Class Actions Under New Zealand’s Representative Rule: Ingenious Solution or Inadequate to the Task?

by

Tom Hallett-Hook

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Faculty of Law
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Abstract

Unlike many common law jurisdictions, New Zealand does not have a statutory class action regime. In the absence of developed rules governing class actions it has been left to the courts to fill this gap in the procedural landscape. The courts have achieved this by refashioning the “representative rule” into something capable of facilitating a modern class action. This has required the judiciary to adopt a “no. 8 wire mentality”, drawing on their inherent jurisdiction and creative interpretation of the High Court Rules to manage the complex issues that arise during aggregate litigation. This paper assesses the extent to which the representative rule can provide for class action litigation in the absence of a statutory regime. It concludes that modern class actions are now possible in New Zealand, but that New Zealand’s lack of procedural rules will impede the effectiveness of these proceedings.
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1 Introduction

In the late 19th century New Zealand remained an isolated country, half a world away from England, and cut off from the resources of the motherland. This isolation, so cultural legend has it, gave rise to a “no. 8 wire mentality” where farmers were required to make do with what they had, cobbling together ingenious solutions to day-to-day problems using the materials on hand. Times have changed since the days of the early settlers; however, the concept of “kiwi ingenuity”, as form of ad hoc problem solving in circumstances where resources are limited, remains a core part New Zealand’s national sense of self.

Although New Zealand is no longer secluded from the world, its approach to aggregate litigation has nevertheless lagged behind commonwealth jurisdictions like Canada and Australia that have statutory class action regimes. Without class actions New Zealand has, until recently, been unable to harness the benefits of collective redress. One such benefit is enhanced access to justice, where the resolution of issues common to multiple plaintiffs within a single proceeding generates significant economies of scale, enabling the pursuit of claims that would not otherwise be economically viable. Another is behavioral modification, where wrongdoers who cause widespread but relatively modest harm can no longer count on the practical reality that individual proceedings are too expensive to pursue to shield them from liability. A further benefit is judicial economy, where the resolution of common issues avoids inefficient duplication of fact finding and legal analysis, and reduces the risk of multiple claims against the same defendant.

New Zealand’s lack of a class action procedure has not gone unnoticed, the Court of Appeal observing in 2009 that this represented “one of the areas of serious underdevelopment in New


2 The idea here is that collectively advancing 10,000 $100 claims involving common issues does not cost 10,000 times more than advancing a single $100 claim.
Zealand civil law.” The New Zealand Rules Committee has attempted to remedy this deficiency by developing a legislative proposal for a formal class action regime, which the Committee provided to the Ministry of Justice in 2009. However, procedural reform does not appear to be high on the legislative agenda, and some seven years later it remains unclear whether a Class Actions Bill will be introduced to the House of Representatives.

In the absence of political will to enact a statutory regime, it has been left to the New Zealand courts to fill this gap in the procedural landscape by refashioning the “representative rule” – itself an import from 19th century England – into something capable of facilitating a modern class action. This process, based as it is on a single procedural rule around 60 words in length, has required the courts to adopt a “no. 8 wire mentality”, drawing on their inherent jurisdiction and creative interpretation of the High Court Rules (“HCR”) to manage the complex issues that arise during aggregate litigation. While the modern approach to representative proceedings is still in its formative stages, commentators have observed that “[m]ost of the features that the 2008 draft Class Action Bill had sought to provide are now available.” This is perhaps unsurprising, as United Kingdom scholars have suggested that the gap between that jurisdiction’s traditionally restrictive approach to representative proceedings and a true class action “can be measured in steps rather than leaps”.

It is difficult to dispute that a well-developed set of procedural rules would be preferable to the ad hoc case by case development of class action procedure that is currently occurring in New Zealand.

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4 The draft Bill and Rules submitted to the Ministry of Justice are not publicly available. However, earlier versions of these documents were circulated as part of a consultation. See *Draft Class Actions Bill 2008 (NZ)* PCO 8247/2.3 [Draft Bill] and *Draft High Court Amendment (Class Actions) Rules 2008 (NZ)* PCO 82481.5 [Draft Rules].

5 *Judicature Act 1908 (NZ)*, 1908/89, Schedule 2 [High Court Rules].


Zealand. Lack of defined procedure creates uncertainty as to how representative proceedings operate, undermining litigants’ ability to make informed decisions about the conduct of their claims, and provoking interlocutory disputes that add to the expense and delay of proceedings. Furthermore, developing rules on a case by case basis, based on the particular facts and disputes before a court, increases the risk of inconsistent decisions and jurisprudence that strikes an inappropriate balance between the interests of plaintiffs and defendants.

An obvious solution to these problems is to enact the draft Class Actions Bill and Rules. However, there is no indication that legislation is imminent and, in the meantime, representative proceedings continue to be brought. This paper examines whether, in the absence of legislative intervention, class actions under the representative rule can provide a functional mechanism by which widespread individual harms are fairly and efficiently addressed. It proceeds in two parts.

Part One considers the circumstances in which a representative proceeding may be brought. It focuses on the extent to which the strictures that historically prevented the representative rule from being used to facilitate class actions have been set aside in New Zealand. It begins with a brief discussion of the United Kingdom’s historic restrictive approach to representative proceedings, concluding that this stems in large part from a conservative understanding of the circumstances in which individual issues can be resolved within the ambit of a representative claim. Next, Part One examines the New Zealand courts’ modern approach to the representative rule. This section argues that the courts’ willingness to accommodate individual issues as part of a representative proceeding demonstrates that class actions are now possible under the representative rule. It then analyzes how this permissive approach to individual issues will influence the criteria used to assess whether a representation order should be granted. At this point, New Zealand case law is insufficiently

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8 See e.g. Wicks, supra note 6; Credit Suisse Private Equity v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 [Credit Suisse] at para 49. See also generally Mulheron, “Steps rather than leaps”, supra note 7 at 445 – 448; and Sorabji, supra note 7 at 513 – 514 (arguing that a statutory class action regime would be preferable to attempting to facilitate class actions under the United Kingdom’s version of the representative rule); Carnie v Esanda Finance Corporation Limited [1995] HCA 9, [1995] 182 CLR 398 [Carnie] at 404; Dutton, supra note 1 at para 34.

9 Wicks, supra note 6 at 109.

10 Ibid at 107 – 108; see also Saunders v Houghton (No. 1), supra note 1 at para 41 (“absent developed rules designed to facilitate consideration of class actions there are likely to be heavy burdens on both counsel and the judge.”)

11 Wicks, supra note 6 at 109.
developed to make any firm predictions about how the courts will ultimately calibrate these threshold criteria; however, it seems likely that subsequent cases will increasingly focus on the sufficiency of class members’ common interests, and the manageability of a proceeding, when making this assessment.

Part Two examines whether the absence of a statutory regime will inhibit how New Zealand class actions operate in practice. This part addresses three issues. First, it examines the HCR’s ability to accommodate two procedural protections afforded to class members under statutory class action regimes: notice and supervision of settlement. Something resembling these protections appears possible in New Zealand; however, the lack of clear legislative guidance as to when, and in what way, these mechanisms should be employed mean it is questionable how effective they will be in practice.

Next, Part Two considers the implications of the High Court’s decision in *Houghton v Saunders*, which held that there is no jurisdiction to constitute representative proceedings on an “opt-out” basis under the HCR. If class members must “opt-in” to a representative proceeding, this makes it more difficult to bring quintessential class actions involving large numbers of plaintiffs with relatively small claims. However, on closer analysis, the High Court’s decision is unlikely to be correct. This suggests that “opt-out” proceedings should be permissible under the HCR. That being said, even if “opt-out” class actions are possible, the ability to constitute representative proceedings on an “opt-in” basis may encourage courts to adopt a conservative approach to the use of the “opt-out” mechanism.

Finally, Part Two evaluates the impact of solicitor-client and party-and-party costs on the viability of representative proceedings. To illustrate the difficulties that arise in this context, it draws on the Ontarian and Australian federal class action regimes which, like New Zealand, operate in an environment where “loser pays” costs awards are the norm. The analysis in this part concludes that New Zealand’s acceptance of third party litigation funding and relatively permissive rules in relation to contingency fee agreements provide the tools necessary to facilitate class action litigation. However, the lack of a legislative common fund mechanism suggests representative

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proceedings will continue to be brought on an “opt-in” basis even if “opt-out” proceedings are permissible. This is because without a common fund mechanism it is difficult to spread solicitor-client costs across the class as a whole without entering into a fee agreement with each individual class member.

The paper concludes that although class actions are now possible, the difficulties outlined above demonstrate that there are a number of obstacles to continued development of New Zealand’s non-statutory regime. The absence of a common fund mechanism, in particular, is likely to prevent representative proceedings from achieving their true potential as this creates strong incentives for claims to be brought on an “opt-in” basis. That said, the issue here is one of degree. The lack of a legislative regime is less than ideal; however, representative proceedings are still being brought, and the representative rule appears capable of facilitating these claims. The accommodating attitude of the judiciary to date suggests that the broad parameters of class action jurisprudence will continue to bed down over time as case law develops, reducing the burden an absence of procedural rules imposes on litigants and the court. If representative proceedings continue to establish themselves as a useful and legitimate part of New Zealand’s procedural landscape, this could in turn make a codified class action regime easier to justify in the mid- to-long-term.

2 Part One: class actions under the representative rule

Part One examines the circumstances in which class actions can be brought under the representative rule. It begins with a discussion of New Zealand’s representative rule, the restrictions that have historically prevented representative proceedings from being used to facilitate class actions, and the way in which the New Zealand courts have set these restrictions aside. It then considers the criteria the court uses to assess whether to grant a representation order in more detail, examining how these are likely to develop in light of the New Zealand courts’ modern approach to the representative rule.

2.1 High Court Rule 4.24

“Class actions” in New Zealand are brought under HCR 4.24 which is often referred to as the “representative rule”. This rule allows a representative plaintiff to bring a claim on behalf of a group of people with the same interest in a proceeding. It provides:
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 representative plaintiff is responsible for instructing counsel and determining how the proceeding will be conducted; however, the court’s decision extends to all members of the group, collectively determining matters in dispute between these individuals and the defendant.\textsuperscript{13} Unless every group member consents, the representative plaintiff must seek the court’s approval, by way of interlocutory application, to bring a claim on a representative basis.\textsuperscript{14} However, even where there is consent, the court retains a discretion to decline to let a claim proceed in representative form where this would be inappropriate.\textsuperscript{15}

2.2 Historically restrictive approach to the representative rule

In order to understand the significance of recent developments in New Zealand, it is necessary to consider the origins of the representative rule and the United Kingdom’s restrictive approach to its use.

The representative rule originally developed in the Court of Chancery in the late 17\textsuperscript{th} and early 18\textsuperscript{th} century as a pragmatic response to the challenges inherent in achieving the equitable objective of “complete justice” through “adjudication on the rights and obligations of all [those who] had had a material interest in [a proceeding].”\textsuperscript{16} As explained in the oft-cited passage from \textit{Duke of Bedford v Ellis}:

\begin{quote}
\textsuperscript{13} Markt & Co Ltd v Knight Steamship [1910] 2 KB 1021 (CA) [\textit{Markt}] at 1039; Moon v Atherton [1972] 2 QB 435 (CA) at 441 [\textit{Moon}].

\textsuperscript{14} LDC Finance Ltd (In Receivership and In Liquidation) v Miller [2013] NZHC 2993 [\textit{Miller}] at para 11.

\textsuperscript{15} R J Flowers Ltd v Burns [1987] 1 NZLR 260 (HC) [\textit{Flowers}] at 264.

\textsuperscript{16} Sorabji, supra note 7 at 501.
\end{quote}
Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could ‘come at justice’ … if everyone interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.\(^\text{17}\)

When law and equity were fused in 1873, courts had to decide how to apply the principles of representative actions to common law proceedings.\(^\text{18}\) Initially courts interpreted the rule liberally, Lord Lindsey observing that “[t]he principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires.”\(^\text{19}\) However, the utility of representative proceedings as a means of resolving a large number of common yet individuated disputes was soon dealt a “crushing blow”\(^\text{20}\) by the restrictive interpretation of the Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd*.\(^\text{21}\) This decision led to the imposition of a number “strictures”\(^\text{22}\) on the use of the representative form, preventing its use where the representative plaintiff sought damages on behalf of individual class members, class members had separate contracts with the defendant, or individual defenses might arise.\(^\text{23}\)

The idea that a representative plaintiff’s claim also determines the claims of those represented underpins much of the historically restrictive approach to the representative rule in the United Kingdom and elsewhere.\(^\text{24}\) The ability to obtain a decision in relation to the class as a whole is, of

\(^{17}\) *Duke of Bedford v Ellis* [1901] AC 1 (HL) at 7.

\(^{18}\) *Prudential Assurance Co Ltd v Newman Industries Ltd and Ors* [1979] 3 All ER 507 [Prudential] at 512.


\(^{20}\) *Sorabji*, *supra* note 7 at 506.

\(^{21}\) *Markt*, *supra* note 13.

\(^{22}\) To adopt the expression used by Mulheron to describe the historic limitations imposed on the representative rule. Mulheron, “Steps rather than leaps”, *supra* note 7 at 427.


course, central to the utility of the representative rule. However, where differences between class members give rise to individual issues relevant to a defendant’s liability, resolving a proceeding on representative basis becomes problematic. The challenge is that class members other than the representative plaintiff are unrepresented, and accordingly cannot establish matters that are particular to their individual claim. This means claims that require an assessment of each participant’s individual circumstances cannot be resolved on a representative basis. Furthermore, if these issues were determined based only on the representative plaintiff’s claim, this would prejudice the interests of the defendant. This is because a defendant could be held liable to claimants who do not have an individual claim, or be prevented from raising defenses that would have disposed of claims brought by non-representative class members. Again, in these circumstances, there is good reason to refuse to allow a claim to proceed on a representative basis.

The historic rejection of representative proceedings seeking damages was based on a similar logic. Fletcher Moulton LJ rationalized this restriction on the basis that:

> Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.

Over the years the United Kingdom has gradually shifted away from the restrictive approach in *Markt*, with courts finding creative ways to work around the difficulties arising from the need to resolve individual issues. For instance, representative proceedings involving damages were permitted where damages could be assessed collectively without the need for individual inquiry and distributed in a lump sum to the representative plaintiff, or where the amount owed to each claimant was otherwise readily ascertainable without the need for individual assessment.

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25 Seymour, *supra* note 24 at 575.

26 *Markt*, *supra* note 13 at 466.


28 See e.g. *EMI Records Ltd v Riley* [1981] 1 WLR 923, [1981] 2 All ER 838 (ChD) at 841. See also *Flowers, supra* note 15 at 271 (endorsing this approach in New Zealand); and Ontario Law Reform Commission, *Report on Class Actions*, (Toronto: Ministry of the Attorney General, 1982) [OLRC Report] vol 1 at 24 – 33 (discussing how damages were approached under the representative rule in Canada).
Alternatively, in *Prudential Assurance Co Ltd v Newman Industries Ltd* (“Prudential”), Vinelott J permitted a representative plaintiff to avoid individual assessments of damages altogether by seeking declaratory relief in relation to the (common) non-damages aspects of class members’ claims, establishing a *res judicata* in relation to these issues.\(^{29}\) On this approach representative proceedings seeking damages as relief remained impermissible,\(^ {30}\) but individual class members could rely on the “declaration of liability” from the representative proceeding in subsequent individual proceedings brought to determine the damages they should be awarded.\(^ {31}\) That said, while the approach in the United Kingdom has been more liberal in recent years,\(^ {32}\) the representative rule in that jurisdiction “remains a device of extremely limited utility”,\(^ {33}\) due, in part, to other courts’ reluctance to accept *Prudential’s* bifurcated approach to the resolution of common and individual issues.\(^ {34}\) By way of contrast, Australia,\(^ {35}\) Canada,\(^ {36}\) and New Zealand\(^ {37}\) have all adopted more flexible facilitative approaches.

### 2.3 New Zealand’s modern “facilitative approach”

Under New Zealand’s modern “facilitative approach” the existence of individual issues is no longer an insurmountable obstacle to a representative proceeding. This section begins with a discussion of why this is the case, examining the origins of New Zealand’s current approach to representative proceedings and the way in which recent decisions have accommodated individual issues.

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\(^{29}\) *Prudential*, *supra* note 18 at 520 – 521.

\(^{30}\) *Ibid* at 521.

\(^{31}\) *Ibid* at 520 – 521. As Mulheron notes, the approach in *Prudential* parallels modern class action regimes which expressly contemplate that common and individual issues may require separate resolution. Mulheron, “Steps rather than leaps”, *supra* note 7 at 431 – 432. However, it is important to recall that Vinelott J remained wedded to a conservative understanding of what could be achieved within the ambit a representative proceeding, requiring each plaintiff to commence separate individual claims, and concluding that time continued to run for limitation purposes prior to the commencement of these proceedings despite the fact that declaratory relief was being sought on a representative basis.


\(^{34}\) *Ibid* at 53 – 56.

\(^{35}\) See *Carnie*, *supra* note 8.

\(^{36}\) See *Dutton*, *supra* note 1.

\(^{37}\) See *Credit Suisse*, *supra* note 8.
issues. It then considers the criteria the court uses to assess whether to grant a representation order, examining how these are likely to evolve now that representative proceedings involving individual issues are possible.

2.3.1 Accommodation of individual issues under New Zealand’s “facilitative approach”

It is possible to trace New Zealand’s modern “facilitative approach” to representative proceedings back to the High Court’s 1987 decision in *R J Flowers v Burns* (“*Flowers*”). In *Flowers* McGechan J held that a liberal interpretation of the representative rule was appropriate and consistent with the *HCR*’s objective of securing the “just, speedy, and inexpensive determination of a proceeding.” This meant that provided injustice could be avoided, the representative rule should be applied in a way that served the interests of expedition and economy, and developed to meet modern requirements as “a flexible tool of convenience in the administration of justice.”

The “facilitative approach” in *Flowers* has proven influential in a number of subsequent cases, and has recently been endorsed by the Supreme Court in *Credit Suisse*. The significance of this

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38 *Flowers*, supra note 15. Prior to *Flowers* the representative rule was not widely used in New Zealand. (*Ibid* at 266 – 267.)

39 *Ibid* at 271.


41 See e.g. *Taspac Oysters v James Hardie & Co* [1990] 1 NZLR 442 (HC) [*Taspac*] at 446 – 447; *Talley’s Fisheries Ltd v Minister of Immigration* [1994] 7 PRNZ 469 (HC) [*Talley’s*] (appointing a company the representative of some 4,500 foreign crew members, reserving leave for the company, and other interested individuals, to apply to rescind or vary the representation order as the proceeding progressed); *Purdue v Boyd Knight* HC Christchurch CP226/93 3 September 1998 [*Boyd Knight (HC)*] at 47 - 48 (suggesting that the defendants likely consented to a problematic representation order because of the more relaxed attitude in *Flowers* and *Taspac*); *Harding & Ors v LDC Finance Limited (In Receivership)* HC Christchurch CIV 2008-409-001140 19 November 2009 at paras 45 – 53 and 79(b) [*Harding*] (allowing a representative proceeding to proceed despite the hypothetical possibility that separate defenses might arise, and individual assessment of damages could prove necessary, while reserving leave to revisit the order following completion of interlocutory steps and finalization of pleadings); *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827 [*Cooper*] at para 48 (parties agreed that “they saw no reason why the Court might not vary or rescind a representation order at a later date if some change in circumstances were to make it necessary or desirable…” providing comfort to the Court that it was appropriate to make the order); *Miller, supra* note 14 at paras 26, 51 – 52 (observing that “[i]t would not be just, nor consistent with the imprimatur to apply the rule with flexibility, to close down now the case for investors by declining leave to the presently agreed representative classes, or to bar further reconsideration of those classes after the next amended pleading is produced”, but imposing a time limit by which any further review must be complete); *Saunders v Houghton (No. 1)*, supra note 1 at para 12.

42 *Credit Suisse*, supra note 8 at paras 53, 61, 151 – 152.
approach is that it encourages a court to explore how individual issues can be accommodated within a representative proceeding rather than adopting a “hard line” interpretation of HCR 4.24’s “same interest” requirement as precluding a representation order where it is possible individual issues may arise. In *Flowers* this meant that representative proceedings relating to a temperature drop in a cool store which had damaged stored kiwifruit were permitted despite the fact that material differences might emerge between class members’ individual oral contracts of bailment, and knowledge of the cool store’s defects, as the proceeding progressed. In McGechan J’s view, allowing the prospect that such difficulties might arise to preclude a representative claim from proceeding at an early interlocutory stage would “elevate the mere expression of contest by a defendant into an automatic barrier to a representative action.” Rather, the preferable approach was to permit a representative proceeding to go ahead while imposing conditions that would enable any such difficulties to be identified, reserving leave to revisit the representation order should this prove necessary. Furthermore, if the commonality between class members did break down, the Court contemplated that this could be managed by splitting the claim into several representative proceedings (in effect, sub-classes) or by joining individual growers to the proceeding.

More recently, the New Zealand courts have firmly embraced the idea that, with creative case management, representative proceedings involving individual issues can be brought without prejudicing the interests of the parties. In *Saxmere v The Wool Board Disestablishment Company Ltd* (“*Saxmere*”) the High Court held that differences between class members’ claims or defenses should not preclude a class action provided that “there is an issue that is common to an identifiable class and the Court does not cause injustice by permitting a class action.” Like McGechan J in

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43 *Flowers, supra* note 15 at 273. McGechan J considered that “[i]t may emerge that some member growers made oral contracts directly with the defendants which differ materially in content, or in fact had different degrees of knowledge of cool store deficiencies, or even had no fruit in store at the time.” Ibid.

44 *Ibid* at 272.

45 *Ibid* at 273 – 274.

46 *Ibid* at 273. The approach here can be contrasted to United Kingdom where, at the time, courts generally rejected applications for a representation order if there was any possibility of individual defenses. See Mulheron, *The Class Action, supra* note 1 at 81, 85 – 87; Seymour, *supra* note 24 at 572 – 579.

47 *Saxmere v The Wool Board Disestablishment Company Ltd* [2005] NZHC 342 [*Saxmere*].

48 *Ibid* at para 182.
*Flowers*, Miller J considered representative proceedings should not be permitted where they would confer a claim on a plaintiff that would not otherwise have been available, or bar a defence that the defendant could otherwise have raised.\(^{49}\) However, all that this meant was that where individual claims or defences existed, individual proof was required.\(^ {50}\) Provided that these individual issues could be separately addressed, it remained permissible to resolve the common aspects of class members’ claims on a representative basis. It followed that the Court could sustain the plaintiff’s representation order in *Saxmere* despite the fact that individual issues had arisen, as it was relatively simple to schedule a further hearing to fairly address these issues.\(^ {51}\)

The High Court adopted a similar approach in *Houghton v Saunders*, a long running representative proceeding brought on behalf of investors in Feltex Carpets Ltd who suffered losses as a result of the company’s decline and collapse in 2005 and 2006. Here, the plaintiffs alleged that that they made their investments in reliance on a prospectus prepared for the IPO which contained untrue and misleading statements.\(^ {52}\) The defendants argued the plaintiffs’ representation orders were inappropriate as damages were sought as a remedy, and individual investors needed to prove they actually relied on the defendants’ prospectus when making their investments.\(^ {53}\)

The issue of damages proved relatively uncontentious. French J accepted that *Markt* no longer reflected the law in New Zealand and that a “declaration of liability”, global assessment of damages, or inquiry under *HCR* 384 could be relied on to navigate the difficulties individuated assessment of this issue created.\(^ {54}\) However, individual reliance was more problematic. The reason

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\(^{49}\) *Ibid*.

\(^{50}\) *Ibid* at paras 185, 201.

\(^{51}\) *Ibid*.

\(^{52}\) *Houghton*, (Representation Order), *supra* note 12 at para 1. Two classes of investor were initially represented: investors who purchased shares as part of Feltex’s initial public offering, and investors who purchased shares on the secondary market.

\(^{53}\) *Ibid* at 102.

\(^{54}\) *Ibid* at para 146 – 150. *HCR* 16.2, the modern equivalent of *HCR* 384, provides that a court may “on the application of any party, before, at, or after the trial of a proceeding, order an account or inquiry, whether or not it has been claimed in that parties pleading”. While the rule is broadly framed, courts have interpreted it restrictively, determining it cannot be used to address issues of liability. See *Tu’itu’u Sualala* [2013] NZHC 1622 at para 41 – 44. Had the court in *Houghton* ultimately relied on this mechanisms, the idea that damage cannot be separated from liability where it is a necessary ingredient of a cause of action could have become an issue. See Seymour, *supra* note 24 at 578 (noting this concern in the context of a *Prudential*-like bifurcated approach).
for this was that if individual investors needed to establish actual reliance, the representative plaintiff could not prove this on their behalf.\textsuperscript{55} In the Court’s view this meant that unless it could infer reliance without an inquiry into the circumstances of individual class members, the requisite commonality of interest necessary to justify a representative action would be lacking.\textsuperscript{56} The Court ultimately permitted the claim to proceed on a representative basis because it accepted that it could arguably infer reliance meaning it was inappropriate to revoke the first plaintiff’s representation order “at this early stage”.\textsuperscript{57}

The circumstances in which an individual issue like reliance can prevent a class action from proceeding are discussed in more detail later in this paper. For present purposes what is significant is that on appeal a consensus emerged that \textit{Houghton} was a case where an allegation of misrepresentation could appropriately be the subject of a representative proceeding.\textsuperscript{58} The Court of Appeal did not determine whether proof of actual reliance was required,\textsuperscript{59} or expressly discuss how this issue could be accommodated within a representative proceeding. However, it did endorse “declarations of liability” as a means of accommodating individual damages. It described

\textsuperscript{55} \textit{Houghton}, (Representation Order), \textit{supra} note 12 at para 110.

\textsuperscript{56} \textit{Ibid} at 120, 128 – 129. The Court’s approach was influenced by the High Court and Court of Appeal’s decisions in \textit{Boyd Knight} (HC), \textit{supra} note 41 and \textit{Boyd Knight v Purdue} [1999] 2 NZLR 278 (CA) [\textit{Boyd Knight} (CA)]. \textit{Ibid} at 107 – 110. Here, a representation order had been granted by consent early in the proceeding. Subsequently, during the course of the hearing, the defendants argued that class members each individually needed to prove reliance. As there had been no objection to the representation order at the time it was made, the High Court considered it would be entirely inappropriate to go behind the order at this late stage, and that doing so would negate its purpose. Instead the Court held that the represented parties could rely on the evidence of the representative plaintiff to establish reliance, and that their individual claims would stand or fall with that evidence. \textit{Boyd Knight} (HC) at 48 – 49. On appeal, the High Court’s decision that reliance had been established by the representative plaintiff was overturned. However, the Court of Appeal also observed that “I am unable to see how a representative could possibly give evidence on behalf of other investors about how each relied upon the financial statements.” \textit{Boyd Knight} (CA) at para 62. French J took this to suggest that where actual reliance was required a representation order was inappropriate as the representative plaintiff could not establish this on behalf of everyone represented. \textit{Ibid} at para 110.

\textsuperscript{57} \textit{Houghton}, (Representation Order), \textit{supra} note 12 at paras 135, 137, 139 – 140. The second plaintiff’s claims were struck out on the basis that the prospectus was not intended to inform the investment decisions of post-IPO investors. (\textit{Ibid} at para 93).

\textsuperscript{58} \textit{Saunders v Houghton (No 1)}, \textit{supra} note 1 at paras 14, 92.

\textsuperscript{59} \textit{Ibid} at paras 86 – 90.
this mechanism in general terms as a means of establishing *res judicata* in relation a common issue so that individual claims for damages could be pursued.\(^{60}\)

On its face, the Court’s brief discussion of “declarations of liability” appears narrowly confined to the issue of damages. However, in a subsequent decision in the *Houghton* litigation, the Court of Appeal clarified that its approval of this mechanism was intended to be read far more broadly:

>[the declaration of liability sought in *Houghton*] may be more accurately described as a declaration of a breach of duty … This is because liability is not determined until proof of the additional elements of causation or reliance and loss … the Court envisaged that individual claims would be identified and pursued at a second or subsequent stage of the liability inquiry.\(^{61}\)

Thus, like *Saxmere*, *Saunders v Houghton (No. 1)* confirms that individual issues can be managed within the ambit of a representative proceeding, and that their existence is no longer sufficient to automatically preclude use of the representative from. Consistent with this approach, the High Court in *Houghton* subsequently departed from its previous position that representative proceedings would be inappropriate if the plaintiffs needed to prove actual reliance, accepting that the plaintiffs’ claim could be heard in two stages in order to address individual issues like reliance.\(^{62}\) At the first stage, the representative plaintiff’s claim would be determined in its entirety, along with an agreed list of issues common to the class as a whole.\(^{63}\) At the second, the individual aspects of other class members’ claims would be resolved.\(^{64}\) This mirrors the way that common and individual issues are managed in more developed class action regimes, where an

\(^{60}\) *Ibid* at para 14.

\(^{61}\) *Saunders v Houghton* [2012] NZCA 545 [*Saunders v Houghton (No. 2)*] at para 57(b). See also *Credit Suisse*, supra note 8 at para 58 – 59 (adopting a similarly expansive reading of this aspect of the Court of Appeal’s decision). The Court of Appeal and Supreme Court’s broad reading of paragraph 14 is supported by *Saunders v Houghton (No. 1)*’s reference to a passage from *Carnie* confirming that class members do not necessarily need to share the same cause of action or entitlement to relief, and the Court’s observation that “[i]n some cases it may be appropriate to identify an initial issue, success or failure which is likely in practice, if not in law, to determine the result of the case. The initial representation order may be limited to that element, reserving the question whether at a further stage the order will be extended or the parties left to continue their cases as individuals.” *Saunders v Houghton (No. 1)*, supra note 1 at paras 18, 38.


\(^{63}\) *Ibid* at paras 8 – 9.

\(^{64}\) *Ibid*. 
initial trial is often used to make binding determinations in relation to the issues common to the class as a whole, and further hearings (or other mechanisms) resolve issues particular to individual class members.

The Supreme Court has subsequently confirmed the court can manage individual issues in this way during the course of an appeal against another interlocutory decision in Houghton. By way of context, following Saunders v Houghton (No. 1) the defendants raised a limitation defense, alleging that some class members had failed to “opt-in” to the claim within the timeframes required to bring a proceeding under the Limitation Act 1950. On appeal this argument evolved to include a second limb which required consideration of the nature of a representative proceeding. This limb of the argument proceeded on the basis that representative proceedings could be used to determine common issues without fully resolving the claims of individual class members, and that this determination created a res judicata which class members could rely on in relation to their individual claims. However, consistent with the decision in Prudential that a “declaration of liability” was necessary to enable separate damages claims to be brought, the defendants submitted that a representative proceeding could only be utilized to determine issues capable of resolution on a representative basis. This meant class members needed to bring a further individual claim (or seek to be joined as a party to the representative proceeding) where there were outstanding individual matters, the decision in the representative proceeding essentially serving as a “staging post” from which to bring further proceedings. As the plaintiffs had failed to do this within the timeframes required under the Limitation Act 1950, it was no longer possible for them to obtain individual relief.

66 Credit Suisse, supra note 8 at para (1)(a).
67 The defendant accepted that the court could deal with damages within a representative proceeding where they could be resolved on a common basis and apportioned automatically. Ibid at para 57.
68 Ibid at para 54
69 Ibid.
71 Credit Suisse, supra note 8 at paras 54, 124.
The defendants’ argument was rejected by all five members of the Supreme Court. The majority and minority considered Prudential’s bifurcated approach to be outmoded. The majority described it as “needlessly complex and inconsistent with the objectives of the High Court Rules”; the minority described it as “pointless formalism” which simply reasserted “the rejected view that a representative claim is not available if damages are claimed or different causes of action are involved”. The Court also endorsed the flexible approach in Flowers, agreeing that individual aspects of class members’ claims could be dealt with using mechanisms such as subclassing, severance, or staged hearings provided that this did not cause injustice by depriving a defendant of the ability to raise defenses against individual class members, or allowing claims to proceed that could not have been constituted on a stand-alone basis. As the minority put it, provided this could be achieved, “all else … is case management”.

The Supreme Court was not required to consider whether to maintain the plaintiff’s representation order. Nevertheless, the willingness of all five judges to conceptualize representative proceedings expansively, as a mechanism that extends beyond resolution of issues common to the class as a whole, confirms that the traditional impediments to representative proceedings, which would prevent them from being used to facilitate modern class actions, are no longer applicable in New Zealand. This is most readily apparent from Elias CJ and Anderson J’s minority decision, which expressly rejected the defendants’ argument on the basis that it was “inconsistent with settled authority that representative claims are appropriately made under r 4.24 where some substantial question is common to a number of litigants or the claims of a number of potential litigants arise

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72 The Court divided 3-2 in relation to the second limb of the defendants’ limitation argument.
73 Ibid at para 147.
74 Ibid at para 56.
75 Ibid at para 60. In the Supreme Court minority’s view, the idea that the court could only deal with damages within a representative proceeding in exceptional circumstances where they were capable of global assessment would “effectively reinstate the straightjacket of Markt & Co Ltd v Knight Steamship Co Ltd, only slightly relaxed.” Ibid at para 57. The Minority also observed that to the extent the UK High Court’s decision in Prudential stood for the proposition that separate successive actions were required, it was “no longer consistent with the approach followed in New Zealand and Australia” (ibid).
76 Ibid at paras 8, 54, 61, 131, 133, 151 – 152.
77 Ibid at para 61.
78 Ibid at para 52.
out of the same transaction or series of transactions.”

However, it is clear that the majority also considered that representative proceedings were capable of accommodating individual issues. The High Court’s recent decision in *Strathboss Kiwifruit Limited and Anor v Attorney-General* (“*Strathboss*”), a proceeding alleging that the Ministry of Primary Industries (“MPI”) negligently performed its functions under the *Biosecurity Act 1993*, confirms that following *Houghton* the New Zealand courts will adopt an expansive approach to representative proceedings. Here, the Court accepted that representative actions could readily accommodate individuated argument to determine quantum, and that “it may also be unnecessary that all aspects of liability be capable of determination on the same footing for all those within a represented class.” Consistent with this approach, the Court rejected the defendant’s argument that a representation order was inappropriate because of differences between claimants as these differences were primarily relevant to quantum, and it was possible to determine whether MPI owed the plaintiffs a duty of care, and whether this duty had been breached, on a representative basis. The fact that subclasses, or additional staged hearings, would be required to resolve class members’ claims was not sufficient to preclude use of the representative form.

The decisions outlined above demonstrate that the representative rule can now be used to facilitate class action litigation in New Zealand. Indeed, once it is accepted that individual differences between plaintiffs can be separately addressed, or managed through the use of sub-classes, *HCR 4.24* is, in principle at least, capable of accommodating almost any type of claim. That said, as discussed in Part Two of this paper, the non-statutory framework within which these proceedings are brought will shape and constrain how they operate in practice. However, before considering

81 *Strathboss Kiwifruit Limited and Ors v Attorney-General* [2015] NZHC 1596 [*Strathboss*].
83 *Ibid* at para 57.
84 *Ibid* at para 58.
86 *Ibid* at paras 57, 60.
this issue, it is worth examining how the criteria used to assess the appropriateness of representative proceedings are likely to evolve in light of the New Zealand courts’ modern approach.

2.3.2 When will a representation order be granted?

The Court of Appeal’s decision in Saunders v Houghton (No. 1) remains the most authoritative statement of the circumstances in which a representation order may be granted.  Here, the Court held:

The principles now established are that a representative action can be brought where each member of the class is alleged to have a separate cause of action, provided:

(a) the order may not confer a right of action on the member of the class represented who could not have asserted such a right in separate proceedings, nor may it bar a defence which might have been available to the defendant in such separate proceeding;

(b) there must be an interest shared in common by all members of the group; and

(c) it must be for the benefit of other members of the class that the plaintiff is permitted to sue in a representative capacity.

This section considers how these criteria are likely to evolve in light of New Zealand’s modern approach to representative proceedings. It concludes that: criterion (a) will play a less prominent role than it has done in the past; criterion (b) will increasingly be used to assess the sufficiency of class members’ common interest and the manageability of representative proceedings; and criterion (c) is unlikely to preclude a representation order where some class members’ claims are weaker than others, and could develop to include an assessment of the adequacy of a representative plaintiff.

87 The minority decision of the Supreme Court in Credit Suisse also summarizes the criteria applicable when assessing whether a representation order should be granted. However, this aspect of the Court’s decision is likely obiter. See Credit Suisse, supra note 8 at para 53.

88 Saunders v Houghton (No 1), supra note 1 at para 13.
2.3.2.1 Criterion (a): no conferral of rights of action or barring of defenses

The New Zealand courts’ willingness to accommodate individual issues means criterion (a) is unlikely to play as significant a role in the assessment of whether a representation order should be granted as it has done in the past. While the existence of individual issues would once have suggested a proceeding was incapable of determination on a representative basis, the underlying question is now one of case management, requiring a plaintiff to demonstrate how individual issues can be fairly addressed within the wider context of a representative proceeding.\(^{89}\) Under criterion (a) a court must ensure the issues proposed for collective resolution are truly common, in the sense that they can be determined for all class members without the need for individual inquiry, and that the manner in which common and individual issues are dealt with does not inhibit the defendant’s ability to respond to individual class members’ claims. This can have implications for the way in which a representative proceeding can be progressed, which may in turn render it unmanageable. However, there is no reason in principle why a plaintiff cannot bring a representative claim involving individual issues or defenses, provided that the proceeding does not improperly treat these issues as common to the class as a whole.

2.3.2.2 Criterion (b): an interest shared in common

The courts’ greater willingness to accommodate individual issues requires a corresponding increase in the emphasis placed on the sufficiency of the common aspects of class members’ claims. This is because once the “same interest” requirement under HCR 4.24 is relaxed to allow proceedings involving individual issues, an extremely wide range of claims can potentially be brought in representative form. It could be argued that representative proceedings involving any common issue should be permitted because collective resolution of even a minor point would be more efficient than determining this matter on an individual basis. However, in reality, the procedural complexity of class actions imposes a considerable burden on the parties and the court. Furthermore, where the representative form results in individually non-viable claims being pursued, this increases rather than reduces the amount of judicial resources devoted to the matter.

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\(^{89}\) See e.g. Strathboss, supra note 81 at paras 55 - 60.
As a result, class action regimes tend to impose some minimum “substantiality” threshold in relation to the common issues shared by class members in order to ensure that only “worthwhile” proceedings proceed on a representative basis. The approaches to commonality under the United States Federal Rules of Civil Procedure (“FRCP”), Australian Federal Court of Australia Act 1976 (“FCAA”), and Ontario Class Proceedings Act (“CPA”), while each a product of their own statutory regime, illustrate how New Zealand could approach this issue.

At the more onerous end of the spectrum, r 23(b)(3) of the FRCP requires the representative plaintiff in a damages class action to establish the existence of questions of fact or law common to the class, and that these common issues predominate over any individual issues. Put broadly, “predominance” requires common issues to constitute a significant part of individual class members’ cases, and involves an assessment of the relative importance of the contentious issues capable of generalizable proof and those that must be determined on an individual basis. By way of contrast, s 33(1) (c) of the Australian FCAA requires class members’ claims to “give rise to a substantial common issue of law or fact.” The Australian courts initially interpreted this as imposing a similarly high threshold, requiring an evaluation of common and non-common issues in order to determine whether resolving the common issues would have a “real” or “major” impact on the resolution of the proceeding. However, the High Court of Australia subsequently adopted

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90 Fed. R. Civ P.
91 Federal Court of Australia Act 1976 (Cth) [FCAA].
93 Fed. R. Civ P. at 23(a)(2).
94 Ibid at 23(b)(3)
95 Mulheron, The Class Action, supra note 1 at 194, 204; Messner v Northshore University HealthSystem 669 F.3d 802 (7th Cir. 2012) at 815; Butler v Sears, Roebuck & Co, 727 F.3d 796 (7th Cir. 2013) at 801.
96 FCAA, supra note 91 at s 33C(1)(c). It should be noted that Australia’s federal class action regime does not employ a certification device. Instead, a plaintiff can commence a class action without formal approval, but the court may later terminate it if the claim does not satisfy the s 33C commencement criteria, or where a court is satisfied that other decertification criteria apply. See generally Vince Morabito & Jane Caruana, “Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia” (2013) 61:3 American Journal of Comparative Law 579 (providing an assessment of the operation and efficacy of the Australian decertification model).
a more permissive approach, clarifying that all that “substantial” requires is for an issue to be “real or of substance.”

On this approach, there is no weighing of common issues against individual ones, and it is not necessary to show that a common issue is a “major” or “core” issue, or that it would wholly or significantly resolve class members’ claims. That said, s 33(1) (b) does require a minimum degree of relatedness between class members for a class action to be warranted.

Finally, in Ontario, the criteria for certification under s 5 of the CPA do not expressly impose any minimum standard of significance in relation to common issues. Section 5(1)(c) simply provides that “the claims or defences of the class members raise common issues.” However, the Supreme Court of Canada has placed a judicial gloss on this criterion, interpreting it to require that common issues be a “substantial ingredient” of each class member’s claim in order for a proceeding to be amenable to certification. Despite this, the threshold for “substantiality” is not especially high, and it is not necessary for a common issue to dispose of the litigation. Rather, it is sufficient that a common issue of fact or law will advance the litigation for, or against, the class. Ontario courts have held that a common issue may be a “substantial ingredient” even where “it makes up a very limited aspect of the liability question”, and even if many individual issues will remain to be resolved.

Bets suggest that the major impact test was less onerous than predominance, but arguably not by much. Grave, Adams & Betts, supra note 1 at 166

98 Wong v Silkfield Pty Ltd (1999) 199 CLR 255 (HCA) at paras 28 – 30; see also Grave, Adams & Betts, supra note 1 at 166 – 167.

99 Ibid.

100 Grave, Adams & Betts, supra note 1 at 159 – 163.

101 CPA, supra note 92 at s 5(1)(c).

102 Hollick v Toronto (City) [2001] 3 SCR. 158, 2001 SCC 68 [Hollick] at para 18. This requirement mirrors the Supreme Court of Canada’s approach to Alberta’s representative rule in Dutton. Dutton, supra note 1 at para 39.


104 Ibid.


106 Ibid.
Criterion (b) of the test in *Saunders v Houghton (No. 1)* involves a similar “gatekeeping” assessment of the *extent* of class members’ shared interest. However, based on existing case law, it is difficult to determine precisely where the line will be drawn between sufficient and insufficient commonality of interest. Formulations of the common interest test directed at common issues of fact or law have required these issues to be substantial, of significance to class members, or for there to be a significant common interest in their resolution. Importantly, however, the High Court has also held that commonality “is not a high threshold to pass” and that “what must be considered is what is common to the class not what differentiates the cases of individual members.”

To date the most authoritative judicial pronouncement on what an assessment of this nature involves is *Saunders v Houghton (No. 1)*’s observation that:

One must always have in mind the threefold test in r 1.2 of “just, speedy and inexpensive”. As ever, judgments of substantiality and proportionality must dictate the result. “The same interest” must mean that, subject to other considerations, the more the parties have in

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107 The Court of Appeal’s formulation of this criterion leaves the precise nature of class members’ shared interest unclear. The difficulty here is that limb (b) generically refers to “an interest shared in common” whereas other recent decisions have adopted (or endorsed) formulations focused on class members’ common interest in the resolution of issues of law or fact. See *Saxmere, supra* note 47, *Beggs v Attorney-General* [2006] NZHC 871, [2006] 18 PRNZ 214 [Beggs], and *Harding, supra* note 41 (all of which adopt the approach in *Dutton*, requiring there to be issues of fact or law common to all members); *Houghton (Representation Order), supra* note 12 at para 100 (“a significant common interest in the resolution of any question of law or fact arising from the proceeding”); *Credit Suisse, supra* note 8 at para 53 (“a common issue of fact or law of significance for each member of the class represented”). That said, two subsequent decisions of the High Court have concluded that the Court of Appeal’s approach is consistent with French J’s articulation of the principles to be applied in the High Court below, which included the proposition that the “same interest” extends to “a significant common interest in the resolution of any question of law or fact arising in the proceeding.” *Cooper, supra* note 41 at para 27; *Miller, supra* note 14 at para 13. Given that a focus on common questions of fact or law more closely aligns with an approach to representative proceedings that accommodates common and individual issues, it seems likely that the courts will continue to interpret the broad terms of criterion (b) as encompassing the more focused conception of “shared interest” relied on by other decision-makers. This is supported by the High Court’s recent decision in *Strathboss*, where Dobson J considered a representation order could be granted where there was a “common interest in the determination of a substantial issue of law or fact”. *Strathboss, supra* note 81 at para 8.

108 *Strathboss, supra* note 81 at para 8.

109 *Credit Suisse, supra* note 8 at para 53.

110 *Houghton (Representation Order), supra* note 12 at para 100.

111 *Registered Securities Limited (in liquidation) & Ors v Westpac Banking Corporation* (2000) 14 PRNZ 348 (HC) [Westpac] at para 28; *Houghton, (Representation Order), supra* note 12 at para 100. See also *Strathboss, supra* note 81 at para 6; *Saunders v Houghton (No. 1), supra* note 1 at para 12 (noting “the Taff Dale approach to an application for a representation order, with its relatively low threshold, is preferred as being consistent with r 1.2 of the High Court Rules”).
common, the more the strength of that facet of the application. Greater precision is unattainable.

… identification of the likely issues is a vital enquiry which overlaps with the enquiry [above]. It is essential to the decision as to the practicability of a representative order and identification of whether, and, if so, what res judicata arises or limitation is prevented from running.¹¹²

The abstract terms in which the Court’s decision discusses the concept of “same interest” provide limited guidance as to what is required.¹¹³ However, the reference to substantiality and proportionality suggests the Court of Appeal contemplated that the “same interest” assessment would involve an evaluation of the importance of the common issues in a proceeding relative to the individual issues that would remain after these common issues are resolved. The Court’s earlier observation in relation to “declarations of liability” that “[t]he more likely that [the] determination [of the issues subject to the declaration] would be both practicable and resolve most or much of the proceeding, the more likely it is that the court would be minded to grant the declaration sought”¹¹⁴ reinforces this conclusion. Of course, even if this reasoning is transposed to decisions about whether to grant a representation order, the suggestion that approval is more likely where common issues would resolve most or much of a proceeding does not assist to identify the circumstances in which an order can be made when the resolution of the common issues will advance a proceeding to a lesser extent.

The approach outlined above seemingly entails an evaluation of common and individual issues similar to Australia’s (rejected) “major impact” analysis or United States “predominance.” That said, the New Zealand courts’ acceptance that commonality is not intended to be a high threshold suggests a less stringent standard may be applicable when deciding where this balance should be

¹¹² Saunders v Houghton (No. 1), supra note 1 at para 19 - 20. The Minority decision in Credit Suisse similarly suggested that: “In some cases, the divergence between those sought to be included in a representative claim may lead the judge, as a matter of assessment, to decline to permit a representative claim or, where the question is continuation of a claim in representative form … to decline to permit it to continue in that form. Here, however, the commonality was assessed as more important than the differences, which were left to be managed by directions at the next stage of the proceeding.” Credit Suisse, supra note 8 at para 52.

¹¹³ The lack of more detailed guidance is understandable as the Court did not ultimately need to decide the extent to which a representative proceeding could accommodate actual reliance. That said, the explanation here can be contrasted to the more fulsome discussion of the considerations that arise when considering commonality in Dutton. Dutton, supra note 1 at para 39.

¹¹⁴ Saunders v Houghton (No. 1), supra note 1 at para 14.
struck. While a weighing exercise is arguably more restrictive than Australia and Ontario’s contemporary approach to commonality, these jurisdictions, and the United States, also require a court to consider whether a class action is preferable to other means of resolving class members’ claims, and whether a proceeding will be manageable. This means that although the relative importance of common and individual issues is not a feature of the commonality inquiry in these jurisdictions, considerations of this nature are taken into account. As a result, a court may not allow a class action to proceed where individual issues would be likely to overwhelm the common issues, or would otherwise make a claim impossible to effectively resolve.

It seems clear that New Zealand courts should conduct a similar assessment of “manageability” as part of their determination of whether to grant a representation order under HCR 4.24. While the *Houghton* Court of Appeal did not address this issue in any detail, it did suggest that the grant of a representation order involved an assessment of its “practicability.” A requirement of this nature is consistent with the idea that the representative rule should be applied in a way that supports the underlying objectives of the *HCR*, and the Supreme Court’s observation that the principal purpose of a representative claim is the promotion of efficiency and economy through the avoidance of a multiplicity of proceedings. This is because a more robust assessment of the parties’ shared interest designed to “weed out” unmanageable claims prevents claims that are unlikely to meaningfully benefit from the use of the representative form.

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115 CPA, *supra* note 92 at s 5(1)(d); FCAA, *supra* note 91 at ss 33M and 33N. See also *Fed. R. Civ. P* at 23(b)(3).
117 *Winkler et al, supra* note 1 at 130 – 133 (discussing assessments of preferable procedure in the Canadian context); *Grave, Adams & Betts supra* note 1 at 513 – 518 (discussing equivalent assessments under the FCAA).
118 *Saunders v Houghton (No. 1), supra* note 1 at para 20.
119 See e.g. *Flowers, supra* note 15 at 271; *Saunders v Houghton (No. 1), supra* note 1 at para 12.
120 *Credit Suisse, supra* note 8 at paras 152, 158. See also *Saunders v Houghton (No. 1), supra* note 1 at para 20.
121 Although, depending on the counterfactual, a class action advancing a large number of individually non-viable claims arguably enhances access to justice at the expense of judicial economy as the proceeding consumes judicial resources that would not otherwise have been expended. H Michael Rosenberg, “Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings” (2010) 6:1 Canadian Class Action Review 37 at 41 – 42. See also *Markson v MBNA Canada Bank 2007 ONCA 334, 85 OR (3d) 321 at para 73* (rejecting an argument of this nature in the Canadian certification context).
The importance of an inquiry into manageability is well illustrated by the *Houghton* High Court’s consideration of individual issues during the case management process. Here, the plaintiff argued reliance should be a common issue as “it would be ludicrous to require each of the 3,000 claimants to give evidence, and that the reality is... that this simply will not happen.”\(^{122}\) The High Court rejected the plaintiff’s proposal, accepting that the issue of reliance needed to be managed flexibly and creatively,\(^ {123}\) but putting off determining how to achieve this until a later date.\(^ {124}\) If, however, addressing reliance individually really was unmanageable, there would arguably have been little point in devoting further judicial resources to advancing the common aspects of the class members’ claims.\(^ {125}\)

It is possible that the New Zealand courts will approach manageability as a distinct inquiry into whether a representative proceeding will be practicable to resolve. However, the difficulty here is that, according to the High Court, where the requisite “same interest” exists for a representation order to be made under *HCR* 4.24, there is no discretion to decline to grant the order.\(^ {126}\) If this is correct, any assessment of manageability will need to be conducted as part of a court’s wider evaluation of whether class members have “the same interest.” This suggests that assessments of commonality under *HCR* 4.24 have a role to play in assessing both the sufficiency of common issues and the manageability of a proceeding. Viewed in this light, New Zealand’s adoption of a more stringent “weighing based” approach to commonality is desirable as it provides the courts with the flexibility to control unmanageable proceedings where necessary. That said, it does not follow that a strict “predominance” threshold is required; it is worth noting that inquiry into the

\(^ {122}\) *Houghton*, (Common Issues), *supra* note 62 at para 32.

\(^ {123}\) *Ibid* at para 34.

\(^ {124}\) *Ibid* at para 34 – 37.

\(^ {125}\) For a somewhat similar inquiry in New Zealand see *Ankers v Attorney General* [1995] NZAR 418, [1995] NZHC 125 [*Ankers*] at 7 – 10 (where the High Court considered whether it should decline to grant relief in a judicial review involving a representation order on the basis that the cost of informing recipients of the social welfare entitlement in issue that their entitlement had been miscalculated would likely outweigh the advantage to those who subsequently requested a reassessment).

\(^ {126}\) *Westpac*, *supra* note 111 at para 27; *Houghton*, (Representation Order), *supra* note 12 at para 100. Although see *contra Cooper*, *supra* note 41 at para 26, and *Miller*, *supra* note 14 at para 12 (which restate and rely on the principles outlined by French J in *Houghton*, but omit this restriction.)
manageability of proceedings in Australia and Ontario has not resulted in a requirement of this nature being imposed by the back door under the FCAA or CPA.

Drawing together the above, the potential implications of the Court of Appeal’s approach are well illustrated by recent New Zealand cases. At one end of the spectrum, New Zealand’s ongoing “Fair Play on Fees” litigation would likely satisfy even a relatively stringent commonality requirement. Put broadly, these proceedings allege that “exception fees” New Zealand banks charged in relation to unexpected overdrafts, exceeded credit limits, and late payments were unlawful. Given that these fees are largely standardized, a determination of their legality would go a significant way towards resolving the claims of all class members who have incurred them.

In the event that a court found some or all of the fees charged were unlawful, an inquiry into the circumstances of each individual class member would still be required to confirm they had been charged a fee, and to assess the size of any monetary award they were entitled to receive. A court could still decide that the proceeding was unmanageable if determining the extent to which individual class members had been overcharged required it to manually review millions of transactions, for example. However, assuming these calculations were relatively straightforward, it is strongly arguable that the common issues involved in determining whether the fees charged were unlawful outweigh the residual individual issues necessary to resolve each plaintiff’s claim.

The “Plaster Cladding Class Action”, a prospective proceeding against a cladding manufacturer arising out of New Zealand’s ongoing leaky building crisis, presents a more challenging scenario for a court considering whether a claim can proceed in representative form. At the time of

127 Cooper, supra note 41 at para 34.
128 Ibid at paras 38, 40, 43.
129 Alternatively, commonality could be called into question if a single class action was brought against a large number of banks, each with their own distinct practices and contractual arrangements with their customers.
130 Indeed, this is likely why the defendant in Cooper agreed that some form of representation order was appropriate. Cooper, supra note 41 at para 15.
131 The Plaster Cladding Class Action has been seeking registrations of interest since early 2015 and has recently obtained the conditional support of a third party litigation funder. Sally Lindsay, “Law suit against plaster cladding manufacturers”, National Business Review (9 March 2015), online: <www.nbr.co.nz/article/law-suit-against-plaster-cladding-manufacturers-sl-169805>; Rob Stock, “James Hardie leaky building $100m class action lawsuit gains big backer”, Stuff (25 May 2015), online: <www.stuff.co.nz/business/industries/68817532/james-hardie-leaky-building-
writing, the precise scope of the plaintiffs’ allegations remain unclear; however, the claim will presumably include a cause of action in negligence alleging that the manufacturer’s cladding system was defective, and that these defects allowed water to penetrate the plaintiffs’ properties, causing them to decay. Assuming the Plaster Cladding Class Action advances a negligence claim, questions largely focused on the defendant are likely amenable to resolution on a representative basis. Such questions might include whether the defendant owes a duty of care to purchasers of buildings constructed using its cladding system; whether the cladding system the defendant manufactured was defective; and whether the defendant was (or should have been) aware of these defects. There are clear benefits to collectively determining these issues as their resolution is likely to be a time consuming and expensive exercise requiring extensive discovery and expert evidence. Deciding these issues once, on behalf of the class as a whole, avoids needless duplication of fact finding and legal analysis. Equally importantly, it also allows individual plaintiffs to pool their resources to muster the evidence necessary to robustly pursue complex allegations of this nature. Furthermore, if any of these issues were resolved in the defendant’s favor, this would bring the class’s claim to an end without the need for individual inquiry.

However, the difficulty here is that even if the court determines the common issues outlined above in favor of the class, a considerable amount of additional work is still required to resolve individual class members’ claims. Assessing whether the ingress of water into a particular building was caused by defective cladding as opposed to problems with the way the building was designed, constructed, or maintained is likely to require complex individuated assessment. Similarly, determining the extent of any harm each plaintiff has suffered requires a potentially contentious evaluation of the damage to their property. The fact that damage from water ingress takes a number of years to become apparent further complicates matters, as determining when time begins to run for limitation purposes requires the court to identify the point at which each plaintiff’s property’s

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132 For a recent discussion of this issue see Carter Holt Harvey Limited v Minister of Education & Ors [2015] NZCA 321 [Carter Holt Harvey] (declining to strike out a cause of action in negligence against a cladding manufacturer on the basis that the manufacturer did not owe a duty of care).
defects were “reasonably discoverable.” Again, this requires a challenging individuated assessment of the way in which the problems with a particular building developed.

In these circumstances, a court applying the predominance standard to the Plaster Cladding Class Action could well conclude that the common issues in the proceeding do not “predominate” over the individual ones, meaning it should decline to grant a representation order. On the other hand, an inquiry focused on whether there is a substantive common issue that will meaningfully advance the proceeding would more readily accept that the benefits of determining common issues relating to the defendant’s duty of care were sufficient to justify use of the representative form. Of course, even on a more permissive approach, a court could still conclude that the proceeding would become unmanageable, particularly if fairness to the defendants required numerous third parties (such as builders, architects, and territorial authorities) to be joined to the proceeding in order to ensure that liability was correctly attributed in relation to each individual plaintiff’s building. Indeed, the potential for concerns about manageability to arise is well illustrated by the Court of Appeal’s recent decision in Carter Holt Harvey, a non-representative proceeding the government brought against cladding manufacturers in relation to defective school buildings. In that case the Court observed:

This proceeding is unique in that it relates to a large and potentially complex claim against a manufacturer in relation to a significant number of schools. The length and scale of the proceeding, if it is litigated in the conventional manner, has the potential to be very cumbersome and costly for the parties. It would also present the High Court with significant resourcing issues. The parties recognise this and have shown a commendable degree of cooperation to date. However, it is clear that intensive case management will be needed along with innovative solutions to ensure that the proceeding is conducted in a manageable and cost-effective way.

A representative proceeding involving a more diverse range of claimants is likely to be even more challenging to coordinate.

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133 Invercargill City Council v Hamlin [1996] NZPC 1, [1996] 1 NZLR 513. The Court of Appeal has recently confirmed that the statutory 10 year limitation longstop applicable to “building work” does not apply to claims against building product manufacturers and suppliers of building material. Ibid at paras 146 – 175.

134 Carter Holt Harvey, supra note 132.

135 Ibid at para 179.
There are also cases where the court is likely to determine that commonality is lacking even on a relatively permissive approach. For instance, in *Beggs* the High Court declined to grant a representation order in relation to a civil claim arising out of the arrest of 41 protestors. Here, the Court accepted there were some common questions of law, and that the fact of arrest and detention was common to the claims of all 41 class members. However, commonality broke down after this point as the legality of each class member’s arrest was dependent on the state of mind of their particular arresting officer, and the question of whether a claimant had been assaulted, strip searched, or denied access to a lawyer was a fact specific inquiry particular to each individual. Gendall AJ’s primary reason for rejecting the plaintiffs’ application was the conventional concern that resolving class members’ claims on a representative basis would prejudice the defendant as some plaintiffs would not be required to prove their case. However, the Court went on to observe that representative proceedings were also inappropriate because the resolution of any common issues that did exist would not significantly advance the cases of all those represented. This suggests that even if the plaintiffs had argued that individual issues should be dealt with separately, the court would not have permitted their claim to proceed in representative form as the commonality necessary to justify a representative proceeding was absent.

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136 *Beggs, supra* note 107 at paras 18 – 19.
137 *Ibid* at para 19.
138 *Ibid* at para 27.
139 *Ibid*.
140 *Ibid* at paras 19 and 28. Additionally, although the 41 prospective class members were divided into six groups, there does not appear to have been a clear link between these groups and the circumstances of the six individuals who sought to be appointed representative plaintiff. *Ibid* at paras 29 – 30.
143 It is, of course, possible to imagine circumstances in which the court could permit a claim like *Beggs*. For instance, if the plaintiffs’ allegations were focused on systemic issues, such as the conditions at the facility where they were held, or an order or policy which officers implemented on the ground, this could have provided a more solid foundation for a representative proceeding. See e.g. *Sherry Good v Toronto Police Services Board* 375 DLR (4th) 200, 2014 ONSC 4583 at paras 46 - 49 (where the plaintiffs alleged a command order was given to arrest protesters without regard to their individual circumstances, allowing the issue of whether the class members had been arbitrary arrested or detained to be determined on a common basis). For an example of a Canadian case similar to *Beggs* where certification was declined see *Thorburn v British Columbia (Public Safety and Solicitor General)*, [2013] BCJ No. 2412, 2013 BCCA 480 (where the British Columbia Court of Appeal declined to certify a class...
Allegations of misrepresentation provide another good example of a situation where the court may find commonality to be wanting. The challenge here is that the tort of negligent misrepresentation raises a multitude of individual issues including whether there is a relationship of proximity between the plaintiff and the defendant, whether a plaintiff relied on the defendant’s statements, and questions of who said what and when.\textsuperscript{144} \textit{Houghton} accepted that these obstacles were surmountable, and that the plaintiffs’ allegation of misrepresentation could proceed on a representative basis even if the plaintiffs still needed to prove actual reliance. However, it is important to recall that this was a case where every class member’s claim related to a single written representation: the prospectus prepared by the defendants’ for the purposes of Feltex’s IPO. This meant that significant issues, such as whether the prospectus was misleading, whether it complied with the law, and whether the defendants had reasonable grounds to believe the statements it contained to be true, could be determined on a representative basis.\textsuperscript{145} Furthermore, even if it was necessary to prove that individual plaintiffs relied on representations included in the prospectus, the existence of a single written document issued at a particular point in time meant that this would have been a comparatively straightforward inquiry. By way of contrast, a claim involving multiple, potentially differing, oral and written representations, made by various representatives of the defendant, over a longer period of time, would require a far more in-depth inquiry into the circumstances of each class member. In these circumstances it would be much more difficult to identify the common thread necessary to justify a representative proceeding.\textsuperscript{146}

As noted, in the absence of more developed case law it is impossible to determine precisely where New Zealand courts will draw the line between viable and non-viable class actions. Ultimately much is likely to depend on the courts’ perception of their capacity to manage individual issues and complex large scale litigation. To date judges have tended to adopt \textit{Flowers’} generous optimistic approach, concluding that they can accommodate difficulties as a proceeding progresses, and allowing representative proceedings to go ahead despite the possibility that issues

\textsuperscript{144} Mulheron, \textit{The Class Action}, supra note 1 at 174.

\textsuperscript{145} Saunders \textit{v} Houghton (No. 1), supra note 1 at para 14; Houghton, (Common Issues), \textit{supra} note 62 at para 14.

\textsuperscript{146} See generally Mulheron, \textit{The Class Action}, supra note 1 at 174 – 178.
may emerge at a later stage. This suggests concerns about manageability may not prove to be a significant obstacle to representative proceedings, at least in the short to medium term. Of course, as the courts’ experience with representative proceedings develops, and the difficulties inherent in managing large scale litigation become more apparent, judicial attitudes may harden.

Before moving on it is worth noting that, in addition to assessing whether a representative proceeding will be manageable, other jurisdictions also tend to consider whether a class action is superior to other means by which the plaintiffs’ claims could be resolved. In Ryder v Treaty of Waitangi Fisheries Commission, a representation order was declined because there was no significant advantage to using the representative form, as the relief individually sought would have required the defendant to act in a particular way in relation to all class members. However, assessments of the “superiority” of representative proceedings have not played a significant role in New Zealand jurisprudence to date. Again, conducting an assessment of this nature seems consistent with the objective of promoting judicial economy, and the idea that representative proceedings should be used to facilitate the expedient and efficient resolution of proceedings. Conceptually, however, “superiority” is more difficult to accommodate within an assessment of whether the parties have the “same interest”. This suggests a residual discretion to decline a representation order may be required for an application to be rejected on this basis.

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147 See e.g. Flowers, supra note 15 at 273; Taspac, supra note 41 at 446 – 447; Talley’s, supra note 41 at 471 – 472; Harding, supra note 41 at paras 45 – 53 and 79(b); Cooper, supra note 41 at para 42 – 49; Miller, supra note 14 at paras 26, 51 – 52; Strathboss, supra note 81 at para 60, 91.

148 See Winker et al, supra note 1 at 133 – 136 (discussing the comparative component of preferable procedure analysis); Multiplex Ltd v P Dawson Nominees Pty Ltd [2007] 164 FCR 275, [2007] 244 ALR 600 (FCA) at para 128 (“Thus, s 33N(1) envisages that the court will engage in a comparison between how the factors specified in grounds (a)-(d) apply to the existing representative proceeding and how they would apply to a hypothetical non-representative proceeding”).

149 Ryder v Treaty of Waitangi Fisheries Commission [1997] 11 PRNZ 608 (HC) [Ryder].

150 Ibid at 612.

151 Although see Beggs, supra note 107 at paras 33 – 34 (where the defendant’s submission that use of the representative form would not reduce hearing time to any significant extent was accepted as a supplementary reason why the order should not be granted); Houghton, (Representation Order), supra note 12 at para 155 (“a representative action would undoubtedly be preferable to 800-plus separate claims”); Miller, supra note 14 at para 26 (where the fact that “[s]ome 1100 separate proceedings could result” was one of the reasons why it would be inappropriate to decline to grant a representation order in light of difficulties with the way in which the classes of represented individuals were defined.)
2.3.2.3 Criterion (c): for the benefit of other class members

Criterion (c) has, to date, played a limited role in determining whether representation orders are appropriate. A conflict of interest between class members, where the resolution of common issues would be beneficial to some of those represented but detrimental to others, will prevent an order from being granted.\footnote{152 See Ankers, supra note 125 (where the scope of a representation order was defined to exclude those who would be adversely affected by recalculation of their social welfare entitlements in line with the Court’s decision); Ryder, supra note 149 at 614 (where a representation order was declined \textit{inter alia} because the groups proposed included people with different views as to the appropriate outcome of the proceeding). See also \textit{Maranatha Limited and Ors v Tourism Transport Limited} [2007] NZHC 256 [Maranatha] at paras 12 - 21 where a representation order relating to a franchise agreement was declined both because there was no discrete issue of contractual interpretation that was common to all franchisees and because a significant portion of the franchisees were happy with the current arrangement. Significantly, the Court in this case proceeded on the basis that the representation order would bind every franchisee. The Court did not address the question of what impact, if any, an individual class member’s opposition to the grant of a representation order should have where it is possible to “opt-out” of the proceeding.} However, accepting that individual issues can be resolved within the ambit of a representative proceeding implicitly recognizes that the claims of some class members may ultimately be unsuccessful, suggesting that the weakness of individual class members’ claims should not undermine the beneficial nature of a representative proceeding as a whole. That said, what precisely is required for a proceeding to be “for the benefit” of those represented remains relatively ill-defined.

Criterion (c)’s focus on permission of the representative plaintiff to sue in a representative capacity is also worth noting. Although not an issue in \textit{Houghton}, this test arguably invites consideration of whether the plaintiff is an appropriate person to become the class representative. Cases following the High Court’s decision in \textit{Saxmere} have considered this issue, which is one of the four factors that must be assessed under the “\textit{Dutton} test” endorsed by Miller J.\footnote{153 See Saxmere, supra note 47 at para 176; Harding, supra note 41 at para 37; Beggs, supra note 107 at para 16 (noting that adequacy of the representative plaintiff was a consideration, although the representation order was ultimately declined on other grounds).} However, later decisions relying on the decisions of the High Court and Court of Appeal in \textit{Houghton} do not identify this as a consideration.\footnote{154 See Cooper, supra note 41 at paras 23 – 29; Miller, supra note 14 at paras 12 – 15.} Given the responsibility that appointment as a representative plaintiff entails, it would be desirable to conduct this assessment under criterion (c) of the Court
of Appeal’s test. That said, whether this will become an established part of assessments of the appropriateness of a representation order remains to be seen.

2.4 Class actions now possible in New Zealand

Based on the analysis above, New Zealand’s liberal approach to representative proceedings appears capable of facilitating modern “class actions” on behalf of large numbers of plaintiffs with common but differentiated claims. This is illustrated by the slow but steady increase in the number of large-scale representative actions, and the willingness of third party litigation funders to support these proceedings. Although the criteria by which the court assesses representation orders will continue to develop, the trajectory of decisions to date is towards accommodation of aggregate litigation.

The way in which representative proceedings have developed in recent years calls into question whether the Draft Bill and Rules proposed by Rules Committee in 2008 remain necessary. Certainly, it seems clear that “class action” proceedings are now readily capable of being brought, suggesting that a legislative scheme is no longer needed to achieve this goal. However, other factors, such as protection of absent class members, the manner in which a class is constituted, and the ability of a representative plaintiff to shift the cost and risk of a class action to others, will have a significant impact on the efficacy and effectiveness of the ad hoc regime being developed by the courts. Part Two of this paper considers these issues.

155 The Supreme Court of Canada in Dutton and High Court of Australia in Carnie have recognized the desirability of an assessment of this nature in the context of a representative proceeding. Dutton, supra note 1 at para 41; Carnie, supra note 8 at 408.

156 See Strathboss, supra note 81; Cooper, supra note 41; Fair Play on Fees, Media Release, “Fair Play on Fees Launches Cases Against Westpac, ASB and BNZ” (11 February 2014), online; GCA Lawyers, Media Release, “Southern Response Class Action launched by GCA Lawyers” (1 May 2015), online; Adina Thorn Lawyers, Media Release, “Defective Cladding Class Action – Litigation Funding Confirmed – Harbour Litigation Funding” (25 May 2015), online.
3 Part Two: how effective will class actions under the representative rule be in practice?

This Part examines the extent to which the regime developing under New Zealand’s representative rule is equipped to facilitate full-fledged class actions similar to those brought in the Canada and Australia. It begins by considering the extent to which *HCR* 4.24 provides for two of the main protections afforded to class members in other jurisdictions, notice and supervision of settlement. The analysis suggests that the *HCR* can provide something resembling these protections, but the absence of clear legislative guidance means it is debatable how effective this will be in practice.

Part Two then assesses the implications of the High Court’s decision in *Houghton* that representative proceedings cannot be commenced on an “opt-out” basis. It concludes that limiting representative proceedings to “opt-in” would restrict the utility of the representative rule, but that the High Court’s decision that “opt-out” proceedings are impermissible is likely incorrect. Finally, the paper assesses the effect that issues of costs and funding will have on representative proceedings. This section concludes that New Zealand’s acceptance of third party litigation funding, and relatively permissive rules in relation to contingency fee agreements, provide the tools necessary to bring class actions. However, the lack of a legislative common fund mechanism suggests plaintiffs will continue to bring representative proceedings on an “opt-in” basis even if “opt-out” proceedings are permissible.

### 3.1 Notice and supervision of settlement

As French J observed in *Houghton*, “opt-out” class action regimes in other jurisdictions provide a number of procedural safeguards to protect the interests of defendants and class members that are not obviously available under the *HCR*. These include a requirement that court-approved notice of events such as certification, or a proposed settlement or discontinuance, be provided to class members; court approval of any settlement or discontinuance; and supervision of fee agreements entered into by class counsel. The *HCR*, unsurprisingly, lack formal mechanisms providing for

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157 *Houghton*, (Representation Order), *supra* note 12 at 163. See also generally Mulheron, “Steps rather than leaps”, *supra* note 7 at 445 – 446 (listing a number of matters class action regimes generally provide for which the United Kingdom’s representative rule does not address).

158 Mulheron, “Steps rather than leaps”, *supra* note 7 at 445 – 446. It is arguable that some of these safeguards are less important in an “opt-in” regime where class members must deliberately choose to become a part of a claim.
these types of protections. However, this is not necessarily an insurmountable obstacle. Where the HCR do not prescribe a procedure, the court can draw on HCR 1.6 and its inherent jurisdiction to fill this gap to ensure that justice is done between the parties, and that the objectives of the HCR are achieved.\textsuperscript{159} That said, the court’s ability to plug procedural gaps is not limitless, and in particular cannot be used to contravene other procedural rules.\textsuperscript{160}

To date, the boundaries of the High Court’s supervisory role in relation to representative proceedings remains largely unexplored. Courts have held that where a litigation funder is involved, close supervision is required to adequately protect the interests of the parties, and in particular the defendant.\textsuperscript{161} However, there has been comparatively little consideration of the extent to which class members’ involvement in a representative proceeding more generally requires the court to take steps to protect class members’ interests, or how this protection can be achieved. Although perhaps not fatal to the extension of representative proceedings in New Zealand, an inability to adequately safeguard the interests of parties to a representative action would be a strike against the efficacy of a non-statutory regime. The following section considers the extent to which the courts are capable of providing for notice and supervision of settlement in the absence of express rules.

3.1.1 Notice

As noted, one protection that schemes in other jurisdictions commonly afford is a requirement that the representative plaintiff provide class members with court-approved notice at various stages in a proceeding. In an “opt-out” class action, where the outcome of a proceeding binds class members unless they take active steps to exclude themselves, notice helps to alleviate due process and fairness concerns by alerting putative class members about the proceedings and providing them

\textsuperscript{159} Donselaar v Mosen [1976] 2 NZLR 191 (CA) at 192; Smith v Covington Spencer Ltd [2007] NZCA 224, [2008] 1 NZLR 75 at para 37.

\textsuperscript{160} Ibid.

\textsuperscript{161} Saunders v Houghton, supra note 1 at para 63; Houghton, (Post CA), supra note 65 at para 37; Strathboss, supra note 81 at paras 9, 30.
with the information they require to make an informed decision as to whether or not to participate. While perhaps less crucial in an “opt-in” class action, where class members must affirmatively agree to participate, court-approved notice that a representation order has been made serves to advise potential claimants of their opportunity to join the proceeding, and ensures that the information they receive provides a balanced account of the implications of doing so. In either case, the court may also require notice at subsequent stages of a proceeding to alert non-representative plaintiffs of significant steps such as a proposed settlement, which they may wish to support or oppose, or the need to come forward to raise individual issues.

Court-supervised communication with class members is relatively well established in New Zealand, at least in relation to information imparted at an early stage of a proceeding. In Houghton the Court of Appeal observed that courts had a role to play in ensuring that class members were informed of all steps in a proceeding, and that no misleading information was provided to encourage new participants. Subsequently, a number of New Zealand courts have scrutinized the contents of communications advising potential class members of the existence of representative proceedings, and their right to “opt-into” a claim. In Cooper v ANZ the defendants submitted that the High Court lacked jurisdiction to approve an “opt-in” notice prepared by the plaintiffs.

162 Winkler et al, supra note 1 at 198; Grave, Adams & Betts, supra note 1 at 290 – 292.
163 Winkler et al, supra note 1 at 198; Grave, Adams & Betts, supra note 1 at 280 – 281.
164 Saunders v Houghton (No 1), supra note 1 at para 63. The Court of Appeal considered that the purpose of these safeguards was to reduce the disadvantages to the defendants. This is likely because of the Court was focused on the use of litigation funding in conjunction with a representative proceeding, which it considered substantially altered the balance between plaintiffs and defendants. (Ibid at para 36). That said, there does not appear to be any reason in principle why the court should not provide similar protections for the benefit of non-representative plaintiffs.
165 Houghton v Saunders HC Christchurch CIV-2008-409000348, 26 May 2010 [Houghton, (Notice)] at paras 25 - 79; Cooper v ANZ Bank New Zealand Limited [2013] NZHC 3116 [Cooper, (Notice)] at paras 11 - 20; Strathboss, supra note 81 at para 77 (noting that the court had previously approved how this proceeding was discussed on the plaintiffs’ website); Miller, supra note 14 at para 54(h) (requiring court approval of a letter to be sent to prospective class members).
166 It is unclear why ANZ considered it would be preferable for the plaintiffs to send the notice out to prospective class members without the Court reviewing it. The High Court ordered that the words “[a]s a result, the Court has deemed it appropriate to notify you …” be deleted, suggesting that the concern here may have been that the approval process would lend credibility to the notice. Cooper, (Notice), supra note 165 at paras 17 – 18. Alternatively, ANZ may have been attempting to prevent the sending of the notice entirely, or avoid orders relating to distribution of the notice to its customers.
This argument was left unresolved, but, it is difficult to see why the court’s inherent jurisdiction would not extend to ordering a representative plaintiff (or their counsel, as an officer of the court) to communicate information to absent class members to ensure that they are aware of developments in a proceeding, or to supervising of the contents of these communications to ensure that the information imparted is fair and accurate.

While it seems clear that the New Zealand courts have the power to approve communications with class members, the precise nature of the court’s role in this regard remains somewhat ill-defined. In Houghton, French J adopted an interventionist approach to an “opt-in” notice, determining that:

… the over arching [sic] principle must be to ensure the notice is accurate and balanced. It is a document that should inform, not recruit. … neither is it a platform for the defendants to advance their cause and attempt to deter prospective claimants.

…

In my view, the opt-in notice should not be a vehicle for debating the merits of the claim …

By way of contrast, in Cooper, the Court distanced itself from the notice’s contents, caveating its decision to approve with the observation that “it is not for the Court to check the content of the notice for accuracy as to matters such as the funding arrangements between a participant and the litigation funder … [i]t is for the Plaintiff’s legal advisers to ensure that the notice contains a fair summary of the position insofar as it relates to that type of issue.” Cooper’s “hands off” approach does not sit particularly well with the idea that the court should ensure that representative plaintiffs (and class counsel) live up to the responsibilities that a representation order confers on them. However, the distinction between Cooper and Houghton may well be overstated as Peters J’s hesitancy likely had more to do with a desire to avoid making a mistake in the context of an urgent review, than a principled objection to assessing the accuracy of notices more generally.

167 The urgent timeframes within which a decision was required led Peters J to err on the side of caution, reviewing the notice with the caveat that “[w]hether this is a course that the Court should follow and, if so, in what circumstances, is a question for another day.” Ibid at para 15.

168 Houghton, (Notice), supra note 165 at paras 27, 30.

169 Cooper, (Notice), supra note 165 at para 16.
Of course, even assuming Houghton’s interventionist approach prevails, the circumstances in which communication will be required in practice are likely to vary from case to case, at least until a more significant body of case law develops. This is because, in the absence of a legislative regime, it falls to the court and the parties to identify the situations where formal notice is required. This is perhaps less of an issue for closely managed “opt-in” representative proceedings, where the identity and contact information of class members is known, and class counsel can more readily be expected to update class members on developments without prompting from the court. However, if “opt-out” representative proceedings become more prevalent in New Zealand, it will be necessary for the court and parties to pay greater attention to the circumstances in which formal notice is necessary to ensure class members’ interests are protected.

3.1.2 Supervision of settlement

A second, more fundamental, issue, as yet unaddressed in New Zealand, is the role the High Court will play in supervising the settlement of representative proceedings.

Ordinarily the parties to a proceeding are free to consensually resolve their dispute on agreed terms. However, a representative plaintiff, as dominus litus, is empowered to bring a proceeding to an end without the consent of those represented.170 This raises a concern that the interests of “absent” non-representative class members will not be adequately reflected in any agreement entered into.171 For example, an unscrupulous representative plaintiff might use the bargaining power a class action provides to leverage a more favorable settlement of their personal claim at the expense of other class members. Similarly, there is a risk that the interests of class counsel will diverge from those they represent at the settlement stage due to the high-stakes entrepreneurial nature of class action litigation, encouraging the negotiation of agreements that ensure the lawyers are well compensated but provide only minimal benefit to individual class members.172 Although the risk of “unfair” settlements is an issue for most class actions, they are a particular problem where large


171 See generally Mulheron, The Class Action, supra note 1 390 – 391; Winkler et al, supra note 1 at 300; Grave, Adams and Betts, supra note 1 at 624, 631 - 636; OLRC Report, supra note 28 at 787 – 789; ALRC Report, supra note 24 at para 218.

172 Winkler et al, supra note 1 at 299.
numbers of relatively small claims are aggregated, as the individual amounts at stake may not be sufficient to motivate plaintiffs to monitor how well class counsel and the representative plaintiff are performing their roles.  

In light of the issues surrounding settlement of aggregate litigation, both the CPA in Ontario and FCAA in Australia provide that a representative plaintiff cannot settle or discontinue a class action without the approval of the court.  

The underlying concern here is to ensure that the agreement entered into is fair, reasonable, and in the best interests of the class as a whole.  

A significant proportion of class actions in Australia and Ontario settle rather than go to trial, in part due to the fact that aggregate litigation’s high stakes encourage parties to avoid the risk of a contested hearing. This means that the integrity of the settlement process is especially important. A similar dynamic seems likely in New Zealand. However, the absence of an equivalent approval mechanism under New Zealand’s HCR means it is necessary to look elsewhere for a means to protect the interests of non-representative class members.

One option is to rely on the rules relating to discontinuance of proceedings to regulate settlement of representative claims. Ordinarily, a plaintiff has the ability to discontinue a proceeding as of right by filing a notice of discontinuance and serving a copy on the other parties to the claim; however, this entitlement is subject to HCR 15.20(3), which provides that “[a] plaintiff may discontinue a proceeding in which there is more than 1 plaintiff only with the consent of every other plaintiff or with the leave of the court …”. Representative proceedings are likely to fall within this restriction, as HCR 1.3 defines “plaintiff” as “the person by whom or on whose behalf

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173 Ibid.

174 FCAA, supra note 91 at s 33V(1); CPA, supra note 92 at s 29(1) and (2).

175 See generally Winkler et al, supra note 1 at 304 – 308 (summarizing the factors considered in the Canadian context); and Grave, Adams & Betts, supra note 1 at 624 – 631 (summarizing the factors considered in the Australian context.)


177 High Court Rules, supra note 5 at r 15.19.
a proceeding is brought”, which mirrors the language used in HCR 4.24.\textsuperscript{178} If this is correct, then in the absence of consent a representative plaintiff cannot discontinue the representative proceeding without leave. This provides a mandatory judicial check on the ability of a representative plaintiff to bring the class’s claim to an end.

In addition to HCR 15.20(3), the High Court can also prevent a representative plaintiff from discontinuing a proceeding as part of its inherent jurisdiction to control abuse of process. In \textit{Nireaha Tamaki v Baker}\textsuperscript{179} a representative plaintiff was replaced, and their decision to discontinue the proceeding set aside, where the discontinuance was against the wishes of some class members. In concluding that this was appropriate, Edwards J observed:

The object of an action is to obtain the relief claimed in it, and the [representative] rule must be read as facilitating the obtaining of an adjudication in respect of that claim. It is impossible … to read the rule as authorising a person suing or defending in a representative capacity to prejudice or alter the rights of those whom he represents. To do so would not be to sue or defend for the benefit of all parties interested. Here the plaintiff claims the right, against the wishes of those whom he represents, to discontinue the action, with the express intent to extinguish their interests in the lands in dispute …

… it seems clear that the plaintiff has no such right, and that to file a discontinuance is, under the circumstances, an abuse of the process of this Court, which there is ample power to control … the Court will in all such cases protect by an appropriate order the rights of all persons interested in a representative suit, not made parties thereto.\textsuperscript{180}

It is, of course, important to distinguish between the procedural step of discontinuing a claim, and the act of entering into a contractual settlement agreement with the defendant. It is debatable whether the High Court could directly interfere with a settlement agreement between a representative plaintiff and defendant in the absence of a statutory provision providing that this

\textsuperscript{178} Namely that “one or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest …” \textit{Ibid} at r 4.24.

\textsuperscript{179} \textit{Nireaha Tamaki v Baker} (1902) 22 NZLR 97 (SC) [Baker].

\textsuperscript{180} \textit{Ibid} at 102 – 103; See also \textit{Moon, supra} note 13; Peter Cashman, \textit{Class Action Law and Practice.} (Sydney: Federation Press, 2007) at 112 (noting that \textit{Re Calgary and Medicine Hat Land Company Ltd} [1908] 2 CH 652 is often cited for the proposition that a representative plaintiff cannot compromise a representative action without leave of the court). See also \textit{Carnie, supra} note 8 at para 5 (per Brennan J) where Brennan J more generally observed that “if for any reason, the court is not satisfied that the interests of the absent but represented class are being properly advanced, the court should exclude the represented person from the action”.

agreement is unenforceable unless approved. However, this agreement could be derailed if the representative plaintiff was unable to bring the claim to an end because the court declined leave to discontinue, or concluded that a purported discontinuance constituted an abuse of process. In effect, this produces a de facto settlement approval process, as a prudent defendant will make settlement conditional on confirmation that the representative plaintiff has successfully discontinued their proceeding. Furthermore, in the absence of defined criteria for approving a discontinuance under HCR 15.20(3), a New Zealand court could arguably employ “settlement approval” criteria similar to those used in other jurisdictions, justifying this as part of its wider supervisory role in relation to representative proceedings. This would involve judicial consideration of the conditional settlement agreement between the parties. However, the Houghton Court of Appeal has expressed a willingness to scrutinize private litigation funding agreements in a representative proceeding, observing:

There is an outstanding issue whether the extent of such control is appropriate. Policy considerations include the court’s reluctance to scrutinise private bargains. Telling the other way is the fact that parties not before the court are potentially affected.

Arguably, scrutiny of a proposed settlement as part of an application to discontinue a proceeding could be similarly rationalized on the basis that when a representative proceeding is settled it also impacts parties not before the court.

There may, however, be a further wrinkle. The Ontario CPA expressly provides that “[a] settlement of a class proceeding that is approved by the court binds all class members.” In the absence of an equivalent mechanism in New Zealand, it is unclear to what extent the terms of any agreement can be transposed onto other class members, given that they are not parties to the contract between the representative plaintiff and defendant. Grave, Adams and Betts observe

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181 For an example of a situation where approval of a settlement agreement is expressly required in New Zealand see Minors’ Contracts Act 1969 1969/41 at s 12.

182 Saunders v Houghton (No. 1), supra note 1 at para 65.

183 CPA, supra note 92 at s 29(3).

184 See e.g. OLRC Report, supra note 28 at 788 (suggesting that a settlement entered into on behalf of the class would bind absent class members); Neil Andrews, “Multi-Party Litigation in England” (2013) University of Cambridge Research Paper No 39 at 5 (suggesting that a settlement will not bind class members without their agreement unless it is constituted as a judgment by consent).
that in Australia a representative plaintiff may have implied or ostensible authority to bind absent class members despite the lack of a provision of this nature under the FCAA. But, even if this is the case, the precise limits of a representative plaintiff’s authority remain ill defined. This suggests parties to a representative proceeding may seek to resolve their claim by consent judgment to ensure that there are binding orders supporting the essential terms of their underlying settlement agreement, and minimize the risk of subsequent proceedings by individual non-representative class members. Where the parties adopt this approach it provides an opportunity to scrutinize the terms on which a proceeding is being resolved as the court retains a discretion to decline the order jointly sought by the parties. Of course, in an “opt-in” representative proceeding, where the identity of every class members is known, it may be possible for class counsel to secure the non-representative class members’ consent to the terms of the proposed settlement.

As with notice, the existence of a means to supervise settlement of representative proceedings in New Zealand does not guarantee that this will occur in practice. One of the challenges for jurisdictions that employ a mandatory settlement approval mechanism is that the settlement agreement negotiated is normally supported by both the representative plaintiff and the defendant. This places a court in the difficult position of having to inquire into the appropriateness of a proposed settlement without the assistance of a contravener. Similar issues would undoubtedly arise in New Zealand; however, the dynamic here also calls into question whether a consistent practice of settlement approval will develop at all. This is because, in the absence of an objecting non-representative class member, there is unlikely to be anyone to argue that the court should scrutinize a settlement agreement in the first place. As such, it may be some time before the New Zealand courts confront the issue of settlement approval.

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185 Grave, Adams & Betts, supra note 1 at 617.
186 For instance, Grave, Adams & Betts note it is questionable whether a representative plaintiff can commit to releases and discharges relating to the underlying subject matter of a proceeding (as opposed to the claim as pleaded), and potential claims against other respondents, on behalf of class members. Ibid.
187 Discontinuance of a proceeding does not, in and of itself, prevent a subsequent claim in relation to the same subject matter. However, a plaintiff who discontinues a claim will need to pay any outstanding costs arising out of a discontinuance before commencing a new proceeding. High Court Rules, supra note 5 at r 15.24.
188 For a good discussion of the difficulties this dynamic creates in Ontario, and the mechanisms by which it may be addressed, see Smith Estate v National Money Mart Company 2011 ONCA 233; 106 OR (3d) 37 at paras 15 – 33.
Against this, it is interesting to note that the contracts entered into between class members, class counsel, and the third party litigation funder in *Strathboss* contain mechanisms which impact on how the proceeding may be settled.189 These agreements are not publicly available. However, the Kiwifruit Claim’s website indicates that in the event of an unallocated lump sum settlement or award of damages the “Claim Committee” will calculate each plaintiff’s entitlement and then “seek the Court’s endorsement of the allocation methodology adopted … and all allocations as being fair and reasonable.”190 This suggests that even if the courts are slow to take on a supervisory role in relation to settlements, something similar could emerge out of the contractual arrangements used to manage the relationship between the actors involved in New Zealand’s “opt-in” representative proceedings.

3.1.3 Implications for procedural protections

The difficulties outlined above highlight a key weakness of New Zealand’s non-codified regime. It appears possible to cobble together analogues of procedural mechanisms from other jurisdictions. However, the absence of clear guidance as to the appropriate role of the court, and the circumstances in which the interests of class members and defendants require protection, leaves the judiciary in the unenviable position of having to develop and deploy procedural protections on the fly in response to the issues that arise in particular proceedings. A more settled practice may emerge over time as class action jurisprudence develops, but there is no guarantee that the court will adopt mechanisms like supervision of settlement without a case that highlights why protections of this nature are required. As a result, it is possible the interests of plaintiffs and defendants will remain under-protected, or that the mechanisms ultimately put in place will be calibrated to address issues that arose in particular proceedings rather than the needs of New Zealand’s regime as a whole.191

189 See generally *Strathboss, supra* note 81 at para 68 – 73.

190 The Kiwifruit Claim, Website, “Frequently Asked Questions” (2015) at “What do I get if the claim is successful”, online: <http://thekiwifruitclaim.org/page/faqs>

191 See generally Wicks, *supra* note 6 at 109.
3.2 “Opting in” and “opting out”

While the absence of procedural protections under the HCR is concerning, the difficulties this creates are unlikely to be insurmountable. New Zealand’s nascent class action regime does, however, have another limitation which could restrict the circumstances in which representative proceedings are used in practice: the High Court’s determination in *Houghton* that “opt-out” representative proceedings are impermissible under the HCR.\(^\text{192}\)

This section considers the implications of the High Court’s decision. It begins with a consideration of respective benefits of “opt-in” and “opt-out” mechanisms, concluding that “opt-in” representative proceedings will make it more difficult to advance certain types of claim. The section then examines the High Court’s decision that “opt-out” representative proceedings are impermissible, finding that this decision is unlikely to be correct. Next, it evaluates Wicks’ argument that both “opt-in” and “opt-out” mechanisms are inconsistent with HCR 4.24, concluding that this understates the capacity of the concept of a representative proceeding to evolve. Finally, the section considers the implications of permitting “opt-in” and “opt-out” representative proceedings, concluding that judicial discretion may lead to underuse of “opt-out”.

3.2.1 Benefits of “opt-in” and “opt-out”

According to the OLRC, the question of whether aggregate litigation should be constituted on an “opt-in” or “opt-out” basis is “one of the most controversial issues in the design of a class action procedure”.\(^\text{193}\) With an “opt-out” mechanism, the outcome of a proceeding binds each individual within the class definition unless they affirmatively exclude themselves from the claim in the prescribed manner. As affirmative consent is not required, an “opt-out” class action “sweeps in” every potential claimant whether they are aware of the proceeding or not, and will often result in a claim where the identity of many class members is unknown. By contrast, an “opt-in” mechanism requires prospective claimants to affirmatively agree to join the claim, with only those

\(^{192}\) *Houghton*, (Representation Order), *supra* note 12 at para 165.

\(^{193}\) *OLRC Report*, *supra* note 28 at 467.
who do so becoming party to the proceeding. Here, the identities of all class members are known and will generally be recorded on a register.\footnote{Rachael Mulheron, “The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis” (2009) 15 Colum J Eur L 409 [Mulheron, “Opt-Out Class Action for European Member States”] at 428 – 429.}

Put broadly, the benefit of an “opt-out” mechanism is that it maximizes the size of the class, while minimizing the up-front cost of commencing a claim on a representative basis and the barriers to individuals becoming involved the proceeding.\footnote{Ibid at 428; Rachael Mulheron, “Justice Enhanced: Framing an Opt-Out Class Action for England” 70:4 MLR 550 at 556; Vince Morabito, “Opt in or Opt Out: A Class Dilemma for New Zealand” (2011) 24 New Zealand Universities Law Review 421 [Morabito, “Opt in or Opt Out”] at 436 – 439.} In doing so, “opt-out” enhances access to justice by drawing in individuals who might otherwise have been unable to participate due to social, intellectual, or psychological disadvantages, or a lack of motivation to become involved due to the modest value of the interest they have at stake.\footnote{Mulheron, The Class Action, supra note 1 at 37 - 38; Mulheron, “Opt-Out Class Action for European Member States”, supra note 194 at 430 – 431; Winkler et al, supra note 1 at 214 – 215.} It also promotes efficiency by assisting to comprehensively resolve the dispute between the defendant and the class, helps to generate the economies of scale necessary for a class action to be economically viable, and increases the pressure on defendants to settle due to the large number of individual claimants represented.\footnote{Winkler et al, supra note 1 at 214 – 215.}

however, address the concern that constituting a proceeding on an “opt-out” basis runs contrary to conventional notions of party autonomy by including class members who have no real interest in becoming involved in a proceeding, or who are entirely unaware of a claim.\textsuperscript{200} In addition, “opt-in” helps ensure that the extent of a representative proceeding is more readily ascertainable, and restricts claims to a more manageable size.\textsuperscript{201}

Technically speaking, “opt-in” and “opt-out” class actions can be used to advance any type of proceeding. In practice, however, the need to secure each class member’s individual consent in an “opt-in” proceeding has implications for the types of claim that are likely to be brought. An “opt-in” mechanism may, for example, be relatively effective to advance a proceeding on behalf of a small class of people who have suffered very serious personal injuries, and are invested in the proceeding as a result.\textsuperscript{202} But, attempting to advance a more paradigmatic class action, which aggregates a large number of claims that would not be individually viable because of the modest relief sought, is significantly more challenging. This is because it is more difficult to attract a sufficient number of class members to make the proceeding economically viable, and more expensive to administer an “opt-in” register involving tens of thousands of claimants. As a result, “opt-out” class actions generally favor plaintiffs by maximizing class size, while defendants will prefer more constrained “opt-in” proceedings that minimize their exposure and the leverage this provides class counsel.\textsuperscript{203}

Mulheron’s recent comparative analysis of United Kingdom’s “opt-in” Group Litigation Orders (“GLOs”), and federal Australian and Ontarian “opt-out” class actions illustrates the potential limits of an “opt-in” regime requiring more active participation by class members. This analysis identified a comparative lack of private law grievances in the United Kingdom, and a complete

\textsuperscript{200} Mulheron, \textit{The Class Action}, supra note 1 at 29 – 30; \textit{OLRC Report}, supra note 28 at 480 – 481. But see Morabito, “Opt in or Opt Out”, supra note 195 at 440 – 441 (noting that there is a tension between the party autonomy objection to opt-out, and the idea that a representative proceeding enables a class representative to conduct proceedings on behalf of others).

\textsuperscript{201} Mulheron, \textit{The Class Action}, supra note 1 at 30.

\textsuperscript{202} Mulheron, “Opt-Out Class Action for European Member States”, supra note 194 at 427.

\textsuperscript{203} See e.g. Winkler \textit{et al}, supra note 1 at 214 – 215. Of course, the distinction here is not entirely clear cut. A defendant may, for example, prefer an “opt-out” mechanism because it enables a proceeding to be more comprehensively resolved, minimizing the risk of duplicate proceedings. (\textit{Ibid} at 215).
absence of certain types of claim, a disparity partially attributable to the “opt-in” nature of GLOs. The New Zealand Rules Committee similarly recognized the limitations of GLOs in its second consultation paper, noting that:

The GLO scheme is not a class action in the true sense because it requires that class members actively join/participate in the action as parties. It is an opt-in, rather than an opt-out device … It would not benefit many people suffering from wrongs if it were adapted and applied in New Zealand. The Rules Committee is proposing that Parliament introduce a true class action which will be beneficial to many claimants who, in the absence of such a procedure, will otherwise be denied real, effective access to justice.

The considerations outlined above have led many common law jurisdictions to employ “opt-out” mechanisms, the United Kingdom being a notable exception. To date, however, New Zealand has adopted a different approach. The High Court in *Houghton* concluded that there is no jurisdiction to commence an “opt-out” representative proceeding under *HCR* 4.24, as the next section discusses.

### 3.2.2 “Opting-in” and “opting-out” under the *HCR*

The representation orders in *Houghton* were initially granted on an *ex parte* basis. At this point the orders were “opt-out”. However, on review, French J rescinded the “opt-out” mechanism and replaced it with a requirement that qualifying shareholders “opt-into” the proceeding by 19 December 2009.

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205 *Ibid* at 436.

206 *Rules Committee, Class Actions for New Zealand - A Second Consultation Paper prepared by the Rules Committee – October 2008*, (Wellington: Rules Committee, October 2008) at para 7 [*Second Consultation Paper*]. The Rules Committee’s proposed regime contemplated that judges would have a discretion as to whether a class actions should be constituted on an “opt-in” or “opt-out” basis. (*Ibid* at para 13)

207 Mulheron, “Difficulties with Group Litigation Orders”, *supra* note 199 at 52. It is worth noting, however, that the United Kingdom has recently legislated to permit “opt-out” collective proceedings in relation to breaches of competition laws. See generally Simon Camilleri *et al.*, “Opt-Out Class Actions in the UK: Collective Proceedings for Competition Law Breaches” (Fried Frank, 2015), online: <www.friedfrank.com/siteFiles/Publications/FINAL%20-%204-7-2015%20-%20TOC%20Memo%20-%20Opt-Out_Class_Actions_in_the_UK.pdf>

208 *Houghton*, (Representation Order), *supra* note 12 at para 224.

French J’s underlying concern with the “opt-out” mechanism an Associate Judge had approved was that a person could become a party to a proceeding without their consent, which Her Honor considered “somewhat alien to our way of thinking.”

French J accepted “opt-out” mechanisms were used in other jurisdictions, but observed these were “accompanied by detailed legislative rules regulating the process that is to be followed [including] safeguards to protect the interests of defendants, as well as the members of the represented class.”

In New Zealand, there was no express provision for an “opt-out” procedure, and the Court concluded commencement of a proceeding on an “opt-out” basis represented “too radical a departure from the existing rules … which only contemplate “opt-in.””

In addition, even if an “opt-out” mechanism were permissible, French J considered use of “opt-out” was unjustifiable as it was possible to identify and directly communicate with every potential class member.

The High Court’s decision that “opt-out” representation orders are inconsistent with HCR 4.24 was not appealed, and has yet to be revisited in subsequent representative proceedings which have been (or are seeking to be) commenced on an “opt-in” basis. Although experience with

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210 Ibid at para 157.
211 Ibid at para 162.
212 Ibid at para 165.
213 Ibid.
214 Ibid at para 166.
215 Saunders v Houghton (No. 1), supra note 1 at para 12 (“The validity of an “opt-out” order in the absence of legislation was not argued and we offer no comment upon that or whether it can stop time running or create res judicata for those who have opted out.”)
216 See Cooper, supra note 41 at paras 50 – 55 (class members required to “opt-in” by a Court imposed deadline); Strathboss, supra note 81 at paras 75 – 78 (class members must “opt-in” by a Court imposed deadline); Adina Thorn Lawyers, Media Release, “Funded Plaster Cladding Class Action Gaining Momentum” (12 August 2015), online: <goodcladding.co.nz/announcements.html> [Adina Thorn Lawyers, “Gaining Momentum”] (class members required to register to participate in the claim prior to its commencement, with class counsel inviting those assessed to “fall within the technical and legal parameters required” to join the class); Parker & Associates, “Cladding Action against James Hardie” (2015), online: <www.parkerandassociates.co.nz/cladding-action.html> (inviting prospective class members to register their interest, enabling class counsel to assess their eligibility to make a claim as part of the class action); GCA Lawyers, Claim Update, “Deadline to join class action extended” (24 June 2015), online: <http://www.srca.co.nz/blog/deadline-to-join-class-action-extended> (class members required to join claim by lawyer imposed deadline prior to commencement); Miller, supra note 14 at paras 27 – 49 (class members who became members of a “Investor Recovery Group” deemed to have opted in, other class members required to “opt-in” by a Court imposed deadline). Interestingly, in Miller the plaintiffs originally sought to commence their claim on an “opt-out” basis; however, they appear to have revisited this position after it became clear the defendants would oppose the use of an “opt-out” mechanism, and the representative order was ultimately made on an “opt-in” basis. It is unclear why the plaintiffs altered their position. It is possible that they received an indication that commencement
“opt-in” proceedings under the HCR is limited, it is difficult to see why encouraging class members to actively participate in claims would prove any easier in New Zealand. Similarly, while “opting-in” to a representative proceeding may be less onerous than joining a GLO, where individual pleadings may be required, collating and administering a record of all those participating remains a time consuming and expensive exercise. As such, if French J is correct that representative proceedings can only be commenced on an “opt-in” basis, this will shape and constrain the types of claim that plaintiffs pursue in New Zealand.

That being said, the High Court’s conclusion in Houghton is not particularly robust. The absence of a clear mechanism by which a class member may “opt-out” of a representative proceeding is common to articulations of the representative rule in a number of commonwealth jurisdictions. However, courts have generally concluded this means a representation order creates a “compulsory class”, with no requirement to obtain the consent of the individuals involved, and no ability for these individuals to exclude themselves from the proceeding. Indeed, as Wicks notes, a number of their claim on an “opt-out” basis was likely to be contentious as Matthews AJ encouraged the parties to narrow the matters in issues prior to the hearing, recommending the parties discuss (unspecified) issues in advance. Miller, supra note 14 at paras 16, 29.

217 Mulheron, “Difficulties with Group Litigation Orders”, supra note 199 at 53. It is, of course, possible that individual pleadings will still be required at an early stage in the proceeding. For instance, in Strathboss the court ordered existing class members to provide particulars by way of pleadings, discovery, and interrogatories, in order to facilitate analysis of material differences between claimants, and required new class members to provide this information within 20 working days of “opting-into” the claim. Strathboss, supra note 81 at para 92.

218 See e.g. Houghton v Saunders [2013] NZHC 3452 at 8 (noting, in the context of a costs decision, that steps taken by the plaintiff to review, collate and copy 3281 opt-in forms as part of the discovery process were beneficial to both the plaintiff and the defendant, and that the plaintiff was not acting as an agent of the court in this regard as “it is the responsibility of a representative plaintiff to organize its class of claimants”); Adina Thorn Lawyers, “Gaining Momentum”, supra note 216 (“We had an overwhelming number of registrations – over 1400 in fact. It has been a massive undertaking to assess those claimants who fall within the technical and legal parameters required for us to mount a successful claim.”).

219 See OLRC Report, supra note 28 at 469 (“Rule 75 does not oblige class members to “opt in” to a class action before the common questions have been decided [and] the case law has not acknowledged any general right in individual class members to exclude themselves from the effect of a judgment”); ALRC Report, supra note 24 at para 5; Ross et al v Manitoba Government Employees’ Union et al, 2001 MBQB 61, 154 Man R (2d) 225 at para 31; Rachael Mulheron, “Opting In, Opting Out, and Closing the Class: Some Dilemmas for England’s Class Action Lawmakers” (2011) 50 Can Bus LJ 376 [Mulheron, “Opting in, Opting Out”] at 388 – 391.

of New Zealand decisions granting representation orders prior to French J’s decision in *Houghton* contemplated that all those represented would be bound without the need for individual consent.\(^{221}\) This approach reflects the equitable origins of the representative rule as a mechanism intended to enable comprehensive resolution of disputes between all those affected, without the need for each individual to appear before the court.\(^{222}\)

Over the years, courts adopting a traditional approach to representative proceedings have attempted to work around the difficulties that a “compulsory class” creates by narrowly defining class membership, or allowing class members who are opposed to a proceeding to be joined as, or represented by, a defendant.\(^{223}\) However, more recently some courts have departed from this restrictive approach, accepting that an “opt-in” or “opt-out” mechanism can be used to define who will be bound by a proceeding.\(^{224}\) Most strikingly, the Supreme Court of Canada in *Dutton* considered class members had a right to “opt-out” of proceedings brought under Alberta’s

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\(^{221}\) Wicks, *supra* note 6 at 81. See e.g. *Talley’s*, *supra* note 41 (where the Court made a representation order requiring a company to represent 4,500 foreign crewmembers “many of whom speak no English, and would have even less interest in becoming involved in legal proceedings in this country.”); *Westpac*, *supra* note 111 (where a representation order was made on behalf of 8,210 investors in circumstances where the plaintiffs argued obtaining consent from each individual investor would be impractical); *Ankers*, *supra* note 125 (where a representation order was made on behalf of all applicants for or renewals of Special Benefit whose applications were determined between particular dates in order to enable them to seek relief from the Ministry of Social Welfare); *Maranatha*, *supra* note 152 (where the court considered a representation order was inappropriate because, inter alia, franchisees happy with the contractual arrangement challenged by the representative plaintiffs should not have to join the claim).

\(^{222}\) Wicks, *supra* note 6 at 81. See also generally *John v Rees* [1969] 2 All ER 274 (HC) at 284 [*Rees*] (“It seems to me that the important thing is to have before the court, either in person or by representation, all who will be affected”); *Carnie* (SC), *supra* note 220 at 469 – 473.

\(^{223}\) See Mulheron, “Opting in, Opting Out”, *supra* note 219 at 390 – 391; *ALRC Report* supra note 24 at para 100; Morabito, “Group Litigation in Australia”, *supra* note 220 at 32 – 33. For examples of cases narrowly defining the class see: *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd* 1997 CanLII 14838 (AB QB), 53 Alta LR (3d) 204 at para 29; *Ranjoy Sales and Leasing Ltd v Deloitte, Haskins and Sells* (1984) 16 DLR (4th) 218 at 230; *Ankers*, *supra* note 125 at 11. For examples of cases noting that class members may be joined as defendants see: *Wilson v Church* (1878) 9 Ch. D. 552; *Watson v Cave (No. 1)* (1881) 17 Ch. D. 19 (CA); *Rees*, *supra* note 222 at 286; *Sugden v Metropolitan (Municipality) Commissioners of Police* 1978 CarswellOnt 730, 19 OR (2d) 669 at para 12; *Hammer Pizza Ltd v Domino's Pizza of Canada Ltd* 1997 CarswellAlta 1233, [1997] AJ No. 67 at para 18; *Baker*, *supra* note 179 at 102.

(similarly worded) representative rule, and that the decision of the court would not bind them if they were not provided with an opportunity to exit.225

Given how representative proceedings have historically operated, French J’s jurisdictional concern about “opt-out” representative orders appears to be based on a misunderstanding of the underlying nature of a representative claim. Although the Court was correct that a representative proceeding had never been commenced on an “opt-out” basis in New Zealand,226 and that “opt-out” representative proceedings are not used in England,227 it is well established in both jurisdictions that a representative claim can bind class members without their affirmative consent.228 Having been presented with a false dichotomy between “opt-in” and “opt-out”, French J appears to have conflated the “opt-out” mechanism, which serves the interests of party autonomy by permitting class members to exclude themselves, with the ability of a representative claim to bind absent class members.229 As a result, the Court erroneously concluded that the way representative proceedings have conventionally operated represented a radical departure from the HCR.

The Supreme Court’s decision in Credit Suisse, which addressed the question of when the claim of an individual class member should be regarded as “brought” for limitation purposes, reinforces this conclusion. Following the High Court’s decision that that participants were required to “opt-in” to the proceedings in Houghton, some class members had failed to take the affirmative action necessary to do so within the timeframes required under the Limitation Act 1950. Elias J, writing for the minority, considered this was fatal to these individuals’ claims as HCR 4.24 required consent or adherence to the mechanism prescribed by the court (in this case “opting in”) before a claim was brought on their behalf.230 However, the majority determined that these plaintiffs’

225 Dutton, supra note 11 at para 49.
227 Ibid at para 158.
228 See fns 13, 221 and 223 above.
229 This is well illustrated by the fact that French J subsequently held that the court has the power to allow class members who had “opted-into” to the claim to “opt-out” again if an amendment to the representation order left them exposed to an adverse costs award where they otherwise would not have been. Houghton, (Notice), supra note 165 at para 45.
230 Credit Suisse, supra note 8 at para 77 – 82.
claims had been brought within time, characterizing “opting-in” and “opting-out” as ancillary mechanisms that served to reduce the size of a class of represented individuals.\(^{231}\) On this approach:

\[
\text{[i]t is not the opting in or out that defines the class. The class represented is defined by reference to the class of persons having the same interest in the same subject matter. That is what r 4.24 provides.}
\]

\[
\ldots
\]

The fact that a different mechanism for reducing the represented class was substituted by French J had no effect on the scope of the original order. It did not change the fact that the proceeding was brought on behalf of (and therefore by) all those who had bought shares in the initial public offering.\(^{232}\)

The majority’s decision reconfirms that a representation order under *HCR* 4.24 relates to the class as a whole, not only those who consent to a claim. When coupled with the Court’s apparent acceptance of “opt-in” and “opt-out” as mechanisms for reducing the size of the class,\(^{233}\) it is easy to see how another court considering the legality of “opt-out” representation orders could reach a different conclusion to French J in *Houghton*.

**3.2.3 Are “opting-in” and “opting-out” both irreconcilable with HCR 4.24?**

It is possible to take the argument that consent should not be required to commence a representative proceeding further. As outlined above, *HCR* 4.24 provides that “[o]ne or more persons may sue … on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding.”\(^{234}\) Wicks suggests this requirement is incompatible with an “opt-in” or “opt-out” approach,\(^{235}\) arguing that by allowing class members to “opt-in” or “opt-out” a court defines the group on whose behalf a proceeding is brought by consent, rather than the commonality of interest

\(^{231}\) *Ibid* at paras 163 – 169.

\(^{232}\) *Ibid* at paras 163, 166.

\(^{233}\) The Court of Appeal below also appears to have considered that “opt-out” representative proceedings were possible. *Saunders v Houghton (No. 2)*, *supra* note 61 at paras 67 – 75.

\(^{234}\) *High Court Rules*, *supra* note 5 at r 4.24.

\(^{235}\) Wicks, *supra* note 6 at 102 – 105.
required under the representative rule. This, Wicks argues, goes beyond what is permissible either by purposive interpretation, or as an exercise of the inherent jurisdiction of the court, as it is inconsistent with the wording of the rule, and undermines the objectives representative proceedings were historically intended to achieve.

It must be acknowledged that the modern approach to representative proceedings strains the language of *HCR* 4.24. Arguably, however, “opting-in” and “opting-out” are best characterized as mechanisms the court uses to protect the interests of absent class members as part of its wider supervisory role in relation to representative proceedings. Historically, the representative rule had little need for an “opt-in” or “opt-out” mechanism. This is because it was used in circumstances where class members had a joint right, which necessarily involved all of the parties, or general right, where a point of principle was determined in relation to all those to whom it applied. However, relaxation of the representative rule’s “same interest” requirement makes an “opt-in” or “opt-out” mechanism more desirable due to increased divergence between the circumstances of class members, and the increased likelihood that some members will have legitimate reasons not to participate in a claim.

Wicks is likely correct that a class under *HCR* 4.24 should be defined by commonality rather than consent. The rule is silent, however, as to whether individual plaintiffs can subsequently exclude themselves from a proceeding that has been duly constituted. Allowing this to occur cuts across the objectives served by a comprehensive “compulsory class” representative proceeding, undermining the efficiency of the representative form, and increasing the risk that defendants will face multiple claims in relation to the same subject matter.

\[\text{Ibid.}\]
\[\text{Ibid.}\]
\[\text{See Carnie (SC), supra note 220 at 469 – 473; ALRC Report, supra note 24 at para 100; Mulheron, “Opting in, Opting Out”, supra note 219 at 390.}\]
\[\text{Wicks, supra note 6 at 80.}\]
\[\text{Ibid at 104 – 105.}\]
\[\text{Ibid at 105.}\]
because they are inconsistent with the underlying philosophy of the representative rule minimizes
the significance of New Zealand’s transition to a “generous approach” to representative
proceedings.\textsuperscript{242} As noted, this approach derives its justification from the underlying objective of
the \textit{HCR} to facilitate the “just, speedy, and inexpensive determination of [proceedings].”\textsuperscript{243}
Allowing class members to exclude themselves by “opting-out” or declining to “opt-in”
deredes its efficiency of the representative form. However, it also supports \textit{HCR} 1.2’s
“overriding ‘just’ requirement”\textsuperscript{244} by protecting the interests of non-representative plaintiffs who
would otherwise lose the ability to bring an individual claim when they are involuntarily swept
into a representative proceeding over which they have little or no control.

It is also important to recall that modern New Zealand representative proceedings are founded on
progressive cases like \textit{Taff Vale}, and the idea that the concept of what constitutes a representative
proceeding is capable of evolving over time. As noted, the liberal decision in \textit{Flowers}, where
McGechan J observed that provided representative proceedings did not work injustice “the rule
should be applied and developed to meet modern requirements”,\textsuperscript{245} remains a touchstone for courts
applying the representative rule.\textsuperscript{246} Strict adherence to the United Kingdom’s historic
conceptualization representative proceedings sits uncomfortably with this approach.

If \textit{HCR} 4.24 expressly precluded “opting-in” or “opting-out”, it would clearly be inappropriate for
a court to permit this to occur; however, it is difficult to see why the rule in its current, sparsely
worded, form should preclude the use of such mechanisms if this would be more consistent with
how representative proceedings are now understood. “Opt-in” or “opt-out” mechanisms could be
imposed by way of an exercise of the court’s inherent jurisdiction, or as part of a judge’s broad
discretion under \textit{HCR} 4.24(b) to allow a representative claim to be brought “as directed”.\textsuperscript{247} As
the Court of Appeal recognized in \textit{Houghton}, in the absence of developed procedural rules it is left

\begin{itemize}
\item \textsuperscript{242} \textit{Ibid} at 105.
\item \textsuperscript{243} \textit{High Court Rules}, supra note 5 at r 1.2.
\item \textsuperscript{244} \textit{Saunders v Houghton (No. 1)} supra note 1 at para 13.
\item \textsuperscript{245} \textit{Flowers}, supra note 15 at 271.
\item \textsuperscript{246} \textit{Credit Suisse}, supra note 8 at paras 61 and 152.
\item \textsuperscript{247} Although see \textit{contra} Wicks, supra note 6 at 85 (arguing that “as directed” cannot be interpreted in this way).
\end{itemize}
to the courts to fill this void through their inherent jurisdiction.\textsuperscript{248} If it is accepted that the New Zealand courts are capable of developing the representative rule in the way that they have, it is appropriate to recognize the impact of these changes when considering the boundaries of a court’s jurisdiction to manage a proceeding of this nature.

3.2.4 Implications of discretion to commence proceedings on an “opt-in” or “opt-out” basis

Even if “opt-in” and “opt-out” representative proceedings are available, there is still a decision to be made as to which mechanism to use in any particular case. The situation here parallels the Rules Committee’s proposed regime, which sought to promote flexibility by permitting proceedings to be certified on an “opt-in” or “opt-out” basis,\textsuperscript{249} while at the same time suggesting that “a majority of class actions would be more appropriately classified as “opt-out”.”\textsuperscript{250} As the Alberta Law Reform Institute has noted, the difficulty with this kind of “judicial choice” model is that it creates uncertainty and encourages litigation over the issue of “opt-in” or “opt-out.”\textsuperscript{251} Given that the choice between “opt-in” and “opt-out” will often have a significant impact on the overall size of the class, defendants have strong incentives to contest this issue. This is problematic as the risk that a proceeding will be constituted on an “opt-in” basis could discourage class counsel from investing time and resources in a proceeding. In addition, as Morabito observes, it is also possible that judicial conservatism would have led to “opt-in” proceedings being disproportionately favored under the Rules Committee’s proposed regime, due to the more conventional way in which they operate.\textsuperscript{252} It is reasonable to infer that this dynamic would be equally if not more pronounced under the representative rule due to the lack of a clear signal that the legislature intended “opt-out” proceedings to be the norm.

Given these issues, even if “opt-out” representative proceedings are permissible, the existence of a parallel “opt-in” mechanism will undermine the ability of plaintiffs to bring “quintessential”

\textsuperscript{248} Saunders v Houghton (No. 1), supra note 1 at para 15.

\textsuperscript{249} Draft Rules, supra note 4 at r 38.8(3)(c).

\textsuperscript{250} Second Consultation Paper, supra note 206 at para 4.

\textsuperscript{251} Alberta Law Reform Institute, Class Actions (Edmonton: Alberta Law Reform Institute, 2000) at 97 – 98.

\textsuperscript{252} Morabito, “Opt in or Opt Out”, supra note 195 at 435
class actions involving a large numbers of individual claimants with relatively low value claims. This assumes, however, that there are strong incentives for plaintiffs (and class counsel) to prefer “opt-out” over “opt-in” to begin with. As the discussion of costs below suggests, New Zealand’s lack of a common fund mechanism means this is unlikely to be the case.

3.3 Costs

Thus far this paper has focused on the legal mechanisms by which representative proceedings are commenced and managed in New Zealand. However, the way a jurisdiction handles adverse costs awards, and the fees and disbursements incurred during the course of a proceeding, can have an equally significant impact on how class actions are used in practice. Indeed, as the OLRC observed, “the question of costs is the single most important issue that this Commission has considered … the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilized at all.” This section examines the impact New Zealand’s approach to costs will have on the viability of proceedings under the representative rule. It draws on the Ontarian and Australian Federal class action regimes to illustrate how costs can influence the way class actions are brought, and the mechanisms available to counteract the difficulties that costs-related issues create.

3.3.1 “Loser pays” costs regimes and class actions

Beginning with the issue of adverse costs awards, New Zealand, like Australia and Ontario, generally requires the unsuccessful party to a proceeding to make a contribution to the costs incurred by the successful party. This situation can be contrasted to jurisdictions like the United States, where party-and-party costs are not generally awarded, and British Columbia, where class actions are legislatively exempt from the general rule that costs follow the event. “Loser pays” costs regimes present a particular challenge for class actions because the representative plaintiff,

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253 i.e. “party-and-party costs.”

254 i.e. “solicitor-and-client costs”.

255 OLRC Report, supra note 28 at 647.

256 Class Proceedings Act [RSBC 1996] Ch 50 at s 37. The Ontario CPA provides for a more limited exception, permitting a court to consider whether a class proceeding was a test case, raised a novel point of law, or involved matter of public interest when determining a costs application. CPA, supra note 92 at s 33(1).
rather than the class as a whole, is responsible for any adverse costs award in relation to the common aspects of the claim.257

This dynamic makes class actions an attractive option for class members, and prevents non-representative plaintiffs, who have little control over a proceeding, from being saddled with a significant adverse costs award. However, it also creates a significant financial disincentive to taking on the role of representative plaintiff. The difficulty here is that the complexity of aggregate litigation can significantly amplify the size of the adverse costs award a representative plaintiff is exposed to as compared to a non-representative individual claim, while the size of the reward the representative plaintiff expects to receive does not increase.258 Furthermore, as aggregate litigation is commonly used to advance claims that are not economically viable on an individual basis, the representative plaintiff’s expected reward will often be insufficient to justify the expense of an individual proceeding in the first place.

This significant disparity between risk and reward means it will seldom be in an individual’s rational self-interest to take on the role of representative plaintiff. As the Ontario Superior Court evocatively put it:

The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars.259

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257 The Ontarian CPA and Australian FCAA’s “opt-out” regimes expressly confirm this to be the case. FCAA, supra note 91 at s 43(1A); CPA, supra note 92 at s 31(2). Both jurisdictions make an exception for costs incurred by a class member in relation to the determination of the individual aspects of their claim. The New Zealand High Court has confirmed that the position at common law, where members of a representative class are not personally liable for costs, remains applicable in the context of modern “opt-in” representative proceedings. Houghton, (Notice), supra note 165 at 37 – 43. But see contra Headley v Kiwi Co-Operative Dairies Ltd (2000) 15 PRNZ 210 (HC) at para 32 – 36 (where the Court converted a claim involving 258 plaintiffs into a representative proceeding, but imposed a condition that the plaintiffs remained jointly and severally liable for any adverse costs award to preserve the position of the defendant).

258 Canadian Courts have, on occasion, awarded representative plaintiffs a modest amount of compensation for their role in a proceeding. However, this will generally only occur in exceptional cases. See generally Baker (Estate) v. Sony BMG Music (Canada) Inc, 2011 ONSC 7105, [2011] OJ No 5781 (QL) [Sony BMG] at para 90 – 96.

Of course, people do not always base their decision to become a representative plaintiff on a financial cost-benefit analysis. An individual may, for example, have personal reasons for wanting to champion a claim, such as a desire to address a perceived injustice, and it is not unheard of for people to take on the role of class representative in “loser pays” jurisdictions despite the financial implications of doing so.\(^{260}\) Likewise, Grave, Adams and Betts note that Australian class counsel sometimes seek out impecunious class members with “nothing to lose” to take on this role.\(^{261}\) Nevertheless, a representative proceeding will be much more difficult to get off the ground where it is necessary to find a representative plaintiff willing to assume the risk of significant adverse financial consequences in the event the claim fails.

### 3.3.2 Solicitor-and-client costs

Solicitor-and-client costs are also problematic for class actions. The difficulty here is that it is the representative plaintiff who engages class counsel. This means that, in the absence of some agreement or legislative mechanism to the contrary, the representative plaintiff is also responsible for paying the solicitor-and-client costs incurred on behalf of the class during the proceeding. Again, class actions are often challenging to progress on this basis because the representative plaintiff, as an individual with a relatively modest claim, will not be willing (or able) to independently fund large scale aggregate litigation.

#### 3.3.3 Mechanisms to address costs-related issues

A number of mechanisms can help to overcome the difficulties that party–and-party and solicitor-and-client costs create for class actions. These include public funding, indemnification by class counsel, contingency fee agreements, and third party litigation funding. This section considers the Ontarian and Australian class action regimes’ experience managing issues of costs, and examines whether the New Zealand regime is equipped to address these issues. It begins with a brief discussion of public funding. Next it considers the interface between indemnification, contingency fees, and third party litigation funding. It concludes with a discussion of the implications of New Zealand’s lack of a “common fund” mechanism.

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\(^{260}\) Grave, Adams & Betts, supra note 1 at 190 – 191.

\(^{261}\) See generally ibid at 183 – 185.
3.3.3.1 Public Funding

In Ontario, public funding is used to defray the costs of class proceedings and reduce the disincentives that adverse costs awards create. Established in 1992, the Class Proceedings Fund selectively supports class actions, paying for disbursements (excluding legal fees), and indemnifying the representative plaintiff in relation to any costs award.\(^{262}\) Plaintiffs are required to apply for support under the fund. The Class Proceedings Committee assesses applications against a range of criteria including the strength of a claim, availability of funds at the time an application is made, and any public interests involved.\(^{263}\) Where a funded representative plaintiff’s claim settles or succeeds at trial, a levy of 10% of any award or settlement, plus the full amount of any financial support in relation to disbursements, is payable to the Class Proceedings Fund. These funds are then used to support future class actions.

By contrast, the Australian federal regime did not adopt the ALRC’s recommendation that an analogous “special fund” be established to meet the costs of class proceedings, including adverse costs awards.\(^{264}\) As a result, Australia must rely on other mechanisms to address costs in the class action context.

Unsurprisingly, given New Zealand’s lack of an established class action regime, there is no public funding regime dedicated to supporting representative proceedings. Financial assistance is, however, sometimes made available to civil litigants under New Zealand’s legal aid regime.\(^{265}\) Where legally aided, an individual is shielded from adverse cost awards in the absence of exceptional circumstances.\(^{266}\) That said, with some limited exceptions, legal aid is only available

\(^{262}\) See generally Law Foundation of Ontario, “Class Proceedings Fund”, online: <www.lawfoundation.on.ca/class-proceedings-fund>

\(^{263}\) Ibid. As at July 2014, 166 applications for funding had been approved since the Class Proceedings Fund’s inception. Gina Papageorgiou, “Ontario’s Class Proceedings Fund: Separating Fact From Fiction” (2015) 10:1 Canadian Class Action Review 83 at 86. Over 75% of the applications that progressed to consideration by the Class Proceedings Committee were granted. (Ibid at 89).

\(^{264}\) ALRC report, supra note 24 at para 307 – 309; Grave, Adams and Betts, supra note 1 at 741 – 742.


\(^{266}\) Legal Services Act, supra note 265 at s 45.
to an individual, not a body of persons, meaning any application would need to be made by the representative plaintiff.\(^{267}\)

To qualify for legal aid, an applicant must satisfy strict income and asset tests\(^{268}\) and a number of additional criteria.\(^{269}\) These criteria include an assessment of whether the cost of a proceeding would exceed what the Ministry of Justice would recover from the damages and costs awarded to the aided individual.\(^{270}\) This criterion is problematic for class actions since, as noted, the cost of the action would normally eclipse the benefit received by the representative plaintiff. Furthermore, where a proceeding is brought on behalf of numerous persons with the same interest, the *Legal Services Act 2011* requires the Legal Services Commissioner to refuse to grant legal aid unless this refusal would seriously prejudice the rights of the applicant, and prohibits a grant of aid if it would be proper for others with the same interest to pay for the proceeding.\(^{271}\) As such, although the possibility of a legally aided class action cannot be entirely ruled out, a representative plaintiff is likely to find public funding challenging to obtain.

### 3.3.3.2 Indemnification, contingency fees and third party funding

Another way to manage the disincentives that adverse costs awards create is for class counsel to indemnify the representative plaintiff. Indemnification is common practice in Ontario; the Superior Court went as far as to suggest it is conventional wisdom that: “… Class Counsel, who have far more to gain from a class action than the individual class members or the representative plaintiff, would be negligent or unethical if they allowed their client, the representative plaintiff, to assume a potentially catastrophic financial risk.”\(^ {272}\) It is important to recognize, however, that indemnification does not remove the financial disincentives that the risk of an adverse costs award creates; rather, it shifts this burden to the representative plaintiff’s lawyers. This means that

\(^{267}\) *Ibid* at s 11(1)

\(^{268}\) *Legal Services Regulations 2011* 2011/144 at cl 5 and 6.

\(^{269}\) *Legal Services Act, supra* note 265 at ss 10 – 12.

\(^{270}\) *Ibid* at s 10(4)(b).

\(^{271}\) *Ibid* at s 12(4).

\(^{272}\) *Bayens v Kinross Gold Corporation*, 2013 ONSC 4974 (CanLII) at para 30; see also *McCracken v Canadian National Railway Company* 2010 ONSC 6026, [2010] OJ No 4650 (QL), 100 CPC (6th) 334 at paras 7 – 9.
adverse costs awards will still prevent class actions where class counsel are unwilling to take on this financial risk. Indeed, the Ontario Superior Court has observed that:

… the large costs awards that have been awarded in recent years are having adverse consequences … [A] very serious consequence is that the number of new class actions appears to be declining, and small but possibly meritorious class actions are disappearing as class counsel warily select the cases that they will prosecute. The risk of grotesque adverse costs awards is a serious disincentive to law firms being prepared to take on class actions and serve the public’s demand for access to justice.273

It is important to note that the risks class counsel assume often extend beyond indemnification of the representative plaintiff. This is because a representative plaintiff’s inability to pay solicitor-and-client costs means that counsel generally conduct class actions on a contingency fee basis. Under a contingency fee agreement, class counsel are only compensated if a proceeding is successfully resolved. This means that the lawyers for the class absorb the upfront costs of pursuing a proceeding, and the risk that they will not be reimbursed for their time and expense if the claim is unsuccessful. In exchange for taking on this risk, they receive an increased reward if the claim succeeds. This reward provides the incentive necessary to assume the risks of taking on the proceeding on a “no-win-no-fee” basis.

In Ontario, the CPA expressly recognized the importance of contingency fees to class actions by making an exception to the general prohibition of arrangements of this nature that existed at the time.274 Section 33 permits a United States “lodestar” approach, where a multiplier increases a lawyer’s “base fee” to compensate counsel for the risk of taking on a proceeding on a contingency basis.275 However, courts have permitted other forms of fee agreement as well,276 and it is now

273 McCracken v Canadian National Railway Company, 2012 ONSC 6838 (CanLII) at para 113; see also e.g. Rosen v BMO Nesbitt Burns Inc., 2013 ONSC 6356 (CanLII) at para 1 – 2 (observing that sizable adverse costs awards are undermining access to justice and that the legislature should consider adopting the “no costs” rule originally proposed by the OLRC); Winkler et al, supra note 1 at 413 (“An indemnity agreement, however, simply shifts the threat of the adverse costs award onto class counsel, who may be sufficiently intimidated by the exposure to costs to decline to take on the case in the first place”).

274 CPA, supra note 92 at s 33. See also generally Nantais v Telectronics Proprietary (Canada) Ltd., 1996 CanLII 7984 (ON SC) 28 O.R. (3d) 523, [1996] O.J. No. 5386 [Nantais]; OLRC Report, supra note 28 at 737 (discussing the importance of contingency fee agreements and recommending that they be permitted).

275 CPA, supra note 28 at s 33.

276 Nantais, supra note 274.
common for class counsel to agree to receive a percentage of any award or settlement recovered as compensation for their services. The average multiplier approved is in the region of 2.5 to 3 times class counsel’s base fee, and percentage based contingency fees of between 20 and 30 percent are “very common.”

By contrast, New Zealand and Australia have adopted a more conservative approach to contingency fee agreements. New Zealand’s **Lawyers and Conveyancers Act 2006 (“LCA”)** confirms that a lawyer may enter into a “conditional fee agreement” with their client. This agreement may include the payment of a “premium” upon the successful resolution of a proceeding in addition to the “normal fee” that would otherwise be paid. The purpose of the premium is to “[compensate] the lawyer (i) for the risk of not being paid at all; and (ii) the disadvantages of not receiving payments on account”. However, the **LCA** expressly provides that this figure must not be calculated as a proportion of the amount recovered in a proceeding.

Where a lawyer and client enter into a “conditional fee agreement” in accordance with the **LCA**’s requirements, s 334 confirms that this agreement will not be an illegal or unenforceable contract “by reason only of the fact that the remuneration the lawyer may receive under it is dependent on the outcome of the matter to which the remuneration relates” or render a lawyer liable to proceedings founded on the tort of maintenance or champerty. However, it is important to note that the **LCA** does not state that other forms of “conditional fee agreement” are unlawful. The

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277 Winkler et al, *supra* note 1 at 405.

278 Benjamin Alarie, “Rethinking the Approval of Class Counsel’s Fees in Ontario Class Actions” (2007) 4:1 *The Canadian Class Action Review* 15 [Alarie] at 29. (determining, on the basis of a review of 27 cases, that the average multiplier approved in these cases was 2.48); *Hislop v Canada (Attorney General)* (2004) 3 CPC (6th) 42 (Ont SCJ) at para 24 (suggesting the average multiplier for cases that settle prior to trial was approximately 3).

279 *Sony BMG, supra* note 258 at para 63.

280 **Lawyers and Conveyancers Act 2006, 2006/1 [LCA].**

281 *Ibid* at s 333 - 335.

282 *Ibid* at s 334(a)(ii).

283 *Ibid* at s 333, definition of “premium”.


285 *Ibid* at s 334(1).

286 *Ibid* at s 334(2).
Court of Appeal recently observed that this means “[s]ome scope is … reserved to the courts for considering the application of the common law of champerty to conditional fee agreements which fall outside the statute’s purview.” As such, it remains possible that a court could deem a percentage based “conditional fee agreement” acceptable in New Zealand.

This approach can be contrasted to Australia where percentage based contingency fees are expressly and unequivocally prohibited. Australia permits conditional costs agreements involving “uplift fees”, analogous to New Zealand “premiums”; however, there is a legislative cap on the size of any uplift, restricting this to 25% percent of a client’s legal costs (excluding disbursements). This cap is intended to “prevent lawyers from inflating fees to unreasonable levels and provide a threshold for the amount of risk lawyers accept.” New Zealand, on the other hand, does not impose a cap on its premiums, although the *Rules of Client Care* require a lawyer to ensure that the total fee charged at the conclusion of a proceeding is “fair and reasonable.”

Indemnification by class counsel appears to be much rarer in Australia than it is in Ontario. This is likely due to Australia’s prohibition of percentage based contingency fees and tight cap on the size of any fee “uplift”. After all, taking on the risk of a sizable adverse costs award is difficult for counsel to justify without the promise of a corresponding increase in the compensation they will receive if a proceeding is successful.

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290 *Ibid* at 603.

291 *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, 2008/214 at r 9.9(b) [*LCA Rules*]. The reasonableness of the total fee is assessed against the criteria specified in r 9.1.

292 Kalajdzic, Cashman & Longmoore, *supra* note 199 at 100; Grave, Adams & Betts, *supra* note 1 at 773 (noting that in Australia “[p]laintiff firms have been known to, on occasion, conduct cases on behalf of plaintiffs with an express indemnity in favour of the plaintiff for any adverse costs order as an element of a “no win-no fee” arrangement”.)
Australia’s lack of a public funding mechanism or robust contingency fee agreements is also a significant driver of demand for third party litigation funding in that jurisdiction.\textsuperscript{293} Put broadly, third party funding involves a funder, with no direct interest in a proceeding, entering into a contractual arrangement with a plaintiff to meet the cost of progressing their claim. Historically, the courts took a dim view of arrangements of this nature, which were often considered to be an abuse of process, or contrary to public policy and the torts of maintenance and champerty.\textsuperscript{294} However, in recent years, third party funding has become accepted as a legitimate means of financing complex aggregate litigation in Australia,\textsuperscript{295} Ontario,\textsuperscript{296} and New Zealand.\textsuperscript{297}

While funding arrangements vary from case to case, funders supporting Australian class actions generally agree to pay the class’s legal fees and disbursements, and to indemnify the representative plaintiff against any adverse costs award.\textsuperscript{298} In exchange, the class reimburses the funder for the costs it has incurred, and pays a percentage (commonly between 25\% and 40\%) of any settlement or damages awarded, in the event that a proceeding is successful.\textsuperscript{299} As will be apparent, a key advantage of third party funding in Australia is that funders are not subject to the same restrictions that apply to lawyers’ fee agreements. This means that, unlike an Australian law firm, litigation funders are able to enter into percentage based “quasi-contingency fee” arrangements.\textsuperscript{300} This provides Australian funders with a stronger incentive to assume the risks inherent in pursuing a

\textsuperscript{293}See e.g. Samuel Issacharoff, “Litigation Funding and the Problem of Agency Cost In Representative Proceedings” (2014) 63 DePaul L Rev 561 [Issacharoff, “Litigation Funding"] at 567; Grave, Adams & Betts, \textit{supra} note 1 at 742 – 743, 786 – 787; Michael Legg and Louisa Travers, “Necessity is the Mother of Invention: The Adoption of Third-Party Litigation Funding and the Closed Class in Australian Class Actions” (2009) 38:3 Common Law World Review 245 [Legg and Travers] at 253; Kalajdzic, Cashman & Longmoore, \textit{supra} note 199 at 145.

\textsuperscript{294}See generally \textit{Saunders v Houghton (No. 1), supra} note 1 at paras 24 – 27.


\textsuperscript{296}\textit{Manulife, supra} note 259.

\textsuperscript{297}\textit{Saunders v Houghton (No 1), supra} note 1.

\textsuperscript{298}See generally Grave, Adams & Betts, \textit{supra} note 1 at 818 – 828.

\textsuperscript{299}\textit{Ibid} at 823, 826.

\textsuperscript{300}The disjuncture here is well illustrated by the fact that some Australian law firms are now attempting to establish associated litigation funding entities in order to circumvent the restrictions on contingency fees. Jones Day, “Litigation funding in Australia: more swings and roundabouts as lawyers withdraw application to be funders” (Jones Day Commentary, February 2014), online: <www.jonesday.com/files/Publication/90f16e70-74e5-4c29-9083-f68810f07e66/Presentation/PublicationAttachment/fd611866-6f6a-40be-8961-f76145057184/Litigation%20Funding.pdf>
class action on a “no-win-no-fee basis” and indemnify the representative plaintiff. The attractiveness of this arrangement is well illustrated by the rapid expansion of third party funding in Australia, from a situation where funded class actions were relatively unheard of in 2004, to one where 39.2% of federal class actions commenced between March 2009 and March 2014 were supported by commercial litigation funding.\(^\text{301}\)

Third party litigation funding is also present in Canada, though funded class actions remain relatively rare. This is in part due to the existence of well-resourced “plaintiffs’ firms” which have amassed substantial “war chests” over the course of a number of successful claims, and remain willing and able to fund their own proceedings.\(^\text{302}\) Where litigation involves third party funding, its predominant purpose has been to perform a role similar to the Class Proceedings Fund: indemnifying the representative plaintiff and providing some assistance in relation to disbursements.\(^\text{303}\) As a result, the percentage based recoveries are significantly lower than in Australia, tending to undercut the Class Proceedings Fund’s 10% levy.\(^\text{304}\)

Returning to New Zealand, the LCA’s more flexible approach to contingency fees suggests that the impediments to lawyer-driven representative proceedings that exist in Australia are unlikely to be replicated. It is doubtful whether class counsel will enter into percentage based agreements due to the risk that a court would find this arrangement unlawful. However, the absence of a hard cap on premiums, and the LCA’s express recognition that any such fee should be calibrated to compensate a lawyer for the risks inherent in representing a plaintiff on a “no-win-no-fee” basis, suggest that “lodestar” multiplier based fees are permissible. While there are arguments in favor of both percentage and multiplier based approaches,\(^\text{305}\) multipliers have successfully facilitated class proceedings in Ontario. This suggests that the lack of percentage based contingency fees in New Zealand will not be an insurmountable obstacle.

\(^\text{301}\) Morabito, “Five Years Later”, supra note 176 at 8 - 9.

\(^\text{302}\) See generally Kalajdzic, Cashman & Longmoore, supra note 199 at 113 – 127.

\(^\text{303}\) Winkler et al, supra note 1 at 413; Ibid at 118.

\(^\text{304}\) Kalajdzic, Cashman & Longmoore, supra note 199 at 118.

\(^\text{305}\) See generally Productivity Commission Report, supra note 288 at 613 – 616; Alarie, supra note 278 at 33 – 38; Martin v Barrett, 2008 CanLII 25062 (ON SC) at paras 38 – 39 (criticizing the lodestar approach).
There remains some uncertainty as to whether a significant multiplier would be accepted as “fair and reasonable” which, until resolved, might well discourage such arrangements. That said, nothing in the Code of Client Care’s “reasonable fee factors”\(^{306}\) indicates that a robust multiplier would be impermissible. To the contrary, a decision maker is required to consider inter alia: a claim’s complexity; the importance of the matter to the client and the results achieved; and the degree of risk the lawyer assumes, including the value of any property involved.\(^{307}\) When coupled with case law from other jurisdictions emphasizing the importance of contingency fees to class proceedings,\(^{308}\) and the New Zealand courts’ facilitative approach to representative proceedings, multipliers significantly larger than the Australia’s 25% legislative cap are likely justifiable.

The extent to which fee agreements will be subjected to judicial scrutiny is also open to question. Without a requirement for the court to approve fee arrangements, the most obvious review mechanism is a complaint to Lawyers Complaints Service under s 132 of the LCA.\(^{309}\) This means that, in New Zealand, the court responsible for carriage of a representative proceeding may not have a significant role to play in ensuring that the fees that class counsel charge are appropriate.\(^{310}\) Against this, the Court of Appeal in Houghton was prepared to involve itself in the approval of funding agreements with third party litigation funders, despite there being no clear legislative basis to do so.\(^{311}\) As such, it is possible fee agreements with class counsel could receive similar scrutiny as part of the approval of a representative proceeding, particularly given that lawyers are officers of the court who are subject to its supervisory jurisdiction.\(^{312}\)

\(^{306}\) LCA Rules, supra note 291 at r 9.1

\(^{307}\) Ibid at r 9.1

\(^{308}\) See e.g. Gagne v Silcorp Ltd (1998), 41 OR(3d) 417; 167 DLR (4th) 325 (CA)


\(^{310}\) The FCAA has similarly been criticized for failing to robustly supervise fee agreements due to the lack of an approval mechanism. Mulheron, The Class Action, supra note 1 at 477 – 478

\(^{311}\) Wicks, supra note 6 at 95 - 97.

\(^{312}\) Regarding the court’s supervisory jurisdiction see generally Joan Loughrey, Corporate Lawyers and Corporate Governance (Cambridge: Cambridge University Press, 2011) at 146 – 149; Black v Taylor [1993] 3 NZLR 403 (CA); Grave, Adams & Betts, supra note 1 at 727 – 728.
If fee agreements are lightly supervised, this could encourage entrepreneurial litigation by reducing the risk that the court will interfere with the arrangements between the representative plaintiff and class counsel. On the other hand, a lack of mandatory scrutiny gives rise to an obvious concern that the interests of absent class members could be compromised by this agreement. That said, as discussed in more detail below, New Zealand’s lack of a common fund mechanism means that class counsel may need to enter into a fee agreement with each class member in order to obtain a contribution to the cost of the proceeding. This means that fee approval is arguably less important as the class members that are required to pay for the proceeding will have consented to the agreement under which this payment is made.

As noted, third party litigation funding is also permissible in New Zealand. At present Saunders v Houghton (No. 1) remains the leading case on funded representative proceedings. Here, the Court of Appeal considered that representative proceedings involving litigation funding required careful supervision and control in order to protect the interests of defendants and represented parties. Where a plaintiff seeks to bring a funded representative proceeding, the court may conduct a preliminary assessment of the merits before granting a representation order. The rationale for this assessment is that the involvement of a litigation funder alters the dynamic between the plaintiff and the defendant, meaning the court needs to be satisfied that representative proceedings are not being used to inappropriately pressure a defendant to settle an unmeritorious

313 The Supreme Court in Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91 has subsequently adopted a far more “hands off” approach to litigation funding, indicating that it “is not the role of the courts to act as general regulators of litigation funding arrangements”, and confining intervention to circumstances where funding constitutes an abuse of process. (Ibid at paras 28 - 29.) However, the Court expressly indicated that its decision should not be read as commenting on whether the courts have a wider supervisory role in relation to representative proceedings. (Ibid at para 28.) Although see Wicks, supra note 6 at 95 – 97 (arguing that the approach in Waterhouse cannot be this easily distinguished from Saunders).

314 Saunders v Houghton (No. 1), supra note 1 at para 21, 27, 31 – 33 and 38; see also Wicks, supra note 6 at 87 – 90.

315 Saunders v Houghton (No. 1), supra note 1 at para 38(d); Strathboss, supra note 81 at 29 – 30.
Although the threshold here is not especially high, it nevertheless creates an additional barrier to representative actions by requiring a time consuming and expensive inquiry into the substance of the claim at an early stage. As noted, class actions in other jurisdictions tend to settle rather than proceed to trial due to the high stakes involved. A corollary of this dynamic is that applications for certification as a class action are often strenuously contested. New Zealand’s preliminary merits test seems likely to contribute to this dynamic by encouraging defendants to robustly challenge the substance of prospective representative proceedings. This will increase the resources required to get funded representative actions off the ground.

A court considering a funded representative proceeding must also decide whether to approve the funder and funding agreement. To date, this has not proven especially controversial in cases following Houghton. Litigation funders’ percentage based fees were uncontroversial in Cooper and Strathboss. In Strathboss the Court also confirmed the appropriateness of indemnification, refusing to exempt the representative plaintiffs from liability for costs on the basis that “[i]t is for the plaintiffs to obtain indemnity as a matter of contract, and for them to be satisfied with the creditworthiness of those standing behind indemnities.” The defendant in Strathboss raised concerns about a requirement that the litigation funder must approve any settlement or discontinuance. However, the Court was satisfied that the potential for conflict between the

316 Strathboss, supra note 81 at para 30. Interestingly, similar concerns are raised in relation to non-funded class actions in other jurisdictions. See e.g. Sun-Rype Products Ltd. v Archer Daniels Midland Company, 2010 BCSC 922 [2010] CarswellBC 1749 at paras 18, 20. See also generally Ian C Matthews, “Preliminary Merits Review for Class Actions in Ontario: Thanks, But No Thanks” (2010) 6:1 Canadian Class Action Review 119 (critiquing the argument that preliminary merits review is desirable, inter alia, to guard against blackmail settlements). If it is accepted that representative proceedings are capable of exposing defendants to inappropriate pressure, it is arguable that New Zealand courts should also apply a preliminary merits test in relation non-funded representative proceedings.

317 Houghton, (Post CA), supra note 65 at paras 43 – 45; Saunders v Houghton (No. 2), supra note 61 at para 100 – 105; Strathboss, supra note 81 at para 30.

318 See e.g. in the Canadian context: Lambert v Guidant Corporation, 2009 CanLII 23379 (ON SC) at para 56; Jessica A Kimmel, “Merits of the Merits In the Class Certification Analysis” (2007) 4:1 Canadian Class Action Review 3 at 12 (“It is generally recognised that as long as a defendant has some chance of defeating the certification application, the cost-benefit analysis will generally favour putting forward the effort to defeat certification, including a solid evidentiary record on the merits”).

319 Cooper, supra note 41 at paras 7 - 10; Strathboss, supra note 81 at para 74.

320 Strathboss, supra note 81 at para 84.

321 Ibid at para 68.
funder and class members was sufficiently remote,\textsuperscript{322} and the funding agreement’s dispute resolution mechanisms sufficiently robust,\textsuperscript{323} that this requirement was appropriate.\textsuperscript{324} In Dobson J’s view, concerns about a third party funder’s control over a proceeding needed to be tempered by the reality that funding agreements are commercial arrangements, meaning that “[i]t would be somewhat naïve to expect that he who pays the piper will not have some ability to call the tune.”\textsuperscript{325}

Although third party funding can make it more difficult to obtain a representation order, it clearly provides a viable alternative mechanism to facilitate class actions in New Zealand. Notably, despite the \textit{LCA’s} relatively liberal approach to “conditional fee agreements”, representative proceedings following \textit{Houghton} have almost uniformly been supported by litigation funders.\textsuperscript{326} It is unclear precisely why this is the case, but uncertainty about whether the court will accept success fees, the concurrent relaxation of the restrictive approach to the representative rule and acceptance of third party litigation funding, and the influence of class action practice in Australia where litigation funding is increasingly the norm, all likely play a role. That said, the best explanation may be that the New Zealand lawyers lack the capital necessary to fund (or take on the risk of funding) a class actions. While this proposition is difficult to substantiate, it is notable that when designing New Zealand’s \textit{Draft Rules} and \textit{Bill} the Rules Committee considered that “unless litigation funding arrangements can be made many class actions will not get off the ground, because of the high front-end costs ...”\textsuperscript{327} and that “without willing litigation funders, little use will be made of the new class action procedure.”\textsuperscript{328} If this is correct, lawyer funded claims could become more common over time as class action oriented firms establish themselves, and larger law firms become increasingly involved in this space.

\textsuperscript{322} \textit{Ibid} at para 70.
\textsuperscript{323} \textit{Ibid} at para 73.
\textsuperscript{324} \textit{Ibid} at para 70.
\textsuperscript{325} \textit{Ibid} at para 66.
\textsuperscript{326} See fn 156 above. It is unclear whether \textit{Harding} was supported by a litigation funder. However, a second cladding class action, commenced in early August 2015, intends to fund itself through class member contributions. Parker & Associates, Website, “Cladding Action against James Hardie” (2015), online: <www.parkerandassociates.co.nz/cladding-action.html>.
\textsuperscript{327} \textit{Second Consultation Paper, supra} note 206 at para 4.
\textsuperscript{328} \textit{Ibid} at para 19.
3.3.3.3 Lack of a “common fund” mechanism in New Zealand

New Zealand’s acceptance of third party funding and permissive “conditional fee agreements” suggest the jurisdiction is relatively well equipped to facilitate large scale “opt-out” class actions. However, there is a further, perhaps fundamental, obstacle to proceedings of this nature, namely that the HCR lack a mechanism to spread the fee charged by class counsel or a litigation funder across the class as a whole.

Taking lawyer funded representative proceedings as an example, the difficulty here is that the representative plaintiff, as the person who retains class counsel on a “no-win-no-fee” basis, is also responsible for paying these lawyers in the event that the proceeding is successful. Other class members benefit from the resolution of the common aspects of their claims. However, in the absence of a contractual obligation to contribute to the costs of a proceeding, they are unlikely to have any obligation to do so. The problem this creates is readily apparent. If, as is often the case in aggregate litigation, a representative plaintiff’s claim was not economically viable on an individual basis, the fees payable to class counsel when a proceeding is successfully concluded would eclipse the reward they receive. Party-and-party costs can assist to offset this expense, but these will generally only compensate a plaintiff for a portion of the amount class counsel is owed, particularly where a fee multiplier is applied. Unsurprisingly, this will discourage individuals from becoming representative plaintiffs due to the risk they will be left out of pocket even if the claim succeeds, and discourage class counsel from taking on claims on a “no-win-no-fee” basis due to the risk that the representative plaintiff will not adequately compensate them. Furthermore, the disincentives for a representative plaintiff persist even if they can afford to independently bring a proceeding, and have a claim that is economically viable to pursue, as the complexity of a class action will significantly increase the cost of resolving their claim.

The Ontarian and Australian regimes both include mechanisms to address this dynamic. Under the CPA a fee agreement between class counsel and representative plaintiff is not enforceable until

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approved by the court, but once approved, s 32(3) provides that “[a]mounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.” This enables deduction of the fees payable under an enforceable agreement from any settlement or monetary award, even though there is no contract between non-representative class members and class counsel. Similarly, in Australia, s 33ZJ of the FCAA permits a representative plaintiff to seek an order that “reasonably incurred” solicitor-client costs in excess of any party-and-party costs be deducted from the damages awarded to the class as a whole.

The absence of an equivalent mechanism in New Zealand makes it difficult to translate success on the part of entrepreneurial class counsel into a reward that recognizes the expense and risk inherent in “no-win-no-fee” aggregate litigation. This challenge is more manageable in the settlement context, where it remains possible for the representative plaintiff to negotiate payment of class counsel’s fees (including any premium) as part of the agreement with the defendant. However, where the class succeeds at trial there is real potential for the representative plaintiff to be left responsible for paying the class’s legal fees and disbursements, while other class members enjoy the rewards of the proceeding without having contributed to its cost. Indeed, New Zealand’s reliance on fee premiums, and a “scale costs” regime which does not ordinarily take a party’s actual legal fees into account, suggests this will often be the case in practice.

330 CPA, supra note 92 at s 32(2).
331 Ibid at s 32(3).
332 Section s 33ZJ of the FCAA does, however, have its limitations. As the provision relates to damages, it is unlikely it can be used in the settlement context. This means that a court seeking to ensure that the costs of a class proceeding are spread fairly needs to rely on its general power to impose conditions on settlements under s 33V(2). Grave, Adams & Betts, supra note 1 at 753 – 754. In addition, as the order only applies to excess costs reasonably incurred, a representative plaintiff could, in theory at least, be left responsible for paying the portion of class counsel’s fees the court deemed unreasonable.
333 The Rules Committee proposed a mechanism similar to s 33ZJ of the FCAA be included in its Draft Rules, enabling excess expenses and disbursements to be recovered by the lead plaintiff. Draft Rules, supra note 4 r 34.22. The Committee noted that this mechanism was included to protect the lead plaintiff against other class members.
335 See generally High Court Rules, supra note 5 at part 14.
The situation here is similar to the one in which Australian third party litigation funders find themselves. As noted, funders generally support a proceeding in exchange for a percentage of the settlement or damages recovered by each class member. But, as s 33ZJ of the FCAA is not applicable to this kind of arrangement, a funder’s ability to recover from class members in this way depends on the funding agreement entered into. As the representative plaintiff cannot enter into an agreement on behalf of the class as a whole, funders must separately contract with each individual from whom a contribution will be sought. Furthermore, as there is no obligation to enter into a funding agreement, it is entirely possible for individuals swept into a class action by Australia’s “opt-out” mechanism to free ride, obtaining the benefits of the proceeding without contributing to the cost of resolving the common issues.

This tension has encouraged litigation funders to find ways to work around Australia’s “opt-out” mechanism to more tightly control class membership. The Federal Court has held that a class definition which, in effect, required class members to “opt-in” to a proceeding by entering into a retainer with a law firm was an abuse of process as it subverted the FCAA’s “opt-out” requirement; however, it has permitted “closed classes”, where class membership is defined, amongst other things, by an individual’s entry into a funding agreement prior to the commencement of a proceeding. Litigation funders have subsequently extensively relied on “closed classes” with growth in litigation funding contributing to increased use of this mechanism. However, regardless of whether this mechanism is used, it remains common for


337 Legg and Travers, supra note 293 at 259. For an overview of the development of “closed classes” in Australia see Grave, Adams & Betts, supra note 1 at 527 – 542, 834 – 839.


339 Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (2007) 164 FCR 275. The Court concluded that the ALRC’s recommendation that class actions should be brought on behalf of all members of a group who had allegedly been harmed had been rejected by the legislature as s 33C(1) of the FCAA permitted a proceeding to be commenced representing “some or all” of the people who satisfied the threshold criteria in s 33C(1)(a). (Ibid at paras 108 – 111). The Court distinguished the reasoning in Dorajay on the basis that in that case it would have been possible for a class member to “opt in” after the proceeding had been commenced. (Ibid at para 143 – 144).

Australian funders to devote considerable time and resources to building a critical mass of claimants who have entered into funding agreements before commencing a representative proceeding.\(^{341}\)

New Zealand’s lack of a clear mechanism to compel non-representative plaintiffs to contribute to the cost of a class action means lawyers and litigation funders have a similar incentive to act as “gatekeepers” to ensure class members enter into retainers or funding agreements. Indeed, this dynamic helps explain why later cases have not revisited French J’s decision that “opt-out” mechanisms are impermissible, despite conventional wisdom suggesting that plaintiffs should strongly prefer “opt-out” to “opt-in”. Without a common fund mechanism a defendant’s interest in minimizing the size of the class by requiring class members to “opt-in” aligns with the plaintiff’s interest in requiring class members to “sign up” to ensure they contribute to the cost of the claim.

Legg and others have observed that the United States common fund doctrine could address this dynamic in Australia.\(^{342}\) This doctrine recognizes that “a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorney’s fee from the fund as a whole”.\(^{343}\) The United States Supreme Court has explained the rationale for the doctrine as follows:

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\text{The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney’s fees against the entire fund, thus spreading fees proportionally among those benefit by the suit.}^{344}
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\(^{341}\) Issacharoff and Eagles, \textit{supra} note 334 at 201 (noting that third party funding imposes a significant transactional threshold for litigation).

\(^{342}\) Legg, “Reconciling Litigation Funding”, \textit{supra} note 336 at 63 – 69; Issacharoff and Eagles, \textit{supra} note 334 at 203 – 205; \textit{ALRC Report, supra} note 24 at para 289.

\(^{343}\) \textit{Boeing Company v Van Gemert} 444 US 472 (1980) \textit{[Boeing]} at 478; see also generally Mulheron, \textit{The Class Action, supra} note 1 at 440 – 441.

\(^{344}\) \textit{Boeing, supra} note 343 at 478.
If “opt-out” proceedings are available in New Zealand, the development of a common fund mechanism, whether legislative or equitable, has much to recommend it. Enabling the distribution of the cost of successfully pursuing a representative claim across all those who benefit from the proceeding is fairer than relying on the representative plaintiff (and others willing to contribute). It also enhances access to justice by providing the incentives necessary to encourage pursuit of large scale “opt-out” representative proceedings. That said, the common fund doctrine is contingent on a class action creating a fund over which the court has jurisdiction. In the absence of a mechanism providing the New Zealand courts with control over the damages (or settlement) awarded to class members, it is difficult to see a similar approach being adopted without legislative intervention.

Without a common fund mechanism, New Zealand representative proceedings will likely continue to proceed on an “opt-in” basis. It is worth noting, though, that unlike litigation funders in Australia, which have been forced to rely on “closed classes” to create a “de-facto opt-in regime”, plaintiffs in New Zealand can “opt-into” a proceeding after it has commenced. This option provides greater flexibility when building a class, but also raises the question of whether class counsel or a litigation funder can adopt a “closed class”-like approach that limits membership to those who have entered into a retainer or funding agreement.

The original “opt-out” mechanism in *Houghton* contemplated that the litigation funding agreement would bind class members unless they “opted-out” of the proceeding entirely, or agreed that class counsel would represent them on their standard retainer. However, the plaintiffs retreated from this position on review. Instead, they acknowledged that the court did not have the power to bind litigants to a funding contract without their consent, and indicated that they had intended that class members could also instruct their own solicitor, or decline to enter into a retainer or funding agreement but remain part of the proceeding. Despite this, the websites for subsequent

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345 Kalajdzic, Cashman & Longmoore, *supra* note 199 at 139.
348 *Ibid* at para 32.
representative proceedings appear to contemplate that entry into a funding agreement is a precondition for participation in the claim.  

The pending “Southern Response Class Action” is being conducted on a “closed class” basis, requiring class members to join the claim by agreeing to a retainer and funding agreement prior to a deadline set by class counsel.  

Similarly, the Plaster Cladding Class Action has asked potential plaintiffs to register their interest, and intends to invite those assessed to have suitable claims to be part of the proceeding when it commences.  

In contrast, class counsel in Strathboss is conducting the proceeding as a more conventional “opt-in” class action where additional class members can join the proceeding after it has commenced.  

Like other claims, Strathboss class members enter into funding agreements.  

In addition, class members must also make a one-off upfront contribution to the cost of the claim.  

It is unclear whether this claim intends agreement to the litigation funder’s terms to be a formal condition of “opting-in”, or whether class counsel will manage the “opt-in” process in a way that informally requires prospective class members to sign up in order for their request to join the claim to be processed.  

If the latter approach is adopted, a plaintiff falling within the class definition could attempt to unilaterally “opt-in” to a proceeding without entering into the associated funding agreement or

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349 Kiwifruit Claim, Website, “Frequently Asked Questions” (2015), online: <thekiwifruitclaim.org/page/faqs> (“To become a plaintiff, you must complete and sign the Participation Notice (which forms part of that legal document package) and make a financial contribution to the claim in accordance with the instructions on that form”); Fair Play on Fees, “Is your bank handing out unfair penalties?”, online: <https://www.fairplayonfees.co.nz/> (“[r]ead and accept the litigation funding and legal services agreement to ensure that you are included in any litigation for recovery of fees you’ve paid.”); GCA Lawyers, “Southern Response Class Action - How it Works”, online: <srca.co.nz/how-it-works>; Adina Thorn Lawyers, “Plaster Cladding Class Action – FAQs”, online” <goodcladding.co.nz/faqs.html>  

350 GCA Lawyers, Claim Update, “Deadline to join class action extended” (24 June 2015), online: <http://www.srca.co.nz/blog/deadline-to-join-class-action-extended>. See also GCA Lawyers, Website, “Southern Response Class Action – Frequently Asked Questions” (2015) at “I already have a lawyer and/or and advocate acting for me, can I join?, online: <http://www.srca.co.nz/faq> (advising class members that they must terminate any arrangement they have with existing counsel to join the claim).  

351 Adina Thorn Lawyers, “Gaining Momentum”, supra note 216.  

352 Strathboss, supra note 81 at para 75 – 78.  


354 Ibid at “FAQs - What will the claim cost me”, online: <thekiwifruitclaim.org/page/faqs>.
retainer. That said, it is unclear whether this will occur in practice as class members may not realise that they can “opt-in” without going through class counsel, or may be insufficiently motivated to attempt to circumvent the funding arrangement entered into by other class members. As such, a corollary of adherence to “opt-in” representative proceedings in New Zealand is that class counsel and litigation funders will retain a considerable degree of control over who participates in a proceeding and on what terms. This control may result in more limited access to justice if class counsel screen plaintiffs (as they are doing in the Plaster Cladding Class Action) and exclude those with challenging claims in order to minimise the cost and complexity of the proceeding.

4 Conclusion

Class actions are now a reality in New Zealand. As outlined in Part One, the ad hoc regime cobbled together by the courts under the representative rule is capable of facilitating proceedings on behalf of large numbers of individual plaintiffs with separate but similar claims. In doing so, it provides a mechanism by which these litigants are able to harness the benefits of aggregate litigation in a manner that was not previously possible. This process could, of course, be derailed by subsequent court decisions. But, the fact that further class actions are being brought, litigation funders are willing to invest in these proceedings,355 and lawyers are beginning to position themselves as class action specialists,356 suggests that aggregate litigation will play an increasingly significant role in New Zealand over the coming years.

That said, New Zealand’s lack of a legislative class action regime is likely to continue to cause problems. As discussed in Part Two, procedural protections afforded to class members could be accommodated under the HCR, but it is questionable whether this will occur in practice in the absence of legislative guidance. Similarly, although plaintiffs can seemingly bring representative proceedings on an “opt-out” basis, and many of the mechanisms necessary to facilitate a

355 See fn 156 above.
proceeding of this nature are present, the absence of a common fund mechanism suggests class counsel and litigation funders will continue to favour “opt-in”.

Continued reliance on “opting-in” will limit the utility of New Zealand class actions. However, the issue here is one of degree. It is reasonable to predict that “opting-in” will make it more difficult to bring claims involving widespread but relatively modest harm in circumstances where potential plaintiffs are difficult to identify and contact. For example, it is easier to build a financial case for a securities class action, where the identity and contact information of each investor is known, than a claim on behalf of consumers who have purchased a defective product, where the cost of tracking down and contracting with claimants could consume a significant portion of each individual’s expected recovery. However, the Plaster Cladding Class Action demonstrates that the value proposition is different where a manufacturer’s negligence has caused more significant harm to an unknown group of plaintiffs. Similarly, New Zealand’s bank fees litigation, which by early 2014 had collectively obtained over 38,800 registrations, shows it is possible for an “opt-in” mechanism to build a class capable of supporting a representative proceeding without sizable individual claims.

Viewed in this light, New Zealand’s formative class action regime can be considered a net positive, despite its limitations. Proceedings that might not otherwise have been brought are now being picked up by litigation funders, enhancing access to justice. Multiple claims against defendants like the Crown are being bundled together, promoting judicial economy by resolving common issues within the ambit of a single proceeding. Defendants to class actions are even revisiting

357 Issacharoff and Eagles, supra note 334 at 201.
358 Fair Play on Fees, Media Release, “Fair Play on Fees Launches Cases Against Westpac, ASB and BNZ” (11 February 2014), online: <https://www.fairplayonfees.co.nz/In-The-News.aspx?id=45>
360 Cooper, supra note 41.
361 Strathboss, supra note 81.
their policies, perhaps as a result of increased exposure to liability.\textsuperscript{362} Although the claims currently underway in New Zealand may only represent a subset of the issues that could be confronted under a more developed “opt-out” regime, this situation is preferable to a complete absence of a class action mechanism.

Of course, this does not render a statutory regime superfluous. Indeed, it is important to recall the Court of Appeal’s prediction in \textit{Houghton} that “[a]bsent developed rules designed to facilitate consideration of class actions there are likely to be heavy burdens on both counsel and the judge”\textsuperscript{363} appears to have been borne out by the expense and complexity of that claim.\textsuperscript{364} Equally, however, the broad parameters of class action jurisprudence will continue to bed down over time as case law develops.\textsuperscript{365}

In a sense, counsel and judges responsible for current representative proceedings are pioneers, working to carve out a space for aggregate litigation on New Zealand’s procedural frontier. If successful, their efforts will establish class actions as a legitimate procedural device with an important role to play within the wider civil litigation context. This, in turn, may lead to a recognition that to fully realise the benefits of the representative form, and robustly protect the interests of class members, something more than a “no. 8 wire” solution is required. Conversion of this recognition into reality remains contingent on the New Zealand legislature’s willingness to support the expansion of aggregate litigation. However, the creation of a codified regime may well be more palatable once class actions are an established part of the procedural landscape.

\textsuperscript{362} Tamsyn Parker, “Kiwibank cuts its credit card fees” \textit{New Zealand Herald} (10 June 2015), online: <www.nzherald.co.nz/personal-finance/news/article.cfm?c_id=12&objectid=11462867>.

\textsuperscript{363} \textit{Saunders v Houghton (No. 1),} supra note 1 at para 41.

\textsuperscript{364} \textit{Houghton v Saunders} [2015] NZHC 548 (awarding the defendants $3,066,044.05 in costs following the claim’s failure at the common issues trial).

\textsuperscript{365} The appellate courts have already, for example, determined how limitation periods will interact with class actions, and provided guidance about when to close a class which has been relied on by subsequent decision makers. See \textit{Credit Suisse,} supra note 8; \textit{Saunders v Houghton (No. 2),} supra note 61 at para 75.
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