an appropriate test. We suggest that the legislation record that that assessment is as between the class members and the defendant, and as between all the class members (reflecting the Australian approach).

We do not consider that the "interests of the class as a whole" limb is required:

- subject to the clarification above, and
- given the proposal that whether class members are treated equitably is a factor relevant to the "fair and reasonable" test.

If "the interests of the class as a whole" remains despite that duplication, our concern is that parties will look to give it a more expansive effect beyond ensuring fairness as between class members.

On that note, we consider it important that if that criterion remains, it not be changed to "best interests". We agree with the Commission's view that a range of fair and reasonable settlements may exist, and it should not be the court's role to determine whether a better outcome may be possible.

We generally agree with the proposed factors the court must consider but make the following comments.

- **Terms and conditions of settlement**
    - *Equitable treatment of class members*: views of class members are clearly important, but views from a small subset of the class should not be able to prevent a settlement from taking place (subject to our comments on the ability for class members to review a court approval of a settlement). We agree that additional payments to representative plaintiffs are undesirable.
    - *Proposed method of distribution*: we agree with the list of relevant matters but encourage a review 'in the round' rather than a strict 'tick box' exercise.
    - *Dealing with unclaimed settlement amounts*: we do not agree that unclaimed funds should be distributed pro rata to class members rather than the defendant(s). See our response above to Q32.
- **Legal fees and litigation funding commissions**: litigation funding commissions should be a factor but we do not consider that approval ought to be denied on that basis only. See our separate comments regarding review of litigation funders' commissions.

- **Risks, costs, benefits of proceeding with litigation**: we agree with the list of information that the FCA expects parties to provide to the court as part of any settlement approval process, but we do not consider that it needs to be mandatory. Ultimately it is up to parties to decide how to satisfy the court that settlement is reasonable. Such information is effectively the type of analysis that one would expect parties to have undertaken in any decision to settle. We agree that the exercise should not involve the court conducting a type of preliminary merits assessment.
- **Process of settlement negotiations**: we agree that potential conflicts of interest need to have been properly managed as part of any settlement negotiation process. Beyond that however, we do not consider that it should be a requirement that the parties obtain an independent evaluation of the settlement once it has taken place. That would only be necessary if there was some concern about conflicts in the process, and perhaps if there was opposition by some of the plaintiffs to the settlement.

In general, we support what appears to be the approach in the USA and Canada that, while the court must consider all of the factors together, the court is not required to conclude that every factor supports a finding of fairness. Some factors may be given greater weight than others, and ultimately it ought to be a discretionary exercise for the court.

On whether the courts should be empowered to vary funder commissions, we refer to our submission in response to Issues Paper 45. We acknowledge the possibility that class members may have had little bargaining power when signing up to a litigation funding agreement. However, it would be better for any review of the litigation funding commission to take place at an earlier stage. Variations to what a funder may receive at a late stage may require the reopening of settlement negotiations and potentially result in their failure.

Finalising the class for settlement

We agree that opt-out class actions can pose difficulties for settlement because of uncertainty about the size of the class. We also agree that converting an opt-out class action to an opt-in class action to facilitate settlement would help. However, it will only be of limited help if class members who do not opt in will not be bound by its terms. We anticipate that a key factor driving settlement from a defendant's perspective will be the avoidance of further litigation. The greater the scope of class members not bound by the terms of the settlement, the less incentive the defendant has to settle. In that scenario, there may be more value to the defendant in litigating and getting a successful precedent in the event of further litigation arising.

We do not consider that class members should have the ability to opt out of a class action settlement once it has been approved. Members of a class who take advantage of and benefit from a collective process ought to be bound by it. Opt-outs from settlement at a late stage may amount to free riding by those members opting out, and run the risk of jeopardising settlement to the detriment of all parties.

If the Commission considers that an opt-out right at the settlement stage is appropriate, we consider that it should only be available in exceptional circumstances (e.g., where the opting out class member can demonstrate no awareness of the class action to that point). For the avoidance of doubt, we consider that there are no circumstances in which a class member in an opt-in class action ought to be able to opt out of a settlement once it is approved.

We agree that potential class members should be allowed to opt in at settlement. Such an approach could create efficiencies by increasing the prospect of avoiding future litigation. We note that the process for doing so would need to be efficient, particularly if settlement is being attempted midway through trial.

We agree with the proposal that the court should determine whether to certify class for purposes of settlement. We also agree that the opt-in date should be prior to the settlement approval hearing. Certainly members who opt-in before the settlement approval hearing should not then be allowed to opt-out post-approval.

Settlement distribution and administration

The court should have the power to make any orders it considers appropriate regarding administration and implementation of a settlement. But we do not consider that the court "must" do so, as the draft provision states. That could be a significant drain on already limited court resources. If the parties require assistance from the court, then the parties should be entitled to seek further orders as needed.

We agree that the court should have the power to appoint a settlement administrator if necessary. Who would be appropriate to carry out that role will depend on the nature of the settlement to be implemented. We do not consider that it is necessary to prescribe who may fulfil that role, though we consider there should be a presumption that an independent administrator is required. The issue of the appropriate administrator for a particular settlement can be dealt with during the settlement approval application.

The most important factor will be ensuring transparency in the administration of the settlement, regardless of who undertakes the role.

We would not oppose the provision of settlement outcome reports to the court. That said, we caution against using the settlement outcome in one case as a test for approval in another case. Each case is specific to its own facts.

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