

# New Zealand Law Commission Supplementary Issues Paper: Class Actions and Litigation Funding

Submission by Omni Bridgeway Limited

12 November 2021

## 1. INTRODUCTION

Omni Bridgeway Limited welcomes the opportunity to provide a supplementary submission to the New Zealand Law Commission's review into Class Actions and Litigation Funding. This submission supplements our original submission dated March 2021 (**March submission**) which also contained some background information about Omni Bridgeway and briefly addressed the importance of access to justice<sup>1</sup>.

## 2. RESPONSE TO QUESTIONS IN THE SUPPLEMENTARY ISSUES PAPER

In this section, we have only included the questions on which we have a submission.

### CHAPTER 1: COMMENCEMENT AND CERTIFICATION OF A CLASS ACTION

(Q1) Do you agree with our draft commencement provisions? If not, how should they be amended?

Omni Bridgeway agrees with sections 1 and 2 of the Law Commission's commencement provisions, including the proposed:

- Numerosity threshold of the representative plaintiff and two or more persons.
- Low bar for commonality, that the claims "all raise a common issue", that is, there need only be one common issue of law or fact.

In relation to certification, see our response to question 2.

The Supplementary Issues Paper states that the Law Commission has concluded that HCR 4.24 should be retained. The Law Commission also states that it may be desirable to amend HCR 4.24 to provide that it should not be used where a class action would be a more appropriate procedure.<sup>2</sup> As outlined in our March submission, Omni Bridgeway considers that retaining HCR 4.24 may lead to confusion and a better option is for the new statutory regime to provide that the court has a general power to make whatever orders it thinks fit in the circumstances of the case.

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<sup>1</sup> See Omni Bridgeway's March submission, pages 1-4.

<sup>2</sup> See Supplementary Issues Paper, paragraph 40.

However, if the Law Commission recommends there is utility in HCR 4.24 being retained, we agree that it should be amended to be clear about the circumstances in which it applies and that it does not apply to claims that are to be commenced under the new regime. This should avoid any confusion over which procedure should be followed.

## (Q2) Do you agree with our draft certification provision? If not, how should it be amended?

In Omni Bridgeway's submission, the class action regime should not include a certification requirement.

As outlined in our March submission, the costs and delay caused by a certification procedure far outweigh any advantages of such a procedure. If a class action is commenced and appears to have no reasonably arguable cause of action, the New Zealand court is empowered to strike out the pleadings or summarily dismiss the proceedings on the application of the defendant or on its own motion. In addition, the lawyers' obligations to the court and, where the action is funded, the funder's commercial interests make it highly unlikely that meritless class actions will be commenced.<sup>3</sup> If, for some unlikely reason, such an action was commenced, procedural tools such as strike out and summary dismissal are available to dispose of the action swiftly and efficiently and provide sufficient protection to a defendant against meritless class actions.

Although the Law Commission noted in the Supplementary Issues Paper that the proposed approach is preferred over a preliminary merits test, and they have deliberately used the language that applies to a strike-out application, this procedure shifts the burden of showing that the statement of claim discloses a reasonably arguable cause of action from a defendant filing a strike-out application, when it considers that to be necessary, onto the plaintiff(s) in every class action. This also adds additional cost and delay in every action.

In Omni Bridgeway's submission, the statutory regime in New Zealand should include threshold requirements only, instead of certification, and an express power (found in the statutory regimes in Australia) for the court to order that the proceedings no longer continue as a class action on certain grounds, including that it will not lead to an efficient and economic resolution of the common and individual issues.<sup>4</sup>

However, if, contrary to our primary submission, a certification procedure is to be introduced, Omni Bridgeway's view is that it should be made clear that, so far as possible, it is to be determined on the pleadings without evidence to avoid the potential cost and delay of satellite litigation.

In Omni Bridgeway's view, the current draft certification provision should be able to be determined on the pleadings, save for the requirement at subsection (2)(c) for the representative plaintiff(s) to demonstrate they have a reasonable understanding of the nature of the claims and their obligations. We consider that this requirement could be dealt with by way of a brief affidavit.

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<sup>3</sup> As we noted in our March submission, in 2013, Professor Vince Morabito and Jane Caruana studied the number of Australian class actions (since 1991) that had been subjected to discontinuance applications. They found that only one quarter of the actions had been subject to an application and, of these, 80% had failed. See Professor Vince Morabito and Jane Caruana "Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia" (2013) 61 Am J Comp L579 at 601.

<sup>4</sup> For example, section 33N(1)(c) of the *Federal Court of Australia Act 1976* (Cth) provides that a court may, on application by a defendant or on its own motion, order that a proceeding no longer continue as a class action if "the [class action] will not provide an efficient and effective means of dealing with the claims of group members".

In Omni Bridgeway's submission, if certification is to be included in the class action regime, it should be made clear that subsection (3)(c) of the current draft certification provision, that is, "the extent of other issues that will need to be determined once the common issue is resolved" is not akin to a "predominance" test which we strongly oppose. As we outlined in our March submission, it is artificial to say that a claim with 51% 'common issues' and 49% 'individual issues' can proceed, but a claim with the reverse percentages cannot. In our view, the question is not whether the claims have 1%, 51%, or 91% individual or common issues, the question is whether resolution of the common issues leaves the class action participants in a position where their individual claims can be determined in an efficient way relative to the cost of that exercise.

In Omni Bridgeway's submission, if certification is to be included in the regime, subsection (3)(c) of the draft certification provision is not required and should not be included as subsection (3)(e) covers the situation where a class action is not the appropriate procedure to deal with the claims.

(Q3) When should sub-classes be allowed? For example:

- (a) where there is a conflict of interest among class members?
- (b) where there is a common issue across all class members, as well as additional issues only shared by a sub-group?
- (c) where there are sub-groups with related issues but no common issue applying to all claims?

In Omni Bridgeway's submission, it is not necessary for the class actions statute to provide for sub-classes. The court should have the discretion to order sub-classes when appropriate, depending on the circumstances of the case. However, in our view, the court should have this power under a general power to make any orders necessary in a class action (see our response to question 23 below). This will give the court the flexibility to do what is in the interests of justice in each individual case.

(Q4) Do you agree with our list of matters that should be included in the court's certification order?

As set out above, in Omni Bridgeway's submission, the class action regime should not include a certification requirement. However, if certification is to be required, we agree with the list of matters that should be included in the court's certification order, provided the court has the power to amend the common issues of law or fact after certification, if that is in the best interests of the class members.

In addition, in Omni Bridgeway's submission, the pleadings, including the matters that will be in the certification order, must be capable of amendment in the usual way, subject to approval by the court.

(Q5) Do you agree that the limitation periods applying to all proposed class members should be suspended when a class action is commenced?

Omni Bridgeway agrees that the limitation periods applying to all proposed class members should be suspended when a class action is commenced.

(Q6) Do you agree with the events we propose should start the limitation period applying to a class member running again?

Omni Bridgeway agrees with the proposed list of events that would start the limitation period applying to a class member running again.

## CHAPTER 2: COMPETING CLASS ACTIONS

(Q7) Do you agree competing class actions should be defined as two or more class actions with respect to the same or substantially similar issues filed against the same defendant by different representative plaintiffs? If not, how should they be defined?

Omni Bridgeway disagrees with the proposed definition of competing class actions.

The definition of a competing class action should be limited to a situation where more than one representative plaintiff seek to represent the same group members. In our view, two class actions which do not have overlapping group membership (whether they are two opt-in class actions or one opt-in and one opt-out without overlapping group membership) are not in competition with each other in the same way that two single-plaintiff proceedings against the same defendant are not in competition with each other.

Take an example of a defendant who has wronged one hundred persons. The defendant has no inherent right to have all one hundred claims determined through a single class action. The starting point is that each person is entitled to bring an individual claim and, if they do so, the defendant faces 100 sets of proceedings. If 50 persons wish to join one class action and the other 50 wish to join another class action (perhaps because of different funding terms, legal representation and/or case theory) they should be free to do so and should not be denied the benefits of the class action procedure because of a statutory definition which assumes the actions are competing.

(Q8) Do you agree that a competing class action should be filed within 90 days of the first class action being filed (or with the leave of the court)? How can information about new class actions be made available to lawyers and funders?

Omni Bridgeway agrees with the proposal that a competing class action should be filed within 90 days of the first class action being filed (or with the leave of the court). We consider that, in most cases, this timeframe should allow sufficient time for actions to be investigated properly and also provide certainty for the participants and the court at an early stage of the proceedings.

Omni Bridgeway agrees with the Law Commission that there should not be a first to file rule, which encourages a rush to the court and can mean that participants have not had sufficient time to investigate whether the action has merit and sufficient support from class members, where required.

Omni Bridgeway also agrees with the Law Commission's proposal to have a publicly available list of current class actions, such as on the Ngā Kōti o Aotearoa | Courts of New Zealand website, with an

ability to sign up for email notifications of any new class actions.<sup>5</sup> We agree this would be an efficient way for lawyers to stay abreast of current class actions and their status. In Omni Bridgeway's submission, all statements of claim for all class actions should be made available online. Timely access to a statement of claim is necessary for lawyers and funders to determine whether an action they propose to bring would in fact compete with an existing proceeding.

### (Q9) When should the court determine the issue of competing class actions?

- (a) prior to certification.
- (b) at the same time as certification.
- (c) the court should have discretion to determine the issue of competing class actions prior to certification or at certification.

In Omni Bridgeway's submission, the issue of competing class actions should be determined as early as possible after the 90 day period. If, contrary to Omni Bridgeway's submission<sup>6</sup>, a certification procedure is to be introduced, then we agree with this issue being determined at the certification stage.

### (Q10) What powers should the court have for managing competing class actions?

- (a) should a court be required to select one class action to proceed and stay the other proceedings?
- (b) or should the court have a broader range of powers available to it?

As we outlined in our March submission, in Omni Bridgeway's view, the statutory regime should include an express power for the court to resolve competing and multiple class actions to avoid the uncertainty and satellite litigation that has occurred in Australia in recent years.<sup>7</sup> In Omni Bridgeway's submission, the court should have broad and flexible powers to resolve and manage competing class actions and there should be no strict requirement in the statutory regime for a selection hearing or any fixed criteria to be considered. In our view, the court must have flexibility to assess the appropriate factors and circumstances of the particular case in a timely and efficient manner.<sup>8</sup>

In Omni Bridgeway's view, it should be clear that the court has the discretion to allow more than one class action with respect to the same or substantially similar issues to continue, or to consolidate two competing actions into a single consolidated proceeding, if that is in the best interests of class members. For example, in some circumstances it may be appropriate for two closed (opt-in) class actions to proceed. As the Law Commission stated, when the court considers how 'competing' cases

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<sup>5</sup> See Supplementary Issues Paper at paragraph 2.27.

<sup>6</sup> See our response to question 2 above.

<sup>7</sup> This uncertainty culminated in an appeal to the High Court of Australia in *Wigmans v AMP Limited* [2021] HCA 7 (AMP case).

<sup>8</sup> The majority in the AMP case stated: "there can be no "one size fits all" approach. There is no rule or presumption that the representative proceeding commenced first in time should prevail. In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case."

are formulated, it might become apparent that there is very little overlap between the class actions and that it would be just and efficient to allow more than one to proceed.<sup>9</sup>

(Q11) When a court considers how competing class actions should be managed, should it consider which approach would best allow class action member claims to be resolved in a just and efficient way? If not, what test do you favour?

Omni Bridgeway agrees that the court should consider which approach proposed in the competing actions would best allow class action member claims to be resolved in a just and efficient way (see our response to question 12 for further details).

(Q12) What factors should be relevant to the court's consideration of which approach would best allow class member claims to be resolved in a just and efficient way? For example, should the court consider:

- (a) how each case is formulated?
- (b) the preference of potential class members?
- (c) litigation funding arrangements?
- (d) legal representation?

As we have said, in Omni Bridgeway's view, the court should have broad and flexible powers to resolve and manage competing class actions and there should be no strict requirement for a selection hearing or any fixed criteria. However, we agree that, when determining which competing action would best allow class member claims to be resolved in a just and efficient way, the court can have regard to a non-exhaustive list of factors, provided they are not fixed criteria.

In our view, primacy should be given to how the case is formulated. This would encourage proper investigation of the action and careful preparation of the pleadings, rather than a rush to court.

Omni Bridgeway agrees that the preference of potential class members is relevant in a closed class action where there is bookbuilding, but not in an open class action. In our view, the litigation funding arrangements and a litigation funder's capacity to meet the costs of the litigation (including adverse costs) are relevant factors to consider when there are competing class actions.

(Q13) Do you have any concerns about defendants gaining a tactical advantage from a competing class action hearing? If so, how should they be managed?

In Omni Bridgeway's view, disclosure of funding arrangements is appropriate and should be imposed in all funded class actions, whether or not there are competing actions, provided it is subject to the right to redact any terms or information that is privileged or that might confer a tactical or strategic

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<sup>9</sup> See Supplementary Issues Paper at paragraph 2.49.

advantage on an opponent. On this basis, Omni Bridgeway does not have concerns about defendants gaining a tactical advantage from a competing class actions hearing.

As we stated in our March submission, in our view, disclosure obligations should be imposed on both plaintiffs and defendants where any form of external funding is involved for either party. This could include an after the event insurance policy, an employer or union funding the litigation, an insurer under a D&O policy, PI policy or other insurance policy that might respond to the claim. Disclosure of the identity of the “funder” (in this extended sense) and any relevant funding agreement or insurance policy should also be required. This gives the parties the ability to ensure there are no conflicts of interest by any third parties involved in funding the claim or the defence of the claim and gives the defendant the opportunity to consider whether and what form of security for costs it may wish to seek in the action. The competing class action hearing would provide an opportunity for this to be aired.

### CHAPTER 3: RELATIONSHIPS WITH CLASS MEMBERS

#### (Q16) How can a representative plaintiff be supported to meet their obligations?

In Omni Bridgeway’s submission, the representative plaintiff will be supported in the role by the lawyers. In our view, in some cases, it can be helpful for the representative plaintiff for there to be a litigation committee. However, we agree with the Law Commission’s views in the Supplementary Issues Paper<sup>10</sup> that it should be up to the representative plaintiff and their lawyers to decide whether a litigation committee is appropriate, depending on the circumstances of the case, and we do not think specific rules on litigation committees are needed in the class actions legislation.

### CHAPTER 4: DURING A CLASS ACTION

#### (Q20) Do you agree with our list of events that should require notice to class members?

Omni Bridgeway agrees with the list of events that should require notice to class members.

#### (Q22) Do you agree with our proposed requirements for an opt-in/opt-out notice?

Omni Bridgeway agrees with the proposed requirements for an opt-in/opt-out notice. In our view, the notice should also include the key terms of any funding arrangement.

#### (Q23) Do you agree that the High Court Rules and the court's inherent jurisdiction are adequate to ensure the efficient case management of class actions? If not, what specific provisions are needed? For example:

- (a) a general power for the court to make any orders necessary in a class action?
- (b) specific provisions for class actions case management

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<sup>10</sup> See Supplementary Issues Paper at paragraph 3.20.



conferences?

- (c) restrictions on filing interlocutory applications in class actions or procedures for dealing with interlocutory applications in an expedited way?
- (d) automatic dismissal of a class action proceeding that is not progressed within a certain time frame?

In Omni Bridgeway's submission, the court should have a broad general power to make any orders necessary in a class action. This will give the court the flexibility to do what is in the interests of justice in each individual case. However, Omni Bridgeway considers that the court should also have certain express powers to avoid the uncertainty and satellite litigation that has occurred under the statutory regimes in Australia in recent years. These should include:

- An express power for the court to resolve competing and multiple class actions at the earliest possible time in the proceedings and as cheaply as possible (see our response to question 10 above). The power should include a discretion to allow more than one class action with respect to the same dispute to continue.
- An express power to make class closure orders.

(Q24) Do you agree that:

- (a) there should be a presumption in favour of staged hearings in class actions?
- (b) the court should have flexibility as to which issues are determined at stage one and stage two hearings?

In Omni Bridgeway's submission, there should not be a presumption in favour of staged hearings in class actions. The court should have flexibility to determine which issues are determined at which stages of the proceeding, depending on the circumstances.

(Q25) How can individual issues in a class action be determined in an efficient way? For example, should the court have the power to:

- (a) appoint an expert to enquire into individual issues.
- (b) order individual issues to be determined through a non-judicial process, where the parties agree to that.
- (c) give directions as to the form or way in which evidence on individual issues may be given.

In Omni Bridgeway's submission, the court should have a broad general power to determine common and individual issues, including by appointing an expert or making orders for a non-judicial process, depending on the circumstances of the case.

(Q26) Are current rules for discovery and information provision adequate for class actions or are specific rules required? For



example:

- (a) should there be a specific rule permitting discovery by class members?
- (b) should the defendant be entitled to any information about class member claims such as a list of class members who have opted in or the number of class members who have opted out?

In Omni Bridgeway's submission, the defendant is entitled to be informed of the class members who have opted out of the class action (when the opt-out notices are filed with the court). Otherwise, in our view, the current rules for discovery and information provision are adequate and there should be no specific rule permitting discovery from class members. In our view, this is not necessary for the common issues stage of the proceedings and would add unnecessary cost and time to the proceedings.

(Q27) Do you support?

- (a) the court having an express power to make common fund orders; and/or
- (b) the court having an express power to make funding equalisation orders.

In Omni Bridgeway's submission, the court should have broad powers which permit it to make common fund orders and funding equalisation orders. In our view, the statutory regime should permit both opt-in (closed) class actions and opt-out (open) class actions. This would give the representative plaintiff the flexibility to choose the most appropriate type of action depending on the circumstances of each case. While Omni Bridgeway considers that opt-in (closed) class actions have more benefits, we recognise there will be some cases where an open class action may be preferable and provide greater access to justice to more class members, for example, this may be the case in some consumer actions.

## CHAPTER 5: JUDGMENT, DAMAGES AND APPEALS

(Q30) Do you agree that aggregate damages should be allowed in class actions?

In Omni Bridgeway's submission, aggregate damages should be allowed in class actions if "a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment"<sup>11</sup>. In our view, there will be actions in which this will be possible and be the most efficient way for group member claims to be resolved.

(Q34) Do you agree that class members should be able to appeal a substantive judgment on the common issues with leave of the High Court?

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<sup>11</sup> See section 33Z(3) of the *Federal Court of Australia Act 1976* (Cth).

In Omni Bridgeway's submission, class members should be able to appeal a substantive judgment on the common issues with leave of the High Court.

## CHAPTER 6: SETTLEMENT

(Q36) Should the court be required to approve class action settlements in both opt-in and opt out proceedings?

In Omni Bridgeway's submission, the court should be required to approve class action settlements in both opt-in and opt out proceedings. In our view, the key feature of a class actions regime that is essential to ensure the interests of plaintiffs and defendants are balanced and the interests of class members are protected is the court's supervisory role, particularly in relation to the settlement approval process.

(Q37) Should the court be required to approve the discontinuance of a class action?

In Omni Bridgeway's submission, the court should be required to approve the discontinuance of a class action.

(Q38) Do you agree with our list of the information that should be provided in support of an application to approve a class action settlement?

Omni Bridgeway agrees with the proposed list of information to be provided in support of an application to approve a class action settlement.

(Q39) Should there be a requirement to give notice to class members of:

- (a) a proposed class action settlement?
- (b) an approved class action settlement?

In Omni Bridgeway's submission, there should be a requirement to give notice to class members of both a proposed class action settlement and an approved class action settlement.

(Q40) Do you agree with the information we propose should be contained in the notice of proposed settlement and the notice of approved settlement?

Omni Bridgeway agrees with the information proposed to be contained in the notice of proposed settlement and the notice of approved settlement.

(Q41) Should class members be given an opportunity to object to a proposed settlement?

Omni Bridgeway agrees that class members should be given an opportunity to object to a proposed settlement.

(Q42) Do you agree there should there be an express power to appoint a counsel to assist the court or a court expert with respect to settlement approval? Should the court be able to order one or more parties to meet some or all of the cost of this?

Omni Bridgeway does not agree that there should be an express power to appoint a counsel to assist the court or a court expert with respect to settlement approval. There is currently no express power in the statutory regimes in Australia but the court is able to appoint a contradictor or costs assessor or other expert under its broad general power to make any order it thinks appropriate or necessary to ensure that justice is done.<sup>12</sup>

(Q43) When the court considers whether to approve a settlement, should it consider whether the proposed settlement is fair, reasonable and in the interests of the class as a whole? If not, what test should it apply?

Omni Bridgeway agrees that the court should consider whether the proposed settlement is fair, reasonable and in the interests of the class as a whole.

(Q44) Should there be specific factors a court must consider when deciding whether a settlement is fair, reasonable and in the interests of the class as a whole? For example, should the court consider:

- (a) the terms and conditions of the settlement.
- (b) any legal fees and litigation funding commissions that will be deducted from class member relief.
- (c) any information readily available to the court on the potential risks, costs and benefits of continuing with the litigation.
- (d) any views of class members.
- (e) the process by which settlement was reached.
- (f) any other factors it considers relevant.

In Omni Bridgeway's submission, there should not be a list of specific factors that the court *must* consider when deciding whether a settlement is fair, reasonable and in the interests of the

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<sup>12</sup> For example, section 33ZF of the *Federal Court of Australia Act 1976* (Cth).

class as a whole. However, in our view, we agree with the proposed list of factors provided they are not an exhaustive list and are factors that the court *may* consider. In our view it is important that this list is non-exhaustive to enable the court to consider any relevant factors as appropriate in the circumstances of the case.

#### (Q45) Should the court have an express power to amend litigation funding commissions at settlement?

In Omni Bridgeway's submission, the court will only approve a settlement of a class action if it considers the settlement to be fair and reasonable and in the interests of the class as a whole. In many cases, this will include an examination of what the class members will receive after costs and the funder's commission.

As we stated in our March submission, we believe that funders operating in New Zealand should be regulated, which will provide further protection to class members.

#### (Q46) Should the court have the power to convert an opt-out class action into an opt-in class action for the purposes of facilitating settlement?

In Omni Bridgeway's submission, the court should have the power to convert an opt-out class action into an opt-in class action for the purposes of facilitating settlement.

#### (Q47) Do you agree that class members should be able to opt out of a class action settlement once it is approved?

Omni Bridgeway does not agree that class members should be able to opt out of a class action settlement once it is approved. They will have the opportunity to object to a proposed settlement and to appeal from an approved settlement.

#### (Q48) Should other potential class members have an opportunity to opt in at settlement?

In Omni Bridgeway's submission, other potential class members should not have an opportunity to opt in at settlement as finality is required. As noted in the Supplementary Issues Paper<sup>13</sup>, we agree that this could deter class members from joining the class action at an earlier point, as they could simply wait and see if there is a settlement.

#### (Q49) When a settlement is reached prior to certification, do you agree that the court should consider whether to certify it for the purposes of settlement?

Omni Bridgeway does not agree that the court should consider whether to certify an action for the purposes of settlement. In our view this would be superfluous and unnecessarily costly.

#### (Q50) Should the court supervise the administration and

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<sup>13</sup> See Supplementary Issues Paper at paragraph 6.117.

## implementation of a class action settlement?

In Omni Bridgeway's submission, the court should not be actively involved in monitoring the administration of a settlement, but should be able to hear and resolve disputes in relation to the administration of the settlement if they arise.

### (Q51) Should the court have a power to appoint a settlement administrator? Who would be appropriate to fulfil this role?

In Omni Bridgeway's submission, the court should have a power to appoint a settlement administrator. This role could be filled by the representative plaintiff's lawyers and/ or any third party administrator approved by the court at the time of settlement approval.

### (Q52) Should there be an obligation to provide a settlement outcome report to the court? Should this be made publicly available?

In Omni Bridgeway's submission, there should be an obligation to provide a settlement outcome report to the court and this should be made publicly available.