New Zealand Law Commission releases long-awaited report on class action and litigation funding

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At a glance

- The New Zealand Law Commission's long-awaited report on class action and litigation funding was released on 27 June.
- The 483-page final report contains a broad range of recommendations, including a recommendation that there should be a Class Action Act and amendments to the High Court Rules.
- The recommendations in the report are generally encouraging news for insurers.

The key recommendations

Highlights of the final report's key recommendations are:

- There should be a Class Action Act, governing only plaintiff class actions, with High Court rule 4.24 remaining for representative orders (both plaintiff and defendant).
- The notable recommendations for the Act are that it should:
  - impose a duty on the representative plaintiff to the class, acting in what they believe to be the best interests of the class (there should be no fiduciary duty though) – legal advice on that duty should be necessary to certify the class
  - require, where there are concurrent class actions, that their certification be considered together and the Court determine orders for efficient management (including case management together, consolidation and staying one or more)
  - set out certification requirements, including that there be a fact or legal issue common to class members, and that there should be a reasonably arguable cause of action
  - provide for orders of costs sharing amongst class members (or common fund orders as they're known in Australia)
  - permit the Court to make an aggregate assessment of monetary relief for the class, without the need for individual class members establishing their entitlement, if the Court can make a reasonably accurate assessment of the amount
  - permit the Court to make orders on distribution of monetary relief (or fund equalisation orders as they're known in Australia)
  - require Court approval for settlement of all class actions, whether opt-in or opt-out, and
  - require the Court's approval of the funding arrangement before the litigation funder can enforce it – the Court must be satisfied that the arrangement is fair and reasonable.

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- The High Court Rules should be amended to reflect these changes.
- There should be further changes to the High Court Rules, including:
  - creating a rebuttable presumption that funded representative plaintiffs will provide security for costs in funded class actions
  - empowering the Court to make orders directly against a litigation funder in any funded proceeding (not just funded class actions) to pay security for costs or any adverse costs awards
  - requiring the representative plaintiff to maintain a list of class members and their relevant details and provide it to the defendant(s) on application
  - empowering the Court to order discovery from class members, and
  - ensuring any funded plaintiff (not just funded representative plaintiffs) disclose the funding agreement to the defendant(s), with necessary redactions for privilege, on application.
- The Government should consider a public fund for class actions, where the action is in the public interest and may not otherwise attract private funding.
- The oversight and regulation of litigation funders by the Court, albeit on an ad-hoc basis, means there does not need to be amendments of existing, or creation of new, licensing requirements for litigation funders.

Implications for insurers

The breadth of the Class Action Act and the recommended amendments to the High Court Rules are generally good news for insurers.

It is interesting that the Law Commission elected to maintain the ad-hoc oversight and regulation of litigation funders, rather than implement specific regulation by amending existing or creating new regulatory and licensing regimes. This makes some sense, given the recommended Class Action Act and amendments to High Court Rules and the limitations and difficulties with implementing an amended or new regime.

However, it is a decision which may transfer the cost of that oversight and regulation away from funders (which could have been the case with a specific regime), and onto the Court, class members and defendants.

That approach seems a little unfair, particularly on class members, as the funder may ultimately recoup costs (in whole or in part) with common fund orders or fund equalisation orders on settlement or judgment.

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