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Class actions in New Zealand: The necessity for introducing a class action regime

Chris Patterson*

New Zealand lacks any class action regime, which is an exception to most other common law jurisdictions. Between 2006 and 2008, The Rules Committee investigated the possible introduction of legislation necessary to create a functional class action regime. During November 2009, the Ministry of Justice produced a ministerial briefing paper recommending that steps be taken to obtain approval to issue formal instructions for drafting a Class Actions Bill. To date, no drafting instructions have been issued. This article suggests that representative actions can never be a substitute for class action litigation. Judicial inconsistencies associated with representative actions, while they do undermine the benefits of group litigation, do not on their own justify the introduction of class action legislation. Rather, legislation is necessary because representative actions cannot in all cases be used to achieve the objectives of aggregate litigation. This article critiques aspects of The Rules Committee's Draft Bill based on both the Canadian and Australian experience with their respective class actions regimes.

INTRODUCTION

The absence of class action rules is creating difficulties for the parties in this case.¹

We live in an unprecedented age of connectivity and globalisation. Information and transport technology, such as the use of computers and/or smart devices connected via the internet and jet travel have connected people like never before. These advances in technology combined with the drive for economic growth has seen global economic activity on a scale that could only have been dreamed about less than 20 years ago. Who would have thought that over 1.49 billion people would all be connected via one particular social media platform.²

There has never been a point in our history when mass wrongs could be committed as easily and on such a scale either by domestic and/or international wrongdoers. The resolution of disputes affecting a common group is not a new phenomenon. What is new is the frequency and size of those affected by wrongs inflicted on a particular group. Group or aggregate litigation can be readily distinguished as against individual litigation. The court hears and determines individual claims with each party squarely before it. The procedures of the court have evolved primarily to meet the demands of individual litigation.

There are a number of features that are unique to modern group litigation. Some, if not the large majority, of the members of the group will have the extent of their participation being limited to only being bound by the outcome of the litigation as well as the consequences that flow from that outcome. The conduct and the manner in which the litigation is run, from the plaintiff(s)' perspective, is determined by the representative party's lawyers. Another unique feature of group litigation is the inclusion of some group members whose individual claims would be simply uneconomic to be litigated on their own.

During the period 2006 to 2008, The Rules Committee considered and conducted targeted consultation regarding the introduction of a class action regime for New Zealand. The result of that

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¹ *Houghton v Saunders* [2012] NZHC 1828, [45] (French J, on plaintiff's application for split trial/determination of preliminary questions). The Supreme Court, in *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37; [2014] 1 NZLR 541; [49], commented that French J "was justified in the remark".

² It is reported that Facebook currently has 1.49 billion users: Statista "Leading social networks worldwide as of August 2015, ranked by number of active users (in millions)" (August 2015) <www.statista.com/statistics>.

process was the production and submission to the Ministry of Justice of a draft *Class Actions Bill* (the Bill) and *Proposed Rules* for inclusion in the *High Court Rules* (PHCR). The Ministry of Justice prepared a briefing memorandum for the relevant Ministers to enable them to consider whether to approve having the Bill referred to the Cabinet Domestic Policy Committee for its approval to introduce a *Class Actions Bill*.³

The Bill and PHCR are primarily based on Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (Pt IVA). The PHCR go some way to address a number of the procedural difficulties that have been experienced in Australia. The PHCR does amount to a significant departure from Pt IVA in that it contains a certification as opposed to decertification mechanism. The PHCR also follows the New South Wales class action regime by addressing what is known as the *Philip Morris* issue by providing for claims against multiple defendants. A unique feature of the PHCR is that it regulates arrangements relating to both legal costs and litigation funding. An attempt is made to discuss the likely effectiveness of some key aspects of the proposed class action regime based on the experience, during the past two decades, in both Australia and the states of Canada since they introduced their respective class actions regimes.

OBJECTIVES OF GROUP (AGGREGATE) LITIGATION

Class action regimes are procedural mechanisms. They are not designed to create any new substantive rights. When considering the objectives of a class regime some thought should be given to the procedural principles that underpin the specific rules. A general discussion regarding procedural theory is outside of the scope of this article. However, the topic is well covered by Andrew Barker in *Ideas on the Purpose of Civil Procedure*.³ It should be sufficient to indicate that I hold a strong view that minimising interlocutory disputes needs to be a key goal for any procedural mechanism.

Resolving procedural disputes falls first upon lawyers and then, if necessary, upon judges. The High Court of New Zealand does not formally allocate cases to judges based on specialisation. New South Wales, for example, does have specialist judges who are assigned to manage class actions cases. The absence of assigning specialist judges is a weakness that will be more significant if, and when, a class action regime is introduced. The management of class action proceedings will not be easily comparable to managing individual litigation.

So what are the objectives of group litigation? There are three commonly cited objectives, being:

- (1) The promotion of access to justice (the access to justice objective);
- (2) The efficient use of judicial resources (the judicial efficiency objective); and
- (3) To encourage compliance with the rule of law (the rule of law objective).

Practical access to justice is both important and a serious concern. Michael Kirby, a now retired Australian judge once, extrajudicially, commented:

[W]e cannot be content with a legal system which prides itself on fair substantive laws, but laws which are not, in reality, available for enforcement by the ordinary citizen. If he does not know the law, is not informed of it, has no realistic access to legal advice, is too timid, apathetic or ignorant to enforce his rights, then the Rule of Law may become a *cliché*; or a shibboleth.⁴

Procedural rules can and do, both directly and indirectly, have an impact the three objectives. The objective of the *High Court Rules* (HCR), as stated in HCR r 1.6, is "to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application". It is simply not possible for the HCR, any other Act or regulation to prescribe a procedure for all possible cases before it. HCR r 1.6 requires the court, in such cases, that matters before it "must be disposed of in the manner that the court thinks is best calculated to promote the objective of these rules".

On its face HCR r 1.6 appears to encompass the two objectives of group litigation. However, HCR r 1.6 is merely aspirational in nature. It is not, in itself, a procedural mechanism. The procedural

³ A Baker, "Ideas on the Purpose of Civil Procedure" [2002] NZ L Rev 437.

⁴ M Kirby, *Reform the Law – Essays on the Renewal of the Australian Legal System* (Oxford University Press, Melbourne, 1983) 169.

administration of group litigation has to be found elsewhere in the HCR. The PHCR also has to be read with HCR r 4.1 which restricts the number of parties named or joined to those whose presence, if necessary, determine the issues or ought to be bound by any judgment given.

Group litigation has been conducted via a number of forms of action including traditional representative, joinder of plaintiffs, consolidation of related proceedings and via a joint trial. The later three actions do not sit well with large group litigation. By far the most common method of group action has been via a representative action.

REPRESENTATIVE ACTIONS: HISTORY AND APPROACH

The origin of representative actions dates back to the 19th century via the United Kingdom's Courts of Chancery⁵ as a procedural response to meet the court's requirement of having "the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy".⁶ Common Law Courts in the United Kingdom did not permit representative actions until 1873.⁷ Fusion of equity and the common law occurred that year in the United Kingdom as well as the introduction of r 10 which provided for representative proceedings in any division of the High Court. A review of the case law suggests that a liberal approach developed to the application of the rule.⁸ In the case of *John v Rees* the English Court of Appeal described the representative procedure as "being not a rigid matter of principle but a flexible tool of convenience in the administration of justice".⁹

New Zealand inherited the effect of legal fusion. The Supreme Court of New Zealand, being the predecessor to the High Court, held all of the jurisdiction and powers of a Court of Chancery. Section 79 of the *Supreme Court Act 1882* (NZ) simply copied the United Kingdom's r 10. All subsequent representative rules have, in substance and practice, been identical. The current rule, HCR r 4.24 simply states:

Persons having same interest

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.

Under HCR r 2.24 a representative can sue on behalf of themselves and anyone else with "the same interest" in the "subject matter of a proceedings"¹⁰ with their consent or "as directed by the court" if consent has not been given.

The Supreme Court, as part of the *Feltex* litigation considered HCR r 4.24 in *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541. In *Credit Suisse* the Supreme Court considered the effect of HCR r 2.24 in terms of statutory limitation defences. The Supreme Court held to avoid creating any injustices that the modern approach to representative actions "in New Zealand" is that:

- (a) the order cannot 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 and cannot bar a defence otherwise available in a separate action;¹¹

⁵For a detailed commentary of the history and general approach of representative actions in the United Kingdom and New Zealand see also *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC), 269-283.

⁶*Duke of Bedford v Ellis* [1901] AC 1 (HL), 8.

⁷*Supreme Court of Judicature Act 1873* (UK) 36 & 37 Vict c 66.

⁸*RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC).

⁹*John v Rees* [1970] 1 Ch 345, 370.

¹⁰The reference in HCR r 4.24 to "the subject matter of a proceeding" rather than simply "the proceeding" as in the United Kingdom and Australia appears to be of no material import. The Majority in *Credit Suisse Private Equity LLC* supported the Australian High Court, which held that there is sufficient community of interest for a representative claim if there is common interest in "the determination of some substantial issue of law or fact": *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398, 408 (Brennan J). See also 404 (Mason CJ, Deane and Dawson JJ) and 427 (McHugh J), and 430 (McHugh J).

¹¹*Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 3, [2014] 1 NZLR 541, [53] (in the minority).

- (b) there must be a common issue of fact or law of significance for each member of the class represented;¹²
- (c) it must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity;¹³
- (d) the existence of individual damages claims by group members does not disqualify a proceeding from advancing as a representative action;¹⁴ and
- (e) an action is brought on behalf of all class members when the representative plaintiff files the action.¹⁵

Two further comments by the majority in *Credit Suisse* are also equally worthy of note. Specifically:

- (a) the goal of representative proceedings is “the promotion of expedition and efficiency of litigation”;¹⁶ and
- (b) there is scope for continual development in representative actions provided the aims underlying aims of representative actions are advanced and so long as defendants are not compromised.¹⁷

RECENT PROCEDURAL EXPERIENCES: REPRESENTATIVE ACTIONS IN NEW ZEALAND

There have been several representative actions in New Zealand in the past 10 years. Currently there are three high profile representative actions, being the “Fair Play on Fees”¹⁸ involving a claim against two major trading banks in respect to exceptional fees charged for exceeding credit card limits; “Cladding Action against James Hardie”¹⁹ which alleges that James Hardie was negligent in its design and manufacture of a cladding system; and the “Kiwifruit” claim brought on behalf of several kiwifruit growers against the Attorney-General (on behalf of the Ministry of Primary Industries (MPI)) alleging that MPI were negligent leading to the outbreak of a bacteria that caused loss of income to the group of kiwifruit growers as well as one post-harvest operator.²⁰

In *Strathboss Kiwifruit Ltd v Attorney-General*²¹ the intending representative plaintiffs bought a number of applications, including leave to bring proceedings as a funded representative action and also for court approval of the terms of funding. The court confirmed that the court was required to conduct an “an appraisal of the tenability of the claims”²² as part of its assessment of whether the proceedings ought to be pursued as a representative action. The strength or lack thereof of the claims might suggest to the court that funded representative action might be used to place improper pressure on a defendant to settle what appears to be an unmeritorious claim.

The Feltex litigation cannot be held up as a triumph for the representative procedure when assessed against its goal of being “the promotion of expedition and efficiency of litigation”.²³ The proceedings commenced during February 2008. There were at least eight pre-trial procedural judgments including appeals (not to mention scores of procedural directions) before the substantive

¹² *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 3, [2014] 1 NZLR 541.

¹³ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 3, [2014] 1 NZLR 541.

¹⁴ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 3, [2014] 1 NZLR 541, 147.

¹⁵ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 3, [2014] 1 NZLR 541, 164.

¹⁶ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 3, [2014] 1 NZLR 541, 152 (in the majority); In *Houghton v Saunders* (2008) 19 PRNZ 173 (HC), [100] French J, held that the threshold for finding the requisite commonality in representative actions was “not a threshold” that that the court should be cautious not to find impediments but should be facilitative of the action on a representative basis

¹⁷ *Houghton v Saunders* (2008) 19 PRNZ 173.

¹⁸ <<https://www.fairplayonfees.co.nz>>.

¹⁹ <<http://www.parkerandassociates.co.nz/cladding-action.html>>.

²⁰ *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596.

²¹ *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596.

²² *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, [30].

²³ *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, [152].

judgment was handed down on 15 September 2014.²⁴ It is difficult to estimate the cost to the representative plaintiff or more accurately his funder.²⁵ On any measure, the Feltex litigation was a spectacular failure in terms of meeting the objectives and goals of group (aggregate) litigation. Even if there was a long line of litigation funders queuing up to bankroll the next representative action, the question has to be asked to whose benefit is a process that is completely reliant on the court to make up the procedure to be followed as it goes.

INTRODUCTION OF CLASS ACTION REGIMES IN AUSTRALIA AND CANADA

The introduction of class action regimes in both Australia and Canada were to advance the same three objects stated above: the access to justice objective, the judicial efficiency objective and the rule of law objective.

Australia

The Australian Law Reform Commission (ALRC) in its *Grouped Proceedings in the Federal Court* report (1988)²⁶ recommended the introduction of a class action procedure, which ultimately became Pt IVA, on the basis that it would achieve two important policy goals being:

1. To enable individuals to bring proceedings to obtain compensation for loss or injury arising from multiple wrongs in circumstances where it might not otherwise be possible to do so, because of the cost and other barriers; and
2. To increase efficiency of the courts and the legal system in dealing with claims by groups of people suffering loss and damage in common circumstances to reduce the cost of proceedings by enabling common issues to be dealt with in one proceeding.

Additionally, the ALRC was of the view that the proposed costs regime would enhance respect for the law, the costs would not be excessive and in fact, the benefits of the procedure would outweigh the costs. The ALRC was confident that the proposed procedure had sufficient safe guards built into it to enable the court to ensure that the policy objectives were achieved.

Australia has both a Federal as well as two State class action regimes being:

1. Part IVA introduced in 1992;
2. Part 4A of the *Supreme Court Act 1986* (VIC) (Pt 4A) introduced in 2000;²⁷ and
3. Part 10 of the *Civil Procedure Act 2005* (NSW) (Pt 10) introduced in March 2011.²⁸

Practice notes are used to supplement the legislative regimes in Australia.²⁹

Both the Pt 4A and the Pt 10 are based on Pt IVA. The main substantive difference between Pt 10 compared to both Pt 4A and Pt IVA is that it is the ability to pursue claims against multiple defendants.

Since the introduction of Pt IVA over 320 class actions have commenced.³⁰

Canada

Unlike Australia, Canada does not have a Federal class action regime. Rather, the class action procedure is available at a State level. In 1978, Quebec enacted legislation to enable class

²⁴ *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74.

²⁵ *Houghton v Saunders* [2015] NZHC 548 – The costs awarded to the defendants in the Feltex litigation was \$3,066,044.05.

²⁶ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report 46, 14 December 1988).

²⁷ <http://www.austlii.edu.au/au/legis/vic/consol_act/sca1986183>.

²⁸ <<http://www.legislation.nsw.gov.au/maintop/view/inforce/act>>. To be read in conjunction with *Uniform Civil Procedure Rules 2005* (NSW), Pt 6 Div 4.

²⁹ The Chief Justice, Supreme Court Representative Proceedings, *Practice Note SC Gen 17* (12 August 2014) <<http://www.supremecourt.justice.nsw.gov.au>>; V Macgillivray, Supreme Court of Victoria – Conduct of Group Proceedings (Common Law Division), *Practice Note No 10 of 2015* (28 November 2014) <<http://assets.justice.vic.gov.au/supreme/resources>>.

³⁰ Between 4 March 1992 to 3 March 2014 there were 329 class actions filed – refer V Morabito, *An Empirical Study of Australia's Class Action Regimes – Third Report* (November 2014).

proceedings.³¹ The significance of class actions only occurred in Canada with Ontario becoming the first common law province to enact class action legislation (the CPA) in 1992.³² Prior to the CPA, group actions in Ontario were prescribed by r 75 of the *Rules of Practice*, Supreme Court of Ontario:

Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.³³

Rule 75 allowed a representative plaintiff to commence an action on behalf of a class, thereby binding it, without the knowledge and consent of its absent members and without any judicial oversight to ensure their interests were considered. In *GM (Canada) v Naken*,³⁴ Estey J, commented that the rule was “totally inadequate” for the task of managing a complex and unwieldy action involving a potential class of 2000 members.

Ontario’s CPA came into force in 1993 and as with Pt IVA in Australia to achieve the access to justice, judicial efficiency and adherence to the rule of law objectives.³⁵ Subsequently, the *British Columbia Proceedings Act 1995* was passed³⁶ which in many respects mirrors the Ontario legislation.

The procedures provided by the legislation in each of the three Canadian provinces are structurally similar to those prescribed by r 23 of the *US Federal Rules of Civil Procedure*.³⁷ The Canadian regime, as does the United States regime, relies upon lawyer-entrepreneurs to initiate and drive class actions. It is the lawyers who risk non-payment for losing cases in the hope of recovering substantial court-awarded contingency fees when cases are successful.³⁸

Something should be said about the key characteristic of the Canadian class action regime. Class action claims must be brought in one of the provincial³⁹ or territorial courts and invoke the relevant jurisdiction’s litigation processes. However, the Supreme Court of Canada has held that class actions can be commenced even in jurisdictions without formal legislation via local Rules of Court.⁴⁰

Unlike Australia, the Canadian class action regime features a certification process. The plaintiff is required to bring a motion to allow the action to proceed as a class action proceeding. The test employed by the courts differs between jurisdictions. There is generally five primary criteria that must be satisfied in order for the class to be certified:⁴¹

- (a) the pleadings must disclose a cause of action;
- (b) there must be an identifiable class;
- (c) the proposed representative must be appropriate;
- (d) there must be common issues; and
- (e) the class action must be the preferable procedure.

As in Australia, the Canadian provinces have an “opt-out” regime, whereby members of a class will be part of the class unless they take positive steps to opt-out within a specified period.

³¹ *Quebec Civ Code* RSQ 1978 c C-25, s 999-1051.

³² *Class Proceedings Act 1992* (Can) SO c 6.

³³ *Rules of Practice and Procedure* 1980 RRO reg 540.

³⁴ *GM (Canada) v Naken* [1983] 1 SCR 72.

³⁵ Ontario Law Reform Commission, *Report on Class Actions*, 1 (1982) 5.

³⁶ *Class Proceedings Act 1996* RSBC c 50.

³⁷ WA Bogart, “Questioning Litigation’s Role – Courts and Class Actions in Canada” (1987) 62 *Ind L J* 665.

³⁸ See *Gagne v Silcorp Ltd* (1998) 167 DLR (4th) 325, 41 OR (3d), 417 (CA); See also G Watson and M McGowan, “Ontario’s New Class Proceedings Legislation-An Analysis” (2001) 2 *Ontario Civil Practice* 751, 757.

³⁹ Prince Edward Island is the only Canadian province that does not have a class action regime.

⁴⁰ *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534.

⁴¹ J Beisner, GA Rubin and J Schwartz “Painting an Unsettling Landscape: Canadian Class Actions 2011-2014” (2015).

ARGUMENTS FOR REFORM IN AUSTRALIA AND CANADA: RESPECTIVE CLASS ACTION REGIMES

The passage of time since Australia and Canada adopted their respective class action regimes has given the judiciary, academic commentators and the respective Law Reform Commissions an opportunity to conduct a fair assessment of the degree to which those objectives are being achieved and to identify possible areas for reform.

Australia

Now that the Australian regime is in its 23rd year, a review of a number of judgments and academic commentary identifies a number of aspects of the regime that should be considered for potential reform. Such reform being justified to ensure that the regime remains consistent and where possible, is enhanced to meet its objectives.

Murphy and Cameron are of the view that “rigid adherence to traditional litigation practices can impede rather than enhance access to justice and efficiency in class actions”.⁴² Both authors have expressed their concern that, for example, “satellite litigation has become an entrenched feature of class action proceedings and greatly increases their cost and duration”.⁴³

So what areas for reform have actually been identified by the courts, academic commentators and the respective jurisdiction’s Law Commissions? Below is a consolidated list of areas identified for potential reform:

1. Reduction of interlocutory applications to combat tactics of delay attrition;⁴⁴
2. The representative party;⁴⁵
3. Section 33N and declassing a proceeding;⁴⁶
4. Constitution of the class;⁴⁷
5. The opt-out notice;⁴⁸
6. Opt-in class actions;⁴⁹
7. Competing classes;⁵⁰
8. Actions against multiple respondents (the *Philip Morris* principle);⁵¹
9. Communications with group members;⁵²
10. Security for costs;⁵³

⁴² B Murphy and C Cameron, “Access to Justice and the Evolution of Class Actions in Australia” (2006) 30 *MULR* 399, 439.

⁴³ Murphy and Cameron, n 42.

⁴⁴ Murphy and Cameron, n 42; S Clark and C Harris “The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?” (2008) 32 *MULR* 775; V Morabito “Group Litigation in Australia – ‘Desperately Seeking’ Effective Class Action Regimes” (National Report for Australia Prepared for the Globalisation of Class Actions Conference, Oxford University, December 2007).

⁴⁵ Murphy and Cameron, n 42; V Morabito, “Replacing Inadequate Class Representatives in Federal Class Actions: Quo Vadis?” (2015) 38 *UNSWLJ* 146.

⁴⁶ Murphy and Cameron, n 42; King & Wood Mallesons “Ripe for Reform – Improving the Australian Class Action Regime” (prepared for the US Chamber Institute for Legal Reform, 2014).

⁴⁷ Murphy and Cameron, n 42; King & Wood Mallesons, n 46; V Morabito, “The Victorian Law Reform Commission’s Class Action Reform Strategy” (2009) 32 *UNSWLJ* 1055.

⁴⁸ Murphy and Cameron, n 42.

⁴⁹ Clark and Harris, n 44.

⁵⁰ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC R 89, 2000).

⁵¹ Murphy and Cameron, n 42; Clark and Harris, Morabito, n 44.

⁵² Clark and Harris, Morabito, n 44.

⁵³ Murphy and Cameron, n 42; Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (ALRC R 46, 1998); V Morabito, “Judicial Responses to Class Action Settlements that Provide No Benefits to Some Class Members – Settlement Approvals that Provide No Benefit to Some Class Members” (2006) 32 *Mon LR* 76.

11. Costs including personal costs orders in class actions;⁵⁴
12. Settlement approval;⁵⁵
13. Cy-Pres damages;⁵⁶ and
14. Litigation funding including the creation of a "Justice Fund".⁵⁷

Part 10 incorporates a number of VLRC's 2008 recommendations. The authors of *Class Actions in Australia*, Grave et al, state: "There [are] also a number of substantive differences between [Pt 10] on the one hand and [Pt IVA and Pt 4A] on the other".⁵⁸ They also point out that the Pt 10 enables proceedings against multiple defendants, enables limited or "closed" classes, as well as giving the court the ability to order that the proceedings no longer continue as a class action if the representative party is "not able to adequately represent the interests of the group members".⁵⁹

Some commentators have criticised the calls for reform and have suggested that they are more akin to a "revolution that would sweep away most of the remaining safeguards against the acknowledged excesses of a class action regime".⁶⁰

Canada

The call for reform in Canada does not appear to be as loud or broad as in Australia. However, four areas for potential reform stand out, being:

- (1) Certification including the use of fictional composite plaintiffs, common issue trials and trials by "statistics";
- (2) Communications with group members;
- (3) Settlement approval; and
- (4) Costs including personal costs orders in class actions.

The large majority of jurisprudence in Canada is focused on the certification requirement.⁶¹ The certification motion establishes the "common issues" to be resolved and paves the way to a common issues trial, which will bind the defendant and the class members to its outcome. It appears that the threshold for certification is not particularly high. Unlike in the United States, there is no formal predominance requirement (communality of issues) which, under r 23 of the *Federal Rules of Civil Procedure*, requires that a class may not be certified unless:

common questions of law or fact ... predominate over any questions affecting only individual members.⁶²

The rationale supporting the predominance requirement is, as the US Supreme Court has explained, to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation",⁶³ ie to ensure that class action litigation does not devolve into multiple trials of issues and facts relevant to only some of the class members. In practical terms, the predominance

⁵⁴ Murphy and Cameron, n 42; Clark and Harris, Morabito, n 44; ALRC, n 53.

⁵⁵ Murphy and Cameron, n 42; Clark and Harris, Morabito, n 44; ALRC, n 53; V Morabito, "An Australian Perspective on Class Action Settlements" (2006) 69 *MLR* 380; M Legg, "Class Action Settlements in Australia – The Need for Greater Scrutiny" (2014) 38 *MULR* 590.

⁵⁶ Clark and Harris, n 44; Morabito, n 47.

⁵⁷ Clark and Harris, n 44; King & Wood Mallesons, n 46; C Croft, "On the Brink of Regulation: The Future of Litigation Funding in Class Actions" (2014) 88 *ALJ* 698; J Hoffman-Ekstein, "Funding Open Classes through Common Fund Applications" (2013) 87 *ALJ* 331; Morabito, n 47, in respect to the creation of a state regulated "Justice Fund".

⁵⁸ D Grave, *Class Actions in Australia* (Thomas Reuters, Australia, 2nd ed, 2012), 72.

⁵⁹ Grave, n 58.

⁶⁰ Clark and Harris, n 44, 821.

⁶¹ For example *Godt v Toronto Transit Comm'n* (Doc 95 CU 89529) (Gen Div); *Brimner v Via Rail Canada Inc* [2000] 47 OR (3d) 793 (ONSC); *Lumley v British Columbia* [1999] BCJ No 2633 (BCCA); and *Garland v Consumers' Gas Co* [1998] 3 SCR 112.

⁶² See Fed R Civ P 23(b)(3).

⁶³ *Amchem Prods Inc v Windsor* 521 US 591 (1997), 623.

requirement serves an important screening function: it is “an attempt to achieve a balance between the value of allowing separate actions to be instituted so that individuals can protect their own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class-action basis”.⁶⁴ Put differently, the predominance requirement exists to ensure that the class action device is not unmoored from its fundamental purpose – namely, “to facilitate the adjudication of disputes involving *common* questions and multiple parties in a single action”.⁶⁵

Amendments to Quebec legislation came into effect during 2003. The main amendments provided that evidence was no longer required to be filed by the plaintiff when applying to have a class certified and that evidence from the defendant was prohibited, without leave of the court.⁶⁶ This has resulted in a perception that Quebec is “class action haven” and greatly favours applications for certification/authorisation.⁶⁷

During the period 2009 to 2012 the Canadian Courts were tending to deny certification and were taking a more strict and thorough approach when considering the proposed class representative’s personal claim.⁶⁸ However, it appears that the Supreme Court of Canada is seeking a return to the traditional approach of more permissive certification.⁶⁹ The relaxed class certification requirement currently applied in Canada enables certification to be granted to a broad class of plaintiffs who are more different than they are alike. This causes the problem of dissimilar plaintiffs alleging highly individualised claims. The court then faces the difficulty of having to attempt to determine whether each class member can establish the elements of their claims based on common evidence alone. This has resulted in Canadian courts determining a defendant’s liability to the class generally. It is hard not to conclude that such generalised approaches will inevitably lead to a procedure that is unreasonably prejudicial to defendants.

Certification

Because of the permissive certification rules that exist in Canada, the following three problems are created.

The first is that defendants are forced to run their defences against a fictional composite plaintiff.⁷⁰ The existence of a variation within the class group members enables plaintiffs to “stitch together” the strongest aspects of their respective cases to present a stronger claim than if group members pursued individualised claims. As such, any action based on a fictional composite is stronger than any individual plaintiff’s claim would have been.⁷¹ This creates a situation in Canada where plaintiffs enjoy the advantage of litigating not on behalf of themselves but via a “perfected plaintiff” being pieced together for the class action litigation.⁷² The class action defendant(s) is therefore placed up against a much stronger collection of claims than it would have to face if the class had not been certified.

A second problem that the Canadian courts have attempted to ameliorate, are the problems inherent in class trials of dissimilar claims by certifying a class for the limited purpose of addressing

⁶⁴ C Wright, *Federal Practice and Procedure* (Thomson West, 3rd ed, 1998).

⁶⁵ Wright, n 64.

⁶⁶ See for example: *Marcotte v Banque de Montreal* (2009) QCCS 2764.

⁶⁷ E Yiannakis and N Bourdreau, “Paradise Lost? Rethinking Quebec’s Reputation as a Haven for Class Actions” (2014) 9 *Canadian Class Action Review* 385.

⁶⁸ See *Wuttunee v Merck Frosst Canada Ltd* (2008) SKQB 78; *Heward v Eli Lilly* (2007) OJ No 404 (ONSC).

⁶⁹ *Vivendi Canada Inc v Dell’Aniello* (2014) SCC 1.

⁷⁰ J Beisner, K Thompson and A Orr Larsen, “Canadian Class Action Law: A Flawed Model for European Class Actions” (2008) 9 *Engage* 123.

⁷¹ *Broussard v Meineke Disc Muffler Shops Inc* 155 F 3d 331 (4th Cir 1998), 344-345.

⁷² *Broussard v Meineke Disc Muffler Shops Inc* 155 F 3d 331 (4th Cir 1998), 344-345.

one or more "common issues".⁷³ Common issues trials are determined by the court and apply to each class member's claims. The individualised aspects of the claims are left to be resolved in subsequent individualised trials. The rationale for common issues trials is to streamline the resolution of common questions applicable to all plaintiffs and attempt to separate issues that are individual to specific group members. This creates a difficulty whereby the court is being asked to resolve these common issues in a vacuum, divorced from the facts of each plaintiff's case. General findings as to such issues as causation or failure to warn made in an issues trial do not relate to the facts of an individual's class member's claim. The risk of generalised findings is that they will result in a finding that would not necessarily be reached if all individual claims had been tried separately. The general finding can materially influence the second phase of a class action trial being the determination of individual claims.

A third problem is that class action plaintiffs often attempt to prove highly individualised elements of their claims such as causation and damages on a class-wide basis using over-generalised statistical evidence. Assessing liability based on statistical evidence enables individual's claims members to recover without ever having to prove the basic element of their claim, forcing defendants to compensate an entire group of plaintiffs without any one of those plaintiffs having to prove that causative loss. A trial by statistics is more akin to a theoretical "trial by average" where it is determined that the defendant's actions would probably have harmed the "average consumer" but never have established that the defendants actually harmed anyone.

Settlements

All class action systems have the potential to increase the pressure on defendants to settle cases, simply because a finding in favour of the representative plaintiff will result in liability for numerous class members.⁷⁴ As such, a flow on effect of permissive certification rules is that it subjects defendants to the class action-based pressure to settle.

As in Australia, class action settlements in Canada are subject to court review and approval.⁷⁵ The court must determine that the settlement is fair and reasonable and otherwise in the best interest of the class. As one court in the United States observed, "class certification may be the backbreaking decision that places insurmountable pressure on a defendant to settle, even where the defendant has a good chance of succeeding on the merits".⁷⁶

The relatively relaxed criteria and approach for class certification in Canada are a cause for deep concern among potential class action defendant(s) and should likewise concern policymakers tempted to use Canada as a model for class action legislation.⁷⁷

There is also the additional ever-present risk that plaintiff class counsel will, with or without colluding with the defendant, "sell out" the class by recommending and advocating for a settlement that is less than the true value of the claim in order to secure a satisfactory fee.⁷⁸ At least one Canadian commentator has suggested that a defendant will obtain a below-market settlement by seeing that the plaintiff's lawyer gets an above-market counsel fee.⁷⁹

Costs

Canada, as in Australia, applies a "costs follow the event" or "loser-pays" rule. Canadian provinces differ on the question whether a successful party in a class action can recover cost from the other

⁷³ See for example *Hewerd v Eli Lilly* (2007) 39 CPC (6th) 153 (SCC) and *Boulanger v Johnson & Johnson* (2007) 40 CPC (6th) 170 (ONSC).

⁷⁴ M Redish and A Kastaneck, "Settlement Class Actions, The Case-Or-Controversy Requirement, and the Nature of the Adjudicatory Process" (2006) 73 *U Chi L Rev* 545, 557.

⁷⁵ *Class Proceedings Act* 1992 SO c 6, s 29(2).

⁷⁶ *Regents of the University of California v Credit Suisse First Boston (USA) Inc* 482 F 3d 372 (5th Cir 2007) 379.

⁷⁷ G Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J Comp & Int'l L* 269, 272.

⁷⁸ *Ortiz v Fibreboard Corp* 527 US 815 (1999), *Flanagan v Ahearn* 134 F 3d 668 (5th Cir 1998).

⁷⁹ J Coffee Jr, "Class Wars: The Dilemma of the Mass Tort Class Action" (1995) 95 *Colum L Rev*, 1343.

party. British Columbia, Newfoundland and Labrador adopted the Ontario Law Reform Commission's recommendation that costs should not be normally awarded in a class proceedings while at the same time retaining the courts discretion to award costs when a party's conduct has been vexatious, frivolous or amounted to an abuse of process.⁸⁰ In Ontario (who has not followed its own Law Reform Commission's recommendation) and Alberta, costs may be awarded against the losing party in a class proceeding in the same manner as any action.⁸¹ In Quebec a class representative is liable only for nominal costs.⁸²

The courts have recognised explicitly that success and survival of the class action regime depends upon risk taking by lawyer entrepreneurs who must be given a premium fee when they win.⁸³ An Ontario Class Proceedings Fund exists primarily to relieve the representative plaintiff from liability for the defendant's costs.⁸⁴

When the Ontario government finally enacted legislation in 1992, it chose to adopt a loser-pays costs system and did not include a merits test in the class certification process. Recently Ontario plaintiffs' counsel and some judges suggested that the loser pays costs system should be reconsidered.⁸⁵ In two recent decisions, Perell J of the Ontario Superior Court voiced concerns about the loser-pays costs regime. In *Holley v The Northern Trust Company* he stated:

My own observation is that the exposure of an adverse costs award does have a deterrent effect beyond discouraging meritless and extortionate claims but whether the adverse costs regime of the Act goes too far in deterring access to justice for meritorious claims in something that the Legislature will have to decide.⁸⁶

In *Magill v Expedia Inc*, Perell J also stated that:

The adverse costs consequences of class proceedings have spiralled out of control and threaten the access to justice goals of legislations, particularly in the context of consumer claims.⁸⁷

NEW ZEALAND CLASS ACTIONS BILL AND PROPOSED HIGH COURT RULES

Between 2006 and 2009, The Rules Committee formed a subcommittee that considered and investigated the possible introduction of legislation necessary to create a functional class action regime.⁸⁸ The subcommittee was chaired by Stevens J with considerable work undertaken by Dr Don Mathieson QC who ultimately drafted the *Class Actions Bill*. Two consultative papers were released by The Rules Committee during April 2007 and again during October 2008.

The Rules Committee, during November 2008, submitted a draft *Class Actions Bill* to the Ministry of Justice for consideration.

Something should be mentioned about the composition and role of The Rules Committee. The Rules Committee is a statutory body.⁸⁹ It is responsible for reviewing and recommending to the Governor General amendments to the rules for the Supreme Court, the Court of Appeal, the High Court and District Courts. The Rules Committee comprises 11 mandatory members.⁹⁰

⁸⁰ *Class Proceedings Act 1995* SBC c 21, s 37.

⁸¹ *Class Proceedings Act 1992* SO c 6, s 31(1).

⁸² See Watson and McGowan n 38; and also L Fox, "Liability for Costs: A Comparison of Bill 28 and Bill 29 and the Quebec Legislation" (1992) *Proceedings of the First Yves Pratte Conference*, 123-136.

⁸³ Watson and McGowan, n 38.

⁸⁴ *Law Society Amendment Act (Class Proceedings Funding) 1992*, SO 1992 c 7.

⁸⁵ See J Fletcher, Access to Justice, "Is Becoming too Expensive" (Canada, *The Globe and Mail*, 21 November 2013).

⁸⁶ *Holley v The Northern Trust Co* (2014) ONSC 3057, 24.

⁸⁷ *Magill v Expedia Inc* (2014) ONSC 2073 d 106.

⁸⁸ Rules Committee *Minutes* (8 June 2009), 5; Rules Committee *Minutes* (6 April 2009), 5; Rules Committee *Minutes* (6 July 2009), 16.

⁸⁹ See *Judicature Act 1908*, s 51B.

⁹⁰ *Judicature Act 1908*, ss (1). The mandatory members are: the Chief Justice; the Chief High Court Judge and two other judges of the High Court appointed by the Chief Justice; the Chief District Court Judge; one other district court judge appointed by the

Whether The Rules Committee, as it is currently constituted, is the appropriate body to take responsibility for drafting and advocating for the *Class Actions Bill* is debatable. Dr Don Mathieson QC, a former member of The Rules Committee, has argued that civil procedural rules reform should be viewed from four perspectives, being: the judiciary, those of litigation lawyers, the litigant and the public.⁹¹ To enable all four perspectives to be included, membership of The Rules Committee's needs to change from being dominated by the judiciary to including representatives of all the stakeholders in our system of justice. In the author's opinion, input from the Law Commission would be appropriate. An effective class action regime goes beyond procedural rules. Substantive laws relating to limitation, res judicata and litigation funding will be effected by stealth via the Bill and Rules proposed by The Rules Committee.

The *Class Actions Bill* was modelled, to a large degree, on Pt IVA. In a number of respects it is unfortunate, due to timing, that The Rules Committee did not have the benefit of being able to consider Pt 10. Part 10 was introduced 18 years after Pt IVA and 5 years after Pt 4A was introduced in Victoria. Considerable work was undertaken by the NSW Law Commission which was alive to the various difficulties that Pt IVA had created and became the subject of judicial consideration and determination. Some of those areas are discussed further in this article.

The main features of the proposed class actions regime for New Zealand that distinguishes it from Pt IVA and Pt 10 (except in respect to multiple defendants) are:

1. Certification is required;
2. The court can order that class actions can proceed on either an opt-in or opt-out basis;
3. Claims can be brought against multiple defendants; and
4. The legal costs of a lead plaintiff and litigation funding are regulated.

The Bill comprises three parts including 19 sections. The purpose of the Bill adopts the aspirational wording of HCR r 1.2 by stating: "The purpose of this Act is to enhance the procedures of the High Court to secure the just, speedy and inexpensive determination of class actions". Part 2 of the Bill sets out the principle features of class actions. In particular, the following features are contained in the draft legislation:

- (a) The Scope of Class Actions (cl 6) which enables a class action to be commenced if 7 or more persons who have the same community of claims against the same proposed defendant(s). Many of the common law restrictions relating relief in representative actions have been removed. As such, the varying nature and commonality of members and defendant(s) is not an impediment to running a class action. Also importantly, class actions must be conducted as either an opt-in or opt-out class action which is a unique aspect of the proposed regime.
- (b) Clause 7 deals with the issue of consent of class members. Consent is not required for an opt-in class action. However, written consent is required to be filed where a class member includes the Crown, a Minister, a Crown entity or a local authority.
- (c) Clause 8 provides that in respect to incapacitated persons they do not have to have a litigation guardian to be a class member unless they take a step in the proceedings in their own name.
- (d) Clause 9 amends the *Adjudicator Act* by providing for the creation of rules to regulate the conduct, administration and incidental matters necessary for a class action regime.
- (e) Clause 10 relates to standing. The Bill adopts the terminology of a "lead plaintiff" rather than for example a "lead representative". The lead plaintiff retains a standing to continue any class action and/or be a party to any appeal even if they cease to have a claim against one or more of the defendant(s).
- (f) Clause 11 addresses the issue of when the number of class members becomes less than 7. In that case and on the application by the lead plaintiff or a defendant, the court may allow the proceedings to continue as a class action or require it to continue as an ordinary proceeding on any conditions the court thinks just.

Chief Justice on the recommendation of the Chief District Court Judge; the Attorney-General; the Solicitor-General; the Chief Executive of the Ministry of Justice; and two barristers and solicitors nominated by the Council of the New Zealand Law Society and approved by the Chief Justice. Ex Officio members include the Attorney General, the Solicitor General and the Chief Executive of the Ministry of Justice.

⁹¹ D Mathieson, "Reforming Civil Procedure" (2012) 43 *VUWLR* 127.

- (g) Clause 12 relates to judgments in class actions. It alters the law relating to raise judicature by binding "class members (whether or not they are parties) at the time when the judgment is given".
- (h) Clause 13 relates to appeals and class actions. There is no general right of appeal. Leave must be obtained to bring an appeal. The parties to an appeal are limited to the lead plaintiff, an individual class member where the subject of the appeal only relates to them and any affected defendant(s). Class members do not have any right to opt-out of an appeal.
- (i) Clause 14 relates to the suspension of limitation periods. The clause if enacted would override the *Limitation Act 1950*. The clause provides that the limitation period is suspended when a class action is commenced. However, in an opt-out class action the limitation period will begin to run again once a class member opts out or if the class action terminates without finally determining the class member's claim. In respect to opt-in class actions, the limitation period recommences for an individual class member upon them ceasing to be a class member or if the class action terminates without finally determining the class member's claim.
- (j) Clause 15 would grant a general power to the court to make any orders consistent with the *Class Actions Act* and the *High Court Rules*. Importantly, the court will be given the statutory power to make an order "prohibiting the making of specified kinds of interlocutory applications by a defendant if they would unnecessarily delay the conduct of the class action or constitute an abuse of process before the court". Presumably the purpose of such a prohibitory order is to address the mischief of a defendant engaging in tactical interlocutory skirmishes for the purpose of delaying or otherwise frustrating the prompt and efficient resolution of the class action proceedings.
- (k) Clause 16 is a transitional provision enabling proceedings that were commenced prior to the Act [once enacted] coming into force being consolidated or heard together with any subsequent class action.
- (l) Part 3 which comprises cll 17 to 19 would amend the *Commerce Act 1986*, the *Fair Trading Act 1986* as well as the *Credit Contracts Consumer Finance Act 2003*. In short, the amendments would give additional powers to the Commerce Commission in respect to each of the three acts, as well as enabling the Commerce Commission to apply to the court to be a lead plaintiff even though it has not suffered any loss or damage. Upon the Commerce Commission being made a lead plaintiff, the *Class Actions Act* and rules are to be modified to the extent necessary to reflect that the Commerce Commission is not claiming any relief in its own right.

The PHCR comprise 23 rules and would make up a new Pt 34 of the HCR. PHCR include the following descriptive headings:

- 34.4 Heading of court documents
- 34.5 Effect of non-compliance
- 34.6 Lead plaintiffs
- 34.7 Pre-commencement procedure
- 34.8 Class action orders
- 34.9 Opt-in class actions
- 34.10 Opt-out class actions
- 34.11 Cause of action accruing after commencement of action
- 34.12 Notice
- 34.13 How notice is to be given
- 34.14 Conversion to ordinary proceeding
- 34.15 When not all issues are common
- 34.16 Further proceedings
- 34.17 Adequacy of representation
- 34.18 Settlement and discontinuance
- 34.19 Judgment – powers of the court
- 34.20 Constitution of fund
- 34.21 Unidentified claimants
- 34.22 Costs
- 34.23 Fees payable by the lead plaintiff

It is not intended and would be beyond the scope of this article to describe and provide a commentary on each of the 23 rules. Rather, as set out in the next section of this article, specific proposed rules are discussed in detail as they fall within areas that have been identified for a reform in both Canada and Australia in respect to their respective class action regimes.

DRAFT CLASS ACTIONS BILL AND RULES: WILL THEY MEET THE OBJECTIVES BASED ON A COMPARISON WITH CANADIAN AND AUSTRALIAN EXPERIENCES?

Lead plaintiffs

One of the areas that has been identified for reform relates to the role and obligations of the “representative party”. The Bill adopts a different term being that of “Lead Plaintiff”. The Rules Committee felt that the use of lead plaintiff would be more appropriate and less likely to create confusion as between a named plaintiff in a representative action.

PHCR r 34.6 states:

Lead plaintiffs

One or more of the 7 or more persons who are eligible to join in a class action under section 6 of the Act may apply under rule 34.7 to be a lead plaintiff (or, as the case may be) lead plaintiffs in the class action.

Neither the Australian or Canadian legislation has a direct equivalent to r 34.6. Rather, s 33A of Pt IVA defines a “representative party” as a person who commences a representative proceeding. Section 33C provides that “a proceeding may be commenced by one or more of those persons as representing some or all of them”.

PHCR r 34.17 states:

Adequacy of representation

- (1) If a lead plaintiff is not able adequately to represent the interests of the class members the court may, on application by a class member, substitute another person as lead plaintiff, and make whatever incidental orders it thinks just.
- (2) If a person is not able adequately to represent the interests of sub-class members the court may, on application by a sub-class member, substitute another person to act in that capacity, and make whatever incidental orders it considers just.

PHCR r 34.17 is, save the rewording, identical to s 33T of Pt IVA. There have been only a few cases where s 33T has been used by the court to remove a representative party. Putting that aside, r 34.17, as with s 33T, provides no guidance to the court of the factors it should take into account when determining whether to substitute a lead plaintiff.

PHCR r 34.22(2) reflects the position both in Australia and Canada being that it is only the lead plaintiff, as opposed to the other group members, who is exposed to any potential adverse costs order. This creates an inconsistency with the objectives of class action proceedings when the lead plaintiff has an individually uneconomic claim. It makes no commercial sense for a lead plaintiff, who only stands to gain a few thousand dollars to expose themselves to, depending on the size and complexity of the litigation, potentially several million dollars in legal costs.⁹²

It is likely that the process of identifying and securing the agreement of a class member to act as a lead plaintiff is a time consuming and frustrating process for both a coordinated group and their lawyers. It must be a factor that adds to delay and cost. The rule provides no real practical safeguard for a class action defendant when the lead plaintiff’s net financial position is an insignificant fraction of the defendant’s realistic possible entitlement to costs.

The costs rule will have the effect of having a lead plaintiff being selected not based on their suitability to best represent the group but rather their willingness to commit themselves to inevitable bankruptcy in the event that the class action fails. A more satisfactory process would remove any unreasonable dissuatives to a suitable class member taking on the role of lead plaintiff. To enable this, the burden of a cost award will need to be shifted. One possible solution is to place the burden on all class members but with the use of a maximum costs cap based on either a percentage of the member’s quantifiable or “best guess” claim, or on a fixed amount. A fixed amount could be varied with a lower amount paid by individuals who are unable to claim costs as a taxable expense and a higher amount for entities conducting business.

⁹² See Murphy and Cameron, n 42, 432-434.

A more suitable lead plaintiff is likely to emerge once the costs dissentative is out of the way and a criteria for selecting an appropriate lead plaintiff has been applied.

Pre-commencement procedure and Class Action Orders

Unlike the Australian but similar to the Canadian regime, the Bill provides for a certification process. PHCR r 34.7 sets out the requirements which are imposed on a lead plaintiff. PHCR r 34.8 sets out the matters that are to be addressed in a class action order, the implication of subsequent class action orders and the pleading restrictions once a class action order has been made.

PHCR r 34.7 requires the lead plaintiff to apply for a class action order. The application is to be by way of an originating application pursuant to Pt 19 of the HCRs. The application is to be served on all proposed defendant(s). The application is to be supported by affidavit evidence that deposes:

- (a) a description of the class which does not need to include the names or number of class members;
- (b) the proposed method for notifying all unidentified class members;
- (c) the names of all proposed defendants;
- (d) an outline of alleged same, similar or related circumstances;
- (e) the nature of the claim(s) and relief sought by way of a draft statement of claim;
- (f) the common substantial issue of law or fact;
- (g) general information as the lead plaintiff's financial position;
- (h) general information as to any actual or prospective funding arrangements; and
- (i) information relevant to the appropriateness of the claim proceeding on a class action basis.

PHCR r 34.8(1) and (2) provide that after hearing from the applicant and proposed defendant(s) a class action order must be made if the court is satisfied that:

- (a) the proposed proceeding is eligible under the *Class Actions Act 2008* and the Rules to be brought as a class action;
- (b) each applicant is entitled to become a lead plaintiff;
- (c) each applicant will be an effective agent of the class members;
- (d) it is appropriate, having regard to the purpose of the Act, to deal with the claims in a class action rather than separately.

PHCR r 34.8(3) provides that a class action order must give permission to the applicant to commence a class action, and directions on each of the following matters:

- (a) identification of the lead plaintiff(s);
- (b) a precise description of the relevant class;
- (c) whether the class action will be either on opt-in or an opt-out basis;
- (d) the opt-in or opt-out date;
- (e) requiring the lead plaintiff(s) to give security for costs and any necessary conditions or deferring any such order to a later case management or pre-trial conference;
- (f) the conduct of the class action, to ensure that it proceeds expeditiously, with a minimum of interlocutory applications, and in a way that is fair both to class members and the proposed defendants;
- (g) the wording of a opt-in or opt-out rights notice; and
- (h) such additional matters as may be necessary or appropriate to give full effect to the order.

PHCR r 34.8 also requires a class action order to stipulate directions, under PHCR r 34.12 (Notice to Class Members), as to the method of giving notice to class members about the existence of the class action and their rights.

PHCR r 34.8(5) and (6) regulates subsequent and further class action orders that would fall within the scope of an existing class action order. In such a case the court may, when determining the subsequent application or on its own initiative (after hearing counsel for the parties to the class action already commenced):

- (a) vary or rescind the class action order previously made;
- (b) order consolidation or a hearing together with the class action already commenced; or
- (c) stay the class action already commenced; and
- (d) make whatever incidental orders are just.

PHCR r 34.8(7) requires the application for a class action order and documents filed which relate to it, must be added to the court file for the class action when it is commenced, and for all subsequent purposes to be treated as part of that proceeding.

PHCR r 34.8(8) prohibits, without leave, the filing of a statement of claim that make claims of a different nature to, or seek relief which is more extensive than, the claims or relief authorised by the class action order.

The author anticipates that the Canadian as opposed to Australian⁹³ commencement experience will be more relevant if the PHCR come into effect given the certification requirement. In Australia, s 33C of Pt IVA, the threshold to commence a class action, merely requires a claim by seven or more persons against the same person based on same, similar or related circumstances and the existence of a substantial common issue of law or fact. Grave et al note that:

The requirements for the commencement of [class actions] have created difficulties for both applicants and respondents. In the almost 20 years since the introduction of [Pt IVA] arguments regarding the application and contours of the commencement criteria have formed a prominent part of the jurisdiction for [class actions]. Despite the significant body of case law that has developed in that period, the commencement criteria continue to give rise to vigorous legal debate.⁹⁴

Australia's decertification mechanism shifts the incident of interlocutory hearings as to the efficiency and appropriateness of a class action proceeding from being at the commencement stage to later in the proceedings via s 33N of Pt IVA. A s 33N application to stop proceedings continuing on a class action basis can be sought on a number of grounds including a claim that the proceedings are not efficient or appropriate to be conducted as a class action.⁹⁵

It is possible the proposed rules should remove or lessen the incidence of attempts by defendants to have the class action proceedings converted to ordinary proceedings as compared with the Australian experience. The reality in Australia from the empirical research undertaken by Professor Vince Morabito indicates that the class action regime in Australia is operating adequately with a decertification mechanism.⁹⁶

The PHCR equivalent to s 33N of Pt IVA is PHCR r 34.14. Under PHCR r 34.8 the effectiveness and appropriateness of a class action procedure is determined by the court at the commencement stage. The question will be the extent to which the New Zealand Court will set the threshold for establishing "a decision whether it is appropriate, having regard to the purpose of the Act, to deal with the claims in a class action rather than separately". Unhelpfully and unsatisfactorily the Bill and PHCR provides no guidance or criteria for the court to apply. It will take a number of certification hearings before any comparisons will be able to be drawn as against the Canadian approach which has been called "plaintiff friendly".

Costs and Funding

The cost rule in New Zealand,⁹⁷ as in Australia and Canada, is that costs follow the event and "the loser pays". In Australia and Canada it is only the principal applicant/plaintiff that is exposed to an order of costs unless costs are incurred in respect to an individual group member.⁹⁸ PHCR r 34.22 materially adopts the same approach. In particular:

(a) Costs may only be awarded to or against a lead plaintiff; and

⁹³ Refer s 33C of Pt IVA.

⁹⁴ Grave n 58, 124-125.

⁹⁵ See *Bright v Femcare Ltd* (2002) 195 ALR 574; [2002] FCAFC 243, [74] (Lindgren J) and [128], [136] and [149] (Kiefel J) for a summary to the principles relevant to a s 33N application.

⁹⁶ V Morabito and J Caruana, "Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia" (2013) 61 *Am J Comp L* 579, 613-614.

⁹⁷ See *High Court Rules*, Pt 14.

⁹⁸ Section 43(1A) of the *Federal Court Act 1976* (Cth) limits costs against the representative party. Sections 33Q and 33R creates an exception in circumstances where costs were incurred in respect to an individual group member.

- (b) The court can make an order that costs be paid to a lead or former lead plaintiff from any awarded damages to the extent that they or are likely to exceed any costs that are recovered from a defendant(s);

In the Australian context Grave et al state that “the costs and funding of representative proceedings have been described as ‘the single most important issue’ within the [Pt IVA] procedure”.⁹⁹

It is difficult to imagine why any individual would agree to be a lead plaintiff without first being provided with a sufficient and adequate costs indemnity. The risk of an adverse costs order needs to be addressed in a manner different to that of individual litigation if one of the purposes of a class action regime being access to justice is to be achieved. One possible approach is to empower the court to make an order that costs be met by the group on a joint basis. Otherwise, it is likely that class action proceedings will need the backing of a commercial litigation funder.

The leading Australian case which clarified the legitimacy of litigation funding was the High Court decision in *Campbells Cash and Carry*.¹⁰⁰ Until the Full High Court decision in *Multiplex*,¹⁰¹ significant uncertainty existed whether the Federal Court would sanction the use of closed classes to secure the commercial position of a litigation funder.¹⁰² Other than one State in the United States, it appears that the proposed class actions regime will be unique at least in terms of providing express regulation of litigation funders.¹⁰³

The position of litigation funders in a general context was considered by the Supreme Court in *Contractors Bonding*.¹⁰⁴ Although *Contractors Bonding* was not a representative proceeding case, it is notable for the Supreme Court’s relatively *laissez-faire* approach to litigation funding. The court held:¹⁰⁵

[I]t is not the role of the courts to act as general regulators of litigation funding arrangements. If that is considered desirable, it is a matter for legislation or regulation. It is certainly not the courts’ role to give prior approval such arrangements, at least in cases not involving a representative action.

The Supreme Court held that judicial intervention in funding arrangements should only occur when “there has been a manifestation of an abuse of process on traditional grounds or where the funding arrangement effectively constitutes the assignment of a cause of action to a third party in circumstances where such an assignment is not permissible”.¹⁰⁶

PHCR r 34.23 regulates the arrangements between:

- (a) a lead plaintiff and their lawyer as to the method of calculation and when legal fees will become payable; and
- (b) a lead plaintiff’s lawyer and a litigation funder relating to the actual or proposed class action.

PHCR r 34.23(2) requires notice to be given to class members or qualified persons of the effect of the actual or proposed fee arrangements (fees notice). Before any distribution the court can, on the application of a person receiving a fees notice, make certain orders if satisfied the fees agreement is oppressive or unfair:

- (a) Varying the agreement so that it is no longer oppressive or unfair;

⁹⁹ Grave, n 58, 742. The authors cite the *Ontario Law Reform Commission 1982 Report on Class Actions* as well as V Morabito and J Esptien “Class Actions in Victoria – Time for a New Approach” (1997) 2 *Expert Report* (Victorian Attorney-General’s Law Reform Advisory Council), 58.

¹⁰⁰ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41.

¹⁰¹ *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200.

¹⁰² See also *Dorajay v Aristocrat Leisure Ltd* (2005) 147 FCR 394; [2005] FCA 1483. For a recent example of an unsuccessful application to approve funding early in a class action see *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mngs Apptd) (In Liq)* (2015) 108 ACSR 1; [2015] FCA 811 (Wigney J).

¹⁰³ V Morabito and V Wayne, “Reining in Litigation Entrepreneurs: A New Zealand Proposal” (2011) 2 *NZ Law Rev* 323.

¹⁰⁴ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

¹⁰⁵ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91, [28].

¹⁰⁶ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91, [76(e)].

- (b) Requiring the parties to the fee agreement to resubmit a revised agreement for approval;
- (c) Fix the fees payable; and
- (d) Impose any incidental terms considered just.

Under PHCR r 34.23 a revised fee agreement that has been submitted to the court pursuant to PHCR r 34.23(4)(b) is unenforceable until it has been approved.

It is questionable whether the court is the appropriate body to determine what will effectively be the reasonableness of lawyers' fees and intended payments to litigation funders. Legal Aid funding is regulated and prescribed in the *Legal Services Act 2011* (NZ) and regulations. Part 14 of the HCR deals with costs. The default position is that costs are to be predictable and therefore the use of a scale assists in that objective. It has not been proposed that the costs scale be amended for class actions. It was the difficulties associated with the former system of the taxing of costs that led to the introduction of a costs scale. Accurately taxing fair costs, in advance, in class actions as opposed to unitary litigation will be an impossible task. The Australian experience has shown that costs can run into the tens of millions of dollars for some class actions. Given the public good aspect of class actions it may be appropriate for costs to be approved on a stage basis by a body similar to the Legal Services Agency with an efficient mechanism for resolving any disputes as to the reasonableness of approved fees.

The Supreme Court, in *Contractors Bonding*, rightly held that "[i]t is not the role of the courts to act as general regulators of litigation funding arrangements. If that is considered desirable, it is a matter for legislation or regulation. It is certainly not the courts' role to give prior approval to such arrangements, at least in cases not involving a representative action. Whether or not the courts have a wider supervisory role in a representative action is not before us and we make no comment on it".¹⁰⁷ It would be more satisfactory, if the High Court is to be empowered to approve a funding arrangement, to prescribe the criteria upon which a fees and their funding arrangement will be regarded as oppressive and unfair. Approached another way would be to stipulate the maximum percentage that a litigation funder is entitled to receive before the arrangement deemed as being oppressive or unfair.

CONCLUSION

The introduction of a class action regime in New Zealand is well overdue. The representative action procedure prescribed by HCR r 4.24 even with further judicial clarification will never effectively achieve the three objectives of access to justice, judicial efficiency and promotion for the rule of law. Both Australia and the Canadian states have operated effective class action regimes for over two decades. There has not, within that time, been any credible suggestion that the regimes should be discontinued. Rather, there have been significant calls and attempts in those jurisdictions to reform certain aspects that have not enabled the regimes to fully meet the objectives. The proposed *Class Actions Bill* and Rules has to some extent attempted to be an improvement on Pt IVA to which it was primarily based.

Certain key areas need to be addressed to meet the general objective of reducing the incidence of interlocutory warfare. In particular, the selection of the lead plaintiff(s), the burden of adverse costs and the determination of the appropriateness of the class action process. Likewise, the removal of unnecessary commercial barriers that inhibit the use of the class action procedure need to be adequately addressed. The PHCR inclusion of rules relating to fee and funding arrangements are innovative and should be commended. While they may reduce the need for judicial activism as to procedure, they do raise the question of the appropriateness and even ability of the High Court to accurately assess the reasonableness of legal fees and litigation funding of complex and lengthy cases that may involve hundreds of millions of dollars.¹⁰⁸

There are significant implications for both the commercial and legal landscape arising from the introduction of a class actions regime. The Rules Committee's work in producing a draft *Class Actions*

¹⁰⁷ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91, [28] and [76(f)].

¹⁰⁸ The GIO settlement was A\$200m.

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Bill and Rules provides an excellent opportunity for further debate and work to be undertaken. The luxury of time does exist for such debate and work to take place given that the current Government has not directed the Ministry of Justice to progress any further work in respect to the introduction of a class action regime.¹⁰⁹ The author believes that the regulation of group actions would now be an appropriate project for the New Zealand Law Commission.

¹⁰⁹ Letter from the Ministry of Justice to Chris Patterson regarding the class actions regime, 9 September 2015.