

4 July 2012

Ben
fyi-request-247-db50fc5b@requests.fyi.org.nz

Dear Ben

Official Information Act Request

I refer to your email of 23 May 2012 requesting, under the Official Information Act 1982 (the Act) information about the draft Class Actions Bill. Specifically you have requested: "what work, if any, the Ministry of Justice has done in relation to the draft Class Actions Bill and Rules that were provided to the Secretary for Justice by the Rules Committee in July 2009" and "copies of any policy papers or advice prepared after July 1 2009 (whether departmental, ministerial, or cabinet) in relation the above Bill (or any other Bill which might fulfil the same purpose)" and "what priority has been accorded to the Class Action Bill (or any other Bill which might fulfil the same purpose)".

The following documents fall within the scope of your request and are attached to this response:

- aide memoire to the Minister of 30 July 2009 "Class Actions Legislation"
- briefing paper of 10 November 2009 "Class Actions"

Some deletions have been made to the following documents:

- aide memoire to the Minister of 30 July 2009 "Class Actions Legislation"
- briefing paper of 10 November 2009 "Class Actions"

under section 9(2)(a) of the Act in order to protect the privacy of natural persons.

I am also withholding information the Ministry of Justice holds about the legislative priority of the Class Action Bill under s9(2)(f)(iv) of the Act. I consider that withholding this information is necessary to maintain the constitutional conventions which protect the confidentiality of advice tendered by Ministers of the Crown and officials.

I am satisfied that there are no other public interest considerations that render it desirable to make the information that is withheld available.

You have the right under section 28(3) of the Act to complain to the Ombudsman, about the decision to withhold some of the information requested.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'G Clark', with a stylized flourish at the end.

Gerard Clark
Manager, Access to Justice and Family Law
Ministry of Justice

AIDE MEMOIRE - CLASS ACTIONS LEGISLATION
30 JULY 2009

Purpose

1. To inform the Minister of Justice of a legislative proposal, from the Rules Committee, for a class actions procedure.

Situation

2. Recently, the Rules Committee provided the Secretary for Justice with legislative proposals to enable class actions proceedings in New Zealand. At present class actions may not be instituted.
3. The proposal is in the form of a preliminary draft Class Actions Bill, with a schedule comprising new rules to be inserted as a new Part of the High Court Rules.
4. The class actions procedure will not create new legal rights. Rather the procedure will provide an avenue for claimants to access the justice system when it may not be viable to institute individual legal proceedings, or through traditional 'representative' proceedings.
5. The principal advantages for class actions proceedings are:
 - Improved access to justice;
 - Improved judicial and court efficiency;
 - Stronger corporate regulation – strengthening the functioning of markets;
 - An alternative funding mechanism for legal proceedings (including to legal aid).

Background

6. Since 2006, the Rules Committee has been examining legislative proposals for a class actions procedure. A Sub-Committee, comprising High Court Judges, representatives of the Solicitor-General, the NZ Law Society, and the Ministry of Justice, has worked with Dr Don Mathieson QC (Special Counsel to the Parliamentary Counsel Office). The Committee has closely examined the Australian and UK legislation, and has sought to adapt relevant features for the NZ situation.
7. Consultation papers and draft legislation was released in April 2007, and in October 2008. These drew supportive submissions from:
 - the NZ Law Society,
 - the NZ Bar Association,
 - the Insurance and Superannuation Registries Ltd,
 - the Commerce Commission,
 - Grant Cameron Associates,
 - the Securities Commission (October 2008),
 - the Ministry of Economic Development,
 - the Crown Law Office,
 - the Legal Services Agency,
 - the Ministry of Consumer Affairs (October 2008).

Comment

8. The proposal raises a number of policy issues. In his letter, the Chairperson of the Rules Committee, Justice Fogarty, notes:

“Any reform involving class action litigation generally will raise a number of important policy considerations. These include:

- The availability of a choice of class action (opt-in or opt-out) under the Rules.
 - Suspension of limitation periods where a class action order is made.
 - Alteration of the common law of *res judicata* that only the parties to a proceeding are thereafter bound by the judgment.
 - Provision for litigation funders with consequential restriction for class action purposes of the torts of maintenance and champerty.
 - Supervision by the High Court of fees agreements entered into between lead plaintiffs, lawyers and litigation funders.”
9. Fortunately, the Rules Committee has developed a considerable amount of material on these issues, and this information is available to the Ministry. In addition, PCO will make Dr Mathieson QC available as a key adviser through the subsequent stages.

Next Steps

10. The Ministry will prepare a report to the Minister of Justice, the Attorney-General, and the Minister for Courts, (copied to the Associate Minister of Justice) providing information on the Rules Committee’s proposal, outlining a proposed work programme, and seeking an indication of the Minister who will lead this reform.
11. Subject to ministerial agreement, the Ministry will then consult key Government departments, examine the policy issues, and prepare a memorandum to the Cabinet Committee on Domestic Policy seeking approval for the proposal. [We have already worked closely with the Ministry of Economic Development, the Securities Commission, and the Commerce Commission. The preliminary draft identifies consequential amendments to relevant legislation for these agencies.]



10 November 2009

Hon Simon Power, Minister of Justice
 Hon Christopher Finlayson, Attorney-General
 Hon Georgina te Heuheu, QSO, Minister for Courts
 cc: Hon Nathan Guy, Associate Minister of Justice

Class Actions

Date	10 November	File reference	CRT - 10 - 09
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Action Sought

Timeframe/Deadline

Agree that the Ministry prepare a memorandum for the Cabinet Domestic Policy Committee seeking policy approval for the introduction of a Class Actions Bill	16 November 2009
Agree the Attorney-General be responsible for leading this project, subject to the approval of the Prime Minister and the Cabinet	16 November 2009

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	1st contact
Helen Wyn	General Manager, Public Law	494 9798	s9(2)(a)	
Gerard Clark	Acting Manager, Access to Justice	494 9796	s9(2)(a)	
s9(2)(a)	Principal Advisor, Access to Justice	s9(2)(a)	s9(2)(a)	X
s9(2)(a)	Advisor, Access to Justice	s9(2)(a)		

Minister's office to complete

- Noted Approved Overtaken by events
 Referred to: _____
 Seen Withdrawn Not seen by Minister

Minister's office comments



10 November 2009

Hon Simon Power, Minister of Justice
Hon Christopher Finlayson, Attorney-General
Hon Georgina te Heuheu, QSO, Minister for Courts
cc: Hon Nathan Guy, Associate Minister of Justice

Class Actions

Purpose

1. This paper reports on the provisions of a draft Class Actions Bill prepared by the Rules Committee, and seeks agreement to prepare a memorandum for Cabinet Domestic Policy Committee seeking policy approval for legislation to establish a class actions procedure in New Zealand.

Background

2. The Rules Committee is a statutory body, established under the Judicature Act 1908. The Committee has responsibility for making procedural rules for the Supreme Court, the Court of Appeal, the High Court and the District Courts.
3. The Committee comprises the Chief Justice, the Attorney-General, the Solicitor-General, the Secretary for Justice, and representatives of the judiciary and the legal profession.
4. The Committee has been examining the need for a class actions regime in New Zealand since 2006. In considering the 'best-fit' class actions model for New Zealand, the Committee extensively examined class action models implemented in overseas jurisdictions including Australia, Canada, the United States of America and the United Kingdom.
5. The Committee released discussion papers, together with draft legislation on a proposed class actions regime in April 2007 and October 2008. The material was made available to the public through the Rules Committee website.
6. The Committee also undertook targeted consultation on its proposal with the New Zealand Law Society, the New Zealand Bar Association, members of the legal profession, the Ministry of Justice, the Ministry of Economic Development, the Commerce Commission, the Securities Commission, and the Legal Services Agency. Submissions received largely supported the proposal.
7. Following extensive research and feedback from its consultation, the Committee concluded the class actions model applicable in the Federal Court of Australia as the most appropriate model for New Zealand. The Bill is therefore largely modelled on the provisions contained in Part IVA of the Federal Court of Australia Act 1976, which took effect in March 1992.
8. The Committee has now presented the Ministry with a revised legislative package comprising a draft Class Actions Bill and associated court rules (included in a Schedule

to the Bill) for the Government's consideration with a view to progression through Parliament.

Discussion

Class Actions

9. A class action is a court proceeding that allows the claims of a number of persons against one or more defendant(s) to be determined in one suit, on the basis that all the claims arise out of same, similar or related circumstances, and give rise to at least one substantial common issue of law or fact.
10. Class actions do not create new legal rights; they merely provide an avenue for claimants to access the justice system when it may be financially untenable for them to institute legal proceedings on an individual basis.
11. Access to justice for claimants is the primary objective of class actions. Class action proceedings provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions.
12. Class actions promote greater efficiency of court and judicial resources by merging numerous claims against one or more defendant(s) into a single proceeding, enabling determination of issues of law or fact through a single judgment.
13. It is also more efficient for a defendant, both in terms of time and costs saving, to defend one single claim brought by all claimants, rather than defend multiple individual claims on the same issue.
14. Class actions also serve an important deterrence objective. The fact that a proceeding might be brought by an aggrieved group acts as a constraint on unlawful conduct.

Draft Class Action Bill – Key Features

15. The Bill will allow multiple litigants to institute a single proceeding against one or more defendant(s) on the basis that all the claims arise out of the same, similar or related circumstances, and give rise to at least one substantial common issue of law or fact.
16. The Bill restricts class action proceedings to the High Court. Proceedings that could be instituted as a class action could include investor and shareholder litigation, actions against the Crown and local government authorities, and product liability actions.
17. The key features of the Bill are:
 - *Scope of class actions* - Seven or more claimants will be able to institute a class action against one or more defendant(s), if all the claims arise out of same, similar or related circumstances, and give rise to at least one substantial common issue of law or fact. The Court will have discretion to allow a class action where there are less than seven members, if it considers it just to do so.
 - *Procedure for instituting class actions* - The Court will be able to order that class actions be instituted either as an opt-in or an opt-out action:

- Opt-in: Where a person, who is eligible to be a member of the class must positively opt-in to the proceedings.
- Opt-out: Where a person who is eligible to be a member of the class is considered to be part of it, unless he or she actively opts-out of the proceeding. No opt-out class action may be ordered if good notice to class members cannot be given or if the order would unfairly prejudice class members
- *Judicial control of proceedings* – The Bill proposes that Courts have greater judicial control over fee and funding agreements, regulation of conduct of court proceedings, and the application of any remedy of damages, when the case is subject to a class action. This is to ensure the efficient and speedy disposal of the proceedings and to protect class members’ entitlements.
- *Restriction of the defence of maintenance and champerty* - Maintenance and champerty involve providing financial assistance for litigation in which the funder has no personal interest, in return for a share of any eventual return. The restriction is to prevent an abuse of Court process by prohibiting unscrupulous third parties from encouraging and interfering in litigation in which they have no personal interest, for profit. The Bill proposes to restrict maintenance and champerty to enable litigation funding companies to fund class actions.
- *Provisions’ affecting the Commerce Commission and the Securities Commission* - the Bill proposes amending various statutes affecting the Commerce Commission and the Securities Commission to enable these bodies to apply to be a lead plaintiff in a class action.

Ministry comment

18. The Ministry has been involved in the development of the class actions proposal as a member of the Class Actions Sub-Committee, along with representatives of the judiciary, the legal profession, the Parliamentary Counsel Office, and the Crown Law Office.
19. As a representative of the Sub-Committee, the Ministry has also led consultation with the Ministry of Economic Development, the Securities Commission, and the Commerce Commission on the proposals.
20. The Ministry supports the proposal to introduce a class actions regime in New Zealand for the reasons outlined in paragraphs 9 – 14 (above). However, the following policy issues will need to be clarified:
 - The availability of a choice of class action (opt-in or opt-out) under the Rules;
 - The suspension of limitation periods where a class action order is made;
 - The alteration of the common law of *res judicata* that only the parties to a proceeding are thereafter bound by the judgment;
 - Provision for litigation funders with consequential restriction for class action purposes of the torts of maintenance and champerty;

- Supervision by the High Court of fees agreements entered into between lead plaintiffs, lawyers and litigation funders.

21. Officials will examine these issues in detail in the memorandum to Cabinet Domestic Policy Committee.

Lead Minister

22. No Minister currently has responsibility for the class actions legislation. The legislation fits well with the role of the Attorney-General for the same reasons the Attorney-General is made a member of the Rules Committee.
23. We recommend Ministers agree the Attorney-General be responsible for the memorandum to Cabinet Domestic Policy Committee, and subject to the approval of the Prime Minister and the Cabinet, be responsible for the class actions legislation.
24. The Ministry will prepare a draft memorandum for the Attorney-General's consideration.

Next Steps

25. The first step in considering the Rules Committee's proposal is to seek policy approval for a class actions procedure to be introduced. We propose that the Ministry prepare a memorandum for the Cabinet Domestic Policy Committee. This memorandum will examine the Rules Committee proposal in detail.
26. In preparing the memorandum, we will consult with relevant government agencies on the proposal, including the Department of the Prime Minister and Cabinet, the Parliamentary Counsel Office, the Ministry of Economic Development, the Treasury, the Crown Law Office, the Commerce Commission and the Securities Commission.
27. The memorandum to the Domestic Policy Committee will seek final approval for the Class Actions Bill (including associated Court Rules in a schedule) to be included in the Government's legislative programme.
28. The memorandum will also seek agreement for formal drafting instructions to be issued for the preparation of a Bill, consistent with Cabinet's policy decisions. The Rules Committee draft Bill is likely to form the basis of the drafting instructions.

Recommendations

29. It is recommended that Ministers:

1. **Note** the Rules Committee has presented the Ministry with a draft Class Actions Bill and associated court rules for Government consideration and implementation
2. **Agree** that the Attorney-General be responsible for the class actions project, subject to the approval of the Prime Minister and Cabinet; **YES / NO**
3. **Agree** that the Ministry prepare a memorandum to Domestic Policy Committee seeking policy approval for the introduction of class actions in New Zealand; **YES/NO**

Helen Wyn
General Manager
Public Law Group

APPROVED / SEEN / NOT AGREED

APPROVED / SEEN / NOT AGREED

Hon Simon Power
Minister of Justice
Date:

Hon Christopher Finlayson
Attorney-General
Date:

APPROVED / SEEN / NOT AGREED

Hon Georgina te Heuheu, QSO
Minister for Courts
Date: