

**High Court Amendment (Class
Actions) Rules 2008**

Governor-General

Order in Council

At Wellington this day of 20

Present:
in Council

Pursuant to section 51C of the Judicature Act 2008, His Excellency the Governor-General, acting on the advice and with the concurrence of the Right Honourable the Chief Justice and at least 2 other members of the Rules Committee (of whom at least 1 was a Judge of the High Court), makes the following rules.

Contents

		Page
1	Title	2
2	Commencement	2
3	Principal rules amended	2
4	New Part 34 inserted	2

**Part 34
Class actions**

34.1	Purpose	3
34.2	Interpretation	3
34.3	Application	4

**High Court Amendment (Class
Actions) Rules 2008**

34.4	Heading of court documents	4
34.5	Effect of non-compliance	4
34.6	Lead plaintiffs	4
34.7	Pre-commencement procedure	5
34.8	Class action orders	6
34.9	Opt-in class actions	8
34.10	Opt out class actions	9
34.11	Cause of action accruing after commencement of action	9
34.12	Notice	10
34.13	How notice is to be given	10
34.14	Conversion to ordinary proceeding	11
34.15	When not all issues are common	11
34.16	Further proceedings	12
34.17	Adequacy of representation	12
34.18	Settlement and discontinuance	12
34.19	Judgment – powers of the court	14
34.20	Constitution of fund	14
34.21	Unidentified claimants	15
34.22	Costs	16
34.23	Fees payable by the lead plaintiff	16

Rules

1 Title

These rules are the High Court Amendment Rules 2008.

2 Commencement

These rules come into force on [date].

3 Principal rules amended

These rules amend the High Court Rules set out in Schedule 2 of the Judicature Act 1908.

4 New Part 34 inserted

The following new Part 34 is inserted:

“Part 34 “Class actions

“34.1 Purpose

The purpose of this Part is to supplement the Class Actions Act 2008 by prescribing detailed procedures for—

- “(a) the initiation and conduct of class actions under that Act; and
- “(b) the costs of a class action; and
- “(c) the supervision and fixation of legal fees incurred in conducting class actions.

“34.2 Interpretation

In this Part, unless the context otherwise requires—

“**Act** means the Class Actions Act 2008

“**class** means a group of persons whose claims are in respect of, or arise out of the same, similar or related circumstances

“**class action** means a proceeding that may be brought under the Act and which is regulated by this Part

“**class action order** means an order under rule 34.8 made in respect of a proposed class action

“**class member** means a member for the time being of a class on whose behalf a class action has been commenced

“**conditional fee agreement** has the same meaning as in section 333 of the Lawyers and Conveyancers Act 2006

“**lawyer** means a person who holds a current practising certificate as a barrister or as a barrister and solicitor

“**lead plaintiff** means a person who is described as lead plaintiff in the heading of a class action, and who has been authorised so to act by a class action order

“**litigation funder** means a person whose business consists wholly or mainly of financing civil proceedings for profit, but does not include—

- “(a) an organisation which finances, or assists in financing, a member of that organisation in relation to a civil proceeding; or
- “(b) a lawyer who provides services under a conditional fee agreement

“**opt-in class action** means a class action which has been directed under rule 34.8 to be conducted as an opt-in class action

“**opt out class action** means a class action which has been directed under rule 34.8 to be conducted as an opt out class action

“**person** include a company registered under the Companies Act 1993 or other body corporate

“**qualified person** means a person who falls within the description of the relevant class as described in a class action order

“**sub-class member** means a member for the time being of a subclass defined by the description or characteristics set out in a class action order under rule 34.8 or an order made under rule 34.15.

“34.3 Application

“(1) Subject to subclause (2), the rules in Parts 1 to 17 and Part 30 of these rules apply to a class action.

“(2) In the event of conflict between this Part and any other provision of these rules this Part prevails.

“34.4 Heading of court documents

The heading of a document filed in a class action must contain the words CLASS ACTION immediately below the name of the court registry.

“34.5 Effect of non-compliance

“(1) A proceeding, or any step in a proceeding, which is, or purports to be, a class action, is void if either—

“(a) it is commenced or taken when no class action order under rule 34.8 has been made; or

“(b) is contrary to an applicable class action order.

“(2) This rule is subject to rule 34.13(6).

“34.6 Lead plaintiffs

One or more of the 7 or more persons who are eligible to join in a class action under section 6 of the Act may apply under

rule 34.7 to be a lead plaintiff (or, as the case may be) lead plaintiffs in the class action.

“34.7 Pre-commencement procedure

- “(1) A person or persons wishing to commence a class action in the capacity of a lead plaintiff (or, as the case may be, lead plaintiffs) must—
- “(a) apply by way of originating application for a class action order:
 - “(b) file affidavit evidence providing the information listed in subclause (3).
- “(2) The application must—
- “(a) comply with Part 19:
 - “(b) be served on all the proposed defendants to the class action.
- “(3) The information required to be provided in support of an application under this rule is—
- “(a) a description, as precise as practicable, of the class members to whom the class action will relate:
 - “(b) when the identity of all qualified persons is not known, details of the method proposed to give notice of the proposed class action to qualified persons, whether by advertising or otherwise.
 - “(c) the names of the proposed defendant or defendants:
 - “(d) an outline of the circumstances said to be the same, similar or related:
 - “(e) the nature of the claims made on behalf of a proposed class, and the relief sought in respect of those claims (annexing a draft statement of claim):
 - “(f) an identification of at least one common substantial issue of law or fact which will arise in the proposed class action:
 - “(g) general information as to each lead plaintiff’s financial position, including assets and liabilities:
 - “(h) general information as to any arrangements, in place or prospective, for funding the proposed class action (including the existence and general effect of any agreement or proposed agreement with a litigation funder):

- “(i) information relevant to a decision whether it is appropriate, having regard to the purpose of the Act, to deal with the claims in a class action rather than separately.
- “(4) For the purposes of subclause (3)(a) it is not necessary to name, or specify the number of, the class members.

“34.8 Class action orders

- “(1) The court must give the applicant, and the persons named as proposed defendants, a reasonable opportunity to be heard before making a class action order.
- “(2) The court must make a class action order if it is satisfied that—
 - “(a) the proposed proceeding is eligible to be brought and conducted as a class action under the Class Actions Act 2008 and these rules; and
 - “(b) each applicant for the order is entitled to become a lead plaintiff in that class action; and
 - “(c) each applicant for the order will be an effective agent of the class members; and
 - “(d) it is appropriate, having regard to the purpose of the Act, to deal with the claims in a class action rather than separately.
- “(3) A class action order must give permission to the applicant to commence a class action, and directions on each of the following matters—
 - “(a) identification of the lead plaintiff or lead plaintiffs:
 - “(b) a precise description of the relevant class for the purposes of the class action:
 - “(c) an order that the class action will be either an opt-in class action or an opt out class action:
 - “(d) the date by which persons must opt-in or (as the case may be) opt out:
 - “(e) either—
 - “(i) an order under rule 5.45, if it applies, requiring the lead plaintiff or lead plaintiffs to give security for costs, and fixing the amount of the security and any conditions related to its payment or otherwise; or

- “(ii) an order that a decision under that rule will be made at a later case management or pre-trial conference:
 - “(f) the conduct of the class action, to ensure that it proceeds expeditiously, with a minimum of interlocutory applications, and in a way that is fair both to class members and the proposed defendants:
 - “(g) the wording of a notification to qualified persons as to their opt-in or opt-out rights as prescribed by this Part and the class action order:
 - “(h) such additional matters as may be necessary or appropriate to give full effect to the order.
- “(4) A class action order must also give directions under rule 34.12 as to the method of giving notice to class members about the existence of the class action and their rights.
- “(5) Subclause (6) applies if—
- “(a) a class action order has been made; and
 - “(b) a class action has been commenced in accordance with that order; and
 - “(c) a person applies for a second class action order for causes of action or claims within the scope of that order.
- “(6) If this subclause applies, the court may, when hearing the application for the second class action order, or on its own initiative (but in either case after hearing counsel for the parties to the class action already commenced)—
- “(a) vary or rescind the class action order previously made; or
 - “(b) order that any class action commenced in accordance with a further class action order be consolidated or heard together with the class action already commenced; or
 - “(c) stay the class action already commenced; and
 - “(d) make whatever incidental orders are just.
- “(7) The application under rule 34.7 and documents filed in the court which relate to it must be added to the court file for the class action when it is commenced, and for all subsequent purposes are to be treated as part of that proceeding.
- “(8) A statement of claim in a class action must not, without leave of the court, make claims of a different nature to, or seek relief

which is more extensive than, the claims or relief authorised by the class action order preceding that class action.

“34.9 Opt-in class actions

- “(1) This rule applies to a class action which a class action order has directed is to be conducted as an opt-in class action.
- “(2) When this rule applies—
- “(a) the Registrar at the registry of the court where the class action is commenced must, immediately after its commencement, open a class register for the proceeding;
 - “(b) the class register is to record the names, addresses, and occupations of those persons who—
 - “(i) are qualified persons; and
 - “(ii) wish to join the proceeding as class members.
 - “(c) a person’s name, address and occupation must be registered on the class register if that person—
 - “(i) has lodged with the Registrar a notice in form [to come] expressing an intention to join the proceeding; and
 - “(ii) is a qualified person; and
 - “(iii) complies with the conditions, if any, specified by the class action order.
- “(3) A person who has been registered under this rule is a class member, and is bound by a judgment or order made in the class action, but—
- “(a) need not be referred to in the heading of court documents; and
 - “(b) need not be served with any documents filed, or any formal judgment sealed, in the class action.
- “(4) The Registrar, when deciding whether a person is a qualified person, or complies with conditions specified by the class action order, may require the person to establish either of those facts by affidavit evidence or otherwise.
- “(5) A Judge may, on application by a defendant, remove the name of a person wrongly registered.

“34.10 Opt out class actions

- “(1) This rule applies to a class action which a class action order has directed is to be conducted as an opt out class action.
- “(2) When this rule applies, a qualified person must for all purposes be treated as a class member unless the person opts out of the action by giving a written notice to the court before the date for so doing fixed by the class action order.
- “(3) The written notice must be in form [to come].
- “(4) On the application of a class member, or the lead plaintiff, or a defendant, the court may fix another date so as to extend the period during which a qualified person may opt out of the class action.
- “(5) Except with the leave of the court, the trial or hearing of a class action must not be commenced earlier than the date before which a qualified person may opt out of the class action.
- “(6) A qualified person who has not opted out of the class action before the date fixed by the court is a party to the class action and is bound by a judgment or order made in it, but—
- “(a) need not be referred to in the heading of court documents; and
- “(b) need not be served with any documents filed, or any formal judgment sealed, in the class action.
- “(7) The Registrar of the court at the office where the class action is commenced must—
- “(a) place written notices given under subclause (2) and complying with subclause (3) on the court file for the proceeding; and
- “(b) create and keep up to date a list of the qualified persons who have opted out; and
- “(c) make that list available, on request, to the lead plaintiff or a defendant or their solicitors.

“34.11 Cause of action accruing after commencement of action

- “(1) The court may, on application by the lead plaintiff, at any stage after a class action has commenced, alter the description of the class.

- “(2) The altered class may include a person whose claim accrued after the commencement of the class action but before a date fixed by the court.
- “(3) The court may—
- “(a) make any supplementary orders it considers just; and
 - “(b) require notice to be given to persons who, as a result of the alteration will be included in the class, of the existence of the class action, and of the date by which persons may opt out (if it is an opt out class action) or opt in (if it is an opt-in class action).

“34.12 Notice

- “(1) Class members (or, in the case of an opt-in class action, qualified persons who may opt to become class members) must be given notice of—
- “(a) the commencement of a class action, the terms of the class action order and the right of each person to seek independent legal advice if desired.
 - “(b) any information about fees which rule 34.23 requires to be in the notice:
 - “(c) an application under rule 34.19:
 - “(d) an application by a defendant which, if granted by the court, would have the effect of dismissing the class action, or removing that defendant from it.
 - “(e) any other matter directed by the court.
- “(2) The court may excuse compliance with any or all of the requirements of subclause (1) when damages are not sought in the class action.
- “(3) Unless the court is satisfied that it is just to do so, an application for approval of a settlement under rule 34.19 must not be determined unless notice has been given to class members.
- “(4) Notice must be given as soon as practicable after the happening of the event to which the notice relates.

“34.13 How notice is to be given

- “(1) This rule applies to notices required by rule 34.12.
- “(2) The form and content of a notice must be as approved by the court.

- “(3) The court must by order specify—
 - “(a) who is to give the notice:
 - “(b) the way in which the notice is to be given:
 - “(c) what relevant information is to be contained in the notice:
 - “(d) how the costs of the notice are to be met.
- “(4) An order under subclause (3) may require notice to be given by—
 - “(a) press advertisement:
 - “(b) radio or television broadcast:
 - “(c) any other means.
- “(5) Personal notice to each class member or qualified person may be ordered only if it is reasonably practicable, and not unduly expensive in all the circumstances, to give it.
- “(6) The failure of a class member or a qualified person to receive or respond to a notice does not affect a step taken, an order made, or a judgment given in a class action, unless the court orders otherwise.

“34.14 Conversion to ordinary proceeding

- “(1) The court may direct that a class action be converted, on such terms as it thinks just, to an ordinary proceeding if the court concludes, on a defendant’s application—
 - “(a) that the cost to that defendant of distributing amounts payable to class members under a judgment in the class action would be disproportionately onerous; or
 - “(b) that the costs that will be incurred in the class action will probably exceed the costs likely to be incurred in separate proceedings by individual class members.
- “(2) If the court dismisses an application under subclause (1) it may order that no further application under that subclause will be considered without the leave of the court.

“34.15 When not all issues are common

- “(1) If the court considers, on application by a lead plaintiff or a defendant, that resolving the common issue or issues will not finally determine the claims, it may give directions as to how the remaining issues will be resolved within the class action.

- “(2) The directions may include establishing a sub-class within the class, and giving consequential directions, including designating a person other than a lead plaintiff to represent sub-class members and to be liable for relevant costs.
- “(3) The court may permit an individual class member to appear in the proceeding for the purpose of determining an issue relating to the quantification of damages or otherwise that relates only to the claims of that member.
- “(4) If the court makes an order under subclause (3) that member, and not the lead plaintiff, is liable for costs associated with the determination of the issue.

“34.16 Further proceedings

If an issue cannot properly or conveniently be dealt with under a direction given under rule 34.15, the court may give directions relating to the commencement and conduct of—

- “(a) a separate proceeding by a class member; or
- “(b) a fresh class action or other proceeding on behalf of sub-class members.

“34.17 Adequacy of representation

- “(1) If a lead plaintiff is not able adequately to represent the interests of the class members the court may, on application by a class member, substitute another person as lead plaintiff, and make whatever incidental orders it thinks just.
- “(2) If a person is not able adequately to represent the interests of sub-class members the court may, on application by a sub-class member, substitute another person to act in that capacity, and make whatever incidental orders it considers just.

“34.18 Settlement and discontinuance

- “(1) A class action may not be settled or discontinued without the approval of the court.
- “(2) The settlement of a class action seeking damages or other monetary relief may not be approved under subclause (1) unless the court considers it fair, reasonable and adequate having regard to—

- “(a) the likely duration and costs of the class action, if it continued; and
 - “(b) the factors listed in subclause (3); and
 - “(c) all the circumstances of the case.
- “(3) The factors that must be considered on an application for approval of a settlement are:
- “(a) whether adequate notice of and information about the terms of the proposed settlement has been conveyed, so far as practicable, to the class members:
 - “(b) whether class members are treated equally by those terms or, alternatively, treated differently, but on proper grounds:
 - “(c) the relationship in those terms between amounts payable to lawyers or a litigation funder and the amounts payable to class members:
 - “(d) the cost, if any, of distributing or otherwise administering the amount received under the settlement.
- “(4) If the court gives its approval under subclause (1) it may—
- “(a) make whatever orders it thinks just about the distribution of any money paid under a settlement.
 - “(b) make an order as to costs:
 - “(c) make an order as to fees payable by the lead plaintiff or plaintiffs that could be made on an application under rule 34.23.
- “(5) A lead plaintiff may, with leave of the court—
- “(a) settle the lead plaintiff’s individual claim in whole or in part at any stage of the class action; and
 - “(b) withdraw as lead plaintiff on conditions as to costs which are considered just.
- “(6) If the court grants leave under subclause (5) it may, on the application of a class member, order the appointment of a new lead plaintiff, and make incidental orders.
- “(7) Before a lead plaintiff is permitted to withdraw under subclause (5), the court must be satisfied—
- “(a) that notice of the application has been given to class members under rule 34.12 in sufficient time for them to apply for the substitution of a new lead plaintiff; and
 - “(b) that any application for the substitution of a new lead plaintiff has been determined.

“34.19 Judgment – powers of the court

- “(1) This rule supplements section 12 of the Act.
- “(2) In its judgment in a class action the court may—
 - “(a) formally decide any question of law or fact:
 - “(b) make a declaration of liability:
 - “(c) grant any equitable relief, or relief that an individual claimant would be entitled to under an enactment:
 - “(d) award damages for class members, subclass members or individual class or subclass members, either for specified sums or by directing the manner in which damages are to be calculated:
 - “(e) award damages in an aggregate amount, without specifying the amounts to be allocated to individuals (but only if it is satisfied that a reasonably accurate assessment can be made of the total amount to which class members will be entitled under the judgment):
 - “(f) direct how class members are to establish their entitlements and resolve any disputes:
 - “(g) make an order as to costs:
 - “(h) make an order as to fees payable by the lead plaintiff or lead plaintiffs that could be made on an application under rule 34.23:
 - “(i) make incidental orders that it thinks just.
- “(3) The court may direct that a defendant pay damages awarded against that defendant into a fund constituted under rule 34.20.

“34.20 Constitution of fund

- “(1) The court may give directions as to the constitution and administration of a fund, the costs of administering it and the basis on which payments are to be made from the fund.
- “(2) The court may require notice to be given to class members about their rights and the procedure for claiming payment out of the fund, including a cut-off day by which such claims are to be made.
- “(3) A class member may make a claim against the fund after the cut-off day only if—
 - “(a) the court grants leave; and
 - “(b) the fund has not already been fully distributed.

“(4) This rule does not limit or affect rule 34.20.

“34.21 Unidentified claimants

“(1) The court may, if this rule applies, make an **unidentified claimants order**.

“(2) This rule applies if—

“(a) the class action is an opt out class action; and

“(b) a defendant ordered to pay damages into a fund constituted under rule 34.20 has derived a financial or other pecuniary advantage from that defendant’s unlawful conduct; and

“(c) it is impossible, or not reasonably practicable, or not cost effective, to identify some of the class members who have suffered damage or loss as a result of that defendant’s unlawful conduct; and

“(d) an amount will remain in the fund after the damages awarded in an aggregate amount have been distributed to class members; and

“(e) the court considers it is just and cost effective to make an order under subclause (4).

“(3) An unidentified claimants order may be made by the court either when it give its judgment in a class action or subsequently upon an interlocutory application by a party to that class action.

“(4) In an unidentified claimants order the court may,—

“(a) order any part of the fund remaining after payment of damages to identified class members (**the balance fund**) to be held on trust by named trustees:

“(b) settle the terms of the trust on which the balance fund is to be held:

“(c) order that the balance fund be held for a purpose that may reasonably be expected to benefit class or subclass members (even if some or all of them have directly benefited):

“(d) make any incidental order considered just.

“(5) The court may order that if any part of the balance fund remains unclaimed or otherwise undistributed after a date fixed in an unidentified claimants order that that remaining part must

be returned by the trustees to a defendant who has paid damages into the fund.

“34.22 Costs

- “(1) This rule applies both when the settlement or discontinuance of a class action is approved by the court under rule 34.18, and when judgment is given in a class action.
- “(2) Costs may be awarded to or against a lead plaintiff, but may not be awarded to or against a class member who is not a lead plaintiff.
- “(3) If the court has made an award of damages in a class action, or one of the terms of a settlement in a class action relates to the payment of damages, the lead plaintiff or a person who has been a lead plaintiff, may apply to the court for an order under subclause (4).
- “(4) The court may order that an amount not greater than the excess costs be paid to the applicant out of the damages awarded, and make any incidental order it considers just.
- “(5) In this rule **excess costs** means the amount by which the expenses and disbursements reasonably incurred by the applicant in relation to the class action exceed, or are likely to exceed, the costs recoverable from the defendant or defendants.
- “(6) Subject to subclauses (1) to (5), Part 14 of these rules applies as if the proceeding was simply one between the lead plaintiff or lead plaintiffs and the defendant or defendants.

“34.23 Fees payable by the lead plaintiff

- “(1) In this rule **fees agreement** means any agreement or arrangement between a lead plaintiff or lead plaintiffs and a lawyer or lawyers as to the amount or method of calculating legal fees, or the circumstances in which they will become payable, and includes—
- “(a) an agreement or arrangement relating to contributions towards fees by class members; and
- “(b) an agreement or arrangement between the lead plaintiff’s solicitor and a litigation funder relating to the class action or proposed class action.

**High Court Amendment (Class
Actions) Rules 2008**

- “(2) When a notice is sent to class members or qualified persons under rule 34.12, it must state the effect of any fees agreement that has been entered into or is proposed.
- “(3) A person who has received a notice under subclause (2) may apply to the court at any time before distribution has occurred for an order under subclause (4).
- “(4) The court, if satisfied on an application under subclause (3) that the fees agreement is oppressive or unjust to the applicant, may make an order—
- “(a) varying the agreement to the extent necessary to remove its oppressive or unjust characteristic; or
 - “(b) requiring the parties to the fees agreement to revise the fees agreement, and to resubmit it for approval; or
 - “(c) fixing the legal fees payable;
 - “(d) imposing any incidental terms considered just.
- “(5) If an order is made under subclause (4)(b), the fees agreement has no subsequent effect, and a revised fees agreement has no effect unless it has been re-submitted and approved.”

Clerk of the Executive Council.

Explanatory note

This note is not part of the rules, but is intended to indicate their general effect.

Issued under the authority of the Acts and Regulations Publication Act 1989.
Date of notification in *Gazette*:
These rules are administered by the
