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# Collective Redress & Class Actions 2024

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## **New Zealand: Law & Practice**

Kirsten Massey and Chris Curran  
Russell McVeagh



# NEW ZEALAND



## Law and Practice

### Contributed by:

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**Russell McVeagh** is a premier law firm in New Zealand, characterised by a dynamic network of specialists who are champions for their clients' strategic goals. The firm's partners are recognised class action experts and are ideally placed to support clients in addressing the strategic and procedural challenges that these proceedings present. With a unique combina-

tion of New Zealand and international experience, the team is highly experienced in all aspects of this ever-changing area, including the representative action procedure, litigation funding arrangements and security for costs, and is regularly called on to advise industry bodies and other clients on the implications of potential class actions.

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# Russell McVeagh

## 1. Policy Development of Collective Redress/Class Action Mechanisms

### 1.1 History and Policy Drivers of the Legislative Regime

In contrast to many other common law jurisdictions, Aotearoa New Zealand does not have formal class action rules or legislation. However, class action-style proceedings have nevertheless increased in prominence in the last decade. In the absence of a class action regime, group litigation is conducted as a representative proceeding under Rule 4.24 of the High Court Rules. Rule 4.24 allows a person or persons to bring a claim on behalf of a group of people sharing the same interest in the subject matter of the proceeding.

The details of the procedure to be applied to such a representative proceeding are not set out in Rule 4.24. However, a reasonably well-developed set of principles for the management and conduct of class action-style proceedings have been developed in the recent case law under the existing procedural rules and the inherent jurisdiction of the High Court, as outlined further in **2.1 Collective Redress and Class Action Legislation**.

#### Consideration of a Legislative Regime

The possibility of legislative reform has been considered at various points.

Between 2006 and 2008, the Rules Committee (a statutory body responsible for the procedural rules of the New Zealand courts) considered and investigated the possible introduction of legislation to introduce a class action regime. In late 2008, a draft Class Action Bill and draft High Court Amendment (Class Action Rules) were

submitted to the Ministry of Justice for consideration but were not acted upon.

Again in 2018, the Rules Committee released new draft procedural rules for consultation; however, the most realistic pathway to reform in this area is now through the work of Te Aka Matua o te Ture, the New Zealand Law Commission (the “Law Commission”). First announced in 2017, in 2019 the Law Commission substantively commenced a first principles review of class actions and litigation in Aotearoa New Zealand. Its terms of reference were to consider (i) whether and to what extent the law should allow class actions, and (ii) whether and to what extent the law should allow litigation funding having regard to the torts of maintenance and champerty.

The Law Commission submitted its final report to Te Tāhū o te Ture, the Ministry of Justice, on 27 June 2022. As signalled in earlier consultation papers, the Law Commission has recommended that there should be a statutory class actions regime, including a new Class Actions Act. The proposed legislative regime is outlined further in **5.2 Legislative Reform**.

### 1.2 Basis for the Legislative Regime, Including Analogous International Laws

New Zealand does not have a formal class actions regime as exists in other jurisdictions. Proceedings that would be advanced as class actions in other jurisdictions may be pursued as representative proceedings in Aotearoa New Zealand.

Such proceedings are brought pursuant to Rule 4.24 of the High Court Rules, which permits a person or persons to bring a claim on behalf of other people who share the same interest in the subject matter of the proceeding.

An equivalent to Rule 4.24 has been in place in Aotearoa New Zealand since the late 1800s, with the then rule modelled on an English equivalent. However, class action-style proceedings have been slow to emerge in New Zealand in comparison to a number of overseas jurisdictions, with the Law Commission noting in its December 2020 Issues Paper that only 44 cases have proceeded under Rule 4.24, with the majority of these filed after 2000.

As the principles for the management and conduct of class action-style proceedings in Aotearoa New Zealand have been developed in case law under the existing procedural rules and the inherent jurisdiction of the Court, they are not modelled to a material degree on any other country's regime.

### 1.3 Implementation of the EU Collective Redress Regime

There is no relevant information in this jurisdiction.

## 2. Current Legal Framework and Mechanisms Applicable

### 2.1 Collective Redress and Class Action Legislation

Currently class action-style proceedings are conducted in Aotearoa New Zealand as a representative proceeding under Rule 4.24 of the High Court Rules. In contrast to many other jurisdictions, there is no formal class action regime or rules.

While Rule 4.24 was not originally drafted to facilitate class actions, the New Zealand Supreme Court has endorsed the use of the Rule in that way. In the Feltex shareholder proceeding (*Credit Suisse Private Equity LLC v Houghton*

[2014] NZSC 37), the Court expressed the view that flexibility in how the Rule is applied accords with the modern approach to representative proceedings and that it is legitimate for the scope of the Rules to continue to adapt to ensure that the overall object of the High Court Rules is achieved.

While the principles for the management and conduct of class action-style proceedings have been developed and continue to develop in the case law, there is a prospect of legislative reform in this area. The Law Commission has conducted a first principles review of class actions and litigation funding in Aotearoa New Zealand and has recommended that a statutory class action regime be created. As stated in **1.1 History and Policy Drivers of the Legislative Regime**, the Law Commission submitted its final report to the Ministry of Justice on 27 June 2022.

## 3. Scope and Definitional Aspects of the Legal Framework

### 3.1 Scope of Areas of Law to Which the Legislation Applies

Representative proceedings are available in any civil matter where the same interest requirement under Rule 4.24 of the High Court Rules is fulfilled.

### 3.2 Definition of Collective Redress/Class Actions

Class action-style proceedings are, strictly speaking, called representative actions in Aotearoa New Zealand, as they are conducted as representative proceedings under Rule 4.24 of the High Court Rules. Rule 4.24 on persons having the same interest states:

“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 threshold concerning the ‘same interest’ requirement is relatively low. In practice, the representative plaintiff(s) is required only to establish that:

- the representative group is capable of clear definition;
- there are issues of fact or law common to all members; and
- the representative plaintiff(s) fairly and adequately represents the group.”

Additionally, the representative order cannot confer a right of action on class members who would not have such a right in separate proceedings, or bar a defence which might have been available to the defendant in a separate proceeding.

If the above requirements are met, the court will consider whether to exercise its discretion to make a representative order (*Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 648). A court will not exercise its discretion to make a representative order if the proposed representative proceedings would not advance the objective of the High Court Rules to secure the just, speedy and inexpensive determination of the proceedings.

## 4. Procedure for Bringing Collective Redress/Class Actions

### 4.1 Mechanisms for Bringing Collective Redress/Class Actions

The primary mechanism by which class action-style proceedings are brought in Aotearoa New Zealand is by way of a representative proceeding under Rule 4.24 of the High Court Rules.

The High Court of New Zealand is the principal institution in which such proceedings are brought. A judgment of the High Court is conclusive unless overruled on appeal, first to the Court of Appeal and then to the Supreme Court.

It is also possible to bring representative actions in the Employment Court in respect of matters of employment law. In accordance with Employment Court Regulation 6, given the absence of an Employment Court procedure for dealing with such actions, the Employment Court will deal with them as often as may be practicable in accordance with the High Court Rules.

### Statutory Mechanisms

Outside of Rule 4.24 of the High Court Rules, certain regulatory bodies in New Zealand have the power to bring collective proceedings. These mechanisms are statutory and include the following.

- The Commerce Commission can bring proceedings on behalf of affected consumers under various statutes, including the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003.
- The Financial Markets Authority (FMA) can, by High Court order, bring a representative proceeding on behalf of a class of persons for breach of the Financial Markets Conduct Act

2013 where the High Court considers that the claim is in the public interest.

- The Human Rights Commission can bring civil proceedings before the Human Rights Review Tribunal on behalf of a class of persons affected by a discriminatory practice in breach of the Human Rights Act 1993.

## 4.2 Overview of Procedure

Class action-style proceedings are brought in New Zealand as representative proceedings, where a named plaintiff or plaintiffs bring a claim on behalf of themselves and those with the same interest in the subject matter of the proceeding, often referred to as the group or class.

Under Rule 4.24 of the High Court rules, a representative proceeding can proceed either:

- with the consent of those represented; or
- as directed by the court on an application made by a party or intending party to the proceeding.

Where the representative plaintiff has the consent of all persons it intends to represent, it may file a representative claim as of right. Without consent, a representative plaintiff requires a court direction and must apply to the court for a representative order. However, even where consent is obtained, the courts have indicated that it is prudent that representative plaintiffs apply for directions to confirm that they may so act (*J Flowers Ltd v Burns* [1987] 1 NZLR 260 at 264).

Given that class action proceedings typically involve a large number of potential group members, obtaining consent is typically not feasible. It is therefore commonplace for representative plaintiffs to apply to the court for a representative order under Rule 4.24(b), often at the same time as the proceeding is filed.

## 4.3 Standing

Any plaintiff who satisfies the same interest requirement in Rule 4.24 of the High Court Rules can bring a representative action. See 3.2 **Definition of Collective Redress/Class Actions** as to the threshold adopted by the New Zealand courts in assessing the same interest requirement under Rule 4.24 of the High Court Rules.

See also 4.1 **Mechanisms for Bringing Collective Redress/Class Actions** as to the statutory mechanisms to allow certain regulatory bodies to bring collective proceedings on behalf of a group of claimants.

## 4.4 Class Members, Size and Mechanism – Opting In or Out

A representative order made under Rule 4.24 of the High Court Rules makes provision for how and when plaintiffs can become members of a representative group and therefore be part of a class action proceeding. Such an order can be sought on either an opt-in or opt-out basis.

If the order provides for membership to be determined on an opt-out basis, all persons within the definition of the class are members of it unless they formally elect not to be. Conversely, if membership is determined on an opt-in basis, no person who is within the definition of the class is a member of it for the purposes of the action, unless that person takes the formal step of opting in.

Until Court of Appeal and Supreme Court decisions in *Ross v Southern Response Earthquake Services Limited* ([2017] NZCA 489; [2020] NZSC 126) class actions in New Zealand had typically proceeded on an opt-in basis. However, these decisions have confirmed that opt-out proceedings are available under Rule 4.24 and should be made in appropriate cases.

The Supreme Court held that the starting point is that the court should adopt the procedure sought by the applicant (opt-in or opt-out), unless there is good reason to do otherwise. However, the court must consider the relevant considerations in light of what will best meet the objectives of the representative action in the particular case. Relevant considerations include:

- impact on class members – if there is a real prospect that some class members may end up worse off, this may favour an opt-in approach; and
- class size – an opt-in approach may be more appropriate where the class is small, although this is not determinative.

The Supreme Court also recognised that proceedings that begin as opt-out (eg, allowing common issues to be determined at “stage one”) may need to become opt-in at “stage two” to avoid prejudice or unfairness (eg, to resolve the remaining individual issues arising on individual class members’ claims).

An “opt-out order” will be given on conditions that include:

- requirements for notice to be given to class members with an explanation of the right to opt out; and
- a requirement for court approval of a settlement or discontinuance.

Notification of potential class members is supervised by the court as a matter of case management on a case-by-case basis. Generally, advertising will be permitted if necessary. The court’s supervision of communications with potential class members will vary in accordance with the circumstances of the case, but will be engaged

where communications to the potential class are misleading or potentially confusing.

## 4.5 Joinder

Further plaintiffs can be added to a representative action, provided that their joinder complies with any representative order made by the court and the timing and terms as set by the court therein.

As an aspect of case management, the court can set a date by which plaintiffs are required to opt in to, or out of, the proceeding. This date can be set at the same time as the representative order is made or at a later stage in the proceeding.

## 4.6 Case Management Powers of Courts

Given the absence of rules governing class actions in Aotearoa New Zealand, representative proceedings are managed in the same way as ordinary cases, under the existing procedural rules and the inherent jurisdiction of the court.

Most complex proceedings in the High Court will have an assigned High Court judge for case management and, where possible, that same judge will continue to manage the proceedings through to determination. Representative proceedings are typically subject to close ongoing case management, and the Court retains the ability to vary or rescind the representative order where continuation of the proceeding in that form is no longer appropriate.

Notwithstanding the lack of a formal class action regime, a reasonably well-developed set of principles for the management and conduct of representative proceedings has been developed in the recent case law, with the courts affirming a flexible and pragmatic approach and the poten-



tial for continued development in appropriate cases.

Given the nature and number of issues that often arise in class actions, the trial of the proceeding is often dealt with in stages, known as bifurcated or split trials. In particular, a split trial may be appropriate where the proceeding gives rise to both issues that are common to all group members (eg, liability) and issues that are different for each class member (eg, reliance and loss).

#### 4.7 Length and Timetable for Proceedings

The time taken for a representative proceeding to progress to trial varies from case to case. However, given the lack of a formal set of procedural rules, representative proceedings often involve complex procedural issues and resulting interlocutory applications (that may generate multiple appeals), and may take several years to reach trial.

#### 4.8 Mechanisms for Changes to Length/Timetable/Disposal of Proceedings

As there is no formal set of class action rules in Aotearoa New Zealand, representative proceedings are subject to management under the existing procedural rules and the inherent jurisdiction of the court. Given this, all the usual procedural mechanisms for the management of the proceedings are available and could be exercised if appropriate in the context of the particular proceeding. These will include trials of preliminary issues, split trials and summary judgment or dismissal.

#### 4.9 Funding and Costs Costs in Class Action Proceedings

There are no special costs rules applying to class action-style proceedings in Aotearoa New Zealand. The usual civil procedure rules are applied,

including that an unsuccessful party will usually be required to pay the costs of the successful party. Costs are set by reference to a prescribed scale, which applies notional daily rates and time allocations for particular steps in the proceeding, depending on its complexity and the skill and experience required of counsel. An award of scale costs is not intended to fully compensate the successful party and, particularly in complex representative proceedings, costs recovered may reflect only a small proportion of the actual costs of the proceeding.

The court may increase costs from the standard scale amount where the conduct of a party or the nature of the proceeding justifies it. Indemnity costs may also be awarded, which compensate for costs actually incurred, but are only available in limited circumstances.

In a representative proceeding, it is the representative plaintiff or plaintiff that will be liable for the defendant's costs if the claim is unsuccessful, as the wider group members are technically not considered parties to the proceeding. As a result, representative plaintiffs may seek indemnification from members of the class or, more commonly, will seek third-party litigation funding and an indemnification from the funder in respect of adverse costs. Since New Zealand's costs regime allows third-party costs awards in certain circumstances, litigation funders have also occasionally been found liable for a successful defendant's costs.

Given that costs awards in representative proceedings can be significant, security for costs is often sought by defendants and is almost invariably ordered by the courts.

## Third-Party Litigation Funding

The use of litigation funding is growing in Aotearoa New Zealand. As with the representative action procedure more generally, there are currently no formal rules governing funding arrangements; however, the principles to be applied have been developed in the recent case law.

The courts have cautiously permitted litigation funding where it is seen as promoting access to justice for plaintiffs, however that permission comes with active judicial scrutiny to ensure that the objectives of justice are met (*Ross v Southern Response Earthquake Services Limited* [2019] NZCA 431 at [104] to [105]; *Saunders v Houghton (No 1)* [2010] 3 NZLR 331 at [24]).

Where a representative proceeding is funded by a third-party litigation funder, the existence of the funder, their identity and location and (as it would be relevant to applications for security for costs) whether they are subject to the jurisdiction of the New Zealand courts, should be disclosed to the other parties and to the court at the time that the proceeding is filed.

There is no general requirement that the funding agreement itself be disclosed, although disclosure may be required (subject to any necessary redactions in respect of confidential, litigation-sensitive or privileged material), where that is necessary to determine an application before the court. Proactive disclosure of (redacted) funding agreements is an emerging practice in funded class actions in New Zealand.

## Common Fund Orders

The New Zealand Court of Appeal recently held that New Zealand courts have jurisdiction to make common fund orders (CFOs) in representative proceedings (*Simons v ANZ Bank New*

*Zealand Ltd* [2024] NZCA 330). A CFO allows a funder to take a share of each class member's recovery regardless of whether the class member signed up to the funding agreement.

The Court of Appeal held that the High Court Rules confer jurisdiction to make CFOs, and that this jurisdiction was consistent with a key objective of Rule 4.24 being to enhance access to justice.

## 4.10 Disclosure and Privilege

The rules in relation to disclosure in representative proceedings are the same as those in any other civil proceeding in Aotearoa New Zealand, with disclosure taking place at a number of stages throughout the litigation process. The most significant obligation is the requirement on the parties to disclose relevant documents in their control in accordance with any disclosure order made by the court.

The court can order standard disclosure of all documents that may advance or damage a party's case, tailored disclosure based on the particular circumstances of the case, or can dispense with discovery altogether. In representative proceedings, discovery is typically subject to close case management by the court.

In addition to discovery orders against the parties, the court may order non-parties to give discovery. In representative proceedings, members of the represented group who are not representative plaintiffs may be required to give discovery if the court so orders as a matter of case management.

Parties are not required to provide disclosure of documents that are subject to privilege, including legal advice and litigation privilege.

## 4.11 Remedies

All relevant civil remedies are available in Aotearoa New Zealand, including injunctive, declaratory, equitable and monetary relief.

## 4.12 Settlement and ADR Mechanisms

In the absence of a set of rules governing representative proceedings, the usual range of alternative dispute resolution (ADR) mechanisms is open to the parties. These include mediation and arbitration. Lawyers are required by the relevant professional rules to keep clients advised of alternatives to litigation that are reasonably available, but whether to engage in ADR is a matter for the parties and there is no requirement for them to do so.

Mediation is commonly used in the context of settlement negotiations in commercial disputes in Aotearoa New Zealand.

New Zealand's Arbitration Act 1996 notably limits the enforceability of arbitration clauses in contracts with consumers. This means that a defendant in a class action brought by consumers may not be able to force the action to proceed by arbitration, even if there is an arbitration clause in their standard form contracts. For an arbitration clause to be enforceable in such circumstances, each consumer must agree (again) to arbitrate after the dispute arises.

## 4.13 Judgments and Enforcement of Judgments

### Judgments and Appeals

The High Court of New Zealand is the principal institution in which representative proceedings are brought. A judgment of the High Court is conclusive unless overruled on appeal.

In most circumstances, there is a right of appeal to the Court of Appeal. Leave to appeal may be

required in some circumstances. Appeals to the Court of Appeal are by way of rehearing, which in practice means that it will be conducted on the record of the evidence given in the High Court (subject to the Court's power to admit further evidence in limited circumstances). Court of Appeal decisions can be appealed to Aotearoa New Zealand's highest court, the Supreme Court, only with the leave of the Supreme Court. Leave is only granted where the appeal involves a matter of general public importance or general commercial significance, or if a substantial miscarriage of justice may occur if the appeal is not heard.

Judgments will be binding on all parties to the proceeding, as determined by the relevant representative order made by the court at the outset of the proceeding. Representative proceedings may determine all issues for all members of the represented group or be structured so as to be binding in respect of the common issues only.

### Enforcement

There is no particular mechanism for the enforcement of judgments in representative proceedings. The relevant mechanisms are therefore those provided in the usual procedural rules, which include attachment, charging, sale and possession orders.

## 5. Legislative Reform

### 5.1 Policy Development

The Law Commission has conducted a first principles review of class actions and litigation in Aotearoa New Zealand. Its terms of reference were to consider (i) whether and to what extent the law should allow class actions, and (ii) whether and to what extent the law should allow litigation funding having regard to the torts of

maintenance and champerty. The Commission has concluded its review and recommended the creation of a statutory class actions regime and that litigation funding should be expressly permitted, subject to appropriate regulation.

As already stated in **1.1 History and Policy Drivers of the Legislative Regime** and **2.1 Collective Redress and Class Action Legislation**, the Law Commission submitted its final report to the Ministry of Justice on 27 June 2022.

## 5.2 Legislative Reform

In its final report to the Ministry of Justice (see **5.1 Policy Development**), the Law Commission has recommended the creation of a statutory class actions regime, with a new Class Actions Act as the principal source of law in relation to class actions in Aotearoa New Zealand. The Law Commission also recommended that litigation funding should be expressly permitted, subject to appropriate regulation.

Key features of the recommended new statutory regime include:

- statutory objectives to improve access to justice and manage multiple claims in an efficient way;
- a new commencement procedure, including a certification stage – this will require court approval of class action proceedings and the consideration of a number of key issues including class definition, the strength of the cause of action and the nature of the class action (opt-in or opt-out);
- provision for both opt-in and opt-out class actions, with no presumption in favour of either approach;
- a mechanism to deal with concurrent or competing class actions;

- the possibility of “aggregate damages”, where the court is empowered to award such damages rather than requiring class members individually to prove their loss or damage;
- court supervision and approval of class action discontinuances and settlements; and
- court oversight and approval of litigation funding agreements, with the court empowered to make costs sharing orders, enabling legal fees and funding costs to be spread equitably between all class members.

The Law Commission also recommended that, in the interests of enhancing access to justice, the government should consider the establishment of a public action fund to provide funding for class actions that are unlikely to attract litigation funding. It was suggested that this could be funded initially by the government and then potentially by levies on future class action settlements.

The Aotearoa New Zealand government will now consider the Law Commission’s recommendations and decide whether to reform the law.

## 5.3 Impact of Environmental, Social and Governance (ESG) Issues

There have not been any ESG-specific class actions commenced in New Zealand to date. However, in common with developments overseas, there has been a continued rise in ESG litigation more generally. This may be reflected in more class actions in this area in future, including as a result of the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021 which made climate-related disclosures mandatory for some large New Zealand financial market participants.

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