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CLASS ACTIONS: OPT-IN/OPT-OUT AND A STATUTORY FRAMEWORK

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Contents (References - table of contents)

Abstract

This paper examines New Zealand's representative action rule while considering overseas statutory class action regimes. The paper proposes that New Zealand replace the current representative action rule with a legislative framework modelled on Australia's federal statutory class action regime. The main argument advanced in this paper is that the simplicity of r 4.24 causes interpretation issues and procedural uncertainty. The paper considers the procedural deficiencies in the current representative action rule, analyses the opt-in/opt-out procedures for determining the represented group and critically evaluates Australia's federal statutory class action regime.

Word length

The text of this paper (excluding abstract, table of contents and footnotes) comprises approximately 7022 words.

Subjects and Topics

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I Introduction

A Defining Class Actions

Class actions increase access to civil justice while also increasing procedural efficiency and consistency of outcomes.[1] It allows claimants who have a common factual or legal issue to group their claims into a single proceeding that can be resolved together.[2] Typically, there is one representative plaintiff, and the outcome will bind all class members.[3] Allowing claims to be grouped into one trial creates significant cost savings for plaintiffs. Further, class action defendants will only need to deal with one claim from a class of plaintiffs. This increases procedural efficiencies and provides a consistent resolution for all plaintiffs. However, the class action claim will likely be for a substantially higher sum. This means class actions can increase the commercial risk and exposure of defendants.

Nevertheless, commercial considerations need to be balanced against the benefits of class actions. The benefits of class actions include improving access to justice, compensation for plaintiffs and deterring corporate misconduct. New Zealand does not have a comprehensive framework for class actions. The representative action rule in r 4.24 of the High Court Rules 2016 (HCR) is most comparable to class actions overseas. The simplicity of r 4.24 has resulted in unclear procedural rules, which causes delays and increases costs as procedural issues need to be constantly raised in interlocutory proceedings. This is particularly highlighted by the uncertainty around utilising the opt-in/opt-out procedure for determining the represented group. This brings into question whether New Zealand's current representative action rule is still fit-for-purpose.

B Class Actions and Consumer Law

Class actions are vital for the feasibility of consumer actions because it usually involves small amounts per claimant. In 2020, around 49 per cent of consumers reported they had a problem with a product or service in the past two years.[4] However, since most consumer claims are small, litigation is usually not considered a practical or economical way of

[1] Law Commission *Class Actions and Litigation Funding* (Issue Paper 45, December 2020) at 26.

[2] At 9.

[3] At 9.

[4] Ministry of Business, Innovation & Employment *New Zealand Consumer Survey 2020: Summary Findings* (May 2020) at 30.

resolving consumer disputes. This means any legal action is only economically viable if undertaken using some form of group litigation. The Law Commission identified 44 representative actions, of which only six were consumer actions.[5] The shows that the number of consumer actions is relatively low. However, these small number of claims can represent the legal claims of a large number of people. Access to justice requires access to the courts, including relief for relatively small claims for a large group of plaintiffs. This is why a robust class action regime is critical to protecting the rights of consumers.

C Purpose of Paper

New Zealand's representative actions procedure was never designed for complex, large-scale cases.[6] Further, the simplicity of the existing representative action rule and its interpretation issues results in procedural uncertainties. This paper proposes that New Zealand replace the current representative action rule with a legislative framework modelled on Australia's federal statutory class action regime. The paper will examine the procedural deficiencies in the existing representative action rule, analyse the opt-in/opt-out procedures for determining the represented group and critically evaluate Australia's federal statutory class action regime.

Part II will analyse the history and interpretation of the representative action rule while also briefly examining the effect of litigation costs and litigation funders. Part III analyses the difficulties with reading opt-in/opt-out procedures into r 4.24 while traversing New Zealand case law, including the current law as articulated in *Ross*[7]. Part IV will critically evaluate key provisions of Australia's opt-out-only model, examine arguments against opt-out mechanisms, consider the benefits of a legislative framework and propose a statutory class action regime for New Zealand. Part V will conclude.

II Representative Action Rule

The Courts of Chancery first developed the representative action rule in the late 17th and 18th centuries.[8] Many jurisdictions following English jurisprudence took a restrictive approach to representative actions.[9] This significantly curtailed representative actions and

[5] Law Commission, above n 1, at 53.

[6] At 26.

[7] *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, BC202063392.

[8] Law Commission, above n 1, at 9.

[9] At 39-40.

acted as a catalyst for jurisdictions to develop class action regimes.[10] As a result, class action regimes are slowly replacing the old representative action rule. Countries such as the United States, Australia and Canada have now established class action regimes. New Zealand only has the old representative action rule, and since the 2000s, there has been a notable increase in representative actions in New Zealand.[11] One of the reasons for the rise in class actions is the availability of litigation funding.[12]

A Costs and Litigations Funding

The correlation between the rise in representative actions and the availability of litigation funding in New Zealand indicates that cost is a barrier to group litigation. It is well known that high cost is one of the key barriers to civil litigation and access to courts.[13] In 2008, the Rules Committee suggested that individual claims for $150,000-$200,000 would not be economically viable taking into account legal and other costs.[14] Further, the jurisdiction of the Dispute Tribunal for small claims is capped at $30,000.[15] This presents a significant gap that class actions can fill. Also, representative actions have now become more complex and usually represent a large number of claimants. The increasing complexity and size of representative actions mean that it will benefit from the financial and strategic support of experienced litigation funders.

Since 2008, there have been around ten representative actions that were funded by a litigation funder.[16] Litigation funding by a commercial funder can overcome the financial barrier to litigation. Such funding is particularly vital for consumer actions where the small value of individual claims means claimants may be unable or unwilling to contribute to

[10] At 40.

[11] At 9.

[12] At 9.

[13] At 9.

[14] Rules Committee *Class Actions for New Zealand: A Second Consultation Paper* (October 2008) at 7.

[15] Dispute Tribunal Act 1988, s 10.

[16] Law Commission, above n 1, at 52; *Houghton v Saunders* (2008) 19 PRNZ 173 (HC); *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69; *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281; *The Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105; *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288; *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478; *Scott v ANZ Bank New Zealand* Ltd [2020] NZHC 906; *Livingstone v CBL Corp Ltd* CIV-2019-404-2727 (ongoing proceedings); and *TEA Custodians Ltd v Wells* CIV-2019-485-642 (ongoing proceedings).

litigation costs.[17] A commercial litigation funder could cover all the legal costs in exchange for a percentage of any compensation rewarded.[18] Litigation funding and its regulation is essential for the success of a statutory class action regime, but it is outside the scope of the paper.

B Features of the Representative Action Rule

New Zealand's representative action rule allows one or more persons to sue on behalf or for the benefit of all persons having the same interest, either with the consent of the persons or as directed by the court. The representative action rule states:[19]

> **4.24 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.

The wording of the rule suggests that the defining feature of representative actions is "persons with the same interest in the subject matter". The "subject matter" can either be the same factual or legal issue. Further, the proceeding can occur either "with the consent of other persons" or "as directed by the court. This conveys that in certain circumstances, representative actions can commence without the consent of all persons with the same interest. The one rule is a stark contrast to the complex class action regimes that exist overseas.

Additionally, New Zealand's representative action rule shares similar features to that of typical class actions. Similar features include preliminary court approval, a common issue, opt-in and opt-out mechanisms for determining the represented group, active court supervision of proceedings, court approval of the settlement, split trials for common issues and damages, and the use of litigation funding.[20] These similar features to overseas class action regimes have come about due to the courts' development of the representative action

[17] Law Commission, above n 1, at 27.
[18] At forward.
[19] High Court Rules 2016, r 4.24.
[20] Law Commission, above n 1, at 9.

rule. The paper will now analyse the issues with interpreting and implementing the representative action rule focusing on opt-in/opt-out procedures.

C Issues with Courts Developing Rule 4.24

The substantial development of the representative action rule by the courts is problematic as it has not undergone any legislative process or public scrutiny. As a result, the representative action rule now has similar features to overseas statutory class action regimes but lacks a clear legislative framework. Implementation of r 4.24 by the courts has also been inconsistent. The Law Commission identified two main issues with the representative action rule. Firstly, the lack of a public policy process to analyse the delivery of collective redress, and secondly, the lack of clear rules specifying when cases should be allowed to proceed and how these cases should be managed.[21] Further, there have only been 44 cases that have utilised the representative action rule, with the majority being filed after 2000.[22]

The number of representative actions seems low given that a form of the representative action rule has existed in New Zealand since 1882. In Australia, 136 class actions were filed in the Federal Court from 2012 to 2018.[23] In Ontario (Canada), class actions are rising, averaging more than 100 per year.[24] The low number of representative actions may be due to New Zealand's low population and the availability of more effective forms of redress outside the court system. However, it may also suggest that the representative action rule poses difficulties resulting in its underutilisation. This is why New Zealand's representative action rule needs to be reviewed to ensure it is fit-for-purpose. In addition, also whether access to justice will be better served by the procedural certainty provided by a statutory class action regime.

[21] Law Commission. above n 1, at 9-10.

[22] At 50.

[23] Australian Law Reform Commission *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, December 2018) at [3.13].

[24] Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms: Final Report* (July 2019) at 5.

III Opt-in and Opt-out Procedures for Determining Represented Group

A What is Opt-in/ Opt-out?

A vital issue in class actions is the procedure that establishes the "class" of plaintiffs. A class is made up of persons who have the same interest in the representative proceeding. The represented class can be determined using either an opt-in or opt-out mechanism. In an opt-out procedure, all persons who share a common interest in the proceedings are part of the class and are bound by the outcome of the representative proceeding unless they choose to exclude themselves and reserve their right to file an individual claim. In contrast, an opt-in procedure requires persons with the same interest to actively consent to be part of the class. Generally, the opt-in mechanism favours the defendant while the opt-out mechanism improves access to justice and benefits plaintiffs. Access to justice in the context of the opt-out procedure is discussed further in part IV.

B Difficulties Interpreting Rule 4.24

Andrew Wicks argues that the use of opt-in and opt-out procedures undermines the rationale for r 4.24.[25] The common interest in the subject matter rather than the group members' consent determines the represented group.[26] This is supported by the wording of r 4.24, namely paragraph (b), which does not require group members' consent. Further, Wicks states that opt-in/opt-out procedures cannot be justified by the exercise of inherent jurisdiction.[27] Additionally, the procedural rules around representative actions do not have a sound basis, and legislative action is required to determine the appropriateness of opt-in and opt-out procedures.[28] The better view is that it is not a jurisdictional issue as courts can create procedural rules. Instead, the issue is that allowing the courts to determine if a representative action can proceed on an opt-in or opt-out basis without clear procedural rules creates uncertainty.

In New South Wales (NSW), the equivalent to r 4.24 was r 13(1) of Part 8 of the Supreme Court Rules 1970 (NSW). The rule states:[29]

[25] Andrew Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" [2015] NZLR 73 at 105.
[26] At 105.
[27] At 105.
[28] At 105
[29] Supreme Court Rules 1970 (NSW), Pt 8, r 13(1).

13 Representation: concurrent interests

(1) Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In *Carnie*, the High Court of Australia (HCA) said that r 13 makes provision for representative actions when there is no legislative framework.[30] More importantly, a lack of a legislative framework does not justify narrowing the scope of the rule.[31] This indicates that r 4.24 can support both an opt-in and opt-out procedure. Even though both rules were modelled on the English rule, the wording of r 13(1) is not identical to r 4.24 and does not mention consent. This suggests the wording of r 4.24 is not critical to its interpretation. The HCA went on to say that the lack of detail in r 13 is not an issue and is one of its strengths as it allows for flexibility.[32] The simplicity of the representative action rule allows a flexible approach to its interpretation that can continue adapting to modern challenges. This approach was also endorsed in New Zealand.[33] However, since *Carnie*, the position has changed with NSW implementing an opt-out-only statutory framework.

C Houghton v Saunders

Houghton saw the emergence of modern representative actions in New Zealand.[34] It was also the first time a representative action was allowed on an opt-out basis at the first instance. This was an unusual approach as other jurisdictions often only allowed opt-out procedures after a legislative change. In *Houghton,* Associate Judge Christiansen initially made an ex parte order on an opt-out basis, which was subsequently overturned by French J.[35] The opt-in/opt-out issue was not argued on appeal, and the case proceeded using the opt-in procedure to determine the represented group.[36] This highlights the procedural uncertainty around opt-in/opt-out procedures for representative actions.

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[30] *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 404.

[31] At 404.

[32] At 422.

[33] *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC); *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [130].

[34] *Houghton v Saunders* (2008) 19 PRNZ 173 (HC), [2009] NZCCLR 13 (HC).

[35] *Houghton v Saunders* HC Auckland CIV-2008-409-348, 26 February 2008 (Order for Directions); *Houghton v Saunders [Lifting Stay]* (2011) 20 PRNZ 509 (HC).

[36] *Houghton v Saunders* [2020] NZCA 638, BC202063782 at [1].

Houghton was about untrue and misleading statements in the share prospectus and investment statement made by Feltex Carpet Limited. The allegations included a breach of s 9 of the Fair Trading Act 1986 (FTA). The opt-out mechanism would have been appropriate in the circumstances, given the shareholders' interests would not have been adversely affected by an opt-out procedure. The shareholders can easily be identified and contacted and would have the option of "opting out" of the representative action. However, the HCR does not have an express opt-out provision for representative actions.[37] Therefore, the Court said that the power to make such an order would have to be derived from the Court's inherent jurisdiction and/or r 9 "cases not provided for" (now r 1.6 HCR).[38] Rule 1.6 allows the Court to dispose of a case in a practical manner when no form of procedure is prescribed by any Act while keeping in line with the objective of the HCR.

The objective of the HCR is to "…secure the just, speedy and inexpensive determination of any proceeding or interlocutory application.".[39] The utilisation of r 1.6 ("cases not provided for") was likely envisaged for rare procedural issues that could not be foreseen. Therefore, it may be inappropriate to use r 1.6 as a stop-gap measure to justify an opt-out procedure for representative actions. As acknowledged by the Court, it would be too radical of a departure from the existing rules to allow an opt-out procedure.[40] The Court determined that the existing rules only contemplated an opt-in procedure, and legislative change is required to allow for an opt-out procedure to determine the represented group.[41] *Houghton* is now overruled by *Ross*, which has changed the status quo by making both opt-in and opt-out procedures available for representative actions.

D Rules Committee

In 2008, the Rules Committee stated that both opt-in and opt-out procedures should be permitted.[42] However, the Rules Committee envisaged allowing opt-in and opt-out procedures in the context of a statutory class action regime rather than using the representative action rule. Additionally, the procedural requirements for representative actions are unclear, and guidance from the courts has been vague or inconsistent. In some cases, the courts allowed representative proceedings without addressing the opt-out issue

[37] *Houghton*, above n 34, at [160].
[38] At [160]
[39] High Court Rules 2016, r 1.2.
[40] *Houghton*, above n 34, [165]
[41] At [165].
[42] Rules Committee, above n 14, at 7.

or made orders requiring individuals who wanted to be involved in the proceedings to opt-in.[43] However, since *Houghton*, guidance from the Court of Appeal (CA) and Supreme Court (SC) has confirmed that representative actions can utilise opt-in and opt-out procedures.

E Ross v Southern Response Earthquake Services Ltd

1 Background

In *Ross*, the plaintiffs brought a claim against their insurer Southern Response regarding the insurance settlement on their house after the Canterbury earthquakes. The crux of the claim was the plaintiffs settled on less favourable terms due to incomplete information provided by their insurer in a "decision pack". The allegations included breaches of s 9 of the FTA and implied duty of faith in their insurance contract. The Ross' brought a representative claim for a class of around 3000 policyholders that settled in similar circumstances. Southern Response did not oppose the representative claim but did oppose the claim being brought on an opt-out basis stating that opt-in was the usual procedure for such claims. This indicates defendants may prefer opt-in over the opt-out mechanism to determine the represented group.

The opt-out procedure includes all persons who fit within the class's definition regardless of whether their identity or whereabouts is known unless they formally opt-out of the representative claim.[44] In contrast, an opt-in procedure requires a person who fits the definition of the class to take an additional formal step of opting in.[45] Initially, the High Court (HC) granted leave for the Ross' representative claim to be brought on an opt-in basis.[46] An opt-in procedure benefits defendants because group members would have to take active steps to be part of the representative claim. This increases the possibility that the represented group will be smaller as many members may fail to take the required action, decreasing defendants' potential exposure. Further, the number of claimants would be certain, providing more certainty around liability and commercial risk.

[43] Andrew Beck "Opt Out is In: The New Class Action Regime" [2019] NZLJ 356 at 357.

[44] *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288, BC201861833 at [46].

[45] At [46].

[46] At [81].

In *Ross*, it was suggested that an opt-out mechanism would likely include 2,700 class members, while an opt-in mechanism would only have around 1,200 class members.[47] This dramatic fall in class members if an opt-in mechanism is used shows why Southern Response preferred the proceedings to be on an opt-in basis. An opt-in mechanism would have decreased the class members by more than 50 per cent. This would have also significantly reduced Southern Response's potential liability. On appeal, the CA overturned the HC decision and allowed an opt-out mechanism. The SC affirmed the CA decision and provided guiding principles around determining whether a representative claim can be brought on an opt-in or opt-out basis.

2 Court of Appeal

In *Ross*, the CA expressly disagreed with *Houghton* stating that both opt-in and opt-out procedures are permissible for representative actions.[48] Rule 4.24 does not explicitly provide for an opt-in or opt-out procedure.[49] Nevertheless, the CA held that the wording of r 4.24(b), namely "as directed by the court", permitted an opt-out procedure as it allowed proceedings without the consent of all persons.[50] After the CA decision, the Rules Committee was urged to amend the HCR to expressly accommodate representation orders based on an opt-out basis.[51] However, the Committee felt the issue needed to be resolved by the legislature.[52] The CA viewed the making of representative orders as a procedural matter that is a question of case management rather than a jurisdictional issue.[53] So, the intention of the CA in *Ross* was to alter the norm of using opt-in procedures for representative actions.[54]

The CA also acknowledged that an opt-out procedure enhances access to justice.[55] There could be various reasons why group members may fail to take positive action, such as not receiving the relevant notice or an unwillingness to participate.[56] So, courts should refrain

[47] At [47].

[48] *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, BC201961638 at [81].

[49] At [83]

[50] At [81]

[51] Rules Committee *Minutes of meeting held on 18 Match 2019* (Minutes 01/18, Circular 21 of 2019, 11 April 2019) at 5.

[52] At 5.

[53] *Ross v Southern Response Earthquake Services Ltd*, above n 48, at [84].

[54] Andrew Beck "Litigation" [2019] NZLJ 356 at 359.

[55] *Ross v Southern Response Earthquake Services Ltd*, above n 48, at [98].

[56] At [98].

from putting unnecessary hurdles that might deprive those who failed to take active steps to obtain relief.[57] The CA acknowledged that a legislative framework for representative actions would be preferable, but in the interim, the courts will exercise supervisory jurisdiction in relation to representative proceedings brought on an opt-out basis.[58] The impact of the CA decision was clarifying that both opt-in and opt-out procedures were permitted for representative actions. The CA also observed that allowing opt-out procedures would incentivise insurers and other entities dealing with the public to comply with the law, thereby having a deterrent effect and preventing corporate misconduct. This is because an opt-out procedure increases the likelihood that large entities will be held accountable for breaches of obligations to a large number of individuals where individual claims are less likely to be pursued.[59]

Further, the CA said that courts should approach procedural issues with the aim of balancing efficiency and fairness.[60] For the opt-in/opt-out issue, balancing efficiency and fairness requires balancing the legitimate interests of class members and the defendant. The SC noted that the common interest requirement in r 4.24 and the HCR would ensure the opt-out procedure is not unjust to the defendant.[61] The protection of the plaintiffs' interests will be discussed in Part IV. Moreover, since litigation funders fund many class actions, their interests must also be considered. The appeal to the SC considered questions regarding the principles determining whether a representative claim should proceed on an opt-in or opt-out basis.[62]

3 Supreme Court

The SC confirmed there is jurisdiction to conduct representative proceedings on an opt-out basis.[63] Further, an opt-out approach has the benefit of improving access to justice.[64] Moreover, in the absence of a statutory framework, "...r 4.24 should continue to be

[57] At [98].

[58] At [105].

[59] *Ross v Southern Response Earthquake Services Ltd*, above n 48, at [99].

[60] At [106].

[61] *Southern Response Earthquake Services Ltd v Ross*, above n 7, at [41].

[62] *Southern Response Earthquake Services Ltd v Ross* [2019] NZSC 140, BC201963631.

[63] *Southern Response Earthquake Services Ltd v Ross*, above n 7, at [4].

[64] At [40].

interpreted to meet modern requirements".[65] Thus, the key issue on appeal was outlining the principles determining whether an opt-in or opt-out procedure is appropriate.[66]

(a) Interveners views on the opt-out procedure

The SC heard the views of the New Zealand Law Society (NZLS), the New Zealand Bar Association (NZBA), and a litigation funder LPF Group Ltd (LPF). All three interveners support the enactment of a statutory class actions framework, but they cannot agree on how to proceed in the absence of a legislative framework.[67] The NZBA agrees with the CA that access to justice, efficiency and deterrence considerations underpin class actions and support an opt-out procedure.[68] The NZLS also agrees that opt-out procedures are supported by access to justice considerations.[69] The LPF agreed that the court has jurisdiction to manage procedural issues but favoured maintaining the current opt-in approach for practical reasons.[70]

LPF is a litigation funder that funds cases with a strong legal basis and operates on a "no success, no fee" basis.[71] It views New Zealand as a small market with smaller classes.[72] The smaller market and classes mean that the payouts are significantly lower than in larger jurisdictions. LPF's fees usually consist of a percentage of each successful outcome.[73] This means for it to be commercially viable for litigation funders such as LPF to operate in New Zealand, the costs need to be relatively low and outcomes predictable. LPF believes opt-in procedures in New Zealand are more certain and allows it "...to build a book of fully-advised and aware plaintiffs".[74] So, LPF believes opt-out procedures should not be allowed until there is legislative reform.[75] A shift to allowing opt-out procedures will create uncertainty and open the possibility of opportunistic defendants using the uncertainty to add costs and cause delays.[76]

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[65] At [89].
[66] At [5].
[67] At [22].
[68] At [22].
[69] At [22].
[70] At [22].
[71] LPF Group Limited "Litigation Funding in New Zealand" <www.lpfgroup.co.nz>.
[72] *Southern Response Earthquake Services Ltd v Ross,* above n 7, at [22].
[73] LPF Group Limited "Working with us" <www.lpfgroup.co.nz>.
[74] *Southern Response Earthquake Services Ltd v Ross,* above n 7, at [22].
[75] At [22].
[76] At [22].

The most robust case for an opt-out procedure according to the NZLS and NZBA is access to justice.[77] In contrast, the LPF believes the uncertainty around the opt-out procedure mitigates access to justice considerations.[78] In addition, developing a body of case law to provide certainty in the absence of a statutory framework will add to the costs.[79] Practically, this might mean that litigation funders will be more hesitant to take on cases on an opt-out basis as the additional costs will decrease profitability. This is because cases proceeding on an opt-out basis might have more interlocutory proceedings due to the current uncertainty around the procedural requirements. However, the procedural uncertainty around the opt-out procedure is likely a short-term issue and should be resolved after a few significant cases.

(b) Principles for opt-in/opt-out procedure

The SC outlined four guiding principles to determine whether an opt-in or opt-out procedure was appropriate. Firstly, the court should adopt the procedure sought by the applicant unless there is a good reason not to.[80] The SC clarifies that there is no preference for an opt-in or opt-out procedure under r 4.24. Instead, the Court will consider all relevant factors to meet the permissible objectives of the representative action on a case-by-case basis.[81] Secondly, an opt-in approach should be favoured if there is a real prospect that some class members may be adversely affected by the proceeding.[82] For example, cases that have a counterclaim or the potential for one to emerge.[83] Thirdly, class size is relevant but not determinative.[84] An opt-in approach may be preferable for small classes.[85] A small class is where the number of class members is small relative to other claims, and there is a "natural community of interest".[86] It would likely be easier to contact class members in such classes favouring an opt-in procedure.[87]

[77] At [23].
[78] At [23].
[79] At [23].
[80] At [95].
[81] At [95].
[82] At [97].
[83] At [97].
[84] At [98].
[85] At [98].
[86] At [98].
[87] At [98].

Lastly, the SC stated that applications under r 4.24 should have proposed conditions to the court's supervision of settlement and discontinuance.[88] The reasoning being that settlement or discontinuance may be unfair to absent plaintiffs in an opt-out procedure or certain plaintiffs under each option.[89] The proposed conditions would vary between applications. So, the rights of absent plaintiffs may be better protected by articulating courts' supervisory obligations in a statutory framework. For example, s 33V of the Federal Court Act 1976 (Cth) in Australia specifically deals with settlement and discontinuance in representative proceedings. The rights of absent plaintiffs are further discussed in Part IV.

Furthermore, it is common for representative actions to have two stages. The first stage would deal with the common issues, and if claims are unsuccessful, the proceedings end for all class members. Stage two will only commence if claims are successful and deal with questions of relief. The SC said that departure from an opt-out procedure at stage two is permissible if it lessens the benefits of a representative proceeding.[90] This was the approach taken in *Ross* with the SC noting that claimants would need to effectively "opt-in" to establish their individual claims in stage two.[91] Therefore, the opt-in and opt-out approach is not prescriptive and can change at different stages of the representative proceedings. Moreover, there may be cases where neither opt-in nor opt-out will be appropriate. In such cases, a universal approach may be appropriate where the relief sought is declaratory or injunctive, and the outcome would affect all class members identically.[92]

IV Statutory Class Action Regime

A Opt-Out-Only Model

1 Australia

(a) Background and access to justice

Class actions have been available in Australia since 1992 with the amendments to Part IVA of the Federal Court Act 1976 (Cth). The enactment of the federal statutory class action

[88] At [101].
[89] At [101].
[90] At [99].
[91] At [10].
[92] At [100].

regime was followed by some states enacting similar legislative frameworks. Victoria[93], New South Wales[94] and Queensland[95] have enacted statutory frameworks while Western Australia has now introduced the Civil Procedure (Representative Proceedings) Bill 2019 (WA) and other states are likely to follow suit. This highlights the trend of moving away from a representative action rule towards a statutory class action regime. The above jurisdictions and the United States and Canada replaced a representative action rule modelled on the English rule with a statutory class action regime. These jurisdictions also made the policy decision to enact an opt-out-only statutory class action regime.

The underlying purpose of Australia's federal statutory class action regime is to enhance access to justice.[96] Access to justice requires a person who causes minor loss to many people to be held liable the same as a person who causes the same amount of loss to a small number of people. Further, there is no policy justification for allowing a person who causes minor loss to many people to escape liability, whereas a person who causes the same amount of loss to a small number of people remains liable to pay for the harm.[97]An opt-out mechanism is seen as improving access to justice, which was also discussed in *Ross* (Part III). This access to justice consideration was the principal reason Australia adopted an opt-out-only statutory federal class action regime.

(b) Part IVA (33C, 33H and 33N)

Part IVA allows representative actions to proceed as long as the conditions in ss 33C (commencement of proceeding) and 33H (originating process) are met. Section 33H requires representative proceeding filings to contain a description of "the group members to whom the proceeding relates", but it is not necessary to name or specify the number of group members when describing or identifying group members. This provision clearly outlines the minimum requirements for defining the class and avoids the uncertainty around whether an opt-in or opt-out mechanism is appropriate. Further, for practical reasons, group members will likely need to "opt in" at a later stage to obtain relief. This counters any argument that an opt-out-only model adversely affects defendants if the number and

[93] Supreme Court Act 1986 (Vic), pt 4A (effect from 1 January 2000).
[94] Civil Procedure Act 2005 (NSW), pt 10 (effect from 4 March 2011).
[95] Civil Proceedings Act 2011 (Qld), pt 13A (effect from 1 March 2017).
[96] Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, October 1998) at [107].
[97] Kate Tokeley "Access to Justice" in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds) *Handbook of Research on International Consumer Law* (2nd ed, Edward Elgar Publishing, Massachusetts, 2018) 413 at 415.

identity of class members are unclear, as it would prevent defendants from managing commercial risk.

Moreover, s 33N acts as a control mechanism, empowering courts to set aside a representative proceeding when "it is satisfied that it is in the interest of justice to do so". The provision is broad enough to give courts the discretion to determine if a representative proceeding should no longer continue. Further, it mitigates the risk that a representative action will proceed in a manner that is detrimental to class members, and to some extent, even the defendant. The key is balancing the interests of the class members as well as the defendant. Section 33N is geared more towards protecting the interests of class members rather than the defendant. This is likely due to the power imbalance that exists between the defendant and class members. Typically, defendants in class actions are large corporations, while class members tend to be ordinary people. However, given the increasing prevalence of litigation funders who assist with litigation strategy, it is arguable that there is now less of a power balance. So, it might be better if the control mechanism in s 33N protected the interests of both parties.

Section 33C is more prescriptive while also being broader than r 4.24. Section 33C states that representative proceedings require "7 or more persons to have claims against the same person", the claims must arise from "same, similar or related circumstances", and must "give rise to a substantial common issue of law or fact".[98] The seven or more persons prescribe the minimum number of plaintiffs for a representative action. There is no equivalent minimum number of plaintiffs in r 4.24. Nevertheless, the courts likely enforced a de facto minimum number of plaintiffs, but the number is unclear. On the other hand, "same, similar or related circumstances" seems wider than the "same interest" in r 4.24. This might be to cast a wide net of class members in line with the access to justice considerations in adopting an opt-out-only model. However, it is tempered by the "substantial common issue" requirement, which would limit and/or identify class members.

Furthermore, it is common to have a two-staged approach to representative actions with relief only being considered in stage two. This is because of the complexity of determining individual claims, particularly in cases such as *Ross,* where each policyholder would have different payouts based on their individual insurance contracts. At times, the complexity of relief claims can delay representative proceedings due to considerations such as whether a representative proceeding is even appropriate given the complexity of determining

[98] Federal Court Act 1976 (Cth), Pt IVA, 33C(1).

individual claims. The benefit of 33C is that it clarifies that representative proceedings can be commenced regardless of whether relief is sought and even if "claims for damage would require individual assessment".[99] The comparison between s 33C and r 4.24 highlights the benefits of a statutory framework. That is, the ability to be more prescriptive and provide more procedural certainty.

(c) Australia's statutory framework

This move to an opt-out-only model is a significant change in the law. This is because the old representative action rule modelled on the English rule allows for both opt-in and opt-out mechanisms. However, in practice, the courts may favour one procedure over the other. For example, in New Zealand, until *Ross*, the courts only allowed an opt-in procedure based on the interpretation of r 4.24 and the lack of a legislative framework supporting an opt-out procedure. So, the main benefit of a statutory class action regime is procedural certainty. However, the Australian experience shows that a statutory framework does not guarantee procedural certainty as statutes are subject to interpretation. For example, the impact of the *Multiplex Funds Management Ltd*[100] decision is that closed classes (opt-in) are also permitted based on the wording of s 33C. Namely, the inclusion of "some" in s 33C(1), which states "…a proceeding may be commenced by one or more persons as representing *some* or all of them" (emphasis added).

The position of the Australian Law Reform Commission is that the benefits of closed classes need to be balanced against the broader objectives of the class action regime, effectively favouring an opt-out-only model.[101] The impact of the *Multiplex Funds Management Ltd* decision is that both opt-in and opt-out mechanisms are now permissible. Still, the availability of the opt-in procedure is limited. Further, in Australia, the majority of class actions resolve by settlement. Around 60 per cent of class actions filed in the Federal Court are resolved by a judicially approved settlement, with only 4.2 per cent of class actions resolved following a trial.[102] The high settlement rates are not a significant issue as one of the key goals of representative proceedings is compensating plaintiffs. Moreover, there were also other concerns in Australia before the enactment of a statutory class actions regime. The concerns included the fear of a rise in litigious culture and

[99] Section 33C(2)

[100] *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (Multiplex)* (2007) 164 FCR 275.

[101] Australian Law Reform Commission, above n 23, at [4.12].

[102] At [3.44].

creating an entrepreneurial class of lawyers promoting class actions.[103] These fears are legitimate but have largely not materialised.[104]

2 Opt-Out-Only Model and Choice

The controversial aspect of an opt-out-only model is that class actions can proceed without the consent of all class members.[105] Arguably, this violates the principle of freedom of choice and is not the norm in litigation.[106] However, the proponents of an opt-out model emphasise improving access to justice, mainly when individual claims are non-recoverable due to cost and other barriers. Furthermore, commencing proceedings on an opt-out basis without all class members' consent preserves rather than defeats their rights.[107] The opt-out notice requirements protect the interests of class members.[108] It allows class members to determine the proper course for their claims. That is, being part of the class action or "opting out" to pursue their claim separately. However, saying that the opt-out notice requirements preserve class members' rights is less persuasive for "absent plaintiffs". Absent plaintiffs are class members who have not received the opt-out notice. These absent plaintiffs do not have the choice of "opting out" as they never received the notice.

Looking more closely, the rights of absent plaintiffs are not a significant issue because other court rules will protect their interests, such as the option of consolidating or staying the proceedings.[109] However, arguably, taking away choice from absent plaintiffs can violate "rights to justice" as contained in s 27(1) of the New Zealand Bill of Rights Act 1990. Observance of natural justice principles requires every person to have the right to "…make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."[110] Natural justice concerns and possible violation of s 27(1) were also raised in *Ross.* The SC said that natural justice concerns are satisfied by ensuring adequate notice to class members that explain their right to opt out.[111] By doing so, the SC adopted the approach taken by the United States Supreme Court in *Phillips*

[103] At [2.5].

[104] At [2.6].

[105] Vince Morabito "Class Actions: The Right to Opt out under Part IVA of the Federal Court of Australia Act 1976 (Cth)" (1994) 19 MULR 615 at 620.

[106] At 620.

[107] Australian Law Reform Commission, above n 96, at [110].

[108] At [110].

[109] At [112].

[110] New Zealand Bill of Rights Act 1990, s 27(1).

[111] *Southern Response Earthquake Services Ltd v Ross*, above n 7, at [56].

Petroleum Co, where the Court rejected the argument that due process requires class members to actively opt-in.[112]

A further distinction can be made for absent plaintiffs — those with recoverable individual claims and those with non-recoverable individual claims. A recoverable individual claim is where it is economically viable to commence proceedings other than through a representative proceeding. In contrast, a non-recoverable individual claim is where it is economically unviable to commence proceedings other than a representative proceeding. Natural justice considerations are more pertinent for recoverable individual claims. That is because if a claim is recoverable, commencing a class action on an opt-out basis would be pre-empting the absent plaintiff's choice by including them in the class action.[113] However, as discussed, preserving the rights of absent plaintiffs are not a significant concern as other procedural rules likely protect their rights. On balance, the lack of consent in the opt-out mechanism is not problematic as adequate opt-out notice requirements address natural justice concerns.

B Procedural Certainty

A statutory framework does not guarantee procedural certainty. In Australia, the federal class action regime in practice operates very differently from what would be expected from the reading of the provisions in Part IVA of the Federal Court Act 1976 (Cth).[114] The main reason for this divergence is the courts using the "catch-all" power contained in s 33ZF of Part IVA to develop mechanisms, devices and practices not included in the legislative framework.[115] Section 33ZF is worded quite broadly and allows the court to "...make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding". New Zealand should not include a similar catch-all provision in its statutory class action regime to avoid a mismatch between the legislative framework and practice.

A catch-all provision may empower the courts, like in Australia, to develop additional procedural rules. This will add to the uncertainty and defeat the purpose of a statutory class action regime. The purpose of a legislative framework is to providing certainty, especially regarding procedural rules. Furthermore, the courts do not need a catch-all provision to

[112] *Phillips Petroleum Co v Shutts* 472 US 797 (1985) at 811-813.

[113] Australian Law Reform Commission, above n 96, at [111].

[114] Vince Morabito "Lessons from Australia on Class Action Reform in New Zealand" (2018) 24 NZBLQ 178 at 210.

[115] At 210.

create new procedural rules. As discussed in part III, the courts can create new procedural rules when there is no existing procedure. This power is derived from the court's inherent jurisdiction and/or r 1.6 HCR "cases not provided for".

C Proposed Statutory Framework for New Zealand

1 Opt-in/opt-out

In New Zealand, a statutory class actions regime should be closely modelled on Australia's federal statutory class action regime. However, unlike Australia, it should not be an opt-out-only model. Instead, the legislative framework should expressly allow both opt-in and opt-out procedures. The statutory framework can also incorporate the four principles for determining whether an opt-in or opt-out procedure is appropriate, as outlined by the SC in *Ross*. However, there should be a presumption favouring an opt-out mechanism to improve access to justice. We cannot wholly exclude opt-in procedures as it has been the preferred approach in New Zealand for years. Further, the SC has confirmed that both opt-in and opt-out procedures are allowable under r 4.24. The ultimate goal of the legislative framework should be to codify the current practise while providing certainty in problematic areas such as the utilisation of opt-in/opt-out procedures. Allowing both opt-in and opt-out procedures is also supported by the Rules Committee.

2 Lessons from Australia

Section 33H outlines the minimum requirements for describing the class and is worded broadly supporting an opt-out procedure. Despite the provision being broad, nothing prevents classes from being narrowly construed either through the claim being drafted narrowly or the use of opt-in devices, such as the requirement to sign a solicitor's cost agreement with the lead plaintiff.[116] A control mechanism like s 33N is needed to avoid unfairness in representative proceedings and empowering the courts to intervene when necessary. Section 33N is geared towards protecting plaintiffs' interests, but the New Zealand provision should protect the interest of both parties. This is because the increasing prevalence of litigation funders means that there is less of a power imbalance.

Further, the New Zealand equivalent to s 33C should expressly provide for an opt-in procedure in limited circumstances. That is, to avoid an opt-in procedure being read into

[116] Phi Finney McDonald *Submission 34* in Australian Law Reform Commission, above n 23, at [4.17]

the provision like in Australia. Further, a catch-all provision such as 33ZF should be avoided to discourage the courts from creating new procedural rules resulting in a mismatch between the legislative framework and practice. The courts already have inherent jurisdiction to develop procedural rules, and a catch-all provision is unnecessary. Overall, a statutory framework modelled on Australia's federal statutory class action regime will be beneficial as it will provide more procedural certainty. However, New Zealand's legislative framework should be more prescriptive than Australia's to avoid a mismatch between practice and the statutory framework.

V Conclusion

The representative action rule is no longer fit-for-purpose and should be superseded by a legislative framework modelled on Australia's federal class action regime. New Zealand has seen an increase in complex representative actions, particularly with the introduction of litigation funding. As a result, the courts have developed r 4.24 to have similar features to overseas class action regimes. However, the simplicity of r 4.24 has caused issues with the interpretation of the rule resulting in procedural uncertainty. This is highlighted by the issues around whether r 4.24 permits both opt-in and opt-out mechanisms. Initially, the courts only allowed representative actions to proceed on an opt-in basis. However, the SC in *Ross* has now confirmed that both opt-in and opt-out procedures are permitted under r 4.24, emphasising that an opt-out approach improves access to justice. The SC also articulated principles for determining whether an opt-in or opt-out approach is appropriate.

The four principles for determining whether an opt-in or opt-out procedure is appropriate as outlined by the SC are:

(1) The court should adopt the procedure sought by the applicant unless there is a good reason not to.
(2) An opt-in approach should be favoured if there is a real prospect that some class members may be adversely affected by the proceeding.
(3) Class size is relevant but not determinative.
(4) Applications under r 4.24 should have proposed conditions to the court's supervision of settlement and discontinuance.

New Zealand's statutory framework should be more prescriptive than Australia's and allow both opt-in and opt-out mechanisms with a presumption favouring an opt-out approach to improve access to justice. The aim of the legislative framework should be to codify the

current practise while providing certainty in problematic areas such as the utilisation of opt-in/opt-out procedures. Moreover, a control mechanism such as s 33N is needed to empower courts to intervene when representative proceedings become unfair. However, unlike s 33N, New Zealand's control mechanism should protect the interests of both parties. Furthermore, New Zealand should avoid a catch-all provision such as 33F to minimise the risk of a mismatch between the legislative framework and practice.

In addition, a common theme of the cases considered were claims for breaches of s 9 of the FTA. This shows that consumer actions are commonly class actions, and an opt-out approach is preferable in such cases as it enhances access to justice and deters corporate misconduct.