Te Aka Matua o te Ture
Law Commission

Setting the Scene:
The law reform project and the current review of class actions and litigation funding

The Future of Class Actions Symposium

THURSDAY, 15 MARCH 2018

THE UNIVERSITY OF AUCKLAND BUSINESS SCHOOL

INTRODUCTION

1 Many thanks for the opportunity to participate in this important and timely symposium on "The Future of Class Actions". The Law Commission is extremely grateful to Nikki Chamberlain, Lecturer in the Faculty of Law at the University of Auckland, for organising this symposium.

2 The symposium is timely because it coincides with the Law Commission's preliminary work in scoping the terms of reference for its new project on "Class Actions and Litigation Funding" which we received from our previous Minister, Hon Amy Adams, shortly before the election last year.

3 We are delighted we shall have the benefit of the experiences and insights to be provided today by the distinguished presenters, international and domestic.

4 My task is to set the scene for the presentations and "Q and A" panels. I propose to do this by briefly introducing the topics of class actions and litigation funding, summarising the law reform role of the Law Commission, explaining why we are reviewing the law relating to class actions and litigation funding and the approach we will take to the review, as well as referring to some of the issues the Commission intends to consider.

5 As you all know, a class action is a proceeding in which a group of plaintiffs with similar interests collectively sues one or more defendants. The proceeding is initiated by a lead plaintiff who represents the interests of the group. Class actions are particularly useful in cases where the amount recovered by each claimant will not be great, but the total sum recovered by a group of claimants is likely to be significant. In such cases the cost of bringing an individual claim is unlikely to be justified by the amount recovered. Consumer protection and investor claims often fall into this category.

6 Litigation funding is when a person who is not a party to a proceeding—such as a specialist litigation funding firm—provides funding to a party to cover some or all of the costs of the proceeding. Usually, the funder covers the plaintiff's costs in return for a share in the proceeds if the claim is successful. Litigation funding is not limited to class actions. It may, however, be particularly important in such cases. In the absence of assistance from a funder, there may not be a lead plaintiff who is willing or able to take on the burden of funding the litigation.

THE LAW REFORM ROLE OF THE LAW COMMISSION

7 I will go into more detail about these topics shortly, but first I would like to summarise briefly the Law Commission's role and explain our interest in class actions and litigation funding.

8 The Law Commission is established by Parliament under the Law Commission Act 1985 as an independent law reform agency.[1] There are four Commissioners and a staff of 13 full time equivalent legal and policy advisers.

9 The Commission's primary statutory function is to keep the law of New Zealand under review in a systematic way.[2] Currently, the Commission does this in large part through law reform references it receives from its Minister,[3] now Hon Andrew Little.

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1 Law Commission Act 1985, ss 4 and 5(3).

2 Section 5(1)(a).

3 Section 7(2).

10 In making its law reform recommendations, the Commission takes into account te ao Māori (the Māori dimension) and gives consideration to the multicultural character of New Zealand society.[4]

11 The Commission is also responsible for advising the Minister on ways in which the law of New Zealand can be made as understandable and accessible as possible.[5] This involves having regard to the desirability of simplifying the expression and content of the law as far as that is practicable.[6]

12 As an independent law reform agency, the Commission does not predetermine the outcomes of its references. It approaches the issues raised by its references dispassionately and considers a wide range of perspectives and options. This helps to ensure that its recommendations are formulated with regard to all of the relevant information and reflect sound public policy.

13 The Commission currently has four active references and one priority request for a Ministerial briefing in its programme. The four active references are: the second statutory review of the Evidence Act 2006 and ministerially-initiated reviews of the Property (Relationships) Act 1976, the Criminal Investigations (Bodily Samples) Act 1995, and Class Actions and Litigation Funding. Further information about these references may be obtained from the Commission's website: <www.lawcom.govt.nz>.

14 The priority request for a Ministerial briefing relates to the proposed treatment of abortion as a health issue. Exercising his power under the Law Commission Act,[7] the Minister has asked the Commission to provide advice on this issue within eight months.

15 When the Commission receives a law reform reference, it generally begins by identifying the key issues that will need to be considered as part of the project (including any issues relating to te ao Māori). This allows the Commission to draft terms of reference, which are confirmed in consultation with the Ministry of Justice and with the Minister's approval. The Commission then undertakes in-depth research of the relevant legal and policy issues, including the approaches taken in other jurisdictions, and often appoints expert advisory groups.

16 After a range of law reform options have been identified and analysed, the Commission usually prepares an issues paper and invites public submissions on it. The Commission also consults interested parties, including through meetings and—in the case of the Property Relationships Act review—a dedicated website. This consultation process assists the Commission to reach a final view on what law reform options to recommend. The Commission's recommendations for reform are set out in a final report to the Minister.

17 This is the process generally followed by the Commission for its large references. The Commission may, however, adopt different processes depending on the circumstances. For example, the abortion law referral will need to meet the Minister's request for priority.

18 The Commission also works closely with the Parliamentary Counsel Office and, where appropriate, may include draft legislation in its final report.

19 The Minister tables our reports in Parliament and the Government responds by deciding whether to accept or reject some or all of our recommendations. If the recommendations are accepted

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4 Section 5(2)(a). The Commission's Māori Liaison Committee provides valuable assistance in this regard (see <http://www.lawcom.govt.nz/engaging-māori>).

5 Section 5(1)(d).

6 Section 5(2)(b) and Douglas White "A Personal Perspective on Legislation: Northern Milk Revisited – Soured or Still Fresh?" (2016) 47 VUWLR 699 at 707–710.

7 Section 7(3).

and legislation is required to implement them, a Bill will be prepared and introduced in Parliament. Decisions whether to implement Law Commission reports therefore rest with the Government of the day and may take several years to make.[8]

20 Before the Government decides to introduce new legislation it will require the responsible Ministry, in the case of class actions and litigation funding the Ministry of Justice, to provide a Regulatory Impact Assessment in accordance with Cabinet's "Impact Analysis Requirements for Regulatory Proposals".[9] The assessment must address a range of matters, including:

- the status quo or "counterfactual"—that is, the situation expected to occur in the absence of any further government action;
- the policy problem or opportunity, including who is affected and how;
- any constraints on the scope for decision making;
- the options considered and the criteria against which they have been assessed;
- a summary of the expected marginal costs and benefits of the option, giving monetised values where possible;
- other likely impacts;
- stakeholder views;
- implementation and operation;
- monitoring, evaluation and review.

21 The Law Commission therefore recognises the importance of giving careful consideration to all of the available options and, to the extent possible, their costs and benefits before making law reform recommendations. The Commission is concerned to identify the likely outcomes of its recommendations so as to avoid unforeseen consequences.

22 References the Commission receives from the Minister vary in scope and size, ranging from requests for advice on a specific issue, such as the abortion referral, or reviews of relatively narrowly focussed areas of the law such as strangulation, which was completed within a year,[10] to extensive reviews of general areas of the law such as the original reviews of the law of evidence and trusts,[11] and our current review of the Property (Relationships) Act 1976.[12] These broad reviews can take several years to complete, especially when extensive consultation is warranted.

23 The principal features of the Law Commission's law reform role are therefore:

- its independence;
- the quality of its legal and policy research;

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8 For example, the Commission recommended in 1994 that a new Property Law Act be introduced (NZLC R29, 1994). Legislation implementing the Commission's recommendations was not passed until 2007 (Property Law Act 2007). The Trusts Bill that was introduced to Parliament in August 2017 implements recommendations made by the Law Commission in its report *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130), which was completed in September 2013.

9 See Cabinet Office Circular "Impact Analysis Requirements" (30 June 2017) CO (17) 3; Treasury *Guidance Note: Best Practice Impact Analysis* (30 June 2017) <www.treasury.govt.nz>; *Treasury Full Impact Statement Template* (30 June 2017) <www.treasury.govt.nz>.

10 Law Commission *Strangulation: The case for a new offence* (NZLC R138, 2016).

11 Law Commission Evidence (NZLC R55, 1999); Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013).

12 Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017).

- the comprehensive nature of its consultation processes; and
- the quality of its advice or final report and the ultimate implementability of its law reform recommendations.

WHY THE COMMISSION IS REVIEWING THE LAW RELATING TO CLASS ACTIONS AND LITIGATION FUNDING

24 During 2017 the Commission had the opportunity to make suggestions to its previous Minister on possible future references. In addition to considering possible references itself, the Commission consulted the wider law reform community for suggestions. As part of that process, the New Zealand Law Society[13] proposed that the law relating to class actions should be reviewed.

25 The Commission agreed with this suggestion, for reasons I will explain shortly. We also considered that the separate, but closely related issue of litigation funding should be included in the proposed reference. Litigation funding plays an important role in facilitating class actions, which would often be unable to proceed without third party funding. The previous Minister agreed that both class actions and litigation funding should be considered by the Commission, and referred the current project to us. That reference has now been confirmed by the new Minister, Hon Andrew Little.

26 There are a number of compelling reasons why it was considered opportune for the Commission to review these issues now. Our laws are lagging behind other jurisdictions we usually compare ourselves with, such as Australia and the United Kingdom. Practitioners, judges and commentators have argued that the absence of a regulatory regime for class actions and litigation funding in New Zealand is creating inefficiencies in the court system and uncertainty for court users.[14] The Feltex litigation, for example, involved more than 20 interlocutory and costs judgments over a five-year period.[15]

27 Both class actions and litigation funding have the potential to enhance access to justice and strengthen the rule of law. They may allow people to enforce their legal rights in situations where it would otherwise be difficult to do so. Class actions may also increase efficiencies in the court system by allowing similar claims to be determined together rather than in separate proceedings.

28 There are, however, also risks and costs associated with both class actions and litigation funding. For example, class action proceedings may take longer and cost more to resolve than individual claims due to the complex procedural issues involved. There is a risk that "opt-out" class actions, which require potential class members to take a positive step to exclude themselves from the

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13 The New Zealand Law Society has a well-established role in law reform: Lawyers and Conveyancers Act 2006, ss 65(e) and 67(1). It has a Law Reform Committee which initiates and reviews law reform proposals. It also has representatives on the Rules Committee.

14 See, for example, *Credit Suisse v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [49] (per Elias CJ); Justice Forrest Miller "Reflections on earthquake litigation (paper presented to New Zealand Insurance Law Association Conference, 15 September 2014) at 8–9; Justice Stephen Kós "Disaster & Resilience: The Canterbury earthquakes & their legal aftermath" (paper presented to Supreme & Federal Courts Judges Conference, Brisbane, 26 January 2016); Justice Lynton Stevens "Court of Appeal jurisdiction needs review" (2016) 895 Law Talk 22; Anthony Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" [2015] NZLR 73; Tom Hallett-Hook "Class actions under New Zealand's representative rule: Ingenious Solution or inadequate to the task?" (LLM Thesis, University of Toronto, 2015) at 2–3; Chris Patterson "Class actions in New Zealand: The necessity for introducing a class action regime" (2016) 5 JCivLP 20; Rachel Dunning "All for One and One for All: Class Action Litigation and Arbitration in New Zealand" (2016) 3 PILJNZ 68; The Rules Committee "Minutes of meeting held on 12 June 2017" (C 31 of 2017) Courts of New Zealand <www.courtsofnz.govt.nz> at 5–7.

15 Some of the procedural history is summarised by Elias CJ in *Credit Suisse v Houghton*, above n 14, at [14]–[48].

proceeding, might prejudice unwitting class members. Litigation funding raises questions of fairness, both to the defendant (for example, if the funder has insufficient capital to meet a costs order) and to the funded plaintiffs (if the funder's interests conflict with theirs or if the terms of the funding agreement are unfair).

29 Because of the complex nature of these issues, it is important that any legislative regime for class actions and litigation funding be introduced only after careful research, policy analysis and consultation. This process should be informed by experiences in other jurisdictions that have introduced class actions regimes, of which there are many. It should also take account of recent developments in case law and practice. This is precisely the kind of task that the Law Commission is well-placed to perform.

30 Against that background, it is perhaps useful to provide an overview of the current state of law and practice in New Zealand. I hope this will help to frame the presentations and discussions that we will be hearing today, as well as providing some further context for the review the Commission is undertaking.

Class actions: the New Zealand position

31 There is currently no detailed legislative regime for class actions in New Zealand. Rule 4.24 of the High Court Rules permits a plaintiff to sue "on behalf of, or for the benefit of, all persons with the same interest in the subject matter of the proceeding" with the consent of those persons or as directed by the court.[16] Proceedings initiated under this rule are commonly referred to as "representative proceedings". In contrast to most comparable jurisdictions, which have detailed legislative class actions regimes,[17] there are no further rules establishing how representative proceedings should be managed.

32 Rule 4.24 was not developed with modern class actions in mind.[18] It had a much narrower purpose, as is evident from the requirement that the represented persons must have the "same interest" (rather than some common interests) and that the proceeding must be on behalf of "all persons" with that interest (rather than only those who choose to take part). The provision was inherited from England, where representative proceedings were developed by the Court of Chancery in the late 17th and early 18th centuries.[19] The rule has stayed largely the same since it was first enacted in 1873.[20] The requirement that all represented parties have the "same interest" was strictly applied, so that damages claims, for example, could not usually be made.[21]

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16 High Court Rules 2016, r 4.24.

17 Including, for example, Australia (at a federal level and in some states – see Federal Court Act 1976 (Cth), Part IVA; Civil Procedure Act 2005 (NSW), Part 10; Civil Proceedings Act 2011 (QLD), Part 13A and Supreme Court Act 1986 (VIC), Part 4A); England and Wales (opt-in group proceedings have been permitted since 2000 under the Civil Procedure Rules, Part 19, while opt-out class actions for certain competition law claims were introduced under the Consumer Rights Act 2015, Schedule 8, Part 1); the United States (Federal Rules of Civil Procedure, r 23 and state legislation); and Canada (at the federal level and in all states except Prince Edward Island: Federal Court Rules SOR/98-106, Part 5.1; Code of Civil Procedure, CQLR, c C-25.01, Book VI, Title III; Class Proceedings Act 1992, SO 1992, c 6; Class Proceedings Act, RSBC 1996, c 50; Class Proceedings Act, RSA 2003, c C-16.5; Class Proceedings Act, RSNS 2007, c 28; Class Actions Act, SNL 2001, c 18.1; Class Proceedings Act, RSNB 2011, c 125; Class Actions Act, SS 2001, c C-12.01; Class Proceedings Act, CCSM, c C130).

18 See the discussion in Stephen C Yeazell "Group Litigation and Social Context: Toward a History of the Class Action" (1977) 77 Colum L Rev 866 at 867–871. The earliest representative proceedings in the English Court of Chancery involved disputes between lords and tenants, or vicars and parishioners. For example, one early claim concerned whether the lord of the manor was entitled to hunt on land currently used by his tenants (*How v Tenants of Bromsgrove* (Ch 1681) 23 Eng Rep 277). The members of the groups represented in these cases were often defendants, rather than plaintiffs. They all shared identical interests in the proceeding and consented to being represented by the named parties.

19 Above n 18.

20 Supreme Court of Judicature Act 1873 (UK), Rules of Procedure, r 10. See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Portland, 2004) at 77.

21 See, for example, *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA).

33 Other jurisdictions that inherited the representative proceeding rule have since introduced specific regimes to facilitate modern class actions. The United States has had a broad, "opt-out" class actions regime since 1966.[22] An "opt-out" regime is one in which persons falling within the identified class are automatically included as a class member (and are therefore bound by the result of the proceeding) unless they actively opt out of the proceeding. Australia has also had an opt-out class actions regime in the Federal Court since 1992.[23] Even England, where the representative proceedings rule originated, has allowed group proceedings on an "opt-in" basis (with lower commonality requirements than under the old representative proceeding rule) since 2000.[24] In 2015 it legislated to allow opt-out class actions for breaches of competition law.[25]

34 By contrast, in New Zealand representative proceedings continue to be governed solely (in legislative terms) by r 4.24. In recent years, however, the courts have applied the rule much more liberally in an attempt to cater for a more modern style of group litigation. In *Credit Suisse Private Equity LLC v Houghton*, Elias CJ and Anderson J emphasised the need for a purposive interpretation of r 4.24 to allow representative proceedings to be a "flexible tool of convenience in the administration of justice".[26] The words "the same interest" have been interpreted as extending to any case where there is at least one "common issue of fact or law of significance for each member of the class represented".[27] Remaining issues that are not common between all class members can be resolved on a sub-class or individual basis.[28] These developments in the courts have allowed class action–style proceedings to become a more regular feature of New Zealand's legal landscape.[29]

35 There have been previous attempts to introduce a class actions regime in New Zealand. Beginning in 2007, the Rules Committee prepared a draft Class Actions Bill and accompanying amendments to the High Court Rules.[30] The Bill was based in large part on Australian Federal and Victorian legislation. The Committee sought to ensure consistency between New Zealand and Australia as far as possible, since proceedings regarding the same complaint might be commenced in both jurisdictions. The Bill was provided to the Minister of Justice in 2009.

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22 Federal Rules of Civil Procedure, r 23. The rule was originally promulgated in 1938 (based on a longstanding rule of equity) but at that stage envisaged a more limited form of representative action. It was substantially amended in 1966 to introduce an opt-out class action regime with more detailed procedural rules, including a certification requirement. See Joanne Blennerhassett *A Comparative Examination of Multi-Party Actions: The Case of Environmental Mass Harm* (Hart Publishing, Portland, 2016) at 26; Scott Dodson "An Opt-In Option for Class Actions" (2016) 115 Mich L Rev 171 at 175–180; and David Marcus "The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980" (2013) 90 Wash U L Rev 587.

23 Federal Court Act 1976 (Cth), Part IVA (inserted by the Federal Court of Australia Amendment Act 1991 (Cth), s 3).

24 Civil Procedure Rules (UK), Part 19.

25 Consumer Rights Act 2015 (UK), Schedule 8, Part 1.

26 *Credit Suisse v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [2]. See also the majority judgment at [130] and [151]–[152].

27 *Credit Suisse v Houghton* at [53]; *Cridge v Studorp* [2017] NZCA 376 at [11] (leave to appeal to the Supreme Court declined in *Studorp Ltd v Unwin* [2017] NZSC 178).

28 *Credit Suisse v Houghton* at [55].

29 While there does not appear to be any empirical research on the number of representative actions in New Zealand, they do seem to be on the rise. A number of high-profile representative actions have been brought in recent years, including the Feltex shareholder litigation (*Houghton v Saunders* [2016] NZCA 493, [2017] 2 NZLR 189); the "Fair Play on Fees" claims against five banks (most of which have now settled out of court); the claim by Kiwifruit growers against the Crown alleging negligence in relation to the PSA virus (*Strathboss Kiwifruit Ltd v Attorney-General* [2016] NZHC 206); claims by home owners against James Hardie alleging cladding defects (*Cridge v Studorp Ltd* [2017] NZCA 376); and the "Southern Response" proceeding involving unresolved insurance claims resulting from the Canterbury earthquakes (*Southern Response Earthquake Services Ltd v The Southern Response Unresolved Claims Group* [2017] NZCA 489). See also MinterEllisonRuddWatts "Litigation Forecast 2017" (30 January 2017) <minterellison.co.nz> at 10.

30 The Rules Committee is a statutory body that was established by section 51B of the Judicature Act 1908 and is continued under section 155 of the Senior Courts Act 2016. The Committee has responsibility for procedural rules in the Supreme Court, Court of Appeal, High Court and District Court.

However, despite letters of support from the then Attorney-General, Hon Christopher Finlayson, the Bill was not progressed due to other government priorities.

36 The Rules Committee has continued to discuss class actions periodically and is currently considering promulgating new rules for representative proceedings.[31] There would, however, be limitations in this approach. As the Committee identified during the development of the draft Bill, there are a number of issues that could likely only be resolved through primary legislation. For example, the res judicata principle may need to be modified to ensure that members of a class, who would not be named parties to the proceeding, are bound by the result. It might also be desirable to suspend the running of limitation periods while a class action is in progress, so that a class member could pursue a separate claim if the action ultimately did not proceed or was unsuccessful.

Litigation funding: the New Zealand position

(i) Commercial litigation funding

37 While class actions have been common internationally for some time, the litigation funding business is a more recent phenomenon. It developed in Australia from the late 1990s and has expanded into other jurisdictions such as the United Kingdom, United States and New Zealand over the last decade. The volume of cases funded by commercial funders in New Zealand appears to be increasing. There are at least seven funding firms operating in New Zealand currently, of which four are New Zealand-based.[32] Another two are based in Australia[33] and one in the United Kingdom.[34]

38 Historically, litigation funding arrangements were prohibited as champertous.[35] Champerty, a form of maintenance that was both a crime and a tort at common law, is when a person with no prior interest in a proceeding agrees to fund it in return for a share of the proceeds. The public policy concern underlying the crime and tort was that an unscrupulous funder may encourage the plaintiff to bring an unmeritorious claim or attempt to influence the proceedings for their own ends (for example, by inflating damages or suppressing evidence). At the same time, they would assume no liability for costs if the claim failed, leaving the defendant with no recourse if the plaintiff is impecunious.

39 Champerty is not a crime in New Zealand, but it remains a tort.[36] In contrast England, Wales and some Australian states have abolished both the crime and the tort.[37] Most Canadian states, like New Zealand, continue to recognise the tort.[38]

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31 See, for example, The Rules Committee "Minutes of meeting held on 12 June 2017" (C 31 of 2017) Courts of New Zealand <www.courtsofnz.govt.nz> at 5–7.

32 The New Zealand-based funding firms we are aware of are LPF Group Ltd, Litigation Funding Ltd, Tempest Litigation Funders and Earthquake Services Ltd.

33 Litigation Lending Services and IMF Bentham.

34 Harbour Litigation Funding.

35 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [24].

36 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [26] (the Supreme Court declined to consider whether the tort should be abolished, since the proceeding was not an action in maintenance and champerty). See also *PriceWaterhouseCoopers v Walker* [2017] NZSC 151 at [119] per Elias CJ.

37 Criminal Law Act 1967 (UK), ss.13-14; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), s 6; Wrongs Act 1958 (VIC), s 32, and Crimes Act 1958 (VIC), s 332A; Civil Law (Wrongs) Act 2002 (ACT), s 221; Criminal Law Consolidation Act 1935 (SA), sch 11, ss 1(3) and 3.

38 An Act Respecting Champerty, RSO 1897, c 327; *McIntyre Estate v Ontario* (Attorney General) [2002] OJ No 3417 (Ont CA) at [25]; *Canadian Encyclopedic Digest* (4th ed, 2016, online) IX.7(a) Torts at §172.

40 In New Zealand the Law Commission recommended the retention of the tort in a 2001 Report,[39] although it acknowledged that almost all submitters urged its abolition.[40] The Commission's recommendation was made on the basis that "New Zealand commerce does not lack unruly corporations prepared to employ ruthlessly aggressive litigious processes against business rivals, hiding behind nominal litigants if need be".[41] If the tort was abolished, parties would be forced to rely on the "protean and amorphous tort of abuse of process."[42] The Commission also noted that "[a]lthough … there is no reported New Zealand case of a successful claim in tort founded on maintenance or champerty this does not establish that the tort fails by its very existence to function as a deterrent."[43]

41 Despite this recommendation and the fact that the tort has not been abolished, the courts in New Zealand and many other jurisdictions have now recognised that the availability of litigation funding can increase access to justice by mitigating the high costs of bringing a court proceeding.[44] They have therefore tended to minimise the role of champerty (in jurisdictions that still recognise it) and have given greater latitude to funding arrangements than was previously the case. While there remain risks that a litigation funding arrangement might lead to abuse of the court's processes or jeopardise the defendant's ability to recover costs, these risks are now addressed by the courts reviewing funding agreements and making security for costs orders in appropriate cases.[45]

42 This is not to say, however, that the role of maintenance and champerty is necessarily abrogated. The Chief Justice recently expressed the view, in her judgment in *PriceWaterhouseCoopers v Walker*, that the public policies behind the law of maintenance and champerty remain relevant.[46] She stated:[47]

> "…the law of champerty and maintenance is concerned … with the conduct of litigation "for their own interests" by those otherwise unconnected with the claim and with no existing property interest to protect. Where that is for profit, a personal or "bare" cause of action is effectively permitted to be bought and sold for the gain it returns to the funder. That circumstance in the absence of statutory regulation carries sufficient risk of oppression to the other party and risk of misuse of the function of the courts in vindication of wrongs to justify close scrutiny of the terms of the arrangement for consistency with the public policies behind the law of maintenance and champerty in preventing civil claims being treated as negotiable investments."

43 Litigation funding also raises questions of fairness as between the funder and the plaintiff(s). The funder may be entitled to such a large proportion of the proceeds that the plaintiffs receive

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39 Law Commission *Subsidising Litigation* (NZLC R72, 2001).

40 At [11].

41 At [11].

42 At [11].

43 At [11].

44 See, for example, *Saunders v Houghton*, above n 35, at [28] and [77]–[79]; *PriceWaterhouseCoopers v Walker* [2017] NZSC 151 at [122] (per Elias CJ); *Gulf Azov Shipping Co Ltd v Chief Humphrey Irikefe Idisi* [2004] EWCA Civ 292, [2004] All ER (D) 284 (Mar) at [54]; *Hamilton v Al Fayed* (No 2) [2002] EWCA Civ 665; [2003] QB 1175 at [47] and [70]; *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 ALR 58 at [65] and [147]–[148] (citing Mason P in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, (2005) 218 ALR 166 at [105]) and *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [180]–[183].

45 See, for example, *Saunders v Houghton* above n 35, at [32], [38] and [77]–[79]; *Walker v Forbes* [2017] NZHC 1212; and *Walker v Forbes* [2017] NZHC 2350.

46 *PriceWaterhouseCoopers v Walker* [2017] NZSC 151.

47 At [121].

little.[48] There is also a risk that the interests of the funder and the plaintiffs will conflict, particularly in relation to whether and on what terms a settlement should be accepted. The New Zealand Supreme Court has, however, emphasised that it is not the role of the court to "assess the fairness of any bargain between the funder and a plaintiff" or to act as "general regulators of litigation funding arrangements", which is a matter for legislation.[49]

44 These observations suggest it is timely to consider whether some clarification of the law, and potentially regulation of third party funding arrangements, is appropriate.

(ii) Conditional/contingent legal fees

45 Litigation funding is not provided solely by specialist funding firms. The use of conditional fee arrangements by lawyers, which can be seen as a type of litigation funding, is a common method of funding class actions in the United States. In New Zealand, conditional fees (also known as contingency fees or "no-win-no-fee" arrangements) are permitted in most cases if the fee is calculated in the normal way plus a premium to compensate for the risk assumed. Lawyers cannot, however, agree to receive payment as a percentage of the proceeds of a successful claim.[50]

(iii) Crowdfunding

46 Another more recent and currently unregulated development is "crowdfunding" of litigation, which is gaining increasing traction globally. Crowdfunding allows money to be raised from a large number of people who each contribute a relatively small amount, typically through Internet-based platforms. There are, broadly, two types of litigation crowdfunding. The first is when money is provided on a donation basis with no expectation of a monetary reward. This will usually occur in public interest cases. The second is when money is "invested" in the proceeding, with the promise of a monetary reward if the claim succeeds.

47 There have already been some examples of donation-based litigation crowdfunding in New Zealand, using generic crowdfunding websites such as Givealittle and Pledgeme. For example:

- In 2016–17 the "Justice for Blessie" Givealittle campaign raised over $150,000 to investigate the Department of Corrections' management of Tony Robertson, who was convicted of murdering Blessie Gotingco while under a supervision order.
- In 2014–15 a Givealittle campaigned raised $65,000 to help cover the legal fees incurred by journalist Nicky Hager as a result of a Police search of his house.
- In 2014 a Pledgeme campaign raised over $2,500 to challenge the Electoral Commission's finding that Darren Watson and Jeremy Jones's satirical song Planet Key was an electoral programme and could not be broadcast except as part of a news story.

48 There are now a number of websites specifically dedicated to litigation crowdfunding in the United Kingdom and United States, such as CrowdJustice and FundedJustice, which are both

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48 See, for example, the discussion in Victorian Law Reform Commission *Access to Justice – Litigation Funding and Group Proceedings* (Consultation Paper, July 2017) at [1.12].

49 *Waterhouse v Contractors Bonding*, above n 36, at [28] and [48].

50 Lawyers and Conveyancers Act 2006, ss 333–335; Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.8.

donation-based, and LexShares, a litigation investment platform. We can therefore reasonably expect that litigation crowdfunding will continue to grow in New Zealand.

49 The Commission's review is likely to consider the implications of these kinds of alternative third party funding mechanisms, in addition to more conventional litigation funding by specialist firms.

THE APPROACH THE COMMISSION WILL TAKE TO THE REVIEW

50 As I've already mentioned, the starting point for the Commission is to scope the project and settle terms of reference. These steps include preliminary research and consultation with interested parties and the Ministry of Justice, identification of issues for consideration, including te ao Māori issues, as well as attendance at conferences such as this one!

51 These steps are vital because the terms of reference need to be sufficiently broad to capture all relevant issues. Experience shows it is counterproductive to discover a relevant issue part way through a project.

52 The Law Commission's task in this review is to assess whether the potential benefits of class actions and litigation funding can be realised in a manner that outweighs any costs and disadvantages they might give rise to. To achieve this, we will need to consult widely and have regard to the diverse interests at stake.

53 We have already been in touch with, and received invaluable feedback from, a range of interested parties to assist us in identifying the issues we will need to consider. This includes:

- the Law Commission's Māori Liaison Committee, which assists the Commission in identifying te ao Māori issues;
- the New Zealand Law Society and Auckland District Law Society Inc;
- a number of practitioners in the field;
- litigation funding companies; and
- government agencies and crown entities, including Crown Law Office, the Commerce Commission, the Financial Markets Authority and the Ministry of Business, Innovation and Employment.

54 We will continue to engage with interested parties during the course of the review. We also intend to undertake a broader public consultation exercise. We will do this primarily by publishing an issues paper and seeking submissions on the questions raised in it. The timeframes for this process are not yet settled, but updates will be posted on the Law Commission's website as they become available. We hope to receive a wide range of submissions, and would encourage you all to engage in that process.

55 As I have mentioned, our own internal preliminary research has already highlighted how far we are lagging behind developments in other countries which enacted relatively comprehensive legislative regimes many years ago.[51] Indeed in several countries there are second stage reviews underway.[52] New Zealand has the opportunity to benefit from these reviews of the initial legislation.

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51 Above n 17.

52 For example, there are reviews currently underway in the Australian federal jurisdiction (Australian Law Reform Commission

56 We will also need to have regard to the costs and benefits of any recommendations we make, as this will be a significant factor in whether they can be implemented successfully. In this respect we look forward to benefiting from the insights of other speakers today, particularly those who are able to share real-world experience from other jurisdictions.

57 As I have noted, one of the functions of the Law Commission is to take into account te ao Māori and the multicultural character of New Zealand society when making its recommendations.[53] In the context of class actions and litigation funding, the Commission will need to consider what particular benefits and risks any developments might have for Māori and other cultural groups. On the one hand, enabling class actions and litigation funding may make it easier for these groups to have their legal rights recognised by spreading the costs of bringing proceedings.

58 On the other hand, there is a question whether some Māori may be prejudiced by opt-out class actions due to difficulties in notifying potential class members. Class actions involving Māori issues have the potential to affect a very large group. For example, claims relating to the Treaty of Waitangi could in theory include all Māori in the proposed "class". This may result in Māori being bound by a judgment without their knowledge or consent.

59 The Commission would welcome feedback on what particular impact class actions and litigation funding might have on Māori and other cultural groups, and how any negative impacts might be avoided or mitigated.

IDENTIFYING ISSUES FOR CONSIDERATION

60 In terms of the other issues that the Commission may need to consider during its review, many of these were grappled with by the Rules Committee when preparing its draft Bill. For example, how should the members of the class be identified? Is an opt-in or opt-out model preferable, or should both be available to suit different types of cases? These are some of the core issues that would need to be addressed in any class actions framework. The Committee was also conscious of the desirability of ensuring harmonisation between New Zealand and Australian laws, given the potential for the same course of conduct to result in class actions in both jurisdictions.

61 The Committee's work is therefore of significant value to us. Since it was completed, however, both law and practice has continued to develop in New Zealand and overseas. The Law Commission will therefore need to consider these matters afresh. New issues have also arisen that the Commission may need to consider. For example, should there be provision for "common fund orders" in class actions, requiring all plaintiffs to contribute to the costs of the proceeding? To what extent should the courts have a supervisory role in ensuring that litigation funding agreements are fair or that the funder has the financial means to meet costs orders?

62 These are just a few of the issues that our research has identified so far. Attached to my written presentation is a copy of our draft terms of reference, on which we would welcome any comments. I should emphasise that the document is very much a draft which has not yet been discussed with Ministry of Justice officials or received the Minister's approval. There is therefore a real opportunity for feedback now.

"Terms of Reference: Inquiry into Class Action Proceedings and Third Party Litigation Funders" (15 December 2017) <www.alrc.gov.au>); Victoria (Victorian Law Reform Commission *Access to Justice – Litigation Funding and Group Proceedings* (Consultation Paper, July 2017)) and Ontario (Law Commission of Ontario "Class Actions Research Project: Terms of Reference" (22 September 2017) <www.lco-cdo.org>).

53 Law Commission Act 1985, s 5(2)(a).

CONCLUSION

63 No doubt many of the issues I have mentioned, or that are included in our draft terms of reference, will be discussed by other presenters today. I look forward to hearing the perspectives of both presenters and participants.

64 The agenda for today is a full one. We have two further presentations before morning tea. Professor Vicki Waye from the University of South Australia will discuss some of the advantages and disadvantages of class action proceedings. Nikki Chamberlain, of the University of Auckland, will then provide an analysis of class actions in New Zealand. After morning tea, a panel of judges and practitioners will participate in a Q&A session about the current procedural approach in the New Zealand courts.

65 In the afternoon, we will hear about the approach to class actions in the United States and Australia, from Professors Brian Fitzpatrick and Vicki Waye. This will be followed by another Q&A session with international and domestic academics. Finally, we will finish the day with two presentations relating to litigation funding, the first from Dr Malcolm Stewart, and the second from Professor Rob Merkin QC and Associate Professor Chris Nicoll on costs and security against non-parties.

66 I have no doubt that today's presentations will stimulate much thought and discussion on this important area of law. I will now hand over to Professor Vicki Waye.

Class actions and litigation funding: Draft terms of reference: Not yet discussed with Ministry of Justice

The Law Commission will undertake a review of the law relating to class actions and third party funding of litigation in New Zealand, to determine whether reform is desirable.

The Commission will aim to make recommendations that:

- facilitate access to justice;
- strengthen the rule of law;
- reflect te ao Maori (the Māori dimension) and the multicultural character of New Zealand society;
- produce benefits for society that outweigh the potential costs (while recognising that further economic analysis may be required before the recommendations can be implemented);
- appropriately balance the interests of plaintiffs (or potential claimants) and defendants; and
- ensure the law is clear and accessible.

In conducting its review, the Commission will have regard to:

- the effect of rule 4.24 of the High Court Rules 2016 (which provides for representative proceedings) and associated case law;
- the draft Class Actions Bill prepared by the High Court Rules Committee in 2009;
- developments in case law and practice relating to third party funding of litigation; and
- approaches to class actions and third party funding of litigation in comparable jurisdictions.
- The Commission will begin by examining the following preliminary matters:
- whether and to what extent the law should enable class actions and third party funding of litigation; and
- whether any legislative reform or other policy changes are required to achieve that.

If the Commission concludes that reform is desirable, it will consider and make recommendations about matters including, but not limited to, the following:

- the extent to which the courts should have a role in supervising, managing or approving class actions and third party funding arrangements;
- the commencement of class actions, including the circumstances in which they should be permitted, who should be able to bring a claim and how the class should be defined;

- the appropriate procedure for determining class actions, including resolution of issues that are not common to all parties;
- the operation of limitation periods in relation to class actions;
- whether any regulatory requirements should be imposed on third party funders;
- issues relating to costs and settlement in class actions and other third party-funded proceedings and;
- assessment and payment of claims at the conclusion of a class action.

In the context of this review, third party funding of litigation includes, but is not limited to, funding by a commercial litigation funding firm. Other methods of funding litigation, such as conditional legal fees and crowdfunding, may also be considered where relevant.

REVIEW PROCESS

The Law Commission will engage with interested parties in both the public and private sector during the review, and will carry out a public consultation process. The Commission will also establish an expert advisory group to provide technical expertise and advice representing a range of perspectives. The Commission will report to the Minister with its recommendations by [TBC].

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