Claims Funding Australia Pty Ltd
ABN 66 158 551 967
Level 21
380 La Trobe Street
Melbourne, Vic 3000

Maurice Blackburn Pty Limited
ABN 21 105 657 949
Level 21
380 Latrobe Street
Melbourne VIC 3000

DX 466 Melbourne
**T** +613 9605 2700
**F** +613 9258 9600

11 March 2021

Te Aka Matua o te Ture Law Commission
Class Actions and Litigation Funding
Law Commission
PO Box 2590
Wellington 6140

**By email**: cal@lawcom.govt.nz

Dear Sir/Madam,

**Issues Paper He Puka Kaupapa 45 - Class Actions and Litigation Funding**

We welcome the opportunity to provide feedback in relation to Issues Paper 45: Class Actions and Litigation Funding.

Please do not hesitate to contact me and my colleagues on +613 9045 6950 or at MHyde@mauriceblackburn.com.au if we can further assist with the Commission's important work.

Yours faithfully

**Martin Hyde**
**Principal Lawyer**
**MAURICE BLACKBURN**


# Submission in Response to Issues Paper 45: Class Actions and Litigation Funding

**11 March 2021**

# TABLE OF CONTENTS*



* The **hyperlinked** chapters respond to the chapters of the issues paper.

## 1. INTRODUCTION

1.1 Maurice Blackburn is Australia's leading plaintiff class actions law firm. Our experts nationwide have an unparalleled record when it comes to delivering for those that have suffered mass wrongs, returning more than AUD $3 billion to clients to date.[1]

1.2 Claims Funding Australia (**CFA**) is a litigation funder and wholly owned subsidiary of Maurice Blackburn. Over the last decade CFA has a proud history of funding commercial and civil claims in Australian, Canada and Aotearoa New Zealand, including the landmark representative proceeding of *Ross v Southern Response Earthquake Services Limited.*[2]

1.3 Maurice Blackburn and CFA welcome this opportunity to provide this joint submission to Te Aka Matua o te Ture Law Commission's (**Commission**) first principles review of class actions and litigation funding in Aotearoa New Zealand.

1.4 We commend the Commission on a thoughtful and balanced Issues Paper He Puka Kaupapa 45 (**Issues Paper**), well informed by expert input and empirical fact-based research. We agree with the great majority of the Commission's preliminary views and its reasoning for them.

1.5 In this submission we comment on those issues where, in our view, the Australian experience of a nearly 30-year statutory class action regime may assist, especially highlighting the new areas of class actions which have given access to justice to millions of Australians who otherwise would have been denied.[3] In our view these new types of class actions will be more available in Aotearoa New Zealand if a statutory regime as now contemplated is enacted.[4] We also comment on issues associated with litigation funding, drawing on our experience as users of litigation funding in our class actions practice and as providers of litigation funding through CFA in various jurisdictions around the world, including Aotearoa New Zealand.

*Australia's class actions system is working well and provides a well of information from which Aotearoa New Zealand can draw*

1.6 The class action regime in Australia is achieving its intended purpose of enabling access to justice and delivering compensation to scores of individuals and companies in circumstances where they would otherwise have been denied the opportunity for redress. The Courts and litigants have supported the effective development and evolution of class actions practice and procedure as new issues have emerged. The Courts have also demonstrated they are able to deal with difficulties as they arise,

[1] We refer to Appendix A, "About Maurice Blackburn" for further details about the firm.
[2] We refer to Appendix B, "About Claims Funding Australia" for further details.
[3] For economy we refer to the Australian class action regime as if it were one: In fact, there are five regimes with the Federal regime now substantially copied in four states across Australia (Victoria, NSW, Queensland and Tasmania) with a fifth State regime in Western Australia presently before the Western Australian legislature. The implementation of State based analogues is a testament to, and acknowledgement of, the utility and effectiveness of the class action procedure in Australia.
[4] We do not comment on those issues where we do not have experience or where the Australian experience may not assist.

including by closely scrutinising lawyers' and funders' costs and reducing them if necessary to the benefit of class members.

1.7 Every independent study on the subject has found that Australia's class actions system functions well and provides necessary access to the justice system for Australian citizens. This has been the finding of thorough, well-constructed inquiries conducted by the Australian Law Reform Commission[5] (**ALRC**), the Victorian Law Reform Commission[6] (**VLRC**) and Australia's Productivity Commission.[7] Indeed, those studies recommended reforms to make class actions *more* accessible.[8] Maurice Blackburn suggests that the Commission should give less weight to the recent highly politicised and hastily assembled inquiry from the Australian Parliament's Parliamentary Joint Committee on Corporations and Financial Services, though even that inquiry's report also notes that it heard consistent support for class actions as a legitimate tool to overcome the costs barriers for many members of the community wishing to enforce their rights and obtain redress through the courts.[9]

1.8 The experiences of the class action regime in Australia present a valuable point of comparison for Aotearoa New Zealand. Indeed, in our view, the Australian experience is the best point of comparison, in particular because of:

(a) our shared, and in many respects, entwined, history,[10] values, institutions, personal connections and geographical proximity;

(b) the great similarities in our legal systems, including shared touchstones of civil procedure to secure the just, speedy and inexpensive determination of proceedings,[11]with our Courts having a long and fruitful history of drawing on each other's experience;

(c) our close economic ties, including connected (often interchangeable) entities and networks and significantly shared industries;

(d) the global COVID-19 pandemic and the re-focus on the importance of regional co-operation including the much-anticipated emergence of an Australia - New Zealand Bubble, which gives fresh impetus for the development of our existing social and economic relations; and

[5] Report available for download via: <https://www.alrc.gov.au/publication/integrity-fairness-and-efficiency-an-inquiry-into-class-action-proceedings-and-third-party-litigation-funders-alrc-report-134/>.
[6] Report available for download via: <https://www.lawreform.vic.gov.au/projects/litigation-funding-and-group-proceedings/litigation-funding-and-group-proceedings-report>.
[7] Report available for download via: https://www.pc.gov.au/inquiries/completed/access-justice/report
[8] Jacob Varghese, 'Ignore the business elite's tall tales – class actions give all Australians access to justice', *The Guardian* (online, 28 May 2020) <https://www.theguardian.com/commentisfree/2020/may/28/ignore-the-business-elites-tall-tales-class-actions-give-all-australians-access-to-justice>.
[9] Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry',* December 2020.
[10] Laura Tingle, 'The High Road What Australia Can Learn from New Zealand', (2020) 80 *Quarterly Essay* 1, 9.
[11] *Federal Court of Australia Act 1976* (Cth) s 37M ("*the just resolution of disputes according to law, and as quickly inexpensively and efficiently as possible*") and *Civil Procedure Act 2005* (NSW) s 56 ("*the just, quick and cheap resolution of the real issues in the proceeding*"). In New Zealand the objective of the High Court Rules at HCR 1.2: namely to secure the just, speedy and inexpensive determination of proceedings; *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [89].

(e) our shared challenges of social and economic inequality.

1.9 Given the closeness of our connections it should come as no surprise that Australian class actions are increasingly having New Zealand dimensions, suggesting that New Zealand would benefit from its own independent statutory regime, and one which, to some extent, is aligned with the Australian regime. We are, for example, increasingly mindful that any wrongdoing which is the subject of Australian class actions may also be happening in New Zealand, sometimes without action, most especially in relation to our mutual financial services industries.[12] In our interconnected economies, corporate wrongdoing increasingly transcends national boundaries. So does the regulatory response to it - even if, as is so often the case, that is too little too late. Aligned Trans-Tasman class action regimes can help address that.

1.10 That Australia's class action regime, while well-established and expanding, continues to be the subject of some debate, is to New Zealand's benefit. Viewed from a distance, the Commission and New Zealand stakeholders are better able to sort 'the wheat from the chaff', somewhat removed from the heat of partisanship and self-interest. Further, the Commission's evident and commendable approach of relying on extensive data and expert consultation will assist it in rejecting the sometimes ill-founded claims of opponents of class actions.

1.11 Aotearoa New Zealand is, however, unlikely to be spared its own share of debate in relation to the implementation of a class action regime, notwithstanding a more civilised political environment and perhaps less abrasive litigation style.[13] But that is to be expected. Class actions are inherently political,[14] challenge the status quo and disrupt powerful and entrenched interests. Representatives of those interests will likely strenuously oppose a class action regime in Aotearoa New Zealand, just like they have and continue to do in Australia.

1.12 The implementation of a class action regime in Aotearoa New Zealand that gives access to justice to all is to be welcomed as a challenge to such vested interests. It will contribute to the development of a robust and encompassing society to which Australia looks with great interest, and on some issues, wistfully.[15]

1.13 We wish the Commission well in its review and we look forward to engaging with the issues further as they evolve.

---

[12] The pertinence of Australia's Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry to New Zealand's financial services industry has been well recognised in New Zealand: see Liam Mason, "Presentation by Liam Mason at the IFSO Conference 2019",<https://www.fma.govt.nz/news-and-resources/speeches-and-presentations/ifso-speech/>.

[13] NZLC IP45, [2.51].

[14] Bernard Murphy and Camille Cameron, 'Access to justice and the evolution of class action litigation in Australia' (2006) 30 *Melbourne University Law Review* 399, at 401.

[15] For instance, in a light-hearted note it has been widely reported that Jacinda Ardern is Australia's most trusted politician - despite her obvious ineligibility: Sam Clench and Shireen Khalil, 'Australia's most trusted politician is New Zealand Prime Minister Jacinda Ardern' *News.com.au* (online, 10 May 2019) <https://www.news.com.au/national/federal-election/australias-most-trusted-politician-is-new-zealand-prime-minister-jacinda-ardern/news-story/1e8dde03e31c0f9ffce2f83cae64c476> . On a more serious note, most in Australia accept that we have much to learn from New Zealand in relation to, amongst other issues, its treatment of indigenous peoples and women in politics, the latter as so potently recently illustrated.

## TABLE OF RESPONSES

A Summary of our responses to each Chapter of the Issues Paper with links are as follows:

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| 4 | **Problems with Using the Representative Actions Rule for Group Litigation** | (1) What problems have you encountered when relying on HCR 4.24 for group litigation?<br>(2) Which kinds of claim are unlikely to be brought under HCR 4.24 and why? | We agree with the Commission's preliminary view that "the current mechanisms [to bring Group Litigation] (including HCR 4.24) are inadequate." |
| 5 | **Advantages of Class Actions** | (3) What do you see as the advantages of class actions? In particular, to what extent do you think class actions are likely to:<br>a. improve access to justice?<br>b. improve efficiency and economy of litigation?<br>c. strengthen incentives to comply with the law. Is this an appropriate role for a class actions regime? | Each of these questions can be answered resoundingly in the affirmative. |
| 6 | **Disadvantages of Class Actions** | (4) Do you have any concerns about class actions? In particular, do you have concerns about:<br>a. the impact on the court system?<br>b. the impact on defendants? | Class actions have a positive impact on the business and regulatory environment. Any concerns (whether perceived or actual) regarding the impact on the Court system or class members' interests can be mitigated or resolved. |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | c. the impact on the business and regulatory environment?<br>d. how class members' interests will be affected? | The Court should retain flexibility in dealing with competing or overlapping claims so as to respond to the circumstances of the cases at hand. |
| 7. | **A Statutory Class Actions Regime for Aotearoa New Zealand** | (5) Should Aotearoa New Zealand have a statutory class actions regime? Why or why not? | We agree with the Commission's preliminary view that it would be desirable to have a statutory class action regime in Aotearoa New Zealand. We also support each of the key reasons the Commission gives for that view. |
| 8. | **Scope of a Statutory Class Actions Regime** | (6) Should a class actions regime be general in scope or should it be limited to particular areas of the law?<br>(7) Should a class actions regime be available in the District Court, Employment Court, Environment Court or Māori Land Court?<br>(8) Should a class actions regime include defendant class actions?<br>(9) Should the representative actions rule be retained alongside a class actions regime? For which kinds of case? | We agree with the Commission's preliminary view that a general regime would be preferable to a sector-based approach and more likely to address the issues with the status quo. We also agree with the reasons the Commission gives for that view.<br><br>We do not comment on (7), (8) and (9). |
| 9. | **Principles for a Statutory Class Actions Regime** | (10) What should the objectives of a statutory class actions regime be? Should there be a primary objective?<br>(11) Which features of a class actions regime are essential to ensure the interests of plaintiffs and defendants are balanced? | In response to (10), we agree with the Commission that access to justice is the clearest advantage of class actions and should be the primary objective of a statutory class action regime.<br><br>In response to (11), active court supervision of proceedings is the essential feature to ensure the |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | (12) Which features of a class actions regime are essential to ensure the interests of class members are protected?<br>(13) Is proportionality an appropriate principle for a class actions regime? If so, what features of a class actions regime could help to achieve this?<br>(14) Are there any unique features of litigation in Aotearoa New Zealand that need to be considered when a class action regime is designed?<br>(15) To what extent, and in what ways, should tikanga Māori should influence the design of a class actions regime?<br>(16) Do you have any concerns about how a class actions regime could impact on other kinds of group litigation or on regulatory activities? How could such concerns be managed?<br>(17) Which issues arising in funded class actions need to be addressed in a class actions regime?<br>(18) Do you agree with our list of principles to guide development of a class actions regime? | interests of plaintiffs and defendants are balanced.<br><br>In response to (12), active court supervision of proceedings is again the essential feature of a class action regime that ensures the interests of class members are protected.<br><br>In response to (13), proportionality is an appropriate principle for a class action regime.<br><br>We do not comment on (14) and (15).<br><br>In response to (16), we do not have any particular concerns.<br><br>In response to (17), we refer to our submissions in response to Part B.<br><br>In response to (18), we agree with the Commission's list of principles. |
| 10 | **Certification and Threshold Legal Test** | (19) Should a class action regime include a certification requirement? If not, should the court have additional powers to discontinue a class action (as in Australia)? | In response to (19), Aotearoa New Zealand should not include a certification requirement in its class action regime. |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | (20) Should a class actions regime contain a numerosity requirement? If so, what should this be?<br>(21) Should the commonality test that applies to representative actions under HCR 4.24 apply to a class actions regime? If not, how should this test be amended?<br>(22) Should a representative plaintiff have to establish that the common issues in a class action are substantial or that they 'predominate' over individual issues?<br>(23) Should a representative plaintiff have to establish that a class action is the preferable or superior procedure for resolving the claim?<br>(24) Should a court be required to conduct a preliminary merits assessment of a class action or an assessment of the costs and benefits?<br>(25) Should a representative plaintiff be required to provide a litigation plan?<br>(26) Should a court consider funding arrangements as part of a threshold legal test for a class action?<br>(27) Should a statutory class actions regime have any other threshold legal tests? | In response to (20), the class action regime should have a numerosity requirement and the "minimum specified number of plaintiffs" approach is preferable.<br><br>In response to (21), the Courts' interpretation of the commonality test in HCR 4.24 is sensible, and we suggest that the Commission consider a commonality test for the class action regime that reflects this interpretation.<br><br>In response to (22), the representative plaintiff should not have to prove that the common issues predominate over individual issues.<br><br>In response to (23), a preferability criterion is unnecessary.<br><br>In response to (24), a preliminary merits assessment or a costs/benefits assessment are unnecessary.<br><br>In response to (25), a litigation plan is unnecessary.<br><br>In response to (26), the Court should not be required to approve litigation funding |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | | arrangements as part of any threshold or certification procedure.<br><br>In response to (27), we do not raise any further matters. |
| 11 | **The Representative Plaintiff** | (28) Should a court consider the representative plaintiff's suitability for the role as part of the threshold legal test for a class action? If so, what should the criteria be?<br>(29) Should a representative plaintiff be a class member or should ideological plaintiffs be allowed?<br>(30) When should a government entity be able to bring a class action as representative plaintiff?<br>(31) When a plaintiff wants to represent the interests of a whānau, hapū or iwi, should the court inquire into their suitability to represent the group in terms of tikanga Māori? | In response to (28), it is unnecessary to require the representative plaintiff to prove that they are suitable for the role.<br><br>In response to (29), the preferable approach is that the representative plaintiff is a class member.<br><br>In response to (30), we agree with the preliminary view expressed by the Commission that it should be open to a government entity to be a representative plaintiff where it has its own claim, so long as it is not obliged to take on this role.<br><br>We do not comment on (31). |
| 12 | **Membership of the Class** | (32) Should class membership be determined on an opt-in basis or an opt-out basis or should different approaches be available?<br>(33) If the court is required to decide whether class membership should be determined on an opt-in, opt-out or universal basis, what criteria should it apply? Should there be a default approach? | The opt-out approach is preferable. Where decisions between an opt-in, opt-out or universal approach are required, an opt-out approach should be the default approach, and beyond this, the Court should apply specific criteria when making these decisions. |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| 13 | **Adverse Costs** | (34) How has the risk of adverse costs impacted on representative actions?<br>(35) Should the current adverse costs rule be retained for class actions or is reform desirable?<br>(36) Are there any other issues associated with class actions that we have not identified? Is there anything else you would like to tell us about class actions? | We note the advantages and disadvantages of the adverse costs rule set out in the Issues Paper.<br><br>The adverse costs rule should be retained. |
| 17 | **Advantages and Disadvantages of Litigation Funding** | (37) Which of the potential advantages and disadvantages of permitting litigation funding do you think are most important, and why?<br>(38) Is litigation funding desirable for Aotearoa New Zealand in principle? | We consider that litigation funding is desirable in Aotearoa New Zealand for the reason that it brings the advantages identified by the Commission, namely improving access to justice, reducing the risks of litigation, allowing plaintiffs to stay focussed on activities other than litigation, expanding financing options in respect of litigation, the availability of a funder's litigation expertise and providing confidence for defendants.<br><br>As to the potential disadvantages identified by the Commission, we agree with the Commission's comments to the effect that these supposed disadvantages are not supported by empirical evidence and, in the case of the risk that the court system becomes burdened with an increase in litigation, that this misses the point that class actions are designed to improve access to the courts. |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| 18 | **Reforming Maintenance and Champerty** | (39) To what extent, if any, do the torts of maintenance and champerty impact on the availability and pricing of litigation funding in Aotearoa New Zealand?<br>(40) Should the courts be left to clarify and develop the law in relation to maintenance and champerty, or should the law in relation to maintenance and champerty be reformed?<br>(41) If reform is required, which option for clarifying the law do you prefer and why? For example, should the torts of maintenance and champerty be:<br>a. retained, subject to a statutory exception for litigation funding?<br>b. abolished?<br>c. abolished, subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality? | Uncertainty remains about whether and when litigation funding agreements are contrary to the policy behind the torts of maintenance and champerty. This naturally has significant impacts on the availability and pricing of litigation funding and imposes an unnecessary burden on the judicial system when dealing with questions of whether and, if so, how, the torts ought to be applied.<br><br>The torts of maintenance and champerty should be abolished subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality |
| 19 | **Funder Control of Litigation** | (42) What concerns, if any, do you have about funder control of litigation?<br>(43) Are you satisfied that existing mechanisms can adequately manage the concerns about funder control of litigation?<br>(44) If not, how should the concerns about funder control of litigation be managed? For example, should litigation funders be | Existing curial oversight is adequate to manage the potential for funder control of litigation, although the requirement of certain minimum contract terms in litigation funding arrangements could further assist in regulating control of litigation by funders. |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate? | Express statutory powers to amend funding agreements are not recommended. |
| 20 | **Conflicts of Interest** | (45) What concerns, if any, do you have about funder plaintiff conflicts of interest?<br>(46) Are you satisfied that existing mechanisms can adequately manage the concerns about funder-plaintiff conflicts of interest?<br>(47) If not, which option for managing the concerns about funder-claimant conflicts of interest do you prefer, and why? For example:<br>a. Should funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?<br>b. Should funders be required to have a conflicts management policy?<br>c. Should funder control of litigation be regulated?<br>(48) What concerns, if any, do you have about lawyer-client conflicts of interest in funded proceedings?<br>(49) Are you satisfied that existing mechanisms can adequately manage the concerns about lawyer-plaintiff conflicts of interest? | The status quo should be enhanced to ensure greater accountability, transparency and enforcement by the introduction of a regulatory approach that includes:<br>(a) a regulatory guide and mandatory conflicts management policy for litigation funders;<br>(b) minimum contract terms;<br>(c) annual reporting requirement of a funder to demonstrate compliance with the regulatory guide; and<br>(d) improved enforcement by an appropriately empowered regulator or alternatively an annual external audit requirement. |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | (50) If not, which option for managing the concerns about lawyer-client conflicts of interest do you prefer, and why? For example:<br>a. Should funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?<br>b. Should professional rules or guidelines be developed for lawyers acting in funded proceedings? If so, what rules or guidelines would be appropriate?<br>c. Should activities that are likely to give rise to lawyer-plaintiff conflicts of interest be prohibited? If so, which activities should be prohibited? | |
| 21 | **Funder Profits** | (51) What concerns, if any, do you have about funder profits?<br>(52) Are you satisfied that existing mechanisms can adequately manage the concerns about funder profits?<br>(53) If not, which option for managing the concerns about funder profits do you prefer, and why? For example:<br>a. Should competition in the litigation funding market be encouraged? If so, how? | We support increased competition in the litigation funding market but caution against onerous regulation that could discourage market entry by funders.<br><br>In the class actions context, we support the Commission's proposal for court supervision of funder commissions via cost sharing mechanisms such as common fund orders and court approval of settlements. We do not support a statutory power to vary funding commission but recognise that Courts should have power to make cost |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | b. Should the courts be empowered to vary funder commissions? If so, when, and how?<br>c. Should funder commissions be regulated? If so, should there be restrictions on how funder commissions can be calculated (and if so, what) or should funder commissions be capped (and if so, how)? | sharing orders that are proportionate, fair and reasonable and based on the exercise of judicial discretion.<br><br>Outside of the class actions context, we otherwise support court supervision of funding agreements by reference to existing common law and statutory principles.<br><br>We do not support the capping of funder commissions as sufficient powers exist for Courts to prevent excessive funder recoveries. |
| 22 | **Capital Adequacy of Litigation Funders** | (54) What concerns, if any, do you have about the capital adequacy of litigation funders?<br>(55) Are you satisfied that the existing security for costs mechanism can adequately manage the concerns about funders' capital adequacy?<br>(56) If not, should the security for costs mechanism be strengthened? In particular:<br>a. Should there be a presumption or requirement that a litigation funder will provide security for costs in funded proceedings?<br>b. Should there be a requirement that security for costs is provided in a form that is enforceable in Aotearoa New Zealand? | Considering the lack of evidence of widespread or systemic misconduct by litigation funders, we do not have any material concerns about the capital adequacy of litigation funders operating in Aotearoa New Zealand.<br><br>The existing security for costs mechanism adequately manages concerns regarding capital adequacy. The most efficacious and straightforward way of ensuring that funders are able to meet their financial obligations to pay adverse costs is by means of an order for security for costs. To further strengthen the security for costs mechanism, we also support the introduction of a statutory rebuttable presumption in favour of security for costs in funded class actions. |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | (57) Alternatively, or additionally, should litigation funders operating in Aotearoa New Zealand be subject to minimum capital adequacy requirements? If so<br>a. Should any minimum capital requirement be formulated by specifying a particular amount (and if so, what amount) or an amount correlated to a funder's financial commitments (and if so, what correlation), or in some other way?<br>b. Should minimum capital adequacy requirements be able to be satisfied if the funder's capital is held in another jurisdiction, or should the capital be held in Aotearoa New Zealand?<br>c. What other requirements, such as audit requirements, would be appropriate?<br>d. Who should oversee compliance with any minimum capital adequacy requirements?<br>e. What consequences should follow from a funder's non-compliance with any minimum capital adequacy requirements? | |
| 23 | **Regulation and Oversight** | (59) Which option for the form of any regulation and oversight do you prefer, and why? For example should regulation and oversight of litigation funding take the form of: | Judicial supervision, bolstered by targeted statutory provisions and regulatory guides to strengthen and clarify the law, are the most efficient and effective way to address the |

| Chapter | Subject | Questions | Summary of joint submissions |
|---|---|---|---|
| | | a. Industry self-regulation and oversight?<br>b. Managed investment scheme requirements, overseen by the Financial Markets Authority?<br>c. Tailored licensing requirements overseen by the Financial Markets Authority (or another existing regulator)?<br>d. A tailored statutory regime, overseen by a new oversight body?<br>e. Court approval of litigation funding arrangements?<br>f. A combination of the above?<br>(60) Are there any concerns about litigation funding, or options for reform, that we have not identified? Is there anything else you would like to tell us? | challenges associated with litigation funding while maximising competition, minimising barriers to entry and improving social justice outcomes.<br><br>We do not consider that managed investment scheme requirements or tailored licensing requirements overseen by the Financial Markets Authority (FMA) or another regulator are suitable for a litigation funding market in Aotearoa New Zealand given its small size and the significant regulatory burdens and impacts on market competition that these options would impose.<br><br>Similarly, we consider that industry-based regulation and oversight would likely be impractical given that most funders are presently based overseas and that a local industry association may be impracticable and provide only limited benefits. |

## RESPONSES TO ISSUES PAPER QUESTIONS

### CHAPTER 4: Problems with Using the Representative Actions Rule for Group Litigation

(1) What problems have you encountered when relying on HCR 4.24 for group litigation?

(2) Which kinds of claim are unlikely to be brought under HCR 4.24 and why?

4.1 Maurice Blackburn agrees with the Commission's preliminary view that "the current mechanisms [to bring Group Litigation] (including HCR 4.24) are inadequate."[16] We also agree with the Commission's articulation of the problems with using the common law representative actions rule to bring claims which might otherwise be brought as class actions. In particular, we agree that the current regime is inadequate because the bringing of worthy claims may be inhibited by the existing procedural framework.[17]

4.2 The Australian experience strongly suggests that a dedicated class action regime will permit new types of socially useful class actions to be brought in Aotearoa New Zealand that would otherwise not be brought, including consumer class actions, which the Commission correctly identifies as being the most common form of new class action in Australia[18] and "follow on" compensation claims following regulatory actions.[19]

4.3 In a speech in 2017 marking 25 years of the operation of the federal class action regime, Australian Federal Court judge Justice Murphy stated:

> *It is important to remember that, before the class action regime was introduced, it was either impossible, or at least exceedingly rare, for consumers, cartel victims, shareholders, investors and the victims of catastrophe to recover compensation, even where the misconduct was plain. Since 1992 the regime has permitted claimants to recover more than $3.5 billion in compensation for civil wrongs they have suffered.*[20]

[16] NZLC IP45, [16]. As Nikki Chamberlain notes "*There have been numerous comments from academics, members of the judiciary and practitioners on the inadequacies of* [HCR 4.24] *for dealing with class-wide disputes*": Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 *New Zealand Business Law Quarterly* 132,133)).

[17] NZLC IP45, [4.27].

[18] NZLC IP45, [4.29].

[19] A further Australian example of a "follow on" class action following regulatory action is the Amcor/Visy class action,<https://www.mauriceblackburn.com.au/class-actions/past-class-actions/amcor-visy-settlement/> which $120m settlement was approved in June 2011 in *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671.

[20] Justice B Murphy, 'Access to justice under the Part IVA regime', *Keynote address at seminar "Class actions – current issues after 25 years of Part IVA",* University of NSW, 23 March 2017.

4.4 The introduction of a comprehensive statutory class action regime in Aotearoa New Zealand would likely lead to the types of beneficial outcomes noted by Justice Murphy. Further, the impetus for Aotearoa New Zealand to act is underscored when one considers that the wrongdoing which is the subject of so many of the new Australian class actions is often likely to have taken place in Aotearoa New Zealand and possibly without action.[21]

[21] See for example, Maria Slade, 'Australian car finance 'rort' legal here', National Business Review, (online), 24 July 2020, <https://www.nbr.co.nz/story/australian-car-finance-rort-legal-here>.

## CHAPTER 5: Advantages of Class Actions

(3) What do you see as the advantages of class actions? In particular, to what extent do you think class actions are likely to:

a. improve access to justice?

b. improve efficiency and economy of litigation?

c. strengthen incentives to comply with the law. Is this an appropriate role for a class actions regime?

5.1 As recently observed by the Supreme Court, a class action regime in Aotearoa New Zealand *is* likely to improve access to justice, improve the efficiency and economy of litigation and the broader legal system, and strengthen incentives to comply with the law by deterring breaches of it.[22] Maurice Blackburn submits that each of the questions posed by the Commission in Chapter 5 can be answered resoundingly in the affirmative.

5.2 Class action litigation frequently has a strong social utility.[23] All key stakeholders acknowledge, or at least do not seriously dispute, the social utility of class actions in increasing access to justice for those to whom it may be otherwise denied.

5.3 Social utility is demonstrated in a number of laudable recent Australian class actions extending access to justice to the most vulnerable and disadvantaged in society, including the $190 million settlement of the Stolen Wages class action brought on behalf of thousands of Aboriginal and Torres Strait Islander people to recover unpaid wages from the State of Queensland,[24] the $112 million settlement of the Robodebt class action against the Australian Federal Government on behalf of hundreds of thousands of social welfare beneficiaries in relation to allegedly unlawful debts claimed,[25] and the settlement of the Cash Converters and Radio Rentals class actions providing compensation to tens of thousands of vulnerable Australians targeted by pay day lenders and consumer finance companies.[26]

[22] *Southern Response Earthquake Services Limited v Brendan Miles Ross and Coleen Anne Ross* [2020] NZSC 126 at [15].
[23] In our view it is relatively easy to determine the social utility of many class actions in Australia when considering the subject matter in issue, the class of persons represented and the claims pleaded (take the cases identified in paragraph [5.3]), in contrast to Ms Kalajdzic's view expressed in relation to the Canadian regime, as quoted by the Commission: NZLC IP45 at [3], Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018), 6.
[24] See *Pearson v State of Queensland (No 2)* [2020] FCA 619.
[25] *Katherine Prygodicz & Ors v Commonwealth of Australia* VID1252/2019.
[26] *McKenzie v Cash Converters International Ltd (No 4)* [2019] FCA 166; *Lynch v Cash Converters Personal Finance Pty Ltd (No 5)* [2020] FCA 389; *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196.

5.4 We believe that the Australian experience will be of assistance in informing the likely outcomes of implementing a well-designed class action regime in Aotearoa New Zealand. Australia's federal legislature intended the federal class action regime to achieve two purposes – enhancing access to justice and improving judicial economy:

> *. . . The first [purpose] is to 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. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.*
>
> *The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.*[27]

5.5 That the regime has achieved these purposes is plain from the views expressed by the Australian Law Reform Commission (**ALRC**),[28] by judges experienced in its operation,[29] by Australia's key regulators and most importantly by Australian citizens and class action claimants.[30]

5.6 In an address delivered to the Law Council of Australia, Justice Murphy observed:

> *. . . after nearly 24 years of operation, there is no real question that the Part IVA regime has become an effective, sustainable and well accepted system for providing mass justice for mass civil wrongs. There are many indicators that the federal class action regime is in rude good health, including that:*
>
> - *the federal regime was essentially copied for the Supreme Court regimes in Victoria and New South Wales, a similar regime is pending in Queensland and a similar regime has been recommended in Western Australia. Imitation is the sincerest form of praise.*
> - *in 2005 and 2006 the ACCC, and ASIC, welcomed cartel and shareholder class actions as playing an important role in maintaining market integrity and achieving compensation for the victims of misconduct;*
> - *since 2009 we have had the benefit of ongoing detailed empirical research undertaken by Prof Morabito, which has revealed the falsity of some of the shibboleths about class actions;*
> - *we have not seen an opening of the floodgates of litigation;*

[27] House of Representatives Official Hansard, 14 November 1991, 3175.

[28] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No 134 (2018), 53 (ALRC Report 134, 2018),

[29] *Pearson v State of Queensland (No 2)* [2020] FCA 619[297].

[30] Essential Research, *The Essential Report – Maurice Blackburn, 2 June 2020,* which report summarises the results of a survey conducted online from 27th May 2020 to 31st May 2020 and is based on 1,059 respondents as cited in B Butler, 'Majority of Australians believe class action lawsuits a good thing, Essential poll finds', *The Guardian,* 3 June 2020.

- *the research shows that there is no common practice of organising class actions so that the class representative is a person of straw in an effort to avoid paying costs if the case is unsuccessful;*

- *the research shows that there is no common practice under which plaintiff lawyers commence unmeritorious class actions in an effort to obtain blackmail settlements;*

- *the research shows that class actions are not always successful, and that just over half of them either do not continue as class actions or they do not continue in that form;*

- *at numerous class action seminars partners from large class action defence firms have agreed that the regime is working reasonably well, and that shareholder class actions are having a normative effect in terms of compliance with the continuous disclosure regime.*

*. . .*

*The most important touchstone in regard to the health of the regime is in relation to the regime's expressly stated aim to enhance access to justice by improving an individual's ability to access legal remedies, and by making substantive laws more enforceable and effective. The regime has delivered handsomely on this aim. It has been successfully applied to numerous and diverse causes of action on behalf of a huge number of claimants, and resulted in damages awards in the region of $2 billion, making substantive laws more effective for the community.*

*To date the regime has been used in relation to:*

- *Shareholder and investor class actions;*
- *Personal injury through food, water or product contamination;*
- *Personal injury through defective products;*
- *Actions under the Migration Act;*
- *Cartel class actions;*
- *Disaster class actions;*
- *Consumer class actions;*
- *Environmental class actions;*
- *Human rights class actions;*
- *Trade union class actions;*
- *Various miscellaneous causes of action.* [31]

5.7 In Australia, any (often politicised) debate regarding class actions tends to focus on shareholder class actions, but as Justice Murphy's list of the types of substantive claims pursued in Australia indicates, shareholder claims are but one of a number of types of claims. Moreover, shareholder claims have been decreasing in recent years, and are likely to decrease further in the short term as a result of ill-conceived but persistent, often ideological, attacks by the present Australian Federal Government.[32]

[31] Justice B Murphy, 'Class actions and the National Court Framework', *Legal Leaders' Briefing,* Law Council of Australia, 7 December 2015, 4 – 5.

[32] Most recently manifested in a proposed watering down of Australia's continuous disclosure laws notwithstanding ASIC maintaining that the present laws are "critical to protecting shareholders", as reported in Lawyerly: Cat Fredenburgh, 'Government continues class action blitz with permanent change to continuous disclosure laws',

5.8 The Australian Competition and Consumer Commission (**ACCC**) has recently said:

> *The ACCC recognises the importance of class actions in providing redress for consumers and businesses that are otherwise unable to obtain compensation for harm caused by breaches of the competition or consumer laws. Further, the threat of private litigation, including class actions, plays an important role in deterring conduct that may breach the CCA.*[33]

5.9 These sentiments are broadly shared by the public, with a recent poll undertaken by Essential Research for Maurice Blackburn demonstrating that almost three-quarters of Australians believe that class actions are a good thing, either because they provide compensation to people who have fallen victim to corporate wrongdoing or because they keep companies honest.[34]

**(a) Improving Access to Justice**

5.10 Access to justice and the rule of law are essential to the health of New Zealand's economy and social fabric, just as they are in Australia.[35]

5.11 In Australia, the federal class action regime, and its state-based equivalents, have enabled access to justice for hundreds of thousands of victims of mass wrongs in circumstances where they would otherwise have been denied an opportunity for redress. Statements to this effect have been made by judges experienced in the operation of the regimes, for example:

(a) as early as 1995, the High Court recognised the benefits of class actions in providing an opportunity for redress to consumers who have suffered mass wrongs. The Hon Justice McHugh stated:

> *The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done efficiently and effectively on their behalf by one person with the same community of interest as other consumers*.[36]

(b) In 2017 in a book chapter co-authored by Justice Murphy and Professor Morabito, the authors concluded unequivocally that*:*

> *The Part IVA regime and its State counterparts have provided a flexible and adaptable procedure for dealing with mass civil claims, which has provided practical access to justice for an enormous number of claimants of many kinds or types, and allowed them to bring cases based in diverse causes of action*

Lawyerly (online), 17 February 2021,https://www.lawyerly.com.au/government-continues-class-action-blitz-with-permanent-change-to-continuous-disclosure-laws/.

[33] ACCC Submission No 15 to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Litigation Funding and the Regulation of the Class Action Industry, (10 June 2020) 3.

[34] Essential Research, *The Essential Report – Maurice Blackburn, 2 June 2020,* which report summarises the results of a survey conducted online from 27th May 2020 to 31st May 2020 and is based on 1,059 respondents as cited in B Butler, 'Majority of Australians believe class action lawsuits a good thing, Essential poll finds', *The Guardian,* 3 June 2020.

[35] Commonwealth Attorney-General's Department, *A strategic framework for access to justice in the federal civil justice system,* September 2009, 3.

[36] *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at [10].

> *arising out of a huge range of circumstances. In most cases the claimants would have been unable to bring their claims before the courts if the class action mechanism was not available to them, and many of them have enjoyed significant success in doing so. Notwithstanding the financial and technical barriers to the use of class action procedure, we would describe the access to justice provided through the regime as broad-based and substantial. In our view there can be no doubt the regime has significantly enhances access to justice.*[37]

(c) When making orders for the distribution of almost AUD $500 million in settlement funds to group members devastated by the Kilmore East-Kinglake bushfires, Justice Forrest remarked:

> *This demonstrates that the class action process works. It shows that when it is properly managed, many substantially disadvantaged and affected people can recover compensation that they would otherwise not have been able to obtain*.[38]

(d) In his judgment approving the settlement of the Radio Rentals class action brought on behalf of tens of thousands of disadvantaged group members sold consumer leases, Justice Lee wrote in December 2019:

> *Although there is a heterogeneity in class actions, it merits noting that the current case is an exemplar of the type of grouped proceeding sought to be promoted by the beneficial reform instituted by Pt IVA of the Federal Court of Australia Act 1976 (Cth) (Act). Persons, including those who might be characterised as vulnerable, commercially unsophisticated, and perhaps even marginalised, have a large number of individually very modest, but collectively significant, claims. The claims are said to arise from unconscionable, even predatory conduct, be an alleged wrongdoer.*
>
> *It is commonplace for cynical comments to be made about the oft-repeated catch-cry that Pt IVA is all about "facilitating access to justice". In part, this scepticism might be the result of the way in which some persons (who use Pt IVA as a mode of advancing joint enterprises) occasionally inappropriately fasten upon this phrase, as providing a simplistic justification for their commercial endeavours. But despite the notion of access to justice being a term loosely used by some, it was, and remains, the critical objective of Part IVA. Although the legal representatives of the applicants will be "rewarded" by payment of their legal costs and disbursements, it is encouraging to anyone who has an interest in Part IVA working as it was intended to work, that cases such as the present can be brought by experienced and competent solicitors and barristers, which allow for the resolution of modest claims such as those advanced in this class action.*

[37] Justice Murphy and Professor Morabito, 'The first 25 years: Has the class action regime hit the mark on access to justice?' in Damian Grave and Helen Mould (ed), *25 years of class actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

[38] Supreme Court of Victoria, "Court approves distribution of almost $700 million to victims of the 2009 Black Saturday disaster" (Media Release, 7 December 2016), 2.

> *... without the benefits of Pt IVA and the willingness of those acting for the applicant and group members to conduct speculative litigation in the public interest, it is reasonable to conclude that these claims would never have been able to be brought.*[39]

(e) In May 2020, when approving the AUD $190 million settlement of the Stolen Wages class action, which had been brought on behalf of Aboriginal and Torres Strait Islander people who sought to recover wages allegedly earned, but unpaid, Justice Murphy stated:

> *This case was a good example of the successful operation of the Part IVA and analogous regimes. It shows, yet again, that when class actions are properly conducted and appropriately managed by the courts, many affected persons can recover compensation for civil wrongs which they would not otherwise have been able to obtain, including people suffering from substantial disadvantages in terms of economic capacity, education, geographic location and cultural issues, which otherwise present significant barriers to their access to justice.*[40]

5.12 The availability of class actions is of increasing importance in a global economy in which civil wrongs are often committed on a mass scale by powerful entities. In this context, class actions allow individuals to aggregate their claims to offset the power imbalance that exists and enforce their legal rights.[41]

5.13 An essential element of improving access to justice is providing compensatory redress to victims of wrongdoing. We agree with Rachael Mulheron, as quoted by the Commission, that compensatory redress is, and has always been, the primary motivator of class action regimes.[42] Without the driving motivator of compensatory redress the class action procedure is unlikely to have evolved as the market-based response to wrongdoing that it essentially is.

5.14 The ACCC recently made the following comments in relation to the way that class actions act as an efficient tool for compensating those who are vulnerable and disadvantaged and who may have no other pathway to access justice:

> *Class actions play a particularly important role in obtaining compensation in circumstances when individual action by plaintiffs is unlikely or uneconomical. In many competition and consumer enforcement matters the harm suffered by an individual consumer is too small to justify individual litigation but the collective loss to all affected consumers is substantial. For the reasons stated above, it may not be feasible or appropriate for the ACCC to seek such compensation.* ***A class action is likely to be the only viable compensation mechanism.***
>
> ***Vulnerable and disadvantaged consumers are often disproportionately impacted by conduct in breach of the CCA, and many such consumers do not have the requisite resources to bring a private action themselves. In these***

[39] *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196 [2] – [4].
[40] *Pearson v State of Queensland (No 2)* [2020] FCA 619 [297].
[41] Bernard Murphy and Camille Cameron, 'Access to justice and the evolution of class action litigation in Australia' (2006) 30 *Melbourne University Law Review* 399, 403.
[42] NZLC IP45 at [5.57].

> ***cases, if the ACCC does not seek a compensation order, a private class action is their only remaining path to access justice***.[43]

**(b) Improving efficiency and economy of litigation**

5.15 In Australia, the federal class action regime gives the Federal Court a procedure to case manage and hear multiple claims in a single proceeding. It increases the efficient use of judicial resources by allowing a common binding decision to be made in one proceeding instead of multiple proceedings. Since its inception the class action regime has therefore allowed the efficient conduct of hundreds of thousands of individual claims. In our view, the introduction of a statutory regime in New Zealand is likely to have a similar effect.

5.16 Recently, the Federal Court has recognised the efficiency of the class action mechanism compared with individual proceedings in the context of considering 28 pelvic mesh proceedings which a law firm had commenced individually instead of as a class action. Justice Lee and separately, Justice Burley, severely criticised the plaintiffs' lawyers for not filing the cases as a class action, with Justice Lee noting the individual filings were *"a scandalous waste of resources*" and a "*misuse of the court system.*"[44]

**(c) Strengthening incentives to comply with the law and deterring wrongdoing**

5.17 Class actions play a regulatory role in the Australian economy by sanctioning corporations, governments and other respondents for contraventions of the law through the payment of compensation, costs of litigation and reputational harm.[45] This role was acknowledged as an important impetus for establishing the Australian federal class action regime at its outset.[46] Again, our understanding is that class actions play a similar role in Aotearoa New Zealand, and the implementation of a statutory regime will only strengthen the capacity for class actions to perform this role.

5.18 Shareholder class actions complement action by Australia's corporate regulator the Australian Securities and Investments Commission (**ASIC**) to enforce Australia's continuous disclosure regime, thereby promoting the integrity of Australia's financial markets. In the same way, product liability class actions complement action by the ACCC and the Therapeutic Goods Administration to deter manufacturers and suppliers from selling goods or services to consumers that are likely to cause injury or harm. Class actions in these contexts are important because Australian regulators are not adequately resourced to investigate or prosecute all breaches of the law and their focus is on prosecutorial activity, not on ensuring compensation to victims.[47] Regulators appear to be similarly constrained in Aotearoa New Zealand. As discussed in chapter 11 below, the Commission has noted that regulatory priorities and/or

[43] ACCC, below n 55, page 3 (emphasis added).
[44] As reported by Miklos Bolza, "Judge flummoxed about why 200 pelvic mesh cases not a class action", *Lawyerly*, (online), 12 September 2019, <https://www.lawyerly.com.au/judge-flummoxed-as-to-why-200-pelvic-mesh-cases-not-filed-as-class-action>.
[45] Michael Legg, 'Evaluating class action effectiveness' (2015) 46 *Precedent (Australian Lawyers Alliance)*129, 129.
[46] Commonwealth, *Parliamentary Debates,* Senate, 13 November 1991, 3026, Michael Tate, Minister for Justice and Consumer Affairs.
[47] Rod Sims, ACCC Chair, 'Companies behaving badly?' *2018 Giblin Lecture,* 13 July 2018.

funding constraints appear to limit regulators in Aotearoa New Zealand from bringing compensation claims.[48]

5.19 Australian regulators and the ALRC have expressly recognised the public function of class actions to vindicate broad statutory policies such as disclosure to the securities market, prohibition of cartels,[49] fostering safe pharmaceuticals[50] and breaches of the competition and consumer laws.[51] For example, ASIC considered the impact of shareholder class actions on the Australian economy in its submissions to the ALRC and observed that:

> *Shareholder class actions can play an important and complementary role in improving shareholder access to justice and fostering accountability.*
>
> *The Corporations Act provides clear avenues for shareholders and consumers to take legal action to enforce their rights. It was clearly not intended that the regulator should have a monopoly on legal action. Where private action can achieve a similar outcome to that which action by ASIC could achieve, it allows ASIC to allocate its regulatory resources to other priorities. ASIC encourages investors to consider private legal action where appropriate to obtain compensation for losses investors may have suffered.*
>
> *Shareholder class actions help to democratise access to justice by addressing the power imbalance that exists between shareholders and defendants. Often, the only practical means for shareholders to enforce their rights is through a funded shareholder class action, as individual losses are too small to justify pursuing individually.*
>
> *In addition to promoting access to justice, class actions can spread the risks of complex litigation and improve the efficiency of litigation by introducing commercial considerations that may reduce costs. The prospect of a shareholder class action can also serve as a positive influence on a firm's governance and culture, improving accountability.*
>
> *Often, the main threat to shareholder investments stems not from the market reaction to a disclosure of a class action, but from the misconduct of companies themselves. We do not see a problem with shareholders seeking to enforce their right to a remedy nor have we seen any evidence that directors are being inappropriately held to account.*[52]

5.20 Importantly, ASIC concluded that there was no evidence that the existing continuous disclosure regime, or shareholder class actions, harmed the Australian economy.[53]

5.21 The ACCC, Australia's national competition and consumer protection enforcement agency, has recently spoken of the legal, logistical and financial challenges it faces

[48] NZLC IP45, [11.39].
[49] Justice B Murphy, 'The Operation of the Australian Class Action Regime', *Bar Association of Queensland,* 8 – 10 March 2013.
[50] ALRC Report 134, 2018, 32.
[51] Australian Competition & Consumer Commission, Submission No 15 to Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, 2.
[52] ASIC, Submission to Australian Law Reform Commission, *Inquiry into class action proceedings and third party litigation funders* (September 2018) 11.
[53] Ibid, 12.

when seeking compensation orders when "the focus of the ACCC's enforcement activity must be on detecting, stopping, deterring or punishing contravening conduct and affecting behavioural change in the market" and endorsed private claims:

> *The ACCC considers that private firms that specialise in class actions are generally far better equipped to overcome these challenges effectively and efficiently. Furthermore, the ACCC considers that where compensation is obtained, it is appropriate for the associated costs to be borne by those being compensated and, ultimately, the party who breached the law, and not the Commonwealth.*[54]

5.22 The ACCC also made the following comments in relation to class actions and deterrence:

> *The ACCC considers that the threat of private litigation, including class actions, plays an important role in deterring conduct that may breach the CCA. Effective deterrence occurs where sanctions, having regard to the likelihood of detection and consequences, outweigh the gains from infringing conduct.*
>
> *Pecuniary penalties play a critical role in deterrence. However, despite significant increases in recent years to the maximum available pecuniary penalties for breaches of the CCA, the penalties awarded are sometimes lower than the gains made from the infringing conduct. Where this is the case, civil pecuniary penalties alone are an inadequate deterrent. Therefore, the threat of further costs from damages payouts resulting from private litigation can be the difference between a party profiting from, or being deterred from, unlawful conduct. The ACCC supports retaining current laws around class actions and litigation funding to ensure businesses are effectively deterred from conduct that harms consumers and small businesses.*[55]

5.23 In our view, the advantages of class actions discussed above in the Australian context would apply equally to the Aotearoa New Zealand context. We encourage the Commission to consider the comments above from Australia's regulators and members of the judiciary regarding the importance of class actions as part of its consideration of the Aotearoa New Zealand regime.

[54] Australian Competition & Consumer Commission, Submission No 15 to Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, 2.
[55] Ibid, 3.

## CHAPTER 6: Disadvantages of Class Actions

(4) Do you have any concerns about class actions? In particular, do you have concerns about:

a. the impact on the court system?

b. the impact on defendants?

c. the impact on the business and regulatory environment?

d. how class members' interests will be affected?

6.1 The Australian experience demonstrates that a well-functioning class action regime constantly evolves and that some remediation is necessary from time to time. [56] Class actions and litigation funding do need to be properly monitored. That monitoring should be done fairly and objectively and informed by expert consultation.[57] This is evidently already happening in Aotearoa New Zealand's courtrooms with the class actions commenced under the representative rule (HCR 4.24). This gives good reason to be confident that such effective management will continue, and indeed be enhanced, under a statutory class action regime.

6.2 In Australia at present, despite the views of the great majority, the fears and misgivings of a small but powerful number of opponents of class actions who call for the regime to be increasingly restricted still manage to get traction with the Australian Commonwealth Government.[58] We anticipate the Commission will hear from Aotearoa New Zealand entities of the same well-funded opponents of class actions.[59] The opponents' claims against class actions should be closely examined for self-interest and partisanship and assessed against empirical fact-based evidence.

[56] Justice B Murphy, *'Class actions and the National Court Framework'*, Legal Leaders' Briefing, Law Council of Australia, 7 December 2015, 4 – 5.

[57] ASIC, Submission to Australian Law Reform Commission, *Inquiry into class action proceedings and third party litigation funders* (September 2018) 11, [54].

[58] Productivity Commission, *Access to Justice Arrangements*, Report No 72 (2014), 601; "The Australian market for litigation funding is small but has operated for two decades"; IBISWorld, Litigation Funding in Australia, Industry Report OD5446, (2018) cited in Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No 134 (2018) [2.12]:"The litigation funding market in Australia has been growing and industry revenue is forecast to grow at an annualised 7.8% over the five years through to 2022–2023. In 2020 the market size of the Australian litigation funding industry was AUD $142.1 million, IBISWorld Litigation Funding in Australia (2020).

[59] Namely the high-powered US business lobby group, US Chamber of Commerce's Institute for Legal Reform, the Australian Institute of Company Directors and the Business Council of Australia.

### *A negative impact on the court system?*

6.3 We agree with the Commission's comments at [7.40] that whilst a class action regime *may* lead to an increase in litigation, there are ways of mitigating any impact.

6.4 Conversely, a class action regime may also lead to a reduction in the number of individual cases, given that a large number of individual cases may, and in many instances should, be aggregated more efficiently into one larger class action claim.[60]

6.5 As noted by the Commission,[61] in Australia the ALRC recently observed that class actions constitute a small portion of the claims filed in the Federal Court:

> *Class action proceedings constitute only a small number of the proceedings filed in the Federal Court annually. For example, up to 4,659 proceedings were filed in the Federal Court in the 2017-2018 financial year, with 32 of these being class action proceedings. This amounted to 0.68% of the Court's filings – a percentage that has only slightly increased since 2013-14.* [62]

6.6 More fundamentally, we note and agree with the Commission's perceptive comment that objecting to class actions because it may increase the rate of litigation misses the point that class actions aim to ensure greater access to justice and, therefore, an increase in litigation may be an indication that a regime has done the very thing it was intended to do.[63] That insight exposes the aridity of much of the Australian debate over whether the number of class actions is increasing or decreasing.[64]

6.7 As stated above, what is not in debate in Australia is that the courts have been judiciously and appropriately managing class actions conducted in new and emerging areas. We have given but a few examples in paragraph 5.3 above.

6.8 In addition, the Australian courts have consistently demonstrated that they are able to manage their class action case load effectively and deal with difficulties as they arise. As Justice Murphy and Professor Morabito have noted:

> *the authors are unaware of any judgment which points to any systemic problem with the operation of the regime. Further, the cases indicate that the courts are well capable of dealing with any problems that may emerge.*[65]

---

[60] *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196 [2] – [4] per Lee J.
[61] NZLC IP45, [6.6]
[62] ALRC Report [3.13]. Whilst we accept that number may not accurately indicate the effect that class actions have on the Court's workload, again as the Commission noted.
[63] NZLC IP45, [6.7].
[64] The perennial and unproven argument from class action detractors that to allow class actions will open a floodgate of litigation has been comprehensively laid to rest. The empirical evidence demonstrates that the numbers of class actions are very modestly increasing, if at all: See Vince Morabito, 'Shareholder Class Actions in Australia – Myths v Facts', 11 November 2019; Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report', July 2017.
[65] Justice Murphy and Professor Morabito, 'The first 25 years: Has the class action regime hit the mark on access to justice?' in Damian Grave and Helen Mould (ed), 25 years of class actions in Australia (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

6.9 In an extra-judicial paper, Justice Murphy set out the Federal Court-instituted reforms made to address problems in the operation of the Australian regime, including instances of high transaction costs.[66] The cost and efficiency measures implemented by the Court identified by his Honour include:

(a) allocating judges experienced in class actions to case management – meaning that matters were listed for trial and settled more quickly;

(b) close management of competing class actions to avoid increased legal costs, wastage of court resources, delay, and unfairness to respondents;

(c) striking out abuses of process - such as the same or associated entities acting as the applicant, litigation funder and solicitor for the applicant;

(d) requiring the enhanced disclosure of litigation funding charges - to ensure any contentious features of the funding agreement come to the attention of the docket judge;

(e) increased judicial scrutiny of litigation funding charges and legal costs including the proportionality of such costs.

6.10 These cost and efficiency measures are equally available to the Aotearoa New Zealand Courts and indeed, are already likely to be used in analogous situations. We refer also to Aotearoa New Zealand's embrace of innovative case management tools to manage collective claims in the context of earthquake-related litigation arising from the Christchurch earthquakes and the claims arising from the leaky homes crisis.[67]

6.11 The effective use of such tools within Aotearoa New Zealand's judicial system demonstrates its readiness to deploy pragmatic and solution-focused case management tools as necessary in its management of a statutory class action regime.

6.12 The Supreme Court's decision in *Southern Response Earthquake Services v Ross* significantly confirms that the Aotearoa New Zealand courts are willing and able to supervise class actions to ensure that they are conducted fairly.[68] It also indicates the courts' willingness to draw on the experience in Australia and other comparable jurisdictions in so far as it is relevant.[69]

---

[66] Justice B Murphy, 'Class actions and the National Court Framework', Legal Leaders' Briefing, Law Council of Australia, 7 December 2015, 4 – 5.

[67] The Earthquake List for example https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/earthquake-list-christchurch/ or the Weathertight buildings list https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/weathertight-buildings-list/

[68] Jane Quinn, 'Supreme Court dismisses Southern Response appeal against landmark class action decision',(online), 18 November 2020, <https://www.bankside.co.nz/post/supreme-court-dismisses-southern-response-appeal-against-landmark-class-action-decision>

[69] *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [171].

***Negative impacts on (b) on defendants and (c) the business and regulatory environment?***

6.13 Far from having a negative impact, the Australian experience demonstrates that class actions have a positive impact on the business and regulatory environment because, amongst other things, they lead to greater corporate responsibility and market integrity.[70]

6.14 Further, the ALRC found that fears surrounding the federal class action regime at its inception, including that it would foster a litigious culture and an entrepreneurial class of lawyers, have, in large measure, not materialised.[71] Similar findings have been made by the Productivity Commission[72] and the Law Reform Commission of Western Australia.[73]

6.15 Any suggestion of an economy-wide negative impact from class actions simply does not withstand scrutiny.

6.16 First, class actions enhance economic efficiency by:

(a) compensating victims of corporate misconduct;

(b) ensuring that the perpetrators of corporate misconduct do not profit from their wrongdoing; and

(c) in so doing, benefiting those companies and businesses who do not engage in misconduct.

6.17 In short, class actions promote the efficient allocation of capital away from wrongdoers and towards those who do the right thing.

6.18 Secondly, the economic impact of class actions whilst significant for those affected by corporate wrongs is simply dwarfed by the overall scale of economic activity. In the 29 years of the Australian system, over AUD $4 billion has been recovered in class action settlements or judgments – approximately 0.01% of total economic activity in that period. In other words, approximately 99.99% of the economy in that period has not been affected by class actions.

6.19 Thirdly, the number and impact of class actions is also dwarfed by the scale of litigation between corporations. In 2019 there were 44 class actions filed but 2800 filings in the Federal Court alone involving companies, with many more in other courts.

[70] ASIC, Submission No 72 to Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, September 2018, [4] – [10].
[71] ALRC [2.6]
[72] Productivity Commission, 2014, 618
[73] Law Reform Commission of Western Australia, *Representative Proceedings,* Final Report Project No 103 (2015), 36.

6.20 Of greater concern are the negative impacts on the business and regulatory environment of *not* having a class action regime and strong parallel public regulatory enforcement to address the negative impacts of corporate wrongdoing by the powerful who may otherwise not be held to account.

6.21 This concern was highlighted by the grave findings of Australia's Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**), many of which are likely to apply equally to Aotearoa New Zealand's financial services sector given its high degree of overlap with Australia - in spite of the frankly heroic statements of some Aotearoa New Zealand banks and stakeholders to the contrary.[74]

6.22 Commissioner Hayne found that financial services entities will not be deterred from future misconduct unless those entities are held to account for their contraventions of the law, stating in his final report:

- *Too often, financial services entities that broke the law were not properly held to account. Misconduct will be deterred only if entities believe that misconduct will be detected, denounced and justly punished. Misconduct, especially misconduct that yields profit, is not deterred by requiring those who are found to have done wrong to do no more than pay compensation. And wrongdoing is not denounced by issuing a media release.*[75]

  . . .

- *The damage done by that conduct to individuals and to the overall health and reputation of the financial services industry has been large. Saying sorry and promising not to do it again has not prevented recurrence. The time has come to decide what is to be done in response to what has happened. The financial services industry is too important to the economy of the nation to allow what has happened in the past to continue or to happen again.*[76]

- *The conduct identified and criticised in the Commission's Interim Report and in this Report has been of a nature and extent that shows that the law has not been obeyed, and has not been enforced effectively. It also points to deficiencies of culture, governance and risk management within entities. Too often, entities have paid too little attention to issues of regulatory, compliance and conduct risks. And the risks of regulatory or other non-compliance and of misconduct are the risks of departure from the first general rule of 'obey the law'. What consequences follow, and whether this amounts to effective enforcement of the law, bears*

[74] Reweti Kohere, 'Defensive banks distance themselves from latest Aussie scandal', *National Business Review* (online), 12 July 2019 < https://www.nbr.co.nz/story/defensive-banks-distance-themselves-latest-aussie-scandal> and Bernard Hickey,'A proper banking and insurance inquiry please', *Stuff*, 5 June 2019, https://www.stuff.co.nz/business/opinion-analysis/113748149/a-proper-banking-and-insurance-inquiry-please which quotes Reserve Bank Governor Adrian Orr opining on TVNZ that he considered the culture of NZ banks to be "*infinitely better than some of the activity you've seen in Australia*," shortly, and ironically, soon followed by the revelations that the CEO of NZ's largest bank, ANZ NZ, David Hisco had been rorting his personal expenses and more recently, ANZ's admission of misleading customers about credit card insurance in *Financial Markets Authority v ANZ Bank New Zealand Limited [2021] NZHC 399 (5 March 2021).*

[75] Royal Commission Final Report vol 1, page 4.

[76] Kenneth Hayne, 'Hayne's verdict on the banks in his own words', *The Sydney Morning Herald* (online), 4 February 2019 <https://www.smh.com.au/business/banking-and-finance/hayne-s-verdict-on-the-banks-in-his-own-words-20190203-p50vft.html>.

*directly upon the nature and extent of the regulatory, compliance and conduct risks that entities must manage."* [77]

- *The root cause for what happened was greed; the greed of both licensees and advisers:*[78]

- *"Scandals dating back to the GFC began to shed light on the conflicts and culture in the financial advice industry. Regulatory responses, however, focused on the remediation of specific instances of poor advice, rather than seeking to identify root causes within institutions and the industry. Those responses set the tone for future approaches to misconduct by financial advisers, that is, to compensate customers according to arrangements negotiated with ASIC while requiring few changes to the business itself.*[79]

6.23 The primary driver of class action filings in Australia over the last 2 years has been the many revelations of wrongdoing aired at the Royal Commission, resulting in more than 20 class actions having been filed against financial services entities.

6.24 As Aotearoa New Zealand and Australia recover from the COVID-19 pandemic, it is more important than ever that businesses and government are not given carte blanche to mislead consumers, cheat their customers, lie to their shareholders and abuse their citizen's trust. Corporate and government wrongdoers should be restrained from cynically exploiting the pandemic to that end.

***How class members' interests will be affected?***

6.25 We agree with the Commission that the design of the class action regime can mitigate or even resolve many of the potential disadvantages (whether perceived or actual) of class actions in relation to protecting interests of class members. We also agree that safeguarding the interests of class members should be a design principle of a class action regime in Aotearoa New Zealand.[80]

6.26 Well-functioning class action regimes, like Australia's, do contain safeguards that protect the interests of class members. The safeguards include the courts' close supervision and oversight of communications with class members at key milestones including opt out notices[81] and settlement notices.

6.27 The courts' supervision of class actions centrally involves a protective function to class members. The courts have shown a willingness to scrutinise relationships and intervene to protect group members when they consider it necessary. The courts will, for example, intervene to ensure there is sufficient disclosure to class members of legal costs or litigation funding arrangements and not permit lawyers to have any significant financial interest in a litigation funder financing a claim.

[77] Royal Commission Final Report vol 1, page 12.
[78] Royal Commission Interim Report, page 122-123.
[79] Royal Commission Final Report vol 1, page 127.
[80] NZLC IP45, [7.41].
[81] See for a recent example, Miklos Bolza, 'Court approves one of the first video opt out notices in a class action', *Lawyerly* (online), < https://www.lawyerly.com.au/court-approves-first-ever-video-opt-out-notice-in-a-class-action/>

6.28 The courts are well placed to undertake that supervisory role. In class actions the court is put in the position of serving in a role akin to a fiduciary for the class.[82] The courts take that protective role extremely seriously. Courts in Australia have a fine track record of discharging their duty to class members. This is shown in the considerable body of jurisprudence on the courts' role in the approval of class action settlements. The courts have shown themselves quite able to review lawyers' fees to the benefit of class members - including on many occasions disallowing costs,[83] requiring lawyers to take a "haircut" on their costs of millions of dollars[84] or requiring two sets of law firms running a class action to get only one set of costs.[85]

6.29 Conflicts in class actions are also closely managed by the court.[86] The Federal Court Class Actions Practice Note (GPN-CA) (**Practice Note**), for example, requires litigation funding agreements to include provisions for managing conflicts of interest between funded class members, the solicitor and litigation funder and stipulates that "*The applicant's legal representatives have a continuing obligation to recognise and to manage properly any conflicts of interest throughout the proceeding*."[87]

***Managing competing class actions***

6.30 The phenomenon of competing class actions occurs predominantly in one species of class action, namely shareholder claims that are, in the main, supported by litigation funders. Some see competing class actions as being a disadvantage of a class action regime and in principle, inimical to the administration of justice. However, one of the best characteristics of the Australian class actions regime has been its flexibility in being able to adapt to and resolve novel issues of practice and procedure, like competing class actions, and to tailor solutions that are appropriate to the circumstances of individual cases.

6.31 That the Court should retain flexibility in dealing with competing or overlapping claims, has been recently endorsed by the Australian High Court in relation to the multiple competing shareholder class actions filed against AMP arising out of the fee for no service revelations aired at the Royal Commission.[88] The majority decision, broadly welcomed by Australian stakeholders, confirms the flexible approach taken by the courts in addressing the multiplicity of proceedings issue when duplicate or overlapping open class actions are filed. The High Court adopted the language that there can be no "one size fits all" approach when determining which case should

[82] ALRC Report, [1.49].
[83] *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626.
[84] See Murphy J's decision to cut Elliott Legal's fees by $2 million in the Murray Goulburn class action settlement, *Webster as trustee for the Elcar Pty Ltd Super Fund Trust v Murray Goulburn Co-operative Co Ltd & Ors* (VID508/2017) as reported in Lawyerly, <https://www.lawyerly.com.au/mark-elliotts-firm-has-costs-cut-by-embarrassing-2m-as-murray-goulburn-settlement-approved>.
[85] Lee J in the Toyota class action, *Williams v Toyota Motor Corporation (NSD 1210/2019))*, 7 November 2019 as reported in *Lawyerly*, <https://www.lawyerly.com.au/two-firms-running-toyota-class-action-will-get-only-one-set-of-costs-judge-says>.
[86] As stated in the ALRC Report at [6.16].
[87] GPN-CA "Conflicts of Interest", [5.9] - [5.10] which states:
*5.9 Any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of "duty and interest" and "duty and duty") between any of the applicant(s), the class members, the applicant's legal representatives and any litigation funder. 5.10 The applicant's legal representatives have a continuing obligation to recognise and to manage properly any conflicts of interest throughout the proceeding.*
[88] *Wigmans v AMP Limited* [2021] HCA 7

proceed in a so called beauty parade of competing claims and found it has the power to make that selection as part of "a larger task of ensuring that justice is done in the competing representative proceedings which have been commenced… where all courts must be astute to protect the best interests of group members."[89]

6.32 We welcome the High Court's decision as a further demonstration of the robustness of Australia's class action regime and endorse the conclusion that the interests of class members, in their totality, should be paramount.

**Conclusion**

6.33 We encourage the Commission to treat many of the alleged disadvantages of class actions with a healthy dose of skepticism. Consider the myth that class actions deter top talent from boardrooms.[90] The threat of a class action pending against Crown Resorts, Australia's largest gambling company, failed to deter a procession of Australia's most prominent and well-connected directors from vying for a position on its board, notwithstanding the evident nature of its business, at least before the recent revelations of the damning inquiry into its suitability to run a casino were aired. Similarly, the threat of class actions against Rio Tinto, the dual London/Australia stock exchange listed mining behemoth, has failed to dissuade any number of the world's corporate elite from also vying for positions on its board, even after it detonated a sacred 46,000 year old Aboriginal site at Juukan Gorge in the Pilbara in 2020.[91]

6.34 Such claims from the opponents of class actions should accordingly be closely examined for self-interest and partisanship and assessed against empirical fact-based evidence.

[89] Ibid, [116].
[90] Miklos Bolza, 'CBA exec warns class actions could deter top talent from boardrooms', *Lawyerly* (online), 8 September 2002, <https://www.lawyerly.com.au/cba-warns-class-actions-could-deter-top-talent-from-company-boardrooms/>
[91] Chanticleer, 'Rio chairman failed his biggest accountability test', *Australian Financial Review*, (online) 3 March 2021, https://www.afr.com/chanticleer/regaining-rio-s-social-license-to-operate-20210119-p56v4y.

## CHAPTER 7: A Statutory Class Actions Regime for Aotearoa New Zealand

(5) Should Aotearoa New Zealand have a statutory class actions regime? Why or why not?

7.1 We agree with the Commission's preliminary view that it would be desirable to have a statutory class action regime in Aotearoa New Zealand. We also support each of the key reasons the Commission gives for that view[92] and the Commission's statements regarding regulators that:

> *under present regulatory powers and settings, relying on regulators to take action when a defendant has caused harm to a large group is an insufficient response to that harm.* "[93]
>
> ..
>
> *there is a role for both class actions and regulatory action in taking action when defendants are alleged to have caused harm to a group*. [94]

7.2 The Australian experience is that regulators primarily enforce compliance rather than seeking compensation for victims,[95] and are inadequately resourced to investigate or prosecute all breaches of the law.[96]

7.3 Australia's key regulatory agencies, ASIC and the ACCC, give strong support to class actions as providing a complementary pathway to improve access to justice for investors and consumers, and an additional deterrence to breaches of the law by corporations, governments and other respondents who may not otherwise be held accountable for wrongdoing.

7.4 Further, as we stated above, Australian regulators and the ALRC have expressly recognised the public function of class actions to vindicate a broad range of statutory policies.[97]

7.5 Our observation of Aotearoa New Zealand's current systems suggests that Aotearoa New Zealand's regulators like their Australian peers will benefit from the strong support of class actions as a complementary pathway to improve access to justice and deter corporate wrongdoing.[98]

---

[92] Being the 4 key reasons identified at paragraph [7.2] of the Report and the helpful discussion of each of those reasons in Chapter 7 of the NZLC IP45.
[93] NZLC IP45, [7.09]
[94] NZLC IP45, [7.11]
[95] NZLC IP45, [7.10]
[96] Rod Sims, ACCC Chair, 'Companies behaving badly?' *2018 Giblin Lecture,* 13 July 2018.
[97] See above,paragraphs [5.17] – [5.18].
[98] See for example, Brent Edwards, *National Business Review*, (online), 14 November 2018, https://www.nbr.co.nz/story/commerce-commission-needs-more-resources-investigate-loan-sharks.

## CHAPTER 8: Scope of a Statutory Class Actions Regime

(6) Should a class actions regime be general in scope or should it be limited to particular areas of the law?

8.1 We agree with the Commission's preliminary view that a general regime would be preferable and more likely to address the issues with the status quo. We also agree with the reasons the Commission gives for that view.[99] We do not comment on the Courts to which the regime should apply.

8.2 A class action regime that is general in its application allows the courts especially, but also other key stakeholders, the flexibility to manage the development of the regime to accommodate changes in society and challenges as they appear, as has occurred in Australia.[100]

8.3 The limitations of a sector-based approach in the UK have again been recently highlighted in the context of the landmark test case brought by the Financial Conduct Authority as to whether a variety of insurance policies, purchased by UK businesses, provided cover for COVID-19 related losses. In January 2021, the case was resolved by a decision of the Supreme Court.[101] The Supreme Court's ruling means that tens of thousands of policyholders will have their claims for COVID-19 losses paid by insurers. However, the litigation funder backing a large collective of policyholders[102] has recently opined on the complexities of putting in place structures to facilitate the day-to-day running of such cases. The funder's view was that the larger the class size, the greater the strains on these structures, signaling the need for a general class action regime to facilitate such socially useful claims.[103]

[99] NZLC IP45 [8.9].
[100] Justice Murphy and Professor Morabito, 'The first 25 years: Has the class action regime hit the mark on access to justice?' in Damian Grave and Helen Mould (ed), *25 years of class actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017), p14.
[101] *The Financial Conduct Authority v Arch and Others* [2020] EWHC 2448 (Comm).
[102] The collective is known as the Hiscox Action Group, and it comprises more than 350 businesses.
[103] *"Class actions in the UK: What needs to Change"*, Stephen O'Dowd, *The Lawyer Monthly*, published February 2021, < https://www.lawyer-monthly.com/2021/02/the-missing-piece-class-actions-in-the-uk/ >.

## CHAPTER 9: Principles for a Statutory Class Actions Regime

(10) What should the objectives of a statutory class actions regime be? Should there be a primary objective?

(11) Which features of a class actions regime are essential to ensure the interests of plaintiffs and defendants are balanced?

(12) Which features of a class actions regime are essential to ensure the interests of class members are protected?

(13) Is proportionality an appropriate principle for a class actions regime? If so, what features of a class actions regime could help to achieve this?

(14) Are there any unique features of litigation in Aotearoa New Zealand that need to be considered when a class action regime is designed?

(15) To what extent, and in what ways, should tikanga Māori should influence the design of a class actions regime?

(16) Do you have any concerns about how a class actions regime could impact on other kinds of group litigation or on regulatory activities? How could such concerns be managed?

(17) Which issues arising in funded class actions need to be addressed in a class actions regime?

(18) Do you agree with our list of principles to guide development of a class actions regime?

9.1 We agree with the Commission that access to justice is the clearest advantage of class actions and should be the primary objective of a statutory class action regime.

9.2 As we have noted above,[104] access to justice and improving judicial economy are the primary purposes of the Australian regime. The Commission uses a broad conception of access to justice, encompassing not just access to the courts, but also a procedurally fair process and a substantively fair result.[105] This is consistent with the conception adopted in Australia, as articulated by Justice Murphy and Professor Morabito when they said:

[104] Response to Chapter 5.
[105] NZLC IP45, [9.6].

> *The right of access to justice is a fundamental human right and an "expression of a social need which is imperative, urgent and more widespread than is generally acknowledged." There are, of course, two elements to it. "Access" to the justice system necessarily depends on the existence of legal mechanisms to enforce rights and the removal or reduction of barriers to the exercise of such rights including costs and complexities associated with accessing the system, economic capacity, education, geographic location, health, language and cultural issues. "Justice" is difficult to define but it denotes the fair administration of the law according to accepted principles. In broad terms access to justice means relatively equitable access to a fair and transparent legal process.*[106]

9.3 In response to question 11, we consider that active court supervision of proceedings is the essential feature to ensure the interests of plaintiffs and defendants are balanced. The key is for the courts to be given sufficient flexibility to manage the cases so that they can effectively balance the competing interests of the opposing parties.

9.4 In our view this requires the Courts to ensure that both parties are acting consistently with their obligations to conduct the case in accordance with the overarching obligations of civil procedure including to "secure the just, speedy, and inexpensive determination" of proceedings and applications.[107] In our experience, all too often lawyers take every point in the conduct of their clients' defence, even when it is unreasonable for them to do so. Those actions by defendants and their lawyers unnecessarily add to the costs of class actions, which the class members, in turn, have to bear through their own lawyers having to respond to the multitude of points raised.

9.5 While a defendant has every right to defend a claim vigorously, that does not include a right to take every point. All parties and their lawyers owe the same duty to the Court to conduct cases in a way that is consistent with the overarching purpose of civil procedure (in its various analogues). Notably, the *Federal Court of Australia Act 1976* (Cth) contains specific provisions placing duties upon parties to civil proceedings before the Court, and their lawyers, to conduct those proceedings in a way that is consistent with the overarching purpose.[108] We commend the concept of a statutory duty being imposed upon parties to proceedings before Aotearoa New Zealand Courts to act consistently with the objectives of HCR 1.2.

9.6 In Australia, well-resourced defendants taking every point can lead to large blow outs in costs, which impact outcomes for class members and are an ongoing issue. An example is the long running Pelvic Mesh product liability class action. In November 2019, Justice Katzmann delivered judgment in favour of the applicants in a 1,500 page judgment, finding that the Johnson & Johnson subsidiary, Ethicon, did not adequately warn of the risks of the implants. Her Honour then ordered Ethicon to pay

[106] Justice Murphy and Professor Morabito, 'The first 25 years: Has the class action regime hit the mark on access to justice?' in Damian Grave and Helen Mould (ed), 25 years of class actions in Australia (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).
[107] HCR 1.2. The overarching goal of New Zealand's civil procedure system has corresponding provisions in the Australia including "the overarching purpose of civil practice and procedure" in the *Federal Court of Australia Act 1976* (Cth), s 37(1) *to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible*) and the overriding purpose in the Supreme Court (*to facilitate the just, quick and cheap resolution of the real issues in the proceedings,* e.g. *Civil Procedure Act 2005* (NSW), s 56.
[108] *Federal Court of Australia Act 1976* (Cth), s. 37N

a portion of costs on an indemnity basis, finding that the company denied key aspects of the case without reasonable grounds, putting the class to unnecessary expense. The case, already spanning nearly 10-years, continued for the 10,000 women who suffered serious injury through the defective implants, after Ethicon appealed her Honour's judgment. On 5 March 2021, the Full Federal Court unanimously rejected all grounds of Ethicon's appeal. Meanwhile, the applicants' legal costs, which Johnson & Johnson have been ordered to pay, have exceeded $40 million.[109]

9.7 In response to question 12, we consider active court supervision of proceedings to again be the essential feature of a class action regime that ensures the interests of class members are protected. We refer to paragraphs [6.9] to [6.12] above.

9.8 In Australia, the Courts have proven able case managers, mindful of the interests of group members. Similarly, the Courts in Aotearoa New Zealand have already shown a willingness to scrutinise relationships and intervene to protect group members when they consider it necessary.[110]

9.9 We suggest the Commission resist submissions that there be added regulation of lawyers so as to protect class members. We note that lawyers in Aotearoa New Zealand, like those in Australia, are already highly regulated and have an existing broad framework of obligations to their clients to avoid conflicts of interest. As was noted by the ALRC, lawyers are subject to fiduciary duties to their clients, ethical duties to the court, statutory duties under state or territory legal profession Acts and professional codes of conduct and practice rules.[111]

9.10 In response to question 13, our view is that proportionality *is* an appropriate principle for a class action regime. Indeed, proportionality is, more broadly, a key goal of an effective civil justice system.[112]

9.11 In Australia, proportionality is included within the overarching purpose of civil practice and procedure. For example, in the Federal Court, it is specifically included as an objective of the overarching purpose, as follows:

> (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
>
> …
>
> (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.113

[109] As reported in Lawyerly: Miklos Bolza, 'J&J ordered to pay $40M in pelvic mesh class action costs as stay bid tossed by the court', *Lawyerly*, (online),https://www.lawyerly.com.au/jj-ordered-to-pay-40m-in-pelvic-mesh-class-action-costs-as-stay-bid-tossed-by-court/.
[110] *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [81].
[111] ALRC Report, [7.129].
[112] As noted by the Victorian Law Reform Commission (VLRC), in its Civil Justice Review (2008).
[113] Section 37M(2)(e) *Federal Court of Australia Act* 1976

9.12 In our view, proportionality is better incorporated into the overarching civil procedure rules in that way, so as to be applicable to all litigation, similar to the way proposed by Justice Venning.[114]

9.13 We do not express any views in response to questions 14 - 15.

9.14 In response to question 16, we do not have any particular concerns about how a class actions regime may impact on other kinds of group litigation or on regulatory activities that could not be managed by judicial supervision and case management.

9.15 In response to question 17, we refer the Commission to our submissions in response to Part B of the Issues Paper.

9.16 In response to question 18, we agree with the Commission's list of principles to guide development of a class action regime.

[114] NZLC IP45, [9.25].

## CHAPTER 10: Certification and Threshold Legal Test

(19) Should a class action regime include a certification requirement? If not, should the court have additional powers to discontinue a class action (as in Australia)?

(20) Should a class actions regime contain a numerosity requirement? If so, what should this be?

(21) Should the commonality test that applies to representative actions under HCR 4.24 apply to a class actions regime? If not, how should this test be amended?

(22) Should a representative plaintiff have to establish that the common issues in a class action are substantial or that they 'predominate' over individual issues?

(23) Should a representative plaintiff have to establish that a class action is the preferable or superior procedure for resolving the claim?

(24) Should a court be required to conduct a preliminary merits assessment of a class action or an assessment of the costs and benefits?

(25) Should a representative plaintiff be required to provide a litigation plan?

(26) Should a court consider funding arrangements as part of a threshold legal test for a class action?

(27) Should a statutory class actions regime have any other threshold legal tests?

10.1 In response to question 19, our view is that Aotearoa New Zealand should not include a certification requirement in its class action regime.

10.2 The Commission has summarised the position in Australia with respect to this issue at [10.16] – [10.19] of the Issues Paper. In particular, both the Victorian Law Reform Commission (**VLRC**) and the ALRC (on two separate occasions) have discouraged the introduction of a certification requirement to the Australian regime. We agree with this view. In our submission, the introduction of a mandatory certification process would worsen the very problems it was intended to address: it would introduce additional costs and inefficiencies, while acting as a barrier to access to justice. The problems which continue to beset the certification process in the United States have been borne of the issues identified by the ALRC: that certification would only result in wasted costs and delay, without achieving its intended purpose.[115]

[115] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 63-64.

10.3 Empirical data does not support the view that the Australian class action regime suffers from procedural problems due to the lack of certification requirement. For example, the Commission cited an empirical study of the Australian class action regime, which, amongst other things, found that in the first 17 years of the federal class action regime, the lack of a certification test had not led to a proliferation of additional interlocutory applications.[116]

10.4 Moreover, the lack of a certification requirement has not opened the floodgates in terms of the number of class actions commenced. The empirical evidence shows that there has been a modest increase in class actions filed, if at all. All informed stakeholders accept this. Research by commercial law firm Allens found that the total number of class action filings actually decreased by 20% in 2019.[117] Across the ten years of 2010 to 2019 inclusive, the Allens data shows annual growth in class actions of just 4.3%.[118]

10.5 However, our view that certification is unnecessary is predicated upon the existence of other mechanisms within the Australian regime.

10.6 First, the potential for adverse costs orders acts as a significant deterrent to the commencement of speculative proceedings. That deterrent does not exist in jurisdictions without an adverse costs rule. Therefore, our view that Aotearoa New Zealand *should not* include a certification requirement in its class action regime should be read with our view, discussed below, that Aotearoa New Zealand *should* adhere to an adverse costs rule.

10.7 Second, as noted by the Commission, there are a number of other mechanisms in place within the Australian regime, which allow the Court to discontinue a class action in appropriate circumstances. We do not repeat these here, however they are noted by the Commission at [10.17] of the Issues Paper, and we strongly encourage the Commission to consider recommending the adoption of such mechanisms as part of its regime.

10.8 In response to question 20, we consider that the class action regime in New Zealand should have a numerosity requirement. In our view, the "minimum specified number of plaintiffs" approach is preferable in comparison to the other approaches set out at [10.33] of the Issues Paper.[119] We do not comment on what the minimum number of group members should be under the regime, but we suggest that a figure of less than

[116] NZLC IP45 at [10.25], citing 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 L 579 at 594.

[117] Allens Linklaters, *Class Action Risk 2020* (online), 2 March 2020 file:///C:/Users/ryr/Desktop/Allens%20class_action_risk_report_2020%20(1)%20March%202020.pdf.

[118] Professor Vince Morabito's work in this space is instructive. Across all courts he identifies a reduction in the total number of class action in 2019 down from 66 in 2018 to 54 in 2019,12 and a similarly modest annual growth rate over the longer term13 and comparatively lower rates of class actions than other jurisdictions. Vince Morabito, 'Shareholder Class Actions in Australia – Myths v Facts', 11 November 2019; Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report', July 2017.

[119] These approaches were the "descriptive numerosity requirement" (used for Group Litigation Orders in England and Wales), the "impracticability of joinder" approach (used in the United States) and the "bare threshold test" (used in Canadian common law jurisdictions and in class actions brought in the United Kingdom Competition Appeal Tribunal".

10 may be an appropriate starting point for consideration. We note, that the draft *Class Actions Bill 2008* at section 6(1)(a) envisaged a numerosity requirement of 7 or more persons to commence a class action, which is consistent with the requirement in Australia.

10.9 In our view, specifying a minimum class size provides a degree of certainty to potential group members and legal representatives when they are considering whether to pursue potential claims as a class action. At the same time, however, there is sufficient flexibility in this approach to allow for a range of class sizes, which will inevitably vary from case to case depending on the type of claim and the surrounding factual circumstances.

10.10 As the Commission has noted, in Australia, the Court maintains the discretion to permit a class action with fewer than seven participants to continue. On some occasions, it has been suggested that this renders the minimum requirement rule artificial or arbitrary. [120] We do not agree. In reality, the number of class actions that are, or would be, commenced with fewer than seven group members is minimal, and in our view, it does not justify a change to the current approach in Australia or to our view as to the appropriateness of the approach for New Zealand's regime.

10.11 In response to question 21, in our view, the Courts' interpretation of the commonality test in HCR 4.24 is sensible, and we suggest that the Commission consider a commonality test for the class action regime that reflects this interpretation.[121] As the Commission has noted, the flexible approach taken by the Court to the 'same interest' requirement has "significantly enhanced the ability of litigants to engage in group litigation in New Zealand."[122]

10.12 Like many other aspects of the class action regime, the commonality test should strike the right balance between specifying what is required of the parties, while still allowing sufficient flexibility to accommodate the complexity inherent in these types of legal proceedings. Therefore, we suggest that the Commission consider a threshold test that:

(a) *does not* specify that group members have "the *same* interest in the subject matter of a proceeding", but rather requires that i) group members have claims that "are in respect of, or arise out of, the same, similar or related circumstances"; and ii) there is "at least 1 substantial common issue of law or fact". This was the test set out in the Rules Committee's 2009 draft Class Actions Bill. It is also very similar to the test under the Australian regime, and there is a useful body of jurisprudence regarding the appropriate interpretation of the elements of this test, which may provide guidance for the legislature, Courts and litigants in New Zealand;[123]

[120] NZLC IP45 at [10.33].
[121] NZLC IP45 at [10.47].
[122] NZLC IP45 at [10.48], quoting Anthony Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" [2015] NZ L Rev 73 at 79.
[123] See, for example, *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, in which the Federal Court interpreted the requirement that class members have claims arising from the same, similar or related circumstances as extending only to those claims that have relationships which, taking into account the facts of the case and the underlying policy objectives of Part IVA of the Federal Court Act, are 'sufficient to merit their grouping as a representative proceeding' (at 404-405). See also *Wong v Silkfield (*1999) 199 CLR 255 in which

(b) *does* require that group members have claims against the same defendant.[124] In our view, it is appropriate to specify this as part of any commonality requirement, as it promotes certainty for both plaintiffs and defendants. Again, this requirement was contemplated in the Rules Committee's 2009 draft Class Actions Bill.

10.13 In response to question 22, in our view the representative plaintiff should not have to prove that the common issues predominate over individual issues. This would lead to further interlocutory disputes at the initial stage of the class action that are inefficient and costly.

10.14 In addition, such a requirement would potentially affect the viability of representative proceedings brought on behalf of victims of mass torts, as has occurred in the United States.[125]

10.15 In our experience, class actions are an efficient vehicle for victims of mass wrongs to obtain fair compensation. Maurice Blackburn has conducted a number of significant representative proceedings on behalf of group members, including the Kilmore East-Kinglake and Murrindindi-Marysville Black Saturday Bushfire class actions, the Bonsoy Class Action and the DePuy ASR hip implants class action. Together these class actions have recovered over $1 billion for victims of mass torts. The introduction of a requirement which would have the effect of excluding claims of this kind would either deny access to justice to thousands who have suffered life-changing injuries, or require such claims to be brought in multiple proceedings with substantial overlap in the issues to be determined, resulting in judicial inefficiency, potential inconsistencies and significantly higher costs to claimants.

10.16 In response to question 23, in our view the introduction of a preferability criterion as part of any threshold or certification test would again just provide a further opportunity for unnecessary interlocutory disputes, adding cost and delay to class action practice and procedure. So long as mechanisms are built into the class action regime giving the Court the discretionary power to discontinue class actions in appropriate circumstances, in our view, it is unnecessary to *require* the plaintiff to prove that the class action procedure is preferable at an initial stage of the proceeding. This issue does not, and will not arise, in many cases.

10.17 The experience in Aotearoa New Zealand thus far appears to support the view that the Court is well-equipped to consider whether a representative action is the preferable procedure as necessary.[126] This suggests that building in a requirement that it does so in every case is overly prescriptive and therefore unnecessary.

---

the High Court unanimously held that the common issues should not be limited to those issues which would 'have a major impact on the …litigation', but should extent to any issues which are 'real or of substance' (at 267).

[124] *Cash Converters International Ltd v Gray* (2014) 223 FCR 139 brought finality to questions about the interpretation of this requirement under the Australian regime, confirming that section 33C(1)(a) does not require that each class member has a claim against each defendant.

[125] Deborah Hensler, 'Has the Fat Lady Sung? The Future of Mass Toxic Torts' (2007) 26(4) *Review of Litigation* 883, 892-893.

[126] NZLC IP45 at [10.56].

10.18 In response to question 24, in our view it is not necessary to conduct a preliminary merits assessment of a class action or an assessment of the costs and benefits. Again, we consider that the introduction of this requirement is likely to result in unnecessary cost and delay. While the assessment may be described as "preliminary", and the Court may intend to take a "broad brush impressionistic approach"[127], in reality it is likely to be a highly involved process, given the complexity and scale of class action proceedings. The parties, and indeed the Court, are likely to spend considerable time and costs preparing for, and conducting, the assessment.

10.19 Experience in jurisdictions with certification requirements has demonstrated this. For example, the certification requirements of Rule 23 of the US system's *Federal Rules of Civil Procedure* have generated inconsistent case law and ongoing debate regarding the extent to which the merits of the pleaded case should be argued in the course of a certification hearing.[128] In one instance a certification hearing was listed for a five day bench trial, with a timetable to the hearing of almost one year, which included allocating six months for discovery dedicated solely to certification issues.[129]

10.20 The intrusion of merits disputes into certification hearings in the US has also resulted in a range of consequential disputes. Heavy reliance on expert evidence in certification hearings has created a lack of clarity about the rules of evidence that should be applied.[130] The US certification regime has also created the potential for inconsistent findings on the same issue, if an unfavourable certification decision is followed by a ruling on the merits of a related individual proceeding.[131] In our view, the introduction of certification hearings involving a merits assessment carries a substantial risk of adding to the cost, inefficiency and delay in resolving class actions. This is clearly inconsistent with the objectives of the regime.

10.21 In response to question 25, in our view it is unnecessary to require the plaintiff to provide a litigation plan at such an early stage of the proceeding. Class actions are often complex and unpredictable reflecting the dynamic interplay of issues and evolving legislative, judicial and societal context. In our view, the preferable approach is to ensure that representative actions are effectively case managed by the Courts from an early stage of the proceeding. As the Commission has noted, practice notes or procedural rules can be utilised to guide the Courts and the parties through this process by setting out the matters to be considered at case management conferences.[132]

---

[127] NZLC IP45, [10.64] referring to *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [17]; *Saunders v Houghton* [2012] NZCA 545, [2013] 1 NZLR 652 at [103]–[105]; and *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) at [44]

[128] Steig Olson, '"Chipping away": the Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus' (2009) 43(4) *University of San Francisco Law Review* 935, 937.

[129] Ibid, 955-956.
The timetable was set following the decision of the United States Court of Appeals for the Seventh Circuit in *Szabo v Bridgeport Machines, Inc* 249 F.3d 672 (7th Cir., 2001).

[130] George Gordon and Irene Ayzenberg-Lyman, 'The Role of *Daubert* in Scrutinizing Expert Testimony in Class Certification' (2014) 82 *George Washington Law Review Arguendo* 135, 143-144.

[131] Thomas Kayes, 'Jury Certification of Federal Securities Fraud Class Actions' (2013) 107(4) *Northwestern University Law Review* 1851, 1854.

[132] NZLC IP45 at [10.67].

10.22 In response to question 26, the Commission has noted that the Courts in New Zealand do not approve litigation funding arrangements when considering applications for leave under HCR 4.24, however the Court does have a role in ensuring that funding arrangements do not amount to an abuse of process.[133] In our view, the Court should not be required to approve litigation funding arrangements as part of any threshold or certification procedure. We provide our views in relation to the Court's role in relation to funding arrangements in greater detail in our submissions in response to Part B, in particular Chapter 21.

10.23 We do not have any further matters to raise at this stage in response to question 27.

[133] NZLC IP45 at [10.68].

## CHAPTER 11: The Representative Plaintiff

(28) Should a court consider the representative plaintiff's suitability for the role as part of the threshold legal test for a class action? If so, what should the criteria be?

(29) Should a representative plaintiff be a class member or should ideological plaintiffs be allowed?

(30) When should a government entity be able to bring a class action as representative plaintiff?

(31) When a plaintiff wants to represent the interests of a whānau, hapū or iwi, should the court inquire into their suitability to represent the group in terms of tikanga Māori?

11.1 In our view, it is unnecessary to require the representative plaintiff to prove that they are suitable for the role, either as part of a threshold legal test or at a later stage in the proceeding. Placing this onus on the representative plaintiff is highly likely to result in wasted costs and a further opportunity for interlocutory disputes. These views are consistent with those expressed by the VLRC in its 2018 report, which are summarised at [11.8] of the Issues Paper.

11.2 In our experience, representative plaintiffs do not undertake their role lightly. Those who step forward are, at a minimum, exposed to public scrutiny in relation to their claim and put to considerable inconvenience in protracted litigation in circumstances where it would be open to them to remain as anonymous group members. In some instances, they are required to participate in grueling, lengthy trials, may be require to give evidence in Court and risk adverse costs orders (if unfunded) running to tens of millions of dollars.[134] In our experience, class members who take on the role of representative plaintiffs are typically well motivated and have a keen sense of their responsibilities to other class members.

11.3 We consider that it would act as a further disincentive to place an additional evidentiary burden on representative plaintiffs and, in effect, require them to adopt a defensive position to suggestions that their motives or capabilities are questionable. We are concerned that such a mechanism could be exploited by defendants to place pressure on actual or prospective representative plaintiffs so as to prevent the bringing of, or encouraging the discontinuance of, meritorious proceedings. Such an outcome would be contrary to a primary objective of a statutory class action regime, being to remove or reduce barriers to commencing worthy actions.

[134] See, e.g., *Matthews v SPI Electricity Ltd (No 9)* [2013] VSC 671 (9 December 2013) [299], [425].

11.4 We note that there are other important mechanisms under Australian legislation to ensure that group members' interests are adequately represented. For example, under section 33T of the *Federal Court of Australia Act 1976* (Cth), the Court has an express power to replace an inadequate representative plaintiff at the request of class members. The Commission has summarised the mechanisms under state-based class actions legislation at [11.7] of the Issues Paper. So long as similar safeguards are present within the Aotearoa New Zealand class action framework to protect group members' interests, in our view it is neither necessary nor appropriate for the Court to be *required* to consider the representative plaintiff's suitability for the role.

11.5 In response to question 29, we agree with the Commission that there are arguments in support of, and against, allowing ideological plaintiffs to act as the representative plaintiff. As the Commission has noted at [11.30], in Australia, a representative plaintiff is required to have a sufficient interest to commence a proceeding against the defendant on their own behalf. In our view, this is the preferable approach, as it means that the representative plaintiff has the same or similar interest in the subject matter as the represented class members. The plaintiff's personal claim is pleaded in the statement of claim, which assists in crystallising the key issues of law or fact that are in dispute between the parties

11.6 As noted by the Commission, there are some instances in which other entities, including unions, the ACCC and ASIC, have been allowed to bring representative claims on the basis that they have statutory standing under other legislation. We note the preliminary views of the Commission that it may not be necessary for the Commerce Commission or the Financial Markets Authority (**FMA**) to be given a statutory power to be representative plaintiff under class actions legislation in New Zealand, given other powers available to those regulators to bring compensation claims.[135] In our view, it may be appropriate for certain other groups or entities to be given statutory standing in the Aotearoa New Zealand context as this may provide greater clarity as to who is able to bring representative claims. We would suggest the Commission and other key stakeholders in the New Zealand class actions context consider which groups should be given this power.

11.7 In response to question 30, we agree with the preliminary view expressed by the Commission that it should be open to a government entity to be a representative plaintiff where it has its own claim, so long as it is not obliged to take on this role. As noted at [11.35] of the Issues Paper, in Australia, local councils have been representative plaintiffs in several class actions in relation to complex financial products and consumer protection.

[135] NZLC IP45 at [11.39].

11.8 Consistent with our views above, if a government entity does not have its own claim against the defendant, we do not think that it should be able to be the representative plaintiff unless it has statutory standing. In any event, the question of whether or not a government entity should have the power to be the representative plaintiff in the Aotearoa New Zealand context does not appear to be the key issue. As the Commission noted, regulatory priorities and/or funding constraints are likely to be the key factors limiting the regulators' willingness to bring compensation claims on behalf of the public, rather than the absence of sufficient power to do so.[136]

11.9 We do not express any views in response to question 31.

[136] NZLC IP45 at [11.39].

## CHAPTER 12: Membership of the Class

(32) Should class membership be determined on an opt-in basis or an opt-out basis or should different approaches be available?

(33) If the court is required to decide whether class membership should be determined on an opt-in, opt-out or universal basis, what criteria should it apply? Should there be a default approach?

12.1 In our view, the opt-out regime adopted in the Australian context is the preferable approach.

12.2 As the Commission noted at [12.30] of the Issues Paper, the Courts in Aotearoa New Zealand have recently given a clear endorsement of the opt-out approach. In *Ross v Southern Response,* the Court of Appeal stated that this approach was "*likely to significantly enhance access to justice.*"[137] The Supreme Court agreed, commenting that this approach was consistent with the three objectives of representative proceedings, and noted "*in particular, an opt out approach has advantages in improving access to justice.*"[138] We agree with these views. We also agree with the Commission's summary of the advantages of the opt-out approach,[139] including that it:

(a) removes many of the barriers that may operate to prevent class members from taking the positive step to join the class action;

(b) facilitates class actions where individual claims are small but the collective amount of harm may be large and worthy of redress; and

(c) increases the likelihood that claims are economically viable and therefore more likely to proceed, as the class size is likely to be larger.

12.3 As the Commission has noted, the Australian class action regime has developed various mechanisms to respond to the concerns that have been raised about the opt-out regime, including requirements with respect to the process for notifying group members of their right to opt out of the proceeding,[140] as well as mechanisms to ensure that costs are fairly distributed among class members.[141] We encourage the Commission to consider these mechanisms as part of its consideration of the opt-out approach and the overall class action regime.

[137] *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [98].
[138] *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [40].
[139] NZLC IP45 at [12.30] – [12.33].
[140] NZLC IP45 at [12.46].
[141] NZLC IP45 at [12.50].

12.4 Where decisions between an opt-in, opt-out or universal approach are required, our view is that an opt-out approach should be the default. Beyond this, we agree with the Commission's preliminary view that the Court should apply specific criteria when determining the appropriate approach for a particular representative action.[142] This would increase certainty for group members, defendants and their legal representatives when preparing to prosecute the case, and it would also be likely to increase consistency in the Courts' decisions on this issue. In our view, the principles set out by the Supreme Court in *Southern Response v Ross* are a useful foundation upon which to develop these criteria (subject to our view that the opt-out approach should be the default).[143]

[142] NZLC IP45 at [12.54].
[143] NZLC IP45 at [12.56].

## CHAPTER 13: Adverse Costs

(34) How has the risk of adverse costs impacted on representative actions?

(35) Should the current adverse costs rule be retained for class actions or is reform desirable?

(36) Are there any other issues associated with class actions that we have not identified? Is there anything else you would like to tell us about class actions?

13.1 We note the advantages and disadvantages of the adverse costs rule set out in the Issues Paper.[144] In Australia, where there is no certification regime, the potential for adverse costs orders has acted as a significant deterrent to the commencement of speculative proceedings.

13.2 However, the disadvantage of this rule is that representative plaintiffs may be exposed to the risk of having to pay substantial amounts of money in adverse costs. While some representative plaintiffs are willing to run this risk, most are not. This means that some class actions that are otherwise meritorious, including potentially significant public interest cases, have not been, or will not be, commenced. This has significant implications for access to justice.

13.3 As noted by the Commission, this risk can be addressed in some cases, for example, where a litigation funder provides a costs indemnity to the representative plaintiff.[145] However, not all cases attract funding, particularly risky or smaller cases, meaning that representative plaintiffs for these unfunded cases are still exposed to the risk of adverse costs orders. In our view, the recent introduction of the contingency fees regime in Victoria was a significant step forward in relation to this issue. The amendments to the Victorian legislation mean that representative plaintiffs can now apply for a 'group costs order', which specifies the contingency fee percentage to be paid to the plaintiff's lawyers upon success, and, if such an order is made, the plaintiff's lawyers are liable to pay any adverse costs orders in the proceeding.[146] By shifting this risk from the representative plaintiffs, this may mean that important, meritorious class actions may be run where they otherwise may not have been.

13.4 In light of the above, in our view, the adverse costs rule should be retained, however we encourage the Commission to consider the following additional issues:

(a) the introduction of a requirement that the Court consider certain factors when making an adverse costs order. As the Commission noted at [13.30] of the Issues Paper, in its 2018 report the VLRC recommended that the Victorian Supreme Court Act be amended to specify that the Court may take into account certain factors in making an adverse costs or security for costs order, including i) the function of the class action in providing access to justice; ii)

[144] NZLC IP45 at [13.13] – [13.16].
[145] NZLC IP45 at [13.31].
[146] Supreme Court Act 1986 (Vic), section 33ZDA.

whether the case is a test case or involves a novel area of law; iii) whether the class action involves a matter of public interest;

(b) the introduction of a public fund for class actions. As the Commission notes at [13.34], in its 1988 report, the ALRC recommended that a public fund be established to indemnify representative plaintiffs in representative proceedings;

(c) the introduction of a contingency fee regime like that now operating in the State of Victoria,[147] or at least, given that the Commission has stated that contingency fees fall outside the terms of reference for the present review, commence the consultation with the legal profession which the Commission has foreshadowed as being the first stage of that consideration.[148] We note that lifting the ban on contingency fees has been supported by each of the four major independent inquiries that have reviewed the Australian class action regime in recent years: the ALRC (2019), VLRC (2008, 2018) and the Productivity Commission (2014).

[147] *Justice Legislation Miscellaneous Amendments Act 2020* (Vic), s 5.
[148] NZLC IP45 at [1.28].

## CHAPTER 17: Advantages and Disadvantages of Litigation Funding

| | |
|---|---|
| (37) | Which of the potential advantages and disadvantages of permitting litigation funding do you think are most important, and why? |
| (38) | Is litigation funding desirable for Aotearoa New Zealand in principle? |

*Advantages of litigation funding*

17.1 We entirely agree with the advantages of litigation funding identified by the Commission.[149]

17.2 Without seeking to elevate any one of the identified benefits above any other, we make the observation that enabling access to justice underpins the most axiomatic objective of any justice system; the rule of law. Indeed, it is the threshold through which the rule of law must pass in order to apply fairly and equitably in a society and enables parties to a dispute equal access to the legal system so that the Courts may adjudicate their disputes in accordance with the law.

17.3 Third party litigation funding performs a crucial role in the overall machinery of justice by seeking to ameliorate some of the financial risks that are inherent in litigation and thereby enable meritorious claims access to the Court. As was pithily observed by Toohey J:

> *"There is little point in opening the doors to the courts if litigants cannot afford to come in[150].*

17.4 The emergence of third party litigation funding has undoubtedly improved access to justice for many thousands of individual and corporate claimants in a variety of legal disputes including class actions.[151] This was acknowledged by the ALRC when it said, citing the empirical research of Professor Morabito:

> *Litigation funding can be said to improve access to justice. There is empirical evidence that a number of successful class actions would not have run absent the funding provided by litigation funders.[152]*

[149] NZLC IP45 [17.1]-[17.27]

[150] Toohey J in a 1989 address to a NELA conference on environmental law, cited by Stein J, 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law' (1996) 13 EPLJ 179 at 180

[151] One of most compelling recent illustrations of this is the *'Stolen Wages'* class action, *Pearson v State of Queensland (No 2)* [2020] FCA 619, conducted on behalf of 10,000 indigenous Australians for unpaid wages against the State of Queensland, funded by funder Litigation Lending Services and which $190m settlement was approved by Murphy J of the Federal Court on 7 March 2020

[152] ALRC Report, [6.1], citing Professor Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017.

17.5 The Commission and the Court have recognised that litigation funding currently plays an important role in representative actions in Aotearoa New Zealand and in many class actions overseas. For example, in *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [177] French J remarked:

> *"In an age where the costs of litigation are beyond the means of many people, professional funders undoubtedly have an increasingly important role to play in ensuring that legal obligations and rights are enforced and vindicated …"*

*Disadvantages of litigation funding*

17.6 In addressing the disadvantages of litigation funding we recognise that the issues identified by the Commission require careful consideration.

17.7 However, we also agree with the Commission's ultimate finding that, "the advantages of litigation funding, particularly its potential to improve access to justice in some cases, outweigh its potential impacts".[153] Further, in our submission these the disadvantages may be lessened by deliberate and thoughtful regulation and the existing powers of the Court. We develop throughout our submission specific proposals that may assist the legislature and the Aotearoa Courts to consider and manage these issues.

*The risk that the court system may become burdened with an increase in litigation, in particular, additional representative or class actions.*

17.8 In our submission it may be simplistic and artificial to characterise an increase in filed proceedings as a "disadvantage" of a well-designed class actions regime which is intended to facilitate access to justice and provide redress for meritorious claims. As was astutely observed by Professor Morabito:

> *It is crucial to bear in mind that a major purpose of class action devices is to enhance access to justice and they are therefore likely to lead to* ***an increase in the overall volume of litigation***[154] (emphasis in original).

17.9 In any event, we agree with the Commission's findings that there is little empirical evidence to support the notion the class actions impose any significant additional burden on the court system and that litigation funding may not increase court workloads at all, on the basis that it may give rise to alternative market solutions for businesses such as portfolio funding.[155]

17.10 The extent to which an increase in representative actions is *burdensome*, will be a direct consequence of the degree to which any class actions reform proposal provides for adequate case management measures and the extent to which Courts manage caseloads utilising the existing powers within their armoury to do so. We develop throughout our submission specific proposals that may assist the legislature and the Aotearoa Courts to consider and manage these issues.

[153] NZLC IP 45 [17.50]
[154] Vince Morabito and Michael Duffy "An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions" [2020] NZ L Rev 377 at 393
[155] NZLC IP45 [17.30]-[17.31].

*The risk of encouraging meritless litigation.*

17.11 We agree with the Commission's conclusion that the risk of litigation funding leading to an increase in meritless cases appears to be low, given the profit motive of funders.[156] Indeed, it is entirely inimical to the commercial incentives and business model of a litigation funder to commit, on a non-recourse basis, significant amounts of capital to litigation is without merit.

17.12 We also submit that the involvement of litigation funders, who are commonly comprised of lawyers that are experienced, competent and in many cases sophisticated litigators themselves, confers strategic and tactical value upon proceedings. For example, in assessing the merits of cases prior to commencements to ensure meritless or otherwise vexatious claims are not pursued.

17.13 In circumstances where litigation is otherwise considered to be without merit the Court is appropriately empowered to deal with such circumstances through its existing powers.[157]

*Impacts on the availability and pricing of directors and officer's liability insurance*

17.14 We agree with the finding of the Commission and the ALRC that there is no robust empirical foundation for the assertion that litigation funding is causative of higher premiums for D&O insurance cover.[158]

17.15 The assertion that litigation funding is *the* cause of an increase in D&O is a convenient but overly simplistic explanation that elides the underlying issue; it is the underlying corporate misconduct of companies and their directors which results in proceedings being issued and not the mere availability of litigation funding. Such an explanation is akin to blaming an increased use of speed cameras for an increasing level of speeding tickets. Such attacks seek to deflect responsibility away from those actually breaking the law by targeting and blaming those merely enforcing the law.

[156] NZLC IP45 [17.35]
[157] NZLC IP45 [17.35]
[158] NZLC IP45 [17.49]

## CHAPTER 18: Reforming Maintenance and Champerty

(39) To what extent, if any, do the torts of maintenance and champerty impact on the availability and pricing of litigation funding in Aotearoa New Zealand?

(40) Should the courts be left to clarify and develop the law in relation to maintenance and champerty, or should the law in relation to maintenance and champerty be reformed?

(41) If reform is required, which option for clarifying the law do you prefer and why? For example, should the torts of maintenance and champerty be:

a. retained, subject to a statutory exception for litigation funding?

b. abolished?

c. abolished, subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality?

### Summary

- We agree with the Commission's findings that, in Aotearoa New Zealand, uncertainty remains about whether and when litigation funding agreements are contrary to the policy behind the torts of maintenance and champerty. This naturally has significant impacts on the availability and pricing of litigation funding and imposes an unnecessary burden on the judicial system when dealing with questions of whether and, if so, how, the torts ought to be applied.

- In light of that uncertainty and for the reasons set out below, the torts of maintenance and champerty should be abolished in Aotearoa New Zealand, as they have been in most Australian jurisdictions, subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality.

- Of the options for reform raised by the Commission, option "c" is the most appropriate although on one view there may be little practical difference between option "b" and "c". Having said this, option "c" would conform with the approach taken in many Australian jurisdictions and this would have the added benefit of clarifying that the body of case law developed in Australia is of precedential value to the Courts of Aotearoa New Zealand in determining questions about the permissibility of litigation funding arrangements.

## The origins and present state of the law of maintenance and champerty

18.1 As the Commission notes, the common law origins of maintenance and champerty lie in the legal landscape of late medieval England.[159] Others locate their ultimate origins in the still more distant past of Classical Antiquity.[160] They are ill-suited to the modern legal context, whether in Australia or Aotearoa New Zealand.

18.2 This is evident from the difficulty which the Commission encountered in finding examples of successful actions relying on the torts,[161] a difficulty which itself is not a new phenomenon. In 1883, Lord Coleridge CJ described it as an action 'of the rarest' of which few modern examples were to be found.[162] By the 19th century, the torts were already well on the way to becoming a legal curiosity.

18.3 The Commission suggested in its 2001 report that the dearth of cases applying the torts is at least consistent with the idea that they function as an effective deterrent.[163] However, we respectfully suggest that the same argument could be advanced in support of any tort which has become obsolete.

18.4 We do not see a need to retain the torts of maintenance and champerty in any form, because there is no vice targeted by those torts which cannot be more effectively addressed by the Court's other powers, such as the power to deal with abuse of process and the discretion to award costs. As the High Court of Australia observed in *Campbells Cash and Carry Pty Ltd v Fostif* (***Fostif***), this becomes apparent when any real consideration is given to the specific kind of conduct they purport to address.[164]

18.5 The High Court of Australia has remarked upon the evolution of maintenance and champerty into legal doctrines more notable for their 'patchwork of exceptions and qualifications' than their substantive contribution to public policy.[165] This pattern will continue if they are not abolished.

18.6 The torts of maintenance, champerty, and abuse of process are legal doctrines shaped by public policy in accordance with certain guiding principles. It is trite to say that the categories of abuse of process are not closed.[166] It is also telling that of the two legal doctrines covering similar territory, each purporting to be based on a public policy imperative, one has adapted to meet the challenges of a rapidly evolving legal landscape, including in the context of representative proceedings,[167] while the other has been progressively chiselled away and fallen into disuse.

[159] NZLC IP45, [16.6].
[160] *Campbells Cash and Carry Pty Ltd v Fostif* (2016) 229 CLR 386, 426.
[161] NZLC IP45, [18.22].
[162] *Bradlaugh v Newdegate* (1883) 11 QBD 1, 15. See discussion in *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)* [2019] QSC 228 at [72] and following.
[163] Te Aka Matua o te Ture | Law Commission Subsidising Litigation (NZLC R72, 2001) (**2001 Report**) at 1.
[164] (2006) 229 CLR 386, 435.
[165] *Campbells Cash and Carry Pty Ltd v Fostif* (2016) 229 CLR 386, 433.
[166] *Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, 93.
[167] See, for example, *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2016] FCA 787.

18.7 More specifically, the torts have been abolished in Victoria, New South Wales, South Australia and the Australian Capital Territory for some decades, with Tasmania following suit more recently.[168] Maintenance and champerty have not become issues of concern in those jurisdictions, and there is no suggestion from any quarters that they be reintroduced. The experiences in these jurisdictions add further weight to the suggestion that these ancient torts have no more useful work to do in modern society.

18.8 Similarly, as the Commission notes, the Law Reform Commission of Western Australia Government is also presently considering whether the torts should be abolished or modified.

18.9 It is well established that where a proceeding has been commenced for the predominant purpose of obtaining a benefit flowing from the existence of the proceeding itself, rather than from the vindication of rights in the proceeding, it will amount to an abuse of process.[169] Given the territory covered by abuse of process, champerty and maintenance can only have additional work to do in preventing proceedings which are legitimately commenced and conducted for the purpose of vindicating the plaintiff's legal rights. We agree with the Law Reform Commission of Western Australia's comments that it is not clear why a proceeding with those characteristics should be proscribed because of its source of funding.[170] We note that the sources of funding relied on by defendants are not similarly examined, or even considered.

18.10 To the extent that the torts do have any continuing effect, it is only to promote uncertainty about their interaction with litigation funding and to provide defendant law firms with an opportunity for arid, satellite litigation on procedural issues. A good example of the mischief that can be caused in jurisdictions where the torts of maintenance and champerty have not been abolished can be found in the recent Supreme Court of Queensland case of *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)*.[171] There the Supreme Court of Queensland confirmed that funding agreements are not by their nature champertous, and that the availability of litigation funding supports the policy objectives of a class action regime, even where the torts are yet to be abolished.[172]

18.11 While that outcome was, with respect, eminently rational, the mere fact that the underlying principles are being contested leads to unnecessary and costly disputation which the torts are prone to create. We consider that this sort of satellite litigation on arid procedural issues should be avoided, where possible, to ensure the overarching objectives of litigation are achieved.[173] It is not in the interest of the parties or a good use of judicial resources. The abolition of these torts would eradicate unmeritorious challenges to litigation funding agreements, while preserving the ability for the Court to deal with any abuse of process.

[168] Law Reform Commission of Western Australia, *Maintenance and Champerty in Western Australia, Project 110: Discussion Paper*, 11.
[169] Ibid [11]-[13].
[170] Law Reform Commission of Western Australia, *Maintenance and Champerty in Western Australia, Project 110: Discussion Paper*, 19.
[171] [2019] QSC 228.
[172] *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)* [2019] QSC 228 at [174]-[178].
[173] *High Court Rules* 2016 Rule 1.2 '*The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application*'.

18.12 The same considerations have created similar uncertainty in Aotearoa New Zealand requiring consideration in costly first instance and appeal decisions up to the Supreme Court of New Zealand, where the issue still remains to be finally resolved.

18.13 In *PricewaterhouseCoopers v Walker* (***Walker***), a majority of the Supreme Court dealt with the central question of whether the impugned litigation funding arrangements were impermissible because they amounted to an assignment of a bare cause of action. In doing so, they cited the Supreme Court's unanimous judgment in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89 (*Waterhouse*) at [57] for the proposition that such arrangements are generally impermissible subject to certain exceptions.[174] For ease of reference, the full passage from *Waterhouse* is reproduced below:

> *"[57] Assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand. The rule had its origins in the torts of maintenance and champerty* ***but now seems to have an independent existence of its own****. This leads to the conclusion that, if a funding arrangement amounts to an assignment of a cause of action to a third party funder in circumstances where this is not permissible, then this would be an abuse of process. In assessing whether litigation funding arrangements effectively amount to an assignment, the court should have regard to the funding arrangements as a whole, including the level of control able to be exercised by the funder and the profit share of the funder. The role of the lawyers acting may also be relevant."* (emphasis added)

18.14 In *Walker,* the majority found that the impugned litigation funding arrangements did not amount to an assignment of a bare cause of action, so that it was unnecessary to determine whether any exceptions to the general rule might apply.[175]

18.15 In a dissenting judgment, Elias CJ did not accept the concession made during the course of the hearing that the litigation funding agreement itself was not contrary to public policy, stating that it was necessary to give some more background as the law of maintenance and champerty.[176] Elias CJ stated that:

> *[115] Much of the caselaw concerning modern applications of the law relating to maintenance and champerty has been concerned with the distinction between assignment of property and the rights ancillary to it and the assignment of a "bare cause of action", a line not always easily maintained. No more satisfactory have been attempts to distinguish between support or assignment arising out of an existing proper interest and support or assignment which in substance (if not in form) entails "trafficking in litigation".*

[174] *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at [62].
[175] *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at [92].
[176] *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at [114].

> *[116] Despite some conceptual obscurity, it is however striking that judges continue to acknowledge the legitimacy of concern about litigation funding which amounts to the assignment of a bare cause of action. Even in those jurisdictions which have abolished the civil wrongs of maintenance and champerty, the reforming legislation has explicitly preserved the ability to treat contracts as contrary to public policy. It has been recognised that there remains public interest in preventing the development of "an unlicensed and unregulated market in litigation for fear of the abuses to which that might lead by attraction of the unscrupulous".*
>
> …
>
> *[119] As Waterhouse affirms, maintenance and champerty are torts which still exist in New Zealand. Their scope is however inevitably affected by how the public policy considerations behind the law are viewed in the circumstances of New Zealand today."*

18.16 The dissenting reasoning of Elias CJ, which creates further uncertainty as to the future operation of these torts, was necessary *strictly because* the torts of maintenance and champerty have not been abolished. Indeed, it is solely for this reason that the established body of Australian case law on the topic of permissible modern litigation funding has been held not to apply in Aotearoa New Zealand.[177]

18.17 With the abolition of the torts of maintenance and champerty, (subject to an appropriate preservation provision), litigation funding could be dealt with by the Courts on the basis of public policy concerns as to any abuse of process rather than by reference to torts which Elias CJ found to occasion *"conceptual obscurity"* giving rise to distinctions which are *"not always easily maintained".*

18.18 In its 2001 report, the Commission rejected the option of abolishing the torts subject to a preservation provision on the basis that no great simplification of the law would be achieved by following these precedents.[178] However, as noted in the Commission's updated findings, a body of case law has since developed which clarifies its meaning.[179]

18.19 It should also be noted that the Australian experience shows that litigation funding is now used in a broad range of civil and commercial litigation and arbitration matters – not just in class actions.[180] There is no reason to limit litigation funding only to class actions in Aotearoa New Zealand. Access to justice with the assistance of litigation funding should be available across a range of civil and commercial litigation areas in Aotearoa New Zealand.

[177] *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at [117]; *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89 at [35]-[40].
[178] 2001 Report at 11.
[179] NZLC IP45 at [18.37].
[180] Jason Geisker and Dirk Luff "Australia" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (4th ed, Law Business Research, London, 2021) 1 at 1.

18.20 In light of the above, it is clear that retaining the torts of maintenance and champerty subject to an exception for litigation funding, is not an appropriate solution. This would not resolve the difficulties which the superior courts of Aotearoa New Zealand are presently grappling with. Rather, it would simply add to the patchwork of exceptions which characterises the present state of the torts, a problem which as set out further below, will likely be exacerbated as class action and litigation funding jurisprudence develops.

**Further developments in the Australian Context**

18.21 The Australian experience provides further guidance as to how maintenance and champerty could interfere with the ongoing development of class actions and litigation funding, with adverse implications for social justice outcomes on a broad and far-reaching scale.

18.22 For example, the Victorian Law Reform Commission has recently suggested that the Court's power to order common fund payments in representative proceedings could also be used to order payment of a contingency fee to lawyers without infringing the prohibition on entering into contingency-based costs agreements.[181] Without deciding the point, the Full Court of the Federal Court has recently left open the possibility that such an order could be viable.[182] If the torts of maintenance and champerty are codified or retained in modified form, will another exception be required if contingency-based common fund payments become commonplace? And if the prohibition on contingency fees is lifted more generally, will a further exception be required?

18.23 Any continuing uncertainty over the status of litigation funding is undesirable. For the above reasons, the torts of maintenance and champerty should be abolished subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality consistent with such provisions employed in Australia.

[181] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Report No 37 (2018) at [3.73]-[3.76].
[182] *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107 at [22], [135]-[139].

## CHAPTER 19: Funder Control of Litigation

(42) What concerns, if any, do you have about funder control of litigation?

(43) Are you satisfied that existing mechanisms can adequately manage the concerns about funder control of litigation?

(44) If not, how should the concerns about funder control of litigation be managed? For example, should litigation funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?

19.1 We submit that existing curial oversight is adequate to manage the potential for funder control of litigation, although the requirement of certain minimum contract terms in litigation funding arrangements could further assist in regulating control of litigation by funders.

### *Supervisory jurisdiction of the courts*

19.2 That existing judicial oversight of funder control is adequate is consonant with the opinion of the Supreme Court in *Waterhouse* and the current state of judicial authority in Aotearoa New Zealand as set out in our response to Chapter 18 of the Issues Paper, namely that conventional court procedures can competently and judiciously manage any concerns regarding control over litigation and equitably balance the best interests of class members with the legitimate commercial interest of litigation funders to manage and protect their investments.[183] The Supreme Court in *Waterhouse* held:[184]

> *Control of litigation by a third party has long been a concern of the courts. One of the reasons traditionally given is that such control might tempt the allegedly champertous maintainer, for his or her personal gain, to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.*
>
> *While such issues could arise, it seems to us that they are no more or less likely to do so than in the case of individual litigants. We agree with the comments in Fostif that such concerns can be dealt with through conventional court procedures. We also accept that some measure of control is inevitable to enable a litigation funder to protect its investment. Not to allow sufficient control for this purpose may reduce unmeritorious claims but this would be at the expense of denying access to the courts for many with legitimate claims (footnotes omitted).*

19.3 The current armoury of the Courts to interrogate, sanction and otherwise regulate the conduct of litigation funders is more than adequate to prevent inappropriate control of representative proceedings. In addition to the general law protections that class members may have against a funder, the Court possesses the following powers to prevent inappropriate control of litigation:

[183] As recognised by the Commission at NZLC IP45 [19.3]
[184] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91 at [45]-[46].

(a) stay of proceedings;[185]

(b) strike out of proceedings;[186]

(c) security for costs;[187] and

(d) non-party costs orders.[188]

19.4 We note that the concept of "control" is not binary but a spectrum of varying degrees. As recognised by the Commission[189] and found by Elias CJ in *PricewaterhouseCoopers v Walker (**Walker**)*:

> *To be objectionable such control must be beyond that which is reasonable to protect money actually advanced or committed to by the litigation funder.*[190]

19.5 Consistent with the observations of the Supreme Court in *Waterhouse*, there is a legitimate locus of control that may be exercised by a litigation funder consistent with its entitlement to protect its investment. This legitimate entitlement has long been recognised in Australia as a result of the seminal High Court decision and jurisprudence that followed from *Campbells Cash and Carry Pty v Fostif Pty (**Fostif**).*[191] In *Fostif* the High Court of Australia found that funding terms that provide some level of control and produce significant profit for the funder "did not, either alone or in combination, constitute an abuse of process, or warrant condemnation as being contrary to public policy".[192]

19.6 Aotearoa New Zealand Courts have adopted a similar, broadly non-interventionist, approach that respects the rights of private parties to contract,[193] but is informed by the supervisory role of the Court in representative proceedings.[194]

19.7 We agree with the modern approach adopted by the Courts. There should not be any requirement for litigation funders, or funded clients, to obtain Court approval of litigation funding agreements.

---

[185] NZLC IP45 [15.28]-[15.37]
[186] NZLC IP45 [15.38]-[15.41]
[187] NZLC IP45 [15.42]-[15.49]
[188] NZLC IP45 [15.50]-[15.56]
[189] NZLC IP45 [19.6]
[190] *PricewaterhouseCoopers v Walker* [2018] 1 NZLR 735 at [122]
[191] *Campbells Cash and Carry Pty v Fostif Pty* [2006] HCA 41, (2006) 229 CLR 386, see in particular [89]-[99].
[192] ALRC Report 134, 2018 [2.46]
[193] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91 at [28]. Nor was it the courts' role to assess the fairness of any bargain between a funder and a plaintiff: at [48] and [76(f)].
[194] See for example, *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614; *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489 at [79]-[80]; *Southern Response Earthquake Services Limited v Brendan Miles Ross and Coleen Anne Ross* [2020] NZSC 126 at [81] and [86]:

> *"While the Court in Waterhouse said it was not the courts' role "to act as general regulators of litigation funding arrangements", the Court left open the scope of the courts' supervisory role for litigation funding arrangements in relation to representative proceedings. That said, we consider it would be premature to say there is an expectation that any litigation funding agreement should routinely be provided to the court as part of an application under r 4.24(b), as the Law Society submits."*

19.8 In the context of representative actions, the Court in *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*[195] enumerated those circumstance that may justify the Court considering the content of litigation funding agreements. Notably the Court starts with the first principle that:

> *"[i]t is not the role of the Court to 'approve' litigation funding arrangements."*[196]

19.9 It might be said that the current limits of intervention by Court also reflect a concern over a lack of statutory power to go any further.[197] However, as set out in our submissions on Chapter 18, the Courts already have interventionist powers in their supervisory jurisdiction to strike down litigation funding arrangements providing for inappropriate levels of control, whether the proceedings are representative or non-representative in nature. We consider the issue of control is a matter which should remain within the Court's supervisory power, enabling it to consider the terms of litigation funding arrangements where it is alleged that such arrangements confer "objectional"[198] control on a funder or are otherwise contrary to law.

19.10 Cases such as *Waterhouse*[199]*, Walker*[200] and *Paine v Carter Holt Harvey Limited*[201] (***Paine***) show that this supervisory jurisdiction is effective. In *Paine* the High Court closely considered the terms of the funding arrangement in that proceeding in the context of an abuse application, concluding that the agreement did not constitute an abuse.[202] The following (non-exhaustive) list of terms were considered by the Court as not conferring inappropriate control on the funder.

(a) termination rights of the funder and plaintiffs *inter se*;[203]

(b) budget approval by the funder without reference to the plaintiffs;[204]

(c) adequacy of dispute resolution mechanisms that involve a referral to senior counsel;[205]

(d) requirement that plaintiffs follow reasonable advice of the solicitors;[206]

(e) variation clauses that only require consent of the representative plaintiff;[207] and

[195] *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489
[196] *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489 [76(a)].
[197] *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489 [79]
[198] *PricewaterhouseCoopers v Walker* [2018] 1 NZLR 735 [122]
[199] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91
[200] *PricewaterhouseCoopers v Walker* [2018] 1 NZLR 735
[201] [2019] NZHC 1614.
[202] *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614 at [82]
[203] *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614 at [67(f)]
[204] *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614 at [67(c)]
[205] *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614 [67(d)-(e)]
[206] *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614 [67(f)]
[207] *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614 [67(g)]

(f) governing law being in a jurisdiction other than Aotearoa New Zealand.[208]

19.11 As set out in our response to Chapter 18 of the Issues Paper, we submit that these controls should be simplified, clarified and strengthened by:

(a) abolishing the torts of maintenance and champerty; and

(b) preserving the court's power to find litigation funding agreements unenforceable on grounds of public policy or illegality.

***Minimum contract terms***

19.12 In addition to curial intervention, the Commission identifies minimum contract terms in litigation funding arrangements as a potential option for further reform in mitigating inappropriate control of litigation by funders.[209] We generally agree in principle with this proposal, and set out in detail our views on the appropriate minimum contract terms in our response to Chapter 20 of the Issues Paper.

***Express statutory powers to amend funding agreements***

19.13 In addition, we have considered whether additional express statutory powers to vary funding agreements in the context of representative actions should be implemented. For the reasons set out below, our view is that such statutory powers are not required and would very likely have a detrimental effect on the litigation funding market and the availability of litigation funding more broadly should they be introduced.

19.14 While at first glance the notion of additional statutory powers of review may seem attractive, there are a number of countervailing considerations which outweigh any perceived benefits, particularly having regard to the Court's current supervisory powers.

***A question of "opt in" or "opt out" proceedings***

19.15 As a general observation the circumstances as to when such a tool would be used must also be considered. If it is intended to be limited to only apply to third party funded representative proceedings, then consideration must then be given to whether the representative claim is brought on an 'opt in' or 'opt out' basis.

19.16 In the context of 'opt in' claims, which have been the default position in New Zealand for the last 40 years, we contend that an express statutory ability empowering the court to vary the terms of a funding agreement expressly agreed by each claimant who has opted into the proceeding is unwarranted. In these circumstances group members have, by definition, taken an active step to be involved in the proceeding, are generally represented and advised by a lawyer as to the terms of the funding agreement and can avail themselves of all of the usual protections of the existing consumer protection laws. In these circumstances, we contend that the usual consumer protections found in existing laws adequately protect the rights and

[208] *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614 [67(i)]
[209] NZLC IP45 at [19.23]-[19.28].

entitlements of claimants that may elect to enter into such arrangements and participate as 'opt in' group members.

19.17 However, for 'opt out' representative proceedings the situation may be different as, *inter alia*, not all group members will have taken active steps to be involved in the proceeding. In particular, group members may not have entered into a funding agreement and doing so may not be a condition of membership in the representative claim.

19.18 The Commission will be aware of the Supreme Court's recent landmark decision in *Southern Response Earthquake Services Limited v Ross*[210] (***Ross***) which held that an opt-out procedure is generally consistent with the three objectives of representative actions, being: (1) improving access to justice, (2) facilitating the efficient use of judicial resources and (3) strengthening incentives for compliance with the law. In commenting on the supervisory role of the Court, the Supreme Court suggested there are several matters that the Court should consider when supervising and approving proposed representative action settlements,[211] including:

(a) whether the settlement is a fair and reasonable compromise;

(b) whether it is in the best interests of the class as a whole;

(c) whether the settlement prejudices any class members.

19.19 As a result of the Supreme Court's decision in *Ross*, it is expected that, going forward, opt out proceedings will become more common for representative claims.[212]

19.20 In contrast to opt in proceedings, in supervising the conduct and settlement of opt out representative proceedings, the issue for the Court to determine will not be whether the terms of a funding agreement should be varied, but rather, how the Court will deal with the problem of 'free riders', being all those group members who seek to take advantage of the benefits offered by inclusion in a funded opt out representative action but who avoid making any contractual commitment to contribute to the costs of the proceeding through a litigation funding agreement. The courts of equity have long ago developed a technique to solve this potential unfairness. A plaintiff who recovered a fund on behalf of a class was entitled to recover his or her reasonable costs in full from the fund.[213] The balance of the fund was then distributed pro rata to the members of the class.

19.21 Consequently, we contend that the need for the Court to be specifically empowered to vary the terms of a funding agreement used in the context of 'opt out' representative proceedings will not arise as the focus of the Court's enquiries will be directed to

[210] [2020] NZSC 126. Claims Funding Australia Pty Ltd is the litigation funder for the plaintiffs, Mr & Mrs Ross in their own capacity and as representatives of the class, in that representative action.
[211] [2020] NZSC 126 at [71], [73] and [82].
[212] *Earthquake Services Limited v Brendan Miles Ross and Coleen Anne Ross* [2020] NZSC 126 at [95]
[213] *Stanton v Hatfield* (1836) 1 Keen 357, 48 ER 344 (Ch); *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 (HL) at 210-213; *Trustees v Greenough* 101 US 527 (1881) at 532; *In re New Zealand Midland Railway Co* (1901) 2 Ch 357 (CA) at 363.

questions of common fund or costs spreading orders, sought to deal with those 'free riders' group members, and thus ensure fairness as between class members.

***Other observations***

19.22 judicial interference with contractual terms would not be countenanced in single party litigation unless there was contravention of an existing principle of law, for example in relation to misleading or deceptive conduct, unconscionable conduct, misrepresentation or unfair contract terms. As mentioned above we consider these existing protections provide ample protection in respect of funding agreements used in representative proceedings just as much as they do in single party funded claims.

19.23 Prescriptive statutory powers can often also be cumbersome but less effective tools as compared with courts exercising their inherent supervisory jurisdiction to deal with emerging issues in a nascent and evolving litigation funding market. Statutory intervention of the type suggested carries the additional risk of disputes being reduced to arid textual interpretation in the context of novel issues not envisaged at the time when the legislation was prepared.

19.24 To the extent that statutory powers to amend commissions in funding agreements are introduced, they will likely give rise to an uncertain body of developing case law as to the principles and commercial rates to be applied by Courts in any review process.

19.25 Not only does this give rise to the risk of costly and expensive satellite litigation, more fundamentally it will give rise to inherent uncertainties in contractual arrangements resulting in a reduction in the availability of litigation funding. Litigation funders are required to take on risks and unknowns as a part of the inherent vicissitudes of litigation. The introduction of a statutory power to vary the terms of those arrangements without the consent of the parties will significantly inhibit the funder's ability to make prudent investment decisions in the knowledge that those terms are binding on the parties. The risk of subsequent judicial intervention may render the enterprise uncommercial and result in unforeseen consequences such as reduced availability of funding and reduced levels of access to justice.

19.26 Further, express powers to amend commissions or other provisions in funding arrangements could place the Courts in the difficult position of attempting to second guess (and receive evidence on) the multifaceted commercial funding decisions of litigation funders with the benefit of hindsight bias. Those funding decisions are ordinarily highly complex and take into account many factors individual to the funder including:

(a) the risk profile, investment exposure, cash requirements, and expected cashflow of the funder by reference to the funder's portfolio of investments, debts and capital and operating expenses;

(b) the funder's risk profile and internal rate of return;

(c) the inherent risk of the litigation in question.

## CHAPTER 20: Conflicts of Interest

| | |
|---|---|
| (45) | What concerns, if any, do you have about funder plaintiff conflicts of interest? |
| (46) | Are you satisfied that existing mechanisms can adequately manage the concerns about funder-plaintiff conflicts of interest? |
| (47) | If not, which option for managing the concerns about funder-claimant conflicts of interest do you prefer, and why? For example:<br>a. Should funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?<br>b. Should funders be required to have a conflicts management policy?<br>c. Should funder control of litigation be regulated? |
| (48) | What concerns, if any, do you have about lawyer-client conflicts of interest in funded proceedings? |
| (49) | Are you satisfied that existing mechanisms can adequately manage the concerns about lawyer-plaintiff conflicts of interest? |
| (50) | If not, which option for managing the concerns about lawyer-client conflicts of interest do you prefer, and why? For example:<br>a. Should funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?<br>b. Should professional rules or guidelines be developed for lawyers acting in funded proceedings? If so, what rules or guidelines would be appropriate?<br>c. Should activities that are likely to give rise to lawyer-plaintiff conflicts of interest be prohibited? If so, which activities should be prohibited? |

### Summary

- In general terms, we support the current approach that parties should be able to privately contract and negotiate the terms of funding agreements. However, the *status quo* should be enhanced to ensure greater accountability, transparency and enforcement by the introduction of a regulatory approach that includes:
    - regulatory guide and mandatory conflicts management policy for litigation funders;
    - minimum contract terms;
    - annual reporting requirement of a funder to demonstrate compliance with the regulatory guide; and

- improved enforcement by an appropriately empowered regulator or alternatively an annual external audit requirement.

20.1 We agree with the observation of the Commission that the real locus of this issue is the control that a funder may exercise over litigation rather than whether there is a real or perceived conflict of interest.[214] Accordingly, we refer the Commission to our submission in response to Chapter 19, Funder Control of Litigation to address substantive issues and proposed reforms in respect of the issue of funder control of representative proceedings.

20.2 We agree with the three broad reform options outlined by the Commission for managing the risk of funder-plaintiff conflicts of interests, being:[215]

(a) encourage or require funders to include minimum terms in their funding contracts.

(b) require funders to have a conflicts management policy.

(c) regulate funder control of litigation.

We refer the Commission to our submission in response to Chapter 19, Funder Control of Litigation for a more fulsome submission on this issue.

20.3 Specifically, we support the implementation of a regulatory mechanism which replicates and improves upon the approach adopted in Australia. We submit that such a regulatory response may include the following elements which draw on our experience in the Australian jurisdiction:

(a) Implementation of a regulatory guide akin to ASIC Regulatory Guide 248, 'Litigation schemes and proof of debt schemes: Managing conflicts of interest' (**ASIC Guide 248**), that includes the strengthened protections detailed in this submission.

(b) Inclusion of a penalty provision that makes it an offence if a litigation funder fails to maintain adequate practices to manage conflicts. [216]

(c) An annual reporting requirement that would require funders who fund class action proceedings to report to an appropriate regulatory authority on their compliance with a requirement to implement adequate practices and procedures to manage conflicts of interest.

(d) Minimum contract terms in funding agreements to require processes for managing conflicts of interest between funded class members, the solicitor and litigation funder, including dispute resolution processes.[217] See our submission

[214] NZLC IP45 [20.31]-[20.32]
[215] See NZLC IP45 [20.13]
[216] Regulatory Guide 248, RG 248.1
[217] See for example, The Federal Court Class Actions Practice Note (GPN-CA) (Practice Note): 'Conflicts of Interest', [5.9] - [5.10] which states:

below where we particularise common funding terms that we support and are common in Australian funding agreements.

(e) The introduction of a High Court Practice Note to provide judicial instruction and guidance on how conflict management processes interact with the processes of the court and integration with any regulatory guide that is adopted. In Australia, this was achieved by the introduction the Federal Court Class Actions Practice Note (GPN-CA).[218]

20.4 It is significant that there is no empirical evidence of widespread concerns or problems in relation to conflicts of interest in class actions and litigation funding and those relatively isolated instances where problems have been identified have been properly dealt with by the courts.[219]

20.5 Lawyers have an existing broad framework of obligations to their clients to avoid conflicts of interest. As was noted by the ALRC, and the Commission, lawyers are subject to fiduciary duties to their client, ethical duties to the court, statutory duties under state or territory legal profession Acts and professional codes of conduct and practice rules.[220]

20.6 Plaintiff class action lawyers are subject to further duties. It is well accepted in Australia that the nature of the tripartite arrangements between class members, litigation funders and lawyers in a funded class action may have the potential to lead to a divergence between interests. Practices and procedures to protect the interests of class members in these arrangements have been in place for some time and have evolved to respond to issues that have emerged.

***Minimum contract terms***

20.7 Regarding minimum contract terms, in our experience it is the common practice of litigation funders to incorporate the following features as a part of their standard contractual funding terms:

(a) A term that the funder must implement and comply with a conflicts management policy which complies with the relevant legal requirements for managing conflicts (which obliges the funder to disclose to the plaintiff any relevant and significant interests that may conflict with those of the plaintiff and how those interests may conflict with the interests of the plaintiff).

---

"*5.9 Any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of "duty and interest" and "duty and duty") between any of the applicant(s), the class members, the applicant's legal representatives and any litigation funder.*
*5.10 The applicant's legal representatives have a continuing obligation to recognise and to manage properly any conflicts of interest throughout the proceeding."*

[218] The Federal Court Class Actions Practice Note (GPN-CA) (Practice Note): 'Conflicts of Interest', at [5.9] - [5.10].

[219] Almost all of which seem to have arisen from the activities of Mark Elliott and his associated entities: see e.g *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 318 ALR 121: [2014] VSCA 351; and the ongoing disputes arising from the Victorian Supreme Court class action *Bolitho v Banksia Securities Ltd*, Supreme Court of Victoria Proceeding SCI 2012 7185.

[220] ALRC Report 134, 2018, [7.129] and NZLC IP45, [20.47]

(b) A term to the effect that in the event of disagreement the instructions of the representative plaintiff prevail over the decision of the funder.

(c) Dispute resolution mechanisms which commonly include terms requiring the funder and the funded client to refer any disputes as to potential settlement of claims to senior counsel or to a mediator or arbitral panel for determination. We submit that the costs of using this dispute resolution mechanism should be borne by the funder in the first instance[221] in order to address the concerns of the Commission that such mechanisms may not provide a genuine pathway for resolution of disputes for clients if they cannot access them.[222]

(d) Termination rights for the plaintiff in the case of serious and/or unremedied breaches of the funding agreement.

(e) A cooling-off period in which clients have an opportunity to seek legal advice if they have not already done so.[223]

20.8 These provisions have worked well in Australia to provide greater clarity to class representatives/members of the processes that apply should potential conflict situations arise. We support the inclusion of such provisions as minimum contract terms in litigation funding agreements in Aotearoa New Zealand.

20.9 Having said this, we are mindful that statutory minimum contract terms ought not to be unduly prescriptive, for the reason that they may have unintended consequences on the flexibility and availability of litigation financing or may otherwise negatively impact social justice outcomes. With that in mind, we make the following comments about the other potential statutory minimum terms proposed in the Issues Paper.

20.10 To the extent that plaintiffs are to benefit from statutorily mandated provisions that they be entitled to terminate the contract for breach of contract, we consider that these provisions ought to be for serious and/or unremedied breaches only following a period for rectification of those breaches. Indeed, it would be detrimental to the availability and pricing of litigation funding were plaintiffs provided with unjustified opportunities to exit litigation funding arrangements and avoid payment of funding commissions, bearing in mind the flow-on effect that this would have on the pricing and availability of litigation funding.

20.11 As to the Commission's discussion of prohibiting any discretionary right for a funder to terminate a funding agreement, we do not support this proposal. However, we understand this to mean a right to terminate for any reason whatsoever, as opposed to a right to terminate in various specified circumstances (such rights also being, by their nature, discretionary once those specified circumstances have occurred). To be clear, we do not support a *general* prohibition on discretionary rights entitling a funder to terminate a funding agreement.

[221] However, where the dispute is determined in the funder's favour, such costs should then become recoverable costs of the funding agreement in the event of a successful outcome, pursuant to the terms of the funding agreement.
[222] NZLC IP45, [20.18].
[223] NZLC IP45, [20.16(a)], referring to Regulatory Guide 248 at [RG 248.71(b)].

20.12 Firstly, we don't accept the proposition that parties to a proceeding are in some way mandated to continue to fund proceedings to their conclusion where they are self-funded. It follows that, so long as a funded party is protected as to adverse costs, there should not be any change in that position which would see third party funders subject to a more stringent requirement to fund proceedings on a mandatory basis.

20.13 Secondly, any prohibition of a termination right proscribed by statue may have unintended consequences and fail to enable sufficient flexibility for the parties to a funding agreement to reach agreement on terms.

20.14 Thirdly, from a commercial and reputational perspective there are strong incentives for a litigation funder not to terminate a funding agreement without strong justification given:

(a) the loss of the non-recourse investment (which is only recoverable upon a successful result);

(b) the exposure to adverse costs which would follow and be visited upon the third party funder; and

(c) the reputational risks that would almost certainly follow should the funder not have sound reasons for termination.

20.15 This issue is better dealt with by prescribing minimum contract terms specifying the circumstances in which a funder may terminate a litigation funding agreement.

20.16 In our submission it is necessary for a funder to be able to cease funding in a range of circumstances such as where (as identified by the Commission[224]):

(a) the funder reasonably ceases to be satisfied about the merits of the dispute;

(b) the funder reasonably believes that the dispute is no longer commercially viable; or

(c) there has been a material unremedied breach of the agreement by the plaintiff justifying termination after notice.

20.17 The existence of these commercial termination clauses is consistent with the overarching objectives of the High Court Rules. They enable claims to be discontinued where they are no longer economic to pursue, rather than forcing litigation funders to continue to fund uneconomic or unmeritorious claims while unnecessarily utilising finite judicial resources.

20.18 While we support such termination rights being permitted, we query whether prescribing the specific circumstances that justify termination will have unintended consequences as the market develops and as novel cases arise which may justify additional bases for termination of a funding agreement. To take one example, co-funded arrangements may give rise to an additional set of justifiable reasons for

[224] NZLC IP45, [20.15(c)].

termination, including for example where one of the co-funding parties is materially in breach of the relevant funding agreement.

20.19 The Commission also raises the prospect of mandating a specific procedure that will be applied to reviewing and deciding whether to accept any settlement offer, including the factors that will and will not be taken into account in deciding to settle.

20.20 CFA generally contracts on the basis that a minimum range of considerations are expected to be considered by the parties and their lawyers in determining whether to accept any particular settlement offer. Having said this we don't contend that these considerations should be mandatory or that the universe of relevant considerations is closed.

20.21 One factor that CFA does consider to be required is that the funded client and their lawyers have proper regard to the prospect of an adverse costs order being made in the event that the settlement is rejected and the claim fails or does no better than the offer made (in which case such cost will be borne by the funder). This consideration is intended to address the moral hazard that a funded claimant may otherwise give insufficient consideration to the costs consequences and exposure associated with rejecting an offer (because they may be indemnified by the funder under the arrangement). This not only has a negative impact on funders but also dulls the effect of the adverse costs system and may also impact on the use of the judicial system's finite resources in the case that reasonable settlement offers are otherwise rejected.

20.22 Finally, we consider that while third party dispute resolution mechanisms are a useful necessary inclusion to manage differences of opinion between plaintiffs and funders in respect of settlement decisions, any minimum contract terms should afford maximum flexibility to the parties to choose the third party who effectively resolves the dispute. For example, resolution by reference to formal processes or external bodies such as mediation or the law society may be unsuitable, particularly where matters (such as settlement offers with fixed times for acceptance) must be dealt with on a time sensitive basis. In those cases, it is often more suitable for the parties to agree on available counsel of adequate seniority (having regard to the sum in dispute and the complexity of the case) as the needs of the case may require.

***Managing conflicts of interest***

20.23 More generally, in our experience disputes in relation to litigation funding agreements are rare. In matters where Maurice Blackburn has acted in funded class actions or CFA has funded class actions and other civil and commercial litigation, we are not aware of any situation where the formal dispute resolution process in the litigation funding agreements between funders and class representatives or members has been invoked, including in relation to the appropriate approach to settlement offers and proposals.

20.24 There is certainly no evidence of widespread failure in the management of the tripartite relationship under the current regime leading to detrimental outcomes for class members or funded claimants. On the rare occasion when issues of concern have arisen the courts have shown a willingness to scrutinise relationships and intervene to protect group members when necessary.[225] The *Banksia class action*[226] is the most clarion example of how Courts are vigilant to police conflicts of interest and have existing power to do so competently and thoroughly.

20.25 It is clear the courts in Australia will not permit lawyers to have a financial interest in a litigation funder financing a claim. This has been tested in the courts' management of a number of shareholder cases over the past 6 years commenced by Melbourne based lawyer and litigation funder, Mark Elliott, now deceased. Mr Elliott trialled different funding models in which he sought to act as the lead plaintiff's solicitor while also being a director of the litigation funder and holding a shareholding either direct or indirect in the funder. In each such occasion that relationship has been closely examined by the Courts and has been rejected or is presently the subject of further scrutiny.

20.26 The current regime already regulates the issue of conflicts of interest, allows the relationship between lawyers and funders to be fairly scrutinised, is operating reasonably well and does not need major amendment. Consistent with this, the ALRC did not recommend major change but modifications to the system already in place.

20.27 We acknowledge that there are legitimate criticisms of the regulatory approach to third-party litigation funders in the Australian jurisdiction. In our view the ALRC correctly identified the core problem with the current approach when it observed that "*Regulatory Guide 248 provides* ***extensive guidance and imposes appropriately designed obligations on litigation funders****, yet there is no way to determine if funders are following it or to what extent"* (emphasis added).[227] However, we submit that the solution is not more onerous and wide-ranging regulation but rather more proactive engagement and enforcement (where required) by an appropriate regulator coupled with oversight by the Court. We consider that the most cost-effective solution would be simply to introduce annual reporting requirements for funders in relation to conflicts of interest, to be overseen either by a regulator or perhaps by reference to an external auditing requirement.

20.28 We agree with the observation of the Commission that the real locus of dispute is the control that a funder may exercise over litigation rather than whether there is a real or perceived conflict of interest.[228] A conflict in the absence of a power to exploit that conflict is unlikely to produce an adverse outcome for plaintiffs or class members. In

---

[225] For example, *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd (2014) 318 ALR 121: [2014] VSCA 351,* the Court of Appeal held that the class action was an abuse of process because it had been commenced with the predominant purpose of earning legal fees for the solicitor rather than such fees being a by-product of the vindication of legal rights. See also*, Bolitho v Banksia Securities Ltd (No 4) [2014] VSC 582; (26 November 2014) at [53]* and the ongoing scrutiny by the Court of the conduct of the Banksia class action Bolitho v Banksia Securities Ltd, Supreme Court of Victoria Proceeding SCI 2012 7185

[226] *Bolitho v Banksia Securities Ltd*, Supreme Court of Victoria Proceeding SCI 2012 7185. See the Victorian Court of Appeal decision (2019) 57 VR 68 for a summary of the extensive procedural history of this class action.

[227] ALRC Report 134, 2018, [6.108]. Emphasis added.

[228] NZLC IP45, [20.31]-[20.32].

making this observation we recognise and agree that a real or perceived conflict, whether or not it is exploited, remains an important issue to regulate, so as to maintain confidence in the integrity of the judicial system and legal processes. Accordingly, we refer the Commission to our submission in response to Chapter 19, Funder Control of Litigation.

**Approval of funding agreements**

20.29 Finally, we note the reference in the Issues Paper to class action litigation funding in Ontario, Canada, where Canadian courts have developed a system of routinely reviewing and approving litigation funding arrangements at the commencement of proceedings.[229] In our view, a similar process in Aotearoa New Zealand would be unjustified in light of:

(a) the rarity of disputes between parties to funding proposals;

(b) the adequacy of proposals suggested in this chapter for minimum contract terms and conflict management policies to deal with perceived risks of unfair litigation funding arrangements; and

(c) the general supervisory jurisdiction of the Courts in respect of funding agreements referred to in Chapter 21, particularly at settlement stage.

20.30 In our submission, to introduce a preliminary approval process in respect of litigation funding arrangements would duplicate judicial oversight in respect of a risk that would be better and more cost-effectively dealt with by the proposals set out above. In doing so, it would promote satellite litigation by defendants at a pre-trial stage, providing unwarranted opportunities for defendants to raise procedural issues rather than dealing with the substantive merits of the relevant dispute.

[229] NZLC IP45, [18.6].

## CHAPTER 21: Funder Profits

(51) What concerns, if any, do you have about funder profits?

(52) Are you satisfied that existing mechanisms can adequately manage the concerns about funder profits?

(53) If not, which option for managing the concerns about funder profits do you prefer, and why? For example:

a. Should competition in the litigation funding market be encouraged? If so, how?
b. Should the courts be empowered to vary funder commissions? If so, when, and how?
c. Should funder commissions be regulated? If so, should there be restrictions on how funder commissions can be calculated (and if so, what) or should funder commissions be capped (and if so, how)?

### Summary

- We support competition in the litigation funding market but caution against onerous regulation that could discourage market entry by funders.
- In the class actions context:
    - We support the Commission's proposal for court supervision of funder commissions via cost sharing mechanisms such as common fund orders and court approval of settlements.
    - We do not support a statutory power to vary funding commission but recognise that Courts should have power to make cost sharing orders that are proportionate, fair and reasonable and based on the exercise of judicial discretion.
- Outside of the class actions context, we otherwise support court supervision of funding agreements by reference to existing common law and statutory principles.
- We do not support the capping of funder commissions as sufficient powers exist for Courts to prevent excessive funder recoveries.

21.1 The primary mechanism by which litigation funders generate "profit"[230] is through commissions, calculated either as a percentage of a resolution sum[231] or as a multiple of costs incurred in funding the litigation.[232] We do not have concerns about funder profits generated in Aotearoa New Zealand but recognise that the mechanisms by which funder profits are regulated is an important matter of public confidence in the representative proceeding procedure and to the interests of class members.

21.2 In response to Question 53a. we agree with the Commission that increasing competition in the litigation funding market is likely to put downward pressure on commission rates.[233] We also agree with the Commission[234] and the ALRC[235] that overly onerous regulation and compliance requirements imposed upon the funding market would likely hamper market entry and favour domestic-based funders, thereby frustrating this outcome. Accordingly, we submit that adoption of the proposals in our submission which encourage market entry but preserve and enhance existing curial and regulatory powers are an appropriate and effective compromise.

21.3 In general terms, we support the Commission's proposal for court supervision of funder commissions via cost sharing mechanisms such as common fund orders (**CFOs**) and court approval of settlements.[236]

21.4 The Supreme Court in *Southern Response v Ross*[237] has recognised that the Court has power to approve settlements as a condition of leave being granted under HCR 4.24(b) to bring a proceeding on an opt out basis[238], and that this power derives from the "courts exercising an adjudicative power in their protective or supervisory jurisdiction"[239]. It is not clear whether such settlement approval power extends to the setting of funding commission rates in the absence of a statutory foundation for this power, however, such an interpretation may be implicit in the Court's finding that:

> *"in deciding whether to approve a settlement, courts can consider the extent to which the settlement prejudices individual class members."*[240]

[230] We understand the use of the term "funder profits" in the Issues Paper to be a reference to "profit" in its generic common usage; being a reference to the mechanism by which, and rate at which, litigation funders generate returns from funding litigation i.e "commissions" and not the technical accounting term referring to the net financial position of an entity after deduction of costs and taxes from revenue. This latter term would permit an analysis of the internal accounting processes and decisions of litigation funders. In this respect, we note that the Issues Paper uses the term interchangeably and in both senses. See NZLC IP45 [21.6] which does refer to a submission by listed litigation funder Omni Bridgeway that uses profit in an accounting context.
[231] The amount recovered either at settlement or judgment
[232] There are other recoveries that litigation funders may seek and courts have considered whether such recoveries are justifiable and not merely operating costs that are not recoverable or are subsumed within the aggregate commission rate (such as project management fees, disbursements or ATE premiums. Regarding ATE premiums, see *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 at [33] for recent perspective on the recoverability of such costs))
[233] NZLC IP45, [21.17].
[234] NZLC IP45, [21.18].
[235] ALRC Report 134, 2018, [1.41].
[236] NZLC IP45, [21.20].
[237] *Southern Response Earthquake Services Limited v Brendan and Colleen Ross* [2020] NZSC 126.
[238] *Southern Response Earthquake Services Limited v Brendan and Colleen Ross* [2020] NZSC 126, [82]-[83].
[239] *Southern Response Earthquake Services Limited v Brendan and Colleen Ross* [2020] NZSC 126, [81].
[240] *Southern Response Earthquake Services Limited v Brendan and Colleen Ross* [2020] NZSC 126, [82].

21.5 In the absence of clarity on the current power of the Court to vary funding commissions, we make the following submissions.

21.6 The recent advent of "opt out" or open class representative proceedings in Aotearoa New Zealand as a result of the decision in *Southern Response v Ross*[241] produces a consequential dichotomy between "opt in" and "opt out" proceedings that we submit Courts need to consider in balancing the rights and interests of class members and litigation funders, *inter se*.

21.7 In an "opt in" proceeding, class members have freely entered into a contractual relationship with litigation funders; they have had the opportunity to consider the funding terms; they have been able to seek independent legal advice and have ultimately agreed to be bound by the terms of the retainer with the lawyers and the litigation funding agreement.

21.8 In an "opt out" class action class members have typically not had such opportunities. As a result there will be class members in an "opt out" proceeding that have not agreed to be bound by the terms of a funding agreement, namely the contractual commission rate.

*"Opt in" class actions*

21.9 We submit that where the class action is "opt in" there is a reasonable basis for the Court to find that the contractual funding commission rate should be applied to class member recoveries and this does not require further intervention of the Court. We submit that the Court should not disturb the private contractual promises of parties under the funding agreement unless there is a valid basis to challenge those terms under relevant protective legislation or rights at common law or equity.

21.10 There is support for this position in Australia.[242] Indeed, it has been held that *"regard must be had to the foundational matter"* that parties bind themselves to contract by executing agreements, which enables third parties to assume the legal efficacy of the instrument.[243] The power to vary the terms of a funding agreement and *"upset the*

---

[241] *Southern Response Earthquake Services Limited v Brendan and Colleen Ross* [2020] NZSC 126

[242] See Pagone J in *Pathway Investments Pty Ltd & Anor v National Australia Bank Ltd (No 3)* [2012] VSC 625, at [20] that it might be necessary in some circumstances for the amount paid to a funder to be justified before a court approves settlement, but that:

> *"[i]t is not for the court to express a view about the commercial desirability of the quantum paid to the litigation funder under [the funding] arrangements*".

See also *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41 (**Fostif**) Gummow, Hayne and Crennan JJ said at [92]:

> *[T]o ask whether the bargain struck between a funder and intended litigant is 'fair' assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity*.

[243] *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289 [49], per Lee J, citing the following passage from *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 182-183 [47]-[48], per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ:

> *… where a man signs a document knowing that it's a legal document relating to an interest in property, he is, in general, bound by the act of signature. Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read or understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is*

*contractual relations freely arrived at in the absence of any complaint by a party to the contract"*[244] such as hardship, misrepresentation or misconduct does not sit conformably with the law of contract at common law or in equity.[245] Further, it causes a greater mischief[246] to the certainty and efficacy of promises made under contract in general and the commercial certainty that funders require in order to undertake the significant financial burdens and risks of funding representative litigation.

21.11 For example, in *Liverpool City Council v. McGraw-Hill Financial* Inc,[60] Lee J approved a 43% commission[247] through a funding equalisation order after considering that the statutory power to approve settlement[248] did not give the court power to interfere with the amount of a funding commission to make a settlement reasonable, or to alter a 'valid contract'[249] between parties (including a funding agreement).[250] Lee J noted that there were no objections or applications to set aside the agreement and that a large portion of the class were sophisticated institutional investors.[251]

21.12 Indeed, it is noted that over many centuries the Courts have developed an armoury of common law and equitable principles which allow contracts to be struck down in limited circumstances, which have been supported by additional statutory provisions. To give some relevant examples, these include the laws relating to misleading or deceptive conduct, misrepresentation, mistake, unconscionable conduct, rectification, unfair contract terms and estoppel.

21.13 We acknowledge, however, there are a diversity of judicial opinions on this issue and the position in Australia is unclear. In Australia there is an evolving line of authority to the effect that the Court already has the power under existing provisions of Part IVA to vary a litigation funder's commission.[252] In addition it has been accepted by some Courts that there is power to determine the percentage commission payable to a litigation funder in the context of a common fund order.[253] Since the seminal judgment

---

*that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief.*

*In most common law jurisdictions, and throughout Australia, legislation has been enacted in recent years to confer on courts the capacity to ameliorate in individual cases hardship caused by the strict application of legal principle to contractual relations. As a result, there is no reason to depart from principle, and every reason to adhere to it, in cases where such legislation does not apply, or is not invoked.*

[244] *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289, [50].
[245] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 182-183, [47]-[48].
[246] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 182-183, [47]-[48].
[247] A total commission of A$92 million out of a total settlement of A$215 million.
[248] *Federal Court Act of Australia 1976* (Cth), section 33V(2).
[249] *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289, [25].
[250] Jason Geisker and Dirk Luff "Australia" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (4th ed, Law Business Research, London, 2021) 1 at 10.
[251] Jason Geisker and Dirk Luff "Australia" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (4th ed, Law Business Research, London, 2021) 1 at 10 .
[252] See for example *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 at [7]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (receivers and managers appointed) (in liquidation) (No 3)* [2017] FCA 330 at [101]; *Mitic v OZ Minterals Ltd (No 2)* [2017] FCA 409 at [26]-[31]; *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in liquidation) (No 3)* [2017] FCA 650 at [105]; *Perera v GetSwift Ltd* [2018] FCA 732 at 365; although there remains some doubt about the issue as was recently noted by Lee J in *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511 at [12]
[253] See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; *Blairgowrie Trading Ltd v Allco Finance Group Ltd* [2017] FCA 330 at [96], [118]-[123].

of the Full Court in *Money Max*[254], common fund orders rapidly became an established feature of funded class actions, particularly in relation to shareholder claims, and were commonly sought in the context of those claims[255] until the High Court decision in *Brewster*.[256]

*"Opt out" class actions*

21.14 We accept that in an "opt out" proceeding it is entirely appropriate that the Court considers and decides what is a fair and reasonable commission to be recovered from the class in circumstances where not all class members have entered into retainers with the lawyer or funding agreements with a litigation funder. This is on the basis that members of the open class that have not entered any funding arrangement have not agreed to be bound by contractual terms. In our submission, Courts should be empowered to make a cost sharing order to ensure that all group members bear a proportionate share of the costs of the litigation so as to ensure they are *"shared fairly between the representative party and those group members who ultimately benefit from the representative proceeding".*[257]

21.15 We submit that the most appropriate mechanism to achieve that equity among the class, solicitor and litigation funders is by the operation of a cost sharing mechanism. Cost sharing mechanisms may take various forms such as a CFO or Funding Equalisation Order (**FEO**).[258] Cost sharing orders are not derivative of a contractual right under a funding agreement but arise as a separate order of the Court in an "opt out" or open class proceeding in which the class is comprised both by members who have entered a funding arrangement and those who have not. Accordingly, they are a different type of order: the power to order a cost sharing order is not coextensive with the power to vary or amend a funding agreement.

21.16 As was recognised by the report of the Australian Parliamentary Joint Committee on Corporations and Financial Services[259] CFOs were observed to provide the following benefits following concerns raised about their availability in *Brewster*[260]:

(a) Federal Court oversight of litigation funding agreements operates to effectively safeguard class members from onerous litigation funding commissions.[261]

[254] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148.
[255] For example, *Blairgowrie Trading Ltd v Allco Finance Group Ltd* [2017] FCA 330; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527; *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [22]; *Hall v Slater & Gordon Ltd* (proceeding VID1213 of 2016).
[256] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45. For an instructive background to the *Brewster* decision see Jason Geisker and Dirk Luff "Australia" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (4th ed, Law Business Research, London, 2021) 1 at 15.
[257] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 at [111] per Gagler J (in the minority).
[258] For an instructive discussion on the development and types of CFOs see *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 at [8]-[30] and *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.
[259] Australian Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020).
[260] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.
[261] Australian Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) [9.69].

(b) CFOs are implemented in a way that is fair and reasonable for class members, ensuring that litigation funders are less likely to benefit from windfall gains and that they address any prejudice to the parties. A related benefit is greater transparency of privately negotiated litigation funding agreements.[262]

(c) If CFOs were unavailable in open class actions in the Federal Court, the Federal Court's ability to exercise oversight of litigation funding fees is uncertain.[263]

(d) Privately negotiated rates tend to be generally higher than those permitted by the Federal Court, leading to significantly increased portions of resolution sums being awarded to funders.[264]

21.17 The High Court in *Brewster* foreclosed on the availability of making a CFO at the commencement of class proceedings pursuant to relevant statutory powers[265]. Following *Brewster* there have been at least six decisions of single judges of the Federal Court of Australia that have considered the availability of a CFO at a later stage in proceedings.[266] Most notably and recently the decision of Lee J in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)*[267] has clarified the position that CFOs are available, and within power, when made at the settlement approval stage of a proceeding and that there is power to make a CFO both under statue[268] and in equity.[269] Importantly, the decision reinforces the recent line of authority of Australian appellate courts[270] that the correct interpretation of *Brewster* does not eschew the availability of a CFO in all circumstances.[271]

---

[262] Australian Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) [9.70] The Law Council of Australia *Submission 67*, p. 8. See detail at footnote 103: It was noted that there is differing judicial opinion on whether the Federal Court presently has the power to interfere and vary the terms of a litigation funding agreement as demonstrated in, for example, *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, Ear*glow Pty Ltd v Newcrest Mining Limited* [2006] FCA 1433, *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In liq) (No 3)* [2017] FCA 330 and *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409.

[263] Australian Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) [9.72] The Law Council of Australia *Submission 67*, p. 8. See detail at footnote 103: It was noted that there is differing judicial opinion on whether the Federal Court presently has the power to interfere and vary the terms of a litigation funding agreement as demonstrated in, for example, *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, Ear*glow Pty Ltd v Newcrest Mining Limited* [2006] FCA 1433, *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In liq) (No 3)* [2017] FCA 330 and *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409.

[264] Australian Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) [9.72] Mr Daniel Meyerowitz-Katz, *Submission 1*, p 1

[265] *Federal Court of Australia Act 1976* (Cth), s33ZF.

[266] *Uren v RMBL Investments Ltd (No. 2)* [2020] FCA 647 (Murphy, J); *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423 (Lee, J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 (Beach, J); *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579 (Moshinsky, J); *Cantor v Audi Australia Pty Ltd (No. 5)* [2020] FCA 637; and *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 (Lee J). NB – only in *Cantor v Audi Australia Pty Ltd* did Foster J find that there explicitly was no power.

[267] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885.

[268] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 [2]-[20]; pursuant to *Federal Court of Australia Act 1976* (Cth), ss 33V(1) and in the alternative, 33V(2).

[269] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 [34]-[40].

[270] *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 (03 November 2020) (Middleton, Moshinsky and Lee JJ); 384 ALR 650 (at 661 [41] per Lee J, Middleton and Moshinsky JJ agreeing); *Brewster v BMW Australia Ltd* [2020] NSWCA 272 (at [28], [30], [41]–[43] per Bell P, Bathurst CJ and Payne JA agreeing).

[271] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 [14].

21.18 In Aotearoa New Zealand, such a power to make a costs sharing order may arise from the decision in *Southern Response v Ross* as an incident of Courts' supervisory jurisdiction[272].

21.19 The Australian experience of CFOs, as a specie of cost sharing order, has proven to be demonstrably to the benefit of class members. Professor Vince Morabito conducted a review of CFOs made in the period between *Money Max* and *Brewster* and found that the median commission rate was 21.9% and returns to class members were greater under CFOs[273]. As summarised in the PJC Report:

> *"…the commissions paid to funders, pursuant to such orders, ranged from 8.3 per cent to 30 per cent of the gross settlement sums, with the median commission rate being equal to 21.9 per cent of the gross settlement sum. Professor Morabito concluded that, in most cases, the median return to class members was greater when a common fund order was made. Professor Morabito contended that common fund orders benefit class members more than litigation funders* [274]

21.20 The push for statutory clarification of the Court's power to set commission rates under cost sharing orders is a logical extension of these jurisprudential developments in Aotearoa New Zealand and Australia. We note, that the draft *High Court Amendment (Class Actions) Rules 2008* (**Draft Class Action Rules**) sought to address this issue. If implemented, the power created by the Draft Class Action Rules at 34(3)(b)-(c)[275] and/or 34(4)(a)[276] may enable a Court to order a CFO. We agree that such a statutory power is warranted. To the extent that these provisions may also submit to an interpretation that they enable a Court to vary contractual terms in an "opt in" class action, we submit that they ought only apply to "opt out" open class actions and that the Court should respect the private bargains struck by competent and consenting contracting parties, subject to existing common law principles.

21.21 We acknowledge the intuitive attraction and simplicity of a statutory power to vary funder commissions. As was recognised by the ALRC, *"a statutory power was seen as a way to remove doubt about the Court's capacity to intervene regarding the terms and commissions set in funding agreements"*.[277] However, in our submission an overly interventionist approach and greater supervisory powers to amend funder commissions is likely to introduce commercial uncertainty for litigation funders and consequently reduce the availability of funding.[278]

---

[272] *Southern Response Earthquake Services Limited v Brendan and Colleen Ross* [2020] NZSC 126 at [82]: "…in deciding whether to approve a settlement, courts can consider the extent to which the settlement prejudices individual class members."

[273] Professor Vince Morabito, *Submission 6*, PJC (December 2020). See also Vince Morabito and Michael Duffy "An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions" [2020] NZ L Rev 377 at 393.

[274] Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry (December 2020) at [9.65].

[275] Rule 34(3) "(3) The factors that must be considered on an application for approval of a settlement are: …
(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…"

[276] Rule 34(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

[277] ALRC Report 134, 2018 [6.90].

[278] ALRC Report 134, 2018 [6.85]-[6.86]; AND NZLC IP45 [21.26].

21.22 We agree with the Commission that *"the use of common fund orders and court approval of settlement can provide a useful tool for reviewing the reasonableness of funding commissions in class actions"*[279], subject to the nuanced refinements to these approaches suggested in this submission.

**Funder profits**

21.23 We recognise that a principal concern of the Commission is to assess whether funder returns are *"excessive"*[280]. In our submission, recoveries that are proportional are not *"excessive"*.[281] Accordingly, we support the power of Courts to make a cost sharing order, in the circumstances outlined in this submission, which sets the funder's rate of recovery at a level which is proportional, fair and reasonable in all the circumstances.

21.24 The ALRC found that the median percentages of settlement funds received by funders and class members was around 30% and 51% respectively. However, a more recent study by Professor Vince Morabito, which included a larger sample size than the ALRC, concluded that recovery rates in Australian class actions were even lower:

> *"Subsequent research, undertaken by the first-named author with respect to a greater percentage of funded federal class actions than those canvassed by the ALRC relating to essentially the same period,* ***revealed a lower median share of gross settlement sums*** *for funding commissions and fees:* ***26 per cent in settled funded Part IVA proceedings****; and* ***25.5 per cent in settled funded Australian class actions****. The Federal Court has recently concluded that these "median percentages are a good proxy for an objective standard of what funding commission may be appropriate" (footnotes omitted).*[282]

21.25 As stated, recoveries that are proportional are not *"excessive"*, however the concept of proportionality involves more than simply comparing the amount payable to funders and lawyers with the overall resolution sum or the in-hand amount paid to class members.

21.26 The concept of proportionality involves broad consideration of the reasonableness of the commission rate in light of various features of the case and the context and manner in which it was resolved, as set out further below. Instead of enshrining a rigid and prescriptive approach (such as a cap or formula), which only takes into account the proportionality of the commission rate when compared to the resolution sum, in our submission the Court should retain a discretion to vary or set a commission rate or contingency fee after carrying out a broader inquiry as to proportionality.

[279] NZLC IP45 [21.26].
[280] NZLC IP45 [21.4].
[281] We submit that Maurice Blackburn and CFA are uniquely qualified to opine on these matters. As recognised by the ALRC Report 134, 2018 at [3.40]: "…from 1997 to October 2018, **Maurice Blackburn** acted for the class in the majority of finalised Part IVA proceedings (50%). There are, however, more law firms entering the field: of the eleven finalised proceedings in the first ten months of 2018, **Maurice Blackburn** represented 27% of applicants (either singularly or together with another firm). Seven other law firms represented one or more applicants in the other matters.
[282] Vince Morabito and Michael Duffy "An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions" [2020] NZ L Rev 377 at 393.

21.27 As previously stated, the Draft Class Action Rules[283] may provide the High Court with the discretion to fashion an appropriate cost sharing order. Such an inquiry could be guided by the introduction of general principles or factors which the Court would be required to consider in determining whether a commission rate is proportionate, including:

(a) the resolution sum;

(b) the aggregate amount in dispute, if it is able to be reliably estimated or determined;

(c) the risks of establishing liability, loss or damage;

(d) any significant procedural risks;

(e) the number of defendants and the level of adverse costs exposure;

(f) solvency risk and the ability of the defendant (and/or any insurer) to ultimately pay a verdict, award or settlement;

(g) the duration of the litigation and the stage at which it was resolved as well as the defendant's conduct of the litigation;

(h) the legal costs expended and to be expended, and the amount (if any) advanced by way of security for costs;

21.28 The principle of proportionality has been recognised in a number of Australian judgments that consider the proportionality of legal costs and commissions[284] Recently, *in Asirifi-Otchere v Swann Insurance*[285], Lee J held that the factual complexity of claims and inherent litigation risks are materially relevant factors to the judicial calculus required to determine an appropriate rate of recovery of a funding commission.[286] In reasoning to a Settlement CFO of 25%[287] Lee J found that what was appropriate and proportionate must not be arrived at with hindsight bias.[288]

21.29 The multi-factorial approach endorsed by Lee J to determine an appropriate commission rate critically weighs the risks and costs *"as they were"* at the commencement of proceedings. In particular, his Honour relied upon the reasoning of the Full Court in *MoneyMax*[289] and their comprehensive list of factors which, depending upon the circumstances, may be relevant in the fixing of a commission rate for a litigation funder upon resolution of a class action.[290] These are as follows:

[283] Draft Rule 34(3)(b)-(c) and/or 34(4)(a).
[284] See *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 at [99] and *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [148]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd* [2017] FCA 330 at [181].
[285] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885.
[286] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [27]-[28]
[287] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [37]-[39]: NB Lee J stated that a CFO of 25% sits toward the middle of the range for class actions in Australia (both historically and currently).
[288] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 [27]-[28].
[289] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Ltd* (2016) 245 FCR 191 (Murphy, Gleeson and Beach JJ)
[290] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Ltd* (2016) 245 FCR 191 [80]; referred to with approval in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 at [21].

(a) The funding commission rate agreed by sophisticated class members and the number of such class members who agreed. This indicates acceptance by astute class members of a particular rate.

(b) The information provided to class members as to the funding commission. This may be important to understand the extent to which class members were informed when agreeing to the contractual rate.

(c) A comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market. It will be relevant to know the broad parameters of the funding commission rates available in the market.

(d) The litigation risks of providing funding in the proceeding. This is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding.

(e) The quantum of adverse costs exposure that the funder assumed. This is another important factor and the assessment must recognise that the funder assumed that risk at the commencement of the proceeding.

(f) The legal costs expended and to be expended, and the security for costs provided, by the funder.

(g) The amount of any settlement or judgment. This could be of particular significance when a very large or very small settlement or judgment is obtained. The aggregate commission received will be a product of the commission rate and the amount of settlement or judgment. It will be important to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the fund.

(h) Any substantial objections made by class members in relation to any litigation funding charges. This may reveal concerns not otherwise apparent to the Court.

(i) Class members' likely recovery *"in hand"* under any pre-existing funding arrangements.

21.30 In the context of legal costs, Beach J noted in *Blairgowrie Trading Ltd v Allco Finance Group Ltd* that considerations of proportionality and risk ought not be tainted by hindsight bias.[291] We consider these considerations to be equally applicable to principles of proportionality as it applies to funder commissions, and set out his Honour's comments below:

> *"But what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved and the expected benefit. The Court should not approve an amount that is disproportionate. But such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. In the latter case, spending $0.50 to recover an expected $1.00 may be proportionate if it is necessary to spend the $0.50. In the former*

[291] *Blairgowrie Trading Ltd v Allco Finance Group Ltd* [2017] FCA 330.

> *case, the absolute dollar amount as a free-standing figure is an irrelevant metric. The question is to compare it with the benefit sought to be gained from the litigation. Moreover, one should be careful not to use hindsight bias. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved. Proportionality looks to the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed; at the later time, circumstances may have changed to alter the calculus, but that would not deny that the work performed and its cost was proportionate at the time it was performed. Perhaps the costs claimed can be compared with the known return, but such a comparison ought not to be confused with a true proportionality analysis. Nevertheless, any disparity with the known return may invite the question whether the costs were disproportionate, but would not sufficiently answer that question."*[292]

21.31 In conclusion, we submit that funder profits can be adequately controlled by promoting competition in the litigation funding market and relying on the existing supervisory jurisdiction of the Courts to regulate litigation funding arrangements, bearing in mind that the relevant considerations for the Courts differ depending on whether the proceedings are representative or not and, if so, whether they are "opt out" or "opt in" proceedings. Other jurisdictions provide a developed (and developing) body of case law which will prove instructive in regulating funder profits in Aotearoa New Zealand.

21.32 We support the introduction of Draft Class Action Rules to the extent that they simply clarify the Court's power to regulate litigation funding arrangements and make costs sharing orders in the context of opt-out representative proceedings. However, we do not support the introduction of specific statutory provisions regulating litigation funding arrangements on the basis that they are unnecessary, and may promote further uncertainty thereby jeopardising social justice outcomes.

[292] *Blairgowrie Trading Ltd v Allco Finance Group Ltd* Ibid, at [181].

## CHAPTER 22: Capital Adequacy

(54) What concerns, if any, do you have about the capital adequacy of litigation funders?

(55) Are you satisfied that the existing security for costs mechanism can adequately manage the concerns about funders' capital adequacy?

(56) If not, should the security for costs mechanism be strengthened? In particular:
a. Should there be a presumption or requirement that a litigation funder will provide security for costs in funded proceedings?
b. Should there be a requirement that security for costs is provided in a form that is enforceable in Aotearoa New Zealand?

(57) Alternatively, or additionally, should litigation funders operating in Aotearoa New Zealand be subject to minimum capital adequacy requirements? If so:
a. Should any minimum capital requirement be formulated by specifying a particular amount (and if so, what amount) or an amount correlated to a funder's financial commitments (and if so, what correlation), or in some other way?
b. Should minimum capital adequacy requirements be able to be satisfied if the funder's capital is held in another jurisdiction, or should the capital be held in Aotearoa New Zealand?
c. What other requirements, such as audit requirements, would be appropriate?
d. Who should oversee compliance with any minimum capital adequacy requirements?
e. What consequences should follow from a funder's non-compliance with any minimum capital adequacy requirements?

### Summary

- The existing security for costs mechanism, together with the Court's ability to make third party costs orders, adequately manages concerns regarding capital adequacy. To further strengthen the security for costs mechanism we support the introduction of a rebuttable statutory presumption that a litigation funder provide security for costs in representative proceedings and that the security be of a type that may be called upon and is enforceable in Aotearoa New Zealand.

- In order to allay concerns regarding enforceability we propose that funding agreements contain standard contractual terms which proscribe the governing law under the agreements to be the laws of Aotearoa New Zealand and that such agreements otherwise submit the funder to the jurisdiction of Aotearoa New Zealand for disputes under and in respect of the agreement.

- We submit that a minimum capital adequacy requirement is not necessary or effective where the combination of court oversight, third party costs order powers and a strengthened security for costs regime ameliorates the need for a capital adequacy regime

***54. What concerns, if any, do you have about the capital adequacy of litigation funders?***

22.1 Considering the lack of evidence of widespread or systemic misconduct by litigation funders, we do not have any material concerns about the capital adequacy of litigation funders operating in Aotearoa New Zealand.

***55. Are you satisfied that the existing security for costs mechanism can adequately manage the concerns about funders' capital adequacy?***

22.2 The existing security for costs mechanism adequately manages concerns regarding capital adequacy. It is our submission that the most efficacious and straightforward way of ensuring that funders are able to meet their financial obligations to pay adverse costs is by means of an order for security for costs.[293] To further strengthen the security for costs mechanism, we also support the introduction of a statutory rebuttable presumption in favour of security for costs in funded class actions. Refer to our submission on Question 56(a).

22.3 As noted by the Commission,[294] the power to order security arises:

(a) as an incident of the inherent jurisdiction of the High Court;[295] and

(b) from the High Court Rules (**HCR**) where it is "just in all the circumstances" and the plaintiff is based overseas or impecunious.[296]

22.4 While the Court's decision to make an order for security for costs must take into account a variety of factors and the mere fact that a funder is involved will not necessarily be determinative, we accept that the existence of litigation funding arrangements is a factor that may justify the Court more readily ordering security.[297] Indeed, this is even more the case where the Court has recognised that proceedings funded by an overseas funder may attract a security for costs order, reflecting the "evident policy" in HCR 5.45.[298]

[293] See also, Maurice Blackburn's submission to the VLRC, [12.1]-[12.5], referred to in the ALRC's Discussion Paper, [3.44] and Maurice Blackburn's submission to the ALRC Report 134, 2018 at [3.11]-[3.17].
[294] NZLC IP45, [17.35((d)] and more generally at Chapter 15.
[295] *Houghton v Saunders* [2015] NZCA 141 at [11].
[296] High Court Rules 2016, r 5.45.
[297] *Houghton v Saunders* [2015] NZCA 141 at [11].
[298] *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [13], referred to in NZLC IP45 at [22.12].

22.5 By way of summary, we agree with the current general disposition of the New Zealand Courts to the regulation of litigation funders (be they locally based or overseas based funders) and submit that the present armoury of the Court to order security and make non-party cost orders is sufficient to manage capital adequacy concerns.

22.6 Any concerns about the capital adequacy of litigation funders go to one of two issues for consideration, the first being the ability of the defendant to recover costs in the event that the claim is unsuccessful. The second being the ability of the funder to cover the plaintiff's legal fees and expenses.

22.7 As to the first concern, for the reasons set out herein,[299] we consider that solicitors have the ability and appropriate systems in place to manage and ensure timely payment of invoices and to alert the client to any issues of concern in respect of non-payment of invoices. Additionally, third party litigation funding agreements commonly have terms enabling funded clients to terminate the funding agreement in the event of an unrectified default in payment by the funder. It is not in the funder's commercial interests to allow an opportunity for the funding agreement to be terminated by reason of payment default as this exposes the funder to a range of other liabilities, including third party costs orders in favour of defendants and loss of security lodged by the funder with the court.

22.8 As to the second concern, the adequacy of any security for costs mechanism to protect the defendant in the event of an unsuccessful prosecution of the claim should be considered in light of the default position a defendant would face were the same proceeding to be brought without litigation funding support. In most circumstances, at least in a class action context, an unfunded representative applicant would not be required to (nor could they) provide security for costs as a condition of proceeding with the representative claim. In this way, the presence of a litigation funder assisting with the provision of security for costs provides a tangible benefit to the defendant, not ordinarily available in equivalent unfunded claims. From a defendant's viewpoint, the risks of recovery of adverse costs (should a claim ultimately fail) will generally be far greater in respect of unfunded claims.

22.9 We agree with the position on capital adequacy taken by the Supreme Court in *Waterhouse*:

> *"We do not consider that the financial means of the funder should be disclosed. The legitimate interest of the other party in this issue can be met by way of an application for security for costs. In any event, it is not the function or within the competence of the courts to provide any general regulation of litigation funders, including of their financial standing".*[300]

22.10 Further, we agree with the current cautious and incremental approach taken by the Courts to ensure that litigation funders are accountable and the exercise of judicial power to order security as the appropriate mechanism to ensure adequate adverse costs protection. As was cogently expressed by the Court of Appeal in *Houghton v Saunders*:

[299] See in particular para [22.36] below.
[300] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91 at [70].

> *"Security allows the court to hold the funder more directly accountable for costs. It is consistent with the Court's jurisdiction to award costs against a non-party which is sufficiently interested in the litigation. Security is all the more appropriate where the funder can avoid liability for future costs by terminating the funding agreement by notice before the litigation concludes."*[301]

22.11 The power of New Zealand Courts to make non-party cost orders[302] provides further protection and comfort to consumers (being representative plaintiffs and class members) and defendants alike that the Court has sufficient power to ensure litigation funders are accountable, discharge their obligations and are otherwise not abusive of the courts' processes. As observed by the Supreme Court in *Waterhouse* "*[c]osts orders can be made against funders, without needing to make out an abuse of process. Funders in New Zealand are thus subject to the discipline of the costs regime without the need to show an abuse of process.*"[303]

*Perspectives from the Australian experience*

22.12 The Australian experience has proved instructive of the complex, nebulous and often counter-productive benefits purportedly offered by a capital adequacy requirement reposed within a broader licensing regime.

22.13 By way of summary of our position, we agree with the conclusions of the ALRC and in particular the submission made to the ALRC by ASIC.[304] We particularise our submission further by saying:

(a) Following an extensive consultation and review process the ALRC ultimately recommended that improved court supervision and oversight of litigation funders via the security for costs mechanism was the most effective regulatory response.[305] The ALRC concluded that a strengthened security for costs regime that included a presumption in favour of security in funded representative proceedings *"would achieve at least the same level of consumer protection without the regulatory burden of a licensing regime."*[306]

(b) ASIC considered that *"the courts are better placed to regulate litigation funders, through court rules and procedure, oversight and security for costs"*[307] and that regulation of funders as a legal service rather than a financial service was consistent with overseas jurisdictions.[308] ASIC ultimately endorsed a regulatory approach which favoured security for costs to a licensing regime with proscribed minimum capital requirements[309] on the basis that *"the security for costs regime provides better insurance against*

[301] *Houghton v Saunders* [2015] NZCA 141 at [11].
[302] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91 at [52]. See also NZLC IP45 [15.50]-[15.56] and *Falloon (as executors of the Estate of the Late Bligh) v The Earthquake Commission* [2020] NZHC 874 [NZLC IP45] for example where non-party costs order was made against a funder.
[303] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91 at [52].
[304] Submission 72 to the ALRC, in particular at [62]-[71].
[305] ALRC Report 134, 2018 [6.37]-[6.42]. See in particular at ALRC Report 134, 2018 [6.42]: "*the ALRC has sought to ensure appropriate and effective consumer protection through improving court oversight of third-party litigation funders on a case-by-case basis.*"
[306] NZLC IP45 [6.37].
[307] ALRC [6.37], referring to ASIC, Submission 72 to ALRC.
[308] ASIC, Submission 72 to ALRC at [77].
[309] ALRC [6.32].

*financial loss than could be provided by licensing regime"*.[310] In weighing the benefits of this approach ASIC succinctly summarised the issues in the following terms:[311]

> "*In our view the existing mechanism for the court to order security for costs is a more targeted and effective way to address the risk that a litigation funder will not have adequate resources to meet an adverse cost order. Security for costs is intended to directly address the credit risks imposed on the defendant and the representative party. Security is paid by the funder in a manner acceptable by the courts (e.g. a bank guarantee).*
>
> *By contrast, as noted above, the AFS licensing financial requirements are not designed to act as security to meet a particular liability, nor are they intended to protect against credit risk more generally."*[312]

22.14 Wide-ranging statutory regulatory regimes are often perceived as a panacea; however, such regimes often unreliably protect against the harms they seek to police. In Australia, the limitations of the financial services licensing regime[313] to reliably protect consumers of financial services has drawn criticism of this type of *"root and branch"* regulatory approach.[314] As stated above, the ALRC abandoned its support for a comprehensive licensing regime for litigation funders, which included capital adequacy, partly on the basis that such regimes may under-deliver and introduce new regulatory costs on government and industry in circumstances where existing controls may already be sufficient:

> *"the ALRC is not satisfied that the benefits of a licensing regime, from the perspective of providing greater certainty that adverse costs orders will be met by litigation funders, outweighs the regulatory costs of imposing a licensing regime with minimum capital adequacy requirements on litigation funders."*[315]

22.15 The risk of impecuniosity is one of the inherent risks of litigation that all parties face.[316] Indeed, the Supreme Court in *Waterhouse* articulated this axiom of litigation in the

---

[310] See ALRC Report 134, 2018 [6.32], summarising the ASIC submission.
[311] See ALRC Report 134, 2018 [6.32].
[312] ALRC [6.32] referring to ASIC Submission 72 to the ALRC at [70]-[71].
[313] The Australian Financial Service Licence (AFSL) regime includes a capital adequacy requirement as a central component.
[314] See Submission 5, to the ALRC, Professor Tarr's (Queensland University of Technology); referred to in ALRC at [6.35]-[6.36]. In particular see [11] of Submission 5 regarding the inadequacy of the AFSL regime to prevent numerous financial collapses:

> *"Very significant limitations of the AFSL scheme have been readily apparent for two decades and despite parliamentary enquiries and commissions, increased regulation and increased educational requirements, recent financial adviser scandals continue. In Australia, for example, HIH Insurance, Storm Financial, One.Tel, Westpoint Group, Fincorp, Opes Prime, Timbercorp Securities, Octaviar Limited, National Australia Bank and the Commonwealth Bank of Australia resulted in substantial losses to retail clients over the past two decades notwithstanding the AFSL regime. The Ripoll Report in 200922 and the current Banking Royal Commission23 evidence the strong ongoing legislative concern with conduct and practices within the financial services sector but also give rise a legitimate concern that a licensing scheme analogous to the AFSL is not necessarily the panacea the Australian Law Reform Commission advocates."*

See also ALRC Report 134, 2018 [6.37].
[315] ALRC Report 134, 2018 [6.34].
[316] For plaintiffs, it is the risk of a defendant who is unable to discharge an award or settlement on account of enforceability issues, accessible assets, insolvency or other delinquency; for a defendant it is an impecunious plaintiff and its indemnifiers.

context of rejecting a submission that a funding agreement was an abuse of process where its terms may allow a funder to withdraw:

> *"We do not accept this submission. The possibility that a plaintiff may run out of funds and have to carry on proceedings without representation is one that all defendants face, whether the plaintiff is funded by a third party funder or not."*[317]

22.16 As was accepted by the ALRC, *"in such a situation, the consumer is unlikely to be in a worse position than if the funder had been unavailable to fund the matter in the first place."*[318] We submit, that such inherent risks cannot be completely removed from litigation but rather that the Court has sufficient power to satisfactorily ameliorate such risks through its existing security for costs power, strengthened by the additional protections we refer to in this submission. Indeed, the presence of litigation funders significantly reduces the cost risks of litigation to defendants and plaintiffs alike.

***56. If not, should the security for costs mechanism be strengthened? In particular:***
***a. Should there be a presumption or requirement that a litigation funder will provide security for costs in funded proceedings?***

22.17 Consistent with the position articulated above, we are in favour of a statutory presumption that security for costs is given in funded class action proceedings. A presumption in favour of security for costs in funded representative proceedings elides the controversy of capital adequacy[319] by making available, in the jurisdiction, an at-call security that protects the processes of the court and the legitimate adverse cost concerns of defendants. It is a far more targeted and effective method of providing assurance of the litigation funder's financial resources. Additionally, a statutory presumption avoids the significant regulatory burden that would otherwise be imposed upon funders and a putative oversight authority to comply with and regulate, respectively, a capital adequacy regime. That regulatory burden is magnified in Aotearoa New Zealand by the small size of its nascent litigation funding industry.

22.18 The mechanism of a rebuttable statutory presumption maintains the discretion of the Court to fashion appropriate orders based on the circumstances of each case and avoid circumstances in which ordering security may unreasonably deny access to the court of otherwise meritorious cases, such as cases that are in the public interest.[320]

---

[317] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91 at [54]. Importantly, the Supreme Court qualified this position at [72] by finding that the terms of a funding agreement and the contractual terms providing withdrawal may be relevant to a finding of abuse: "*if the terms in some way give legal control over the proceedings to the funder (for example, the ability to withdraw funding if the funded party refuses to obey instructions given). We also leave open the question of whether the terms of possible withdrawal may be relevant to an application for security for costs*"

[318] ALRC Report 134, 2018 [6.53].

[319] See for example, *Walker v Forbes* [2017] NZHC 1212 at [79]: "…the defendants would be required to enforce any claims they might have under the guarantee in the event that they succeed at trial. Security for costs avoids the need for this because the amount for which the security is given can be apportioned and distributed by the Court without the need for further enforcement procedures."

[320] Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.49] and NZLC IP45 [22.20].

It also allows the court to consider other matters, such as the strength and other facts and circumstances relating to the claim. The introduction of a presumption in favour of security was also recommended by the ALRC.[321]

22.19 Our support for a presumption in favour of security for costs in funded *representative* proceedings does not, however, extend to *non-representative* claims. We accept that there may be novel circumstances in which an order for security in a non-representative claim may have merit,[322] however, this is likely to be the exception and the approach of the Supreme Court in *Waterhouse* ought to prevail in such circumstances.[323]

22.20 We submit that if a presumption of security extended to *non-representative* claims it would likely have the perverse effect of stifling third party funding of lower quantum, single-party claims on the basis that the commercial investment metrics that inform a decision to provide funding in such cases may weigh against the provision of funding, thereby denying access to justice for otherwise meritorious claims.[324]

22.21 The unique aspects of representative proceedings, such as the significant legal costs typically incurred and the often protracted nature of this type of litigation justifies a departure from the usual approach to security that we submit should be taken in non-representative claims. We submit that a presumption of security in representative proceedings reduces costly interlocutory disputes at the commencement and throughout proceedings, reduces the burden on Courts that have to hear and determine these disputes and more equitably recognises the legitimate adverse cost risks faced by defendants.

*Costs lacuna – unpaid legal fees of a representative plaintiff*

22.22 We acknowledge, as noted by the Commission[325] and the ALRC[326], that an order for security for costs does not indemnity a representative plaintiff or class members for the unpaid legal fees of their solicitors in the event the funder fails. In respect of this issue we make the following observations:

[321] See ALRC Recommendation 12 and ALRC Report 134, 2018 at [6.48]-[6.53].
[322] For example, as occurred in the High Court proceeding *Walker v Forbes* [2017] NZHC 1212, where security for costs were ordered to be paid by the funder in that proceeding, arising from the complexity of a protracted single-party commercial dispute and concerns of recoverability.
[323] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91.
[324] Commercial considerations such as the overall quantum of claims, return on capital and the opportunity cost of capital may weigh against a decision to provide funding based on the funder's investment portfolio and available capital. For example, consider a single-party, low quantum liquidation proceeding in which the liquidator seeks funding. If the amount held on security is disproportionate to the return likely to be generated by it, and the funder is deprived of the use of that capital in addition to having to fund the liquidator and other costs of the proceeding the funding metrics may not support a decision to fund a proceeding. This is particularly the case in circumstances where the security is given in the form of cash.
[325] NZLC IP45 [22.16].
[326] ALRC Report 134, 2018 [6.43] and ALRC Discussion Paper, [3.49].

(a) we are not aware of any instances where a litigation funder suffered financial failure and the representative plaintiff's solicitors subsequently sought to enforce an obligation by the plaintiff personally to pay legal fees;[327]

(b) we are not aware of any instance where the financial failure of a funder in fact compromised the defendant's position in relation to costs in the event that the plaintiff's case failed.[328]

22.23 In order to address the costs lacuna that may subsist between the representative plaintiff, class members and their solicitor we support the recommendation of the ALRC[329] that a solicitor acting for the representative plaintiff, whose action is funded in accordance with third-party litigation funding agreement, be prevented from seeking to recover any unpaid legal fees from the representative plaintiff or group members.[330] This outcome may be achieved by a contractual term in the funding agreement which binds the solicitor. As was observed by the ALRC:

> *The solicitor's only recourse for the payment of their bills would be to the funder, protecting the representative plaintiff and group members from any liability to pay costs if the funder fails.*[331]

22.24 In an Australian proceeding, *Clasul Pty Ltd v Commonwealth of Australia* (proceeding NSD 368 of 2013) in which Maurice Blackburn acted as the plaintiff's lawyers, the funder did suffer financial failure. However, the applicant was not put in a position where it became obliged to pay legal costs, and the defendant's interests had been protected by further orders.[332]

22.25 Relatedly, there are strong commercial incentives for solicitors to select a litigation funder that, in their assessment, is competent and financially stable otherwise they will ultimately be left unpaid, which operates to the mutual benefit and protection of plaintiffs and class members. As was observed by the ALRC in recommending that solicitors do not have recourse to plaintiffs or the class for unpaid bills:

> *"…solicitors are in a better position than consumers to assess the financial viability of a funder as plaintiff firms are repeat users of litigation funding services and such firms understand the intricacies of class action litigation and its costs. The ALRC considers that this is a sound public*

[327] See *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119 (***Clasul***) at [45(d)] and [51]; In *Clasul*, for which Maurice Blackburn acted as the plaintiff's lawyers, the funder did suffer financial failure, however the applicant was not put in a position where it became obliged to pay legal costs, and the defendant's interests had been protected by further orders. See also, the Law Council of Australia's submission to the ALRC (Submission 62), referred to at ALRC Report 134, 2018 [6.45]:

> *The Law Council's submission also noted that their Class Actions Committee 'questions how commonly, in funded litigation, representative applicants are made directly liable for their own solicitors' costs under their retainer agreements".*

[328] Cf *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd; Jeffery & Katauskas Pty Limited v Rickard Constructions Pty Limited* [2009] HCA 43, where the funder had not provided an indemnity regarding adverse costs.

[329] See ALRC Report 134, 2018, p.163, Recommendation 11: *Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to prohibit a solicitor acting for the representative plaintiff, whose action is funded in accordance with a Court approved third-party litigation funding agreement, from seeking to recover any unpaid legal fees from the representative plaintiff or group members.*

[330] ALRC Report 134, 2018 [6.43], and See ALRC Recommendation 11.

[331] ALRC Report 134, 2018 [6.43].

[332] *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119, [45(d)] and [51].

> *policy position given the information asymmetry that exists between funders and the solicitor on the record on the one hand, and the representative plaintiff."*[333]

22.26 We recognise that the *Feltex*[334] class action reveals a weakness in this submission; the solicitors in that proceeding failed to foresee financial difficulties of the funder(s) involved, resulting in consequences for the plaintiff and class.[335] However, we submit that this may be distinguished on the basis that the proceeding is recognised as the one of the first representative proceeding under HCR 4.24[336] and therefore the solicitors were dealing with novel and complex issues and had only a protean understanding of class actions and their costs. We submit that solicitors in Aotearoa New Zealand have developed a sound and robust understanding of these issues in the intervening years and can competently assess these risks and source appropriate funding.

***56. If not, should the security for costs mechanism be strengthened? In particular:***
***b. Should there be a requirement that security for costs is provided in a form that is enforceable in Aotearoa New Zealand?***

22.27 We support a statutory presumption that a litigation funder provide security for costs in representative proceedings and that the security be of a type that may be called upon and is enforceable in New Zealand. We recognise that New Zealand Courts have accepted various forms of security.[337] The precise type of security that may be acceptable to the Court is a matter for the Court, however, we support the following, non-exhaustive, commonly accepted forms of at-call security that may be readily enforced in the jurisdiction:

(a) cash security paid into Court or held on trust;

(b) bank bond or guarantee;[338] and

(c) bank letter of credit or other forms of security acceptable to a respondent, such as an undertaking in the form of a deed of indemnity.

22.28 In order to further allay concerns regarding enforceability we propose that funding agreements contain standard contractual terms which prescribe the governing law under the agreements to be the laws of Aotearoa New Zealand and otherwise submit the funder to the jurisdiction of Aotearoa New Zealand for disputes under and in respect of the agreement.

[333] ALRC Report 134, 2018 [6.47].
[334] *Houghton v Saunders* (2008) 19 PRNZ 173 (HC).
[335] See NZLC IP45 [22.7].
[336] NZLC IP45 [3.11].
[337] See NZLC IP45 [15.48].
[338] See *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596.

*ATE insurance*

22.29 New Zealand Courts have typically rejected ATE insurance[339] as an adequate form of security arising from concerns regarding enforceability against underwriters.[340] The Court of Appeal in *Houghton v Saunders* did however highlight the narrow circumstances in which a deed of indemnity from the insurer may be permissible.[341]

22.30 We echo the concerns of the New Zealand Courts, the Commission[342] and the ALRC[343] regarding enforceability of ATE policies against foreign underwriters, associated enforcement costs and related ancillary litigation in respect of ATE insurance.[344] This is particularly the case where this sub-specie of insurance is typically underwritten by entities operating outside of New Zealand.[345]

22.31 Australian courts have been willing to accept a deed of indemnity from an ATE insurer as sufficient security in representative proceedings.[346] However, a concern has emerged in the Australian jurisdiction that the costs of such policies are simply passed on (either directly or indirectly[347]) increasing the cost of litigation for the class members and diminishing in-hand recoveries. We consider this outcome to be averse to the interests of class members.

22.32 In a recent class action settlement approval decision of the Federal Court in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, Lee J refused to approve reimbursement to a litigation funder for the costs of an ATE insurance policy on the basis that providing such an indemnity was the "central obligation" of a litigation funder.[348] In approving the settlement, which included a Settlement Common Fund Order for 25% of the gross settlement sum, his Honour made the following observation in respect of ATE recoveries:

---

[339] In the form of a deed of indemnity from an ATE insurer.
[340] *Houghton v Saunders* [2013] NZHC 1824 at [115] at first instance; and *White v James Hardie New Zealand* [2019] NZHC 188.
[341] Refer to NZLC IP45 at Chapter 15, footnote 102; *Houghton v Saunders* [2015] NZCA 141 at [51] where Dobson J highlighted the possibility that ATE "provided by an underwriter whose obligations are enforceable in New Zealand and who is deemed reputable and solvent" could be a sufficient form of security; and *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [15] cited with approval by Dobson J in Houghton v Saunders [2020] NZHC 2030 at [65].
[342] NZLC IP45 [22.15].
[343] Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.50] and [6.51], citing *Capic v Ford Motor Co of Australia Ltd* NSD724/2016.
Compare this approach with *DIF III Global Co-Investment Fund LP v BBLP LLC* [2016] VSC 401. Referred to in NZLC IP45 [22.21].
[344] *White v James Hardie New Zealand* [2019] NZHC 188 at [15].
[345] We are aware of one ATE underwriter that operates out of Australia, Liberty Insurance, and understand that many ATE underwriters are based in London.
[346] *DIF III Global Co-Investment Fund LP & Anor v BBLP LLC & ors* [2016] VSC 401 and *Australian Property Custodian Holdings Ltd (in liq) (rec and mgr appted) v Pitcher Partners* [2016] VSC 399. See also *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* [2017] FCA 699, where Yates J found that an ATE insurance policy alone, in the absence of a formal deed of indemnity form the insurer, was not sufficient.
[347] *Perera v GetSwift Limited* [2018] FCA 732; (2018) 263 FCR 1 at [193]; referred to in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 at [31].
[348] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 at [33]. See generally the discussion at [29]-[33].

> *"If the Court is going to build up an accumulated experience of making Settlement CFOs and be able to compare them, it is highly desirable that Settlement CFOs are made on identical bases by reference to gross settlement sums and stripping away "sundries" such as miscellaneous fees and, importantly,* ***the costs of the funder performing its central obligation to provide an indemnity against adverse costs****. If a funder wishes to defray their risk of performing that obligation it is a matter for the funder but, in my view, it is not a cost that ought be passed on separately to group members when the Court controls the remuneration."*[349] (emphasis added).

***57. Alternatively, or additionally, should litigation funders operating in Aotearoa New Zealand be subject to minimum capital adequacy requirements? If so:***
- ***a. Should any minimum capital requirement be formulated by specifying a particular amount (and if so, what amount) or an amount correlated to a funder's financial commitments (and if so, what correlation), or in some other way?***
- ***b. Should minimum capital adequacy requirements be able to be satisfied if the funder's capital is held in another jurisdiction, or should the capital be held in Aotearoa New Zealand?***
- ***c. What other requirements, such as audit requirements, would be appropriate?***
- ***d. Who should oversee compliance with any minimum capital adequacy requirements?***
- ***e. What consequences should follow from a funder's non-compliance with any minimum capital adequacy requirements?***

22.33 We repeat our submissions above and reiterate that a minimum capital adequacy requirement is not necessary or effective where the combination of court oversight and a strengthened security for costs regime ameliorates the need for a capital adequacy regime.

22.34 We agree with the Commission that capital adequacy requirements *"may not be conducive to a competitive market if overseas-based funders are unwilling to bring their capital into the jurisdiction. Capital adequacy requirements may create a barrier to entry and may advantage some incumbents in the market."*[350]

22.35 A minimum capital adequacy regime may discourage market entry and cause exit of some funders from the market and would likely have the consequence of stifling competition by favoring New Zealand-based litigation funders and large-scale litigation funders that are able to sustain the costs of maintaining a commercial presence and capital in the jurisdiction. Competition is the most effective mechanism for downward pressure on commissions and costs and regulatory decisions that reduce competition may have unintended outcomes on the accessibility of funding, the diversity of funding models to suit different litigation and increase the costs of litigation funding for plaintiffs and class members.

[349] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 at [33].
[350] NZLC IP45 [22.30].

22.36 Further, as noted above, the risk of solicitors not being paid for costs, or a portion of their costs, along the way is no different to the risk faced by solicitors acting for clients in ordinary unfunded commercial and civil litigation. Legal costs and expenses associated with conducting litigation on a "pay as you go" basis are commonly invoiced regularly throughout the course of the litigation (often monthly). Law firms and their principals are well versed in managing debtors and often have standard terms of engagement and sophisticated systems in place to manage outstanding invoices. In the unlikely event that a litigation funder defaults on its obligation to pay regular legal costs and disbursement invoices, those services can be terminated by the lawyers. Alternatively, arrangements might be agreed with the lawyer and the client to continue the litigation on a deferred or partly deferred basis. Either way, a capital adequacy requirement will not likely result in any practical difference in outcomes in these circumstances.

22.37 As the Commission noted, the ALRC did not favour capital adequacy requirements.[351] The ALRC concluded that security for costs and improved court oversight would achieve the same level of protection as a licensing regime with minimum capital adequacy requirements, but without the regulatory costs.[352] As to the observation[353] that when determining whether to make a security for costs order or the quantum of that order, a court may not be in a position to ascertain the extent to which a litigation funder has made funding commitments to multiple parties across multiple jurisdictions, that consideration should not be a factor that influences the making, timing or quantum of an order for security for costs. Just as litigation funders may subsequently take on other liabilities in respect of other unrelated litigation, they may also see other unrelated litigation they are funding be resolved or settled, thus improving their capital position. Litigation funders operating in Aotearoa New Zealand already owe obligations under the general law that provides adequate consumer protection.

*A broader policy perspective*

22.38 From a broader policy perspective, a few observations should be made as to the utility and practical impact and consequences of stricter regulatory requirements on any industry or profession.

22.39 *Firstly*, the introduction of ever-increasing stream of regulatory requirements will often not serve as an enhanced safeguard against corporate failures. Instead, enhanced regulations can often act as roadblock to competition and add to the compliance cost associated with the provision of services (or goods). These additional costs and lack of competition will ultimately be passed on to the consumer in the form of higher transaction costs. Regulation alone will not safeguard consumers from corporate failures. Regulation did not stop the last global financial crisis in 2008. In discussing the trend towards ever increasing levels of government regulation against their effectiveness in preventing failures, eminent Scottish historian and Milbank Family Senior Fellow at the Hoover Institution at Stanford University, Niall Ferguson, put it this way:

[351] NZLC IP45 Paper at [22.31].
[352] ALRC Report 134, 2018 at [6.34] and [6.37].
[353] See at 22.31 of the Law Commission Issues Paper | He Puka Kaupapa 45 *Class Actions and Litigation Funding*

> *The most striking feature of the global financial system is how little it has changed in a decade, despite the promulgation of thousands of pages of new financial regulations on both sides of the Atlantic.*[354]

22.40 In other words, regulation alone has not prevented past corporate collapses and it will not prevent them in the future.[355]

22.41 *Second*, it is contended that a focus on compliance with the intent of the law and the effectiveness of regulators, to ensure that any misconduct is subject to proportionate consequences, is of far greater value than simply increasing the regulatory burden. In its response to the Interim Report of the recent *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* in Australia, Treasury identified a number of key questions to be asked in relation to the problems identified in the Australian Banking, Superannuation and Financial Services Industry. Relevantly, half of Treasury's questions focused on:

(a) simplification of laws and regulations so that the intent is met, rather than merely its terms being complied with and how this can be done; and

(b) what more can be done to improve compliance with the existing law (and industry codes) and the effectiveness of regulators, to deter misconduct and ensure that grave misconduct meets with proportionate consequences.

22.42 The ability to encourage and obtain industry compliance with a simplified set of requirements is often more effective than having an elaborate series of regulations that are largely ignored or not enforced with any material consequence.

22.43 *Third*, following on from the second observation, in our view a far more effective tool for the protection of users of litigation funding and defendants to third party funded proceedings is:

(a) the provision of adequate security for costs, with a rebuttable presumption that security for costs be provided in third party funded litigation; coupled with

(b) the ability of the court to make third party costs orders against those third party litigation funders in appropriate circumstances.

2.43 Considering the lack of evidence of widespread or systemic misconduct by litigation funders we query the utility and administrative burden associated with annual audits, and whether the regulator should rather be empowered to require an audit on an as needs basis.[356] In doing so, we note the Commission's comments as to the potential for enforced capital adequacy regulation to impose a disproportionate regulatory

[354] See Niall Ferguson MA, D.Phil. , '*Many unhappy returns to the financial crash of 2008*' 16 September 2018, http://www.niallferguson.com/journalism/finance-economics/many-unhappy-returns-to-the-financial-crash-of-2008 accessed 8 March 2021.
[355] See also para [22.14].
[356] See also, Maurice Blackburn, Submission No 37 to Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, July 2018, 15-19 [3.5(d)].

burden, noting that this form of regulation was avoided in the UK for that reason, and the reasoning applies to more forcefully in the context of the smaller market of Aotearoa New Zealand.[357]

[357] NZLC IP45 at [22.47].

## CHAPTER 23: Regulation and Oversight

(59) Which option for the form of any regulation and oversight do you prefer, and why? For example should regulation and oversight of litigation funding take the form of:
- a. Industry self-regulation and oversight?
- b. Managed investment scheme requirements, overseen by the Financial Markets Authority?
- c. Tailored licensing requirements overseen by the Financial Markets Authority (or another existing regulator)?
- d. A tailored statutory regime, overseen by a new oversight body?
- e. Court approval of litigation funding arrangements?
- f. A combination of the above?

(60) Are there any concerns about litigation funding, or options for reform, that we have not identified? Is there anything else you would like to tell us?

23.1 Naturally, our submissions on the most suitable form of regulation and oversight follow from our submissions more generally in relation to the specific benefits and challenges associated with litigation funding. For ease of reference, we provide a very brief summary of those submissions as follows:

(a) In Chapter 18 (champerty and maintenance), we submit that the torts of maintenance and champerty should be abolished subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality.

(b) In Chapter 19 (funder control of litigation), we submit that existing curial oversight is adequate to manage the potential for funder control of litigation, although the requirement of certain minimum contract terms in litigation funding arrangements could further assist in regulating control of litigation by funders. While at first glance the notion of additional statutory powers of review may seem attractive, there are a number of countervailing considerations which outweigh any perceived benefits bearing in mind the nascent and evolving nature of litigation funding and class actions in Aotearoa New Zealand.

(c) In Chapter 20 (conflicts of interest), we support the current approach that parties should be able to privately contract and negotiate the terms of funding agreements. However, the status quo should be enhanced to ensure greater accountability, transparency and enforcement by the introduction of a regulatory approach that includes:

(i) a regulatory guide and mandatory conflicts management policy for litigation funders;

(ii) minimum contract terms;

(iii) annual reporting requirement of a funder to demonstrate compliance with the regulatory guide; and

(iv) appropriate oversight and enforcement by an appropriately empowered regulator or alternatively an annual external audit requirement.

(d) In Chapter 21 (funder profits), we support competition in the litigation funding market and caution against onerous regulation that could discourage market entry by funders. In the class actions context, we support the Commission's proposal for court supervision of funder commissions via cost sharing mechanisms such as common fund orders and court approval of settlements. We do not support a statutory power to vary funding commission but recognise that Courts should have power to make cost sharing orders that are proportionate, fair and reasonable and based on the exercise of judicial discretion.

(e) In Chapter 22 (capital adequacy), we submit that the existing security for costs mechanism, together with the Court's ability to make third party costs orders, is the most effective option to manage any concerns regarding capital adequacy. To further strengthen the security for costs mechanism we support the introduction of a rebuttable statutory presumption that a litigation funder provide security for costs in representative proceedings and that the security be of a type that may be called upon and is enforceable in Aotearoa New Zealand. However, we submit that minimum capital adequacy requirements are not necessary and in Australia were counselled against by the ALRC and ACCC, noting that the regulatory burden outweighs any potential benefits.

23.2 In short, our submissions are to the effect that judicial supervision, bolstered by targeted statutory provisions and regulatory guides to strengthen and clarify the law, are the most efficient and effective way to address the challenges associated with litigation funding while maximising competition, minimising barriers to entry and improving social justice outcomes.

23.3 We do not consider that managed investment scheme requirements or tailored licensing requirements overseen by the Financial Markets Authority (**FMA**) or another regulator are suitable for a litigation funding market in Aotearoa New Zealand given its small size and the significant regulatory burdens and impacts on market competition that these options would impose.

23.4 Similarly, we consider that industry-based regulation and oversight would likely be impractical given that most funders are presently based overseas and that a local industry association may be impracticable and provide only limited benefits.

23.5 Bearing in mind our previous submissions as to the best path for the development of class actions and litigation funding in Aotearoa New Zealand, below we deal more generally with the options for regulation and oversight raised by the Commission. In doing so, we note that the perceived benefits of any proposed regulatory system must be weighed against the regulatory burden and costs of imposing that system.

**Regulation of litigation funders as managed investment schemes – position in Australia**

23.6 In Australia, from 22 August 2020 and despite the recommendations of the ALRC, and ASIC that the regulatory burden would outweigh the benefits of doing so,[358] multi-party litigation funders must now hold an Australian Financial Services Licence (**AFSL**) and comply with Australia's managed investment scheme regime. The basis for this was explained by Christian Porter QC MP to be that *"[t]here is growing concern that the lack of regulation governing the booming litigation funding industry is leading to poor justice outcomes."*[359] The nature or source of that *"growing concern"* was not identified, other than a blanket statement that the median return to successful claimants utilising litigation funding are lower than those for successful claimants who don't. This is naturally the case given the service that litigation funders provide and the risks that they undertake. The concern identified by the Attorney-General is based on the patently false premise that all of the underlying claims would have been successful in the absence of litigation funding.

23.7 While the relevant regulations are ostensibly aimed at improving regulation of the class action funding landscape, on a strict reading, the regulations imposed are arguably much broader in scope and require an AFSL for funding of any action which has more than one plaintiff.[360]

23.8 Further uncertainty in the intended operation of the regulations has been highlighted by the Australian Restructuring, Insolvency and Turnaround Association in a submission update to the Parliamentary Joint Committee on Corporations and Financial Services dated 30 October 2020, including that *"[u]nfortunately, and despite the stated intent of the Explanatory Statement, the exclusion that external administrators relied on to access funding from 'funders' for insolvency actions has been removed (former R5C.11.1(1)(b))."*

23.9 Despite this uncertainty, it is telling that more than 6 months after the introduction of the AFSL and managed investment scheme requirements for multiparty funded actions in the Australian market, to our knowledge only two litigation funding participants have obtained an AFSL in response to the regulations. CFA has not yet committed to obtaining an AFSL for reasons including:

(a) the significant costs associated with the preparation of an application for an AFSL and associated compliance obligations, estimated to be well in excess of AUD$60,000;

(b) the significant ongoing regulatory burden of doing so; and

[358] ALRC Report 134, 2018 [6.37]-[6.42]. ASIC's Submission 72 to the ALRC Report 134, 2018 at [62]-[72].
[359] Attorney-General for Australia and Minister for Industrial Relations "Committee to examine impact of litigation funding on justice outcomes" (press release, 5 March 2020).
[360] *Corporations Regulations 2001 (Cth), 5C.11.01.*

(c) the potential for further amendment of the regulatory regime bearing in mind the Australian government:

(i) is yet to respond to the recommendations of the final Australian Law Reform Commission report[361] as to class action proceedings and third-party litigation funders tabled in parliament on 19 January 2019; or

(ii) is yet to respond to the recommendations of the Parliamentary Joint Committee on Corporations and Financial Service's report as to its inquiry into litigation funding and the regulation of the class action industry published on 21 December 2020

(iii) and remains in consultation with industry groups about the impact and operation of the present regulations.

23.10 The Australian experience highlights the significant regulatory burden, and potential to stultify competition in the litigation funding market, of imposing top-down regulation overseen by a government regulator. Such costs will ostensibly be significantly higher in New Zealand bearing in mind the smaller size of its litigation funding market, which the Commission identifies as having only five domestic based and six overseas-based participants.[362]

23.11 Further, we agree with the Commission's comments that:

(a) the regulatory settings for managed investment schemes were not designed with the regulation of litigation funding and funded litigation in mind; and

(b) litigation funding does not pose the same kind of risks to participants (claimants) as financial investments such as shareholding, because it is non-recourse funding.[363]

23.12 Finally, a consideration of this form of regulation must take into account the risks and detriments that the regulation seeks to avoid. As set out in previous chapters, there are no risks of litigation funding identified by the Commission that are not better suited to oversight by a combination of court supervision bolstered by further statutory and regulatory clarification and/or minimum contract terms.

**Tailored licensing requirements overseen by the FMA or an existing regulator**

23.13 While tailored licensing requirements may impose lesser burdens on individual market participants, we note that in the larger Australian market the ALRC did not recommend licensing in its final report, being persuaded by a submission from ASIC that the benefits of licensing regime would not outweigh the regulatory costs imposing a licensing regime, and concluding that the same level of consumer protection could be achieved through recommendations to improve court rules and procedure, oversight and security for costs. [364]

[361] ALRC Report 134, 2018.
[362] NZLC IP45 at [14.34].
[363] NZLC IP45 at [23.36].
[364] ALRC Report 134, 2018 at [6.32]- [6.34] and [6.37].

23.14 We completely agree with these findings, and submit that they apply with greater force to the smaller funding market of Aotearoa New Zealand.

**Tailored statutory regime with new oversight body**

23.15 For the same reasons as set out in the preceding paragraph, we do not consider that the perceived benefits of a tailored statutory regime could outweigh the regulatory burden and impact of such a regime on market competition.

23.16 Further, we do not consider that the establishment of a new regulatory oversight body in Aotearoa New Zealand will reduce the regulatory burden of overseeing litigation funders. We anticipate that this would likely increase costs and that the small size of the market would render this option impracticable.

**Court approval of litigation funding arrangements**

23.17 We do not understand the Commission to express any final view about imposing requirements for upfront court approval of litigation funding arrangements, although we agree with the Commission's comments that:

(a) the adequacy of litigation funding arrangements is not generally part of the threshold legal test applied in overseas class action regimes; and

(b) common fund orders (or in our submission, costs sharing orders more generally) could provide a form of court oversight and approval of litigation funding.[365]

23.18 With this in mind, we refer to the Commission to chapters 19 and 21 of our Submissions as to why court approval (or variation) of litigation funding agreements is not necessary or appropriate in Aotearoa New Zealand, with regulation and oversight being more effectively undertaken in the courts' existing supervisory jurisdiction, including the power to make costs sharing orders in "opt-out" representative proceedings.

[365] NZLC IP45 at [23.50] and [23.51].

## APPENDIX A – ABOUT MAURICE BLACKBURN:

Maurice Blackburn is a plaintiff litigation firm with 32 permanent offices and 31 visiting offices throughout tall mainland Australian states and territories. We employ more than 1,000 staff nationally, including approximately 330 lawyers who provide advice and legal assistance to thousands of clients each year.

In addition to specialised practice areas in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation and financial advice disputes, Maurice Blackburn has the largest and most experienced class actions practice in Australia. We currently act in around 20 class actions that are active and ongoing at various procedural stages (including settlement administration) in the Federal Court of Australia and also in the Supreme Court of Victoria and the Supreme Court of NSW.

Since the establishment of our class actions practice in 1998, we have acted in more class actions than any other plaintiff law firm, and we have obtained more than AUD $3 billion in compensation for class members in a range of different class actions including shareholder and investor cases, product liability claims, consumer actions, cartel cases and mass tort claims.

We have observed and been active participants in the development of class actions practice and jurisprudence since the infancy of the regime in Part IVA of the *Federal Court of Australia Act 1976* (Cth). We acted for the representative plaintiffs in the earliest class actions that involved third party litigation funders and since then we have worked with numerous domestic and international litigation funders as the funding industry and funding practices developed over time. Our firm also conducted the earliest shareholder class actions, and this type of class action continues to be a significant part of our practice.

Further details about Maurice Blackburn can be found at <https://mauriceblackburn.com.au/>

## APPENDIX B – ABOUT CLAIMS FUNDING AUSTRALIA:

Claims Funding Australia Pty Ltd (**CFA**) is the litigation funding arm and wholly owned subsidiary of Maurice Blackburn – Australia's number one class action law firm.

CFA is a litigation funding specialist headquartered in Melbourne with offices located through Australia. It forms part of the Claims Funding Group of companies which, since 2009, has provided third party litigation funding services across Australia, New Zealand, Japan, Canada and across Europe.

CFA, with the support of Maurice Blackburn, provides capital and strategic support to clients ranging from individuals, small businesses and liquidators through to large companies. CFA funds a broad range of commercial and insolvency related litigation including preference claims, insolvent trading claims, D&O and audit claims, misleading conduct and other forms of commercial litigation and native title claims. In New Zealand, CFA's experience extends to funding class actions and in doing so, CFA draws on the wealth of experience that Maurice Blackburn brings to bear. Specifically, in New Zealand CFA continues to fund the landmark representative proceeding of *Ross v Southern Response Earthquake Services Limited* which has led to judicial recognition and approval of "opt out" class actions in that jurisdiction.

Further details about CFA can be found at <https://www.claimsfundingaus.com.au/>