

11 November 2021

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

Submitted via email: cal@lawcom.govt.nz

Submission on Supplementary Issues Paper on Class Actions and Litigation Funding

1. Introduction

Thank you for the opportunity to make a submission on the "Class Actions and Litigation Funding Supplementary Issues Paper". This submission is from Consumer NZ, an independent, non-profit organisation dedicated to advocating on behalf of New Zealand consumers. Consumer NZ has a reputation for being fair, impartial, and providing comprehensive consumer information and advice.

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2. General comments

We support most of the Law Commission's preliminary views in the supplementary issues paper. However, we are concerned the complexity of the regime could result in it being too costly for plaintiffs to bring a class action lawsuit.

Affordability is a key element to improving access to justice. In some jurisdictions, the cost of bringing a class action lawsuit has been reported as excessive and a barrier to justice.

We therefore recommend the Law Commission considers the overall complexity of the regime and the impact this will have on costs and access to justice. The Law Commission should also consider whether it may be appropriate to cap costs.

3. Answers to questions

Our answers to some specific questions in the supplementary issues paper are set out below.

Q8. Do you agree that a competing class action should be filed within 90 days of the first class action being filed? How can information about new class actions be made available to lawyers and funders?

Yes, we agree with the proposed 90-day timeframe. We also support the idea of having a publicly available list of current class actions, such as on the Courts of New Zealand

website. This information would be useful for lawyers, potential class members, and organisations such as Consumer NZ.

Q10. What powers should the court have for managing competing class actions?

In our view, there should be a presumption that only one class action will proceed, subject to the overriding discretion of the court to order otherwise. Given the population of New Zealand, we think it is unlikely there will be many competing class actions.

Q12. What factors should be relevant to the court's consideration of which approach would best allow class member claims to be resolved in a just and efficient way?

We agree with the list of factors set out in paragraph 2.45 of the supplementary issues paper.

Q16. How can a representative plaintiff be supported to meet their obligations?

We agree a litigation committee may assist the representative plaintiff to carry out their role. However, this should not be mandatory. We also consider it would be useful for lawyers to have to follow specific guidance to ensure the representative plaintiff understands their role.

In addition, we think representative plaintiffs should receive payment for taking on this important role.

Q22. Do you agree with our proposed requirements for an opt-in/opt-out notice?

Yes. We agree a detailed opt-in or opt-out notice is necessary to ensure class members receive the requisite information to make an informed decision about whether to participate in the class action. We support the list of factors in paragraph 4.20 being included in an opt-in, opt-out notice.

We also support the development of a standard opt-in, opt-out notice to ensure the format is consistent and the language is clear and concise.

Q27. Do you support the court having an express power to make common fund orders and/or funding equalisation orders?

Yes, we support the court having an express power to make common fund orders and/or funding equalisation orders to prevent the unfairness of only some class members having to fund the costs of an opt-out class action lawsuit.

Q30. Do you agree that aggregate damages should be allowed in class actions?

Yes, we agree aggregate damages should be allowed in class actions. It may be feasible in some cases to assess damages on an individual basis, but this may not always be possible. Therefore, aggregate damages should be allowed. We also agree a pro-rata distribution of unclaimed damages will be preferable in most circumstances.

Q31. Should the court be able to order cy-pres damages and if so, under what circumstances?

Yes, we agree the court should be able to order cy-pres damages when it is not practical or possible for monetary relief to be distributed to individual class members. We also support the proposed drafting of clause 12.

Q39. Should there be a requirement to give notice to class members of a proposed class action settlement and an approved class action settlement?

Yes, we agree there should be a requirement to give notice in both these situations. It is important for class members to have the opportunity to consider the terms of the settlement and express any objection or support for a proposed settlement.

It is also important that class members are given notice of an approved class action settlement so they can opt-out of a settlement once it is approved.

Q40. Do you agree with the information we propose should be contained in the notice of proposed settlement and the notice of approved settlement?

Yes, we agree with the information set out in paragraphs 6.29 and 6.30 of the supplementary issues paper.

Q41. Should class members be given an opportunity to object to a proposed settlement?

Yes, class members should be given an opportunity to object to a proposed settlement.

Q54. Is there anything else you would like to tell us?

Yes, please see our general comments on page 1 of this submission.

Thank you for the opportunity to make a submission. If you require any further information, please do not hesitate to contact me.

Yours sincerely



Jon Duffy
Chief Executive