

# NZILA Conference 2002

Settling class actions:  
The early compensation tactic

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# What is the tactic?

The deployment, to avoid/settle class action litigation, of a uniform compensation offer package, with the intention that it be taken up by all qualifying claimants

## When do you use it:

Section 131 Companies Act: best interests

In suitable multi party claim situations

When your parent company lets you

# Some multi-party claim situations:

- H & R Block: investment fraud (1990-91)
- Mercury Energy: Auckland power blackout (1998)
- Telecom NZ: Palmerston North Exchange outages (1998, 1999)
- Dow Agrochemicals: New Plymouth land contamination (2000-01)
- NZ Refining Company/Mobil Oil NZ: dirty diesel (2001)

## “Public sector” examples:

- Gisborne cervical cancer enquiry
- Auckland Hospital: baby bodies
- GE contamination: Gisborne corn scare
- Waihi mining: property subsidence
- Leaky buildings

# Issues to be considered:

- Liability risk – *were you at fault?*
- Litigation risk – *what are your risks anyway?*
- Can you close out all liability with a package?

*Number of claimants*

*Identifying claimants*

*Prospects for success (take-up)*

## Issues to be considered (contd):

- Overall quantum – *is there any point?*
- Brand – *would you be better to settle anyway?*
- Timing – *when to deploy*
- Mechanics – *how, who, eligibility, etc*
- Individual claimant profiles – *what do you need to anticipate?*

# Liability

- Precedent – *has liability been established before*
- Facts – *are they sufficiently known, reliably? Do they suggest liability?*
- Law – *is this a new area?*
- Initial opinion – *is it robust? What further information might change it?*
- Should you run a test case?

# Litigation risk

- **Outcome** - *is an adverse result likely?*
- **Prejudice** – *how bad do you look? Where will the pressures be?*
- **Appeals** – *likelihood of appeals? Who does that suit?*
- **Time** – *can you afford the time required for a long battle, and ongoing damage to reputation?*
- **Cost** – *what will your litigation costs be?*

# Will the package close-out liability?

- Number of claimants – *the greater the number, the smaller the compensation*
- Identification/communication – *will you be able to find them all?*
- Prospects for success (take-up) – *will it work?*
- For how long will you need to hold the offer open?

# Quantum

- Overall – *is it curtains either way? Can you claim upstream?*
- Compensation level – *enough to tempt a claimant, but limited to meet your risk*

# Brand

- **Sales** – *is there actually an effect on sales?*
- **Present damage** – *has already happened. Need for acknowledgement of fault?*
- **Future damage** – *how you deal with claims*
- **Competition** – *what are the others doing? Why? Can you work together? Answer: upstream, not downstream*

# Timing

Need time to identify claimants/losses

Need time to consider position

**BUT**

Need to act before class action mounts

**OR**

**Delay:** *wearing down claimants vs negative impact on your image*

# Mechanics of the package:

- **Legal rights?** *Assignment, or full and final settlement?*
- **GST/income tax**
- **Rules for eligibility, and nature/extent of quantifying loss**
- **Assessors** — *who will implement your package?*
- **Insurance** — *will you be seeking cover? Need to clear the package with insurers?*
- **Review** — *need a process for considering claims, reviewing the rules, making exceptions, etc*

# Claimant profiles:

- Equality – *people want to know they are being treated equally*
- Transparency – *equality vs confidentiality*
- May need to involve insurers
- Business need – *what do claimants actually need from you? Is money the only option?*

# Conclusions

- If liability risk is significant, more likely the question of compensation will not be if, but when, how and how much
- Each situation is different, and will require its own assessment of liability, legal principles, efficacy, brand risk and strategy
- Remember Kiwi mentality: *it seeks acknowledgment, openness and fairness. In principle a package can meet these needs, whilst preserving business position*