Te Aka Matua o te Ture
Law Commission

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Class Actions and Litigation Funding

Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa

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Foreword

Democratic society is defined not only by the existence and stability of its legal institutions but by their accessibility to citizens. In Aotearoa New Zealand, addressing procedural, financial and other barriers to accessing civil justice is a pressing contemporary policy challenge.

Te Aka Matua o te Ture | Law Commission is undertaking a first principles review of class actions and litigation funding. Our review forms part of wider and ongoing efforts to improve the affordability and efficiency of litigation. As a mechanism for collective redress, class actions offer the prospect that claimants with a factual or legal issue in common can group their claims together into a single proceeding. Litigation funding provided by a commercial funder may facilitate access to civil justice by covering some or all of a claimant's legal costs in exchange for an agreed percentage of any compensation awarded.

At the same time, class actions and litigation funding have attracted some public notoriety in comparable jurisdictions overseas, where media attention has focussed on issues such as the wider impacts of class actions on the business environment and litigation funders' commissions. The crucial question is whether the potential benefits of class actions and litigation funding in terms of promoting access to civil justice can be realised in a way that manages the risks and outweighs any disadvantages they may give rise to.

This Issues Paper summarises the various issues that arise and explores some of the options for addressing them. We seek submissions and comment from interested parties. The Commission is committed to taking into account te ao Māori across all of its law reform work. The class action, as a mechanism for facilitating collective redress, may be particularly amenable to analysis from Māori perspectives and we welcome submissions and comment in that regard.

The Commission will take into account the feedback we receive in response to this Issues Paper as we develop our recommendations. If the weight of submissions and our further analysis favours proceeding with class actions and/or litigation funding, we expect to publish a further paper with more detailed proposals for regulation in these areas.

Amokura Kawharu

Tumu Whakarae | President

Executive summary

THE REVIEW PROCESS AND THIS ISSUES PAPER

1. Te Aka Matua o te Ture | Law Commission is undertaking a first principles review of class actions and litigation funding. Our terms of reference ask us to consider whether and to what extent the law should allow class actions, and whether and to what extent the law should allow litigation funding having regard to the torts of maintenance and champerty.

2. In preparing this Issues Paper, the Commission has held preliminary conversations with key stakeholders from the legal profession, with relevant government agencies, and with commercial litigation funders based in Aotearoa New Zealand and overseas. We established an independent expert advisory group comprising of lawyers and academics, representing a diverse range of perspectives and experiences. We met with the group in August 2020. We have liaised with the judiciary and received comments from judges on several of the issues we address in this paper. We discussed our plans for the review with the Commission's Māori Liaison Committee. We also commissioned Capital Strategic Advisors (CSA) to provide expert high level analysis on the economics of class actions and litigation funding within a theorised base case of civil litigation.

3. It is evident from our initial conversations and research that there is no broad consensus on the desirability of a class actions regime or litigation funding, nor on the extent to which, or how, they should be regulated. It is primarily for this reason that a first principles review is needed. We note that a lack of consensus is a common feature of discussions on these topics elsewhere. In Australia for example, a recent Federal Parliamentary inquiry into class actions and litigation funding was prompted by concerns over issues such as the level of funders' commissions.[1] In relation to class actions, the policy challenge is neatly summarised by Jasminka Kalajdzic: "There is no doubt that class actions enable litigation that would otherwise not be brought. The much more difficult question is whether such litigation is socially useful".[2]

4. The purpose of this Issues Paper is to facilitate consultation and feedback on whether the potential benefits of class actions and litigation funding can be realised in a way that outweighs any risks and concerns. We are calling for submissions or comments until 11 March 2021. We will take into account the feedback we receive as we develop our recommendations. We expect to consult further on those recommendations, before delivering our final report to the Minister of Justice in the first half of May 2022.

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1 Attorney-General for Australia and Minister for Industrial Relations "Committee to examine impact of litigation funding on justice outcomes" (press release, 5 March 2020).

2 Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 6. See also Arthur R Miller "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'" (1979) 92 Harv L Rev 664.

Chapter 1 – Introduction

5. The Commission's review is taking place within a wider context of ongoing work across legal and policy environments to address barriers to accessing civil justice in Aotearoa New Zealand. One of the principal barriers is the high cost associated with civil litigation, which significantly impedes access to the courts. Other constraints include social barriers and the psychological stress that often accompanies the prospect of being a party to litigation.

PART A – CLASS ACTIONS

Chapter 2 – Introduction to class actions

6. A class action is characterised by the act of grouping claimants with a common factual or legal issue into a single proceeding so that their claims can be resolved together. This is normally achieved through the selection of one class member to act as a representative plaintiff on behalf of the class. All class members will be bound by the outcome.

7. The United States was the first jurisdiction to establish a class actions regime and Australia and Canada then followed. Class actions procedures have since spread globally. The precursor to class actions was the representative actions rule, which was developed in the Courts of Chancery in the late 17th and early 18th centuries. Many jurisdictions, including Aotearoa New Zealand, incorporated a representative actions rule in their civil procedure rules. Overseas, limitations in the representative actions rule provided impetus for the development of class actions regimes.

Chapter 3 – Group litigation in Aotearoa New Zealand

8. Aotearoa New Zealand does not have a class actions regime as exists in some overseas jurisdictions. Instead, proceedings that might be taken as a class action in comparable jurisdictions may be able to be pursued as a representative action under High Court Rule 4.24 (HCR 4.24). There has been a noticeable increase in the number of representative actions being brought in recent years. Reasons for this increase include the arrival of litigation funding in Aotearoa New Zealand.

9. In addition to representative actions under HCR 4.24, other methods of group litigation for seeking collective redress include civil procedure techniques (such as joinder and consolidation), statutory procedures under legislation such as the Companies Act 1993 and Human Rights Act 1993, proceedings brought by regulators, and avenues such as judicial review and test cases.

Chapter 4 – Problems with using the representative actions rule for group litigation

10. In the absence of a class actions regime, the representative actions rule in HCR 4.24 has been developed to include many of the features of a typical class actions. These features include preliminary court approval for a case to proceed as a representative action, the requirement for a common issue, opt-in and opt-out mechanisms for determining the represented group, active court supervision of proceedings, court approval of settlement, split trials for common issues and damages and the use of litigation funding.

11. Nonetheless, there are a number of problems with using HCR 4.24 to bring claims that are very similar to class actions. These include the lack of a public policy process to analyse the best way for delivering collective redress, and the lack of clear rules which specify when

cases should be allowed to proceed and how they should be managed. We think it is likely that the inadequacies in the current framework are preventing or limiting group litigation on some issues, including consumer issues and compensation claims following regulatory action.

Chapter 5 – Advantages of class actions

12. As noted, our review is taking place within a wider context of ongoing work to address barriers to accessing civil justice. We have identified three primary advantages of class actions regimes, the first of which is improving access to justice. Access to justice in this context includes access to the courts, a fair and transparent process, meaningful participation rights for class members and a substantively just result.

13. In addition, a class action is likely to improve efficiency and economy of litigation, particularly in respect of cases that would be economically viable to litigate separately. Class actions may also be able to play a role in strengthening incentives (for would-be wrongdoers) to comply with the law, although the extent to which class actions can have this effect is difficult to measure.

Chapter 6 – Disadvantages of class actions

14. One of the concerns about class actions regimes is that an increase in group litigation will increase the workload of the courts. The data shows that in overseas jurisdictions, class actions make up a small proportion of all cases filed. The number of cases filed may not accurately represent the additional workload, because class actions can require more intensive case management. That said, objecting to a class actions regime because it may increase litigation misses the point that class actions aim to increase access to justice.

15. Other concerns about class actions regimes include negative impacts for defendants in terms of the cost of defending the actions, and the consequential impact on the wider business and regulatory environment – particularly the availability and cost of directors and officers liability insurance (D&O insurance). Another concern is that class members' interests may be insufficiently protected, as they do not have the status of parties and may have limited opportunities to participate in the litigation.

Chapter 7 – A statutory class actions regime for Aotearoa New Zealand

16. We have formed the preliminary view that it would be desirable to have a statutory class actions regime in Aotearoa New Zealand. The key reasons for this view are:

    (a) Group litigation has a number of benefits and there is a demand for group litigation in Aotearoa New Zealand, but the current mechanisms (including HCR 4.24) are inadequate.

    (b) Alternatives to class actions such as alternative dispute resolution mechanisms would not provide the same level of access to justice as a class actions regime, and they might best be considered as supplements to such a regime.

    (c) Class actions improve access to justice, facilitate efficiency and economy of litigation and strengthen incentives to comply with the law.

    (d) Many of the disadvantages of class actions can be mitigated by the design of the regime.

(e) A statutory regime can provide greater certainty, predictability and transparency of the law.

Chapter 8 – Scope of a statutory class actions regime

17. There are several matters that would need to be addressed in the creation of any class actions regime for Aotearoa New Zealand. These include the scope of such a regime and the broad principles that would underpin it. Class actions regimes typically also have a number of core features. We discuss, present options for, and invite feedback on these matters.

18. In relation to scope, an initial issue is whether the regime should cover all areas of law or just some. Many class actions regimes are broadly applicable across all areas of the law, although some are subject to specific exclusions on issues such as immigration and environmental law. The United Kingdom has taken a different approach, and limits its class actions regime to competition law claims. Our preliminary view is that a general regime would be preferable and more likely to address the issues with the status quo. Other initial scope issues include which courts the regime should apply to, whether defendant class actions should be permitted, and whether HCR 4.24 should be retained.

Chapter 9 – Principles for a statutory class actions regime

19. On the basis of our research and preliminary consultations to date, we have identified a number of principles which we think should guide the development of a class actions regime. It is particularly important that any regime have clear objectives for the class action procedure, as these will drive the design of the legislation and the detailed drafting decisions. As noted, the key advantages of class actions are improving access to justice, promoting efficiency and economy of litigation, and improving incentives to comply with the law. Our preliminary view is that access to justice is the clearest advantage and should be the main objective of a statutory class actions regime.

20. Other principles we have identified include balancing the interests of plaintiffs and defendants; protecting the interests of class members, proportionality, reflecting and responding to the needs of contemporary Aotearoa New Zealand, recognising and providing for tikanga Māori, ensuring no adverse impact on other methods of group litigation, and providing clarity on issues arising in funded class actions.

Chapter 10 – Certification and threshold legal test

21. A key design question for any class actions regime is whether the court must first approve or certify the case proceeding in a class action form. Almost all jurisdictions with a class actions regime require a class action to be certified before it can proceed. A notable exception is Australia.

22. In jurisdictions where there is a certification requirement, an intending representative plaintiff will need to meet requirements such as: numerosity (there is a sufficient number of people within the class); commonality (there must be a nexus of factual or legal issues between the individual claims); and preferability or superiority (a class action must be preferable or superior to other possible methods of resolving the dispute). Some jurisdictions also undertake a preliminary assessment of the merits or cost-benefit analysis, require a litigation plan, and/or review any litigation funding arrangements, as part of the certification process.

23. Different jurisdictions apply different criteria to these requirements. None of the Australian class actions regimes have a certification requirement. The Australian regimes do, however, provide mechanisms for defendants to challenge the use of a class action on certain grounds.

Chapter 11 – The representative plaintiff

24. Another important design question concerns who can be the representative plaintiff. In some jurisdictions, assessing the suitability of the representative plaintiff is part of the certification process. In Australia, where there is no certification requirement, the inadequacy of a representative plaintiff may be grounds to discontinue a proceeding or substitute the plaintiff. Questions include whether a representative plaintiff must be a class member, and whether any class actions regime should allow government entities to be representative plaintiffs.

25. A particular issue arising in the context of Aotearoa New Zealand concerns the potential role of tikanga Māori in a class action involving a Māori collective where class members identify with the claim through a common issue, as well as with the collective through kinship. A person who can meet the general requirements for appointment as a representative plaintiff may not have a mandate, in terms of tikanga, to represent the people they purport to represent. Or, a person who does not meet the requirements for a representative plaintiff may have a mandate, in terms of tikanga, to represent those people.

26. In this context it may be appropriate to consider the role of tikanga in evaluating the representativeness of an intended plaintiff and whether tikanga considerations such as whakapapa, whanaungatanga and mana should apply in addition to, or instead of, any of the other requirements for representative plaintiffs.

Chapter 12 – Membership of the class

27. There are many different ways that class membership can be determined. Early representative action cases in Aotearoa New Zealand were brought on a universal basis, meaning everyone who came within the defined represented group would be bound by the decision. Subsequently, cases were brought on an opt-in basis, whereby members must choose to join the group. As recently interpreted by the courts, HCR 4.24 also permits representative actions to be brought on an opt-out basis, which requires potential members to positively opt out of the case by a certain date. It is possible for a class actions regime to provide for opt-in as well as opt-out procedures, depending on the case.

Chapter 13 – Adverse costs

28. A general principle of civil litigation in Aotearoa New Zealand is that the unsuccessful party must pay costs to the successful party. Whether an adverse costs rule should apply to a class actions regime is an important design question. This is because liability for adverse costs can affect the efficacy and utility of class actions. Given the potential for adverse costs to negatively affect the ability to bring a class action, we discuss several alternatives or variations to the usual rule. We also consider overseas examples of public class proceedings funds which have been established to indemnify representative plaintiffs against adverse costs orders. We do not, however, consider changes to civil legal aid, as this is outside the scope of our terms of reference.

PART B – LITIGATION FUNDING

Chapter 14 – Introduction to litigation funding

29. Litigation funding involves a person who is not a party to and has no interest in the litigation agreeing to fund some or all of a plaintiff's costs in exchange for a share of any sum recovered (the funder's commission). It is usually non-recourse, meaning that if the case is unsuccessful, the funder will be paid nothing. If the case is successful, the funder will be reimbursed for the costs of the litigation and will be compensated for bearing the financial risk of the case through payment of the commission.

30. The market for litigation funding in Aotearoa New Zealand is relatively small compared to jurisdictions like Australia and England and Wales. We have identified 40 cases in Aotearoa New Zealand in which the plaintiff received litigation funding. This number includes ten representative actions under HCR 4.24, comprising five consumer claims, three shareholder claims, one investor claim and one claim against the Government.

Chapter 15 – Regulation of litigation funding

31. Litigation funding is not specifically regulated in Aotearoa New Zealand. Instead, litigation funding is regulated to a limited extent by the torts of maintenance and champerty and principles that have developed by the courts in the exercise of powers to stay proceedings for abuse of process, order the provision of security for costs and order non-party costs. Some statutes such as the Fair Trading Act 1986 may also apply to the provision of litigation funding. In contrast, in some overseas jurisdictions, litigation funding is regulated as a financial service, through industry self-regulation, or through a combination of legislation and civil procedure rules that specify conditions that must be satisfied in order for funding arrangements to be enforceable.

Chapter 16 – Problems with the lack of regulatory certainty

32. The lack of specific regulation of litigation funding in Aotearoa is problematic. To date, the courts have adopted a cautiously permissive approach to litigation funding. However, the absence of regulation means that the parameters within which litigation funders should operate are unclear. In turn, this uncertainty may impact on the pricing and availability of litigation funding and, more broadly, raise rule of law concerns in the sense that predictability and transparency of laws are currently lacking.

Chapter 17 – Advantages and disadvantages of litigation funding

33. Litigation funders are profit-driven entities that invest in litigation in return for a commission. Litigation funding may therefore have limited application to public interest litigation, or litigation where non-monetary relief is sought. It does nevertheless have a role in improving access to justice by alleviating the costs and risks of litigation. The need for litigation funding to address financial barriers to accessing civil justice is increasingly being acknowledged, including by the courts. In particular, some representative actions and insolvency proceedings may be unable to proceed without it. Litigation funding may also allow plaintiffs to stay focussed on their business-as-usual activities and expand their litigation financing options.

34. The potential disadvantages of litigation funding we have identified are that it may increase litigation and thus the workload of the courts, it may encourage meritless litigation, and it

may impact on the availability and pricing of D&O insurance. However, an increase in litigation is not itself a reason to object to litigation funding and the courts have developed a range of mechanisms to prevent meritless cases from proceeding. We have not yet seen robust evidence that the increase in funded litigation across Australasia has caused a hardening of the D&O insurance market.

35. Our preliminary view is that litigation funding is desirable in principle and should be expressly permitted, provided that certain concerns can be adequately managed. These concerns relate to:

    (a) Funder control of litigation.

    (b) Conflicts of interest.

    (c) Funder profits.

    (d) Capital adequacy of funders.

Chapter 18 – Reforming maintenance and champerty

36. There is some uncertainty about whether litigation funding is contrary to the torts of maintenance and champerty, and whether the policy behind the torts is still relevant or is outweighed by access to justice considerations. To date the torts have not been relied on in Aotearoa New Zealand. It may be necessary to reform the torts if the policy behind them is no longer relevant or if the torts are having a chilling effect on the pricing and availability of litigation funding. Our preliminary discussions on this issue elicited mixed views.

37. If litigation funding is to be expressly permitted, then the tension between the torts of maintenance and champerty and litigation funding needs to be resolved. This could be achieved by leaving it to the courts to clarify and develop the law, retaining the torts but carving out a statutory exception for litigation funding, abolishing the torts or abolishing the torts but retaining the courts' ability to find a funding agreement unenforceable on grounds of public policy.

Chapter 19 – Funder control of litigation

38. Control of litigation by a third-party is one of the key rationales underlying maintenance and champerty. The concern is that a third-party who maintains litigation will attempt to control the litigation for their own ends. At the same time, litigation funders have a legitimate commercial interest in protecting their interest. Existing mechanisms for addressing funder control include the courts exercising their general powers to manage their proceedings, the torts of maintenance and champerty, and tax law. As a law reform option, parties could be encouraged or required to include minimum contract terms in their litigation funding agreements.

Chapter 20 – Conflicts of interest

39. In funded litigation, there is a tripartite relationship between the funder, the funded plaintiff, and the lawyer. In many instances, the interests of all three will align. However, in some instances, interests between a funder and the plaintiff, and between the lawyer and the plaintiff, may diverge and conflict. For example, misaligned interests between a funder and plaintiff may arise and create problems when one party wishes to settle but the other does not. Conflicts of interest may arise between a lawyer and plaintiff if the lawyer relies on the

funder for the continuation of the litigation, has been retained by the funder, or has some other commercial relationship with the funder.

40. Mechanisms for managing funder-plaintiff conflicts of interest include encouraging or requiring funders to include minimum contract terms that specify how any conflicts should be resolved, requiring funders to maintain conflicts management policies and regulating funder control. To some extent the existing rules that regulate professional conduct by lawyers will mitigate the risks of lawyer-plaintiff conflicts of interest. However, the rules were not designed to account for the particular types of conflicts that might arise in funded litigation. Options for reform include creating new professional rules or guidelines for lawyers, and prohibiting lawyers from holding commercial interests in funders.

Chapter 21 – Funder profits

41. Profiting from funding another party's litigation is one of the primary concerns underpinning the torts of maintenance and champerty. Excessive profits may risk diminished substantive justice for plaintiffs, and the misuse of the proper functions of the courts. Most litigation funding is conducted on a non-recourse basis, meaning the funder will only recover their costs and commission from the funded party if the claim is successful. As such, it is a relatively high-risk investment for funders. In return for assuming this risk, funders seek high returns. Litigation funding is therefore a relatively expensive product for consumers and it is not easy to draw the line between what is a reasonable profit and what is an excessive one. Options for managing the concern include facilitating increased competition in the litigation funding market, court supervision of funder commissions and direct regulation of the amount of permissible funder commissions.

Chapter 22 – Capital adequacy of litigation funders

42. When a case is funded by a litigation funder, the funder assumes responsibility to pay the plaintiff's legal costs. The funder will often also agree to meet any security for costs or adverse costs which are ordered against the plaintiff. If however the funder does not maintain access to adequate capital, then the case may be discontinued, the plaintiff may be left with significant unexpected liabilities, and plaintiff's lawyer may not be paid for their services. The defendant may be left with significant unpaid costs.

43. There are several possible options for reform to manage capital adequacy concerns. These include strengthening the security for costs mechanism to make it clear that a litigation funder will be expected to provide security, and that the security needs to be in a form which is enforceable in Aotearoa New Zealand. Regulations could also be introduced to require litigation funders to maintain a certain minimum level of capital. This approach will require determining what the minimum level should be, and whether the capital must be held within Aotearoa New Zealand.

Chapter 23 – Regulation and oversight

44. The lack of regulation of litigation funders and funding arrangements, and the tension between litigation funding and the torts of maintenance and champerty, means there is some uncertainty about the permissibility and parameters of litigation funding in Aotearoa New Zealand. Our preliminary view is that the current lack of certainty in the law, and the need for better transparency and accountability of litigation funder operations in relation to the above concerns, warrant a regulatory response. The need for regulation (or the

extent of regulation needed) may depend on the nature of the funded proceeding or the funded plaintiff. For instance, recent reforms in Australia have focussed on litigation funding of class actions. However, some concerns will be common across all kinds of funded proceedings.

45. Regulation of litigation funding may take different forms, and a combination of different forms of regulation may also be appropriate. Options for regulation include industry self-regulation (a model which operates in England and Wales), and regulation of funded litigation as managed investment schemes (whereby litigation funders would be required to hold a market services licence, similar to the position in Australia in relation to funded class actions). A new tailored licensing system for litigation funders could be created, or indeed a new statutory regime could be established with oversight by a new statutory body. A further option is that courts could be tasked with approving funding arrangements.

List of questions

CHAPTER 4: PROBLEMS WITH USING THE REPRESENTATIVE ACTIONS RULE FOR GROUP LITIGATION

Q1 What problems have you encountered when relying on HCR 4.24 for group litigation?

Q2 Which kinds of claim are unlikely to be brought under HCR 4.24 and why?

CHAPTER 5: ADVANTAGES OF CLASS ACTIONS

Q3 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?

CHAPTER 6: DISADVANTAGES OF CLASS ACTIONS

Q4 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?

CHAPTER 7: A STATUTORY CLASS ACTIONS REGIME FOR AOTEAROA NEW ZEALAND

Q5 Should Aotearoa New Zealand have a statutory class actions regime? Why or why not?

CHAPTER 8: SCOPE OF A STATUTORY CLASS ACTIONS REGIME

Q6 Should a class actions regime be general in scope or should it be limited to particular areas of the law?

Q7 Should a class actions regime be available in the District Court, Employment Court, Environment Court or Māori Land Court?

Q8 Should a class actions regime include defendant class actions?

Q9 Should the representative actions rule be retained alongside a class actions regime? For which kinds of case?

CHAPTER 9: PRINCIPLES FOR A STATUTORY CLASS ACTIONS REGIME

Q10 What should the objectives of a statutory class actions regime be? Should there be a primary objective?

Q11 Which features of a class actions regime are essential to ensure the interests of plaintiffs and defendants are balanced?

Q12 Which features of a class actions regime are essential to ensure the interests of class members are protected?

Q13 Is proportionality an appropriate principle for a class actions regime? If so, what features of a class actions regime could help to achieve this?

Q14 Are there any unique features of litigation in Aotearoa New Zealand that need to be considered when a class action regime is designed?

Q15 To what extent, and in what ways, should tikanga Māori influence the design of a class actions regime?

Q16 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?

Q17 Which issues arising in funded class actions need to be addressed in a class actions regime?

Q18 Do you agree with our list of principles to guide development of a class actions regime?

CHAPTER 10: CERTIFICATION AND THRESHOLD LEGAL TEST

Q19 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)?

Q20 Should a class actions regime contain a numerosity requirement? If so, what should this be?

Q21 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?

Q22 Should a representative plaintiff have to establish that the common issues in a class action are substantial or that they 'predominate' over individual issues?

Q23 Should a representative plaintiff have to establish that a class action is the preferable or superior procedure for resolving the claim?

Q24 Should a court be required to conduct a preliminary merits assessment of a class action or an assessment of the costs and benefits?

Q25 Should a representative plaintiff be required to provide a litigation plan?

Q26 Should a court consider funding arrangements as part of a threshold legal test for a class action?

Q27 Should a statutory class actions regime have any other threshold legal tests?

CHAPTER 11: THE REPRESENTATIVE PLAINTIFF

Q28 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?

Q29 Should a representative plaintiff be a class member or should ideological plaintiffs be allowed?

Q30 When should a government entity be able to bring a class action as representative plaintiff?

Q31 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?

CHAPTER 12: MEMBERSHIP OF THE CLASS

Q32 Should class membership be determined on an opt-in basis or an opt-out basis or should different approaches be available?

Q33 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?

CHAPTER 13: . x2dh2ŋ*Whlh

Q34 How has the risk of adverse costs impacted on representative actions?

Q35 Should the current adverse costs rule be retained for class actions or is reform desirable?

Q36 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?

CHAPTER 17: ADVANTAGES AND DISADVANTAGES OF LITIGATION FUNDING

Q37 Which of the potential advantages and disadvantages of permitting litigation funding do you think are most important, and why?

Q38 Is litigation funding desirable for Aotearoa New Zealand in principle?

CHAPTER 18: REFORMING MAINTENANCE AND CHAMPERTY

Q39 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?

Q40 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?

Q41 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?

CHAPTER 19: FUNDER CONTROL OF LITIGATION

Q42 What concerns, if any, do you have about funder control of litigation?

Q43 Are you satisfied that existing mechanisms can adequately manage the concerns about funder control of litigation?

Q44 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?

CHAPTER 20: CONFLICTS OF INTEREST

Q45 What concerns, if any, do you have about funder-plaintiff conflicts of interest?

Q46 Are you satisfied that existing mechanisms can adequately manage the concerns about funder-plaintiff conflicts of interest?

Q47 If not, which option for managing the concerns about funder-plaintiff conflicts of interest do you prefer, and why? For example:

a. Should funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?

b. Should funders be required to have a conflicts management policy?

c. Should funder control of litigation be regulated?

Q48 What concerns, if any, do you have about lawyer-plaintiff conflicts of interest in funded proceedings?

Q49 Are you satisfied that existing mechanisms can adequately manage the concerns about lawyer-plaintiff conflicts of interest?

Q50 If not, which option for managing the concerns about lawyer-plaintiff conflicts of interest do you prefer, and why? For example:

a. Should funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?

b. Should professional rules or guidelines be developed for lawyers acting in funded proceedings? If so, what rules or guidelines would be appropriate?

c. Should activities that are likely to give rise to lawyer-plaintiff conflicts of interest be prohibited? If so, which activities should be prohibited?

CHAPTER 21: FUNDER PROFITS

Q51 What concerns, if any, do you have about funder profits?

Q52 Are you satisfied that existing mechanisms can adequately manage the concerns about funder profits?

Q53 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)?

CHAPTER 22: CAPITAL ADEQUACY

Q54 What concerns, if any, do you have about the capital adequacy of litigation funders?

Q55 Are you satisfied that the existing security for costs mechanism can adequately manage the concerns about funders' capital adequacy?

Q56 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?

Q57 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?

CHAPTER 23: REGULATION AND OVERSIGHT

Q58 Which of the concerns with litigation funding, if any, warrant a regulatory response?

Q59 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?

Q60 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?