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ICNZ submission on IP48 Class Actions and Litigation Funding: Supplementary Issues Paper | Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa

Thank you for the opportunity to submit on the *Class Actions and Litigation Funding: Supplementary Issues Paper* (Issues Paper), which was released by Te Aka Matua o te Ture on 30 September 2021.

The Insurance Council of New Zealand/Te Kāhui Inihua o Aotearoa (**ICNZ**) represents general insurers and reinsurers that insure about 95 percent of the Aotearoa New Zealand general insurance market, including about a trillion dollars' worth of Aotearoa New Zealand property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents, travel and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability, business interruption, professional indemnity, cyber, commercial property and directors and officers insurance).

Please contact Jane Brown (jane@icnz.org.nz) if you have any questions on our submission or require further information.

Submission

Our responses to the questions posed in the Issues Paper are set out below.

Chapter 1: Commencement and certification of a class action

Q1. Do you agree with our draft commencement provisions? If not, how should they be amended?

ICNZ agrees that the draft commencement provisions are appropriate. In particular, we agree that there should be at least one representative plaintiff for every defendant as this will give the defendant greater certainty about the case against them. However, we agree that it would be overly burdensome to require class members or representative plaintiffs to have a claim against *every* defendant.

Q2. Do you agree with our draft certification provision? If not, how should it be amended?

ICNZ is concerned to note that the draft certification provision allows for certification of opt-out class action proceedings. In addition to the matters raised in our previous submission,[1] opt-out proceedings create a number of complexities that could be avoided by confining class action proceedings to opt-in only. Although the question of opt-in versus opt-out is not raised in this Issues Paper, we consider that it is important to reiterate our firm opposition to opt-out proceedings.

Clause 4(2) provides a list of factors that a court "may consider" when assessing the suitability of a representative plaintiff. ICNZ is of the view that the suitability of the representative plaintiff is of such importance that the language used in this clause should be stronger. It is also our view that the court should consider all of the matters referred to in clause 4(2) on each occasion that it assesses suitability. For that reason, we believe that the words "*may* consider" should be substituted for "*shall* consider". Additionally, we believe that the court should consider whether the representative plaintiff has the ability to pay costs in the event that the defendant is successful. This might include consideration of whether there is any funding arrangement.

As with clause 4(2), we believe that the wording in clause 4(3) should be amended to reflect the importance of carrying out a full assessment of whether a class action proceeding is an appropriate procedure for the effective resolution of the claims of the relevant class members in every instance. We therefore suggest that the wording in this clause also be amended from "*may* consider" to "*shall* consider".

Q3. When should sub-classes be allowed? For example:

- ***a. Where there is a conflict of interest among class members?***
- ***b. Where there is a common issue across all class members, as well as additional issues only shared by a sub-group?***
- ***c. Where there are sub-groups with related issues but no common issue applying to all claims?***

ICNZ is concerned that allowing numerous sub-classes would increase a defendant's legal costs to an unreasonable extent, unless there is a common issue across all class members. We believe that the issues must be closely connected, rather than "related" and therefore agree that sub-classes should be allowed in the situations in a. and b. above, but not c. We also agree with the comment in paragraph 1.108 of the Issues Paper that the benefits of class actions are more able to be realised where there is a common issue across all of the claims.

In addition to the above point, ICNZ is of the view that the court should only create a sub-class if the issue is capable of passing the certification test as per clause 4(3).

Q4. Do you agree with our list of matters that should be included in the court's certification order?

ICNZ agrees that the list of matters that must be included in the certification order set out in paragraph 1.109 of the Issues Paper are appropriate.

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1 https://www.icnz.org.nz/fileadmin/user_upload/ICNZ_Submission_on_Class_Actions__Litigation_Funding_Issues_Paper_110321.pdf

Q5. Do you agree that the limitation period applying to all proposed class members should be suspended when a class action is commenced?

ICNZ agrees that the limitation period should be suspended when a class action is commenced as this will provide certainty for the parties involved and is the fairest approach for class members, particularly if the class action is ultimately not certified.

Q6. Do you agree with the events we proposed should start the limitation period applying to a class member running again?

ICNZ agrees with Te Aka Matua o te Ture's position that it is preferable to provide a detailed list of circumstances that would start a limitation period running again and believes that the circumstances listed in paragraph 1.122 of the Issues Paper are appropriate.

Chapter 2: Competing class actions

Q7. Do you agree competing class actions should be defined as two or more class actions with respect to the same or substantially similar issues filed against the same defendant by different representative plaintiffs? If not, how should they be defined?

ICNZ agrees that the wide definition of competing class actions proposed by Te Aka Matua o te Ture in paragraph 2.21 of the Issues Paper is appropriate. A definition such as this will ensure that any competing class actions are able to be appropriately managed by the court.

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

ICNZ agrees that competing class actions should be filed within 90 days of the first class action being filed and that allowing an action to be filed outside this timeframe, with the leave of the court, allows sufficient flexibility to ensure that the process is fair for all parties.

In addition to the suggestion in paragraph 2.27 of the Issues Paper about publishing information on class actions on the Ngā Kōti o Aotearoa / Courts of New Zealand website, it would also be useful to publish this information in publications such as *LawTalk* or *LawPoints* which reach a wide group of lawyers.

Q9. When should the court determine the issue of competing class actions?

- ***a. Prior to the certification.***
- ***b. At the same time as certification.***
- ***c. The court should have discretion to determine the issue of competing class actions prior to certification or at certification.***

ICNZ believes that option (b) is preferable to the other options, particularly as, of all the suggestions, this approach is most likely to keep legal costs low and will avoid delay.

While it might be useful for the court to have the discretion to decide when to determine the issue, ICNZ agrees that this discretion may result in the need for more than one pre-certification application, which will only risk increasing costs and the chance of delay.

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

- ***a. Should a court be required to select one class action to proceed and stay the other proceedings?***
- ***b. Or should the court have a broader range of powers available to it?***

ICNZ is of the view that a court should be required to select one class action to proceed and stay the other proceedings (option a). Competing class actions taking different approaches would be an inefficient use of the court's time and resources and would increase legal costs for defendants. We believe that the onus should be on the class to reach an agreement on the best way to approach the proceedings. This should not occur at the expense of the defendant or be permitted to cause delay.

Q11. When a court considers how competing class actions should be managed, should it consider which approach would best allow class member claims to be resolved in a just and efficient way? If not, what test do you favour?

ICNZ agrees that a court should consider which of the competing approaches would best allow the class members' claims to be resolved in a just and efficient way.

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

- ***a. How each case is formulated?***
- ***b. The preferences of potential class members?***
- ***c. Litigation funding arrangements?***
- ***d. Legal representation?***

ICNZ believes that funding arrangements are of paramount importance. In particular:

- Whether a funder can provide security for costs and/or meet an adverse costs award; and
- Whether the funder's commission is fair, just and reasonable.

ICNZ agrees that it would not be in the interests of justice to place undue weight on the action that was filed first. Broadly, ICNZ considers that it is more important for the plaintiffs to take the time to properly formulate their case to avoid unnecessary legal costs and delay later in the proceedings.

Q13. Do you have any concerns about defendants gaining a tactical advantage from a competing class action hearing? If so, how should they be managed?

ICNZ believes that defendants must be allowed to be present at any hearing in respect of competing class actions. If the plaintiffs consider that there are certain confined matters that should remain confidential for genuine tactical reasons, it is open to them to ask the court for an order that the defendant be absent from the courtroom for that discussion. Should such a discretion be available to the court, we believe that it should be exercised sparingly.

Chapter 3: Relationships with class members

Q14. What obligations should the representative plaintiff have? For example:

- ***a. Acting in the best interests of the class.***
- ***b. Ensuring the case is properly prosecuted.***
- ***c. Being liable for adverse costs (or ensuring an indemnity is in place).***

d. Making decisions on any settlement, including applying for court approval of settlement.

ICNZ considers that it is vitally important that the representative plaintiff act in the best interests of the class and that they understand the potential for conflict between that obligation and the interests of the litigation funder. We also believe that the court should ensure that the funder has provided an indemnity for costs.

Q15. Should the representative plaintiff's obligations be set out in a class actions statute?

While ICNZ agrees that the representative plaintiff's obligations exist independently of any statute, it is likely to be helpful for the representative plaintiff to have the ability to find all of their obligations in one place.

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

ICNZ agrees that a litigation committee could provide a useful framework to support the representative plaintiff but is unlikely to be appropriate in every instance. A litigation committee will not be party to the proceeding or a formal representative of the class members. As such, it will be important for the representative plaintiff to understand that they will retain their obligations as class representative and that the litigation committee is simply there to provide assistance regarding the requirements of their role.

Q17. Do you agree that the representative plaintiff's lawyer should be regarded as the lawyer for the class after certifications?

a. If so, what duties should the lawyer owe to the class?

b. If not, what relationship should exist between the representative plaintiff's lawyer and the class?

ICNZ considers that the scope of the solicitor-client relationship is an inherent problem with opt-out proceedings and is one of the many factors mitigating against that process. However, as the draft provisions allow for opt-out proceedings, ICNZ considers that it would make sense for the solicitor for the representative plaintiff to owe duties to the class as a whole. It would be impossible for a lawyer to ensure that they fulfil their duties to each individual class member where some of those class members are yet to be identified. Creating a duty to the class as a whole will protect plaintiffs' interests and can be codified in the existing Rules of Conduct and Client Care for Lawyers.

Q18. Do you agree communications between the defendant's lawyer and class members should be directed to the representative plaintiff's lawyer after certification? If not, how should the defendant's lawyer communicate with class members?

ICNZ believes that it would be most appropriate for the defendant's lawyer to communicate with the representative plaintiff's lawyer post-certification. However, given the complexities created by opt-out proceedings, ICNZ is of the view that it would be preferable for the court to make directions in relation to such contact at certification, taking into account the arrangements of the particular class action, rather than having a blanket rule about communication that applies in all cases.

Q19. Do you agree the court should review defendant communications with class members about individual settlements after certification? If not, what, if any, defendant communications with class members should require court review?

ICNZ believes that it would be most appropriate for this issue to be dealt with at certification, depending on the circumstances of the case and whether the claim is to be opt-in or opt-out. ICNZ would not want the review of such communications to become an onerous or time-consuming process, as this would frustrate the purpose of the regime to provide an efficient and cost-effective process for the resolution of disputes.

Chapter 4: During a class action

Q20. Do you agree with our list of events that should require notice to class members?

ICNZ agrees that providing class members with adequate notice of events in the class action is an important way of ensuring that their interests are protected. We therefore agree that the list of events in paragraph 4.5 should require notice to class members.

Q21. Should the court have the power to order the defendant to:

a. Disclose the names and contact details of potential class members to the representative plaintiff?

b. Assist with giving notice directly to class members?

ICNZ does not believe that the court should have the power to order the defendant to disclose names and contact details of potential class members for the following reasons:

- Disclosure of a customer's personal information to a third party representative plaintiff is not one of the reasons for which customers are informed that their personal information is collected. As a result, the disclosure of such information would likely be in breach of Information Privacy Principle 10 of the Privacy Act 2020 and would not fall neatly within the exception at (1)(e)(iv), as such disclosure would not be "*necessary for the conduct* of proceedings".
- In order to disclose customers' personal information, some, if not all of ICNZ's members would be required to amend disclosure statements on all policies to reflect the possibility that they might be required to disclose information to a representative plaintiff, should an order be made. Such disclosure has the potential to negatively impact the insurer-customer relationship. This will also be a costly exercise for insurers if they had to updated hard copy documentation.
- The identity of an insurer's customers is commercially sensitive information. ICNZ believes that there are other effective ways for a representative plaintiff to contact a potential class that would not impact on an insurer's obligations to their customers and their commercially sensitive information.

However, ICNZ is supportive of option B and insurers would be prepared to assist the court in giving notice directly to class members, but would suggest that the exercise of this power be subject to submissions at the certification stage.

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

ICNZ agrees with the proposed requirements for an opt-in/opt-out notice in paragraph 2.20 of the Issues Paper. We would also suggest that the notice be required to disclose the identity of the litigation funder (if any). We note that 4.20(h) suggests that the court may direct any other information be included that they consider appropriate, which could include directions about a litigation funder, however, we believe that this requirement is of such importance that it should be expressly included.

Q23. Do you agree that the High Court Rules and the court's inherent jurisdiction are adequate to ensure the efficient case management of class actions? If not, what specific provisions are needed? For example:

- ***a. A general power for the court to make any orders necessary in a class action?***
- ***b. Specific provisions for class actions case management conferences?***
- ***c. Restrictions on filing interlocutory applications in class actions or procedures for dealing with interlocutory applications in an expedited way?***
- ***d. Automatic dismissal of a class action proceeding that is not progressed within a certain timeframe?***

ICNZ's preference would be for there to be specific provision made for the case management of class actions, rather than relying on the court's inherent jurisdiction. This would provide the parties with some certainty around how they might expect the case to operate. ICNZ agrees that the provisions in question 23 above would all be relevant. In relation to point (c), we believe that it would expedite interlocutory applications to decide them on the papers, unless the interlocutory issue is sufficiently complex to justify oral hearing. ICNZ considers that parties should always try to confer and agree matters so as to avoid unnecessary interlocutory applications. A failure to confer could be dealt with by way of a costs order in the usual way.

In relation to point (d), ICNZ submits that it would be fair and reasonable for a class action proceeding that has not been progressed within 6 months, to be automatically dismissed. This would prompt the representative plaintiff to stay in contact with both the defendant and the court to keep them updated as to why there is delay and what could be done by the parties to progress the matter. While case management conferences certainly touch on the progress of proceedings, they are often rescheduled several times over a year without substantive progress. This is unacceptable for both the class members and the defendant(s), given the potential size and extent of the defendant's liability and the consequent financial impact on its business.

Q24. Do you agree that:

- ***a. There should be a presumption in favour of staged hearings in class actions?***
- ***b. The court should have flexibility as to which issues are determined at stage one and stage two hearings?***

Our comments on the two proposals are set out below:

a. The experience for some insurers in the Canterbury Earthquakes Insurance Tribunal is that staged hearings have the effect of increasing the parties' legal costs without any corresponding increase in efficiency. However, we acknowledge that there may be some circumstances where staged hearings are desirable for both parties. On that basis, the representative plaintiff should be permitted to make an application to overcome the presumption of a single hearing as per High Court Rule 10.15.
b. Where the representative plaintiff overcomes the presumption in favour of a single hearing, ICNZ agrees that the court should then have the flexibility to makes orders as to which issues should be determined at each hearing.

Q25. How can individual issues in a class action be determined in an efficient way? For example, should the court have the power to:

- ***a. Appoint an expert to enquire into individual issues.***
- ***b. Order individual issues to be determined through non-judicial process, where the parties agree to that.***

c. Give directions as to the form or way in which evidence on individual issues may be given.

ICNZ agrees that each of the above powers could be useful depending on the individual issues in the class action. These proposals may have the effect of streamlining a process that has the potential to be arduous and costly.

Q26. Are current rules for discovery and information provision adequate for class actions or are specific rules required? For example:

- ***a. Should there be a specific rule permitting discovery by class members?***
- ***b. Should the defendant be entitled to any information about class member claims such as a list of class members who have opted in or the number of class members who have opted out?***

In relation to the above examples:

a. ICNZ agrees that there is no real need for a specific rule permitting discovery by class members, as the current High Court Rules already contain provision for non-party discovery.

b. ICNZ strongly supports the proposal for the representative plaintiff to keep a register of class members who have opted in or out, and to provide a copy of that list to the defendant where requested. It is fundamental to the administration of justice that the defendant knows the size of the claim against it. This information would also help to inform settlement considerations.

Q27. Do you support:

- ***a. The court having an express power to make common fund orders; and/or***
- ***b. The court having an express power to make funding equalisation orders.***

ICNZ considers that it is important for the court to have oversight of funder commission to ensure that class members are treated fairly and receive a reasonable proportion of any settlement. For that reason, ICNZ supports the use of common fund orders.

Q28. If common fund orders are available, when in the proceeding should they be made?

- ***a. At any early stage of the proceeding, with the rate set at this stage.***
- ***b. At any early stage in the proceeding, with the court providing a provisional or maximum rate at this stage and setting the final rate at a later stage.***
- ***c. After the common issues are determined.***
- ***d. At a late stage of proceedings, such as at settlement or before damages are distributed.***
- ***e. The court should have discretion in an individual case.***

ICNZ agrees that making a common fund order at an early stage will assist in providing potential class members with all of the information they need in order to decide whether to opt in or out. It would also assist the defendant in assessing their potential costs exposure. However, ICNZ also recognises the disadvantages associated with attempting to set a fair rate early in the proceedings. For that reason, ICNZ favours option b., which would allow for the setting of a provisional rate at an early stage and then finalising the rate at a later date. Under this option, we believe that the court should be provided discretion to decide the appropriate stage at which the provisional and final rates should be set.

Chapter 5: Judgment, damages and appeals

Q29. Do you agree with our draft provision on the binding effect of a class actions judgment? If not, how should it be amended?

ICNZ agrees that a judgment on a common issue should bind every class member and believes that the drafting of clause 5(1) is appropriate. We also agree that judgment on a common issue should not bind a person who was eligible to opt in but did not do so (clause 5(2)(a)), as they may not have been aware of the proceeding. However, ICNZ considers that judgment on a common issue should be binding on a person who has opted out of the proceeding (unless they have taken their own proceedings). That person would have been aware of the proceeding (in order to opt out) and had an opportunity to have their claim determined to the extent that it is represented by the common issue.

ICNZ does not consider that a judgment should be binding on a person with a claim that is different to the common issue and who has opted out. Ideally, the situation will be avoided where an insurer or its insured are subject to multiple proceedings in respect of the same issues.

Th effect on a potential plaintiff who opts out of their right to proceed against the same defendant in respect of the same common issues should be clearly set out in the opt-out notice.

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

ICNZ would prefer that there be a presumption in favour of assessing damages on an individual basis, with plaintiffs able to apply for aggregate damages in certain cases. However, we agree that aggregate damages will be appropriate in some cases, such as opt-out cases where it would otherwise be difficult to achieve finality.

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

ICNZ agrees with the sentiment in 5.44 of the Issues Paper, that cy-près damages should be available, but only where direct compensation of class members is not feasible. We believe that there should be a strong preference towards compensating the class members themselves, where possible.

Q32. Do you agree with our draft provisions on monetary relief? If not, how should they be amended?

ICNZ agrees with the drafting of clause 12. However, in relation to clause 11(2) we believe that a presumption in favour of a plaintiff establishing its losses in the usual way would be preferable. We recognise however, that this presumption would be difficult to apply in the case of opt-out proceedings due to the fact that all class members may not be identifiable.

Q33. Do you agree that parties to a class action proceeding should be able to appeal:

a. A decision on certification as of right?

b. A decision on settlement approval with leave of the High Court?

ICNZ agrees that appeals should be permitted in both of the above circumstances, as both decisions will have a significant impact for the parties.

Q34. Do you agree that class members should be able to appeal a substantive judgment on the common issues with leave of the High Court?

ICNZ agrees that class members should be able to appeal a substantive judgment on the common issues with leave of the High Court. This provides an avenue for appeal where the representative

plaintiff does not do so, but also ensures that the appeal is of a suitable threshold and taken for a legitimate reason.

Q35. Do you think there are any other decisions in a class action that class members should be able to appeal, with or without leave?

We have not identified any other decisions that we believe class members should be able to appeal and agree that class members should not be able to appeal a court's decision to approve a settlement due to the delay it would create.

Chapter 6: Settlement

Q36. Should the court be required to approve class action settlements in both opt-in and opt-out proceedings?

ICNZ consider that court approval for class action settlements should be required for both opt-in and opt-out proceedings. Both categories of proceeding carry the risk of conflict between class members and the litigation funder. Furthermore, the power imbalance between a class member and a funder is such that the court should play a role in protecting the interests of class members, regardless of whether the proceeding is opt-in or opt-out.

Q37. Should the court be required to approve the discontinuance of a class action?

As the decision to discontinue proceedings will affect all class members, we agree that court approval should be required to discontinue a class action.

Q38. Do you agree with our list of the information that should be provided in support of an application to approve a class action settlement?

ICNZ agrees that the list of information in paragraph 6.17 is appropriate for an application to approve a class action settlement. We also consider it important that the eventual amendment to the High Court Rules makes it clear that the primary responsibility for preparing this application rests with the plaintiff. ICNZ anticipates that it may be difficult for the plaintiff and defendant to reach agreement on 6.17(e) (the likely cost and duration of the class action if the litigation continues) and 6.17(g) (potential relief that could be awarded if the case was successful). It is therefore ICNZ's view that the plaintiff and defendant will need to provide separate confidential submissions on these issues, which should be allowed for in the proposed rules.

Q39. Should there be a requirement to give notice to class members of:

- ***a. A proposed class action settlement?***
- ***b. An approved class action settlement?***

ICNZ agrees that there should be a requirement to give notice in both instances. Class members should have a right to consider whether they agree with the proposed settlement and raise any objections before a hearing. They should also be allowed to opt-out of a settlement if they wish to do so, but only in the case of an opt-out proceeding.

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

ICNZ agrees that the proposed information in paragraphs 6.29 and 6.30 is appropriate and will provide sufficient information to class members so as to protect their interests.

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

ICNZ believes that class members should be given a reasonable, but finite, time period to object to a proposed settlement. This would ensure that one class member cannot hold up the settlement process for an unduly long period of time.

Q42. Do you agree there should be an express power to appoint a counsel to assist the court or a court expert with respect to settlement approval? Should the court be able to order one or more parties to meet some or all of the cost of this?

ICNZ agrees that there should be an express power to appoint someone to assist the court with settlement approval. We are aware that a similar process has been used in the Canterbury Earthquakes Insurance Tribunal and members have found the presence of a court-appointed expert to be helpful. If the court has a discretion to order parties to meet the cost of an expert(s), we believe that the cost must be shared equally between the plaintiff(s) and defendant(s).

Q43. When the court considers whether to approve a settlement, should it consider whether the proposed settlement is fair, reasonable and in the interests of the class as a whole? If not, what test should it apply?

ICNZ agrees that this is the appropriate test for deciding whether to approve a settlement.

Q44. Should there be specific factors a court must consider when deciding whether a settlement is fair, reasonable and in the interests of the class as a whole? For example, should the court consider:

- ***a. The terms and conditions of the settlement.***
- ***b. Any legal fees and litigation funding commission that will be deducted from class member relief.***
- ***c. Any information readily available to the court on the potential risks, costs and benefits of continuing with the litigation.***
- ***d. Any views of class members.***
- ***e. The process by which settlement was reached.***
- ***f. Any other factors it considers relevant.***

ICNZ agrees that the legislation should include specific factors to consider when assessing whether a settlement is fair, reasonable and in the interests of the class as a whole. This would provide certainty for the parties at the outset, rather than waiting for jurisprudence to develop ad hoc. The above points would also be helpful factors for the parties to have in mind when negotiating settlement.

Consistent with our response to question 41 above, we believe that there should be a time limit imposed for the application of these consideration – for example, 30 days. This will avoid settlement becoming a drawn-out process and the risk that the factual information used to calculate the settlement becomes invalid.

Q45. Should the court have an express power to amend litigation funding commissions at settlement?

ICNZ believes that the court should have the express power to amend litigation funders' commissions at settlement to ensure that the amounts are fair and reasonable in proportion to the sum that the individual class members will receive. ICNZ's strongly believes that the class members

should receive the benefit of any settlement. We also note that a 'fair and reasonable' approach is consistent with the approach taken in legislation in Australia.[2]

Q46. Should the court have the power to convert an opt-out class action into an opt-in class action for the purposes of facilitating settlement?

ICNZ agrees that it is necessary for the court to have the power to convert an opt-out class action into an opt-in class action to enable the cost-effective and timely resolution of claims and to reduce the burden on the court. We therefore support this proposal.

Q47. Do you agree that class members should be able to opt out of a class action settlement once it is approved?

Achieving finality is likely to be difficult if class members can opt out following settlement. Being able to do so would mean that someone could receive the benefit of having access to the entire proceeding without being bound to the outcome. ICNZ's view is that once a class member has decided to opt-in (or not opt-out), they should be bound by the outcome of the proceedings.

Q48. Should other potential class members have an opportunity to opt in at settlement?

ICNZ agrees with potential class members being able to opt in at settlement as this supports the principle of finality.

Q49. When a settlement is reached prior to certification, do you agree that the court should consider whether to certify it for the purposes of settlement?

ICNZ agrees that, when settlement is reached prior to certification, the court should consider whether to certify it for the purposes of settlement.

Q50. Should the court supervise the administration and implementation of a class action settlement?

ICNZ believes that it is essential that the court provides a supervisory role during the administration and implementation of a class action settlement in order to ensure the ongoing protection of class members' interests.

Q51. Should the court have a power to appoint a settlement administrator? Who would be appropriate to fulfil this role?

ICNZ agrees that the court should have the power to appoint a settlement administrator. We also agree that the decisions around the appropriate person to fulfil this role may depend on the circumstances, and that it should not be necessary for the administrator to have a legal qualification.

Q52. Should there be an obligation to provide a settlement outcome report to the court? Should this be made publicly available?

While ICNZ agrees that a settlement outcome report should be provided to the court, we believe that the amount of the settlement and the sums paid to lawyers should remain confidential. Making that information public has the potential to prejudice future class action proceedings and

[2] For example, the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders that was introduced on the 30th of September 2021 aims to ensure that in class actions involving a litigation funder, distribution is "fair and reasonable".

settlements. In the interests of transparency, it should be possible to disclose the percentages deducted by both the funder and the plaintiff's lawyers, along with the percentage received by the class members. The actual amount received by the class members in monetary terms is not relevant. ICNZ agrees that it may be difficult to maintain confidentially with a large number of class members, but the risk that someone might disclose the details themselves will not have the same effect as a publicly distributed report setting out detailed settlement figures.

Conclusion

Thank you again for the opportunity to submit on the Issues Paper. If you have any questions, please contact our Legal Counsel on (04) 475 8008 or by emailing jane@icnz.org.nz.

Yours sincerely,

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Chief Executive

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