

Issues Paper | He Puka Kaupapa 45

Class Actions and Litigation Funding

**Ko ngā Hunga Take
Whaipānga me ngā Pūtea
Tautiringa**



Te Aka Matua o te Ture | Law Commission is an independent Crown Entity operating under the Law Commission Act 1985. The Commission was established to deliver the purpose set out in the Act, which is to “promote the systematic review, reform and development of the law of New Zealand”.

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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

Have your say

This Issues Paper sets out issues we have identified in relation to class actions and litigation funding. It is available online at www.lawcom.govt.nz.

We want to know what you think about the issues covered in this paper. Do you agree or disagree with the way the issues have been articulated? Are there additional issues you think should be considered? Please also explain the reasons for your views.

Submissions or comments (formal or informal) on our Issues Paper should be received by **11 March 2021**.

You can email your submission to cal@lawcom.govt.nz.

You can post your submission to
Review of Class Actions and Litigation Funding
Law Commission
PO Box 2590
Wellington 6140

WHAT HAPPENS TO YOUR SUBMISSION?

Te Aka Matua o te Ture | Law Commission will use your submission to inform our review and we may refer to your submission in our publications. We may publish all or part of your submission on our website. We will also keep all submissions as part of our official records.

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Glossary

Adverse costs	Adverse costs are costs which the court may order an unsuccessful party to pay to a successful party in a proceeding or interlocutory application to reimburse them for their legal costs. Adverse costs rules are sometimes also referred to as 'loser pays', 'costs follow the event' or 'costs shifting' rules.
ATE insurance	After-the-event insurance (ATE insurance) is a form of legal expenses insurance, purchased after a dispute has arisen, to indemnify the insured party in the event of an adverse costs order being made against them.
Certification	Certification is a preliminary stage where the court decides whether the case can proceed in class action form.
Champerty	Champerty is a tort (and in some jurisdictions, a crime) where a person who is not a party to and has no interest in the litigation, provides financial assistance to a party to a civil action in return for a share of any recovery. Champerty is a form of maintenance (defined below).
Class action	A class action is a form of group litigation. It is characterised by the grouping of claimants with a common factual or legal issue into a single legal 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, although all class members will be bound by the outcome. A class actions regime will usually have detailed legislative provisions or civil procedure rules.
Class Actions Bill	Between 2006 and 2009, the Rules Committee in Aotearoa New Zealand drafted a Class Actions Bill (and accompanying High Court Rules). The Government chose not to progress the Bill at that time.
Conditional fee	A conditional fee is a fee agreement where some or all of the lawyer's fees and expenses are payable only if the lawyer achieves a successful outcome. In Aotearoa New Zealand, a conditional fee may include a 'premium' to compensate the lawyer for the risk of not being paid at all and for the disadvantages of not receiving payment on account, provided it is not calculated as a proportion of the amount received by the client.
Contingency fee	A contingency fee is a fee arrangement where, if the matter on which the lawyer acts is successful, the lawyer's fee will be calculated as a proportion (usually a percentage) of any sum recovered. A contingency fee is a fee arrangement where, if the matter on which the lawyer acts is successful, the lawyer's fee will be calculated as a proportion (usually a percentage) of any sum

	recovered. If the matter is unsuccessful, the lawyer will be paid nothing. This form of fee arrangement is not permitted in Aotearoa New Zealand.
D&O insurance	Directors and officers liability insurance (D&O insurance) is a form of liability insurance designed to protect company directors and senior employees against personal loss arising from liabilities incurred in the performance of their duties. D&O insurance also provides cover for the reasonable costs of defending a claim.
FRCP 23	In the United States, federal class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. We refer to this rule as FRCP 23.
Group litigation	Group litigation is a term to describe forms of civil litigation where a group of claimants seek redress collectively. It includes class actions and representative actions, as well as civil procedure techniques such as joinder and consolidation and mechanisms applying to specific areas of the law.
HCR 4.24	Rule 4.24 of the High Court Rules 2016. HCR 4.24 enables a plaintiff (or a defendant) in Aotearoa New Zealand to sue (or be sued) on a representative basis.
HCR 78	Rule 78 of the High Court Rules. HCR 78 preceded, and was replaced by, HCR 4.24.
Litigation funding	Litigation funding is where a person who is not a party to, and has no interest in, the litigation agrees to fund some or all of a party's costs, in exchange for a share of any sum recovered.
Maintenance	Maintenance is a tort (and in some jurisdictions, a crime) where a person who is not a party to and has no interest in the litigation, assists a party to a civil action to bring or defend the action, without lawful justification, and this causes damage to the other party.
Non-recourse	Litigation funding is generally provided on a non-recourse basis. This means that a funder will only recover their costs and commission from the funded party if the claim is successful. If the claim is unsuccessful, the funder has no ability to recover any of their investment in the claim from the funded party.
No win, no fee	No win, no fee arrangements are a form of conditional fee arrangement, where a client will not have to pay their lawyer unless the claim is successful. This term is commonly used to describe conditional fee arrangements in Australia.
Opt-in	Opt-in is an approach to determining class membership in a representative action or class action. Under this approach, potential class members must affirmatively opt into the litigation by taking a prescribed step by a certain date in order to be bound by any judgment on the common questions in the proceeding, or by a settlement.
Opt-out	Opt-in is an approach to determining class membership in a representative action or class action. Under an opt-out approach, all people who fall within the description of the class are bound by the

	judgment on common issues or settlement unless they take a prescribed step by a certain date to exclude themselves from the proceeding.
Representative action	A representative action permits a person to sue (or be sued) on behalf of other people who share the same interest in the subject matter of a legal proceeding. In Aotearoa New Zealand, a representative action is brought under HCR 4.24.
Representative plaintiff	The representative plaintiff represents the other class members in representative actions and class actions. Unlike other class members, they are a party to the litigation.
Representative order	A representative order is an order made by the Court giving a plaintiff (or a defendant) permission to act as a representative under HCR 4.24.
Universal class	A universal class is an approach to determining class membership in a representative action or class action. It is also referred to as a compulsory class. Under this approach, all people who fall within the class definition are part of the claim and there is no opportunity to opt into or out of the litigation. This approach is typically used in cases seeking an injunction or declaration.

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.

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.
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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: ADVERSE COSTS

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?

CHAPTER 1

Introduction

WHY THIS REVIEW?

- 1.1 Te Aka Matua o te Ture | Law Commission is undertaking a first principles review of class actions and litigation funding. Terms of reference were published on 18 December 2019 and are set out in Appendix 1. The terms of reference provide that the Commission will consider whether and to what extent the law should allow class actions and litigation funding. Our objective is to ensure that the law in these areas can support an efficient economy and a just society, and is understandable, clear and practicable.
- 1.2 A class action enables a group or class of people with similar claims to have those claims determined in a single proceeding. 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. As with other forms of group litigation (where legal claims involving multiple plaintiffs or defendants are grouped together), the benefits of class actions include improved access to civil justice, procedural efficiency and consistency of outcomes.
- 1.3 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 party's costs. The funder will usually receive an agreed percentage of any amount awarded to the litigant if the claim is successful, but will be paid nothing if the claim is lost. Litigation funding is not limited to class actions, but many class actions would be unable to proceed without it.
- 1.4 There are risks and costs associated with both class actions and litigation funding. For example, a class action is likely to take longer and require more case management than ordinary or individual litigation. Prolonged proceedings can impose significant burdens on defendants and delay justice for the claimants. Litigation funding can give rise to conflicts of interest between a funder and plaintiff over material issues, such as whether to settle a claim and for how much.
- 1.5 Aotearoa New Zealand does not have a class actions regime. The High Court Rules (HCR) simply provide for a person to sue (or be sued) on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding. These are referred to as 'representative actions'. The number of representative actions being initiated is steadily increasing, and the nature of the claims being brought is also changing. They now include, for example, insurance, shareholder and product liability claims. The representative action procedure was not designed for claims of the scale or complexity of many of these cases.

- 1.6 Aotearoa New Zealand also has no specific regulation of litigation funding. Litigation funding established itself as a funding model for litigation in Australia in the 1990s and then developed and expanded elsewhere, including to the United Kingdom and the United States. A relatively small number of litigation funders now operate in Aotearoa New Zealand, and some overseas based funders also fund litigation in this country.

INTERSECTIONS BETWEEN CLASS ACTIONS AND LITIGATION FUNDING

- 1.7 Although distinct activities, class actions and litigation funding are being considered together in this review because the intersections between them in practice raise a number of overlapping issues. Litigation funding currently plays an important role in representative actions in Aotearoa New Zealand and in many class actions overseas. The complex and costly nature of group litigation means plaintiffs are often unable to afford to bring an action without recourse to external funding. Given lawyers cannot charge contingency fees in Aotearoa New Zealand, obtaining litigation funding from a commercial funder may be the only funding option available. This is particularly true in consumer actions where the small value of the individual claims means claimants are unlikely to be able or willing to contribute to litigation costs.¹ In Aotearoa New Zealand, costs generally follow the event, so an unsuccessful litigant may have to pay a proportion of the other party's legal costs under an adverse costs order. With the risk of such adverse costs orders, the need for litigation funding in low value claims may sometimes be acute.
- 1.8 An increase in the availability of litigation funding can increase the number of representative or class action proceedings.² In Australia for example, the percentage of funded class actions filed in the Federal Court has increased appreciably over the past 30 years.³ The nature of class actions also raises additional issues for litigation funding. In particular, the involvement of a represented but potentially passive class may require greater court oversight of funding arrangements.⁴

ACCESS TO JUSTICE

- 1.9 Our review of class actions and litigation funding is taking place within a wider context of ongoing work across legal and policy environments to address barriers to accessing civil justice.⁵ Access to justice as a general concept concerns the ability of people to have their

¹ Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132 at 151–152.

² See Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132 at 151–152.

³ Vince Morabito "Empirical Perspectives on 25 Years of Class Actions" in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) 43. From March 1992–March 2013 15 per cent of cases in the Federal Court were funded; from March 2013–March 2018 64 per cent of cases were funded; and from March 2017–March 2018 78 per cent of cases were funded. See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.19].

⁴ See *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [77].

⁵ See for example The Rules Committee *Improving Access to Civil Justice: Initial Consultation with the New Zealand Community* (Discussion Paper); The Rules Committee *Improving Access to Civil Justice: Initial Consultation with the Legal Profession* (Discussion Paper, 16 December 2019); Helen Winkelmann, Chief Justice of New Zealand "Speech of

legal rights determined and upheld through a process which is fair, efficient and transparent for all parties involved. Access to *civil* justice concerns the ability of people to vindicate their civil law rights. Access to justice implicates central rule of law values. Jeremy Waldron, for example, has argued that both legal certainty as well as opportunities for people to participate in legal institutions are necessary to fulfil the rule of law's regard for the freedom and dignity of people.⁶ The right to a fair and public hearing in the determination of legal rights and obligations is recognised internationally as a fundamental human right.⁷

- 1.10 Although central to democracy, there are widely acknowledged problems in realising the ideal of access to civil justice in practice. The high costs associated with litigation are well beyond the means of most New Zealanders and significantly impede access to courts and the vindication of rights in civil cases. In February 2020, the Minister of Justice, Andrew Little, said it is uneconomic to seek justice from the courts for civil claims of less than \$100,000 because of the high costs of lawyers' fees, High Court filing fees, and the extraordinarily long waits for a hearing.⁸ Other estimates suggest that the figure may be much higher.⁹ Meanwhile, the jurisdiction of the Disputes Tribunal, a low cost forum for resolving small claims, is capped at \$30,000.¹⁰ There is a significant gap in the system for resolving claims that are valued above this amount but fall below the threshold for economic viability of litigation in the courts.

The Rt Hon Dame Helen Winkelmann at her swearing in as Chief Justice of New Zealand" (Te Kōti Mana Nui | Supreme Court, Wellington, 14 March 2019); New Zealand Bar Association Working Group into Access to Justice *Access to Justice | Āhei ki te Ture* (2018); Bridgette Toy-Cronin and others *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (Te Whare Wānanga o Ōtākou | University of Otago, 2017); Stephen Kós, Judge of the Court of Appeal of New Zealand "Civil Justice: Haves, Have-nots and What to Do About Them" (speech to the Arbitrators' and Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016); Geoffrey Venning, Chief Judge of the High Court of New Zealand "Access to Justice – A Constant Quest" (speech to New Zealand Bar Association Conference, Napier, 7 August 2015); Helen Winkelmann, Chief High Court Judge "Access to Justice – Who Needs Lawyers?" (speech to the Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address, Dunedin, 7 November 2014); Rob Stock "Many Kiwis just can't afford to fight rip-offs and sue companies, Justice Minister says" (2 February 2020) Stuff <www.stuff.co.nz>; Pokapū Ratonga Ture | Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (November 2006); Colmar Brunton *Legal needs among low income New Zealanders: Research report* (5 March 2018); and Colmar Brunton *Legal needs among New Zealanders: A general population survey – which includes comparisons with a previous survey of the low income population* (13 April 2018).

⁶ Jeremy Waldron "The Concept and the Rule of Law" (2008) 43 Ga L Rev 1 at 59. See also Andrew Little, Minister of Justice "Speech to Law Foundation Awards Dinner" (Wellington, 8 December 2017).

⁷ See for example *Universal Declaration of Human Rights* GA Res 217A (1948).

⁸ Rob Stock "Many Kiwis just can't afford to fight rip-offs and sue companies, Justice Minister says" (2 February 2020) Stuff <www.stuff.co.nz>. See also The Rules Committee *Improving Access to Civil Justice: Initial Consultation with the Legal Profession* (Discussion Paper, 16 December 2019) at 7; and Stephen Kós, President of the Court of Appeal "Better Justice" (speech to the Legal Research Foundation Annual General Meeting, Auckland, 20 August 2018).

⁹ In 2008, the Rules Committee suggested that civil claims for \$150,000 to \$200,000 are "quite possibly uneconomic": Rules Committee *Class Actions for New Zealand: A Second Consultation Paper* (October 2008) at 7. Others have suggested claims as high as \$500,000 may not be economic to bring in the High Court: Letter from Philip Skelton and Tom McKenzie to Rules Committee regarding the "Improving Access to Civil Justice" discussion paper (10 September 2020) at [2].

¹⁰ Disputes Tribunal Act 1988, s 10(3).

- 1.11 In addition to the direct costs of taking a claim to court, the risk of an adverse costs order may also deter people from seeking redress through litigation. Adverse costs orders do not cover the successful party's actual costs, only a proportion of what it was reasonable for them to spend. Nonetheless, what amounts to reasonable is calculated by reference to what lawyers charge clients in the private market.¹¹
- 1.12 The risk of an adverse costs order is mitigated for legally aided litigants because their liability for costs is limited by legislation.¹² However, access to civil legal aid is itself limited. The maximum income threshold for eligibility for legal aid is very low — \$23,820 per annum for someone with no dependents.¹³ Moreover, a shortage of registered civil legal aid lawyers in Aotearoa New Zealand can make civil legal aid difficult to obtain.¹⁴ Even if a person qualifies for legal aid and finds a registered lawyer willing to take their case, civil legal aid is provided as a loan which the recipient may need to repay with interest.¹⁵
- 1.13 For civil claims that do proceed to court, there may still be an access to justice problem if there is an imbalance of resources between the disputing parties. The cost of litigation favours deep-pocketed individuals or entities.¹⁶ There are significant challenges for individuals trying to vindicate their rights against well-resourced defendants, especially in proceedings with numerous interlocutory steps and/or successive appeals.¹⁷
- 1.14 In addition to financial burdens, social barriers and the significant psychological stress that often accompanies the prospect of being involved as a party to litigation can also deter people from participating in civil proceedings. As we discuss in this Issues Paper, class actions and litigation funding have the potential to ameliorate these issues and promote a more inclusive and accessible civil justice system. The risk of litigation in response to wrongdoing can also deter wrongdoing and consequently have a positive influence on behaviour. In this respect, class actions and litigation funding can help protect the interests of vulnerable individuals and groups.
- 1.15 At the same time, it is important to note two key limitations of these mechanisms. First, by definition, a class action can only proceed if there is a class of people with a factual or

¹¹ See High Court Rules 2016, schs 2 and 3; and Bridgette Toy-Cronin "I fought the law and the lawyers won" (22 July 2020) Newsroom <www.newsroom.co.nz>.

¹² Legal Services Act 2011, s 45.

¹³ Legal Services Act 2011, s 10(2); and Legal Services Regulations 2011, reg 5(1)(a)(iii).

¹⁴ See Andrew Ashton "Lawyer shortage biting Hawke's Bay practices; one offers \$25K cash incentive" *The New Zealand Herald* (online ed, Auckland, 5 February 2018); Kayla Stewart and Bridgette Toy-Cronin *The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services – Auckland and Otago Pilot Report* (University of Otago Legal Issues Centre, May 2018); Samantha Gee "Missing out on civil legal aid a justice issue, lawyers say" (12 August 2018) Stuff <www.stuff.co.nz>; and Te Kāhui Ture o Aotearoa | New Zealand Law Society "Legal aid: the problems and issues" (2018) 923 LawTalk 77. Lawyers are reportedly frustrated by the low level of fees for civil legal aid work. For further discussion, see Steven Zindel "The parlous state of civil access to justice in New Zealand" (2018) 920 LawTalk 54.

¹⁵ See Legal Services Act 2011, ss 18–21 and 40; and Tāhū o te Ture | Ministry of Justice "Do you need to pay back your legal aid?" Justice.govt.nz <www.justice.govt.nz>.

¹⁶ Rob Stock "Many Kiwis just can't afford to fight rip-offs and sue companies, Justice Minister says" (2 February 2020) Stuff <www.stuff.co.nz>; and Nick Rowles-Davies *Third Party Litigation Funding* (Oxford University Press, Oxford, 2014) at [1.81].

¹⁷ Bill Wilson "Insights from a litigation funder" (2016) 888 LawTalk 27 at 29.

legal issue in common, and at least one of them has the capacity and motivation to commence litigation. Second, litigation funding is only likely to be available in cases which appeal to the commercial priorities of litigation funders. This may pose a significant obstacle to the viability of any class action or other litigation seeking a non-monetary remedy.¹⁸

OTHER STUDIES AND OVERSEAS COMPARISONS

1.16 Class actions and litigation funding have been the subjects of several law reform exercises over the past four decades: to some extent in Aotearoa New Zealand, and more widely in other jurisdictions. In this Issues Paper, we draw on relevant findings and take account of overseas experiences.

Aotearoa New Zealand

1.17 In Aotearoa New Zealand, the Rules Committee¹⁹ has previously carried out work on class actions, including the preparation of a draft Class Actions Bill and related amendments to the HCR. The Class Actions Bill did not progress due to other government priorities.²⁰

1.18 The Commission reviewed the torts of maintenance and champerty and recommended their retention in a 2001 Report.²¹ Historically, litigation funding agreements have been regarded as champertous. Given the role that litigation funding now has in facilitating access to the courts, it is timely to revisit the Commission's earlier view.

Comparable jurisdictions

Class actions

1.19 It is estimated that around 40 jurisdictions now have some form of class actions regime.²² We primarily refer to approaches taken in the United States, Australia (federal and state jurisdictions) and Canada (particularly in the federal and common law jurisdictions). We consider these jurisdictions to be relevant comparators for our review of class actions because each of them began with a rule on representative actions in a form similar to that provided by the High Court Rules. The limitations in representative actions then prompted the development of class actions regimes.

1.20 We also discuss provisions of class actions regimes from other jurisdictions in relation to specific issues of interest, and the United Kingdom Competition Appeal Tribunal as an example of a sector-specific class actions regime.

¹⁸ We note some entities may fund cases for philanthropic or strategic reasons: see Kaja Zaleska-Korziuk "When the Good Samaritan Pays: The Phenomenon of Strategic Third-Party Funding" (2018) 18 *Asper Rev Int'l Bus & Trade L* 160.

¹⁹ The statutory body established by s 51B of the Judicature Act 1908 and continued by s 105 of the Senior Courts Act 2016 to develop rules of procedure for the District Court, High Court, Court of Appeal and Supreme Court.

²⁰ The Rules Committee has continued to undertake work in this area, including the preparation of draft amendment rules for representative actions.

²¹ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 10.

²² Deborah R Hensler "From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally" (2017) 65 *U Kan L Rev* 965 at 966.

Litigation funding

- 1.21 There is a relative lack of targeted regulation of litigation funding internationally. That said, there is some statutory regulation of litigation funding in Australia, and some principles can also be ascertained from relevant Canadian case law and from industry self-regulation through the London-based Association of Litigation Funders. We also expand our focus to consider other precedents. The United Arab Emirates' two independent financial free zones, the Dubai International Financial Centre and the Abu Dhabi Global Market, have established common law courts. These courts have developed innovative rules and codes of practice for litigation funding. Hong Kong and Singapore have likewise promulgated regulations and developed guidelines for the provision and use of third-party funding in the mediation and arbitration contexts.
- 1.22 In addition to examining experiences within these jurisdictions, we also draw on academic literature which takes a broader view. In particular, we reference the work of Rachael Mulheron, an internationally recognised expert on class actions whose comparative studies we cite across Part A of this Issues Paper.

PURPOSE AND SCOPE OF THIS ISSUES PAPER

- 1.23 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.
- 1.24 While we anticipate this paper will be of particular interest to lawyers who work in civil litigation, we welcome hearing from anyone with interest in these issues. This might include the business community, government agencies, insurers, litigation funders, litigants (particularly those with experience of representative actions and cases involving commercial litigation funding), and people with academic or other knowledge of access to justice issues.
- 1.25 We are calling for submissions or comments until 11 March 2021. These can address any topic concerning class actions and litigation funding, but we have included focussed questions in this paper to give submitters an indication of the areas we think need close attention. A full list of questions is set out at the beginning of the paper. We would welcome feedback on any of these questions.
- 1.26 If the weight of submissions or comments and our further analysis favours proceeding with the regulation of class actions and/or litigation funding, we will prepare more detailed proposals for regulation in these areas, and may consult further on those proposals. We intend to deliver our final report to the Minister of Justice during the first half of 2022.
- 1.27 We note that class actions regimes in all their variations are inherently procedural devices. We are not reviewing substantive rights and obligations that often give rise to class litigation, such as consumer laws and directors' duties. We also recognise that differences in procedural and substantive law across comparable jurisdictions may affect how and when class actions and funded litigation may arise. We have taken these differences into consideration when making comparisons with those other jurisdictions. In addition, in accordance with our terms of reference, civil legal aid falls outside the scope of this review.

1.28 During the research phase for this Issues Paper, we became aware of several related issues that fall outside our terms of reference. These include limitations in other forms of group litigation and lawyers' contingency fees. We note the anomaly of asking whether funders should be able to charge percentage-based success fees but not also asking whether lawyers should be allowed to charge on this basis. However, the terms of reference for this review are concerned with litigation funding whereas contingency fees concern how lawyers may charge for their services in wider circumstances. Additional considerations would arise with respect to the regulation of lawyers' fees that would require different and extensive consultation with the legal profession.

STRUCTURE OF THIS ISSUES PAPER

1.29 We address class actions in Part A of this Issues Paper, and litigation funding in Part B.

1.30 Part A is structured as follows:

- (a) In Chapters 2 to 4, we introduce class actions, discuss current mechanisms for group litigation in Aotearoa New Zealand, and identify problems with using the representative actions rule for claims that would be brought as a class action in other jurisdictions.
- (b) In Chapters 5 to 7, we then ask whether Aotearoa New Zealand should have a class actions regime. We consider the advantages and disadvantages of class actions and reach the preliminary view that it would be preferable to have a class actions regime rather than maintain the status quo. We are interested to hear views on the desirability of class actions, and the ongoing role of representative actions.
- (c) In Chapters 8 to 13, and on the basis of our preliminary view, we then examine what the scope and broad principles for any statutory class actions regime should be. We also invite views on key design principles, such as the threshold requirement legal test for the representative plaintiff, how class membership is determined and the adverse costs rule.

1.31 Part B is structured as follows:

- (a) In Chapters 14 to 15, we introduce litigation funding and provide an overview of the litigation funding market and the regulation of litigation funding in Aotearoa New Zealand. We also discuss approaches to regulation in some overseas jurisdictions.
- (b) In Chapter 16, we explain that the current regulatory uncertainty is problematic, and discuss the potential impact of uncertainty on the litigation funding market.
- (c) In Chapter 17, we discuss advantages and disadvantages of litigation funding. We express the preliminary view that litigation funding is desirable in principle.
- (d) In Chapter 18, we consider and seek views on whether and, if so how, the law of maintenance and champerty should be reformed.
- (e) In Chapters 19 to 22, we consider specific concerns with litigation funding in terms of funder control, conflicts of interest, funder profits, and capital adequacy, and how these concerns can best be managed.
- (f) In Chapter 23, we ask whether and to what extent the concerns with litigation funding warrant a regulatory response. We consider potential options for the form of regulation and oversight of litigation funding.

Part A

Class Actions



CHAPTER 2

Introduction to class actions

INTRODUCTION

- 2.1 In this chapter we:
- (a) Define, and summarise the key features of, class actions regimes.
 - (b) Introduce the class actions regimes of comparable jurisdictions.
 - (c) Explain the importance of the context of a particular class actions regime.

DEFINITION AND KEY FEATURES OF CLASS ACTIONS

- 2.2 A class action is characterised by the act of grouping claimants with a common factual or legal issue into a single legal 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, although all class members will be bound by the outcome.
- 2.3 Drawing on the work of a number of law reform bodies, Rachael Mulheron proposes the following high level definition of a class action:¹

A class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.

¹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 3 drawing on reports by the Australian Law Reform Commission, the South African Law Reform Commission, the Ontario Law Reform Commission and the Alberta Law Reform Commission.

- 2.4 Overseas class actions regimes have detailed procedural provisions in either legislation or civil procedure rules. These include rules for how a class action is commenced, managed and concluded.² Capital Strategic Advisors has noted the “striking” parallels with company arrangements, with their membership rules (shareholder registers and rules for buying and selling shares), management rules (where shareholders have no general right to participate in management), and rules about the distribution of company funds.³ Through this analogy we can see that a class action may facilitate collective action in litigation where economically efficient, “just as the company legal form does for business”.⁴
- 2.5 Key features of class actions include:
- (a) Preliminary court approval is often required before the case can proceed as a class action.
 - (b) The requirement for a common issue.
 - (c) The existence of a representative plaintiff or defendant.
 - (d) The existence of a class of represented persons.
 - (e) A mechanism to determine membership of the class, typically ‘opt-out’.
 - (f) The decision on the common issues binds the class.
 - (g) A method of determining individual issues.
 - (h) Active court supervision of proceedings.
 - (i) The court must approve settlement.
 - (j) Class actions are typically funded by a lawyer or litigation funder.
- 2.6 We briefly discuss these features below (and examine them in more detail later in our Issues Paper).

Preliminary court approval to proceed as a class action

- 2.7 Most class actions regimes have a preliminary stage where the court determines whether the case should be allowed to proceed as a class action. The rationale for this is that:⁵
- ...class actions are sufficiently different from individual proceedings to require a special judicial filter to weed out class actions that are contrary to the interests of the class members, the defendant, or the public.
- 2.8 This preliminary stage is usually known as certification and we discuss this in more detail in Chapter 10. Australia has chosen not to have a certification stage for its class actions

² Rachael Mulheron has identified 100 points of class action design: see Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 82–93.

³ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 33.

⁴ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 33. Capital Strategic Advisors further notes the lack of detail needed for a class actions regime (under this analogy) in r 4.24 of the High Court Rules 2016. In particular, r 4.24 says very little about membership, and nothing about management or the allocation of funds.

⁵ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 281.

regimes, although courts may order that a proceeding no longer continue as a class action where it is not suitable to proceed in this form.

- 2.9 At the certification stage, a court must apply specified criteria to determine whether a case may proceed as a class action. A key aspect of the certification test across jurisdictions is determining whether there is sufficient commonality among individual claims. Other common features of certification tests include whether the class is a sufficient size, whether a class action is the preferable way of resolving the claim and whether the proposed representative plaintiff will fairly and adequately represent the class.

Common issue

- 2.10 Class actions regimes generally require a plaintiff to establish a common issue of fact or law among all class members, which is known as a commonality requirement. Where there are common issues not shared by all class members, it may be possible to create subclasses to enable these issues to be considered.⁶ Jurisdictions have taken different approaches to how significant the common issues must be. For example, in some jurisdictions, the common issues must predominate over individual issues. We discuss the issue of commonality further in Chapter 10.

Representative plaintiff or defendant

- 2.11 A class action must have a litigant who acts on a representative basis. In the vast majority of cases, this will be a representative plaintiff. Some jurisdictions allow defendant class actions, where a plaintiff brings a claim against a representative defendant, although such cases are rare. We discuss defendant class actions in Chapter 8. However, our analysis otherwise focuses on plaintiff class actions.
- 2.12 For a plaintiff class action, the case is filed in the name of a representative plaintiff, who has been described as “the face” of the litigation.⁷ The representative plaintiff has the important role of representing the other class members and in some jurisdictions has been held to have a fiduciary responsibility to class members.⁸ One of the representative plaintiff’s key tasks is to provide a link between class members and the lawyer acting for the class.⁹ Unlike class members, the representative plaintiff is a party to the litigation, and they will be liable for any adverse costs order unless other arrangements have been made.¹⁰

⁶ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 184.

⁷ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 275.

⁸ *Dyczynski v Gibson* [2020] FCAFC 120, (2020) 381 ALR 1 at [209] per Murphy and Colvin JJ; and Joseph M McLaughlin *McLaughlin on Class Actions* (online ed, Thomson Reuters) at [§4:27] (citing several United States authorities). See also *Poulin v Ford Motor Co of Canada Ltd* (2008) 301 DLR (4th) 610 (ONSC) at [62] where the responsibilities of the lead plaintiff to class members were said to be “akin to that of a fiduciary”.

⁹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 291.

¹⁰ For example, there may be an agreement between class members to contribute to any adverse costs award or an indemnity may be provided by a litigation funder or a law firm. We discuss the issue of a representative plaintiff’s costs liability in Chapter 13.

- 2.13 Jurisdictions with class actions regimes have developed means of ensuring that the representative plaintiff properly represents the class and that no conflict of interest arises. Class actions regimes have taken differing approaches on whether a representative plaintiff must have their own claim or whether ideological plaintiffs (such as organisations) should be permitted. We discuss issues associated with the representative plaintiff in Chapter 11.

Class of represented persons

- 2.14 The presence of class members is a defining characteristic of a class action. Although class members do not usually play an active role in the litigation, they will be bound by a judgment on the common issues in the proceeding.
- 2.15 Many features of class actions regimes are designed to ensure that class members' interests are adequately protected, including: requirements for notice to potential class members, providing class members with sufficient opportunity to opt in or opt out of the claim, providing an opportunity for a class member to be heard by the court and requiring court approval of any settlement.

Mechanism for determining class membership, typically 'opt-out'

- 2.16 Another defining feature of a class actions regime is the mechanism that is used to determine class membership. In common law jurisdictions, the usual approach is to have a class formed on an 'opt-out' basis, where those who fall within the class definition become part of the class unless they take specific steps to remove themselves from the proceeding. Another approach is 'opt-in', where individuals must actively join the proceeding to become part of the class. For certain types of case, particularly those involving an injunction or declaration, it may be necessary to have a compulsory or universal class, where there is no opportunity to opt in or out. We discuss the issue of determining class membership in Chapter 12.

Decision on common issues binds the class

- 2.17 A decision on the common issues in a class action will generally be binding on all class members and will prevent individual class members from relitigating the issues. This feature of class actions litigation means that providing notice of a proceeding is particularly important in opt-out proceedings, because a class member who fails to remove themselves from the litigation will be bound by the decision.

Methods for determining individual issues

- 2.18 In many class actions, it will still be necessary to resolve individual issues once the common issues have been determined. For example, after a finding that a defendant breached a legal obligation, it may be necessary to determine whether that caused loss to individual class members and what remedies should be awarded. Class actions regimes generally provide courts with a range of powers for managing how individual issues are determined. One technique is to have a split trial, with the 'stage one' hearing considering the common issues and the 'stage two' hearing considering individual issues such as damages.

Active court supervision

2.19 Judges may need to play an “unusually active role” in the control, supervision and disposition of class action proceedings.¹¹ A key reason is to ensure that the interests of class members are adequately protected. This becomes particularly important in the settlement context where an “adversarial void” can arise because both the representative plaintiff and defendant are advocating for the settlement to be approved.¹²

Settlement approval

2.20 As we discuss in Chapter 6, it is very common for class action cases to settle. In comparable jurisdictions, court approval of a class action settlement is required and this generally involves a settlement hearing. When considering a proposed settlement, a key consideration for a court will be whether a settlement is fair and reasonable and in the best interests of the class. A court may also have a role in supervising the way that a class action settlement is distributed to class members.

Typically funded by a lawyer or litigation funder

2.21 The costs of running a class action are often significant. There are the legal fees for what may be protracted litigation, as well as disbursements such as expert witness reports and court fees. The representative plaintiff must also be able to meet any adverse costs order. While the costs of bringing a class action are significant, a successful class action may result in a substantial damages award or settlement. Class actions have been described as “unquestionably entrepreneurial in nature”¹³ and they have provided a business opportunity for both litigation funders and law firms.

2.22 In some overseas jurisdictions, class actions are funded by lawyers working on a contingency basis, with the fee typically calculated as the percentage of a settlement or damages award. In Canada, for example, contingency fees have been described as “the engine that drives class actions”.¹⁴ Contingency fees are also the predominant method of funding class actions in the United States.¹⁵

2.23 In other jurisdictions, notably Australia, litigation funding is a key method of funding class actions.¹⁶ We discuss litigation funding in detail in Part B of our Issues Paper.

¹¹ Australian Law Reform Commission *Access to the Courts – II Class Actions* (ALRC Discussion Paper 11, 1979) at [65]. See also Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 446 noting the “activist role” played by class action judges.

¹² Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 93; and Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [22.3].

¹³ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 6.

¹⁴ See Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 127.

¹⁵ See Kenneth M Kliebard and others “Class/collective actions in the United States: overview” (1 September 2020) Thomson Reuters Practical Law <<http://uk.practicallaw.thomsonreuters.com>>.

¹⁶ In Australia, only Victoria allows contingency fees. Lawyers in Victoria have been permitted to charge contingency fees since 30 June 2020: Justice Legislation Miscellaneous Amendments Act 2020 (Vic), s 5. This followed a

- 2.24 Another option is to have a non-profit class action fund which indemnifies a representative plaintiff for adverse legal costs and may also provide some funding for legal fees and disbursements. This may enable funding for cases that address important legal issues but are unlikely to attract litigation funding. A class action fund typically sustains itself by taking a small percentage share of any recoveries in class action proceedings. We discuss class action funds as a means of mitigating an adverse costs rule in Chapter 13.

CLASS ACTIONS REGIMES IN COMPARABLE JURISDICTIONS

- 2.25 The United States was the first jurisdiction to establish a class actions regime and Australia and Canada then followed. Class actions procedures spread globally in the 2000s and there are now around 40 jurisdictions with a class actions regime.¹⁷ As we explain in Chapter 1, we have focused our comparative analysis on the United States, Australian and Canadian class actions regimes, as well as the competition law-specific regime in the United Kingdom.
- 2.26 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.¹⁸ The rule was designed to avoid the disadvantages of the “complete joinder rule” which required all persons with an interest in the case to be joined to the proceedings.¹⁹ The representative action allowed a representative plaintiff or defendant to pursue litigation on behalf of a group in respect of a common dispute, if the relief sought would benefit the represented group.²⁰
- 2.27 Many jurisdictions incorporated a representative actions rule in their civil procedure rules that was closely modelled upon the English rule.²¹ These jurisdictions were heavily influenced by the early English jurisprudence that took a restrictive approach to which

recommendation made by the Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at Recommendation 7.

¹⁷ Deborah R Hensler “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally” (2017) 65 U Kan L Rev 965 at 966.

¹⁸ For discussion of the early history of representative actions see John Sorabji “The hidden class action in English civil procedure” (2009) 28 CJK 498; and *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [19]–[24].

¹⁹ John Sorabji “The hidden class action in English civil procedure” (2009) 28 CJK 498 at 501. Disadvantages of the complete joinder rule included: providing a formidable barrier to a complainant by requiring them to bring every interested party before the court, increasing the time and expense of litigation by joining a large number of passive parties and making it impractical to bring disputes to court where there were too many interested parties to join: *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [19]–[21].

²⁰ In *Duke of Bedford v Ellis* [1901] AC 1 (HL) at 8, Lord Macnaghten explained:

Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could “come at justice,” to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

²¹ With the merger of the common law and equity courts in England, the representative actions rule became codified in r 10 of the Rules of Procedure. These Rules were contained in the schedule to the Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict c 66.

claims could proceed as representative actions.²² This resulted in the representative actions rule being rarely used and provided impetus for the development of class actions regimes.²³

The United States

- 2.28 The representative actions rule was among the English legal traditions imported to the United States.²⁴ However, the rule was rarely used, which has been attributed to uncertainty about its nature and effect.²⁵ The 1938 Federal Rules of Civil Procedure created a single code of civil procedure for actions under both the common law and equity, including a ‘class actions’ rule in Rule 23 (FRCP 23). This was primarily intended to be a restatement of the earlier equitable rules,²⁶ but it also included some innovations. In particular, it required the courts to categorise a class action as one of three types based on the relationship between the class members, which became known as ‘true’, ‘hybrid’ and ‘spurious’ class actions.²⁷ The most novel of these was the spurious action, which constituted a type of opt-in class action.²⁸ FRCP 23 in its early form was both rarely used and remained legally uncertain on key issues,²⁹ including the boundaries between the three types of class action.³⁰
- 2.29 FRCP 23 was amended in 1966 following a review by the Advisory Committee on Civil Rules. The three-part classification system was abandoned in favour of a mechanism for

²² In particular, the decision in *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) took a restrictive approach and required class members to show that issues of fact and law were identical between them. Following this case, a plaintiff had to show (a) a common interest arising under a common document; (b) a common grievance; and (c) a remedy beneficial to all the class but not damages: see John Sorabji “The hidden class action in English civil procedure” (2009) 28 CJK 498 at 508. The influence of this decision on representative action rules in other jurisdictions is referred to in *Carnie v Esanda Finance Corp Ltd* (1996) 38 NSWLR 465 (NSWSC); and Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 80.

²³ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 42–43.

²⁴ It was codified in the Federal Equity Rules of 1842 and 1912. For the 1912 rule, see Equity R 38, 226 US 659 (1912).

²⁵ Arthur R Miller “Keynote Address: The American Class Action – From Birth to Maturity” (2018) 19 Theo Inq L 1 at 2.

²⁶ Graham C Lilly “Modeling Class Actions: The Representative Suit as an Analytic Tool” (2003) 81 Neb L Rev 1008 at 1015; and Tom Ford “The History and Development of Old Rule 23 and the Development of Amended Rule 23” (1966) 32 Antitrust L J 254 at 255.

²⁷ The true category was defined as involving joint, common or secondary rights; the hybrid category, as involving several rights related to specific property; and the spurious category, as involving several rights affected by a common question and related to common relief: see Tom Ford “The History and Development of Old Rule 23 and the Development of Amended Rule 23” (1966) 32 Antitrust L J 254 at 255–256.

²⁸ A true class action resembled a traditional representative action in binding all persons with respect to a narrow common issue, while a hybrid class action bound class members to the extent that the action concerned a common property interest, and the spurious class action bound those who intervened. Under a spurious class action, a claim could be brought on behalf of a class by a representative, but members would only be bound if they chose to opt into the procedure, and class members could still seek their own redress if the representative’s claim was unsuccessful: see Mark C Weber “Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions” (1988) 21 U Mich J L Reform 347 at 348.

²⁹ Key issues included what constituted a ‘class’, whether members had to be given notice and when absent members would be bound: see Arthur R Miller “Keynote Address: The American Class Action – From Birth to Maturity” (2018) 19 Theo Inq L 1 at 3.

³⁰ Tom Ford “The History and Development of Old Rule 23 and the Development of Amended Rule 23” (1966) 32 Antitrust L J 254 at 257–258.

binding class members on common issues. The 1966 version of FRCP 23 was drafted in a manner which leaves room for judicial discretion and encourages judicial oversight and control of class actions.³¹ Amendments to the Rule also made it much easier to pursue a class action seeking damages.³² FRCP 23 now sets out four categories of class action:

- (a) Cases where bringing individual actions would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the adverse party.³³ This category is often referred to as an ‘incompatible standards’ class action and is said to be rarely used.³⁴
- (b) Cases where an individual judgment would be likely to dispose of the interests of the class or would substantially impair or impede their ability to protect their interests.³⁵ This is often referred to as a ‘limited fund’ class action, as this category typically involves a situation where many plaintiffs are otherwise likely to individually sue a single defendant with limited funds.³⁶
- (c) Cases where the defendant has acted or refused to act on grounds that apply generally to the class so an injunction or declaration is appropriate with respect to the class as a whole.³⁷ This is referred to as an ‘injunctive’ class action and is the category often used in civil rights class actions.³⁸
- (d) Cases where questions of fact and law common to class members predominate over individual matters and where a class action is superior to other methods of fairly and effectively adjudicating the matter.³⁹ This is the most common category for class actions seeking monetary damages and so this category is often called ‘money damages’ class actions.⁴⁰

2.30 Some members of the Advisory Committee on Civil Rules were opposed to this final category of class actions, regarding it inappropriate to aggregate a group of people with no prior connection or to bind people to a proceeding they were unaware of. As a compromise, certain procedural safeguards were also added to this category.⁴¹ As well

³¹ Arthur R Miller “Keynote Address: The American Class Action – From Birth to Maturity” (2018) 19 *Theo Inq L* 1 at 7. Note also that the class actions regime contained in Rule 23 is less detailed than subsequent class actions regimes in Canada and Australia.

³² There were virtually no class actions seeking damages prior to the 1966 reforms: see Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 *Emory LJ* 399.

³³ United States Federal Rules of Civil Procedure, r 23(b)(1)(A).

³⁴ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:1].

³⁵ United States Federal Rules of Civil Procedure, r 23(b)(1)(B).

³⁶ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:1].

³⁷ United States Federal Rules of Civil Procedure, r 23(b)(2).

³⁸ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:1].

³⁹ United States Federal Rules of Civil Procedure, r 23(b)(3).

⁴⁰ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:1].

⁴¹ Some committee members thought a new liberalised procedure could be useful for attaining statutory remedies for large groups in competition law and securities cases and pursuing small claims in aggregate. Other members opposed liberalisation because of the risk that lawyers would take advantage of class members, while subjecting companies and public bodies to an excessive amount of litigation. See Arthur R Miller “Keynote Address: The American Class Action – From Birth to Maturity” (2018) 19 *Theo Inq L* 1 at 5–6.

as the predominance and superiority requirements, class members were required to be given individual notice and the right to opt out of the proceedings.⁴² These safeguards were not added to the other categories of class actions as they were thought to be “natural” class actions that did not require special safeguards.⁴³

- 2.31 Although the earlier 1938 version provided for what was called a class action, the 1966 amendments are seen as marking the arrival of the modern class action in the United States.⁴⁴ All but two states have class actions rules with most of these modelled on FRCP 23.⁴⁵

Australia

- 2.32 Australia has long had a representative actions procedure but, following the restrictive English approach, Australian courts took the view that damages could not be recovered in a representative action.⁴⁶ In 1977, the Commonwealth Attorney-General requested that the Australian Law Reform Commission (ALRC) consider whether class actions procedures should be introduced. A key question for the ALRC to consider was whether representative actions should be extended to allow recovery of damages.⁴⁷
- 2.33 In its 1988 report, the ALRC recommended that a “grouped proceedings” procedure be introduced where each group member would be a party to proceedings before the court.⁴⁸ Following the ALRC’s report, Part IVA of the Federal Court of Australia Act 1976 was enacted to allow class actions in the Federal Court.⁴⁹ The regime came into effect in March 1992.⁵⁰ The legislature did not precisely follow the ALRC’s recommendations. In particular, under Part IVA, class members are not parties to the proceedings.⁵¹
- 2.34 New South Wales, Victoria, Queensland and Tasmania have introduced regimes closely modelled on the federal regime,⁵² and Western Australia is currently in the process of introducing a similar regime.⁵³

⁴² Arthur R Miller “Keynote Address: The American Class Action – From Birth to Maturity” (2018) 19 *Theo Inq* L 1 at 6.

⁴³ Arthur R Miller “Keynote Address: The American Class Action – From Birth to Maturity” (2018) 19 *Theo Inq* L 1 at 6.

⁴⁴ See Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 14.

⁴⁵ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 17. Virginia and Mississippi do not have state level class actions regimes. However, claimants can still file federal class actions in both states. See Kenneth M Kliebard and others “Class/collective actions in the United States: overview” (1 September 2020) Thomson Reuters Practical Law <<http://uk.practicallaw.thomsonreuters.com>>.

⁴⁶ Australian Law Reform Commission *Access to the Courts – II Class Actions* (ALRC Discussion Paper 11, 1979) at 7–8; and Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 3.

⁴⁷ See Australian Law Reform Commission *Access to the Courts – II Class Actions* (ALRC Discussion Paper 11, 1979) at 9.

⁴⁸ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 34 and 46.

⁴⁹ Some matters are also contained in Court Rules and Practice Notes: see Federal Court Rules 2011 (Cth), rr 9.31–9.35; and Federal Court of Australia, *Practice Note GPN-CA – Class Actions Practice Note*, 20 December 2019.

⁵⁰ Federal Court of Australia Amendment Act 1991 (Cth).

⁵¹ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [2.9]–[2.18].

⁵² Civil Procedure Act 2005 (NSW), pt 10; Supreme Court Act 1986 (Vic), pt 4A; Civil Proceedings Act 2011 (Qld), pt 13A; and Civil Proceedings Act 1932 (Tas), pt VII.

⁵³ See Civil Procedure (Representative Proceedings) Bill 2019 (WA).

- 2.35 We note that in Australia, class actions are referred to as representative proceedings and class members are referred to as group members. However, we refer to them as class actions in our Issues Paper to avoid confusion with representative actions.

Canada

- 2.36 The representative action was also exported from England to the common law provinces of Canada, as well as to the Canadian Federal Court.⁵⁴ The Canadian courts initially took a restrictive approach to representative actions, following the early English authorities.⁵⁵ While some cases began to relax these strict requirements during the 1970s,⁵⁶ other cases, most notably the 1983 *Naken* decision of the Supreme Court of Canada, continued to take a restrictive approach.⁵⁷
- 2.37 In 1978, the civil law province of Québec became the first Canadian jurisdiction to introduce a class actions regime.⁵⁸ In 1982, the Ontario Law Reform Commission published a three volume report which recommended the establishment of a class actions regime.⁵⁹ That report has been described as essentially the underpinning of all Canadian class actions legislation (with the exception of Québec).⁶⁰ In 1983, the Supreme Court lent further support to legislative reform when it declared that the representative actions rule was “totally inadequate” to the task of resolving claims involving numerous similarly situated parties.⁶¹ In 1989, an Advisory Committee on Class Action Reform was established in Ontario to progress class actions legislation. The Committee’s report contained a Draft Bill which formed the basis of the Class Proceedings Act 1992.⁶²
- 2.38 In 1996, the Uniform Law Conference of Canada passed a model class actions statute, which influenced subsequent class actions regimes.⁶³ Over the next 10 years, class actions

⁵⁴ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 44.

⁵⁵ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 18, 22–24 and 46.

⁵⁶ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 23–24. See at 46–47 for discussion of other provinces.

⁵⁷ *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72.

⁵⁸ Class Proceedings Act SO 1992 c 6. Québec’s class actions regime was enacted in 1978 under the Code of Civil Procedure. The Québec regime is substantially different to the other class actions regimes in Canada: see Janet Walker (ed) *Class Actions in Canada: Cases, Notes, and Materials* (2nd ed, Emond Publishing, Toronto, 2018) at 21.

⁵⁹ See Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982); Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982); and Ontario Law Reform Commission *Report on Class Actions* (Volume III, 1982). The request for the Law Commission to conduct a detailed study of class actions followed a Parliamentary committee determining that the representative action regime was “in a very serious state of disarray”: Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 8.

⁶⁰ Janet Walker (ed) *Class Actions in Canada: Cases, Notes, and Materials* (2nd ed, Emond Publishing, Toronto, 2018) at 21.

⁶¹ The Canadian Supreme Court commented that “the rule, consisting as it does of one sentence of some thirty words, is totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty of this one”: *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72 at 105.

⁶² *Report of the Attorney General’s Advisory Committee on Class Action Reform* (Ministry of the Attorney General, February 1990); and Class Proceedings Act SO 1992 c 6 (this came into effect on 1 January 1993).

⁶³ Ruth Rodgers *Civil Section Documents: A Uniform Class Actions Statute* (Uniform Law Conference of Canada, 1995).

regimes were enacted throughout Canada, including at the federal level.⁶⁴ With two notable exceptions, Canadian class actions regimes are relatively uniform across the common law jurisdictions.⁶⁵

- 2.39 In 2019 the Law Commission of Ontario published a review of Ontario’s class actions regime.⁶⁶ Some of the recommendations made in that report were adopted in 2020 amendments to the legislation.⁶⁷

England and Wales

- 2.40 England and Wales have not adopted a general class actions regime applying to all areas of the law. A representative actions rule remains in force,⁶⁸ however, the courts’ restrictive interpretation of the requirements of this rule means it has “languished little used”.⁶⁹
- 2.41 A new procedure for managing group litigation was introduced in 2000: the Group Litigation Order (GLO). The court can make a GLO for the “case management of claims which give rise to common or related issues of fact or law”.⁷⁰ Under a GLO, individual claims are managed collectively, rather than as a single claim being brought on behalf of a class or group.⁷¹ Therefore, it is not a form of representative action.⁷² A judgment made on the ‘GLO issues’ in one of the claims will be binding on the other claims (unless the court orders otherwise).⁷³ Rachael Mulheron has observed that the decision to adopt a GLO device rather than a class actions regime was due to the perception that class

⁶⁴ Namely, Ontario, British Columbia, Saskatchewan, Newfoundland and Labrador, Manitoba, Alberta, New Brunswick, and Nova Scotia. See Class Proceedings Act SO 1992 c 6; Class Proceedings Act RSBC 1996 c 50; The Class Actions Act SS 2001 c C-12.01; Class Actions Act SNL 2001 c C-18.1; The Class Proceedings Act CCSM 2002 c C-130; Class Proceedings Act SA 2003 c C-16.5; Class Proceedings Act RSNB 2011 c 125; and Class Proceedings Act SNS 2007 c 28. The federal regime is contained in the Federal Courts Rules SOR/98-106, pt 5.1. There is no class actions regime in Prince Edward Island, or the three territories of Nunavut, Yukon, and the Northwest Territories.

⁶⁵ There are two key areas of divergence across the different class actions regimes in Canada (excluding Québec). One area concerns adverse costs. Some jurisdictions, such as Ontario, apply a two-way costs shifting rule while others (including British Columbia) apply a no costs rule. The other area concerns whether non-residents can be bound as class members, or whether class members outside of the jurisdiction will need to opt-in to the class action: see Janet Walker (ed) *Class Actions in Canada: Cases, Notes, and Materials* (2nd ed, Emond Publishing, Toronto, 2018) at 22.

⁶⁶ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019).

⁶⁷ The amending legislation was the Smarter and Stronger Justice Act SO 2020 c 11. As well as implementing some of the Law Commission of Ontario’s recommendations, the Act also amended the certification requirements for class actions. We discuss this in Chapter 10.

⁶⁸ The Civil Procedure Rules 1998 (UK), r 19.6.

⁶⁹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 68.

⁷⁰ The Civil Procedure Rules 1998 (UK), r 19.10.

⁷¹ Under a Group Litigation Order the court establishes a group register into which individuals’ claims are entered: see The Civil Procedure Rules 1998 (UK), rr 19.10–19.11. Claims entered into the group register may then be managed collectively by the court: rr 19.12 and 19.13.

⁷² Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [1-018].

⁷³ The Civil Procedure Rules 1998 (UK), r 19.12.

actions regimes lacked utility and flexibility, and criticisms of the United States class actions regime such as claims of excessive legal fees and limited recovery for individuals.⁷⁴

- 2.42 In 2008, the Civil Justice Council published a report which recommended that a generic collective action should be introduced in England and Wales to enable actions to be brought by a representative plaintiff in relation to any type of civil claim in which multiple parties have an interest.⁷⁵ The Government rejected this recommendation in favour of a sectoral approach to collective redress.⁷⁶ It considered that a collective right of action should only be introduced in a sector where there was evidence of need and that other regulatory options should be considered before introducing generic collective actions.⁷⁷
- 2.43 In 2015 a class actions procedure for competition law claims (known as collective proceedings) was introduced in the Competition Appeal Tribunal.⁷⁸ The Tribunal's jurisdiction extends to the whole of the United Kingdom.⁷⁹

CONTEXT OF OVERSEAS CLASS ACTIONS REGIMES IS IMPORTANT

- 2.44 When comparing class actions regimes, it is important to be aware of the broader legal context of each regime as this will affect which claims can proceed, how a case will be managed and the issues that might arise.
- 2.45 Class actions are a procedural device which are said to “provide the substantive law with teeth”.⁸⁰ The types of claim that can be brought will therefore depend on the underlying substantive law in a jurisdiction. For example, while personal injury litigation is a key area for class actions in other jurisdictions, most damages claims for personal injury have been barred and replaced by the statutory Accident Compensation scheme since 1974.⁸¹
- 2.46 One factor which affects the substantive outcome of a class action proceeding is the remedies available in a jurisdiction and how they are determined. For example, in the United States, the availability of punitive and triple damages, as well as the role of juries

⁷⁴ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 68–69.

⁷⁵ Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008).

⁷⁶ Ministry of Justice *The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* (July 2009).

⁷⁷ Ministry of Justice *The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* (July 2009) at 3. See further discussion of this in Chapter 8.

⁷⁸ These actions are governed by the Competition Act 1998 (UK) and The Competition Appeal Tribunal Rules 2015 (UK). A competition law specific procedure for collective redress had existed since 2003 under an earlier version of the Competition Act 1998 (UK), s 47B. However, the earlier procedure only allowed for designated organisations to bring claims on behalf of consumers, and only on an opt-in basis. Only one case was ever brought, and only one per cent of affected parties opted into the case: Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [11-002].

⁷⁹ See “Competition Appeal Tribunal” <www.catribunal.org.uk>.

⁸⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 53.

⁸¹ Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [2.1]. See also the Accident Compensation Act 2001, s 317.

- in awarding damages, has contributed to substantial damages awards and settlements in some cases.⁸²
- 2.47 A jurisdiction’s general procedural rules will affect the conduct of class actions. A class actions regime is unlikely to cover every single procedural point that might arise in a case and so it may sometimes be necessary to rely on general rules of procedure.⁸³
- 2.48 A key difference between jurisdictions relates to whether class action regimes have an adverse costs rule. In Aotearoa New Zealand, the losing party is generally liable for a portion of the other party’s legal costs.⁸⁴ Some jurisdictions take this same approach, while other jurisdictions apply a ‘no costs’ rule. Possible liability for costs is a strong disincentive to litigation generally and similarly can affect both whether, and how, class action proceedings are managed.⁸⁵ We discuss the issue of costs in Chapter 13.
- 2.49 Jurisdictions have also taken different approaches to funding class actions. As we mentioned earlier in this chapter, in Canada and the United States, it is common for the lawyer to work on a ‘contingency’ basis, where their fees are calculated as a proportion of any damages award or settlement. Some Canadian jurisdictions also have a class actions fund which can provide an indemnity against adverse costs.⁸⁶ In Australia, class actions are often funded by a litigation funder. A jurisdiction’s method of funding a class action will have implications for the kinds of cases that can be brought, how these cases will be run and what issues might arise. We discuss litigation funding in Part B of our Issues Paper.
- 2.50 Rather than focusing on individual elements of a particular class actions regime, it is important to be aware of how different requirements of a regime interact to ensure the needs of plaintiffs and defendants are balanced. For example, the United States class actions regime has demanding predominance and superiority requirements in its certification test; however, this is coupled with a ‘no costs’ rule as well as substantial damages awards. The adverse costs rule in Ontario has been mitigated with a Class Proceedings Fund which can provide an indemnity against adverse costs.⁸⁷
- 2.51 We also note that in many overseas jurisdictions, class actions have become deeply polarising.⁸⁸ While proponents see class actions as a “panacea for a myriad of social ills”,

⁸² Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 57–58.

⁸³ For example, Ontario’s class actions regime provides that the rules of civil procedure apply: Class Proceedings Act SO 1992 c 6, s 35.

⁸⁴ See High Court Rules 2016, r 14.2.

⁸⁵ See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 437. Note the fact the risk of adverse costs will fall on the representative plaintiff rather than the class as a whole may also create a significant financial disincentive to taking on that role: see Tom Hallett-Hook “Class Actions Under New Zealand’s Representative Rule: Ingenious Solution or Inadequate to the Task?” (LLM Dissertation, University of Toronto, 2015) at 56–57.

⁸⁶ We discuss these in Chapter 13.

⁸⁷ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 38 and 47.

⁸⁸ For instance, Christian Porter QC MP, announcing the Parliamentary Joint Committee into Litigation Funding and Class Actions in Australia said “there is growing concern that the lack of regulation governing the funding industry is leading to poor justice outcomes for those who join class actions”. An opposition spokesperson, Mark Dreyfus QC MP described the inquiry as “a shameless move towards denying justice and fair compensation for ordinary Australians” adding the

critics see it as a “Frankenstein monster”.⁸⁹ One factor that may have led to this polarisation is the development of a separate plaintiff bar and defendant bar. In Aotearoa New Zealand, we are aware of some legal firms which act exclusively for either plaintiffs or defendants in representative actions. However, we are aware of other firms which have acted for both plaintiffs and defendants in representative actions. Given the small size of Aotearoa New Zealand, this might continue to be the case if a class actions regime was introduced. We hope this, coupled with the collegial nature of the legal community in Aotearoa New Zealand, might prevent the extreme polarisation that has occurred with class actions in other jurisdictions.

government was more interested in protecting its “big business mates”: Ben Rigby “Regulatory net tightens over litigation funders as Australian parliament launches class action inquiry” *The Global Legal Post* (online ed, London, 22 May 2020).

⁸⁹ Arthur R Miller “Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the ‘Class Action Problem’” (1979) 92 *Harv L Rev* 664 at 665. See also Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 *Emory LJ* 399 at 406–417.

CHAPTER 3

Group litigation in Aotearoa New Zealand

INTRODUCTION

- 3.1 Aotearoa New Zealand does not have a class actions regime as exists in other jurisdictions. When considering whether Aotearoa New Zealand should have such a regime, it is important to consider the different ways that proceedings may already be brought by or on behalf of a group.
- 3.2 In this chapter, we examine current means of seeking collective redress:
- (a) Representative actions under High Court Rule 4.24 (HCR 4.24).
 - (b) Civil procedure techniques such as joinder of plaintiffs, consolidation and test cases.
 - (c) Statutory procedures such as the representation procedure in the Companies Act 1993, claims on behalf of a class in the Human Rights Review Tribunal and procedures in the Employment Relations Act 2000.
 - (d) Proceedings brought by regulators.
 - (e) Broader techniques such as public law proceedings.

REPRESENTATIVE ACTIONS UNDER HCR 4.24

- 3.3 Proceedings that might be taken as a class action in comparable jurisdictions may be able to be pursued as a representative action in Aotearoa New Zealand under HCR 4.24.¹ A representative action permits a person to sue (or be sued) on behalf of other people who share the same interest in the subject matter of a legal proceeding. As discussed in Chapter 2, the representative action was developed in the Courts of Chancery in the late 17th and early 18th century to avoid the disadvantages of the complete joinder rule.

¹ We note that the term representative action or representative claim is sometimes used in a broad sense, to include any claim brought in a representative capacity. In this section we focus on representative actions brought under r 4.24 of the High Court Rules 2016 (and earlier provisions). Later in this chapter, we discuss representative litigation in the broader sense, including Māori collective litigation and judicial review claims.

- 3.4 A representative actions rule has been in place in Aotearoa New Zealand since 1882. Rule 79 of the Code of Civil Procedure in the Supreme Court provided that:²

When there are numerous parties having the same interest in an action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action on behalf of or for the benefit of all parties so interested.

- 3.5 The rule was modelled on an English equivalent.³ It was subsequently replaced in 1908 by Rule 79 of the Code of Civil Procedure,⁴ which was in turn replaced in 1986 by Rule 78 of the High Court Rules.⁵ The current provision is HCR 4.24, which states:

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—

(a) with the consent of the other persons who have the same interest; or

(b) as directed by the court on an application made by a party or intending party to the proceeding.

- 3.6 As the wording of HCR 4.24 indicates, there are two ways of bringing a representative action. First, a person may sue or be sued on a representative basis with the consent of the other persons who have the same interest in the subject matter of the proceeding (HCR 4.24(a)). If consent has been given, then a person may be appointed as a representative plaintiff or defendant as of right and it is not necessary to obtain the approval of the court. However, the proceeding may not be allowed to continue as a representative action if a court later considers that those consenting do not have the necessary common interest.⁶ It is possible for consent to be given after the proceeding has been filed.⁷ We have found few claims that have proceeded on this basis.⁸ One possible reason is that in cases affecting large numbers of people, it would be difficult for a plaintiff to ascertain and contact all of those with the same interest in the subject matter.⁹

² The Code of Civil Procedure in the Supreme Court, r 79 included in sch 2 of the Supreme Court Act 1882.

³ See r 10 of the English Rules of Procedure, in the Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict c 66.

⁴ Rule 79 of the Code of Civil Procedure in the Supreme Court (in sch 2 of the Judicature Act 1908) read:

Where there are numerous persons having the same interest in an action, one or more of them may sue or be sued, or may be authorised by the Court to defend, in such action on behalf of or for the benefit of all persons so interested.

⁵ Rule 78 of the High Court Rules read:

Where two or more persons have the same interest in the subject-matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intending party to the proceeding, sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested.

⁶ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [66]–[67]. See also *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 at [183].

⁷ *Visini v Cadman* [2012] NZCA 122, (2012) 21 PRNZ 70 at [20].

⁸ Not all claims indicate whether the case proceeded on the basis of r 4.24(a) or (b) of the High Court Rules 2016. Examples of cases proceeding on the basis of consent are: *Lin v Registrar of Companies* [2016] NZHC 395; *Minister of Education v James Hardie Ltd* [2018] NZHC 1481; *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005; and *Visini v Cadman* [2012] NZCA 122, (2012) 21 PRNZ 70.

⁹ See *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [28] where the Court noted the following:

Plainly it was not feasible ... to obtain the consent of every member of the class to a representative claim ... the sheer number would make that impractical in any event.

- 3.7 The second way a representative action may proceed is pursuant to a court order (HCR 4.24(b)). Most HCR 4.24 cases have proceeded on this basis. Some cases have held that once a court determines that the requisite commonality of interest exists, it does not have discretion to refuse the application for a representative order.¹⁰ In *Proprietors of Wakatū v Attorney-General*, Glazebrook J made obiter comments that where it is clear that a claim is a representative one (and particularly where representation is contested), the court should consider of its own motion whether a representation order should be made, even where there is no application before the court.¹¹
- 3.8 The earliest representative action in Aotearoa New Zealand was the 1902 case of *Nireaha Tamaki v Baker*, a case under the Native Land Claims Adjustment and Laws Amendment Act 1901.¹² However, representative actions were slow to gain popularity, with only two other cases allowed to proceed on a representative basis prior to 1980 and only four cases in the 1980s.¹³
- 3.9 Reasons for this slow uptake may include Aotearoa New Zealand's small population size, its history of conservative damages awards, the common law torts of maintenance and champerty (which have historically restricted litigation funding) and, since 1974, the inability to bring personal injury claims.¹⁴ The lack of procedural rules for representative actions and the availability of other methods of bringing group proceedings may also have contributed. There has, however, been a noticeable increase in representative actions in recent decades, as shown in the table below.

Numbers of representative actions in the High Court

- 3.10 We are aware of 44 cases in which the High Court has allowed a case to proceed under HCR 4.24 (or its predecessor rules), with the majority of these filed after 2000.¹⁵ This is shown in the table below, as well as cases where leave to bring a representative action has been declined. We have only included cases in this table which have clearly been brought under HCR 4.24 (or its predecessor rules). We have come across a number of

¹⁰ *Registered Securities Ltd (in liq) v Westpac Banking Corp* (2000) 14 PRNZ 348 (HC) at [27]; and *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [100(vii)].

¹¹ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [661].

¹² *Nireaha Tamaki v Baker* (1902) 22 NZLR 97 (SC). In that case, the plaintiff had sought to restrain the Commissioner of Crown lands from disposing of land which was claimed to be the property of the Rangitāne iwi. The Court accepted that the plaintiff sued in a representative capacity. The plaintiff subsequently applied to discontinue the proceedings against the wishes of some members of the group. The Court set aside the discontinuance, although its decision was largely based on the 1901 Act rather than general principles applicable to representative actions.

¹³ In *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 266, the Court commented that “[t]here is surprisingly little New Zealand authority as to the correct approach to interpretation” of the representative actions rule.

¹⁴ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 151.

¹⁵ We wish to acknowledge Nikki Chamberlain's research on this topic, which was the first empirical study of representative actions in New Zealand: Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 (updated in Nikki Chamberlain and Susan Watson “The Emergence and Reform of the New Zealand Class Action” in Brian T Fitzpatrick and Randall S Thomas (eds) *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge, Cambridge University Press, 2021) (forthcoming)). Our research has found the same cases, as well as three cases which were subsequent to Chamberlain's research. Note that our table also includes *Stirling v Attorney-General* HC Wellington CP161/96, 27 May 1998, which Chamberlain's research categorises under the Māori Land Court (the citation in her study is: *Mansell – Haparangi A4* (2005) 288 Rotorua MB 9 (288 ROT 9)).

cases which refer to having been brought “on a representative basis” or “in a representative capacity”, but without referring to this rule.¹⁶ As the basis for these is unclear, we have not included them in this table.

Decade proceeding filed	Cases allowed to proceed as representative actions	Cases where leave to bring a representative action declined
1880s-1970s	3 ¹⁷	4 ¹⁸
1980s	4 ¹⁹	4 ²⁰
1990s	9 ²¹	3 ²²
2000s	13 ²³	2 ²⁴

¹⁶ See for example *Mawson v Auckland Area Health Board* [1991] 3 NZLR 599 (HC); *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA); and *Bounty Oil & Gas NL v Attorney-General* [2010] NZAR 120 (HC).

¹⁷ *Nireaha Tamaki v Baker* (1902) 22 NZLR 97 (SC); *Mundy v Cunningham* [1973] 1 NZLR 555 (SC); and *Hill v The Wellington Co-operative Taxi Owner-Drivers' Society Ltd* HC Wellington A4/75, 3 February 1988.

¹⁸ *Hohepa v Abbott* (1909) 29 NZLR 213 (SC); *Take Kerekere v Cameron* [1920] NZLR 302 (SC); *Morgan v Taranaki Farmers' Meat Co Ltd* [1925] NZLR 513 (SC); and *Derby v Pukeikura* [1935] 35 GLR 205 (SC).

¹⁹ *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC); *Overseas Containers Ltd v Geo H Scales Ltd* HC Wellington CP395/86, 22 September 1986; *The New Zealand Meat Industry Assoc v The Accident Compensation Corporation* HC Wellington CP275/87, 19 October 1987; and *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC).

²⁰ *Clarke v Clarke* HC Auckland M354/86, 2 December 1987; *Poverty Bay Electric Power Board v Attorney-General* HC Wellington CP552/87, 5 November 1987; *Hawke's Bay Bulk Gas Users Group v Commerce Commission* (1988) 4 NZCLC 64,147 (HC); and *Dakin v Goldcorp Exchange Ltd (in rec)* (1988) 4 NZCLC 64,675 (HC).

²¹ *Howick Engineering Ltd v Manukau City Council* HC Auckland CP2021/91, 11 August 1992; *Talley's Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC); *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC); *Purdue v Boyd Knight* (1998) 8 NZCLC 261,720 (HC); *Wanganui District Council v Tangaroa* [1995] 2 NZLR 706 (HC); *Stirling v Attorney-General* HC Wellington CP161/96, 27 May 1998 (note that although the judgment does not refer to HCR 78, this appears to have been the basis for the representative orders); *Devcich v Cowley Stanich & Co* (1997) 11 PRNZ 47 (HC); *Registered Securities Ltd (in liq) v Westpac Banking Corp* (2000) 14 PRNZ 348 (HC); and *Hedley v Kiwi Co-Operative Dairies Ltd* (2000) 15 PRNZ 210 (HC).

²² *Thomas v Bolger (No 1)* [2002] NZAR 945 (HC); *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC); and *Ryder v Treaty of Waitangi Fisheries Commission* [1998] 1 NZLR 761 (HC).

²³ *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000; *'Akau'Ola v The President of the Conference of the Methodist Church of New Zealand* HC Auckland CP183/SW01, 5 December 2001; *Erris Promotions Ltd v Commissioner of Inland Revenue* [2004] 1 NZLR 811 (HC); *Jones v Attorney-General* HC Wellington CP175/02, 8 July 2003; *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005; *Paki v Attorney-General* [2009] 1 NZLR 72 (HC); *Stickland v Drummond* HC Auckland CIV-2006-404-3078, 13 May 2008; *Healthcare Providers New Zealand Inc v Northland District Health Board* HC Wellington CIV-2007-485-1814, 7 December 2007; *Houghton v Saunders* (2008) 19 PRNZ 173 (HC); *Harding v LDC Finance Ltd (in rec)* HC Christchurch CIV-2008-409-1140, 19 November 2009; *Accent Management Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,126 (HC); *Blue Star Taxis (Christchurch) Society Ltd v Gold Band Taxis (Christchurch) Society Ltd* HC Christchurch CIV-2009-409-2921, 19 November 2010; and *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC).

²⁴ *Beggs v Attorney-General* (2006) 18 PRNZ 214 (HC); and *Maranatha Ltd v Tourism Transport Ltd* HC Auckland CIV-2006-404-6431, 3 April 2007.

Decade proceeding filed	Cases allowed to proceed as representative actions	Cases where leave to bring a representative action declined
2010s	15 ²⁵	5 ²⁶
Total	44	18

- 3.11 The *Houghton v Saunders* litigation (a claim filed in 2008 on behalf of over 3,600 shareholders in the failed Feltex Carpet Company) might be regarded as the advent of the modern representative action.²⁷ The proceedings have given rise to a number of significant judgments and may also have increased interest in representative actions under HCR 4.24.²⁸ Since this case was filed, a number of other complex representative actions have been brought on behalf of large groups of claimants.
- 3.12 Part of the reason for the growth in representative actions is the arrival of litigation funding in Aotearoa New Zealand. We are aware of ten representative actions filed since 2008 which have been funded by a litigation funder.²⁹ Nikki Chamberlain observes that, prior to the arrival of litigation funding, it was often not economically feasible to bring a “low stakes” representative action, particularly given the risk of adverse costs orders.³⁰ Litigation funding typically covers some or all of the legal costs of bringing the representative action as well as any adverse costs if the case is unsuccessful. If the case is successful, the funder will be reimbursed for the costs of the litigation and will also

²⁵ *Cadman v Visini* (2011) 3 NZTR 21-011 (HC); *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827; *LDC Finance Ltd (in rec and in liq) v Miller* [2013] NZHC 2993; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69; *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281; *Vlaar v van der Lubbe* [2016] NZHC 2398, (2016) 4 NZTR 26-022; *Lin v Registrar of Companies* [2016] NZHC 395; *The Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105; *Minister of Education v James Hardie Ltd* [2018] NZHC 1481; *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288; *Smith v Claims Resolution Service Ltd* [2019] NZHC 127; *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478; *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906; *Livingstone v CBL Corp Ltd* CIV-2019-404-2727 (ongoing proceedings); and *TEA Custodians Ltd v Wells* CIV-2019-485-642 (ongoing proceedings). We are also aware of a representative action which was filed in 2020 (a shareholder representative action relating to Intueri Education Group) but we understand the court has not yet decided whether this can proceed under r 4.24 of the High Court Rules 2016: see Reweti Kohere “Let Intueri class action go to trial, defendants argue” *The National Business Review* (New Zealand, 24 November 2020).

²⁶ *Matthews v Memelink* [2012] NZHC 2284; *Kapiti High Voltage Coalition Inc v Kapiti Coast District Council* [2012] NZHC 2058; *About Image Ltd v Advaro Ltd* [2017] NZHC 3264; *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2018] NZHC 936; and *Tahi Enterprises Ltd v Taua* [2018] NZHC 516.

²⁷ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC).

²⁸ Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 74.

²⁹ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC); *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69; *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281; *The Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105; *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288; *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478; *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906; *Livingstone v CBL Corp Ltd* CIV-2019-404-2727 (ongoing proceedings); and *TEA Custodians Ltd v Wells* CIV-2019-485-642 (ongoing proceedings). The claim against Intueri Education (referred to at n 25 above) is also supported by a litigation funder.

³⁰ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 151.

receive a share of any compensation achieved. The arrival of litigation funders has been said to facilitate consumer representative actions in particular.³¹

- 3.13 The development of the law on HCR 4.24 is likely to be another factor contributing to the increase in representative actions. As we discuss in Chapter 4, the courts have developed HCR 4.24 so the procedure has many of the features of class actions. Chamberlain cites “the willingness of the judiciary to allow HCR 4.24 to be used to create class actions” as another reason for the increase in cases.³² In *Ross v Southern Response*, the Court of Appeal commented that the substantial increase in representative actions “has undoubtedly been stimulated by the rapid spread of the class action procedure in other common law jurisdictions”.³³
- 3.14 While the increasing number of representative actions is significant, they still make up a very small percentage of all civil claims. For example, the 15 representative actions filed in the 2010s can be contrasted with the 2,176 civil proceedings filed in the High Court in 2019 alone.³⁴ However, those 15 cases are significant, given that, together, they represent the legal claims of many thousands of people.³⁵

Type of legal claim

- 3.15 The 44 cases allowed to proceed as representative actions under HCR 4.24 (or its predecessor rules) can be broadly grouped into the following categories of cases: government (13), investor (7), shareholder (4), general commercial (8), consumer (6), trusts and estates (4) and environmental (2).³⁶
- 3.16 The ‘government’ cases category involves representative actions where the Government has been either a plaintiff or a defendant and, broadly speaking, the proceeding involved public law issues.³⁷ Some include judicial review claims.³⁸ The cases span the period from 1984 to 2015, with the issues involved including:

³¹ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 152.

³² Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 151.

³³ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [51].

³⁴ Ngā Kōti o Aotearoa | Courts of New Zealand “Annual Statistics for the High Court 31 December 2019” <www.courtsofnz.govt.nz>.

³⁵ For example in one case, 13,500 bank customers registered to participate in the claim: *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827 at [1]. Another case involved a group of 800 investors: *LDC Finance Ltd v Miller* [2016] NZHC 567 at [1].

³⁶ This largely replicates the categories used by Nikki Chamberlain in her empirical study: Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132. We note this categorisation is somewhat broad brush and some cases could fit into more than one category. For example, *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 is in the general commercial category. The causes of action were judicial review, breach of statutory duty and negligence.

³⁷ Note there are also some cases involving a Government party in the ‘consumer’ category, namely: *The Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105; *Minister of Education v James Hardie Ltd* [2018] NZHC 1481; and *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288.

³⁸ *Howick Engineering Ltd v Manukau City Council* HC Auckland CP2021/91, 11 August 1992; *Talley’s Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC); *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC); *Jones v Attorney-General* HC Wellington CP175/02, 8 July 2003; *Healthcare Providers New Zealand Inc v Northland District Health Board* HC Wellington CIV-2007-485-1814, 7 December 2007; and *Accent Management Ltd v Commissioner of Inland Revenue*

- (a) Māori land claims.³⁹
 - (b) Taxation, rates and ACC levies.⁴⁰
 - (c) Social security.⁴¹
 - (d) Immigration.⁴²
 - (e) Negligence.⁴³
 - (f) Contractual issues.⁴⁴
- 3.17 There have been seven representative actions brought by ‘investors’ since 1993.⁴⁵ The defendants have included auditors, accountants, company directors, a company and banks. There have been four representative actions brought by shareholders, one in 1999, one in 2008 and the other two in 2019.⁴⁶
- 3.18 The eight ‘general commercial’ cases include claims in equity, contract, tort and restitution as well as statutory claims (including under the Fair Trading Act 1986 and Companies Act 1993).⁴⁷ These cases span the period 1986 to 2018.

(2010) 24 NZTC 24,126 (HC). In addition, one of the claims in the ‘general commercial’ category included a judicial review claim: *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005. We note that judicial review claims are often brought on a representative basis without seeking a formal order under r 4.24 of the High Court Rules 2016. We discuss this later in this chapter.

³⁹ *Nireaha Tamaki v Baker* (1902) 22 NZLR 97 (SC); *Wanganui District Council v Tangaroa* [1995] 2 NZLR 706 (HC); *Stirling v Attorney-General* HC Wellington CP161/96, 27 May 1998; and *Paki v Attorney-General* [2009] 1 NZLR 72 (HC). As well as these cases brought under earlier versions of HCR 78, there are many cases where a Māori chief has represented a group of claimants without obtaining a formal representation order. We discuss this later in this chapter.

⁴⁰ *Erris Promotions Ltd v Commissioner of Inland Revenue* [2004] 1 NZLR 811 (HC); *Accent Management Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,126 (HC); *The New Zealand Meat Industry Assoc v The Accident Compensation Corporation* HC Wellington CP275/87, 19 October 1987; and *Howick Engineering Ltd v Manukau City Council* HC Auckland CP2021/91, 11 August 1992.

⁴¹ *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC); and *Jones v Attorney-General* HC Wellington CP175/02, 8 July 2003.

⁴² *Talley's Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC).

⁴³ *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69.

⁴⁴ *Healthcare Providers New Zealand Inc v Northland District Health Board* HC Wellington CIV-2007-485-1814, 7 December 2007.

⁴⁵ *Purdue v Boyd Knight* (1998) 8 NZCLC 261,720 (HC); *Devcich v Cowley Stanich & Co* (1997) 11 PRNZ 47 (HC); *Registered Securities Ltd (in liq) v Westpac Banking Corp* (2000) 14 PRNZ 348 (HC); *Stickland v Drummond* HC Auckland CIV-2006-404-3078, 13 May 2008; *Harding v LDC Finance Ltd (in rec)* HC Christchurch CIV-2008-409-1140, 19 November 2009; *LDC Finance Ltd (in rec and in liq) v Miller* [2013] NZHC 2993; and *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906.

⁴⁶ *Hedley v Kiwi Co-Operative Dairies Ltd* (2000) 15 PRNZ 210 (HC); *Houghton v Saunders* (2008) 19 PRNZ 173 (HC); *Livingstone v CBL Corp Ltd* CIV-2019-404-2727 (ongoing proceedings); and *TEA Custodians Ltd v Wells* CIV-2019-485-642 (ongoing proceedings).

⁴⁷ *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC); *Overseas Containers Ltd v Geo H Scales Ltd* HC Wellington CP395/86, 22 September 1986; *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC); *Lin v Registrar of Companies* [2016] NZHC 395; *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005; *Blue Star Taxis (Christchurch) Society Ltd v Gold Band Taxis (Christchurch) Society Ltd* HC Christchurch CIV-2009-409-2921, 19 November 2010; *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC); and *Smith v Claims Resolution Service Ltd* [2019] NZHC 127.

- 3.19 The six ‘consumer’ cases were filed between 2013 and 2018. There have been three product liability cases relating to building materials,⁴⁸ two cases relating to resolution of insurance claims arising out of the Christchurch earthquakes,⁴⁹ and one case relating to bank fees.⁵⁰
- 3.20 The four ‘trusts and estates’ cases span the period 1975 to 2016 and have involved small groups of represented persons, ranging from 3 to 17 people.⁵¹
- 3.21 The final category is ‘environmental’, with only two cases: one in 1972 and another in 2000.⁵²

Outcome of representative actions

- 3.22 Some representative actions have proceeded to judgment, others appear to have settled and some are ongoing. Of the cases where a representation order has been granted:
- (a) In 12 cases, the plaintiff obtained a successful judgment in its favour.⁵³ In most cases, the remedy was a declaration, although there are two cases where the court awarded damages.⁵⁴
- (b) In eight cases, the defendant successfully defended the action.⁵⁵

⁴⁸ *Minister of Education v James Hardie Ltd* [2018] NZHC 1481; *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281; and *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478.

⁴⁹ *The Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105; and *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288.

⁵⁰ *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827.

⁵¹ *Hill v The Wellington Co-operative Taxi Owner-Drivers' Society Ltd* HC Wellington A4/75, 3 February 1988; *'Akau'Ola v The President of the Conference of the Methodist Church of New Zealand* HC Auckland CP183/SW01, 26 June 2001; *Cadman v Visini* (2011) 3 NZTR 21-011 (HC); and *Vlaar v van der Lubbe* [2016] NZHC 2398, (2016) 4 NZTR 26-022.

⁵² *Mundy v Cunningham* [1973] 1 NZLR 555 (SC); and *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000. As discussed below, there has also been one representative action in the Environment Court: *Norton v Marlborough District Council* EnvC Christchurch C017/09, 30 March 2009.

⁵³ *Mundy v Cunningham* [1973] 1 NZLR 555 (SC); *Howick Engineering Ltd v Manukau City Council* HC Auckland CP2021/91, 11 August 1992; *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1995; *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC); *Wanganui District Council v Tangaroa* [1995] 2 NZLR 706 (HC); *Whakatane District Council v Keepa* [2002] BCL 174 (HC); *Healthcare Providers New Zealand Inc v Northland District Health Board* HC Wellington CIV-2007-485-1814, 7 December 2007; *Eaton v LDC Finance Ltd (in rec)* [2012] NZHC 1105 (an appeal was subsequently filed and then the matter was settled: see *Eaton v LDC Finance Ltd* [2013] NZHC 728); *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC); aff'd [2014] NZSC 137, [2015] 1 NZLR 215; *Vlaar v van der Lubbe* [2016] NZHC 2398, (2016) 4 NZTR 26-022; *Lin v Registrar of Companies* [2016] NZHC 395; and *Houghton v Saunders* [2018] NZSC 74, [2019] 1 NZLR 1 (note that this case was set down for a ‘stage two’ hearing to determine damages, however, the case was struck out due to the failure to meet a security for costs order. The High Court’s decision to strike out the case has been appealed to the Court of Appeal and a decision is pending).

⁵⁴ *Eaton v LDC Finance Ltd (in rec)* [2012] NZHC 1105 (as noted above, the defendant appealed this case and it was subsequently settled); and *Wu v Body Corporate 366611* [2011] 2 NZLR 837 (HC).

⁵⁵ *Accident Compensation Corporation v New Zealand Meat Industry Assoc* [1988] 1 NZLR 1 (CA); *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA); *Hedley v Kiwi Co-operative Dairies Ltd* HC Palmerston North CP24/99, 21 December 2001; aff'd CA104/02, 18 December 2002; *Palu v Conference of the Methodist Church of New Zealand* (2003) 1 NZTR 13-008 (HC); *Erris Promotions Ltd v Commissioner of Inland Revenue* [2004] 1 NZLR 811 (HC); *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277; and *Accent Management Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,126 (HC).

- (c) There are 15 cases where there is no substantive judgment and it is likely that the matter was settled.⁵⁶
- (d) There are nine cases still proceeding through the courts.⁵⁷

How representative actions have been funded

- 3.23 As noted above, we are aware of 10 representative actions which have been funded by a litigation funder. We discuss litigation funding of representative actions in Part B of our Issues Paper.
- 3.24 There are several other ways that representative actions may have been funded to date. First, the representative plaintiff and/or the represented individuals may have paid for the costs of running the case themselves. In such a case, the representative plaintiff would be liable for adverse costs unless an alternative arrangement has been made, such as the group agreeing to contribute to any adverse costs order.
- 3.25 Second, a lawyer may have agreed to bring the representative action on a no win, no fee basis. This arrangement is a form of conditional fee. Conditional fees are permitted in Aotearoa New Zealand provided that any premium paid to the lawyer in case of success is not calculated as a percentage of a damages award or settlement.⁵⁸
- 3.26 Third, a lawyer may have agreed to act pro bono, and we are aware of this occurring in at least one representative action to date. However, although pro bono legal representation removes the substantial cost of legal fees, there will still be disbursements to cover and the risk of an adverse costs order.

⁵⁶ *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC); *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* HC Auckland CL104/88, 23 May 1990 (this refers to the matter being resolved with a payment into court); *Overseas Containers Ltd v Geo H Scales Ltd* HC Wellington CP395/86, 22 September 1986; *Hill v The Wellington Co-operative Taxi Owner-Drivers' Society Ltd* HC Wellington A4/75, 3 February 1988; *Stirling v Attorney-General* HC Wellington CP161/96, 29 September 2004 (sealed judgment of Miller J); *Devcich v Cowley Stanich & Co* (1997) 11 PRNZ 47 (HC); *Registered Securities Ltd (in liq) v Westpac Banking Corp* (2000) 14 PRNZ 348 (HC); *Jones v Attorney-General* HC Wellington CP175/02, 8 July 2003; *Stickland v Drummond* HC Auckland CIV-2006-404-3078, 13 May 2008; *Blue Star Taxis (Christchurch) Society Ltd v Gold Band Taxis (Christchurch) Society Ltd* HC Christchurch CIV-2009-409-2921, 19 November 2010; *Cadman v Visini* (2011) 3 NZTR 21-011 (HC); *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827; *LDC Finance Ltd (in rec and in liq) v Miller* [2013] NZHC 2993; *The Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105 (in this case, the parties agreed to a mediation process led by Sir Graham Panckhurst: see Liz MacDonald "Southern Response quake claimants withdraw class action" (15 May 2018) Stuff <www.stuff.co.nz>); and *Minister of Education v James Hardie Ltd* [2018] NZHC 1481 (the settlement is discussed in Victoria Young "Education Ministry, Carter Holt cut deal over leaky schools" (9 October 2020) BusinessDesk <<http://businessdesk.co.nz>>).

⁵⁷ These cases are: *Strathboss Kiwifruit Ltd v Attorney-General*; *Cridge v Studorp Ltd*; *Ross v Southern Response Earthquake Services Ltd*; *Smith v Claims Resolution Service Ltd*; *Paine v Carter Holt Harvey Ltd*; *Scott v ANZ Bank New Zealand Ltd*; *Livingstone v CBL Corp Ltd* CIV-2019-404-2727 (ongoing proceedings); *TEA Custodians Ltd v Wells* CIV-2019-485-642 (ongoing proceedings); and *Houghton v Saunders* (this case was struck out by the High Court on 14 July 2020 although this decision has been appealed to the Court of Appeal: see *Houghton v Saunders* [2020] NZHC 1088 at [92]; and *Houghton v Saunders* [2020] NZHC 2030 at [3]).

⁵⁸ Lawyers and Conveyancers Act 2006, ss 333 and 334. See also Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 9.8–10.

- 3.27 Finally, we are aware of at least one representative party being funded by legal aid.⁵⁹ We note, however, that the availability of legal aid for representative parties is currently restricted.⁶⁰

Representative actions in other courts

- 3.28 Representative actions may be brought in the Employment Court relying on HCR 4.24.⁶¹ Between 1992 and 2002, the Employment Court has allowed seven cases to proceed on a representative basis relying on High Court Rule 78 (HCR 78, the predecessor to HCR 4.24).⁶² In two of these cases, HCR 78 was used on a standalone basis,⁶³ with the other five cases citing HCR 78 in conjunction with other Employment Court procedural provisions.⁶⁴
- 3.29 We are not aware of any Employment Court cases since 2002 that have been allowed to proceed as representative actions relying on HCR 4.24.⁶⁵ Nikki Chamberlain suggests this may be due to litigants using other procedures such as test cases or provisions in the Employment Relations Act 2000.⁶⁶ Later in this chapter we outline other methods of bringing group litigation in the Employment Court.

⁵⁹ See *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000 at [10] (in that case, legal aid was granted to a representative defendant). We are also aware of one case in which an applicant who unsuccessfully sought a representation order under HCR 78 sought legal aid (*Ryder v Treaty of Waitangi Fisheries Commission* [1998] 1 NZLR 761 (HC)). In *Glancy v Legal Services Agency* (2003) 17 PRNZ 168 (CA), the Court of Appeal held that s 10(4) of the Legal Services Act 2000 (the equivalent of s 12(4) of the Legal Services Act 2011) did not apply to the case because of the lack of jurisdiction to make a representation order: at [37].

⁶⁰ Section 12(4) of the Legal Services Act 2011 requires an application for civil legal aid to be refused in relation to litigation in which several people have the same interest if this would not seriously prejudice the interests of the applicant or it would be proper for other persons having that interest to pay for the proceedings.

⁶¹ Employment Court Regulations 2000, reg 6(2)(a)(ii). In a recent case, the Court said it was common ground that HCR 4.24 applied in the Employment Court by virtue of this regulation: *McCook v Chief Executive of the Inland Revenue Department* [2020] NZEmpC 109 at [109]. See also Employment Relations Act 2000, s 212 (and its predecessor, Employment Contracts Act 1991, s 130). In *Chapman v Waitemata Stevedoring Services Ltd (No 2)* [1992] 3 ERNZ 756, the plaintiff relied on HCR 78 and both parties accepted that the High Court Rules applied by virtue of s 130(2) of the Employment Contracts Act 1991. In that case, the Employment Court declined the application for a representation order on the basis that the union did not have the same interest in the subject matter as those it sought to represent.

⁶² *Fire Service Commission v Duncan* [1995] 1 ERNZ 169 (EmpC); *Andersen v Capital Coast Health Ltd* [2000] 1 ERNZ 256 (EmpC); *Hyndman v Air New Zealand Ltd* [1992] 1 ERNZ 820 (EmpC); *New Zealand Air Line Pilots Assoc IUOW v Mount Cook Group Ltd* [1992] 3 ERNZ 355 (EmpC); *Dwyer v Air New Zealand Ltd (No 2)* [1996] 2 ERNZ 435 (EmpC); *New Zealand Seafarers' Union Inc v Silver Fern Shipping Ltd* [1998] 3 ERNZ 768 (EmpC); and *Ranchhod v Auckland Healthcare Services Ltd* EmpC Auckland AEC161/99, 16 December 1999.

⁶³ *Fire Service Commission v Duncan* [1995] 1 ERNZ 169 (EmpC); and *Andersen v Capital Coast Health Ltd* [2000] 1 ERNZ 256 (EmpC).

⁶⁴ *New Zealand Air Line Pilots Assoc IUOW v Mount Cook Group Ltd* [1992] 3 ERNZ 355 (EmpC); *Dwyer v Air New Zealand Ltd (No 2)* [1996] 2 ERNZ 435 (EmpC); *Ranchhod v Auckland Healthcare Services Ltd* EmpC Auckland AEC161/99, 16 December 1999; *Hyndman v Air New Zealand Ltd* [1992] 1 ERNZ 820 (EmpC); and *New Zealand Seafarers' Union Inc v Silver Fern Shipping Ltd* [1998] 3 ERNZ 768 (EmpC). Note that in the first three of these cases, HCR 78 is said to apply by analogy.

⁶⁵ We note that in one recent case, the Employment Court declined to allow a case to proceed as a representative action pursuant to r 4.24 of the High Court Rules 2016 on the basis that there was insufficient commonality of interest between the plaintiffs and those they wished to represent and it would not be in the interests of justice: *McCook v Chief Executive of the Inland Revenue Department* [2020] NZEmpC 109 at [141].

⁶⁶ Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132 at 151.

3.30 Representative actions are also possible in the District Court. The District Court Rules 2014 contain a provision identical to HCR 4.24 (currently District Court Rule 4.24). However, we are not aware of it ever being used to bring a representative action in the District Court.⁶⁷ We are aware of one case in which the rule was used to bring a representative action in the Environment Court.⁶⁸ We understand this case was funded by the Environmental Legal Assistance Fund which is administered by the Ministry for the Environment.⁶⁹

Development of the law on HCR 4.24

3.31 Because the language of HCR 4.24 is sparse, courts have had to develop rules for when a representative action should be allowed and how cases should be managed. Some particular issues that have been developed through the case law, which we briefly discuss below, are:

- (a) The threshold test for allowing a case to proceed as a representative action, including the same interest test.
- (b) Whether claims for damages should be allowed.
- (c) The effect of a representative action on limitation periods.
- (d) Whether an opt-in or opt-out approach should be used to determine membership of the represented group.
- (e) The court's role when a litigation funder is funding a representative action.

Threshold legal test for allowing a claim to proceed as a representative action

3.32 The Court of Appeal has observed that what constitutes “the same interest in the subject matter of a proceeding” is usually the critical issue in applications to bring a representative action under HCR 4.24.⁷⁰ In England, the requirement that group members have the ‘same interest’ in a claim has been described as the most problematic and least workable aspect of the representative actions rule.⁷¹

3.33 Aotearoa New Zealand has been described as taking a modern facilitative approach to representative actions, where the courts are encouraged to consider how individual issues can be incorporated within a representative action rather than taking a “hard line”

⁶⁷ Previous rules are District Court Rules 2009, r 3.33.5 (which simply imported r 4.24 of the High Court Rules 2016); and District Court Rules 1992, r 80.

⁶⁸ *Norton v Marlborough District Council* EnvC Christchurch C017/09, 30 March 2009. Resource Management Act 1991, s 278 provides that the Environment Court and Environment Judges have the same powers that the District Court has in the exercise of its civil jurisdiction.

⁶⁹ For details of grants made under the Environmental Legal Assistance Fund, see Manatū Mō Te Taiao | Ministry for the Environment “Previous Environmental Legal Assistance Fund applications” (9 December 2019) <www.mfe.govt.nz>.

⁷⁰ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [14].

⁷¹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 78. As we noted in chapter 2, in *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA), the English Court of Appeal took a very restrictive approach to this question, requiring class members to show that issues of fact and law were identical between them. This case is said to have set back the development and application of the representative action through the 20th century: John Sorabji “The hidden class action in English civil procedure” (2009) 28 CJQ 498.

interpretation of the same interest requirement.⁷² This approach can be traced back to the 1987 decision of *RJ Flowers v Burns*, where the High Court proposed that a liberal approach to representative actions would best align with the objectives of the HCR:⁷³

...if injustice can be avoided, the rule can and should be applied to serve the interests of expedition and economy, both indeed the underlying reason for its existence... The traditional concern to ensure that representative actions are not to be allowed to work injustice must be kept constantly in mind. Subject to those restraints however the rule should be applied and developed to meet modern requirements.

- 3.34 In *Saunders v Houghton (No 1)*, the Court of Appeal noted there were different lines of authority as to how “persons with the same interest” should be interpreted. The Court endorsed a generous approach to representation applications with a relatively low threshold.⁷⁴ It also endorsed a number of earlier statements of the High Court about the availability of representative actions where each member of the group is alleged to have a separate cause of action.⁷⁵ The Court concluded that:⁷⁶

“The same interest” must mean that, subject to other considerations, the more the parties have in common, the more the strength of that facet of the application. Greater precision is unattainable.

- 3.35 In 2014 in *Credit Suisse Private Equity v Houghton*, the Supreme Court considered the same interest requirement in the context of a dispute over the application of limitation periods to representative actions.⁷⁷ While the judges took differing views on the limitation point, both majority and minority judgments emphasised the need to take a flexible approach to HCR 4.24. The majority judgment endorsed the approach taken in *RJ Flowers*, commenting that it is legitimate for the scope of HCR 4.24 to continue to adapt in order to achieve the overall objective of the High Court Rules.⁷⁸ The minority stated that the question of what constitutes the same interest in the subject matter of a proceeding was to be “assessed purposively to allow the representative action to be a flexible tool of convenience in the administration of justice”,⁷⁹ and that the representative plaintiff and those represented must have “a community of interest in the determination

⁷² See Tom Hallett-Hook “Class Actions Under New Zealand’s Representative Rule: Ingenious Solution or Inadequate to the Task?” (LLM Dissertation, University of Toronto, 2015) at 10–11.

⁷³ *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 271.

⁷⁴ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [10]–[12].

⁷⁵ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [13] citing *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) and *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC). The Court of Appeal endorsed the availability of the representative action in such cases provided that: (a) it did not confer a right of action on a class member who could not have asserted that right in separate proceedings or prevent a defence a defendant may have had available in a separate proceeding; (b) there was an interest shared in common with all members of the group; and (c) permitting the plaintiff to sue in a representative capacity was for the benefit of the other members of the class.

⁷⁶ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [19].

⁷⁷ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541.

⁷⁸ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [129]–[130] per McGrath, Glazebrook and Arnold JJ citing *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) and High Court Rules 2016, r 1.2.

⁷⁹ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [2] per Elias CJ and Anderson J citing *John v Rees* [1970] Ch 345 (Ch) at 370.

of some substantial issue of law or fact”.⁸⁰ The minority judgment also commented that it was sufficient if the party and those represented have the same interest in the *subject matter* of the proceeding and there is no requirement for identical claims or even the same cause of action.⁸¹

3.36 The Court of Appeal observed in its 2017 decision in *Cridge v Studorp* that the principles governing the application of HCR 4.24 were “well-established” and summarised them as follows:⁸²

- (a) The rule should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
- (b) Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.
- (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
- (d) The words ‘same interest’ extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.
- (e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.
- (f) It must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.
- (g) The court should take a liberal and flexible approach in determining whether there is a common interest.
- (h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action rather than being facilitative of it.
- (i) A representative action should not be allowed in circumstances that would deprive a defendant of a defence it could have relied on in a separate proceeding against one or more members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.

3.37 In *Southern Response Earthquake Services v Southern Response Unresolved Claims Group*, the Court of Appeal cited these principles and added that a preliminary

⁸⁰ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [2] per Elias CJ and Anderson J citing *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 408 per Brennan J. See also the judgment of Mason CJ, Deane and Dawson JJ at 404 and the judgment of McHugh J at 427.

⁸¹ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [55] per Elias CJ and Anderson J.

⁸² *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11] (references omitted). The Court of Appeal also cited these principles in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [51].

assessment of the merits of the claim was also required.⁸³ We discuss this further in Chapter 10.

Claims for damages

- 3.38 The 1910 English case of *Markt v Knight Steamship* was initially regarded as precluding any representative action for damages.⁸⁴ In *Take Kerekere v Cameron*, an early Aotearoa New Zealand case, *Markt* was cited as authority for the proposition that a representative action was inappropriate for determining numerous claims of damages.⁸⁵
- 3.39 The High Court adopted a less strict approach subsequently. In *RJ Flowers*, the Court considered that a liberal approach should be taken to the law on representative actions, even in the area of damages. A representative action for damages was possible where the represented group included all or virtually all potential plaintiffs and they all consented to damages being paid on a global basis to the representative plaintiff.⁸⁶ Several years later in *Taspac Oysters v James Hardie* the Court discussed, with apparent approval, dicta in the English case of *Prudential Assurance Co v Newman Industries*, that a representative action could be brought seeking a declaration of liability. If successful, individual group members could then pursue separate claims for damages.⁸⁷ In *Saxmere v The Wool Board Disestablishment Co*, the Court accepted that global damages may be appropriate in the circumstances described in *RJ Flowers*.⁸⁸ In cases where the claims of each plaintiff may require individual assessment or arise under different contracts or duties, the representative plaintiff may be required to prove breach of a duty owed to the group and loss flowing from the breach. However, any general requirement to establish damages in separate and individual proceedings was said to be “a severe procedural constraint on a rule that was designed to ensure a large group of litigants could come at justice”.⁸⁹
- 3.40 In *Saunders v Houghton (No 1)*, the Court of Appeal restated that representative proceedings for damages were not foreclosed.⁹⁰
- 3.41 The issue of damages in representative actions was briefly mentioned by the Supreme Court in *Credit Suisse*. Both the minority and majority judgments concluded that the prior view that damages claims are unsuitable for representative actions is no longer held in

⁸³ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [15]–[16].

⁸⁴ *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA).

⁸⁵ *Take Kerekere v Cameron* [1920] NZLR 302 (SC).

⁸⁶ *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 271.

⁸⁷ *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC) at 446–447 citing *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 (Ch). *Taspac* has since been cited as authority for the possibility of separate proceedings for damages on the basis of the declaration of liability in the representative action: for example, see *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [14].

⁸⁸ *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 at [179].

⁸⁹ *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 at [182].

⁹⁰ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [14] citing *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC) at 446.

Aotearoa New Zealand.⁹¹ The appellants had argued that representative proceedings for damages were “exceptional” and were only appropriate where total liability could be readily established as a global sum and the amount due to individuals was uncontested. This argument was unanimously rejected by the Court as being a narrow approach which was unsupported by the authorities.⁹² Both the majority and minority judgments held that a representative action is not restricted to dealing with common issues, and that group members are not required to file separate proceedings to determine individual issues such as damages. Requiring the filing of separate proceedings or applications for joinder to the representative proceedings would negate the advantages of a representative action.⁹³

- 3.42 In recent representative actions, courts have adopted the approach of having staged hearings, with common issues determined at the first hearing (‘stage one’) and individual issues such as damages left for subsequent determination (‘stage two’).

Limitation periods

- 3.43 In *Credit Suisse*, one of the issues before the Supreme Court was when an action had been ‘brought’ on behalf of a represented person for statutory limitation purposes. Was it when the representative plaintiff had filed a claim in representative form or was it when group members had joined the proceeding in accordance with the court’s direction (in this case, by opting in)? The Court was divided on this issue. The majority held that a representative action is ‘brought’ for both the representative plaintiff and all group members when the statement of claim is filed and therefore prior to group members having an opportunity to opt into in the proceedings. This may necessitate a representative order being backdated if it is not made at the time of filing.⁹⁴ Although the case used an opt-in mechanism, the majority commented that it was inappropriate to allow the existence of either an opt-in or opt-out mechanism to influence when limitation periods start to run in a representative action.⁹⁵ The minority considered that an action was not brought on behalf of a represented person until they joined the proceeding in accordance with the court’s orders.⁹⁶
- 3.44 In *Cridge v Studorp*, the Court of Appeal said that the majority’s conclusion in *Credit Suisse* that proceedings are brought for limitation purposes when the statement of claim is filed must logically apply whenever a proceeding is commenced as a representative action,

⁹¹ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [8] per Elias CJ and Anderson J and at [129] and [146] per McGrath, Glazebrook and Arnold JJ.

⁹² *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [122]–[123] and [129] per McGrath, Glazebrook and Arnold JJ and at [57]–[60] per Elias CJ and Anderson J.

⁹³ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [8], [56] and [59] per Elias CJ and Anderson J and at [147] and [158] per McGrath, Glazebrook and Arnold JJ.

⁹⁴ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [128] and [168].

⁹⁵ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [168].

⁹⁶ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [10], [65]–[68] and [83].

regardless of whether the court allows it to continue on that basis or not.⁹⁷ The Court held that:⁹⁸

... when time stopped running under the Limitation Act for the representative owners, it stopped for everyone else on whose behalf they purported to sue and that remained the case regardless of whether a representative order was later made or not.

Opt-in and opt-out proceedings

- 3.45 All of the early representative actions were brought on a “universal basis”, which means they were brought on behalf of a defined group without first obtaining the consent of its members or providing any opportunity for them to remove themselves from the litigation.⁹⁹ This included a number of cases which involved a large group.¹⁰⁰
- 3.46 In *Houghton v Saunders*, the plaintiff successfully brought a without notice application for a representative order based on an opt-out procedure. This meant that Feltex shareholders who were within a defined group would be represented by the named plaintiffs unless they elected to opt out of the proceedings by a specified date.¹⁰¹ The defendants successfully applied to review the opt-out order. In the High Court’s view, an opt-out procedure departed too radically from the existing Rules. Without legislative change, the Court had to work within HCR 78, which only contemplated opt-in proceedings.¹⁰² Subsequent to this decision, representative actions proceeded on an opt-in basis and the issue of whether opt-out proceedings should be available did not come squarely before the courts for another decade.¹⁰³
- 3.47 In *Ross v Southern Response*, the plaintiff unsuccessfully sought an order that the representative action be brought on an opt-out basis.¹⁰⁴ On appeal, the Court of Appeal held that there was no jurisdictional barrier to making an opt-out order under HCR 4.24.¹⁰⁵ The Supreme Court agreed with the Court of Appeal that opt-out orders should be made in appropriate cases.¹⁰⁶ It also set out guidance to assist courts in determining whether an opt-in, opt-out or universal approach is likely to be appropriate in a particular case.¹⁰⁷ We discuss this further in Chapter 12.

⁹⁷ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [82]–[83].

⁹⁸ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [86].

⁹⁹ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [82].

¹⁰⁰ For example in *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC), the plaintiff was granted an order allowing her to act on behalf of herself and 65,000 other applicants for a Special Benefit. In *Talley’s Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC), Sealord was appointed as a representative defendant to represent 4,500 foreign crew members.

¹⁰¹ See *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [21], [23] and [26].

¹⁰² *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [165].

¹⁰³ Note that in *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541, the majority appeared to accept that both opt-in and opt-out orders were available, but this was not an issue the Court needed to decide: see [163] and [168].

¹⁰⁴ *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288.

¹⁰⁵ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [81] and [111].

¹⁰⁶ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [89].

¹⁰⁷ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [90]–[101].

Court approval of settlement

- 3.48 In *Southern Response v Ross*, the Supreme Court considered that courts have the power to approve settlements in representative actions.¹⁰⁸ It said that, as a general rule, court approval to settle or discontinue a proceeding should be a condition of granting leave to bring a representative action on an opt-out basis. The court should also consider whether this should be a requirement of granting leave to bring an opt-in proceeding.¹⁰⁹ The Court said that when approving a settlement, courts could consider the extent to which a settlement prejudiced individual class members and could draw on the assistance of independent experts.¹¹⁰
- 3.49 There are several examples of the High Court having approved settlements of representative actions, although courts have not yet developed general guiding principles for approval of such settlements.¹¹¹

Court's role in cases involving litigation funding

- 3.50 In several cases, the courts have discussed their role with respect to representative actions which are funded by a litigation funder. When considering whether to grant leave under HCR 4.24, it is not the role of the courts to approve litigation funding agreements, and any decision to grant leave should not be taken as an endorsement of those agreements.¹¹² Nevertheless, the courts have acknowledged they may need to have a greater role in overseeing litigation funding of representative actions, and that they will ensure agreements with a litigation funder do not amount to an abuse of process.¹¹³ We discuss this issue in more detail in Chapter 15.

¹⁰⁸ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [82].

¹⁰⁹ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [83] and [101].

¹¹⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [82].

¹¹¹ See *Eaton v LDC Finance Ltd* [2013] NZHC 728 and *Stirling v Attorney-General* HC Wellington CP161/96, 29 September 2004 (sealed judgment of Miller J). Another possible example is *Mawson v Auckland Area Health Board* HC Auckland CP2018/87, 8 July 1993 (as we have noted earlier in this chapter, this case is not included in our list of 44 cases as it is unclear whether HCR 78 was the basis for the representative claim). See also *Ranchhod v Auckland Healthcare Services Ltd (No 2)* [2001] ERNZ 771 (EmpC) where the Employment Court approved the settlement of a representative action.

¹¹² *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [76(a)].

¹¹³ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [85]. See also *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [77]–[82].

Benefits of representative actions under HCR 4.24

3.51 The representative actions procedure in HCR 4.24 has enabled litigation in situations where it would be uneconomic for individual group members to bring their own claim.¹¹⁴ The Court of Appeal has observed:¹¹⁵

...it is when the individual claims are small that the r 4.24 procedure provides the clearest benefits. It enables the individual to seek vindication of his or her rights, even though it would be uneconomic to do so if it were forced to bring its own claim.

3.52 It is often said that it is not economic to bring a civil claim that is under \$100,000 in the High Court.¹¹⁶ Representative actions have enabled individuals with claims under this amount to group together to bring a proceeding — for example the *Cooper v ANZ Bank* claim which related to \$15 bank fees.¹¹⁷ Although the access to justice benefit appears clearest when individual claims are modest, HCR 4.24 has also enabled claimants with more substantial claims to group together, which makes it easier to secure litigation funding.

3.53 Combining claims may also be important when the evidence of multiple claimants is needed to establish the claim. For example, in *Smith v Claims Resolution Services*, the claim alleges a pattern of behaviour by the defendant. Proving the allegation will require evidence from a large group of claimants. The High Court noted that if the claims were brought separately, this could mask the existence of any improper joint venture.¹¹⁸ Similarly, in *Southern Response Earthquake Services v Southern Response Unresolved Claims Group*, the claimants alleged that Southern Response had adopted a strategy of delaying and misleading conduct and intended to rely on the experiences of multiple claimants to prove this strategy.¹¹⁹ The Court of Appeal accepted the submission that the claimants would not be able to prove or challenge the strategy unless they acted collectively.¹²⁰

¹¹⁴ See *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(b)]; *Smith v Claims Resolution Service Ltd* [2019] NZHC 127 at [38] (noting the evidence given by the representative plaintiff and other group members that they would be unable to afford to bring separate proceedings against the defendants). See also *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [55] where the Court of Appeal commented: “We also weigh that the r 4.24 procedure will enable claimants to pursue the good faith claims which while otherwise uneconomic, are of importance to them”.

¹¹⁵ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [48].

¹¹⁶ See Chapter 1.

¹¹⁷ *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827. The claim related to an average fee of \$15 that customers were charged as an honour or dishonour fee, credit card late payment fee or credit card over limit fee. See Gareth Vaughan “Parties behind ‘largest class action in NZ’s history’, taken against major banks, stand to pocket up to NZ\$250 mln” (11 March 2013) Interest <www.interest.co.nz>.

¹¹⁸ *Smith v Claims Resolution Service Ltd* [2019] NZHC 127 at [35].

¹¹⁹ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [3] and [44].

¹²⁰ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [48].

- 3.54 Using HCR 4.24 may enable multiple claims to be resolved in an efficient and effective manner and avoid multiple proceedings being filed.¹²¹ In *Cridge v Studorp*, the Court of Appeal upheld the High Court’s decision to grant a representative order, commenting that requiring the same evidence to be given in respect of each individual claim “would clearly be a wasteful duplication”.¹²²
- 3.55 The representative action is not the only method of seeking redress for an issue that affects many people. When considering whether Aotearoa New Zealand needs a statutory class actions regime, it is important to consider other existing methods of group litigation which include:
- (a) Civil procedure techniques such as joinder of plaintiffs, consolidation of proceedings and test cases.
 - (b) Specific statutory procedures for bringing group proceedings in different circumstances such as the representation procedure in the Companies Act 1993, claims on behalf of a class in the Human Rights Review Tribunal and procedures under the Employment Relations Act 2000.
 - (c) Proceedings by regulators including the Commerce Commission and the Financial Markets Authority.
 - (d) Broader techniques such as judicial review proceedings, Māori collective action procedures and non-court processes.
- 3.56 We discuss these different methods below.

CIVIL PROCEDURE TECHNIQUES FOR BRINGING GROUP CLAIMS

- 3.57 Civil procedure techniques which are available for bringing group litigation with respect to any kind of civil claim include joinder of plaintiffs, consolidation and test cases. In addition, High Court Rule 4.27 (HCR 4.27) enables a representative procedure in certain circumstances.

Joinder of plaintiffs

- 3.58 One method of bringing a group claim is to name all of the group members as plaintiffs. High Court Rule 4.2 (HCR 4.2) enables people to be joined as plaintiffs in a proceeding if: (a) they are alleging a right to relief with respect to the same matter;¹²³ and (b) if each plaintiff brought a separate proceeding, a common question of law or fact would arise.¹²⁴ Commentary suggests that if plaintiffs are entitled to join as plaintiffs under HCR 4.2, they

¹²¹ See for example *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [38] and [54]; *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [39]; and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [12].

¹²² *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [32]. See also *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [158] per McGrath, Glazebrook and Arnold JJ.

¹²³ Or the same transaction, event, instrument, document, series of documents, enactment, or bylaw: High Court Rules 2016, r 4.2(1)(a).

¹²⁴ High Court Rules 2016, r 4.2(1)(b). Rules 4.1, 4.3 and 4.56 are also relevant. See *Smith v Noble Investments Ltd* [2017] NZHC 477 at [7], observing that when considering the procedural regime for joinder of parties, these rules must all be read together.

can simply list themselves as plaintiffs in the claim. If an intending plaintiff falls outside this rule or wishes to be added after the proceedings have commenced, then it will be necessary to make an application under High Court Rule 4.56.¹²⁵ The High Court has traditionally taken a liberal approach to joinder of plaintiffs.¹²⁶

- 3.59 This method of group litigation is being used in *White v James Hardie*, a claim alleging that building products and cladding systems are defective and not weathertight.¹²⁷ The plaintiffs are stated to be “Karen Louise White and the Persons Listed in Schedule 1”. At the time the proceedings were filed, there were 365 plaintiffs in this proceeding.¹²⁸ The approach taken in this case can be contrasted with *Cridge v Studorp*, which is based on essentially the same pleaded facts, but has been brought as a representative action under HCR 4.24.¹²⁹
- 3.60 An advantage of joinder is that it avoids the need to apply for a representative order under HCR 4.24, which may prevent delay and expense. If all group members have the status of plaintiffs, this may also avoid some of the issues that can arise with representative actions such as group members’ lack of right to appear before the court and potential conflicts of interest with the representative plaintiff. However, it also means that all group members will have joint and several liability for adverse costs orders.¹³⁰ This approach may also have the disadvantage of being unwieldy and difficult to manage, compared with a representative action. Further, it also requires the plaintiffs to be readily identifiable. Joinder may work best where the number of plaintiffs is relatively small.

Consolidation and other orders under HCR 10.12

- 3.61 High Court Rule 10.12 (HCR 10.12) enables the High Court to order that two or more proceedings be consolidated, tried simultaneously or successively, or that one or more proceedings be stayed until the determination of others. The Court must be satisfied that a common question of fact or law arises, or the rights to relief arise out of the same event or transaction (or series of events or transactions), or there is some other reason why an order is desirable. The rule may be invoked even where the proceedings do not claim the

¹²⁵ Andrew Beck *Civil Procedure – A to Z of New Zealand Law* (online ed, Thomson Reuters) at [13.3.6.5]. See also *Smith v Noble Investments Ltd* [2017] NZHC 477 at [25]–[26], explaining that HCR 4.1–4.3 set out the principles or jurisdictional threshold for joinder. Once a claim has been commenced, any adjustment of parties must occur through HCR 4.56, which will require reference back to the jurisdictional basis of joinder set out in rules 4.1–4.3.

¹²⁶ Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR4.2.03] and [HR4.56.04]. See also *Winton v Winton* [2018] NZHC 1323 at [23]:

The approach to applications for joinder under r 4.56 is liberal. The Court must be in a position to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit.

¹²⁷ *White v James Hardie New Zealand* [2017] NZHC 2105 at [5]. This proceeding was filed together with *Waitakere Group v James Hardie*, which has five named plaintiffs: at [14].

¹²⁸ See *White v James Hardie New Zealand* [2017] NZHC 2105 at [10].

¹²⁹ See *White v James Hardie New Zealand* [2018] NZHC 1627, (2018) 24 PRNZ 198 at [15]; and *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582.

¹³⁰ High Court Rules 2016, r 14.14.

same relief.¹³¹ The Court of Appeal has commented “[i]t is difficult to conceive of a wider procedural discretion”.¹³²

3.62 Relevant considerations when considering whether to make an order under HCR 10.12 include:¹³³

- (a) whether it would save time and cost;
- (b) whether it would allow judicial resources to be used more efficiently;
- (c) whether it would eliminate or reduce the risk of inconsistent findings;
- (d) whether the size and complexity of a consolidated proceeding might cause confusion, prejudice or oppression to a party; and
- (e) readiness for trial.

3.63 Because consolidation enables the status of the original parties to be retained, it may appeal to those who consider that class actions interfere with individual autonomy and procedural due process.¹³⁴ However, as consolidation only applies to cases which have already been filed, it generally only serves the purpose of enabling efficiency and economy of litigation rather than providing access to justice by aggregating claims which would not be individually viable.¹³⁵

Test cases

3.64 Courts may conduct test cases to resolve issues which are likely to arise in other proceedings. A test case is one which “raises a novel point or principle of law with ramifications going beyond the particular case”.¹³⁶ Examples include some of the insurance test cases which arose from the Christchurch earthquakes in 2010 and 2011. Miller J, in his extrajudicial writing, commented of these cases that: “Although the decisions were not binding on other policyholders and insurers, it was practically unlikely that the same issues would be relitigated in other proceedings”.¹³⁷

3.65 This method of group litigation does not provide the same degree of certainty for group members who are not party to the proceeding being used as a test case. In *Cridge v Studorp*, the defendant opposed a representation order being made under HCR 4.24 and argued that a test case procedure should be used. The Court of Appeal considered that a representative action would better achieve the just, speedy and inexpensive determination of proceedings than a test case procedure, stating: “[a] test case would

¹³¹ High Court Rules 2016, r 10.13(a).

¹³² *Regan v Gill* [2011] NZCA 607 at [10] as cited in *Fairway Holdings Ltd v McCullagh* [2019] NZCA 353 at [6].

¹³³ Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR10.12.03].

¹³⁴ Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 115.

¹³⁵ Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 115.

¹³⁶ Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HRPt14.17].

¹³⁷ Forrest Miller “Introduction” (2018) 24 NZBLQ 93 at 93.

involve the same work and judicial resources as a lead representative case, but without the tangible benefit of generating findings that are binding on all”.¹³⁸

Representation order under HCR 4.27

- 3.66 HCR 4.27 provides for representation by other persons in specific situations. This includes the High Court having the power to direct a “local authority, public body or other representative body” to represent “any class of person” (or the inhabitants of a locality).¹³⁹ However, there are very few instances of this rule being relied upon to bring proceedings on behalf of a class.¹⁴⁰

SPECIFIC STATUTORY PROCEDURES

- 3.67 In this section we discuss group litigation procedures provided by particular statutes.

Companies Act 1993

- 3.68 Section 173 of the Companies Act enables the High Court to appoint a shareholder to represent other shareholders who have “the same or substantially the same interest”. The Court may make orders as to the control and conduct of the proceedings, the distribution of any amounts paid by a defendant among shareholders and costs. Commentary notes that proceedings under this provision are similar to those under HCR 4.24, although the Court’s specific powers under section 173 are wider and more flexible than those under HCR 4.24.¹⁴¹ It does not appear that this provision (or the earlier provision, section 209ZF of the Companies Act 1955) has ever been used to bring a representative action.¹⁴²

Health and Disability Commissioner Act 1994

- 3.69 Under the Health and Disability Commission Act 1994, the Director of Proceedings can commence proceedings in the Human Rights Review Tribunal with respect to conduct alleged to be in breach of the Code of Health and Disability Services Consumers’ Rights.¹⁴³

¹³⁸ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [39].

¹³⁹ High Court Rules 2016, r 4.27(g). See also r 4.27(h), which relates to representation where the local authority or other body may have interests adverse to those of the inhabitants of a locality or a class of persons.

¹⁴⁰ We have only found four cases where r 4.27 of the High Court Rules 2016 (or its predecessor rule) has been used to bring a proceeding on behalf of a class: *Titchener v Attorney-General* (1990) 3 PRNZ 52 (HC); *Contradictors v Attorney-General (No 2)* [1999] 2 NZLR 519 (CA); *ENZA Ltd v Apple and Pear Export Permits Committee* (2001) 15 PRNZ 303 (HC); and *New Zealand Association for Migration and Investment v Attorney-General* [2003] BCL 327 (HC).

¹⁴¹ Andrew Brown and others *Company Law* (online ed, Thomson Reuters) at [CA173.01].

¹⁴² In *Hedley v Kiwi Co-Operative Dairies Ltd* (2000) 15 PRNZ 210 (HC), the plaintiff sought to bring a representative action under r 78 of the High Court Rules and s 173 of the Companies Act. The Court granted a representative under HCR 78 but held that s 173 could not apply (because the claim was not restricted to issues between shareholders and a company and its directors).

¹⁴³ Health and Disability Commissioner Act 1994, s 50.

This includes the power to bring proceedings on behalf of a class of persons.¹⁴⁴ However, this power has never been used.¹⁴⁵

Human Rights Act 1993

3.70 The Human Rights Commission has jurisdiction under the Human Rights Act 1993 to bring proceedings in the Human Rights Review Tribunal with respect to an alleged discriminatory practice which affects a “class of persons”.¹⁴⁶ However, it has never done so. The Act also provides that the Director of Human Rights Proceedings, a statutory officer who can provide free legal representation for proceedings under that Act, may provide representation to “a group of persons”.¹⁴⁷ An example is *Atkinson v Ministry of Health* where the Director represented a group of nine plaintiffs in their challenge to a policy that parents could not be paid to be caregivers for their disabled adult children.¹⁴⁸

Privacy Act 2020

3.71 The Privacy Act 2020 allows the Director of Human Rights Proceedings to bring proceedings in the Human Rights Review Tribunal on behalf of a “class of aggrieved individuals”.¹⁴⁹ The Privacy Act 1993 contained a similar power although, like the powers under the Health and Disability Commissioner Act and the Human Rights Act, this was never used.¹⁵⁰ The new legislation also allows “a representative lawfully acting on behalf of a class of aggrieved individuals” to bring proceedings (in certain circumstances).¹⁵¹

Employment Relations Act 2000

3.72 While representative actions can be brought in the Employment Court relying on HCR 4.24 (as discussed earlier in this chapter), there are also provisions in the Employment Relations Act 2000 that can be relied upon to bring employment claims on a representative basis. The Court will sometimes use a combination of provisions when considering whether to allow a case to proceed on a representative basis. Empirical research on the different types of representative claims in the Employment Court, Labour Court and Employment Relations Authority has found a total of 40 claims to date, with 33 of them being in the 1990s.¹⁵²

¹⁴⁴ Health and Disability Commissioner Act 1994, s 50(3).

¹⁴⁵ Letter from Nicola Willis (Director of Proceedings) to Douglas White (past President of the Law Commission) regarding s 50 of the Health and Disability Commissioner Act (20 October 2017).

¹⁴⁶ Human Rights Act 1993, s 92B(2).

¹⁴⁷ Human Rights Act 1993, s 90(1)(c).

¹⁴⁸ See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

¹⁴⁹ Privacy Act 2020, s 97(6).

¹⁵⁰ Privacy Act 1993, s 82(4). This Act was repealed as from 1 December 2020.

¹⁵¹ Privacy Act 2020, s 98.

¹⁵² Eilish Buckley “Accessing Collective Justice in New Zealand’s Employment Courts and Tribunals: A Study of Employment Class Actions” (LLB (Hons) Dissertation, University of Auckland, 2020) at 19. This dissertation was supervised by Nikki Chamberlain.

- 3.73 Ten of these cases relied on section 123 of the Employment Contracts Act 1993 as a basis for a representative action.¹⁵³ The comparable provision in the Employment Relations Act 2000 provides:¹⁵⁴

In any proceedings the court may allow to appear or to be represented any person who applies to the court for leave to appear or be represented and who, in the opinion of the court, is justly entitled to be heard; and the court may order any other person so to appear or be represented.

- 3.74 Courts have also relied on their power to “generally give such directions as are necessary or expedient in the circumstances” as the basis for allowing a case to proceed on a representative basis.¹⁵⁵
- 3.75 Another relevant provision is section 236 of the Employment Relations Act 2000 which is entitled “Representation”. It provides that where certain legislation gives an employee the right to do anything or to take action in respect of an employer or in the Authority or the Employment Court, the employee may choose any other person to represent them. This has been relied on in four Employment Court cases to bring a case on a representative basis.¹⁵⁶
- 3.76 It appears that representative cases are being brought without reference to statutory representation procedures in some instances. For example, one case records that the proceeding was run by agreement as “an informal representative action”.¹⁵⁷
- 3.77 There are also several provisions in the Employment Relations Act 2000 which enable unions to bring claims on behalf of members:
- (a) Section 18(1) entitles a union to represent its members without further authorisation over any matter involving their collective interests as employees.

¹⁵³ In seven of these cases, s 123 was relied upon as the sole provision for authorising a representative proceeding: *Dwyer v Air New Zealand Ltd (No 2)* [1996] 2 ERNZ 435 (EmpC); *Ports of Auckland Ltd v New Zealand Waterfront Workers Union EmpC Auckland AEC52/93*, 18 October 1993; *Gray v Wellington City Mission* [1995] 2 ERNZ 126 (EmpC); *Ford v Capital Trusts Ltd* [1995] 2 ERNZ 47 (EmpC); *New Zealand Air Line Pilots' Assoc v Airways Corp of New Zealand* [1995] 2 ERNZ 545 (EmpC); *Manufacturing & Construction Workers Union Inc v Honda New Zealand Ltd* [1996] 1 ERNZ 354 (EmpC); and *McCulloch v New Zealand Fire Service Commission* [1998] 3 ERNZ 378 (EmpC). Three cases relied upon s 123 in combination with other provisions (including in some instances HCR 78): *New Zealand Seafarers' Union Inc v Silver Fern Shipping Ltd* [1998] 3 ERNZ 768 (EmpC); *Ranchhod v Auckland Healthcare Services Ltd EmpC Auckland AEC161/99*, 16 December 1999; and *Ivamy v New Zealand Fire Service Commission* [1995] 1 ERNZ 724 (EmpC).

¹⁵⁴ Employment Relations Act 2000, sch 3 cl 2.

¹⁵⁵ Employment Relations Act 2000, s 221(d); and Employment Contracts Act 1991, s 140(d). In *Law v Caterair New Zealand Ltd* [1998] 2 ERNZ 159 (EmpC), Colgan J considered that the discretion in s 140 was wide enough to allow the court to consider an application for a representative order: at 164). Section 140 was also relied upon in both *Ranchhod v Auckland Healthcare Services Ltd EmpC Auckland AEC161/99*, 16 December 1999 (as well as ss 123 and 130(2)); and *New Zealand Seafarers' Union Inc v Silver Fern Shipping Ltd* [1998] 3 ERNZ 768 (EmpC) at 770 (as well as s 123 and HCR 78).

¹⁵⁶ *Hyndman v Air New Zealand Ltd* [1992] 1 ERNZ 820 (EmpC); *New Zealand Air Line Pilots Assoc IUOW v Mount Cook Group Ltd* [1992] 3 ERNZ 355 (EmpC); *Paul v New Zealand Society for the Intellectually Handicapped Inc* [1992] 1 ERNZ 65 (EmpC); and *Northern Local Government Officers Union Inc v Auckland City* [1992] 1 ERNZ 1109 (EmpC). Note these cases relied on its predecessor provision: Employment Contracts Act 1991, s 59.

¹⁵⁷ *Irvine v Virgin Australia (NZ) Employment and Crewing Ltd* [2019] NZERA 109 at [8].

- (b) Section 56(1)(a) allows unions to enforce collective employment agreements they are party to.
 - (c) A union can represent an employee in matters concerning their individual rights if they have authority to do so under section 236.
 - (d) A union can bring proceedings seeking a compliance order if it is affected by non-observance or non-compliance under section 137(4).
- 3.78 Labour inspectors may bring proceedings on behalf of employees for the recovery of wages or benefits payable under the Minimum Wage Act 1983 or Holidays Act 2003.¹⁵⁸ They may also seek compensatory damages for employees when taking enforcement action against an employer for a breach of minimum employment standards.¹⁵⁹

PROCEEDINGS BROUGHT BY REGULATORS

- 3.79 Both the Commerce Commission (the Commission) and Financial Markets Authority (FMA) have powers which enable them to seek compensation on behalf of individuals.

Commerce Commission

- 3.80 The Commission is able to apply for a compensation order on behalf of consumers under section 43 of the Fair Trading Act 1986 when there has been a breach of the Act which has caused (or is likely to cause) consumers loss or damage.¹⁶⁰ This section does not explicitly refer to the Commission but allows “any person” to apply for orders, regardless of whether they have suffered the loss or damage themselves. The purpose of permitting “any person” to apply for orders is to facilitate consumer protection in circumstances where an individual’s loss may not warrant stand-alone proceedings.¹⁶¹ Orders that can be sought under section 43 include an order directing the defendant to refund money to consumers,¹⁶² or an order directing the defendant to pay consumers the amount of the loss or damage.¹⁶³
- 3.81 In *Commerce Commission v Carter Holt Harvey*, the High Court observed that section 43 was not a class actions provision and required claims for specific persons who had

¹⁵⁸ Employment Relations Act 2000, s 228.

¹⁵⁹ Employment Relations Act 2000, s 142J(3).

¹⁶⁰ Under pt 1 (misleading or deceptive conduct), pt 2 (disclosure and consumer information), pt 3 (product safety), pt 4 (safety of services) or pt 4A (consumer transactions or auctions): see Fair Trading Act 1986, s 43(1)(a). Note that s 43 also applies in cases such as aiding, abetting or inducing contravention of provisions in these Parts of the Act: see ss 43(1)(b)–(e).

¹⁶¹ *Commerce Commission v Carter Holt Harvey* [2009] NZSC 120, [2010] 1 NZLR 379 at [5] per Elias CJ. See also the comment in *Commerce Commission v Martini Ltd* DC North Shore, 8 November 2005 at [33]:

The litigation reality is that customers are unlikely to bring proceedings merely seeking a refund of the purchase price. It would simply be uneconomic to do so. That is why s 43 was amended at the committee stage to allow the present form of application to enable, for instance, the Commerce Commission to seek orders in favour of other persons.

¹⁶² Fair Trading Act 1986, s 43(3)(e).

¹⁶³ Fair Trading Act 1986, s 43(3)(f).

suffered specific losses.¹⁶⁴ It concluded that section 43 did not permit a claim to be brought on behalf of an indeterminate group of people identified only by class.¹⁶⁵

- 3.82 A compensation order under section 43 may be sought as part of criminal proceedings or through separate civil proceedings.¹⁶⁶ In the *Carter Holt Harvey* litigation, the Commission brought civil proceedings seeking compensation following a guilty plea to charges of misleading and deceptive conduct in relation to the sale and marketing of timber. These proceedings were ultimately settled.¹⁶⁷ The Commission also sought section 43 compensation orders in a claim about alleged inflated home valuations.¹⁶⁸ It appears this case also settled.¹⁶⁹ Another example is *Commerce Commission v Alpha Club*, where the Commission successfully sought an order that the defendant refund those who joined their pyramid selling scheme.¹⁷⁰ There are also several criminal prosecutions in which the Commission has successfully obtained section 43 compensation orders.¹⁷¹
- 3.83 In some cases where the Commission has formed the view that there has been a breach of the Fair Trading Act, it reaches a settlement which includes compensation for consumers, without the need to bring proceedings. Some examples include: a settlement of around \$20 million to bank customers relating to the marketing, promotion and sale of interest rate swaps;¹⁷² a \$45 million settlement for investors in ING funds;¹⁷³ and a \$60 million settlement to investors in relation to the failed investment product Credit SaLS.¹⁷⁴
- 3.84 The Commission can also bring civil proceedings under the Credit Contracts and Consumer Finance Act 2003.¹⁷⁵ This legislation sets out rules that apply to credit contracts, consumer leases and buy-back transactions of land. Several provisions in the Act refer to the Commission's power to act on behalf of a class:

¹⁶⁴ *Commerce Commission v Carter Holt Harvey* [2008] 1 NZLR 387 (HC) at [43]–[44].

¹⁶⁵ *Commerce Commission v Carter Holt Harvey* [2008] 1 NZLR 387 (HC) at [43]–[44].

¹⁶⁶ See *Direen v Commerce Commission* (1998) 8 TCLR 444 (HC) at 452.

¹⁶⁷ Te Komihana Tauhokohoko I Commerce Commission “Commerce Commission settles timber claim against Carter Holt Harvey” (press release, 9 November 2011).

¹⁶⁸ *Commerce Commission v Bennett & Associates Ltd* (1995) 6 TCLR 691 (CA).

¹⁶⁹ Te Komihana Tauhokohoko I Commerce Commission “Fletcher Homes, Residential Mortgages and Bennett and Associates offer compensation to home buyers” (press release, 29 May 1996).

¹⁷⁰ *Commerce Commission v Alpha Club New Zealand Ltd* (2002) 10 TCLR 569 (HC).

¹⁷¹ *Commerce Commission v Ecoworld New Zealand Ltd* [2005] DCR 921 (court ordered refunds of purchase of water treatment units); *O'Neill v Commerce Commission* (2006) 3 NZCCLR 898 (HC) (court upheld District Court order that the appellants refund the purchase price of Celluslim products); and *Commerce Commission v Morton* DC Napier CRN8041009621, 5 May 1999 (defendant ordered to pay a refund of \$200,000, divided pro rata amongst 1,901 individuals).

¹⁷² Te Komihana Tauhokohoko I Commerce Commission “Settlement payments completed in interest rate swaps case” (press release, 7 October 2015).

¹⁷³ Te Komihana Tauhokohoko I Commerce Commission “Commerce Commission directs payment of \$45 million to ANZ/ING investors” (press release, 21 July 2010).

¹⁷⁴ Te Komihana Tauhokohoko I Commerce Commission “Commerce Commission secures \$60m for investors in failed Credit SaLS product” (press release, 18 December 2012).

¹⁷⁵ Credit Contracts and Consumer Finance Act 2003, s 111(2)(c).

- (a) Section 88 makes creditors, lessors, transferees and buy-back promoters liable for statutory damages in certain circumstances. The Commission may make an application for statutory damages on behalf of a “person or class of persons”.¹⁷⁶
 - (b) The Commission may also make an application for an order under sections 93 (court’s general power to make orders) or 94A (court orders in relation to repossessions) on behalf of a “person or class of persons”.¹⁷⁷
 - (c) The Commission may apply for an injunction on behalf of a “person or class of persons” to restrain a person from engaging in conduct that would breach the Act.¹⁷⁸
- 3.85 There are, however, relatively few cases where the Commission has sought orders on behalf of consumers under these provisions.¹⁷⁹

Financial Markets Authority

- 3.86 The FMA has various powers to obtain compensation on behalf of individuals. Where the FMA brings proceedings under the Financial Markets Conduct Act 2013, it may seek a compensatory order to provide redress to an aggrieved person who has suffered loss or damage because of the contravention (or is likely to).¹⁸⁰ However, the FMA has not yet sought a compensatory order under these provisions.
- 3.87 Section 34 of the Financial Markets Authority Act 2011 also enables the FMA to exercise a person’s right of action against a financial markets participant, or to take over that person’s proceedings.¹⁸¹ This relates to proceedings under financial markets legislation (other than criminal proceedings) as well as proceedings for a contravention, fraud, negligence, breach of duty or other misconduct relating to an FMA inquiry or investigation.¹⁸² Subject to certain requirements,¹⁸³ the FMA may exercise this power if, as the result of its investigation or inquiry, it considers it is in the public interest to do so.¹⁸⁴
- 3.88 The primary objective of the section 34 power is to promote the public interest rather than obtain redress for investors, although redress may often follow if the FMA’s action is successful.¹⁸⁵ In deciding whether it is in the public interest to exercise the power, the

¹⁷⁶ Credit Contracts and Consumer Finance Act 2003, s 90(4).

¹⁷⁷ Credit Contracts and Consumer Finance Act 2003, s 95(3).

¹⁷⁸ Credit Contracts and Consumer Finance Act 2003, s 96.

¹⁷⁹ See *Commerce Commission v Sportzone Motorcycles Ltd (in liq) (No 2)* [2014] NZHC 2486 at [14]; *Commerce Commission v Bluestone Mortgages NZ Ltd* HC Auckland CIV-2009-409-617, 21 October 2010 at [5]; *Commerce Commission v Best Buy Ltd* [2017] NZDC 13575, [2018] DCR 213 at [28]–[29]; and *Commerce Commission v Appenture Marketing Ltd* [2018] NZDC 3266, [2019] DCR 375 at [43].

¹⁸⁰ Financial Markets Conduct Act 2013, ss 484 and 494–496.

¹⁸¹ Financial Markets Authority Act 2011, s 34(1). Financial markets legislation is defined as the Acts listed in Schedule 1 of the Financial Markets Authority Act and the enactments made under those Acts.

¹⁸² Financial Markets Authority Act 2011, s 34(2).

¹⁸³ Financial Markets Authority Act 2011, s 35.

¹⁸⁴ Financial Markets Authority Act 2011, s 34(1).

¹⁸⁵ Financial Markets (Regulators and KiwiSaver) Bill 2010 (211-1) (explanatory note).

FMA must have regard to specified matters.¹⁸⁶ In its “enforcement policy”, the FMA states it is likely to use its section 34 power in priority areas, such as a case that involves serious risk of harm to the financial markets, risk of significant loss, large numbers of investors, high product risk, particular investor vulnerability, or a case involving predatory, prevalent or increasing patterns of misconduct.¹⁸⁷ The FMA has only used the section 34 power in one case to date.¹⁸⁸

- 3.89 Proceedings taken by the FMA using its section 34 power may be on a representative basis. If the FMA commences or takes over proceedings in respect of a particular person and there are other persons with the same or substantially the same interest, the High Court may appoint the FMA to represent some or all of those persons.¹⁸⁹ The court may also make orders as to the conduct and control of those proceedings, the costs of the proceedings and how any amounts paid by a defendant are to be distributed among those represented.¹⁹⁰ There have not yet been any instances of the FMA using this representative power.

OTHER AVENUES FOR ADDRESSING ISSUES AFFECTING A GROUP

- 3.90 Other legal procedures which may enable claims affecting a group to be resolved include judicial review and litigation on behalf of a Māori collective. Group claims may also be resolved outside of the courts.

Judicial review proceedings

- 3.91 Judicial review proceedings can involve litigation of an issue that may affect the rights of a wide group, even if brought by a single plaintiff.¹⁹¹ An example is *Finnigan v New Zealand Rugby Football Union*, which sought judicial review of the Rugby Union’s decision to allow an All Black team to tour South Africa.¹⁹² Cooke P observed “[t]his decision affects the New Zealand community as a whole”.¹⁹³ More recent examples include *Seales v Attorney-General*¹⁹⁴ and *Borrowdale v Director-General of Health*.¹⁹⁵
- 3.92 Judicial review claims may also be brought on behalf of organisations which represent others. Some notable examples include: the New Zealand Māori Council’s challenge to

¹⁸⁶ Financial Markets Authority Act 2011, s 34(5).

¹⁸⁷ Te Mana Tatai Hokohoko | Financial Markets Authority “Enforcement” (23 April 2019) <www.fma.govt.nz>.

¹⁸⁸ *Financial Markets Authority v Prince & Partners Trustee Co Ltd* [2017] NZHC 2059.

¹⁸⁹ Financial Markets Authority Act 2011, s 39(1).

¹⁹⁰ Financial Markets Authority Act 2011, s 39(2).

¹⁹¹ See Andrew Beck “Opt Out Is In: The New Class Action Regime” [2019] NZLJ 356 (noting that in the area of public law it is common for a single plaintiff to bring a claim challenging a decision).

¹⁹² *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (HC and CA); *Finnigan v New Zealand Rugby Football Union Inc (No 2)* [1985] 2 NZLR 181 (HC); and *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 (CA).

¹⁹³ *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (HC and CA) at 179.

¹⁹⁴ *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556 (this case sought declarations with respect to the lawfulness of assisted dying).

¹⁹⁵ *Borrowdale v Director-General of Health* [2020] NZHC 2090 (this was a judicial review proceeding concerning the lawfulness of the restrictions imposed by the Government in response to COVID-19).

the implementation of the mixed ownership model proposals,¹⁹⁶ a case brought by a West Coast organisation about the impact of climate change on Resource Management Act processes,¹⁹⁷ the Quake Outcasts challenge to the Crown’s approach to Red Zone compensation,¹⁹⁸ the Forest and Bird challenge to conservation land swaps,¹⁹⁹ and the challenge by New Health to fluoridisation.²⁰⁰

- 3.93 Courts have taken a relaxed approach to standing in judicial review proceedings given the constitutional significance of judicial review.²⁰¹ The issue of the sufficiency of an applicant’s interest is assessed in the context of all the facts, rather than as a preliminary jurisdictional issue.²⁰² Relief can be granted without the impugned executive decision or action being challenged having a direct impact on the applicant’s rights, but where there is such an impact the case for relief will be stronger.²⁰³
- 3.94 Judicial review is designed to be a “simple, untechnical and prompt”²⁰⁴ procedure and has various features designed to achieve this.²⁰⁵ Consequently, it can be an efficient way to determine an issue that affects a wide group.

Procedures for collective action by Māori

- 3.95 Māori often initiate legal proceedings to establish or protect rights of a collective, such as an iwi or hapū. In *Proprietors of Wakatū v Attorney-General*, the Supreme Court held that a rangatira or kaumātua has customary authority to bring a collective claim on behalf of their people.²⁰⁶ Elias CJ observed that “[c]hiefs of high standing have long advanced such collective claims”, citing several examples.²⁰⁷ Similarly, the Supreme Court commented in

¹⁹⁶ *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

¹⁹⁷ *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.

¹⁹⁸ *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1.

¹⁹⁹ *Hawke’s Bay Regional Investment Company Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041.

²⁰⁰ *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

²⁰¹ *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [91(a)] per Elias CJ and Arnold J. See also Matthew Smith *NZ Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [36.1.2]; and Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [JR8.02(2)].

²⁰² See for example *Consumers Co-Operative Society (Manawatu) Ltd v Palmerston North City Council* [1984] 1 NZLR 1 (CA) at 6 per McMillan J. See also Matthew Smith *NZ Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [36.1.3]; and Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [JR8.02(2)].

²⁰³ *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [91(a)] per Elias CJ and Arnold J.

²⁰⁴ *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 at [39]; *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353; and Matthew Smith *NZ Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [25.1.2].

²⁰⁵ These include only permitting cross-examination to occur with the leave of the Court (which is sparingly granted), limiting the availability of discovery (which is a matter of discretion for the judge) and lower court filing fees: see Matthew Smith *NZ Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [72.1.1] and [71.5.1]; and High Court Fees Regulations 2013, sch.

²⁰⁶ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [494] per Elias CJ, [673] per Glazebrook J and [807] per Arnold and O’Regan JJ.

²⁰⁷ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [494] citing *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC); *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA); and *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

Southern Response v Ross “... proceedings which would now fall within r 4.24 have long been a feature of litigation in this country brought by Māori where a chief has represented the plaintiffs”.²⁰⁸

- 3.96 There is authority that an iwi or hapū cannot bring a proceeding in its own name.²⁰⁹ However, proceedings are frequently brought in the name of a whenua, hapū or iwi incorporation, rūnanga, trust or other entity. The New Zealand Māori Council has also been the plaintiff in some significant cases.²¹⁰ Specific mechanisms for Māori legal claims affecting a group include the Waitangi Tribunal claims process,²¹¹ the Māori Land Court,²¹² and the Marine and Coastal Area (Takutai Moana) Act 2011.²¹³

Alternative dispute resolution processes

- 3.97 There are examples of special Tribunals and processes being set up to respond to a particular issue that has caused widespread harm. Although these rely on individual adjudication or consideration, they are (theoretically) able to provide a more efficient and cost-effective way of dealing with widespread harm than individual litigation in the High Court. Some examples are the Weathertight Homes Tribunal, the Greater Christchurch Claims Resolution Service, the Canterbury Earthquakes Insurance Tribunal and the Ministry of Social Development’s historic abuse claims process.²¹⁴

²⁰⁸ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [27]. The Court refers to the examples cited in *Proprietors of Wakatū v Attorney-General* as well as proceedings brought by Nganeko Minhinnick, such as *Minhinnick v The Historical Places Trust* CA280/97, 18 December 1997.

²⁰⁹ *Te Ara Rangatu o Te Iwi Ngāti Te Ata Waiohua Inc v Attorney-General* [2018] NZHC 2886, [2019] NZAR 12 at [75].

²¹⁰ Most notably, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

²¹¹ A claim to the Tribunal may be made in respect of an individual or group of Māori: Treaty of Waitangi Act 1975, s 6(1).

²¹² The primary objective of the Māori Land Court is to promote and assist Māori to retain Māori land and General land owned by Māori and to assist Māori to effectively use, manage and develop that land: Te Ture Whenua Maori Land Act 1993, s 17.

²¹³ Under this legislation, an iwi, hapū or whānau group seeking recognition of their protected customary rights or customary marine title may appoint a person (or a legal entity) as their representative: Marine and Coastal Area (Takutai Moana) Act 2011, s 9 definition of “applicant group”. For an example of this, see *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559.

²¹⁴ See Weathertight Homes Resolution Services Act 2006; Greater Christchurch Claims Resolution Service “Home” <www.gccrs.govt.nz>; Canterbury Earthquakes Insurance Tribunal Act 2019; and Te Manatū Whakahiato Ora | Ministry of Social Development “Historic Abuse – Make a Claim” <www.msd.govt.nz>. Royal Commissions and inquiries can also consider situations of widespread harm, although they have no power to determine the civil, criminal or disciplinary liability of any person: see Inquiries Act 2013, s 11(1).

CHAPTER 4

Problems with using the representative actions rule for group litigation

INTRODUCTION

- 4.1 In this chapter, we explain how the representative actions rule has been used to bring claims which might be brought as class actions in other jurisdictions. We then discuss the problems with this approach:
- (a) The lack of public policy process to consider the issue of class actions.
 - (b) Issues caused by the lack of clear rules for representative actions, including delay and expense for litigants.
 - (c) Types of group litigation that might be inhibited by the current procedural framework.

USING THE REPRESENTATIVE ACTIONS RULE TO PURSUE CLASS ACTION-STYLE CLAIMS

- 4.2 In the absence of a class actions regime in Aotearoa New Zealand, the representative action rule has been incrementally developed to include many of the features of a class action, including:
- (a) Preliminary court approval for a case to proceed as a representative action.¹
 - (b) The requirement for a common issue.
 - (c) Opt-in and opt-out mechanisms for determining membership of the represented group.
 - (d) Active court supervision of proceedings.
 - (e) The court must approve settlement.
 - (f) Methods for determining individual issues (in practice, split trials for common issues at stage one and damages at stage two).

¹ In cases under r 4.24(b) of the High Court Rules 2016. As we explain in Chapter 3, a representative action can be brought without an order of the court if all those with the same interest consent, under r 4.24(a).

- (g) Cases are often funded by a litigation funder.
- 4.3 Courts are likely to consider whether to allow other class action features in upcoming representative action cases, including the availability of a common fund order (where the group members all contribute to the costs of the litigation funder)² and how competing representative actions should be managed.³
- 4.4 Many recent representative actions involve sizeable claims and are brought on behalf of a large group of people who are mostly unknown to each other. These cases look very similar to those brought as class actions in other jurisdictions.
- 4.5 There are several examples of the High Court referring to representative actions as “class actions”.⁴ It has also been said that representative actions brought under High Court Rule 4.24 (HCR 4.24) “meet the markers of a class action in substance”.⁵ However, the term ‘class action’ is often used in Aotearoa New Zealand in a broader sense, to refer to any means of bringing group litigation.⁶
- 4.6 In *Southern Response v Ross*, the Supreme Court discussed whether procedures for representative actions should continue to develop in the absence of a more detailed legislative framework. It said that “so long as the concern not to work injustice is kept in mind, r 4.24 should continue to be interpreted to meet modern requirements”.⁷ In that case, it affirmed the Court of Appeal’s decision to allow opt-out claims to be brought under HCR 4.24. The Supreme Court also said that courts have the power to approve settlements in representative actions.⁸ This case provides a clear example of HCR 4.24 being used to bring a claim with many of the features of a class action.
- 4.7 Nonetheless, as we discuss below, there are a number of problems with using HCR 4.24 to bring claims that have similar features to class actions.

Lack of public policy process

- 4.8 While cases with similar features to class actions are proceeding through the courts in Aotearoa New Zealand, this has been the result of incremental evolution of the representative actions rule through case law. There has not been a comprehensive public policy process, with opportunities for stakeholder input, to consider whether a class

² In *Ross v Southern Response*, the plaintiff has applied for a common fund order. See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [62].

³ This issue has arisen as a result of the two representative actions filed with respect to CBL Corporation.

⁴ See *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 2482, (2015) 23 PRNZ 64 at [22]; *Houghton v Saunders* [2012] NZHC 1828, [2012] NZCCLR 31 at [38]; *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 at [182] and [184]; and *Cridge v Studorp Ltd* [2020] NZHC 1836 at [1]. See also the comment in Stephen Kós “Disaster & Resilience: The Canterbury earthquakes and their legal aftermath” (paper presented to Supreme and Federal Courts Judges Conference, Brisbane, 26 January 2016) at [33] that “[c]lass actions remain uncommon in New Zealand. The main reason is that the rules regarding such proceedings remain antediluvian”.

⁵ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 138.

⁶ For instance, *White v James Hardie New Zealand* [2017] NZHC 2105 is often referred to as a class action, although it is being brought using the joinder rule rather than under HCR 4.24: see “Plaster Cladding Class Action” <www.goodcladding.co.nz>.

⁷ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [89].

⁸ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [82].

actions regime is desirable for Aotearoa New Zealand and, if so, the design and scope of a regime.

4.9 We note that the Rules Committee looked at the issue of class actions between 2006 and 2009.⁹ The Committee developed two consultation papers, a draft Class Actions Bill and draft amendments to the High Court Rules. However, its work was limited in scope and it was not able to undertake extensive consultation at the time.¹⁰ The Government chose not to progress the draft Bill and Rules.

4.10 Having class action-style litigation in Aotearoa New Zealand as a result of the incremental development of HCR 4.24 rather than as the result of a public policy process raises several issues. First, the law has developed without analysis of the best way for delivering collective redress in Aotearoa New Zealand.¹¹

4.11 Second, there has been little opportunity to consider whether our representative actions mechanism appropriately balances the needs and interests of the different groups involved.¹² Miller J, writing extra-judicially, has said that class actions are allowed in Aotearoa New Zealand (through HCR 4.24) and commented:

Class actions are intrinsically complex, time-consuming and expensive. They call for a process that balances the interests of claimants and defendants, offering procedural safeguards and ensuring that trial is viable for both. To fail in these objectives may be to force settlements that are unfair to one side or the other.¹³

4.12 Third, the representative action has developed without the benefit of the insights of a range of stakeholders. Engaging individuals and groups in policy design and development can improve policy quality by helping to better understand problems and risks and to craft solutions that are more likely to meet the needs of users. It may also improve the legitimacy and impact of policies.¹⁴ The Legislation and Design Advisory Committee Guidelines note that a lack of consultation:¹⁵

... may result in valuable perspectives and information being overlooked and also risks unintended consequences. It may also result in a failure to identify alternative means of achieving the policy objective.

⁹ The Rules Committee is a statutory body originally established by s 51B of the Judicature Act 1908 and continued by s 155 of the Senior Courts Act 2016 to develop rules of procedure for the District Court, High Court, Court of Appeal and Supreme Court.

¹⁰ In 2018, the Rules Committee sought feedback on proposed High Court Rules for representative actions. The aim of the draft Rules was to codify the case law to provide clarity in anticipation of subsequent legislative developments. This work was suspended pending the Supreme Court's decision in *Southern Response Earthquake Services Ltd v Ross*.

¹¹ See Forrest Miller "Introduction" (2018) 24 NZBLQ 93 at 93; and Vicki Waye "Advantages and Disadvantages of Class Action Litigation (and its Alternatives)" (2018) 24 NZBLQ 109 at 113.

¹² See Anthony Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" [2015] NZ L Rev 73 at 109. See also Nikki Chamberlain "Contracting-Out of Class Action Litigation: Lessons from the United States" [2018] NZ L Rev 371 at 397 who noted that "the legislature is in a better position to balance the needs of class action plaintiffs and defendants after consultation".

¹³ Forrest Miller "Introduction" (2018) 24 NZBLQ 93 at 94.

¹⁴ See Te Tari o te Pirimia me te Komiti Matua | Department of the Prime Minister and Cabinet "Policy Methods Toolbox: Community Engagement" (3 November 2020) <www.dpmc.govt.nz>.

¹⁵ Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 16. See also 9–10.

- 4.13 Fourth, a number of significant issues have not yet been addressed because they have not arisen in cases to date. For instance, courts have not yet had to address issues such as the criteria for approving settlements and whether a common fund order should be allowed.¹⁶
- 4.14 Fifth, the courts do not have the opportunity to consider big picture design issues that can be considered in a public policy process, such as which courts or areas of law a class actions regime should apply to.¹⁷

CASES PROCEED WITHOUT THE BENEFIT OF CLEAR RULES

- 4.15 Representative actions have had to proceed without the benefit of procedural rules which specify how these cases should be managed. The only specific rule for representative actions is HCR 4.24, which is a mere 61 words long. This rule has changed little in substance since it was first introduced into Aotearoa New Zealand's civil procedure rules in 1882 and it is insufficient for managing the issues that arise in modern representative actions. In *Credit Suisse Private Equity v Houghton*, Elias CJ commented that HCR 4.24, a rule based on a 19th century model, was being "required to bear a weight for which it was not designed".¹⁸
- 4.16 Issues that arise due to the lack of developed rules include:
- (a) A lack of certainty and clarity about the procedures for conducting representative actions, causing delay and expense for litigants.
 - (b) Debate as to whether HCR 4.24 and the High Court's inherent jurisdiction are sufficient to regulate all aspects of representative actions.
- 4.17 We explore these issues below.

Lack of certainty and clarity causing delay and expense

- 4.18 There is a lack of certainty about many aspects of the procedural framework for representative actions.¹⁹ In *Southern Response v Ross*, the Supreme Court said there was

¹⁶ As we note above, an application for a common fund order has been made in *Ross v Southern Response*. See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [62]. With respect to settlement, the Supreme Court has confirmed that courts have the power to approve a settlement in a representative action: at [82]. In that decision, the Court cited several representative actions where the High Court has approved settlements, including *Harding v LDC Finance Ltd (in rec)* HC Christchurch CIV-2008-409-1140, 19 November 2009; *Ranchhod v Auckland Healthcare Services Ltd (No 2)* [2001] ERNZ 771 (EmpC); and *Stirling v Attorney-General* HC Wellington CP161/96, 27 May 1998. However, there are currently no general guidelines for approval of settlements such as in overseas jurisdictions with class actions regimes. The Supreme Court has indicated that it may be appropriate to draw on the assistance of independent experts when considering proposed settlements: *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [82].

¹⁷ See also the observation in Andrew Beck "Opt Out Is In: The New Class Action Regime" [2019] NZLJ 356 at 359 that:

... the courts are not in a position to develop detailed schemes governing procedures, with all the intricate details necessary to ensure proper protection for persons who might be affected as a result of the way in which processes operate. It is all very well for courts to take action they perceive as necessary, but such action is inevitably of an ad hoc nature, and comes at the expense of parties involved in the process.

¹⁸ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [49] per Elias CJ and Anderson J citing *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [3] per Gleeson CJ.

¹⁹ See Kate Tokeley "Class Actions for New Zealand Consumers" in Christian Twigg-Flesner and others (eds) *The Yearbook of Consumer Law 2008* (Ashgate Publishing, Aldershot (UK), 2007) 297 at 313 commenting that the lack of detail in r 78 of the High Court Rules formerly contained in sch 2 of the Judicature Act 1908 (the predecessor to r 4.24

a limit to how far it could go in providing guidance as to how the Court’s discretion under HCR 4.24 should be exercised, particularly without a legislative framework. It commented “there are a number of procedural and other matters that will simply have to be worked through as the issues arise in a particular case”.²⁰

- 4.19 Given the lack of certainty, parties in representative actions have had to file multiple interlocutory applications to determine procedural issues. While the lack of statutory rules allows judges to tailor procedures to a particular case,²¹ requiring procedural issues to be determined on a case-by-case basis can also be inefficient and “may restrict access to justice through being cost-prohibitive”.²² This seems contrary to the objective of the High Court Rules, which is to secure “... the just, speedy and inexpensive determination” of proceedings and applications.²³ As the Court of Appeal has observed, in the absence of developed rules to facilitate representative actions there are “likely to be heavy burdens on both counsel and the judge”.²⁴ The use of judicial resources for resolving these issues may also lead to delays in other cases.
- 4.20 The cost of getting the law on representative actions to its current state has been substantial, with several cases proceeding to appeal courts on preliminary matters.²⁵ A case that is often cited to illustrate the inefficiency of the current regime is *Houghton v Saunders*.²⁶ The case was filed in 2008 and there were over 20 interlocutory and costs judgments before the hearing on common issues in 2014, as well as numerous judgments subsequent to the substantive hearing. Several of the judgments in that litigation have commented on the difficulties caused by the lack of rules.²⁷
- 4.21 Capital Strategic Advisors (CSA) draws a parallel between representative actions and company arrangements. It notes that economic efficiency and equity would be greatly harmed in the absence of clear rules to facilitate collective action through the company.

of the High Court Rules 2016) leads to uncertainty and confusion. See also Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 109 commenting that the absence of a legislative class actions regime can deny the parties advance certainty about their procedural rights.

²⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [94].

²¹ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 152.

²² Nikki Chamberlain “Contracting-Out of Class Action Litigation: Lessons from the United States” [2018] NZ L Rev 371 at 398.

²³ High Court Rules 2016, r 1.2.

²⁴ See *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [41].

²⁵ Andrew Beck “Opt Out Is In: The New Class Action Regime” [2019] NZLJ 356 at 369. See also Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 107 commenting there “... there is currently potential for litigation over almost every aspect of group litigation procedure”.

²⁶ See for example Chris Patterson “Class actions in New Zealand: The necessity for introducing a class action regime” (2016) 5 J Civ LP 20 at 23–24; Forrest Miller “Reflections on the earthquake litigation” (paper presented to New Zealand Insurance Law Association Conference, Wellington, September 2014) at 9; and Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 108.

²⁷ See *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74 at [14] (commenting that supervising pre-trial issues had been made more difficult by the lack of class action provisions in the High Court Rules); *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [41] (commenting that the lack of rules was likely to impose “heavy burdens” on counsel and the judge); *Houghton v Saunders* [2012] NZHC 1828, [2012] NZCCLR 31 at [45] (commenting that “[t]he absence of class actions rules is creating difficulties for the parties in this case”); and *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [49] per Elias CJ and Anderson J.

CSA observes that standardising provisions and making them legally enforceable greatly reduces the transaction costs and risks of collective action.²⁸

- 4.22 Other problems arising from the lack of certainty and the associated cost and delay include the risks that:
- (a) The law will develop inconsistently.²⁹
 - (b) Well-resourced defendants may take advantage of the procedural uncertainty by requiring plaintiffs to respond to numerous interlocutory applications.
 - (c) Availability and pricing of litigation funding may be affected, which may impact on access to justice.
 - (d) Potential plaintiffs with meritorious claims may be deterred from bringing proceedings.³⁰
 - (e) Litigants may choose to settle claims, even if they would be likely to succeed in court, to avoid protracted and expensive legal proceedings.
- 4.23 However, these difficulties should not be overstated. While some representative actions have required multiple interlocutory applications, this is not always the case. For example, there have been remarkably few interlocutory judgments in *Cridge v Studorp*, a matter that went to hearing in August 2020.³¹ The increase in representative actions filed over the past two decades shows that the lack of procedural rules has not been an insurmountable barrier for litigants.

Is HCR 4.24 and the inherent jurisdiction sufficient to regulate representative actions?

- 4.24 Given the language is so sparse, it could be argued that HCR 4.24 does not provide a sufficient basis on which the various procedural issues that arise in representative actions can be resolved.³² In several cases, courts have referred to their ability to use the inherent jurisdiction to manage those issues,³³ but there has also been some debate as to whether

²⁸ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 33.

²⁹ See *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [21].

³⁰ See Chris Patterson “Three possible legislative responses” (2016) 881 LawTalk 20 at 22.

³¹ There have been a total of seven judgments issued in this proceeding to date. The only real interlocutory matters to be determined were whether leave to bring a representative action should be granted (and related limitation issues) and pre-trial admissibility of evidence.

³² See Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 102.

³³ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [59] per Elias CJ and Anderson J; *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [105] and [110]; *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [43], [52], [89] and [94]; and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [15] and [36]. The High Court’s inherent jurisdiction is founded in the common law and is independent of any statutory jurisdiction. See Rosara Joseph “Inherent Jurisdiction and Inherent Powers in New Zealand” (2005) 11 *Canta LR* 220 at 221; and Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [SC12.02(2)].

it is appropriate to use the inherent jurisdiction to address more significant matters such as the use of an opt-out mechanism.³⁴

- 4.25 In *Southern Response v Ross*, the Supreme Court noted the willingness of courts in Australia and Canada to interpret the representative actions rule flexibly, enabling some development of procedures, including in an opt-out context.³⁵ The Court also noted the need for courts to exercise “an adjudicative power in their protective or supervisory jurisdiction” in representative actions.³⁶ At the same time, the Court accepted that, absent a more detailed statutory framework, there will “inevitably be some uncertainty” on issues as they proceed through the courts, and that the cost of resolving such uncertainty through litigation is “not an ideal situation for either plaintiffs or defendants”.³⁷ In other words, the Supreme Court endorsed the use of HCR 4.24 and the inherent jurisdiction to develop procedures for managing modern representative actions, but recognised the limits to this approach.
- 4.26 Courts have commented on the desirability of having detailed legislative rules for managing representative actions.³⁸ Some academics and practitioners have suggested that legislative reform is urgently needed in this area because the current regime is inefficient, expensive, does not facilitate access to justice and does not comply with rule of law values.³⁹ The New Zealand Law Society and the New Zealand Bar Association have also supported the development of class actions legislation.⁴⁰

³⁴ See Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 105. Contrast Tom Hallett-Hook “Class Actions Under New Zealand’s Representative Rule: Ingenious Solution or Inadequate to the Task?” (LLM Dissertation, University of Toronto, 2015) at [3.2.3].

³⁵ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [52].

³⁶ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [81].

³⁷ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [89]. See also at [94].

³⁸ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [15] and [41]; and *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [49] per Elias CJ and Anderson J (“French J was justified in the remark that ‘[t]he absence of class action rules is creating difficulties for the parties in this case’”). See also *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [105] noting that:

It would be preferable to have a legislative framework for representative claims which provides greater certainty and predictability for both claimants and defendants. Such a framework would reduce the procedural conflict that bedevils representative proceedings.

³⁹ See for example Chris Patterson “Class actions in New Zealand: The necessity for introducing a class action regime” (2016) 5 J Civ LP 20 at 37 (the introduction of a class actions regime is “well overdue” and that the representative action procedure under r 4.24 of the High Court Rules 2016 cannot effectively achieve the objectives of access to justice, judicial efficiency and promotion of the rule of law); Nikki Chamberlain “Contracting-Out of Class Action Litigation: Lessons from the United States” [2018] NZ L Rev 371 at 398 (legislation dealing with civil action procedure is “desperately needed” and that the current procedure for representative actions does not accord with the objective of the High Court Rules); and Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 109 (“[E]nacting class action legislation would accord with basic rule of law values”). See also Andrew Beck “Opt Out Is In: The New Class Action Regime” [2019] NZLJ 356 at 369:

[I]f representative proceedings are truly to achieve the objective of efficiency and cost reduction then the legislature needs to act swiftly to put in place a process that does not require ongoing preliminary decisions from the courts.

⁴⁰ This position was expressed in their role as intervenors in the Supreme Court appeal of *Ross v Southern Response*. The third intervenor, litigation funder LPF, also supported enactment of class action legislation. See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [22].

QUESTION

Q1

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

GROUP LITIGATION THAT MAY BE INHIBITED BY THE CURRENT PROCEDURAL FRAMEWORK

4.27 The current procedural framework for representative actions may be preventing or limiting group litigation in relation to some issues or areas of the law. We have heard that the current procedural uncertainty increases legal cost and risk and this can make it difficult to secure funding for a case. While it is difficult to ascertain exactly which kinds of litigation this prevents, we have identified two areas where there appears to be more group litigation in jurisdictions with class actions regimes than in Aotearoa New Zealand. These are consumer cases, particularly those with low individual claim values, and compensation claims following regulatory action.

Consumer cases

4.28 Relatively few representative actions have been taken in relation to consumer issues, particularly where the value of each individual claim is low. As outlined in Chapter 3, six consumer representative actions have been brought between 2013 and 2018. These cases are:

- (a) A claim about bank fees of an average of \$15.⁴¹
- (b) Three cases about building materials used for residential properties and schools.⁴² Some, if not all, of the individual claims involve substantial amounts.⁴³
- (c) Two cases relating to resolution of insurance claims arising out of the Christchurch earthquakes.⁴⁴ The individual claim sizes are likely to vary. In *Ross v Southern Response*, many individual claims are said to be over \$100,000.⁴⁵

Consumer class actions in other jurisdictions

4.29 While comparisons with other jurisdictions are difficult, given variations in the substantive law and dispute resolution processes, it is worth noting that 117 consumer class actions

⁴¹ *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827. See Gareth Vaughan “Parties behind ‘largest class action in NZ’s history’, taken against major banks, stand to pocket up to NZ\$250 mln” (11 March 2013) Interest <www.interest.co.nz>.

⁴² *Minister of Education v James Hardie Ltd* [2018] NZHC 1481; *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281; and *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478.

⁴³ For example, in *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281 at [11] and [24], claims for two of the named plaintiffs are \$275,000 (Cridge/Unwin) and \$393,000 (Fowler)(note the claims also include a claim for stigma/diminution of value which was unquantified at that point).

⁴⁴ *Ross v Southern Response Earthquake Services Ltd*; and *Smith v Claims Resolution Service Ltd*.

⁴⁵ GCA Lawyers “Southern Response Concealment Class Action” (press release, 17 November 2020).

were filed in Australia between June 1992 and May 2017.⁴⁶ In the year to 30 June 2019, 16 consumer class actions were filed in Australia.⁴⁷ Consumer class actions are now the most common form of new class action case in Australia.⁴⁸ These have included claims of modest individual value. For example, the settlement of a class action against Volkswagen relating to the “Dieselgate” scandal (concerning deficiencies in diesel emissions controls) resulted in an estimated average settlement payment of \$2,800 per vehicle.⁴⁹ In Canada, consumer protection and product liability cases made up an estimated 27 per cent of class actions between 1993 and 2008.⁵⁰

Why is there a lack of consumer representative actions in Aotearoa New Zealand?

- 4.30 A number of factors may be contributing to the lack of “low value” consumer representative actions in Aotearoa New Zealand. Given our small population size, small value consumer claims may not have been seen as economically viable for plaintiffs or litigation funders, particularly if brought on an opt-in basis.⁵¹ There may also be a lack of interest among consumers in pursuing low value claims and a lack of awareness that a consumer issue affects a large group.⁵² It may also be difficult to find a motivated representative plaintiff when each individual’s claim is small.
- 4.31 More generally barriers to access to justice for consumers include:⁵³
- (a) Power imbalances between consumers and traders.
 - (b) Consumers may find legal processes intimidating and have limited ability to navigate these processes.
 - (c) Consumers’ lack of awareness of their substantive legal rights.
 - (d) The nature of modern supply chains and online sales creating a perception that consumers are unable to complain.

⁴⁶ Vince Morabito *The First Twenty-Five Years of Class Actions in Australia* (Fifth Report, An Empirical Study of Australia’s Class Action Regimes, July 2017) at 27. This comprises product liability and consumer protection claims.

⁴⁷ King & Wood Mallesons *The Review: Class Actions in Australia 2018/2019* (2019) at 4. These include product liability claims relating to the Essure contraceptive device, Hardi spray units, faulty airbags and aluminium composite panel cladding; claims relating to add-on car insurance; a claim by the taxi industry against Uber; and claims relating to banking charges and legal fees.

⁴⁸ Allens *Class Action Risk 2020* (March 2020) at 3 and 6.

⁴⁹ Maurice Blackburn Lawyers “Volkswagen, Audi, Skoda Australian class actions” <www.mauriceblackburn.com.au>. We note that in 2015 a New Zealand law firm sought expressions of interest for a group action against Volkswagen but we are unaware of any proceedings being filed. See Gibson Sheat Lawyers “Volkswagen Vehicle Emissions Claims” (8 October 2015) <www.gibsonsheat.com>.

⁵⁰ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 15.

⁵¹ See Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner and others (eds) *The Yearbook of Consumer Law 2008* (Ashgate Publishing, Aldershot (UK), 2007) 297 at 304 and 312 observing that an opt-in approach poses a particular difficulty in a consumer dispute where it may be difficult to identify potential plaintiffs (for example, a list of persons who purchased a defective mass-marketed product).

⁵² Jessica Palmer “Access to Justice for Consumers” in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) 495 at 497.

⁵³ Jessica Palmer “Access to Justice for Consumers” in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) 495 at 496–498 and 500–504. See also Consumer Protection *New Zealand Consumer Survey 2018: Summary Findings* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2019) at 40.

- (e) Social and cultural factors that weigh against complaining.
 - (f) The cost of litigation in both money and time, particularly when compared to the low value of some individual consumer claims.
 - (g) The limited availability of legal aid, free or low-cost legal services, especially for representative actions.
- 4.32 Another factor may be the perception that consumer issues are best left to the Commerce Commission to pursue. However, while the Commission has an important role to play in protecting consumers, it rarely pursues compensation claims on behalf of consumers (as discussed in Chapter 3). It is also important to note that the Commission does not enforce the Consumer Guarantees Act 1993 — only an aggrieved consumer can bring an action under this legislation.⁵⁴

Consumer issues often go unresolved

- 4.33 The limited number of consumer representative actions in Aotearoa New Zealand does not reflect a lack of consumer problems. Surveys on unmet legal needs have found that consumer issues are the most prevalent legal problem experienced by New Zealanders, but people are less likely to seek help in resolving these issues than other legal issues.⁵⁵ The 2018 Consumer Survey found over half of consumers (56 per cent) had reported a problem with a product or service over the past two years.⁵⁶ Only 35 per cent reported the problem was able to be resolved to their satisfaction.⁵⁷ This survey indicates that certain groups are less likely to have knowledge about consumer rights, and to take action to resolve their problems. While there is some variation across different measures, young people, students, people who identified as Māori, Pacific or Asian, non-English primary language speakers, low-income households, and people without tertiary education were less likely to have knowledge of their consumer rights.⁵⁸ Those with low levels of knowledge were more likely to have their problems left unresolved, and young people,

⁵⁴ See Alexandra Sims "Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action" (2010) 16 NZBLQ 145 at 146.

⁵⁵ Pokapū Ratonga Ture I Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (November 2006) at 1 and 35; and Colmar Brunton *Legal needs among New Zealanders* (13 April 2018) at 3 and 7.

⁵⁶ Consumer Protection *New Zealand Consumer Survey 2018: Summary Findings* (Hīkina Whakatutuki I Ministry of Business, Innovation and Employment, May 2019) at 31. See also Colmar Brunton *Legal needs among New Zealanders* (13 April 2018) at 3 which found that 9 per cent of the general population had an "impactful problem" with a product or service over the past two years.

⁵⁷ Thirty-nine per cent were not able to resolve the problem, either because they did not take action (28 per cent) or because the problem was unlikely to be resolved (11 per cent). Eighteen per cent reported the problem was resolved but not to their satisfaction and eight per cent were still in the process of resolving the problem. Where the person did not take action to resolve the problem, reasons were: no time (34 per cent), unsure what action to take (33 per cent), couldn't be bothered (33 per cent), didn't think action would resolve it (29 per cent), unsure where to seek advice (20 per cent), not sure if legal issue (17 per cent), product/service not worth enough money (15 per cent), would cost more money to resolve (15 per cent), not confident to deal with it (13 per cent), afraid of damaging relationship with supplier (4 per cent), and other (15 per cent). See Consumer Protection *New Zealand Consumer Survey 2018: Summary Findings* (Hīkina Whakatutuki I Ministry of Business, Innovation and Employment, May 2019) at 40 and 42.

⁵⁸ Consumer Protection *New Zealand Consumer Survey 2018: Summary Findings* (Hīkina Whakatutuki I Ministry of Business, Innovation and Employment, May 2019) at 10.

students and people who identified with the ‘other ethnicities’ group⁵⁹ were also specifically identified in this category.⁶⁰ Where problems were resolved, the vast majority were resolved directly with the business and only one per cent were resolved through the Disputes Tribunal or a court.⁶¹

- 4.34 Disputes about debt, which tend to affect more disadvantaged groups, are a category of legal issue that often remains unresolved.⁶² Class actions relating to debt have been brought in other jurisdictions. For example, in Australia, two class actions were brought against pay-day lender Cash Converters in relation to its lending practices, resulting in a combined settlement of \$23 million.⁶³

Limitations of other mechanisms for resolving consumer issues

- 4.35 Consumers do have a variety of alternative dispute resolution mechanisms for resolving problems. Claims of up to \$30,000 may be brought in the Disputes Tribunal,⁶⁴ although as we note above, few consumer disputes are resolved in this way. Those who do use the Disputes Tribunal are said to be “disproportionally male, Pākehā, better educated and in the middle income bracket”.⁶⁵ The Tribunal does not address unequal access to legal services: claimants are not able to appear with a lawyer nor given access to legal advice, while corporate defendants are likely to have obtained legal advice prior to the hearing.⁶⁶ Further, Disputes Tribunal proceedings are held in private,⁶⁷ so it does not provide the benefit of the vindication of rights in a public forum.
- 4.36 In addition to the Disputes Tribunal, there are various industry-specific dispute resolution processes for resolving consumer claims.⁶⁸ However, we understand that these are generally designed for individual rather than collective dispute resolution. While some

⁵⁹ The survey categorised ethnic identification in the following groups: NZ European, Māori, Pacific Peoples, Asian and other ethnicities. See *Consumer Protection New Zealand Consumer Survey 2018: Summary Findings* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2019) at 81.

⁶⁰ *Consumer Protection New Zealand Consumer Survey 2018: Summary Findings* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2019) at 43.

⁶¹ *Consumer Protection New Zealand Consumer Survey 2018: Summary Findings* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2019) at 43. Of the problems that were resolved, 88 per cent were resolved directly with the business, 1 per cent were resolved through a dispute resolution services or mediation and 1 per cent were resolved through a lawyer.

⁶² Colmar Brunton *Legal needs among New Zealanders* (13 April 2018) at 3 and 7.

⁶³ Vince Morabito and Jarrah Ekstein “Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study” (2016) 35 CJQ 61 at 75.

⁶⁴ Disputes Tribunal Act 1988, s 10(3).

⁶⁵ Alexandra Sims “Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action” (2010) 16 NZBLQ 145 at 160.

⁶⁶ Jessica Palmer “Access to Justice for Consumers” in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) 495 at 507.

⁶⁷ Disputes Tribunal Act 1988, s 39(1).

⁶⁸ New Zealand consumers have access to over 50 dispute resolution schemes in New Zealand including the Disputes Tribunal and industry-specific schemes such as the Banking Ombudsman, Motor Vehicle Disputes Tribunal, Insurance and Financial Services Ombudsman and Telecommunications Dispute Resolution. Each scheme has its own process for resolving disputes, which may involve mediation and/or a hearing process. See *Consumer Protection New Zealand Consumer Survey 2018: Summary Findings* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2019) at 18; and Consumer Protection “Take your complaint further” <www.consumerprotection.govt.nz>.

may allow for claims to be brought by a group of individuals or for claims to be aggregated, there appears to be a lack of clear information about this possibility and an absence of a process to aggregate claims. Given the low value of many consumer claims, collective complaint mechanisms are of particular importance in overcoming barriers to access to justice.⁶⁹

- 4.37 Kate Tokeley argues that while it can be tempting to view consumer disputes as unimportant and not worth burdening the legal system with because of the small amounts involved, it is important to recognise the cumulative effects that many small harms can have on society. She also notes the deterrent role class actions can play by ensuring wrongdoers do not escape liability simply by causing small amounts of harm to a large number of people rather than large amounts of harm to a few.⁷⁰ She concludes it is in the public interest to have a mechanism which allows consumers to sue as a class.⁷¹

Compensation following regulatory action

- 4.38 Another area where there may be a lack of representative action cases relates to compensation claims which follow on from regulatory action. In other jurisdictions, it is common for ‘follow on’ or ‘piggyback’ class actions to be filed after a regulator has commenced enforcement action.⁷² An Australian example is the proceedings against Reckitt Benckiser, the manufacturer of Nurofen, in relation to its claims that its various pain products targeted different parts of the body (when they contained the same active ingredient). The Australian Competition and Consumer Commission successfully brought proceedings against Reckitt Benckiser, with the Federal Court finding the company had engaged in misleading and deceptive conduct and ordering it to pay a fine of \$6 million.⁷³ A class action was then filed seeking compensation for consumers who had purchased Nurofen products; this was settled for \$3.5 million.⁷⁴
- 4.39 Follow-on representative actions do not seem to be an established practice in Aotearoa New Zealand. For example, while our Commerce Commission successfully brought proceedings against Reckitt Benckiser in relation to the Nurofen claims (with the District

⁶⁹ Jessica Palmer “Access to Justice for Consumers” in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) 495 at 515.

⁷⁰ Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner and others (eds) *The Yearbook of Consumer Law 2008* (Ashgate Publishing, Aldershot (UK), 2007) 297 at 300. We discuss whether class actions create a deterrence effect in Chapter 5.

⁷¹ Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner and others (eds) *The Yearbook of Consumer Law 2008* (Ashgate Publishing, Aldershot (UK), 2007) 297 at 325.

⁷² See for example Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 73–74; Janet Walker *Who’s Afraid of US-Style Class Actions?* (2012) 18 *Southwestern Journal of International Law* 509 at 531–532; Michael J Legg “Shareholder Class Actions in Australia – The Perfect Storm?” (2008) 31 *UNSWLJ* 669 at 687; and John C Coffee Jr “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working” (1983) 42 *Md L Rev* 215 at 222.

⁷³ Australian Competition and Consumer Commission “Full Federal Court orders \$6 million penalty for Nurofen Specific Pain products” (press release, 16 December 2016).

⁷⁴ Amber Schultz “Thousands claim compensation for misleading Nurofen products” *The Sydney Morning Herald* (online ed, Sydney, 11 January 2018).

Court ordering a fine of \$1.08 million),⁷⁵ there was no subsequent representative action seeking damages despite the ability to rely on that successful prosecution.⁷⁶

4.40 So far as we are aware, none of the 44 representative actions under HCR 4.24 identified in Chapter 3 followed enforcement proceedings by a regulator, although we are aware of several cases with connections to regulator activity:

- (a) There was a Securities Commission investigation into the Feltex Carpet Company prior to *Houghton v Saunders* being filed.⁷⁷ The Registrar of Companies also unsuccessfully prosecuted five directors of Feltex in the District Court.⁷⁸
- (b) The *Scott v ANZ Bank* representative action resulted from information uncovered in an investigation by the Financial Markets Authority.⁷⁹
- (c) In 2019, two representative actions were filed in relation to the collapse of CBL Corporation. These were filed prior to three regulatory proceedings (two actions by the Financial Markets Authority and one by the Serious Fraud Office) rather than as ‘follow on’ proceedings.⁸⁰

4.41 There are provisions in both the Fair Trading Act 1986 and the Financial Markets Conducts Act 2013 which allow a finding of breach to be relied upon in a subsequent civil proceeding.⁸¹ While these provisions could be used to facilitate a representative action, to our knowledge they have not been relied upon in this context.

4.42 While it may be the current procedural framework which is inhibiting follow-on claims, it could also be due to other factors. First, the claim size might be insufficient to make a follow-on claim economically viable for litigation funders. For example, in relation to the Nurofen claims, differences in population size mean a compensation claim in Aotearoa New Zealand would presumably be significantly less than the Australian one, which settled for \$3.5 million. Second, follow-on compensation claims may be unnecessary in cases where a company has provided redress for consumers, either voluntarily or as a result of a settlement with the Commerce Commission. Third, there may be legal difficulties with establishing compensation claims. For example, it can be difficult to

⁷⁵ *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd* [2017] NZDC 1956, [2017] DCR 431. See also Te Komihana Tauhokohoko | Commerce Commission “\$1m penalty for misleading Nurofen specific pain range claims” (press release, 3 February 2017).

⁷⁶ Fair Trading Act 1986, s 46. See also Chapter 3.

⁷⁷ “Feltex IPO prospectus not misleading: Securities Commission” *The New Zealand Herald* (online ed, Auckland, 11 October 2007).

⁷⁸ The directors each faced two charges under s 36A of the Financial Reporting Act 1993. The prosecution was unsuccessful: Feltex “Registrar of Companies will not appeal Feltex decision” (press release, 16 August 2010).

⁷⁹ This proceeding is *Scott v ANZ Bank New Zealand Ltd* [2019] NZHC 1908. See *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2018] NZCA 590 where the Court of Appeal held it was within Te Mana Tatai Hokohoko | Financial Markets Authority’s powers to disclose the information to investors for the purpose of determining whether to bring a claim against ANZ. The Supreme Court denied leave to appeal: *ANZ Bank New Zealand Ltd v Financial Markets Authority* [2019] NZSC 40.

⁸⁰ These proceedings are *Livingstone v CBL Corp Ltd* CIV-2019-404-2727 (ongoing proceedings); and *TEA Custodians Ltd v Wells* CIV-2019-485-642 (ongoing proceedings).

⁸¹ Fair Trading Act 1986, s 46; and Financial Markets Conduct Act 2013, s 487.

determine who is the “harmed” consumer in relation to breaches of the Commerce Act 1986 because the affected party often passes on the cost to consumers.⁸²

- 4.43 We note also that follow-on claims are not without their critics. Some have argued that follow-on class actions may be unnecessarily duplicative and may undermine the work of regulators.⁸³

QUESTION

Q2

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

Time to consider a statutory class actions regime

- 4.44 Because of the issues we have discussed in this chapter, we think it is timely to consider whether Aotearoa New Zealand should have a statutory class actions regime. In Chapters 5 and 6 we discuss the advantages and disadvantages of class actions and then in Chapter 7 we discuss our preliminary conclusion.

⁸² Letter from Te Komihana Tauhokohoko | Commerce Commission to Rules Committee regarding the consultation paper on class actions (31 July 2007) noting that the reasons for the relative lack of private damages claims in New Zealand for breach of competition law are uncertain. One obstacle noted in other jurisdictions was that many competition claims encounter evidential difficulties, particularly in cartel cases where the offending behaviour is covert and hard to detect and where assessment of damages may be complicated by inflated prices being passed down a vertical chain of purchasers and customers.

⁸³ See for example Linda A Willett “Litigation as an Alternative to Regulation: Problems Created by Follow-On Lawsuits with Multiple Outcomes” (2005) 18 Geo J Legal Ethics 1477 at 1477, 1482 and 1491.

CHAPTER 5

Advantages of class actions

INTRODUCTION

- 5.1 In this chapter we discuss three primary advantages of class actions:
- (a) Improving access to justice.
 - (b) Enabling economy and efficiency of litigation.
 - (c) Strengthening incentives for compliance with the law.
- 5.2 The Canadian Supreme Court set out these advantages in *Western Canadian Shopping Centres Inc v Dutton* and they have been described as the “definitive tripartite justification” for class actions in Canada.¹ They are also seen as key advantages of class actions in other jurisdictions as well as being described as the advantages of representative actions in Aotearoa New Zealand.
- 5.3 While some of these advantages are already being realised in Aotearoa New Zealand through litigation under High Court Rule 4.24 (HCR 4.24), we would expect them to be more easily realised under a statutory class actions framework. This is because a statutory framework would provide a more certain basis for bringing proceedings than the current representative actions regime, as well as providing better protections for the parties involved.

CLASS ACTIONS MAY IMPROVE ACCESS TO JUSTICE

Conceptualising access to justice

- 5.4 Access to justice concerns the ability of people to have their legal rights determined and upheld through a process which is fair, efficient and transparent for all parties involved. Effective access to justice is vital for upholding rule of law values.² As the Ontario Law

¹ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 49; and *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [27]–[29]. Note the Court listed judicial economy and efficiency first, and access to justice second.

² See Jeremy Waldron “The Concept and the Rule of Law” (2008) 43 Ga L Rev 1 at 59. See also Andrew Little, Minister of Justice “Speech to Law Foundation Awards Dinner” (Wellington, 8 December 2017).

Reform Commission (OLRC) has noted, “effective access to justice is a precondition to the exercise of all other legal rights”.³

- 5.5 We consider the possible access to justice benefits of a class actions regime in the context of an access to civil justice ‘gap’. As we discussed in Chapter 1, Aotearoa New Zealand is facing significant issues with respect to access to civil justice. The costs associated with litigation mean seeking redress through the courts is beyond the means of most New Zealanders.⁴ Many claims are not economic to pursue in the High Court because of the high costs involved.⁵ Lawyers’ fees are not affordable in many cases and access to civil legal aid is limited.⁶ The potential for adverse costs awards also adds a significant financial barrier to potential litigants.⁷
- 5.6 A class action is a form of court proceeding, or ‘formal justice’. This means it may be more accurate to refer to a class action as having the potential to ‘improve access to the court system’ rather than improving access to justice generally. Access to the courts and other formal dispute resolution mechanisms can sometimes dominate discussion of access to justice, given the centrality of the court system to the rule of law.⁸ However, other aspects of access to justice are also relevant to the achievement of justice, such as access to legal information and education, non-court dispute resolution and law reform.⁹ In practice, formal justice, or resolving disputes through the courts and tribunals (often with legal assistance), is the least common form of resolving disputes.¹⁰ Disputes are more often resolved through ‘everyday justice’ (avoiding conflicts or managing disputes) or ‘informal justice’ (resolving disputes with the help of a third party advisor or facilitator).¹¹
- 5.7 That said, while access to the court system is only a small component of access to justice, it can still have a significant impact. Formal justice mechanisms may have wide influence because the decisions of adjudicative bodies cast a shadow, influencing and guiding people beyond those who are parties to a particular dispute.¹² The availability of formal justice also supports the effectiveness of everyday and informal justice.
- 5.8 Jasminka Kalajdzic considers a holistic concept of access to justice should be applied to class actions. Rather than simply focusing on access to the courts and lawyers, she

³ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 139.

⁴ See The Rules Committee *Improving Access to Civil Justice: Initial Consultation with the New Zealand Community* (Discussion Paper) at [2] and [30].

⁵ See Chapter 1.

⁶ Kayla Stewart, Bridgette Toy-Cronin and Louisa Choe *New Zealand lawyers, pro bono, and access to justice* (University of Otago Legal Issues Centre, March 2020) at 4; and University of Otago Legal Issues Centre *Accessing Legal Services: The Price of Litigation Services* (July 2019) at 21–22.

⁷ We discuss adverse costs in Chapter 13.

⁸ We have adopted the categories “formal justice”, “informal justice” and “everyday justice” from Australian Government Attorney-General’s Department “Access to Justice” <www.ag.gov.au>.

⁹ Christine Coumarelos and others *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs Volume 7, August 2012) at 207.

¹⁰ Australian Government Attorney-General’s Department “Access to Justice” <www.ag.gov.au>.

¹¹ Australian Government Attorney-General’s Department “Access to Justice” <www.ag.gov.au>.

¹² Robert H Mnookin and Lewis Kornhauser “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale L J* 950 at 997. We discuss the behaviour modification and deterrence benefits of class actions later in this chapter.

proposes four components of access to justice: access to the courts, a fair and transparent process, meaningful participation rights for class members and a substantively just result.¹³ This broader conception moves the focus from a class action increasing access to the court system to ensuring the entire process from commencement to resolution meaningfully achieves a fair and just result for class members. The ability of a class action to achieve this will depend on the processes and protections built into the regime. We have found Kalajdzic’s conception of access to justice a helpful framework and we discuss these four components below.

Improving access to the courts

5.9 Improving access to the courts is seen as a key benefit of class actions in other jurisdictions.¹⁴ The Supreme Court of Canada has said that “[w]ithout class actions, the doors of justice remain closed”.¹⁵ All of the Canadian class actions statutes are aimed at improving access to the courts and when courts certify a class action, access to justice is always given as a reason.¹⁶ Access to justice is also seen as an important objective of the Australian class actions regimes.¹⁷ In the United States, the objective is usually framed as compensating victims of alleged wrongdoing.¹⁸ Commentary has observed that in the United States, class actions may enable litigation to proceed in situations where it would not otherwise be economically feasible, redress the power imbalance between plaintiff and defendant and make it easy for individuals to participate in litigation.¹⁹

Overcoming barriers to bringing litigation

5.10 Class actions may help improve access to the courts by helping to overcome financial, social and psychological barriers to litigation.

¹³ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 51. Professor Kalajdzic’s broader conception of access to justice generally aligns with substantive rule of law theories. See further Brian Z Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004) at 102–113.

¹⁴ See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 47–66.

¹⁵ *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [28].

¹⁶ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 4. See also Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 52; and *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [28].

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3175 (Michael Duffy, Attorney-General); Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 146; Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [7.1]; and Parliament of Tasmania “Fact Sheet: Supreme Court Civil Procedure Amendment Bill 2018” <www.parliament.tas.gov.au>.

¹⁸ Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 Emory LJ 399 at 418; William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§1.7]; and Deborah R Hensler “Happy 50th Anniversary, Rule 23! Shouldn’t We Know You Better After All This Time?” (2017) 165 U Pa L Rev 1599 at 1611.

¹⁹ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§1.7].

Financial barriers

5.11 As we noted earlier in this chapter, there are significant financial barriers to bringing litigation in Aotearoa New Zealand and many small value claims are likely to be uneconomic because of high legal costs.²⁰ A class action may improve access to the courts by enabling a large number of small claims, which would be uneconomic to pursue individually, to be grouped together into a single claim.²¹ By grouping claims together, the size of the claim increases and the costs of bringing the claim can be shared. In terms of who may benefit from this, we note that a recent survey on unmet legal needs found that people with low incomes are more likely than others to experience a greater occurrence of legal problems in a given year.²² A class action procedure alone may not sufficiently lower the financial barrier for potential litigants. However, grouping claims together is likely to make litigation funding more attractive to funders who typically seek to fund higher value claims.²³

Social and psychological barriers

5.12 As well as financial barriers, social and psychological barriers can also limit access to the courts.²⁴ For instance, claimants may not know they have a possible claim and those who do may have insufficient familiarity with the legal system to commence litigation.²⁵ This is likely to disproportionately affect certain groups. One survey found that people who identified as Māori or Asian or were from a low income household were more likely to report having a low level of awareness of their consumer rights.²⁶

5.13 Claimants may also doubt the possibility that litigation will be useful or worthwhile, fear possible reprisals, feel shame or fear stigmatisation because of the nature of their claim, or want to move on from a painful or traumatic episode in their past.²⁷ There may also be cultural barriers to accessing the courts. For example, the Porirua and Kapiti Community Law Centre has said that feelings of whakamā may hinder engagement with the legal system and undermine access to justice.²⁸ Individuals who are vulnerable or marginalised

²⁰ University of Otago Legal Issues Centre *Accessing Legal Services: The Price of Litigation Services* (July 2019) at 20–22.

²¹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018); Catherine Piché “Class Action Value” (2018) 19 *Theo Inq L* 261 at 272–273; Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 *NZBLQ* 109 at 109 and 115; and Kenneth S Canfield “Advantages and Disadvantages of Class Actions from a Plaintiff’s Lawyer’s Perspective” [1999] *Brief* 58 at 61.

²² Colmar Brunton *Legal needs among New Zealanders* (13 April 2018) at 5.

²³ We discuss how funders select cases in Chapter 14.

²⁴ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 127–129.

²⁵ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 127–128.

²⁶ Consumer Protection *New Zealand Consumer Survey 2018: Summary Findings* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2019) at 10.

²⁷ See Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 75; and Vince Morabito “Ideological Plaintiffs and Class Actions—An Australian Perspective” (2001) 34 *UBC L Rev* 459 at 503.

²⁸ Letter from Porirua Kapiti Community Law Centre to Rules Committee regarding the “Improving Access to Civil Justice” Initial Consultation (2020) at 3. The Porirua Kapiti Community Law Centre offers the following definition of whakamā: “Whakamā is a Māori concept which encompasses feelings of shame, a lack of knowledge, inferiority, inadequacy, shyness, embarrassment, and self-doubt”.

may face particular barriers to accessing the court system. This might include socio-economic, health, age-related, psychological and/or intellectual barriers.²⁹

- 5.14 By grouping claimants together, a class action can help individuals overcome some of the stresses and difficulties posed by individual litigation. In one case, the Supreme Court of Canada acknowledged that the vulnerability of class members, who were deaf and blind survivors of sexual abuse, was a factor favouring certification because the class action process could help mitigate communication difficulties.³⁰ A class action may also help redress any power imbalance felt by individuals when litigating against a large and powerful defendant.
- 5.15 Capital Strategic Advisors (CSA) suggests that class actions are likely to make access to justice more equitable by enabling claimants to overcome these non-financial barriers.³¹ In some instances the vulnerability may result from the harm alleged to have been caused by the defendant, such as abuse in state care.³² CSA also observes that broad based class membership could increase access to justice for risk-adverse individuals.³³

Which types of litigation do class actions enable?

- 5.16 When assessing whether class actions improve access to the courts, it is important to consider which kinds of cases ultimately proceed as class actions. Catherine Piché, discussing Québec class actions, suggests the lack of data means it is questionable whether class actions truly allow people to bring claims that they otherwise would not bring.³⁴ Despite this, Piché concludes that class actions do compensate and provide access to justice to those in Québec.³⁵
- 5.17 In overseas jurisdictions, class actions brought by shareholders and investors (securities class actions) tend to dominate.³⁶ For example, in Australia, they comprised around 30 per cent of class actions filed in the 2018/2019 financial year.³⁷ By comparison, discrimination class action claims are rare in Australia.³⁸ Securities claims have also been prevalent in Ontario, comprising 16 per cent of class actions filed between 1993 and February 2018.³⁹ In the United States, securities class actions have been described as the

²⁹ Vince Morabito and Jarrah Ekstein “Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study” (2016) 35 CJK 61 at 62.

³⁰ *Rumley v British Columbia* 2001 SCC 69, [2001] 3 SCR 184 at [39].

³¹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 43 and 65.

³² Vince Morabito and Jarrah Ekstein “Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study” (2016) 35 CJK 61 at 62.

³³ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 43.

³⁴ Catherine Piché “Class Action Value” (2018) 19 Theo Inq L 261 at 273.

³⁵ Catherine Piché “Class Action Value” (2018) 19 Theo Inq L 261 at 300.

³⁶ As noted in Chapter 3, shareholder and investor cases also make up a significant proportion of representative actions in Aotearoa New Zealand.

³⁷ King & Wood Mallesons *The Review: Class Actions in Australia 2018/2019* (2019) at 4.

³⁸ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.9].

³⁹ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 15.

“800-pound gorilla that dominates and overshadows other forms of class actions”.⁴⁰ One study showed that securities class actions comprised 37 per cent of United States class action settlements between 2006 and 2007.⁴¹

- 5.18 The prevalence of securities class actions overseas may in part be due to reliance on litigation funding or lawyers charging a contingency fee.⁴² A key consideration for funders (and lawyers charging contingency fees) is the claim value — claims with low costs, large pay-outs, and low risks will be particularly attractive.⁴³ Securities class actions are said to be particularly compatible with litigation funding models.⁴⁴ Funders are less likely to be attracted to rights based, non-monetary claims which may be of significant public interest.⁴⁵ The proliferation of securities class actions does potentially improve access to justice for shareholders and investors. However, the benefits of such cases will likely accrue to higher income rather than lower income individuals.⁴⁶
- 5.19 While securities class actions appear to dominate, class actions are also regularly brought with respect to other types of legal claim which may be more significant in increasing access to the courts for those who may otherwise face the financial, social and psychological barriers discussed above.
- 5.20 For instance, consumer cases make up a significant proportion of class actions overseas,⁴⁷ and are now the most common form of new class action case in Australia.⁴⁸ Employment

⁴⁰ John C Coffee Jr “Reforming the Securities Class Action: An Essay on Deterrence and its Implementation” (2006) 106 Colum L Rev 1534 at 1539.

⁴¹ Brian T Fitzpatrick “An Empirical Study of Class Actions Settlements and Their Fee Awards” (2010) 7 JELS 811.

⁴² Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 607. We discuss litigation funding and case selection in Chapter 14.

⁴³ Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 607. We discuss litigation funding and case selection in Chapter 14.

⁴⁴ Vince Morabito *Shareholder class actions in Australia – myths v facts* (An evidence-based approach to class action reform in Australia, November 2019) at 9. See also Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.9] commenting that federal class actions are “heavily skewed towards shareholder and investor disputes” because they are considered “low risk and profitable to run”.

⁴⁵ Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 607.

⁴⁶ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 88.

⁴⁷ Consumer class actions were 22.7 per cent of class actions filed between 1992 and 2017: Vince Morabito *The First Twenty-Five Years of Class Actions in Australia* (Fifth Report, An Empirical Study of Australia's Class Action Regimes, July 2017) at 27. In the year to 30 June 2019 consumer cases were 29.6 per cent of cases filed: King & Wood Mallesons *The Review: Class Actions in Australia 2018/2019* (2019) at 4.27 per cent of class actions filed in Ontario between 1993 and 2018 were Competition Act (15 per cent) and consumer protection (12 per cent) claims: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 15. In the United States 12.6 per cent of class action settlements approved in 2006 and 2007 were consumer actions: Brian T Fitzpatrick “An Empirical Study of Class Action Settlements and Their Fee Awards” (2010) 7 JELS 811 at 818.

⁴⁸ Allens *Class Action Risk 2020* (March 2020) at 3 and 6.

class actions⁴⁹ and class actions against the Government⁵⁰ are also commonly seen overseas.

- 5.21 There are also many examples of class actions brought on behalf of vulnerable people or which could be considered ‘public interest litigation’. In Australia, around one-quarter of federal class actions filed in the first 22 years of the class actions regime were brought on behalf of vulnerable persons, including refugees and claimants with intellectual disabilities.⁵¹ The recent “stolen wages” class action in Australia represents a significant example where the action successfully obtained a gross sum of \$190 million on behalf of thousands of indigenous workers for unpaid wages over a period of 30 years.⁵² Class actions in Canada have also been successful in winning compensation for indigenous victims of government mistreatment.⁵³

Procedural access to justice

- 5.22 Kalajdzic’s second and third components of access to justice are a fair and transparent process and meaningful participation rights for class members.⁵⁴ It is essential to ensure that the procedural rights of all participants in a class action are protected. No matter how speedy or efficient a process is, if it remains a mystery to its participants or leaves them doubting whether they have been treated fairly, this is not meaningful access to justice.⁵⁵ The extent to which a class actions regime can satisfy these components will largely depend on its design. Safeguards might include court oversight to ensure the protection of class members’ interests, robust mechanisms for notice and the ability of class members to object to a settlement.
- 5.23 Importantly, access to justice “cannot be assessed solely from the perspective of the claimants” and must also include consideration of the interests of other parties as well as

⁴⁹ Employment class actions were 10.9 per cent of class actions filed between 1992 and 2017: Vince Morabito *The First Twenty-Five Years of Class Actions in Australia* (Fifth Report, An Empirical Study of Australia’s Class Action Regimes, July 2017) at 27. In Ontario, employment and pension claims were 12 per cent of class actions filed between 1993 and 2018: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 15. In the United States 12.6 per cent of class action settlements approved in 2006 and 2007 were employment actions: Brian T Fitzpatrick “An Empirical Study of Class Action Settlements and Their Fee Awards” (2010) 7 JELS 811 at 818.

⁵⁰ In Australia 19.6 per cent of class actions filed to 30 June 2020 were claims against the Government: Vince Morabito “Government has shelled out \$1.1B in class actions” (23 July 2020) Lawyerly <www.lawyerly.com.au>; and King & Wood Mallesons *The Review: Class Actions in Australia 2018/2019* (2019) at 4. In Ontario seven per cent of class actions filed between 1993 and 2018 were against the Government: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 15.

⁵¹ Vince Morabito and Jarrah Ekstein “Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study” (2016) 35 CJQ 61 at 87.

⁵² *Pearson v State of Queensland (No 2)* [2020] FCA 619.

⁵³ For example, the Sixties Scoop Class Action, and the Federal Indian Day School Class Action: see “Sixties Scoop Class Action” Klein Lawyers <www.callkleinlawyers.com>; and “Federal Indian Day School Class Action” <<http://indiandayschools.com>>.

⁵⁴ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 51.

⁵⁵ Roderick McDonald “Access to Justice in Canada Today – Scope, Scale, Ambitions” in J Bass, WA Bogart and Frederick H Zemans (eds) *Access to Justice for a New Century: The Way Forward* (The Law Society of Upper Canada, Toronto, 2005) 19 at 105 as cited in Ray Finkelstein “Class Actions: The Good, The Bad and The Ugly” in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) 415 at 416, n 3.

the public at large.⁵⁶ As we discuss below, it has been argued that class actions can lead to a compensation culture of “frivolous litigation designed to extract unmeritorious settlements”.⁵⁷ CSA observes that additional class actions can impose costs on defendants, even where they successfully defend actions.⁵⁸ Procedural protections can play an important role in protecting the defendant’s access to justice rights by ensuring that meritless claims cannot progress.⁵⁹

Substantive access to justice

- 5.24 Kalajdzic’s final component of access to justice in class actions is achieving a substantively fair result.⁶⁰ A class action may increase access to the protections of substantive law by effectively giving such laws ‘teeth’.⁶¹ One means of assessing whether class actions provide substantive justice is the extent to which class members are compensated through class actions.
- 5.25 There is a limited evidence on the extent to which class members achieve compensation or other forms of substantive justice through participation in a class action.⁶² One assessment of a sample of class actions in Québec found that the majority of those class actions compensated class members.⁶³ However, some United States scholars consider there is a lack of evidence demonstrating that class members achieve meaningful compensation, particularly in securities class actions.⁶⁴ In a survey of consumer class actions, the Federal Trade Commission found that only nine per cent of class members

⁵⁶ *Houghton v Saunders* [2020] NZHC 1088 at [70].

⁵⁷ Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 129. See also Brian T Fitzpatrick “Can the Class Action Be Made Business Friendly?” (2018) 24 NZBLQ 169 at 171.

⁵⁸ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 43. CSA also note that, as with any increase in litigation, an increase in the number of class actions will impose an increased cost on the courts.

⁵⁹ For instance, see Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 93.

⁶⁰ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 51 and 70.

⁶¹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 53.

⁶² Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 57.

⁶³ See Catherine Piché “Class Action Value” (2018) 19 Theo Inq L 261.

⁶⁴ Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 Emory LJ 399 at 418–419 and 433; Jason Scott Johnston “High Cost, Little Compensation, No Harm to Deter: New Evidence On Class Actions Under Federal Consumer Protection Statutes” [2017] Colum Bus L Rev 1 at 4–11; and John C Coffee Jr “Reforming the Securities Class Action: An Essay on Deterrence and its Implementation” (2006) 106 Colum L Rev 1534 at 1545–1546. Contrast Anjan V Thakor, Jeffrey S Nielsen and David A Gulley *The Economic Reality of Securities Class Action Litigation* (United States Chamber Institute for Legal Reform, 26 October 2005). Although note in one study securities class actions did compromise the vast majority of money transferred in class action settlements: Brian T Fitzpatrick “An Empirical Study of Class Action Settlements and Their Fee Awards” (2010) 7 JELS 811 at 825.

claimed compensation from a settlement.⁶⁵ Another study found the median distribution rate in a sample of consumer class actions was 15 per cent.⁶⁶

- 5.26 Litigation, including class actions, is widely criticised as a very expensive way of compensating victims.⁶⁷ Class actions often have high transaction costs, including legal fees, court expenses, insurance costs and commission paid to a litigation funder. Even in cost shifting jurisdictions where a successful plaintiff may recoup some of their legal expenses from the defendant, class members are highly likely to receive less than full compensation, particularly where a proportion of a settlement must be paid to a litigation funder.⁶⁸ In *Houghton v Saunders*, the High Court accepted that the importance of access to justice for a plaintiff may be “diluted” where a substantial sum of any award is paid to a litigation funder.⁶⁹
- 5.27 At the same time, it is rare (in any kind of litigation) for a plaintiff to recover the full amount of compensation that they claimed at the outset. In addition, access to justice can also encompass a plaintiff’s broader interest in the vindication of their claim even if that only entails partial compensation for the loss suffered. In addition, even if class actions have high transaction costs which limit compensation, the alternative may be that individuals never learn of their legal rights and receive nothing for their loss. The partial compensation which a class action can achieve is closer to substantive justice than nothing.⁷⁰ While this response prioritises access to the courts over access to full substantive justice for claimants, without meaningful alternatives it is nonetheless a real improvement.⁷¹
- 5.28 The effectiveness of a class actions regime at compensating class members will largely depend on how key elements of the regime are designed. For example, the court’s role in approving settlements and their distribution will be crucial in ensuring that substantive justice can be meaningfully achieved for class members.⁷²

CLASS ACTIONS MAY ENABLE EFFICIENCY AND ECONOMY OF LITIGATION

- 5.29 In the context of representative actions, the Supreme Court in *Credit Suisse Private Equity LLC v Houghton* commented that representative actions seek to promote “the efficiency

⁶⁵ Federal Trade Commission *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (September 2019) at 11–12.

⁶⁶ Nicholas Pace and others *Insurance Class Actions in the United States* (RAND Corporation, 2007) at 55 as cited in Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 263.

⁶⁷ Deborah L Rhode *Access to Justice* (Oxford University Press, New York, 2004) at 33 as cited in Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 57.

⁶⁸ Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 127–128.

⁶⁹ *Houghton v Saunders* [2020] NZHC 1088 at [74].

⁷⁰ John C Coffee Jr “The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action” (1987) 54 U Chi L Rev 877 at 900.

⁷¹ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 57–58.

⁷² Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 58.

and economy of litigation”.⁷³ The Court went on to explain in *Southern Response v Ross* that the Court was guided by the objective of the High Court Rules: to secure the “just, speedy, and inexpensive determination of any proceeding or interlocutory application”.⁷⁴ The Supreme Court also observed that both ensuring access to justice and facilitating the efficient use of resources “fall readily within that objective”.⁷⁵

- 5.30 Efficiency and economy of litigation is a common goal for overseas class actions regimes.⁷⁶ A class action may promote economy and efficiency by allowing the court to hear multiple claims together, thereby freeing up judicial resources. Class actions can also promote consistency in the law by avoiding multiple decisions on the same matter.⁷⁷

Improving economies of scale

- 5.31 A class action is likely to improve efficiency and economy of litigation in cases where individual class members’ claims are economically viable to litigate separately. A class action can avoid what would otherwise be multiple individual proceedings.⁷⁸
- 5.32 By grouping economically viable claims together, a class action can impose a lower social cost through economies of scale.⁷⁹ Such class actions will have a lower cost of litigation per class member. Importantly, the benefits of these cost reductions not only accrue to class members but also defendants, who do not need to defend multiple cases.⁸⁰ The

⁷³ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [147]. The Court of Appeal also recognised “facilitating efficient use of judicial resources” as one of the advantages of representative claims: *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [52]. This was adopted by the Supreme Court on appeal: *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [40].

⁷⁴ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [38]. Note that the objective of the High Court Rules 2016 is set out in r 1.2.

⁷⁵ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [38].

⁷⁶ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 49; Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 2; and Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General). For the United States, see William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§1:9]; and Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 Emory LJ 399 at 418 and 421. In relation to United States practice, see also United States Federal Rules of Civil Procedure, r 23 (Notes of Advisory Committee on Rules—1966 Amendment), stating that r 23(b)(3) (which covers what are frequently referred to as “damages class actions”):

... encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote, uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Also relevant is the Class Action Fairness Act of 2005 Pub L No 109-2, 118 Stat 4 at 4 (2005), s 2(a)(1) where Congress found that:

Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

⁷⁷ See *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [27].

⁷⁸ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 57–58; Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General); and Ontario Law Reform Commission *Report on Class Actions* (1982, Volume I) at 118.

⁷⁹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 34. The economies of scale achieved by a class action will significantly depend on class definition. Where there are differences between class members’ claims this can increase cost.

⁸⁰ Ontario Law Reform Commission *Report on Class Actions* (1982, Volume I) at 118.

court system is also likely to benefit from these greater efficiencies, despite the resource intensive nature of class actions.⁸¹ However, although high value claims could be grouped together in a class action, the management and coordination tasks required for claims to proceed in this way means that relatively few of these class actions are likely to occur.⁸²

- 5.33 CSA notes that class actions are more likely to consist of claims by individuals who would otherwise be unable to bring their claim.⁸³ An example might be low value consumer claims. It has been said that few people would pursue small consumer claims in the absence of a class actions rule.⁸⁴ If that is so, consumer class actions would add to, rather than reduce, the burden on the court system. However, the addition of low value cases, while potentially increasing that burden, is consistent with the goal of improving access to justice discussed above.⁸⁵ A low value claim class action can still be regarded as an efficient use of court time given how many individual claims may be resolved in one proceeding.
- 5.34 A class action may also create greater judicial efficiency and economy compared to individual claims because a class action is more likely to settle rather than go to trial.⁸⁶ A process which results in a single settlement rather than multiple trials or settlements can provide significant savings on legal costs for all parties and the court system itself.

Precedential consistency and certainty

- 5.35 A class action can also contribute to greater judicial efficiency and economy by reducing the risk of inconsistency from multiple judgments. A class action ensures that like cases are treated alike, promotes legal consistency and certainty and avoids the need for duplication of judicial efforts.⁸⁷ The certainty provided by judgments on common issues which bind the entire class will also provide greater clarity than reliance on alternatives such as test cases.
- 5.36 Representative actions in Aotearoa New Zealand appear to demonstrate the benefits a class action type procedure could offer for ensuring consistency across judgments. One commentator observes that *Cridge v Studorp*, by dealing with common issues despite a number of factual differences between class members, has potentially helped avoid inconsistent judgments on core common issues such as the existence and scope of a duty

⁸¹ See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.14]; and Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at 140.

⁸² See Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 35.

⁸³ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 46.

⁸⁴ Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 *Emory LJ* 399 at 422.

⁸⁵ See discussion in Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 120–121.

⁸⁶ Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 81; Andrew Morrison and Colin Loveday “Class Actions in Australia” (10 December 2019) Lexology <www.lexology.com>; and Jeremy Martin and Myriam Brixi “Class Actions in Canada” (10 December 2019) Lexology <www.lexology.com>. We discuss the strong settlement pressures in class actions in Chapter 6.

⁸⁷ For further discussion of the benefits of precedential certainty see Douglas White “Originality or Obedience? The Doctrine of Precedent in the 21st Century” (2019) 28 *NZULR* 653 at 671–672.

of care.⁸⁸ At the time of this Issues Paper, the ‘stage one’ trial of this case was occurring in the High Court.

Class actions may indirectly increase efficiency

- 5.37 Craig Jones has also made the point that a correctly functioning class actions regime can indirectly contribute to greater efficiency and economy of litigation:⁸⁹

[It] will tend to increase deterrence, reduce incidence of compensable accidents, promote settlement and ease the associated costs that are currently externalised through formal and informal insurance. Assuming that the secondary benefit of increased compensation for victims is also realised, then these effects will be further enhanced. The money thus saved can be redirected into the judicial system to accommodate these cases.

CLASS ACTIONS MAY STRENGTHEN INCENTIVES TO COMPLY WITH THE LAW

- 5.38 Class actions can play a role in enforcing the law and making sure that defendants internalise the costs of their wrongdoing. This may then result not only in the defendant modifying its behaviour, but also other potential wrongdoers being deterred by the prospect of a future class action. In these ways, class actions may improve compliance with the law.
- 5.39 The Supreme Court has said that strengthening incentives for compliance with the law is an objective of representative actions.⁹⁰ It cited comments of the Supreme Court of Canada that class action proceedings “serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public”.⁹¹

The role of class actions in enforcing the law

- 5.40 While regulators play an important role in enforcing the law, resourcing constraints mean that they are unable to take action in all cases. Agencies therefore apply enforcement criteria to determine when it is appropriate to take action and what form this should take.⁹² Class actions may play a role by allowing action to be taken when regulators are unwilling or unable to act.⁹³ Such private enforcement may have a “safety valve” function as it enables enforcement to occur even if public enforcers are “captured” or otherwise

⁸⁸ Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 115. *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 is a representative action alleging that faulty cladding systems manufactured by Studorp Ltd and James Hardie caused damage to the claimants’ homes.

⁸⁹ Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 83.

⁹⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [37] and [40]. The Supreme Court adopted the Court of Appeal’s description of the objectives of r 4.24 of the High Court Rules 2016: see *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [52].

⁹¹ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [39], citing *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [29]. See also *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(b)].

⁹² We refer to Te Komihana Tauhokohoko | Commerce Commission’s and Te Mana Tatai Hokohoko | Financial Markets Authority’s enforcement criteria in Chapter 7.

⁹³ See for example *Deposit Guaranty National Bank of Jackson v Roper* 445 US 326 (1980) at 339: “The aggregation of individual claims in the context of a class wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government”.

unavailable.⁹⁴ In addition, as the Australian Securities and Investment Commission has observed, where private action can achieve a similar outcome to regulatory action, this allows the regulator to allocate its resources to other priorities.⁹⁵

- 5.41 The lawyer representing the class is sometimes described as a ‘private Attorney-General’ because of their role in enforcing the law.⁹⁶ However, there is some debate as to whether it is appropriate for class actions to have a law enforcement function, or whether compensation should be the sole focus. Some consider that enforcing laws should be the role of regulators rather than class action lawyers. For example, the Australian Institute of Company Directors has argued that regulators should enforce continuous disclosure and misleading and deceptive conduct provisions, and that private actions should be prohibited.⁹⁷
- 5.42 Others consider that the class action is not simply a procedural device with the objective of maximising individual recovery but is a regulatory device which can enforce standards and protect the public from widespread harm.⁹⁸ The United States Federal Judicial Center’s guide for judges states:⁹⁹

Class actions may also help regulators control conduct that threatens to harm various markets. Securities and other consumer class actions serve to enforce regulatory standards designed to deter fraudulent marketplace conduct that might otherwise escape regulation.

- 5.43 As well as the argument that class actions can step in where regulators have failed, some see private action as superior to government action. Brian Fitzpatrick has put forward a ‘conservative case for class actions’, arguing that private lawyers representing private citizens pursuing defendants after they have committed wrongdoing should be preferred over government regulation.¹⁰⁰ His reasons for preferring private over public regulation include that class action lawyers have more of an incentive to do a good job because of their profit motive and government agencies may be subject to capture.¹⁰¹

⁹⁴ John C Coffee Jr *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard University Press, Cambridge (Mass), 2015) at 175. See also John C Coffee Jr “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working” (1983) 42 Md L Rev 215 at 226–227.

⁹⁵ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [9.29].

⁹⁶ See for example William B Rubenstein “On What A ‘Private Attorney General’ Is—And Why It Matters” (2004) 57 Vand L Rev 2129; Owen M Fiss “The Political Theory of the Class Action” (1996) 53 Wash & Lee L Rev 21; and Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 44.

⁹⁷ Australian Institute of Company Directors, Submission No 40 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 10–13.

⁹⁸ Craig Jones “The Class Action as Public Law” (paper presented at Osgoode Hall Law School, January 2006) as cited in Janet Walker (ed) *Class Actions in Canada: Cases, Notes, and Materials* (2nd ed, Emond Publishing, Toronto, 2018) at 19. See also Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 44.

⁹⁹ Barbara J Rothstein and Thomas E Willging *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed, Federal Judicial Center, 2010) at 1.

¹⁰⁰ Brian T Fitzpatrick “Why Class Actions Are Something *both* Liberals *and* Conservatives Can Love” (2020) 73 Vand L Rev 1147 at 1154; and Brian T Fitzpatrick *The Conservative Case for Class Actions* (University of Chicago Press, Chicago, 2019).

¹⁰¹ Brian T Fitzpatrick and John H Beisner “The conservative case for class actions” (2020) 104 Judicature 68 at 70–71.

- 5.44 Alternatively, class actions may be viewed as an additional form of enforcement, rather than one which usurps the role of regulators.¹⁰² In European jurisdictions which have strong inclinations towards public regulation (compared to the United States), class actions are seen as “a complementary form of private regulation that supports rather than substitutes for state authority”.¹⁰³
- 5.45 The co-existence of regulatory action and private proceedings has recently been seen in Aotearoa New Zealand in relation to the collapse of CBL Corporation. There have been two civil proceedings brought by the Financial Markets Authority (FMA) and a criminal prosecution by the Serious Fraud Office, as well as two representative actions brought by shareholders.¹⁰⁴ The *Scott v ANZ Bank* representative action is a further example of collaboration between a regulator and private litigants. In that case, the FMA received information from ANZ Bank during its investigations into the Ponzi scheme run by Ross Asset Management. The FMA disclosed this information to investors in Ross Asset Management, which ultimately resulted in a representative proceeding being filed by investors against ANZ Bank.¹⁰⁵
- 5.46 In Aotearoa New Zealand, class actions may play a particularly valuable enforcement role in respect of statutes that have no regulator in charge of their enforcement, such as the Consumer Guarantees Act 1993. It may also be valuable where legislation is premised on the principle of private enforcement, such as the Companies Act 1993.¹⁰⁶ We note that Aotearoa New Zealand regulators acknowledge the role that class actions may play. For example, the FMA has recently stated that it recognises that “private class actions play a crucial part in addressing defective corporate disclosure”.¹⁰⁷ In its 2007 submission to the Rules Committee on the draft Class Actions Bill, the Commerce Commission said that it supported the private enforcement of competition and fair trading laws in Aotearoa New Zealand as an important complement to the Commission’s work.¹⁰⁸

¹⁰² See Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 269:

Like public enforcement, private enforcement can fail, but taken together the two systems make it much more likely that market actors will comply with economic regulation and that critical regulatory policies will take hold on the ground.

¹⁰³ Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 127.

¹⁰⁴ Nikki Chamberlain “CBL collapse ignites firestorm of litigation” [2020] NZLJ 163.

¹⁰⁵ Te Mana Tatai Hokohoko | Financial Markets Authority’s decision to disclose the information was the subject of litigation: see *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2018] NZCA 590. ANZ unsuccessfully sought to strike out the representative proceeding: see *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906.

¹⁰⁶ See Andrew Beck *Morison’s Company Law (NZ)* (online ed, LexisNexis) at [36.1]; and Fran Barber “Indirectly Directors: Duties Owed Below the Board” (2014) 45 VUWLR 27 at 41.

¹⁰⁷ Te Mana Tatai Hokohoko | Financial Markets Authority “FMA statement on director liability and continuous disclosure” (press release, 17 June 2020).

¹⁰⁸ Letter from Geoff Thorn (General Manager of the Commerce Commission) to the Rules Committee regarding a possible group actions regime in the High Court Rules (31 July 2017) at 6–7.

Behaviour modification and deterrence

5.47 A class action can result in the defendant modifying their behaviour and the risk of a class action may also deter other potential defendants from engaging in wrongdoing.¹⁰⁹ As Deborah Hensler explains:¹¹⁰

The goal is to incentivize economic actors to include the expected value of injuries or losses caused by their illegal behaviour (including the legal expenses associated with recouping losses) in their calculus when deciding whether and how to design, produce, distribute, and market a product or service.

5.48 At the same time, it may be challenging to prove the existence of behaviour modification and deterrence and measure their effect.¹¹¹ The Law Commission of Ontario (LCO) has commented that the question of whether behaviour modification is achieved in practice is one that has “long vexed class action scholars”.¹¹²

5.49 In relation to behaviour modification, the terms of a judgment or a settlement in a class action may require a defendant to modify its behaviour, such as an injunction or a settlement term requiring it to take (or refrain from taking) certain steps. Research into federal class action settlements in the United States found that 23 per cent contained a provision requiring a defendant to change its behaviour in some way. Examples included modifying terms of employee benefit plans, modifying compensation practices, changes in business practices, capital improvements, and research and property repairs. These types of terms were most common in civil rights cases (where 75 per cent of cases had such a term) and least common in securities cases (2 per cent).¹¹³ However, it has been observed in Aotearoa New Zealand that while claimants may be interested in settlement terms requiring changes in practice, when a litigation funder is involved, settlement becomes focused on money.¹¹⁴ Even when a settlement agreement does not contain a behaviour modification provision, defendants will sometimes cease offending practices on their own account after they are sued.¹¹⁵

5.50 As to a wider deterrent effect, some studies have found that class actions do have a general deterrent effect but the position remains contested. Brian Fitzpatrick’s research found six studies that showed class actions have a deterrent effect and only one that did

¹⁰⁹ This has been referred to as specific deterrence (stopping the defendant from continuing the misconduct) and general deterrence (preventing potential wrongdoers from committing misconduct): Brian T Fitzpatrick “Do Class Actions Deter Wrongdoing?” (12 September 2017) Social Science Research Network <www.ssrn.com> at 184.

¹¹⁰ Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 244.

¹¹¹ See Catherine Piché “Class Action Value” (2018) 19 *Theo Inq L* 261 at 276.

¹¹² Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 89.

¹¹³ Brian T Fitzpatrick “An Empirical Study of Class Action Settlements and Their Fee Awards” (2010) 7 *JELS* 811 at 824; and Brian T Fitzpatrick “Do Class Actions Deter Wrongdoing?” (12 September 2017) Social Science Research Network <www.ssrn.com> at 184.

¹¹⁴ See comments by Bell Gully partner Jenny Stevens in Rod Vaughan “Debate over litigation funding heats up” (5 June 2020) ADLS <<http://adls.org.nz>>.

¹¹⁵ Brian T Fitzpatrick “Do Class Actions Deter Wrongdoing?” (12 September 2017) Social Science Research Network <www.ssrn.com> at 185.

not.¹¹⁶ Others consider there is insufficient evidence.¹¹⁷ Linda Mullenix comments that while in some cases prudent lawyers are likely to guide their clients' actions to avoid class action litigation:¹¹⁸

it is equally likely that the prospect of future class litigation serves little or no deterrent function and that at least some (if not many) corporate clients view class litigation as a cost of doing business, with costs passed along to consumers.

- 5.51 In its 2019 report on class actions, the LCO referred to the difficulty in measuring behaviour modification and noted this tended to be proved through anecdotal evidence rather than statistics or quantitative data.¹¹⁹ It considered it unnecessary for every class action to achieve behaviour modification in order for the objective to be valid in a general sense. Rather, it said the question was whether class actions provided general incentives for increased compliance with the law, stating that its research and consultations had confirmed the answer was “most certainly yes”.¹²⁰ In other words, the LCO considered that taken as a whole class actions have a behaviour modification effect even if it is not obvious from all cases.¹²¹
- 5.52 The deterrent effect of a class action may depend, to some extent, on the level of settlement or damages awarded compared to a regulatory fine. The Australian Law Reform Commission (ALRC) was advised that damages in shareholder class actions tend to be greater than penalties or fines imposed by the Australian Securities and Investment Commission for infringement of continuous disclosure rules.¹²² In the United States, it has been calculated that class action settlements in securities class actions are often ten times the fines imposed by the Securities and Exchange Commission.¹²³ However, the fact that

¹¹⁶ Brian T Fitzpatrick “Do Class Actions Deter Wrongdoing?” (12 September 2017) Social Science Research Network <www.ssrn.com> at 196–200.

¹¹⁷ For example, it has been observed that while the costs of defending class actions are visible, we do not know which of the precautionary measures taken by defendants would not be there without the threat of a class action: James D Cox and Randall S Thomas “Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the US Securities Law” (2009) 6 ECFLR 164 at 183. It has also been said that if a class action claim is based on an activity unique to government, general deterrence is largely irrelevant: Craig Jones and Angela Baxter “The Class Action and Public Authority Liability: ‘Preferability’ Re-Examined” (2007) 57 UNBLJ 27 at 44.

¹¹⁸ Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 Emory LJ 399 at 420.

¹¹⁹ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 89.

¹²⁰ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 89.

¹²¹ Some examples of behaviour modification that were given to the LCO included: employers changing policies relating to overtime, legal advice to corporate clients including discussions about the risk of class action litigation, improved disclosure by companies and changes to solitary confinement practices. However, there were cases where behaviour modification did not appear to occur or where it was difficult to isolate the deterrent effect of class actions compared to other factors such as regulatory proceedings: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 89–90.

¹²² Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [9.31].

¹²³ John C Coffee Jr *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard University Press, Cambridge (Mass), 2015) at 175. See also John C Coffee Jr “Reforming the Securities Class Action: An Essay on Deterrence and its Implementation” (2006) 106 Colum L Rev 1534 at 1542–1543. Some have said that the threat of a class action looms much larger than the prospect of enforcement by the Securities and Exchange Commission: see Myriam Gilles and Gary B Friedman “Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers” (2006) 155 U Pa L Rev 103 at 106.

settlements are much larger than regulatory fines does not mean that securities class actions create an adequate deterrent threat. One reason is that only claims above a certain level are economic to pursue, which means that small companies are said to become practically exempt from securities class actions.¹²⁴ Another reason is that it may be defendant companies and insurers who actually pay the costs of a settlement, rather than culpable officers and directors.¹²⁵ One study found that individual defendants almost never contribute personally to settlements in United States securities class action settlements.¹²⁶ Australian research found that individuals are more likely to have orders or enforcement mechanisms imposed on them personally by regulatory action than by an investor class action.¹²⁷

- 5.53 Where there is both regulatory action and a class action over the same conduct, there could be a risk of a defendant being punished too much, or “over deterrence”.¹²⁸ However, research indicates it is unlikely that the penalties inflicted by a class action that follows regulatory action cause wrongdoers to internalise more than 100 per cent of the social cost of their actions.¹²⁹
- 5.54 CSA suggests that, with respect to class actions with high individual values (where the individual would have otherwise brought their own litigation), a class action enables the same deterrence incentive to occur at a lower social cost of litigation.¹³⁰ CSA’s analysis also suggests class actions involving low value individual claims are likely to improve deterrence of activities prone to causing small harms across a large number of people.¹³¹
- 5.55 According to CSA, insurance does reduce deterrence incentives, but not necessarily below an efficient deterrence level. This is because insurers substitute various monitoring, reporting and practice requirements to encourage precautionary behaviour and investments. Insurers generally also reserve the right to refuse to pay out if the insured acted in breach of the insurance contract. A defendant could also be left with significant exposure if its level of insurance cover falls short of the expected damages.¹³²
- 5.56 Our overall sense of the literature is that class actions can modify behaviour and have a deterrent effect, although the extent of these effects is difficult to measure. A class actions regime is likely to both modify the actions of those subject to a class action and

¹²⁴ John C Coffee Jr “Reforming the Securities Class Action: An Essay on Deterrence and its Implementation” (2006) 106 Colum L Rev 1534 at 1543.

¹²⁵ John C Coffee Jr “Reforming the Securities Class Action: An Essay on Deterrence and its Implementation” (2006) 106 Colum L Rev 1534 at 1550–1551.

¹²⁶ See Janet Cooper Alexander “Rethinking Damages in Securities Class Actions” (1996) 48 Stan L Rev 1487 at 1499; and Denise N Martin and others “Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions” (1999) 5 Stan J L Bus & Fin 121 at 134.

¹²⁷ Michelle Welsh and Vince Morabito “Public v Private Enforcement of Securities Laws: An Australian Empirical Study” (2014) 14 JCLS 39 at 64.

¹²⁸ See discussion of this in John C Coffee Jr “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working” (1983) 42 Md L Rev 215 at 220.

¹²⁹ Myriam Gilles and Gary B Friedman “Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers” (2006) 155 U Pa L Rev 103 at 155–157.

¹³⁰ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 34.

¹³¹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 38.

¹³² Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 24–25 and 44.

also cause others to pre-emptively modify their behaviour to mitigate the risk of also becoming subject to one.

Should behaviour modification and deterrence be an objective of class actions or simply an incidental benefit?

- 5.57 The above discussion shows that class actions may play a role in modifying behaviour and deterring wrongdoing, through enforcing the law in specific cases. However, there is some debate as to whether deterrence should be an objective of a class actions regime, or simply a by-product.¹³³ Rachael Mulheron has commented that compensatory redress is, and has always been, the primary motivator of class actions regimes.¹³⁴ However, Craig Jones argues that from a public policy perspective, deterrence is a more important objective than compensation in furthering the goals of class actions.¹³⁵ One reason is that deterrence can prevent harm from occurring in the first place, rather than simply compensating for harm after the fact.¹³⁶
- 5.58 If deterrence is to be an objective of a class actions regime, this may have implications for its design. From a deterrence perspective, it is the sum paid by a defendant that matters and it is irrelevant whether that sum is paid as compensatory damages to class members or as an equivalent sum to others (such as a charity).¹³⁷ It has been observed that the amount of legal fees paid to the plaintiff's lawyer may not be problematic from a deterrence perspective as it may incentivise the lawyer to vigorously prosecute the case. However, from a compensation perspective, the amount of money a lawyer receives is significant as it will reduce the amount paid to class members.¹³⁸
- 5.59 In its 1982 report on class actions, the OLRC considered the view that behaviour modification and deterrence are not a proper function of civil litigation and that these should only be pursued through criminal (or quasi-criminal) enforcement. In rejecting this view, the OLRC noted that:¹³⁹
- (a) Even an individual case which had compensation as its main purpose would inevitably help to achieve deterrence by preventing the defendant from retaining unjust profits or forcing a defendant to internalise costs.
 - (b) There were aspects of civil substantive law which had incorporated deterrence, such as restitution and punitive damages.

¹³³ Deborah Hensler has commented that “[w]hether regulatory enforcement ought to be a goal of collective litigation ... is central to controversy over the use of class action procedures in virtually every jurisdiction that has considered adopting, expanding, or restricting their use”: Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 243–244.

¹³⁴ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 79.

¹³⁵ Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 29.

¹³⁶ Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 44.

¹³⁷ See Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 244.

¹³⁸ See Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 44–45.

¹³⁹ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 142–145.

- (c) It may not be in the public interest (or the interests of defendants) to make behaviour modification the exclusive preserve of the criminal law.
- (d) Fines imposed in criminal proceedings may not deprive defendants of the benefits of their wrongful conduct or require them to internalise the costs of the injuries caused to individuals.
- (e) A class action procedure simply removes the barriers to litigation that prevent individual claims from being brought. A class action will not modify behaviour to any greater extent than other methods of removing barriers to bringing claims.
- 5.60 The OLRC considered that, while the main justification for class actions was achieving either judicial economy or increased access to justice, behaviour modification was “essentially an inevitable, albeit important, by-product of class actions”.¹⁴⁰
- 5.61 Deterrence is now seen as a key goal of class actions in the United States,¹⁴¹ although it was not the original purpose of the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure which created the class actions regime.¹⁴²
- 5.62 In its 1988 report recommending a group proceedings regime, the ALRC considered that the primary goal of the regime was to enable people to access legal remedies and said that any deterrent effect on the respondent’s behaviour was only incidental.¹⁴³ Subsequently, neither behaviour modification nor deterrence was mentioned as an objective of class actions in the Attorney-General’s Second Reading speech on the Bill introducing the federal class actions regime.¹⁴⁴ There are, however, some indications that class actions are seen as having a behaviour modification and deterrence role in Australia, even if this is not emphasised to the same degree as access to justice.¹⁴⁵

¹⁴⁰ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 145.

¹⁴¹ Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 *Emory LJ* 399 at 420; Deborah R Hensler “Happy 50th Anniversary, Rule 23! Shouldn’t We Know You Better After All This Time?” (2017) 165 *U Pa L Rev* 1599 at 1611. See also William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§1:8]; and Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 63–64.

¹⁴² Arthur R Miller “Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the ‘Class Action Problem’” (1979) 92 *Harv L Rev* 664 at 669:

Although it was expected that the revision would operate to assist small claimants, the draftsmen conceived the procedure’s primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies.

¹⁴³ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [323].

¹⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

¹⁴⁵ In the Senate, the Minister for Justice and Consumer Affairs commented in Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3125 (Michael Tate):

The enhancement of the rights of many shareholders to take this sort of representative proceeding will be a great aid to the more formal regulators, such as the Australian Securities Commission, in ensuring compliance with the corporations law.

See also Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [1.13]; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [9.28] commenting that “[i]t is generally accepted that there are two goals that shareholder class actions are expected to deliver: compensation for shareholders harmed by breaches of the rules, and deterrence against future breaches”.

- 5.63 In its 1996 report, the Scottish Law Reform Commission rejected the view that behaviour modification or punishment should be an aim of multi-party litigation. It considered that the proper objective of a claim for damages was to obtain compensation, rather than being used as a pretext for a public inquiry.¹⁴⁶

QUESTION**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?

¹⁴⁶ Scottish Law Commission *Multi-Party Actions* (Scot Law Com No 154, Report, 1996) at [2.23].

CHAPTER 6

Disadvantages of class actions

INTRODUCTION

- 6.1 In this chapter we discuss the following potential disadvantages of a class actions regime:
- (a) Negative impacts on the court system.
 - (b) Negative impacts for defendants, including pressure to settle claims and increased costs.
 - (c) Broader negative impacts on the business and regulatory environment.
 - (d) Insufficient protection of class members' interests.
- 6.2 Many of these potential disadvantages are inter-related. There are also a number of counter-arguments, which we discuss below.

CLASS ACTIONS MAY HAVE NEGATIVE IMPACTS ON THE COURT SYSTEM

- 6.3 Because class actions make it easier for individuals to join a legal action, a class actions regime may result in an increase in litigation. While some of this litigation may be socially advantageous, it could also lead to meritless class actions or claims which involve relatively trivial individual claims.

Increasing the workload of the courts

- 6.4 One criticism of class actions is that it may lead to a 'flood' of class actions that will overload the courts and cause delays for other litigation.¹ For example, there have been a significant number of securities class actions in other jurisdictions. In Australia, while there were initially very few, the numbers have steadily increased, with around 20 securities class actions filed annually in recent years.² One report claims that securities

¹ This criticism is discussed in Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 169.

² There were 17 securities class actions filed in the year ending 30 June 2017, 24 securities class actions filed in the year ending 30 June 2018 and 19 securities class actions filed in the year ending 30 June 2019. Vince Morabito discusses some of the reasons for the "fairly significant" number of securities class actions and disputes the claim there has been an "explosion" in securities class actions in Australia: Vince Morabito *Shareholder class actions in Australia – myths v facts* (An evidence-based approach to class action reform in Australia, November 2019) at 15.

class actions are “skyrocketing” in the United States, with one in 12 companies subject to such a case.³

- 6.5 Class action litigation is also likely to be judicially intensive because of the sheer size of cases and the need for judges to ensure that class members’ interests are safeguarded.⁴ Class actions may also be harder fought than other litigation because the stakes are so much higher, creating additional costs for litigants and the court.⁵ An increase in judicial workload also means the costs of running the court system will increase, and this cost is largely borne by the taxpayer. While civil litigants in Aotearoa New Zealand are required to pay filing fees and hearing fees, these are intended to recover less than half of the actual cost to the court system.⁶ In the United States, securities class actions have been described as “essentially subsidized by the U.S. taxpayer” since they consume so much judicial resource.⁷ Similarly, it has been noted that in Canada, the public purse essentially underwrites class action lawyers’ business.⁸
- 6.6 The data shows that in overseas jurisdictions, class action cases make up a relatively small proportion of all cases filed. For example, in the 2017–2018 financial year, only 32 of the 4,659 proceedings filed in the Federal Court of Australia were class actions, which amounts to 0.68 per cent.⁹ The Australian Law Reform Commission (ALRC) did note, however, that the number of cases may not accurately indicate the effect that class action cases have on the court’s workload, given the length of time they take to resolve and the intensive case management and court oversight required.¹⁰ Vince Morabito’s empirical analysis identified 634 class actions in Australia between March 1992 and June 2019, a period of over 27 years.¹¹ Deborah Hensler discusses the data available on class actions filed in different jurisdictions and concludes:¹²

³ United States Chamber Institute for Legal Reform *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* (October 2018) at 1.

⁴ The Victorian Law Reform Commission has commented that class actions are significantly more resource-intensive than other cases and often require extensive judicial case management: Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at 140.

⁵ Michael J Legg “Shareholder Class Actions in Australia – The Perfect Storm?” (2008) 31 UNSWLJ 669 at 698.

⁶ Court fees are set out in the High Court Fees Regulations 2013. The Ministry of Justice’s consultation paper on these fees set the estimated cost recovery level at 33 per cent for the District Court, 37 per cent for the High Court, 15 per cent for the Court of Appeal and 0.5 per cent for the Supreme Court. See Tāhū o te Ture | Ministry of Justice *Civil fees review: A public consultation paper* (September 2012) at 7.

⁷ John C Coffee Jr “Reforming the Securities Class Action: An Essay on Deterrence and its Implementation” (2006) 106 Colum L Rev 1534 at 1540.

⁸ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 8.

⁹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.13].

¹⁰ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.14].

¹¹ Vince Morabito *Shareholder class actions in Australia – myths v facts* (An evidence-based approach to class action reform in Australia, November 2019) at 12.

¹² Deborah R Hensler “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally” (2017) 65 U Kan L Rev 965 at 987.

Taken together these data suggest that in common law jurisdictions class actions are used sparingly (relative to the size of national caseloads of civil damage litigation) and tend to rise and fall in response to broader economic trends, as well as with precedential decisions. There is no evidence of class actions overwhelming any country's civil justice system.

- 6.7 Further, objecting to a class actions regime because it may increase the rate of litigation misses the point that class actions aim to ensure greater access to justice.¹³ In relation to shareholder class actions, the ALRC cited these as examples of claims that might be litigated under the new regime it recommended.¹⁴ In other words, the class actions regime has done the very thing it was intended to. Capital Strategic Advisors (CSA) notes that while class actions involving low individual claim values will increase costs for the court system, any policy change that increases litigation activity will have that effect. The underlying driver is not anything specific to low-value class actions but rather that the fees paid by users of the court system are lower than the actual costs incurred by the court system.¹⁵

Encouraging trivial claims

- 6.8 While some class action claimants may have suffered significant harm, this is not always the case. There are many examples of class actions litigating what might seem like trivial claims, particularly in the United States. For example, one class action against a cable television company involved allegations that a \$5 late payment fee was excessive.¹⁶ Another alleged that a furniture retailer sold more loan insurance than was needed, with an estimated average loss to individual class members of \$3.83.¹⁷ Between 2010 and 2012, there were a series of class actions in the United States about the failure of ATMs to contain a sticker advising that a fee may be charged (even though the fee itself was required to be disclosed on the ATM screen).¹⁸ A recent example is a 2020 settlement of a class action claim that black pepper containers were underfilled, resulting in payments of around \$4 per customer.¹⁹
- 6.9 It may not be an effective use of the court system to litigate trivial claims, particularly where there are lower cost alternatives available. In Aotearoa New Zealand, these include the Disputes Tribunal and specific bodies such as the Banking Ombudsman, Privacy

¹³ See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 75; and Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 82–83.

¹⁴ See Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 33.

¹⁵ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 43.

¹⁶ *Selnick v Sacramento Cable* No 541907 (Cal Super Ct 1996) as cited in Deborah R Hensler and others *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Corporation, 2000) at 418.

¹⁷ *Inman v Heilig-Meyers Furniture* No CV 94-047 (Ala Cir Ct Fayette County filed May 12, 1994) as cited in Deborah R Hensler and others *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Corporation, 2000) at 418.

¹⁸ Congress voted to remove the sticker requirement from legislation in 2012. The Bureau of Consumer Protection considered that the consumer benefit being eliminated was minimal. It noted that the sticker notice did not tell the consumer the amount of the fee or whether a fee would be charged, it usually only stated that a fee “may” be charged: Supplementary Information issued by the Bureau of Consumer Financial Protection on 26 March 2013 in relation to Disclosures at Automated Teller Machines (Regulation E) 78 FR 18221-01.

¹⁹ See “McCormick & Company, Inc, Pepper Products Settlement” <www.blackpeppersettlement.com>.

Commissioner and Motor Vehicles Disputes Tribunal.²⁰ A potential consequence of class actions may be the development of a litigious mindset in the community, with litigation being seen as the first resort for dispute resolution.²¹

- 6.10 Vicki Waye has observed that whether class actions lead to a “compensation culture” of frivolous litigation depends on the features of a class actions framework and a jurisdiction’s litigation culture.²² We think the risk of trivial claims is likely to be lower in Aotearoa New Zealand than in some other jurisdictions. First, some of the overseas examples which have caused particular concern are due to the substantive law in place in those jurisdictions, such as the requirement to have a fee notice ‘on or at’ an ATM. Second, our population size means that class actions involving very small individual claims may not be economically feasible. Third, our adverse costs regime may deter trivial claims from being commenced. The High Court is empowered to order indemnity costs where a party commenced proceedings “vexatiously, frivolously, improperly, or unnecessarily”.²³
- 6.11 We also note that while class action claims might involve small individual amounts which seem trivial, the cumulative effect may be significant. For example, while the television cable company class action mentioned above involved a \$5 fee, the estimated gain to the defendant was \$5 million. As was put by former United States Vice President Walter Mondale:²⁴

Nothing is more destructive to a sense of injustice than the widespread belief that it is much more risky for an ordinary citizen to take \$5 from one person at the point of a gun than it is for a corporation to take \$5 each from a million customers at the point of a pen.

High transaction costs

- 6.12 Class actions are said to impose high transaction costs compared with alternatives such as regulatory action. These costs include legal fees, expenses such as court fees and expert reports, adverse costs insurance and litigation funder commissions.²⁵ Data from other jurisdictions shows these costs can be considerable:

²⁰ For details of dispute resolution bodies by services, see Consumer Protection “Help by product & service” <www.consumerprotection.govt.nz>.

²¹ Michael J Legg “Shareholder Class Actions in Australia – The Perfect Storm?” (2008) 31 UNSWLJ 669 at 708.

²² Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 129. She discusses class actions in Israel, where up to a third of all class actions have been classified as frivolous and many cases are withdrawn prior to certification due to low prospects of success and few cases ever reach a settlement. This is compared with Australia, where around half of cases result in a judicially approved settlement and only a small number are voluntarily withdrawn.

²³ High Court Rules 2016, r 14.6(4)(a).

²⁴ Vice President Walter F Mondale “Address to the Second Judicial Circuit Conference” (10 September 1977) as cited in Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner and others (eds) *The Yearbook of Consumer Law 2008* (Ashgate Publishing, Aldershot (UK), 2007) 297 at 300.

²⁵ Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 127. Capital Strategic Advisors refers to class actions as having ‘management costs’ such as the time a lawyer must spend promoting the claim to prospective class members, conducting due diligence and assessing class member claims and the time spent by the parties and the court on certification: Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 35.

- (a) In Australia, the median funder commission taken out of class action settlement funds is 25 per cent.²⁶ Legal fees make up a median 15 per cent of settlements.²⁷
 - (b) An Ontario study found that the average lawyer's fee approved by a court in a class action was \$3.06 million.²⁸
 - (c) Data from the United States shows that legal fees made up an average of 27 per cent of gross recovery.²⁹
- 6.13 The Law Commission of Ontario (LCO) commented that almost all stakeholders expressed a concern about the enormous expense and slow pace of class actions.³⁰ In Australia, the average duration of settled class actions is 978 days (or over two and a half years).³¹ Where a matter proceeds to trial, this can involve a lengthy hearing. For example, in Australia, the class action resulting from the 2009 Black Saturday bushfire through Kinglake-Kilmore East involved 208 hearing days, with over 5000 pages of opening and closing submissions.³² In the United States, one study found the average time to settle a class action was around three years.³³

CLASS ACTIONS MAY HAVE NEGATIVE IMPACTS FOR DEFENDANTS

- 6.14 The negative impacts of class actions will be felt most keenly by the defendants they are brought against – and their insurers. While the typical class action defendant is a large

²⁶ Vince Morabito *Common Fund Orders, Funding Fees and Reimbursement Payments* (An Evidence-Based Approach to Class Action Reform in Australia, January 2019) at 11. This does not include litigation costs that a funder will receive reimbursement for. See also Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.49]–[3.50] showing that litigation funding fees make up a median 30 per cent of a settlement in funded cases in the Federal Court. Funding commissions ranged from 17 per cent of a \$3 million settlement (\$510,000) to 62 per cent of a \$6.6 million settlement (\$4.092 million).

²⁷ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.49]–[3.50]. Fee percentages ranged from 2 per cent of a \$250 million settlement (\$5 million) to 50 per cent of a \$3 million settlement (\$1.5 million). Vince Morabito comments that while the Full Federal Court of Australia has observed it frequently costs at least \$10 million to run a class action, this figure has been surpassed in several cases, citing examples of cases costing over \$36 million, \$25 million and \$19.2 million to run. See Vince Morabito “Lessons from Australia on Class Action Reform in New Zealand” (2018) 24 NZBLQ 178 at 184.

²⁸ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 131.

²⁹ Theodore Eisenberg, Geoffrey Miller and Roy Germano “Attorneys’ Fees in Class Actions: 2009–2013” (2017) 92 NYU L Rev 937 at 947. Costs and expenses made up a median 1.71 per cent of recovery: at 963.

³⁰ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 23.

³¹ Vince Morabito *The First Twenty-Five Years of Class Actions in Australia* (Fifth Report, An Empirical Study of Australia's Class Action Regimes, July 2017) at 30. The category of settled class actions with the longest average duration was product liability class actions, with a duration of 1,149 days.

³² Jack Forrest “Issues in Case Management of Class Actions and Administration of Settlements – Kilmore East/Kinglake Bushfire Trial” in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) 71 at 73.

³³ Brian T Fitzpatrick “An Empirical Study of Class Action Settlements and Their Fee Awards” (2010) 7 JELS 811 at 820. This was a study of federal class action cases from 2006–2007. The average time to settlement was 1,196 days and the median time was 1,068 days.

company, overseas experience shows this is not always the case. In Australia, for example, one in five class actions has been brought against the Government.³⁴

- 6.15 For a defendant, the impact of a class action can be significant because of the potential costs it may face in defending the action. A defendant will incur legal costs regardless of whether it is ultimately found to be liable, given that an unsuccessful plaintiff will usually only have to pay a portion of the defendant's costs.³⁵ There will also be indirect costs such as time spent by management on defending the litigation and negative reputational effects.³⁶ One United States report claims that the mere filing of a securities class action erases (on average) 3.5 per cent of a defendant company's equity value.³⁷

Defendants face strong settlement pressure

- 6.16 Defendants in class actions may face strong incentives to settle because of the high transaction costs and the potential for a large but uncertain financial liability.³⁸ For example, even if a corporation believes its prospects of defending a claim are high (say 80 per cent), it may be economically rational to settle a \$100 million claim for \$20 million to remove the risk of liability and avoid further costs.³⁹ In the United States, some have even described class actions as a form of 'legalised blackmail' whereby defendants feel compelled to settle claims, irrespective of the merits, due to the high costs of litigation and the risk of a large recovery against them.⁴⁰
- 6.17 The data shows that class actions do frequently settle. In the United States it is very rare to go to trial and most cases allowed to proceed as a class action result in a settlement.⁴¹

³⁴ Vince Morabito "Government has shelled out \$1.1B in class actions" (23 July 2020) Lawyerly <www.lawyerly.com.au>.

³⁵ See Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 43.

³⁶ Michael J Legg "Shareholder Class Actions in Australia – The Perfect Storm?" (2008) 31 UNSWLJ 669 at 674–675.

³⁷ United States Chamber Institute for Legal Reform *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* (October 2018) at 18.

³⁸ Michael J Legg "Shareholder Class Actions in Australia – The Perfect Storm?" (2008) 31 UNSWLJ 669 at 698 and 699–700.

³⁹ Gary L Sasso "Class Actions: De Minimis Curat Lex?" (2005) 31(4) *Litigation* 16 at 18.

⁴⁰ The concept of a 'blackmail settlement' is believed to have originated in Henry J Friendly *Federal Jurisdiction: A General View* (Columbia University Press, New York, 1973). See also United States Chamber Institute for Legal Reform *Unstable Foundation: Our Broken Class Action System and How to Fix It* (October 2017) at 17–18; Linda S Mullenix "Ending Class Actions as We Know Them: Rethinking the American Class Action" (2014) 64 *Emory LJ* 399 at 416; Milton Handler "The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review" (1971) 71 *Colum L Rev* 1 at 9 ("Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail"). For a critique of the legalised blackmail argument, see Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 146; Charles Silver "'We're Scared to Death': Class Certification and Blackmail" (2003) 78 *NYU L Rev* 1357; and Bruce Hay and David Rosenberg "Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy" (2000) 75 *Notre Dame L Rev* 1377 at 1391.

⁴¹ William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§11:1]. One empirical study of class actions in four districts found that the percentage of certified class actions that resulted in a class settlement ranged from 62 per cent to 100 per cent: Thomas E Willging, Laural L Hooper and Robert J Niemic *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center, 1996) at 60.

This is said to be particularly the case for securities class actions.⁴² In Canada, over 90 per cent of cases allowed to proceed as class actions result in negotiated settlements.⁴³ In Australia, empirical analysis of class actions between March 1992 and March 2017 shows that 52 per cent of class actions settled, with some categories of cases having much higher settlement rates than others.⁴⁴ In its 2018 report, the ALRC noted that all federal shareholder class actions had settled to date and that it was difficult to assess whether claims were meritorious in the absence of judgments.⁴⁵ In Victoria, approximately two-thirds of all class actions have settled.⁴⁶

- 6.18 Settlement of litigation in general has many benefits. It enables both sides to avoid the legal costs of going to trial, frees up judicial resources for other cases, is generally faster, avoids a lengthy period of uncertainty and may enable a more creative array of remedies. In Aotearoa New Zealand, most civil disputes settle and only 9.5 per cent of all civil proceedings in the High Court go to trial.⁴⁷
- 6.19 The desire to settle rather than litigate because of the prospect of an adverse judgment or non-recoverable legal costs is not unique to class actions.⁴⁸ In 1982, the Ontario Law Reform Commission (OLRC) observed that the prospect of high litigation costs and large monetary awards also incentivises defendants to settle non-class action cases. In its view, any increased pressure to settle meritorious class actions that results simply from the ability of class actions to overcome individual barriers to litigation and provide greater access to the courts was legitimate and desirable.⁴⁹
- 6.20 A high settlement rate is not necessarily problematic and may simply indicate a rational response to litigation risk. However, there is a risk that defendants will feel compelled to settle meritless class action claims. There is also a risk that defendants will overpay in settlement because the risks of class actions are so high. We discuss these risks below.

⁴² Linda S Mullenix “Ending Class Actions as We Know Them: Rethinking the American Class Action” (2014) 64 Emory LJ 399 at 432–433 commenting that the “in terrorem” effect of a certified securities class action is so powerful that they almost never go to trial. She cites figures showing that only 14 out of 3,998 securities class actions went to trial verdict.

⁴³ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 92.

⁴⁴ Vince Morabito *The First Twenty-Five Years of Class Actions in Australia* (Fifth Report, An Empirical Study of Australia’s Class Action Regimes, July 2017) at 30, 34 and 37. For example, 73 per cent of investor class actions settled compared with 26 per cent of consumer protection class actions: at 30.

⁴⁵ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [9.50]–[9.51]. We are aware of one shareholder class action having proceeded to judgment since the Australian Law Reform Commission’s report: *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747, (2019) 140 ACSR 38.

⁴⁶ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.10].

⁴⁷ Geoffrey Venning “Greater Efficiency in Civil Procedure” (paper presented to New Zealand Bar Association-Australian Bar Association Joint Conference, Queenstown, August 2019).

⁴⁸ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 76.

⁴⁹ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 147.

Settlement of meritless claims

- 6.21 Class action critics warn of ‘strike suits’ which are:⁵⁰
- [F]rivolous claims which utilise the threat of unmanageable and expensive litigation to compel defendants to settle because of the risks inherent in any litigation and the enormous costs of defending a class action.
- 6.22 In the 1990s, concern was expressed about strike suits in securities class action litigation in the United States.⁵¹ Legislative reform resulted, including prescribed procedures for selecting the representative plaintiff and class counsel in securities class actions, stricter pleading requirements for securities claims, potential sanctions for plaintiffs and lawyers who brought frivolous lawsuits and precluding certain types of securities class action from being brought in state courts.⁵²
- 6.23 It is difficult to know how many settled class action cases are lacking in merit in the absence of a court having adjudicated on these claims.⁵³ A report on settlement of United States class actions described cases resulting in settlements under \$5 million as “nuisance suits” and found that in 2019 just under 22 per cent of securities settlements were under this level.⁵⁴ Some consider the meritless settlements argument to be overblown, noting that there are many successful applications to dismiss cases and many unsuccessful applications for class certification.⁵⁵ One report shows that between 1997 and 2018, 44 per cent of United States federal securities class actions (excluding merger and acquisition cases) were dismissed.⁵⁶
- 6.24 The OLRC did not discount the possibility that some class actions would be frivolous or otherwise lacking in merit. However, it said the answer was not to bar all class actions but rather to develop a procedure that could prevent meritless claims or those commenced

⁵⁰ Australian Law Reform Commission *Access to the Courts – II Class Actions* (ALRC Discussion Paper 11, 1979) at [23].

⁵¹ See Conference Report (HR Rep No 104-369) at 31 on what is now the Private Securities Litigation Reform Act of 1995 Pub L No 104-67, 109 Stat 737 (1995). See also discussion in Elliott J Weiss and John S Beckerman “Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions” (1995) 104 Yale LJ 2053 at 2084–2088 where the authors comment:

Some portion of class actions surely meet our definition of strike suits, but whether the correct figure is four percent or forty percent we cannot say. We are confident, though, that the strike suit problem has an agency-cost dimension.

⁵² Private Securities Litigation Reform Act of 1995 Pub L No 104-67, 109 Stat 737 (1995); and Securities Litigation Uniform Standards Act of 1998 Pub L 105-353, 112 Stat 3227 (1998). See discussion of these Acts in David M Levine and Adam C Pritchard “The Securities Litigation Uniform Standards Act of 1998: the sun sets on California’s Blue Sky laws” (1998) 54 Bus Law 1.

⁵³ The Australian Law Reform Commission commented on this point. It noted that all federal shareholder claims had settled at that point and the question of whether claims were meritorious was difficult to assess in the absence of any having proceeded to judgment: Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [9.50]–[9.51].

⁵⁴ Cornerstone Research *Securities Class Action Settlements: 2019 Review and Analysis* (2019) at 4.

⁵⁵ Myriam Gilles and Gary B Friedman “Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers” (2006) 155 U Pa L Rev 103 at 158. See also Brian T Fitzpatrick “Can the Class Action Be Made Business Friendly?” (2018) 24 NZBLQ 169 at 171; and Charles Silver “‘We’re Scared to Death’: Class Certification and Blackmail” (2003) 78 NYU L Rev 1357 at 1396.

⁵⁶ Cornerstone Research *Securities Class Action Filings: 2020 Midyear Assessment* (2020) at 13.

in bad faith from proceeding.⁵⁷ The ALRC considered that the risk of meritless claims was countered by the adverse costs rule that operates in Australia and the court’s power to dismiss proceedings that were frivolous, vexatious or an abuse of process.⁵⁸ It has also been said that there are unique characteristics of litigation in the United States that might lead to ‘blackmail’ settlements, including the use of jury trials in civil cases and high levels of punitive damages.⁵⁹

- 6.25 In Aotearoa New Zealand, a court has the power to strike out or stay a claim which does not disclose a reasonably arguable cause of action, is likely to cause prejudice or delay, is frivolous or vexatious or is an abuse of the court’s process.⁶⁰ In addition, the adverse costs regime is likely to deter meritless claims and allow a defendant to recoup at least some of their legal costs in defending such a claim. Indemnity costs may also be available if the claim was brought vexatiously, frivolously, improperly or unnecessarily.⁶¹ CSA comments that an adverse costs regime “should discourage all but the most motivated nuisance plaintiff”.⁶² However, where a defendant faces a claim they think has little merit but which is unlikely to meet the threshold for indemnity costs, it may still consider it economically rational to settle the claim because it will not recover all of its costs.⁶³
- 6.26 Many jurisdictions also have a certification stage where the court must determine whether a case can proceed in class action form and this provides another way of screening out meritless claims.⁶⁴

Overpayment due to risk aversion

- 6.27 It is possible that defendants will pay more than they should to settle a class action claim because of the risk and uncertainty involved. A company may be willing to settle for not only what it believes the average outcome will be, but an amount above that to avoid the possibility of an extreme outcome.⁶⁵ This risk is heightened in the United States because of the role of juries in setting the amount of damages and the greater availability of punitive damages. However, there is limited evidence that defendants are risk averse.⁶⁶

⁵⁷ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 149. See also Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [130].

⁵⁸ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [351].

⁵⁹ Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 57–58.

⁶⁰ High Court Rules 2016, r 15.1. See also rr 5.35A and 5.35B of the High Court Rules 2016 which allow a Registrar to refer a proceeding to a judge before service if it is “plainly an abuse of the court”.

⁶¹ High Court Rules 2016, r 14.6(4).

⁶² Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 22.

⁶³ Michael Legg comments that strike suits are possible in Australia because a successful company will not recover all of its direct costs (let alone indirect costs such as management time): Michael J Legg “Shareholder Class Actions in Australia – The Perfect Storm?” (2008) 31 UNSWLJ 669 at 710.

⁶⁴ We discuss certification in Chapter 10.

⁶⁵ Brian T Fitzpatrick “Can the Class Action Be Made Business Friendly?” (2018) 24 NZBLQ 169 at 173.

⁶⁶ Charles Silver “‘We’re Scared to Death’: Class Certification and Blackmail” (2003) 78 NYU L Rev 1357 at 1409. See also John C Coffee Jr “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working” (1983) 42 Md L Rev 215 at 230 discussing risk aversion among plaintiff lawyers.

Even if defendants are risk averse, this may be cancelled out by plaintiff lawyers also being risk averse and being willing to accept too little to settle cases.⁶⁷

Impacts of large settlements or damages awards

- 6.28 For a defendant, the impact of a settlement or damages award will depend on many variables such as its financial position, insurance arrangements and the size of the payment. The cost of a class action may be indirectly passed on to consumers in the form of increased prices for goods and services.
- 6.29 It has been claimed that class actions result in “company-killing verdicts”, but this is disputed and few if any companies are said to have been rendered insolvent by a class action.⁶⁸ A defendant facing a securities class action could rationally predict that the outcome would be a “modest settlement” rather than a “company-killing verdict rendered at trial”.⁶⁹ Vince Morabito has challenged the claim that Australian class actions have resulted in billions of dollars being paid by defendants. His research shows there have been 13 Australian class action settlements of \$100 million or more over a 27-year period, which he considers is not an excessive number of high value settlements.⁷⁰
- 6.30 We also note that it is the existing right to compensation and obligations to redress and not the procedures for enforcing those rights and obligations which determine the legal position of defendants.⁷¹

CLASS ACTIONS MAY HAVE NEGATIVE IMPACTS ON THE BUSINESS AND REGULATORY ENVIRONMENT

- 6.31 A class action will clearly have an impact on the defendant it is brought against. However, the risk of class actions may have a broader impact on the business and regulatory environment. We discuss potential issues below.

Impact on directors and officers liability insurance

- 6.32 In Australia, it has been claimed that the increase in shareholder class actions has had a significant impact on the pricing and availability of directors and officers liability insurance (D&O insurance).⁷² The increase in Australian shareholder class actions has been said to

⁶⁷ Brian T Fitzpatrick “Can the Class Action Be Made Business Friendly?” (2018) 24 NZBLQ 169 at 174.

⁶⁸ Charles Silver “‘We’re Scared to Death’: Class Certification and Blackmail” (2003) 78 NYU L Rev 1357 at 1404–1405.

⁶⁹ Charles Silver “‘We’re Scared to Death’: Class Certification and Blackmail” (2003) 78 NYU L Rev 1357 at 1407.

⁷⁰ Vince Morabito *Common Fund Orders, Funding Fees and Reimbursement Payments* (An Evidence-Based Approach to Class Action Reform in Australia, January 2019) at 9. He explains that another three cases could possibly be added to this list — two involve confidentiality orders and one involves waiver of debt rather than a payment by the defendants.

⁷¹ See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 77. We discuss this point further in Chapter 7.

⁷² The claim is discussed in Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [9.81]–[9.85]. See also Australian Institute of Company Directors, Submission No 40 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 7–9.

affect the pricing and availability of D&O insurance in Aotearoa New Zealand.⁷³ A recent report predicts that increased litigation funding, developments in representative actions as well as potential class actions law reform, and the growing regulatory burden on directors and officers, could also result in changes to the D&O insurance market in Aotearoa New Zealand.⁷⁴ It has been suggested that these changes may in turn adversely impact the ability of companies to recruit directors and officers.⁷⁵

- 6.33 We describe the recent trends in the Australasian D&O insurance market in more detail in Chapter 17 and consider the claims that an increase in funded shareholder class actions in particular are contributing to the ‘hardening’ of the market (where premiums increase and the availability of insurance decreases). As we discuss in Chapter 17, we have not yet seen robust evidence in support of those claims.

Difficulties in appointing directors

- 6.34 It is possible that individuals will be deterred from becoming directors because of the fear of a class action being brought against companies they serve on. According to a 2019 report, 40 per cent of directors agreed that the scope of director responsibilities was more likely to deter them from taking on a governance role than a year ago. The report attributed this to increasing disclosure obligations and regulatory scrutiny as well as potentially the rise of class actions and litigation funding.⁷⁶ This risk may also be compounded by the impact of class actions and litigation funding on the market for D&O insurance.

Defendants may become overly risk averse

- 6.35 While an aim of class actions is to deter negative conduct, the fear of a class action could potentially also cause defendants to become overly risk-averse and avoid desirable conduct.⁷⁷ If Government agencies fear class actions and become more risk-averse, for example, this could slow down decision making or cause a retreat from certain areas of regulation.⁷⁸ However, as we discuss elsewhere in this Issues Paper, the potential for

⁷³ Institute of Directors New Zealand, MinterEllisonRuddWatts and Marsh *Directors and Officers Insurance: Trends and Issues in Turbulent Times* (June 2019) at 5.

⁷⁴ Institute of Directors New Zealand, MinterEllisonRuddWatts and Marsh *Directors and Officers Insurance: Trends and Issues in Turbulent Times* (June 2019) at 11.

⁷⁵ Institute of Directors New Zealand, MinterEllisonRuddWatts and Marsh *Directors and Officers Insurance: Trends and Issues in Turbulent Times* (June 2019) at 3.

⁷⁶ Institute of Directors New Zealand and ASB *Director Sentiment Survey 2019* (21 November 2019) at 8. See also Australian Institute of Company Directors, Submission No 40 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 5.

⁷⁷ Edward H Cooper “Class Action Advice in the Form of Questions” (2001) 11 Duke J Comp & Intl L 215 at 219; Martin H Redish “The Liberal Case Against the Modern Class Action” (2020) 73 Vand L Rev 1127 at 1144; and Brian T Fitzpatrick “Can the Class Action Be Made Business Friendly?” (2018) 24 NZBLQ 169 at 173.

⁷⁸ See Tim Smith and Duncan McLachlan “Kiwifruit and the Crown – Expanding regulator liability in *Strathboss*” (2018) 920 LawTalk 49. This discusses the High Court’s decision in *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559, a representative action under r 4.24 of the High Court Rules 2016, which is described as “a decision causing some angst for all regulators carrying out an operational rule”. This decision was subsequently overturned by the Court of Appeal (*Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98) and the Supreme Court has granted leave to hear the case (*Strathboss Kiwifruit Ltd v Attorney-General* [2020] NZSC 68).

liability is ultimately due to the underlying legal claims rather than the procedure used to bring the claims.⁷⁹

Impact on overall business environment

- 6.36 Where businesses face greater exposure to litigation, this may create additional compliance and legal costs. In relation to Australia, it has been said these costs could harm the country's competitive position as businesses may choose to base themselves in a less litigious country.⁸⁰ This argument was dismissed by the Alberta Law Reform Institute, which did not think the presence or absence of a class actions regime was likely to have any effect on business location.⁸¹ We note that many businesses in Aotearoa New Zealand conduct operations in jurisdictions that have class actions regimes. We think it is unlikely that these businesses would choose to move locations simply because a class actions regime was introduced here.
- 6.37 The Australian Institute of Company Directors has argued that Australia's "relatively facilitative class action law" combined with its strict continuous disclosure regime has created a constant risk of a class action every time a listed company has a significant decline in share price.⁸² It also argued that these factors risked having a chilling effect on a company's ability to attract investment or to engage in mergers and acquisitions or capital raising activity.⁸³
- 6.38 Class actions could also have a positive impact on the business environment because stricter enforcement could lead to greater transparency and integrity of the market.⁸⁴ Similarly, CSA comments that deterring small but widespread harms is likely to have wider implications for confidence in markets. CSA argues that if behaviour such as misleading and deceptive conduct is allowed to go undeterred, it may lead to a "race to the bottom" where other firms are encouraged to engage in similar practices, further reducing participation in markets.⁸⁵ In CSA's assessment, there are no reasonable innovation and productivity arguments for inhibiting wronged parties from accessing the justice system through class actions. An essential part of this analysis is that courts apply the same liability rules regardless of the choice of legal vehicle for pursuing claims, so it is the substantive law rather than class actions which creates the liability.⁸⁶

⁷⁹ In relation to the *Strathboss* decision for example, commentary has focused on the High Court's substantive findings on the plaintiff's claims as opposed to the use of the representative actions rule to bring the claim. See Stephen Young and Alex Latu "Class actions, Crown negligence, immunities and epidemics on trial" [2020] NZLJ 368.

⁸⁰ Michael J Legg "Shareholder Class Actions in Australia – The Perfect Storm?" (2008) 31 UNSWLJ 669 at 710.

⁸¹ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [147].

⁸² Australian Institute of Company Directors, Submission No 40 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 4.

⁸³ Australian Institute of Company Directors, Submission No 40 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 7.

⁸⁴ Michael J Legg "Shareholder Class Actions in Australia – The Perfect Storm?" (2008) 31 UNSWLJ 669 at 710.

⁸⁵ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 44.

⁸⁶ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 45.

Increased cost to Government

6.39 As noted above, one in five Australian class actions has been against the Government. This has resulted in payments of over \$1 billion to claimants, which is ultimately borne by taxpayers.⁸⁷ A similar result may occur in Aotearoa New Zealand with class actions regularly brought against the Government, resulting in significant costs to defend and settle cases. A number of representative actions have been brought against the Government, as we set out in Chapter 3.

CLASS ACTIONS MAY PROVIDE INSUFFICIENT PROTECTION OF CLASS MEMBERS' INTERESTS

6.40 If a class actions regime is poorly designed, there is a risk that class actions will insufficiently protect the interests of class members. One issue is that class members will be bound by the outcome of a case, potentially even in circumstances where they were unaware of the case. Even when class members are aware of the case, they may have limited knowledge and little ability to participate in the litigation.

6.41 Another issue is that conflicts of interest may arise. These conflicts may arise between different class members as well as between the class and the representative plaintiff.⁸⁸ A conflict may also arise between the lawyer and the class at settlement if settlement improves the prospects and timing of payment of the lawyer's fee but may result in a reduced amount available for class members.⁸⁹ Conflicts may be exacerbated when a litigation funder is present and where there is a tripartite relationship between the lawyer, litigation funder and representative plaintiff.⁹⁰

Class action judgment binds the class

6.42 A key feature of class actions is that a single judgment on common issues binds the whole class. These common issues cannot be relitigated in subsequent proceedings by class members. However, in an opt-out class action, there is a risk of class members being bound by a judgment when they had little or no knowledge of proceedings. We have been told this could have a particularly harsh effect in Māori collective litigation, in cases where a class comprises members of a hapū or iwi and the judgment has an impact well beyond the lifetimes of the current members of group. The potential risks associated with opt-out proceedings are discussed further in Chapter 12.

6.43 Class actions regimes do, however, contain safeguards to minimise the effect that an unwitting class member will unintentionally be bound by litigation they did not wish to be

⁸⁷ Vince Morabito "Government has shelled out \$1.1B in class actions" (23 July 2020) Lawyerly <www.lawyerly.com.au> stating that a total of \$1,155,270,100 was paid in judicial-approved settlements and post-trial awards of damages.

⁸⁸ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.126].

⁸⁹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.129].

⁹⁰ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.130]; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [1.43].

part of. In particular, this includes the requirement to provide notice and an opportunity to opt out of the claim. We discuss this in Chapter 12.

Class members have limited involvement in litigation

- 6.44 Class members do not have the status of parties and may have limited opportunities to meaningfully participate in a class action proceeding. Class actions regimes generally give class members the opportunity to object to a settlement although objectors face hurdles in doing so, including a lack of legal representation and lack of expertise at reviewing the settlement.⁹¹ As a result, objections tend to be scarce and they are rarely successful.⁹² Some regimes also provide class members with the opportunity to apply to participate in the proceeding.⁹³ However, class members need sufficient understanding of the litigation and how they can have their concerns put before the court in order to take up these opportunities.⁹⁴
- 6.45 The Victorian Law Reform Commission (VLRC) has noted that a disadvantage of class actions is that most class members have limited contact with the lawyers acting for the class and incomplete information about the cost, progress and likely outcome of proceedings. It described this as inevitable, because the lawyers acting for the class cannot have the same degree of contact with all class members as they have with the representative plaintiff.⁹⁵

Conflicts between class members and with the representative plaintiff

- 6.46 In a class action, there are likely to be differences between the claims of the representative plaintiff and the other class members, as well as differences between class

⁹¹ See Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.183]–[4.187]; Class Proceedings Act SO 1992 c 6, ss 14, and 27.1(7), (8) and (16); United States Federal Rules of Civil Procedure, r 23(e)(1) and (5)(A); and The Competition Appeal Tribunal Rules 2015 (UK), r 94(7).

⁹² See Michael Legg "Class Action Settlements in Australia – The Need for Greater Scrutiny" (2014) 38 MULR 590 at 599–600; Azra Alagic "Objectors – The Reality of Objecting to Class Action Settlements" (1 September 2020) Class Action Clinic: Windsor Law <www.classactionclinic.com>; and William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:21] and [§13:58].

⁹³ In Canada, a court may permit a class member to participate in the proceeding to ensure that the interests of class members are fairly and adequately represented: Federal Courts Rules SOR/98-106, r 334.23(1); Class Proceedings Act SO 1992 c 6, s 14(1); Class Proceedings Act RSBC 1996 c 50, s 15(1); Class Proceedings Act SA 2003 c C-16.5, s 16(1); The Class Proceedings Act CCSM 2002 c C-130, s 15(1); The Class Actions Act SS 2001 c C-12.01, s 17; Class Proceedings Act SNS 2007 c 28, s 18(1); Class Proceedings Act RSNB 2011 c 125, s 17(1); and Class Actions Act SNL 2001 c C-18.1, s 166. In the United States, class members may intervene in proceedings: see United States Federal Rules of Civil Procedure, rr 23(d)(1)(B)(iii), 23(d)(1)(c) and 24. In the United Kingdom Competition Appeal Tribunal, a proposed class member may apply to make submissions at the certification hearing: The Competition Appeal Tribunal Rules 2015 (UK), r 79(5).

⁹⁴ We note that in 2019 the University of Windsor class action clinic was set up for this purpose. See Class Action Clinic: Windsor Law "Our Mission and Services" <www.classactionclinic.com>.

⁹⁵ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.4]. See also Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [1.35].

members. They will have different circumstances and they may have experienced different types and amounts of harm.⁹⁶ This may lead to conflicts of interest.

- 6.47 Another risk is that a representative plaintiff may seek to settle their own claim at a premium, in return for discontinuing the class action or settling it on terms that are not advantageous to all class members. One scenario is a representative plaintiff who brings a class action for the sole purpose of exerting pressure on a defendant to settle their own personal claim. Another scenario is that a representative plaintiff has brought the claim in good faith but cannot rationally refuse a generous offer from the defendant to settle their own claim, at the expense of the class.⁹⁷
- 6.48 There are, however, features of class actions regimes which are designed to safeguard against the risk of such conflicts. In most jurisdictions, there is a requirement that a representative plaintiff fairly and adequately represent the class, which includes an absence of conflicts of interest.⁹⁸ Sub-classes may be created, each with a representative plaintiff, where there are differences between class claims.⁹⁹ Another safeguard is judicial approval of class actions settlements, which is required across comparable jurisdictions.¹⁰⁰ In general, courts will need to consider whether a proposed settlement is fair, reasonable and in the best interests of the class overall.¹⁰¹ A representative plaintiff may also need to obtain the leave of the court before they can settle their individual claim and withdraw as representative party.¹⁰²

Potential conflicts between the lawyer and the class

- 6.49 A principal-agent problem arises where a principal is unable to observe an agent's effort or quality and has difficulty getting the agent to act in their best interests.¹⁰³ CSA surmises that class actions involving low individual claim values suffer from severe principal-agent problems between the lawyer and the representative plaintiff. Because the representative plaintiff's individual stake in the litigation is low in such a case, they have a

⁹⁶ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper* (July 2017) at [3.65].

⁹⁷ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 164.

⁹⁸ This is discussed in Chapter 11.

⁹⁹ See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 184–188 and 287.

¹⁰⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 390.

¹⁰¹ In Australia, the parties will usually need to persuade the court that (a) the proposed settlement is fair and reasonable, having regard to the claims of those who will be bound by the settlement; and (b) it is in the interests of the class members, as well as the applicant and respondent: see Federal Court of Australia, *Practice Note GPN-CA – Class Actions Practice Note*, 20 December 2019 at [14.3]; Supreme Court of Victoria, *Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions) (Second Revision)*, 1 July 2020 at [16.1]; *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925, (2000) 180 ALR 459 at [19]; and Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [22.1]. In Canada, in order to approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class: *Nunes v Air Transat A T Inc* (2005) 20 CPC (6th) 93 (ONSC) at [7]; and Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 93.

¹⁰² See for example Federal Court of Australia Act 1976 (Cth), s 33W.

¹⁰³ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 5 (glossary).

weak incentive to supervise their lawyer. This can lead to litigation costs that are substantially higher than efficient levels.¹⁰⁴

- 6.50 In practice, there is evidence that class actions can result in significant fees paid to lawyers. This is particularly the case in jurisdictions which allow contingency fees (calculated as a percentage of a settlement or damages award), such as Canada and the United States.¹⁰⁵ Even in jurisdictions without contingency fees, class actions can result in substantial legal fees for plaintiff lawyers and law firms. For example, in the Federal Court of Australia, legal fees comprise a median 15 per cent of settlements, which can amount to several million dollars.¹⁰⁶
- 6.51 It is not unheard of for lawyers to earn significant fees in traditional litigation and in principle there would be nothing inherently wrong with a lawyer earning a substantial fee in a class action as well. The LCO has observed that legal fees are directly related to access to justice as lawyers may not pursue cases if their fees are set too low.¹⁰⁷ However, the profit motive combined with certain features of class actions, such as the lack of a traditional lawyer-client relationship with class members, may risk inappropriate litigation or conflicts of interest.¹⁰⁸
- 6.52 The potential financial benefit to lawyers provides an incentive for lawyers to find and bring class action cases, meaning that litigation is often driven by lawyers rather than by individuals seeking access to justice. A Canadian survey found that less than 25 per cent of class actions were initiated by a client; instead, lawyers often reported commencing class actions following the announcement of regulatory investigations, referrals by third parties or the firm's own research.¹⁰⁹ Lawyers also play a key role in selecting the representative plaintiff.¹¹⁰ The constitution of the class has been described as “entirely a creation of the lawyer: class counsel control its beginning, its end, its shape, and its conduct”.¹¹¹

¹⁰⁴ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 37. Capital Strategic Advisors also comments that the principal-agent problems arise from two sources of information asymmetry: a client's inability to perfectly observe lawyers' actions and effort levels and a client's lack of legal expertise: see at 22–24. We note that lawyers are bound to act competently and must not charge more than a fee that is fair and reasonable. See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3 and 9 in particular.

¹⁰⁵ See Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 131 which states legal fees have been calculated as an average of \$3.06 million in class action cases; and Theodore Eisenberg, Geoffrey Miller and Roy Germano “Attorneys' Fees in Class Actions: 2009–2013” (2017) 92 NYU L Rev 937 at 944 which states the mean attorney fee award for cases with recoveries over \$100 million ranged from \$37.9 million in 2010 to \$124 million in 2013.

¹⁰⁶ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.49].

¹⁰⁷ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 71.

¹⁰⁸ Martin H Redish “The Liberal Case Against the Modern Class Action” (2020) 73 Vand L Rev 1127 at 1142.

¹⁰⁹ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 73.

¹¹⁰ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 79; and Susan P Koniak and George H Cohen “In Hell There Will Be Lawyers Without Clients or Law” (2001) 30 Hofstra L Rev 129 at 132–133.

¹¹¹ Susan P Koniak and George H Cohen “In Hell There Will Be Lawyers Without Clients or Law” (2001) 30 Hofstra L Rev 129 at 143.

- 6.53 However, the mere fact that a lawyer identifies a case does not mean that it lacks merit. Given the barriers to access to justice, it may be unrealistic to expect an individual to be the driving force behind class action litigation, particularly where individual claims are small.¹¹² Lawyers may also uncover legal harms that individuals do not even recognise as such. In this way, entrepreneurial class action lawyers may further access to justice by addressing information deficits.¹¹³ The class action lawyer has been described as a “bounty hunter”, who is motivated to prosecute legal violations that are still unknown by prospective clients.¹¹⁴ There are situations where solicitation of clients for a class action may be inappropriate. For example, a Canadian class action law firm was criticised after contacting residential school survivors to discuss their experiences of abuse.¹¹⁵
- 6.54 Where the lawyer rather than the client drives cases, this may cause certain types of cases to be preferred over others. Because class actions provide a business opportunity, the size of a potential damages claim is a critical factor for lawyers in selecting cases and so class actions have been described as providing access to justice for the middle class more than for the poor.¹¹⁶ Class action lawyers are also incentivised towards cases where their costs of finding and evaluating a case are low, such as cases which “piggyback” on regulatory action.¹¹⁷ There is a risk that an unconstrained lawyer may be motivated to sue where the client would not.¹¹⁸
- 6.55 The profit motive may also cause lawyers to pursue opportunistic claims or settle claims at a disadvantage to class members.¹¹⁹ In the United States, there have been a considerable number of class actions challenging merger and acquisition transactions. These lawsuits generally claim that corporate disclosures were inadequate and/or misleading and seek a preliminary injunction to put the transaction on hold. There may be pressure on defendants to settle these claims quickly so the transaction can be closed.¹²⁰ Settlements are frequently said to involve the class receiving “trivial” additional

¹¹² Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 87.

¹¹³ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 86.

¹¹⁴ John C Coffee Jr “Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions” (1986) 86 Colum L Rev 669 at 679.

¹¹⁵ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 87. See also David Napier “Sins of the Father – Residential Schools special report” *Anglican Journal* (online ed, Toronto, 2 May 2000).

¹¹⁶ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 88.

¹¹⁷ John C Coffee Jr “Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions” (1986) 86 Colum L Rev 669 at 681–682; and John C Coffee Jr “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working” (1983) 42 Md L Rev 215 at 224.

¹¹⁸ John C Coffee Jr “Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions” (1986) 86 Colum L Rev 669 at 680.

¹¹⁹ See generally Howard M Erichson “Aggregation as Disempowerment: Red Flags in Class Action Settlements” (2016) 92 Notre Dame L Rev 859 for a discussion of features of class action settlements that benefit the plaintiff’s lawyer and the defendant without providing value to class members.

¹²⁰ United States Chamber Institute for Legal Reform *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* (October 2018) at 7.

disclosures while the plaintiff's lawyer receives a significant fee.¹²¹ Another form of settlement that may provide little benefit to class members is coupons for the defendant's product, particularly where the coupons may not be transferred to others, may not be used with other discounts and have restrictions such as an expiry date.¹²² There may also be a risk of collusive or 'sweetheart' deals, where plaintiff lawyers are willing to settle class action claims for less than their true value in exchange for generous legal fees.¹²³ However, the collusive settlement claim has been criticised on the basis that class action fees must be approved by the court rather than by settlement between the parties (in the United States at least).¹²⁴

- 6.56 There are a number of ways that these concerns can be mitigated. In Aotearoa New Zealand, a lawyer cannot get paid a fee calculated as a percentage of the amount recovered by a client.¹²⁵ A lawyer can charge a fee calculated as a normal fee plus a premium for success but this must still be "fair and reasonable".¹²⁶
- 6.57 Rules of professional conduct and ethical guidelines for lawyers are another means of mitigating concerns about conduct in class actions. For example, following the concerns about solicitation of vulnerable clients for a class action (discussed above), the Canadian Bar Association issued voluntary guidelines stating that lawyers "should not initiate communications with individual survivors of Aboriginal residential schools to solicit them as clients or inquire as to whether they were sexually assaulted".¹²⁷
- 6.58 There are also features of class actions regimes that are designed to mitigate any potential conflict between the interests of lawyers and class members, such as requirements to give class members notice of certain stages in a class action proceeding, rules on who can be the representative plaintiff, requiring the court to approve settlement of a class action, the ability for class members to object to settlement and the court's general supervisory role in class actions.

¹²¹ Emma Weiss "In Re Trulia: Revisited and Revitalized" (2018) 52 U Rich L Rev 529 at 529; and United States Chamber Institute for Legal Reform *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* (October 2018) at 7.

¹²² See Howard M Erichson "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 878–882.

¹²³ Deborah R Hensler and Thomas D Rowe Jr "Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform" (2001) 64 LCP 137 at 138. See also John C Coffee Jr "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions" (1986) 86 Colum L Rev 669 at 690; John C Coffee Jr "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working" (1983) 42 Md L Rev 215 at 232; and Susan P Koniak and George H Cohen "In Hell There Will Be Lawyers Without Clients or Law" (2001) 30 Hofstra L Rev 129 at 146–147.

¹²⁴ Myriam Gilles and Gary B Friedman "Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers" (2006) 155 U Pa L Rev 103 at 160.

¹²⁵ See Lawyers and Conveyancers Act 2006, ss 333 and 334.

¹²⁶ See Lawyers and Conveyancers Act 2006, ss 333 and 334; and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.

¹²⁷ Canadian Bar Association "Resolution 00-04A" <www.grantnativelaw.com> as cited in Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 87.

Possible conflicts between class and litigation funder

- 6.59 As discussed elsewhere in this Issues Paper, litigation funding is a common method of funding class actions, particularly in jurisdictions where lawyers are prohibited from charging contingency fees. In Australia, almost half of all class actions filed between 2012-2017 were financed by a litigation funder.¹²⁸ Litigation funding is less common in Canada and the United States, where contingency fees may be charged. In Aotearoa New Zealand, litigation funding is increasingly being used to fund representative actions.¹²⁹ If this form of funding continues to be available here, we would expect a significant proportion of class actions to involve a litigation funder.
- 6.60 Conflicts of interest may arise between litigation funders and claimants, as we discuss in detail in Chapter 20. The VLRC noted that these conflicts of interests may affect decision making at different stages of a class action proceeding, including:¹³⁰
- (a) When recruiting class members. The litigation funder has an incentive to maximise the class size and so may give undue prominence to the prospects of success of a claim.
 - (b) The terms of a funding agreement. The litigation funder has an incentive to maximise the amount it receives if the claim is successful, while class members will want to minimise costs and maximise their return.
 - (c) Settlement. The litigation funder may want to settle while class members wish to continue the claim. The terms of a settlement, such as non-monetary benefits, may also cause a conflict.
- 6.61 Data on Australian federal class action settlements show that a median 51 per cent of the settlement was returned to the class in funded class actions compared with 85 per cent in unfunded class actions.¹³¹

QUESTION

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?

¹²⁸ Vince Morabito *The First Twenty-Five Years of Class Actions in Australia* (Fifth Report, An Empirical Study of Australia's Class Action Regimes, July 2017) at 33. This shows that 74 out of 160 class actions filed between 1 June 2012 and 31 May 2017 were funded by a litigation funder, which is 46.2 per cent.

¹²⁹ We discuss this in Chapter 3.

¹³⁰ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper* (July 2017) at [3.62].

¹³¹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.49].

CHAPTER 7

A statutory class actions regime for Aotearoa New Zealand

INTRODUCTION

- 7.1 Earlier in this Issues Paper we discussed the problems with the current representative actions regime, as well as the advantages and disadvantages of a class actions regime. After considering these matters, we have formed the preliminary view that it would be desirable to have a statutory class actions regime in Aotearoa New Zealand.
- 7.2 In this chapter, we discuss the key reasons for our preliminary view, namely:
- (a) Group litigation is beneficial but current mechanisms and alternatives are inadequate.
 - (b) Class actions are likely to improve access to justice, facilitate efficiency and economy of litigation and strengthen incentives for compliance with the law.
 - (c) Many of the potential disadvantages of class actions can be mitigated by the design of the regime.
 - (d) A statutory regime can provide greater certainty, predictability and transparency of the law.
- 7.3 The position we have reached is a preliminary one and we intend to fully consider all of the submissions or comments we receive on our Issues Paper before forming a final view.

GROUP LITIGATION IS BENEFICIAL BUT CURRENT MECHANISMS AND ALTERNATIVES ARE INADEQUATE

- 7.4 As discussed in previous chapters, group litigation provides benefits such as improved access to justice, procedural efficiency and consistency of outcomes. Capital Strategic Advisors (CSA) observes that without group litigation mechanisms, coordination among potential plaintiffs is likely to be costly, especially if they each retain their own lawyer, find it difficult to agree among themselves, or are unknown to each other. Potential problems include:¹

¹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 31–32 (discussing the counterfactual of there being no class actions regime).

- (a) People may be tempted to free ride on the efforts of others, and adopt a ‘wait and see’ approach before commencing their own litigation.
- (b) If a defendant has a limited ability to pay, plaintiffs have incentives to compete to access the defendant’s funds.
- (c) A defendant has an incentive to over-spend in an effort to defeat early litigation attempts, in order to deter later claims.
- (d) If a plaintiff has a claim with a low chance of success, even if they are successful, other potential plaintiffs may still doubt their own prospects of success and fail to bring their own claim.

Existing group litigation mechanisms

7.5 As we have outlined in Chapter 3, Aotearoa New Zealand is seeing an increasing number of representative actions in the High Court under Rule 4.24 of the High Court Rules (HCR 4.24). While the first case was brought in 1902, the majority were filed in the last 20 years. The representative actions rule has changed little since the procedure was first introduced and we think it is insufficient for modern group litigation. The lack of procedural rules for representative actions and the current approach of relying on the courts to develop procedural rules on a case-by-case basis makes litigation inefficient and increases its costs.² It may also be preventing certain types of group litigation from proceeding. In Chapter 4 we identified consumer claims (particularly those where individual claim values are small) and compensation claims following regulatory action as potential examples.

7.6 In addition to HCR 4.24, there are other methods of bringing group litigation in Aotearoa New Zealand (as we discussed in Chapter 3). However, these methods have limitations. For example, joinder might be more useful as a case management technique where proceedings have already been filed, rather than as a mechanism for overcoming barriers to litigation.³ The specific statutory group litigation procedures we outlined are rarely, if ever, used.

Regulatory action

7.7 The argument is sometimes made that litigation is an inefficient and expensive method of holding defendants to account where they have caused harm and that this role is better left to government regulators.⁴ Regulators play an important role in enforcing breaches

² These points are discussed in more detail in Chapter 4.

³ See Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 50, where she notes that the drawbacks of using consolidation and joinder devices have been cited by overseas law reform bodies when considering class actions reform.

⁴ In David Friar and Daniel Scholes “Do litigants need a new statutory regime to cover opt-out class actions?” (3 April 2020) Auckland District Law Society <www.adls.org.nz> the authors refer to the proportion of compensation paid to law firms and litigation funders in Australian class actions and ask:

Is an opt-out class action regime the most efficient way to remedy wrongs by corporate defendants? Or should regulators be better empowered and resourced to prosecute the type of proceedings commonly brought as class actions?

See also Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 265 who notes that:

of the law and in Chapter 3 we discussed the powers of the Commerce Commission and the Financial Markets Authority (FMA) with respect to enforcement of consumer, competition and financial markets legislation.

- 7.8 There are a number of advantages of regulatory action over private litigation including the broad powers that regulators have (such as the ability to compel information), the ability to consider issues in their broader context and public funding of the legal costs.⁵ A regulator can draw upon a range of enforcement tools, which can create incentives for businesses to provide adequate redress and enable wider objectives to be achieved, such as changing future corporate behaviour. For example, the prospect that a regulator could bring legal action against a business or that the regulator could increase or reduce the penalty faced by a business can incentivise negotiated redress payments at appropriate levels.⁶ Rachael Mulheron has commented:⁷

Undoubtedly, if public enforcers had the resources and willingness both to prosecute culpable defendants, and to pursue compensatory redress on behalf of victims of that behaviour, then the need for private enforcement via civil litigation would be reduced, if not obviated.

- 7.9 In our view, 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. The reality of resource constraints is that regulators must prioritise their enforcement activities and cannot bring proceedings against every possible defendant who is alleged to have caused loss to a class.⁸ For example, when deciding whether to commence an investigation and what enforcement action is appropriate, the Commerce Commission focuses on the extent of detriment, the seriousness of conduct and the public interest.⁹ The FMA focuses on responding to market conduct that poses the greatest likelihood of harm to capital markets.¹⁰ We note that recognition of the limitations of

... there is little agreement on whether private class actions operate as a useful complement to public enforcement. Some argue that private class actions add little of value to public enforcement of market regulations. They argue that in many instances class counsel bring actions when public regulators deemed or would deem no actionable violation took place, and that where public officials have undertaken regulatory activities class counsel simply ride the coattails of public officials, driving up the costs of enforcement without achieving commensurate benefits.

⁵ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.8]–[8.9]; and Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [118].

⁶ The Australian Law Reform Commission notes that the shift in the role of regulators in England and Wales has meant that:

... regulators do not ‘settle’ for lower sums as happens in contested litigation. What may be reduced is the civil penalty (or fine) and ... the transaction costs (lawyers fees and court costs) ...

See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.33].

⁷ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 72.

⁸ The Australian Competition and Consumer Commission has commented that “class actions are an efficient and appropriate mechanism for obtaining compensation that generally and appropriately supplements public enforcement”: Australian Competition and Consumer Commission, Submission No 15 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 2.

⁹ Te Komihana Tauhokohoko | Commerce Commission “Enforcement Criteria” <www.comcom.govt.nz>.

¹⁰ Te Mana Tatai Hokohoko | Financial Markets Authority “Enforcement” (23 April 2019) <www.fma.govt.nz>.

regulatory agencies has been a factor in class actions reform in other jurisdictions.¹¹ In CSA's assessment, while regulatory agencies reduce the need for class actions, they are unlikely to remove the need for them entirely. This is due to constraints faced by regulators such as politically determined budgets.¹²

- 7.10 While private litigants are likely to have compensation as a key goal of proceedings, regulators are likely to have broader aims, such as encouraging compliance with the law, deterring misconduct, clarifying the law and ensuring public safety. Litigation may not always be the most suitable tool for achieving these broad goals, as seen in the guidelines developed by the Commerce Commission and the FMA on determining the appropriate enforcement response.¹³ Even where a regulator decides it is appropriate to bring proceedings against a particular defendant, the regulator will not necessarily seek compensation for harmed individuals.¹⁴ An Australian empirical study of 19 securities class actions found that the Australian Securities and Investment Commission had only pursued compensation in three of those cases.¹⁵
- 7.11 In our view, 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. Class actions may be particularly valuable where legislation does not have a regulator to enforce it, such as the Consumer Guarantees Act 1993. They may also be beneficial where the legislation has given the regulator a relatively limited role. For example, the Companies Act 1993 was intended to provide for self-enforcement and the Registrar of Companies has a very limited enforcement role.¹⁶

Other alternatives to class actions are also inadequate

- 7.12 Rather than a class actions regime, Aotearoa New Zealand could consider other new options for group litigation. However, we do not think they would 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.

¹¹ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 211; Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [36] and [38]; and Department for Business, Innovation and Skills *Private Actions in Competition Law: A consultation on options for reform – final impact assessment* (January 2013) at [17]–[18].

¹² Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 27.

¹³ See Te Komihana Tauhokohoko | Commerce Commission *Enforcement Response Guidelines* (October 2013) at [5]; and Te Mana Tatai Hokohoko | Financial Markets Authority *Regulatory response guidelines* (August 2016) at 8 and 10–14.

¹⁴ For example, Te Mana Tatai Hokohoko | Financial Markets Authority (FMA) brought two civil proceedings in relation to CBL Insurance. There have also been two representative actions filed relating to CBL Insurance. The website promoting one of the actions states:

We understand the key focus for the FMA is to establish that the defendants have breached their duties and for pecuniary penalties as well as clarify law and provide important legal precedents. So, while the FMA's case, if successful, will impose fines on the directors, their proceedings aim to address wider public interest and regulatory concerns under the Financial Markets Conduct Act and are therefore unlikely to directly provide compensation for individual investors.

See CBL Class Action "FAQ's" <www.cblassaction.co.nz>.

¹⁵ Michael J Duffy "Australian private securities class actions and public interest—Assessing the 'private Attorney-General' by reference to the rationales of public enforcement" (2017) 32 *Aust Jnl of Corp Law* 162 at 190. Duffy comments this suggests a "generally useful supplemental role" for private securities class actions.

¹⁶ See Andrew Beck *Morison's Company Law (NZ)* (online ed, LexisNexis) at [36.1]; and Fran Barber "Indirectly Directors: Duties Owed Below the Board" (2014) 45 *VUWLR* 27 at 41.

Group Litigation Order

- 7.13 As discussed in Chapter 2, the Group Litigation Order (GLO) used in England and Wales since 2000 enables claims raising common or related issues to be managed together and has the benefit of enabling a judgment on one claim to bind other claimants. It has been described as “primarily a managerial tool” which allows similar cases to be grouped together for a judge to make managerial decisions best suited to the particular litigation.¹⁷ The GLO differs from most class actions regimes in several ways: it is an opt-in regime so litigants have to choose affirmatively to litigate; the rules are “lightly detailed” with many important issues not covered; and each litigant is a party rather than a class member.¹⁸ Group members are liable for costs incurred in relation to their individual claim and generally severally liable for an equal proportion of “common costs”.¹⁹ Use of the GLO has been relatively limited, with around 110 up to June 2020.²⁰
- 7.14 The courts can already consolidate individual proceedings, as we discussed in Chapter 3. While consolidation is similar to a GLO, the procedure could be expanded to include features of GLOs such as a group register of claims and proportional sharing of costs.²¹ However, the objective of consolidation is largely judicial economy, rather than addressing access to justice issues. This is because, like GLOs, consolidations will only apply to cases that have been or will be filed, and so do not generally address the issue of claims that would not be considered viable unless pooled in a class action.²²
- 7.15 As the United Kingdom’s Civil Justice Council identified, a significant limitation of the GLO is its failure to facilitate access to justice because individuals with potential claims must take active steps to commence proceedings or join the GLO claim register. As a consequence, they have not been used by those with small individual claims, even though such claims can be extremely large when aggregated.²³

Collective alternative dispute resolution mechanisms

- 7.16 Alternative dispute resolution (ADR) mechanisms could enable claims to be brought on a collective basis but might be most effective in combination with an expanded role for regulators (which we address below).

¹⁷ Christopher Hodges “From class actions to collective redress: a revolution in approach to compensation” (2009) 28 CJK 41 at 43.

¹⁸ Rachael Mulheron “Some Difficulties with Group Litigation Orders – and Why a Class Action is Superior” (2005) 24 CJK 40 at 47–48.

¹⁹ The Civil Procedure Rules 1998 (UK), r 46.6(3) and (4)(b). Common costs are costs incurred in relation to the GLO issues; individual costs incurred in a claim while it is proceeding as a test claim; and costs incurred by the lead legal representative in administering the group litigation: see r 46.6(2).

²⁰ There are 109 Group Litigation Orders listed by the courts: HM Courts & Tribunals Service “Guidance: Group Litigation Orders” (23 June 2020) UK Government <www.gov.uk>. Commentary notes that this list may not be comprehensive but that the use of group litigation orders remains relatively limited: Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [1-021].

²¹ See The Civil Procedure Rules 1998 (UK), rr 19.11(2)(a) and 46.6.

²² Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 115–117.

²³ Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 51.

- 7.17 Mediation and arbitration are possible alternatives to litigation,²⁴ but these are designed to deal with individual cases, and the effective use of these processes to deliver collective redress has been questioned.²⁵
- 7.18 Class arbitration has been used in some jurisdictions, particularly the United States.²⁶ However, the use of class arbitration, in the context of consumer claims at least, is problematic. The private and confidential nature of arbitration makes it difficult if not impossible for the courts to ensure that consumers are adequately protected during the arbitral proceedings. For this reason, a consumer dispute can only be arbitrated in Aotearoa New Zealand if the consumer consents in writing to arbitration after the dispute has arisen.²⁷ In practice, as a result of this requirement, it is very rare for consumer disputes to be arbitrated. A similar requirement applies in relation to insurance disputes.²⁸
- 7.19 There are also cases of businesses establishing ad hoc mass redress schemes, which can provide access to justice and compensation for claimants in a cost-effective and efficient way.²⁹ However, inconsistent access to and quality of ADR limits its effectiveness as a vehicle for collective redress.³⁰ Recent experience in Australia indicates that regulators can have an important role to play in the use of ADR to achieve collective redress through oversight, engagement and a preparedness to exercise other enforcement powers, including litigation.³¹

Expanded role for regulators in collective redress

- 7.20 We concluded above that simply relying on regulators to take action when a defendant has caused harm to a group is an insufficient response. In this section, we consider the option of conferring expanded or new roles on regulators with respect to collective redress.
- 7.21 There are various ways a regulator can be involved in obtaining redress for individuals:³²
- (a) It may have the power to pursue collective litigation on behalf of affected individuals.
 - (b) It may be able to negotiate with a business to pay redress to affected people.

²⁴ Some specific dispute bodies in New Zealand will refer claims to mediation or individuals can organise a private mediation at their own expense and if the other party agrees: Consumer Protection “Take your complaint further” <www.consumerprotection.govt.nz>.

²⁵ Christopher Hodges “Collective Redress: The Need for New Technologies” (2019) 42 J of Consum Policy 59 at 67.

²⁶ See Rachel Dunning “All for One and One for All: Class Action Litigation and Arbitration in New Zealand” (2016) 3 PILJNZ 68.

²⁷ Arbitration Act 1996, s 11(1).

²⁸ Insurance Law Reform Act 1977, s 8(2).

²⁹ Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 123.

³⁰ Christopher Hodges “Current discussions on consumer redress: collective redress and ADR” (2012) 13 ERA Forum 11 at 28.

³¹ See the discussion of the response to the Storm Financial collapse: Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.24]–[8.27].

³² Christopher Hodges “Collective Redress: The Need for New Technologies” (2019) 42 J of Consum Policy 59 at 63.

- (c) It may have a power to order redress to be paid.
- (d) It may have the power to establish a redress scheme or to approve a voluntary redress arrangement.
- 7.22 The Australian Law Reform Commission (ALRC) in a 2018 report discussed the limitations of class actions in providing access to a remedy and considered there may be a role for resolving mass damages claims outside of litigation.³³ It noted that the focus of regulators had been on enforcement rather than compensation, and that when compensation was obtained it was usually in the form of a refund not full compensation including consequential loss. It recommended that regulators of consumer products and services should have “regulatory redress powers” to enable compensation for individuals who have suffered harm.³⁴ For example, this could include a power to order redress in specific circumstances.
- 7.23 A possible mechanism to facilitate regulatory redress of collective claims is to provide a framework for regulators to establish consumer redress schemes or to approve voluntary redress schemes proposed by a business. The framework for approval of a scheme could establish criteria to ensure a scheme’s independence and transparency about how consumers can gain access to compensation through the scheme.³⁵ Such a scheme can offer cost savings for all consumers by avoiding litigation and for regulators because businesses are responsible for the costs of establishing the scheme. Further, regulators can also be given the power to reduce penalties to reflect the provision of voluntary redress. They are not intended to be a substitute for the effective enforcement of the law and frameworks for redress schemes might provide that an affected person or a regulator can still bring legal proceedings to enforce the law. However, the ongoing ability to take legal proceedings could be seen to undermine the certainty and finality of a collective redress scheme for defendants.³⁶
- 7.24 The ALRC suggested a standing regulatory redress scheme be adopted, which a business could voluntarily engage to establish a specific redress scheme where they have identified a breach that may require collective redress. The ALRC preferred a single standing scheme, rather than a number of industry specific schemes, to ensure consistent coverage across jurisdictions and sectors.³⁷
- 7.25 The deployment of such a scheme to obtain collective redress does not necessarily have to sit with a regulator. Some jurisdictions have established frameworks for economy-wide

³³ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.8].

³⁴ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 23 and [8.76].

³⁵ For example, the United Kingdom’s Competition and Markets Authority has the authority to approve voluntary redress schemes for breaches of the Competition Act 1998 (UK). See Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 124; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.35]–[8.42].

³⁶ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.42].

³⁷ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.55]–[8.58].

mass ADR that is carried out by non-governmental organisations. Collective settlements from such ADR are binding on a class.³⁸ Other jurisdictions have consumer ombudsmen, which tend to be industry-specific. Consumer ombudsmen have likewise developed processes to aggregate and resolve mass claims between consumers and businesses. The ombudsmen can also refer issues to the sector regulator for the exercise of broader regulatory powers.³⁹

- 7.26 Many sectors have longstanding industry dispute resolution services, which form part of the industry's wider regulatory framework. However, these may have limitations such as focusing on individual cases rather than systemic issues that might affect a group, relying on a complaint being made, not all sectors being covered by a scheme, and jurisdictional limits (such as monetary caps).⁴⁰
- 7.27 Aotearoa New Zealand already has some regulatory and ADR frameworks, which could be enhanced to provide access to redress on a collective and more systematic basis.⁴¹ This would likely require a change in the priorities of regulators, with a greater emphasis on pursuing collective redress, as well as an increase in resourcing to ensure that an emphasis on collective redress does not undermine regulators' wider objectives. It may also require giving powers to seek collective redress to other agencies or organisations or facilitating voluntary redress by businesses with regulatory oversight.
- 7.28 If the options we have discussed in this section were to be pursued instead of, or as well as, a statutory class actions regime further detailed consideration would be required, which is beyond the scope of our terms of reference.

CLASS ACTIONS HAVE SEVERAL ADVANTAGES

- 7.29 We consider that class actions may improve access to justice, improve the efficiency and economy of litigation and strengthen incentives to comply with the law.

Class actions are likely to improve access to justice

- 7.30 We consider that a statutory class actions regime is likely to improve access to the court system for some litigants by removing or reducing the economic, social and psychological barriers to litigation. The economic analysis we commissioned by CSA suggests this is particularly likely to be the case where a class action involves low-value individual claims

³⁸ For example, the Netherlands' Collective Settlement of Mass Claims (WCAM) process: Vicki Waye "Advantages and Disadvantages of Class Action Litigation (and its Alternatives)" (2018) 24 NZBLQ 109 at 124.

³⁹ Christopher Hodges "Collective Redress: The Need for New Technologies" (2019) 42 J of Consum Policy 59 at 68–69.

⁴⁰ See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.11]–[8.14] (recommending that enforcement tools available to regulators of consumer and small business products and services should be reviewed to provide for a consistent framework of regulatory redress).

⁴¹ We discuss the existing role of regulators in Chapter 3. New Zealand consumers also have access to over 50 dispute resolution schemes in New Zealand including the Disputes Tribunal and industry-specific schemes such as the Banking Ombudsman, Motor Vehicle Disputes Tribunal, Insurance and Financial Services Ombudsman, and Telecommunications Dispute Resolution. Each scheme has its own process for resolving disputes, which may involve mediation and/or a hearing process. See Consumer Protection *New Zealand Consumer Survey 2018: Summary Findings* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2019) at 18; and Consumer Protection "Take your complaint further" <www.consumerprotection.govt.nz>.

which would not be economic to pursue individually. Although the current representative actions regime has seen some low-value cases proceed, many recent representative actions have involved high-value individual claims. We think that a statutory class actions regime is likely to increase the number of cases brought, including low-value claims. This is because having clear procedural rules would increase certainty, which should make litigation more efficient and less costly, making a greater range of claims economic. CSA's analysis found that class actions involving only high value individual claims were unlikely to affect access to justice, because these claims would have been brought anyway, although it noted that few class actions were likely to fit into this category.

- 7.31 While a statutory class actions regime is likely to improve access to justice, it is important to be clear about the limitations of this. As the ALRC has commented, “the class actions regime is not a panacea”.⁴² Class actions will only be available to those who share a claim with a sufficient number of other litigants, which may exclude a number of people who currently face barriers to accessing justice.
- 7.32 A class action will also need to have funding, which in many cases will mean class members will seek litigation funding. As discussed in Part B of this Issues Paper, litigation funders consider factors such as the estimated quantum of the case and the enforceability of any judgment against the defendant when deciding which cases to fund. In practice, this has meant that certain types of class action are more likely to attract litigation funding. The ALRC received feedback that many potential class actions with reasonable prospects were not brought because funders and lawyers deemed them uneconomic.⁴³ Shareholder class actions have become the most popular form of class action in Australia, largely because they are very compatible with litigation funding models.⁴⁴ By comparison, Australia has seen few class action claims by native title holders or by alleged victims of racial discrimination (in non-migration proceedings).⁴⁵ We expect a similar trend might occur in Aotearoa New Zealand, with class actions not necessarily assisting the groups who have the greatest difficulties in accessing civil justice. As we have noted earlier in this Issues Paper, class actions have been described as providing access to justice to the middle class more than the poor.⁴⁶

⁴² Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.8].

⁴³ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.9].

⁴⁴ Vince Morabito *Shareholder class actions in Australia – myths v facts* (An evidence-based approach to class action reform in Australia, November 2019) at 9. See also Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [8.9] commenting that federal class actions are “heavily skewed towards shareholder and investor disputes” because they are considered “low risk and profitable to run”.

⁴⁵ Between 1 June 1992 and 31 May 2017 there were three claims by native title holders (0.5 per cent of claims) and six claims by alleged victims of racial discrimination in non-migration proceedings (1.1 per cent). See Vince Morabito *The First Twenty-Five Years of Class Actions in Australia* (Fifth Report, An Empirical Study of Australia's Class Action Regimes, July 2017) at 27.

⁴⁶ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 88.

Class actions may improve the efficiency and economy of litigation

7.33 Our economic analysis by CSA shows that class actions will improve the efficiency and economy of litigation where claims have high individual value because these claims would otherwise have been brought individually.⁴⁷ Class actions with low individual value, while improving access to justice, will increase the workload of the courts because these claims would not otherwise be brought. However, they could be considered an efficient use of this additional court time because they allow so many claims to be determined at once.

Class actions may improve compliance with the law

7.34 While there is some debate about whether behaviour modification and deterrence should be goals of a class actions regime (as we discussed in Chapter 5), they seem likely to be an effect of class actions, intended or otherwise. CSA's analysis found that class actions will make deterrence incentives more efficient for activities prone to create small harms across large numbers of people.⁴⁸

MANY OF THE POTENTIAL DISADVANTAGES CAN BE MITIGATED BY GOOD DESIGN

7.35 In Chapter 6 we discussed the potential disadvantages of a class actions regime, including negative effects for defendants, class members and the court system. Although some are unavoidable as they inherent in a class actions regime, we think the design of the regime can mitigate many of the potential disadvantages.⁴⁹ We pick up some of these points again in our discussion of principles for a statutory class actions regime in Chapter 9.

Impacts on defendants

7.36 A statutory class actions regime is likely to lead to an increase in litigation, which will impose greater costs on defendants. It is important to distinguish between meritless and meritorious claims when considering the potential increase in litigation. We would not expect there to be a flood of meritless or vexatious class action claims, given that this has not occurred with representative action claims and that a court can strike out such claims. A class actions regime could also be designed to include an approval or screening process to identify and exclude meritless cases at an early stage. If our adverse costs regime is retained for class actions, this would also provide a disincentive to bringing claims without a proper basis.

7.37 It is difficult to object to a class actions regime on the basis that it will lead to an increase in meritorious cases, given that a primary objective of class actions regimes is to increase access to the courts.⁵⁰ Nonetheless, we acknowledge that defendants and insurers are

⁴⁷ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 34–35.

⁴⁸ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 45.

⁴⁹ CSA draws a parallel with companies, where rules can be adopted which mitigate principal-agent problems between management and shareholders while retaining most of the benefits of collective action. See Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 33.

⁵⁰ See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 75.

likely to be concerned about the financial impact of any rise in litigation in certain industries.⁵¹ In other jurisdictions, reforms have been enacted to respond to concerns about certain types of class actions. For example, as discussed in Chapter 6, the United States introduced reforms to requirements for bringing securities class actions to respond to the issue of ‘strike suits’. In Australia, the Government temporarily amended the continuous disclosure provisions in the Corporations Act 2001 as a response to COVID-19, noting:⁵²

[t]he heightened level of uncertainty around companies’ future prospects as a result of COVID-19 exposes companies to the threat of opportunistic class actions for allegedly falling foul of their continuous disclosure obligations if their forecasts in the middle of a pandemic are found to be inaccurate.

- 7.38 It is also important to note that a class actions regime is a procedural device which makes it easier for litigants to pursue existing causes of action, rather than creating any new forms of legal liability. In the United States, the business community has been described as having a “kill-the messenger” opposition to class actions, because they enforce substantive laws that businesses do not like.⁵³ If concerns arise as to the impact of a particular form of liability on defendants, then the remedy may lie in reform to the substantive law. This point is made by CSA, which comments that if existing law is not working well, that is an argument for changing the law rather than inhibiting wronged parties from accessing the justice system through class actions.⁵⁴
- 7.39 In Chapter 9, we propose that balancing the interests of plaintiffs and defendants should be a design principle of any class actions regime in Aotearoa New Zealand.

Impacts on the court system

- 7.40 An increase in litigation will also impact on the court system. Although this is an inevitable effect of a reform which seeks to allow more people access to the court, we think there are ways of mitigating this impact. In Chapter 9, we suggest that ensuring litigation is just, speedy, efficient and proportionate is an appropriate underlying principle for a class actions regime. The High Court Rules already contain mechanisms designed to ensure that cases proceed in an efficient and effective way and we consider that suitable case management procedures could be developed for class actions.

⁵¹ Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 15 comments that even if it is assumed that class action legislation is solely procedural:

... it does not necessarily follow that the system designer should ignore the substantive effect of aggregation on the outcomes of litigation. Indeed, although generally phrased in procedural terms, the principal purpose of aggregate actions remains to influence who can sue whom for what, and most importantly, how successfully.

⁵² See Josh Frydenberg (Treasurer of the Commonwealth of Australia) “Temporary Changes to continuous disclosure provisions for companies and officers” (press release, 25 May 2020); and Josh Frydenberg (Treasurer of the Commonwealth of Australia) “Extension of temporary changes to continuous disclosure provisions for companies and officers” (press release, 23 September 2020). The Financial Markets Authority declined to take similar action in relation to Aotearoa New Zealand’s continuous disclosure laws: Financial Markets Authority “FMA statement on director liability and continuous disclosure” (press release, 17 June 2020).

⁵³ Brian T Fitzpatrick “Can the Class Action Be Made Business Friendly?” (2018) 24 NZBLQ 169 at 170.

⁵⁴ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 45.

Protecting interests of class members

7.41 In Chapter 6, we discussed the risk that class members' interests may be insufficiently protected in a class action. Depending on how the regime is designed, class members may be bound by a claim they are unaware of, or their interests may conflict with those of the representative plaintiff, lawyer or litigation funder. Other jurisdictions have been alive to these issues and consequently class actions regimes tend to contain features designed to protect class members' interests. These include notice requirements, active court supervision of class actions and court approval of settlements. We also note that the potential risks to class members need to be balanced against the potential benefit of improving class members' access to justice. As we discuss in Chapter 9, we think that safeguarding the interests of class members should be a design principle of a class actions regime in Aotearoa New Zealand.

A STATUTORY REGIME CAN PROVIDE GREATER CERTAINTY, PREDICTABILITY AND TRANSPARENCY

7.42 A key advantage of a statutory class actions regime is that it will provide certainty, predictability and transparency as to the procedure to be followed. Although some initial litigation is to be expected over any new legislation, we hope that a statutory regime will ultimately minimise the number of procedural points that need to be litigated. The role of the judiciary would be primarily to apply and interpret the procedural rules, rather than creating them. This should reduce legal costs for both the plaintiff and defendant and reduce the burden on the court system.

7.43 It will still be important to allow for some judicial discretion so that procedures can be adapted to the circumstances of a particular case.⁵⁵ Consideration would also need to be given as to which matters should be in a class actions statute and which should be in the High Court Rules (which the Rules Committee has responsibility for). Several of the Australian jurisdictions have addressed some procedural matters in class actions practice notes.⁵⁶

7.44 We have considered whether it is necessary to have a class actions procedure or whether more detailed rules for proceedings brought under the existing representative actions rule would suffice. We note that in 2019 the Rules Committee drafted amendments to the High Court Rules which sought to codify current practice in representative actions.⁵⁷ However, rather than adapting a rule which dates back to 1882, we think it would be preferable to create a new regime. We also think there are many detailed matters that should be provided for in legislation or rules and adding all of these to the representative actions rule would effectively make it a class actions regime but without the principled basis which would support a statutory regime. It may also be desirable to retain the

⁵⁵ See Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 83.

⁵⁶ Federal Court of Australia, *Practice Note GPN-CA – Class Actions Practice Note*, 20 December 2019; Supreme Court of New South Wales, *Practice Note No SC GEN 17 – Supreme Court Representative Proceedings*, 31 July 2017; Supreme Court of Victoria, *Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions) (Second Revision)*, 1 July 2020; Supreme Court of Queensland *Practice Direction No 2 of 2017 – Representative Proceedings*, 27 February 2017; Supreme Court of Tasmania, *Practice Direction No 2 of 2019 – Representative Proceedings*, 6 September 2019.

⁵⁷ Draft High Court Rules (Representative Proceedings) Amendment Rules 2019 (PCO 20692/4.2).

original representative actions rule for particular situations (such as claims against a representative defendant or cases with a very small class), as we discuss in Chapter 8.

QUESTION**Q5**

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

CHAPTER 8

Scope of a statutory class actions regime

INTRODUCTION

- 8.1 In this chapter, we discuss some initial questions relating to the scope of a class actions regime and the consequences of its adoption, in particular:
- (a) Should a class actions regime cover all areas of the law?
 - (b) Which courts should a class actions regime apply to?
 - (c) Should defendant class actions be allowed?
 - (d) Should the representative actions rule be retained?

WHICH AREAS OF THE LAW SHOULD A CLASS ACTIONS REGIME COVER?

- 8.2 An initial issue is whether any class actions regime should cover all areas of the law or be limited to certain types of legal claim.

General or sectoral class actions regime?

- 8.3 Many class actions regimes apply across all substantive areas of the law. This is the approach taken in the United States, Canada and Australia, which reflects the preference for generally applicable procedures in these common law jurisdictions.¹
- 8.4 Other jurisdictions, such as the United Kingdom, have chosen to apply its class action regime to certain sectors only. Where a sectoral approach is taken, the power to bring a class action will often be in the substantive statute rather in separate procedural rules.²

¹ Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 245.

² Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 245.

Jurisdictions will sometimes start with a class action procedure applying in one area of the law and then expand it to other areas of the law if it is seen as successful.³

- 8.5 The United Kingdom’s class actions regime is limited to competition law claims. Although a report by the Civil Justice Council had recommended that a generic collective action should be introduced,⁴ the United Kingdom Government rejected this recommendation in favour of a sectoral approach. It considered that a collective right of action should only be introduced in a sector where there was evidence of need and that other regulatory options should be considered before introducing generic collective actions.⁵
- 8.6 The United Kingdom Government gave two reasons for preferring a sectoral approach. First, there were potential structural differences between sectors which could require different approaches.⁶ For example, regulatory frameworks differ between sectors, as do organisations who might be available to act as a representative plaintiff.⁷ Second, a full assessment of likely economic and other impacts was needed before any reform was implemented.⁸ It said it was “virtually impossible” to achieve a meaningful impact assessment of class actions on a global basis and that any global assessment could underplay issues specific to certain sectors, such as a particular risk of blackmail suits.⁹
- 8.7 Rachael Mulheron has argued that the United Kingdom Government’s reasons for rejecting a generic collective action were flawed and did not provide sufficient support for a sectoral approach.¹⁰ In her view, a general regime was able to handle differences between sectors. For example, if some sectors had a more active regulatory regime, this would simply make it more difficult for a plaintiff to establish that a collective action was the appropriate means of resolving the common issues.¹¹ Mulheron acknowledged that the potential economic impact of class actions reform was a legitimate concern for a government but considered that risks such as blackmail suits could be dealt with by suitably drafted rules rather than withholding reform from some sectors.¹²

³ Deborah R Hensler “Can private class actions enforce regulations? Do they? Should they?” in Francesca Bignami and David Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, Cheltenham (UK), 2016) 238 at 245–246.

⁴ Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 137.

⁵ Ministry of Justice *The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’* (July 2009) at 3.

⁶ Ministry of Justice *The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’* (July 2009) at 6.

⁷ Ministry of Justice *The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’* (July 2009) at 6.

⁸ Ministry of Justice *The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’* (July 2009) at 6.

⁹ Ministry of Justice *The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’* (July 2009) at 6.

¹⁰ Rachael Mulheron “Recent milestones in class actions reform in England: a critique and a proposal” (2011) 127 LQR 288 at 297. Note that Mulheron was a contributing author of the Civil Justice Council report.

¹¹ Rachael Mulheron “Recent milestones in class actions reform in England: a critique and a proposal” (2011) 127 LQR 288 at 300–301.

¹² Rachael Mulheron “Recent milestones in class actions reform in England: a critique and a proposal” (2011) 127 LQR 288 at 301–305.

- 8.8 Other jurisdictions which have taken a sectoral approach to their group action regimes include: Belgium,¹³ Brazil,¹⁴ Chile,¹⁵ France,¹⁶ Japan¹⁷ and Spain.¹⁸
- 8.9 Our preliminary view is that a general, rather than sectoral, class actions regime would be preferable for Aotearoa New Zealand. We note that the current representative actions regime is general in its application and that a range of different claims have been brought (as we discussed in Chapter 3). We are not aware of any demand for a sectoral class actions regime. We think that a sectoral approach is unlikely to address all the issues that have been identified with the status quo, including the limitations of the representative action procedure. Given the small size of our jurisdiction, we think it would be difficult to build up a body of case law if class actions were restricted to one area of the law. Also, such a restriction could cause difficulties in situations where claims rely on several different causes of action and only some can be brought as a class action.

Exclusions from a class actions regime

- 8.10 Jurisdictions that have a general class actions regime may expressly exclude specific kinds of legal claims. For example, in Australia, a federal migration proceeding may not be brought as a class action.¹⁹ This exclusion was not part of the class actions regime at the outset, but was subsequently inserted into the Migration Act 1958 because of concerns that class actions resulted in many people being granted bridging visas while they waited for the class action to be determined.²⁰ Another example is the Ontario Environmental Bill of Rights 1993 which prevents an action for a contravention (or imminent contravention) from being brought as a class action.²¹

¹³ An action for collective redress can be brought in relation to allegations that an enterprise has violated its contractual obligations or specified Belgian and European laws (which relate to consumer protection): Hakim Boularbah and Maria-Clara Van den Bossche "Belgium" in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 13 at 14.

¹⁴ A class action can be brought to deal with matters relating to the environment, consumer relations, assets and rights carrying artistic, aesthetic, historical, tourism and landscape value: Sérgio Pinheiro Marçal and Lucas Pinto Simão "Brazil" in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 26 at 29.

¹⁵ Collective suits are permitted for specific matters including consumer protection, unfair competition law and quality of construction: Gonzalo Fernández, Juan Carlos Riesco and Claudio Matute "Chile: Global Litigation Guide 2019 - Chilean Chapter" *Mondaq* (online ed, Chile, 28 February 2019).

¹⁶ The group action mechanism was initially limited to consumer and competition law. It was later extended to health issues, data protection, discrimination, environmental matters and administrative law: Alexis Valençon and Nicolas Bouckaert "France" in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 85 at 86.

¹⁷ Class actions are permitted for consumer claims: Chie Yakura, Louise C Stoupe and Yuka Teraguchi "Litigation and enforcement in Japan: overview" (1 December 2019) Thomson Reuters Practical Law <www.uk.practicallaw.thomsonreuters.com>.

¹⁸ Collective actions only apply to consumer protection issues: Alejandro Ferreres Comella and Cristina Ayo Ferrándiz "Spain" in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 194 at 194.

¹⁹ Migration Act 1958 (Cth), s 486B(4)(a).

²⁰ See Commonwealth, *Parliamentary Debates*, House of Representatives, 14 March 2000, 14622 (Philip Ruddock, Minister for Immigration).

²¹ Environmental Bill of Rights SO 1993 c 28, s 84(7).

- 8.11 In Aotearoa New Zealand, it might be appropriate to exclude some types of legal claim from a class actions regime. One type of claim we have considered is judicial review claims. As judicial review claims seek non-monetary remedies such as a declaration or injunction, it may be unnecessary to pursue these as a class action. As discussed in Chapter 3, judicial review is designed to be a straight-forward and efficient process and using a class action procedure for such claims may cause additional cost and delay for parties.
- 8.12 While a number of representative actions under High Court Rule 4.24 (HCR 4.24) (or its predecessors) have involved judicial review claims, most of these actions occurred in the 1990s and the last one was decided in 2010.²² This may reflect the evolution of representative actions as primarily facilitating significant monetary claims. Given that judicial review already enables a person to bring a claim which will affect others (as we discussed in Chapter 3), it may seem unnecessary to meet the additional requirements of HCR 4.24.
- 8.13 Our preliminary view is that it is unnecessary to exclude judicial review claims from a class actions regime. Instead, this is an issue courts could consider when deciding whether a claim should proceed as a class action. For example, some certification tests require the court to consider whether a class action is the preferable procedure for resolving the issue. While in some cases, a class action may not be the best way of resolving a judicial review claim, there may be some situations where it would be (for example, where the case includes other causes of action).²³

QUESTION**Q6**

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

WHICH COURTS SHOULD THE REGIME APPLY TO?

- 8.14 As with representative actions, the High Court would be the primary court for class action proceedings. There is a question whether a class actions regime should also be available in the District Court, Employment Court, Environment Court or Māori Land Court.

²² *Howick Engineering Ltd v Manukau City Council* HC Auckland CP2021/91, 11 August 1992; *Talley's Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC); *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC); *Jones v Attorney-General* HC Wellington CP175/02, 8 July 2003; *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005; *Healthcare Providers New Zealand Inc v Northland District Health Board* HC Wellington CIV-2007-485-1814, 7 December 2007; and *Accent Management Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,126 (HC).

²³ For example, in *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 there was a judicial review cause of action as well as claims seeking damages for breach of statutory duty and in negligence.

District Court

8.15 Civil cases can be brought in the District Court, although these make up a very small proportion of the District Court's workload.²⁴ It is possible to bring a representative action in the District Court under District Court Rule 4.24 (DCR 4.24), but we are not aware of this ever having occurred. The District Court has a jurisdictional threshold of \$350,000 and many class action claims would be above this.²⁵ Claims below \$350,000 are also unlikely to attract litigation funding. For these reasons, if a class actions regime applied to the District Court, we think it would be rarely used. The question of whether to retain DCR 4.24 will need to be considered if a statutory class actions regime is introduced, whether or not it applies to the District Court. Later in this chapter, we discuss whether a representative actions rule should be retained alongside a statutory class actions regime.

Employment Court

8.16 As we discuss in Chapter 3, a number of representative actions have been brought in Employment Court, relying on HCR 4.24 (and its predecessors). Cases have taken different approaches on whether HCR 4.24 applies on its own, by analogy or in combination with other provisions in the Employment Relations Act 2000.²⁶ Therefore, we think there may be some benefit in clarifying the law. In employment cases, many employees may be affected by a particular workplace policy or practice, so it may be efficient to deal with these in a class action. We note that in overseas jurisdictions with class actions regimes, employment cases tend to make up a reasonable proportion of class action cases.²⁷

Environment Court

8.17 We are aware of one case in which a representative action was brought in the Environment Court, relying on DCR 4.24.²⁸ This case involved three individuals who wanted to be recognised as representing their whānau in relation to a resource consent appeal. The reason for seeking the representation order was to meet eligibility

²⁴ In the 2018–2019 reporting year, there were 687 new defended civil cases in the District Court, compared with 128,746 new criminal cases: Te Kōti ā Rohe | District Court of New Zealand *Annual Report 2019* (2019) at 35 and 45.

²⁵ District Court Act 2016, s 74.

²⁶ See Chapter 3.

²⁷ In Australia, there were six employment class action claims filed in the year ending 30 June 2019, making up 11 per cent of all class actions: King & Wood Mallesons *The Review: Class Actions in Australia 2018/2019* (2019) at 4. Vince Morabito's empirical research shows that employment claims made up 21 per cent of all Australian class actions between 1992–2004 and only 3.6 per cent between 2004–2017. See Vince Morabito *The First Twenty-Five Years of Class Actions in Australia* (Fifth Report, An Empirical Study of Australia's Class Action Regimes, July 2017) at 28. In Ontario, employment and pensions cases made up 12 per cent of class actions between 1993–2018: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 15. In the United States, an empirical study of federal class action settlements in 2006–2007 showed that labour employment was the second largest category of case, making up 14 per cent of cases: Brian T Fitzpatrick "An Empirical Study of Class Action Settlements and Their Fee Awards" (2010) 7 JELS 811 at 818.

²⁸ *Norton v Marlborough District Council* EnvC Christchurch C017/09, 30 March 2009. Resource Management Act 1991, s 278 provides that the Environment Court and Environment Judges have the same powers that the District Court has in the exercise of its civil jurisdiction.

requirements for the Environmental Legal Assistance Fund.²⁹ The fact that only one representation order has been sought in the Environment Court may indicate a lack of demand for this kind of procedural device. This may be because claims are often brought by an incorporated society, which is said to provide a “simple and relatively risk-free way” for a group of people to bring an environmental claim together.³⁰ Also the nature of Environment Court proceedings is that the outcome will generally affect a wide group without needing to have a class of people bound by the judgment.

Māori Land Court

- 8.18 Our preliminary view is that it would not be appropriate for a class actions regime to apply in the Māori Land Court. Section 30 of the Te Ture Whenua Māori Act 1993 already enables the Court to “determine, by order, who are the most appropriate representatives of a class or group of Maori”.³¹ This jurisdiction applies to “proceedings, negotiations, consultations, allocations of property, or other matters”.³² Principles have developed on the exercise of this jurisdiction.³³ We are not aware of any demand for a class actions regime in the Māori Land Court and we are concerned that it could interfere with current approaches to determining representation.

QUESTION

Q7

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

SHOULD DEFENDANT CLASS ACTIONS BE ALLOWED?

- 8.19 Discussion of class actions is generally focused on plaintiff class actions.³⁴ In this section, we explore whether any class actions regime should also be available for proceedings against a defendant class.
- 8.20 In a defendant class action, the plaintiff brings a claim against a group of potential defendants who are all similarly situated with respect to the claim. The defendant group is represented by a representative defendant. From a broad policy perspective, the benefits of defendant class actions largely mirror plaintiff class actions in terms of procedural efficiency and access to justice. Many of the standard provisions applying to

²⁹ *Norton v Marlborough District Council* EnvC Christchurch C017/09, 30 March 2009 at [3].

³⁰ Derek Nolan (ed) *Environmental and Resource Management Law* (online ed, LexisNexis) at [19.21].

³¹ Te Ture Whenua Maori Act 1993, s 30(1)(b).

³² Te Ture Whenua Maori Act 1993, s 30(2).

³³ See for example *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Iwi Trust Board* (2018) 173 Waikato Maniapoto MB 51 (173 WMN 51); *Ngāti Pāoa Whanau Trust* (1995) 96A Hauraki MB 155 (96A H 155); and *Manuirangi v Nga Hapu o Nga Ruahine Iwi Inc* [2010] Chief Judge’s MB 355 (2010 CJ 355).

³⁴ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 42; Vince Morabito “Defendant Class Actions and the Right to Opt Out: Lessons for Canada from the United States” (2004) 14 Duke J Comp & Intl L 197 at 199; and Ruth Rodgers *Civil Section Documents: A Uniform Class Actions Statute* (Uniform Law Conference of Canada, 1995) at [17].

plaintiff class actions can be applied without difficulty to defendant class actions.³⁵ However, defendant class actions also raise distinctive issues, which we discuss below.

Defendant representative actions under HCR 4.24

- 8.21 Defendant representative actions are expressly allowed under HCR 4.24.³⁶ To date, there have only been seven, including two in the Employment Court.³⁷ Several defendant representative actions have been pursued as a means of bringing cases against a hapū, iwi or other Māori grouping.³⁸
- 8.22 In general, courts will not allow a representative defendant to be appointed where the defendants are likely to have different defences.³⁹ In such a case, “the interests of justice will generally require the plaintiff to proceed against the individuals who comprise the group”.⁴⁰ The fact that a representative defendant is opposed to taking on the role does not necessarily preclude them being appointed.⁴¹ The High Court has indicated that it may not be appropriate to appoint a representative defendant on a without-notice basis because the court will be concerned to ensure that the defendant will be adequately represented and funded.⁴² The issue of whether a defendant should be allowed to opt out of a proceeding where there is a representative defendant has not arisen under HCR 4.24 to date.

Issues raised by defendant class actions

- 8.23 While defendant class actions raise many of the same issues as plaintiff class actions, they also raise distinct issues, including the following:

³⁵ See Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [456].

³⁶ High Court Rules 2016, r 4.24 states that persons may “may sue or be sued” as the representatives of a larger group.

³⁷ See *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000; *Wanganui District Council v Tangaroa* [1995] 2 NZLR 706 (HC); *Talley’s Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC); and *Blue Star Taxis (Christchurch) Society Ltd v Gold Band Taxis (Christchurch) Society Ltd* HC Christchurch CIV-2009-409-2921, 19 November 2010. *Blue Star* is a rare instance of a case involving both a representative plaintiff and representative defendant. For judgments in the Employment Court, see *Fire Service Commission v Duncan* [1995] 1 ERNZ 169 (EmpC); and *Air New Zealand Ltd v Flight Attendants & Related Services (NZ) Assoc Inc* [2002] 2 ERNZ 770. We are also aware of two unsuccessful applications to appoint a representative defendant: *Derby v Hemi Pukeikura* [1935] GLR 205 (SC); and *Tahi Enterprises Ltd v Taua* [2018] NZHC 516.

³⁸ See *Tahi Enterprises Ltd v Taua* [2018] NZHC 516; *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000; *Derby v Hemi Pukeikura* [1935] GLR 205 (SC); and *Wanganui District Council v Tangaroa* [1995] 2 NZLR 706 (HC).

³⁹ *Tahi Enterprises Ltd v Taua* [2018] NZHC 516 at [39]. The approach in *Tahi Enterprises* is a slight relaxation of an older approach under which the availability of different defences was treated as an absolute bar to bringing representative proceedings. See for example *Derby v Hemi Pukeikura* [1935] GLR 205 (SC), which applied the restrictive approach of *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 (HL).

⁴⁰ *Tahi Enterprises Ltd v Taua* [2018] NZHC 516 at [39].

⁴¹ See *Talley’s Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 (HC) at 471, where the Court appointed Sealord to represent foreign crew members who could be affected by the outcome of the proceeding even though it objected to taking on the role. See also *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000, where the Court appointed Mr Keepa as representative defendant, although he objected to the appointment on the grounds that a prior hui had only given him authority to represent Tūhoe in the Māori Land Court.

⁴² See obiter comments in *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000 at [7].

- (a) While a representative plaintiff chooses to take on the role, a representative defendant is usually selected by the plaintiff and may be unwilling to perform this role.⁴³
- (b) In a plaintiff class action, class members do not face a risk of personal liability or an adverse costs order. However, proceedings against a representative defendant expose defendant group members to the risk of liability, including orders to pay damages.⁴⁴
- (c) In a plaintiff class action, the act of bringing the claim usually suspends the limitation period for class members. This means that the class members are given the advantage of extra time to bring their claims if the class action is later discontinued. By contrast, in a defendant class action the suspension of the limitation period applies to the plaintiff's individual claims against the defendant class members. This means that a plaintiff who initiates and then discontinues a class action is given the advantage of additional time to bring individual claims against the defendant class members, rather than the class members gaining an advantage.⁴⁵
- (d) Under an opt-out mechanism, defendant class members are all strongly incentivised to opt out, given they are both involuntary participants and face direct liability. The ability to opt out provides an important due process protection for members of a defendant class, but it may undermine the utility of defendant class actions if all or most defendants opt out and plaintiffs are forced to file individual proceedings.⁴⁶ The risk of defendants opting out en masse has been identified as a reason why so few defendant class actions have been commenced.⁴⁷

⁴³ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 44; and Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 4.

⁴⁴ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 44; and Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 4. It is unclear as to whether represented defendants could ever be exposed to liability under an adverse costs order. As we discuss in Chapter 11, in a plaintiff representative action in Aotearoa New Zealand, group members are not liable for adverse costs. In some jurisdictions, such as Ontario, defendant class actions are allowed on an identical basis to plaintiff class actions. This includes that only the representative plaintiff is liable to pay costs: *Class Proceedings Act SO 1992 c 6, s 31(2)*.

⁴⁵ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [470]; Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 44; and Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 4.

⁴⁶ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 44; and Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 4.

⁴⁷ Vince Morabito "Defendant Class Actions and the Right to Opt Out: Lessons for Canada from the United States" (2004) 14 *Duke J Comp & Intl L* 197 at 226–227.

Approaches taken by overseas jurisdictions

- 8.24 Some jurisdictions have decided to allow defendant class actions, namely the United States,⁴⁸ the Canadian federal regime,⁴⁹ Ontario⁵⁰ and Nova Scotia.⁵¹ In practice, very few defendant class actions have been brought in those jurisdictions that allow them.⁵²
- 8.25 Most regimes with defendant class actions apply the same provisions to both plaintiff and defendant class actions. This approach has been criticised on the basis that procedures were designed solely with plaintiff class actions in mind.⁵³ The Alberta Law Reform Institute (ALRI) recommended providing for defendant class actions but suggested that some provisions applying to plaintiff class actions would need to be modified, including:
- (a) Certain certification requirements.⁵⁴
 - (b) The ‘common issue’ requirement.⁵⁵
 - (c) The application of limitation period.⁵⁶
 - (d) Rules for discontinuing proceedings.⁵⁷
 - (e) Removing the right to opt out of proceedings.⁵⁸

⁴⁸ United States Federal Rules of Civil Procedure, r 23(a).

⁴⁹ Federal Courts Rules SOR/98-106, r 334.14(2)–(3).

⁵⁰ Rules of Civil Procedure RRO 1990 reg 194 r 12.07.

⁵¹ Class Proceedings Act SNS 2007 c 28, s 5(2).

⁵² In the United States, defendant class actions are said to be “as rare as unicorns”: John C Coffee Jr “Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation” (2000) 100 Colum L Rev 370 at 388. See also Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 45; Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [431]; Ian F Leach “Defendant Class Proceedings – The Class Action Joshua Tree” *Mondaq* (online ed, Canada, 9 January 2012) (there were only three requests to certify defendant class proceedings in Ontario, and no requests in the Federal Court or Nova Scotia); Graham C Lilly “Modeling Class Actions: The Representative Suit as an Analytic Tool” (2003) 81 Neb L Rev 1008 at 1041 (as at 2003, the United States Supreme Court had met only eight certified defendant class actions); and Lorell M Guerrero “Asarco Attempts to Certify Rarely-Seen Defendant Class Action” (31 May 2019) American Bar Association <www.americanbar.org>.

⁵³ For example, the Ontario Committee which designed Ontario’s Class Proceedings Act explicitly sought to provide for defendant class actions in a way which “mirrored plaintiff class proceedings”: *Report of the Attorney General’s Advisory Committee on Class Action Reform* (Ministry of the Attorney General, February 1990) at 29–30. See also Vince Morabito “Defendant Class Actions and the Right to Opt Out: Lessons for Canada from the United States” (2004) 14 Duke J Comp & Intl L 197 at 219–220.

⁵⁴ The Alberta Law Reform Institute (ALRI) observed that the Ontario certification requirement to have a plan for advancing the proceedings make sense for a representative plaintiff but not a defendant. The ALRI therefore recommended that this certification requirement be removed for defendant class actions: Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [457]–[459].

⁵⁵ The ALRI observed that the particular wording of the Ontario statute’s common issues requirement created potential problems when applied to defendant class actions: Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [462]–[463].

⁵⁶ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [470]–[473].

⁵⁷ Unlike plaintiff class actions, court approval should not be needed to discontinue a defendant class action: Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [469].

⁵⁸ See Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [445]–[449].

- 8.26 The ALRI suggested that due process concerns could be addressed through protections such as giving defendant class members the right to be named as an individual defendant, to apply to become the representative of a sub-class, or to have additional representative defendants appointed.⁵⁹ However, none of the ALRI's suggestions were adopted.⁶⁰ In the United States, the Uniform Law Commission also recommended removing the right to opt out from defendant class actions.⁶¹ The recommendation seems to have been followed in only a few states.⁶²
- 8.27 Some jurisdictions have chosen not to provide for defendant class actions.⁶³ One reason for this is the perceived difficulty in adapting class action procedures to defendant classes.⁶⁴ In most of the jurisdictions without defendant class actions, the representative actions rule has been retained.⁶⁵ In Australia, the Australian Law Reform Commission had suggested retaining the representative action rule to retain a means of pursuing multiple defendants.⁶⁶

QUESTION

Q8

Should a class actions regime include defendant class actions?

SHOULD THE REPRESENTATIVE ACTIONS RULE BE RETAINED?

- 8.28 If a statutory class actions regime is adopted, should the representative actions rule be retained? One argument for abolishing the rule is that a parallel representative action procedure may undermine the objectives and protections provided by a statutory class actions regime.⁶⁷ Removing the rule (or at least confining the rule to its more traditional

⁵⁹ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [464]–[467] and Recommendation 26(4).

⁶⁰ As discussed above, Alberta instead followed the recommendation of the Uniform Law Conference of Canada and did not include any provisions providing for defendant class actions.

⁶¹ Allen D Vestal “Uniform Class Actions” (1977) 63 ABA J 837 at 841.

⁶² Vince Morabito “Defendant Class Actions and the Right to Opt Out: Lessons for Canada from the United States” (2004) 14 Duke J Comp & Intl L 197 at 222.

⁶³ These jurisdictions include all of the Australian regimes, as well as Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, and Saskatchewan.

⁶⁴ Ruth Rodgers *Civil Section Documents: A Uniform Class Actions Statute* (Uniform Law Conference of Canada, 1995) at [17].

⁶⁵ The Australian federal regime, Queensland, South Australia, Tasmania, Victoria, Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, and Saskatchewan. Two jurisdictions have abolished their representative actions rules without providing for defendant class actions (New South Wales and Manitoba).

⁶⁶ The Australian Law Reform Commission also recognised the need for further research on defendant class actions: Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 4.

⁶⁷ This concern was raised with respect to reform in New Zealand by Anthony Wicks:

[T]he existence of a parallel regime for group litigation would create opportunities to avoid the legislative regime where parties saw advantages in doing so. If Parliament does go to the trouble of making the difficult policy decisions over where the balance should be struck between the interests of plaintiffs and defendants in group litigation, this choice should not be able to be circumvented by resort to a parallel regime.

See Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 112. This was also key reason for initially abolishing the representative rule in Ontario when its class actions regime was first passed.

role) would also simplify and streamline the law.⁶⁸ In jurisdictions that provide for both procedures, fewer representative actions appear to be brought compared to class actions.⁶⁹ This suggests there is little to be gained from keeping the representative action procedure.

- 8.29 Arguments for abolishing the representative actions rule are largely premised on the assumption that a class action would be a more effective way of bringing the same cases.⁷⁰ However, it would be more accurate to say that the representative actions procedure has expanded to include class action-like proceedings. This does not mean that all representative actions resemble class action proceedings, or that all representative actions could or should be brought as class actions. Historically, many representative actions involved non-monetary remedies, a small group of applicants with identical interests or a representative defendant. By contrast, the typical class action involves monetary remedies being sought on behalf of a large class by a representative plaintiff. It is far from clear whether all the protections and other measures contained in a class actions regime would be justified or appropriate in all situations currently covered by the representative actions rule. While many of the more recent representative actions have resembled typical class actions for damages, there are several recent cases involving small groups seeking non-monetary remedies.⁷¹
- 8.30 If representative actions provide a better procedure in some situations, then it may be prudent to retain the representative actions rule.⁷² Our research indicates that many common law jurisdictions with class actions have continued to retain some version the rule.⁷³ The risk that representative actions might be used as a means of avoiding class action protections could be managed by courts retaining the discretion to determine whether a representative procedure is preferable to a class action in a given case or by

However, a version of the rule was reinstated which only applied to defendants: Garry D Watson (ed) *Ontario Civil Procedure* (online ed, Thomson Reuters) at [R12§3].

⁶⁸ This is especially the case if there are minor yet highly technical inconsistencies between the two procedures.

⁶⁹ See for example Francesca Bartlett and Jennifer Corrin “Representative or the same? Representative rule and class actions in Queensland and Western Australia” (2016) 35 CJK 41 at 44–45 comparing the prevalence of class actions and representative actions in Australia. They conclude that when plaintiffs have a choice between procedures, the data suggests they have a strong preference for using a codified class actions regime: at 41–45. See also Vince Morabito “Statutory Limitation Periods and the Traditional Representative Action Procedure” (2005) 5 OUCJLJ 113.

⁷⁰ There is now a lot of overlap between the two procedures, especially as representative actions have become more influenced by class actions regimes (as we discuss in Chapter 4). See, for example, *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126; *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534; and *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398.

⁷¹ See for instance *Vlaar v van der Lubbe* [2016] NZHC 2398, (2016) 4 NZTR 26-022 which involved a representative plaintiff representing five beneficiaries of an estate. The remedy sought was for the representative plaintiff to be appointed as both an executor and a trustee of the estate. See also *Lin v Registrar of Companies* [2016] NZHC 395 in which a group of apartment owners who were also creditors of a company successfully applied to have a liquidator’s report set aside.

⁷² For example, where non-monetary remedies are sought, a small number of group members have identical interests, or the proceeding is against a group of defendants.

⁷³ Our research indicates that the Australian jurisdictions with a class actions regime have retained a representative action rule, except for New South Wales. Most of the Canadian jurisdictions with class actions regimes have retained a representative actions rule, with the exception of the Federal Court and Manitoba. Note that Nova Scotia’s representative rule is limited to circumstances in which the expense or complexity of a class proceeding is not warranted because all members of a class are identified as members of an organisation: Nova Scotia Civil Procedure Rules, r 68.01.

providing specific criteria.⁷⁴ For example, in Ontario and Nova Scotia, the representative actions rule expressly provides that a representative action procedure can be used where it would be unduly expensive to bring a class action.⁷⁵ If a class actions regime provided for a minimum number of class members (such as the requirement for seven people in the Australian regimes), then representative actions might be appropriate for smaller groups.

- 8.31 The courts may also decide that the availability of an expansive representative action procedure is unwarranted if there is a statutory class actions regime and so the rule could be limited to its more traditional role.⁷⁶
- 8.32 If defendant class actions are not permitted, then it may also be desirable to retain the representative actions rule to enable claims to be brought against a representative defendant. Overseas jurisdictions that do not allow defendant class actions have generally retained a representative actions rule, as discussed earlier in this chapter.
- 8.33 Finally, we note that representative actions are available in courts that may not be included in a class actions regime, including the District Court and the Environment Court.⁷⁷

QUESTION**Q9**

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

⁷⁴ This could allow the court to determine that a class action is preferable to a representative procedure, even though the representative actions rule has evolved in recent times to include proceedings that closely resemble class actions.

⁷⁵ In Ontario this special exception only applies to trade unions and unincorporated associations: Rules of Civil Procedure RRO 1990 reg 194 r 12.08. Nova Scotia has a simplified representative proceeding for when “the expense or complexity of a class proceeding is not warranted because all members of a class are identified as members of an organization”: Nova Scotia Civil Procedure Rules, r 68.01(1)(b).

⁷⁶ This approach was taken by the Supreme Court of British Columbia, which found that an expansive approach to the representative actions rule is not appropriate when a detailed statutory regime is provided, and that the representative actions rule cannot be used as a means of pursuing a class action-like claim outside of the restrictions of a class actions regime: *Araya v Nevsun Resources Ltd* 2016 BCSC 1856, (2016) 408 DLR (4th) 383 at [498]–[504].

⁷⁷ While there are no instances of a representative order being granted in the District Court, a representative order has been granted in the Environment Court relying on r 4.24 of the District Court Rules 2014: see *Norton v Marlborough District Council* EnvC Christchurch C017/09, 30 March 2009.

CHAPTER 9

Principles for a statutory class actions regime

INTRODUCTION

- 9.1 In this chapter, we identify the principles which we think should guide the development of a statutory class actions regime.
- 9.2 We think that a statutory class actions regime should:
- (a) Have clear objectives for the class action procedure.
 - (b) Strike an appropriate balance between the interests of plaintiffs and defendants.
 - (c) Ensure that the interests of class members are safeguarded.
 - (d) Provide a procedure that is just, speedy, efficient and proportionate.
 - (e) Be appropriate for contemporary Aotearoa New Zealand.
 - (f) Recognise and provide for relevant tikanga Māori concepts.
 - (g) Not adversely impact on other methods of bringing collective litigation.
 - (h) Provide clarity on issues arising in funded class actions.
- 9.3 We discuss these principles below.

CLEAR OBJECTIVES FOR THE CLASS ACTIONS PROCEDURE

- 9.4 It is important to clearly identify the objectives for the class actions procedure as these will drive the design of the legislation and the detailed drafting decisions that are needed.¹
- 9.5 In Chapter 5 we discussed three key advantages of class actions: improving access to justice, promoting efficiency and economy of litigation, and improving incentives to comply with the law. These are frequently identified as the goals of class actions regimes in comparable overseas jurisdictions. Aotearoa New Zealand courts have also identified these as objectives of representative actions under High Court Rule 4.24 (HCR 4.24).²

¹ Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 14.

² *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [37]–[40]; *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [52]; and *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(a)] and [11(b)].

- 9.6 We think that improving access to justice is the clearest advantage of class actions and this should be the main objective of a statutory class actions regime.³ As we discussed in Chapter 5, class actions may improve access to justice by helping to remove financial and non-financial barriers to bringing legal claims. We use the term ‘access to justice’ to encompass not just access to the courts, but also a procedurally fair process and a substantively fair result.
- 9.7 We also think that improving economy and efficiency of litigation is an important objective for a statutory class actions regime. As we discussed in Chapter 5, class actions can be an efficient use of the judicial system by allowing many claims to be considered at one time. We think that a detailed statutory class actions regime will ensure greater efficiency and economy of litigation than the current representative actions regime by reducing the need to argue procedural points.
- 9.8 These two objectives also reflect the terms of reference for our review, which provide:
- A key benefit of establishing clearer regimes for class actions and litigation funding would be to enhance access to justice. The Law Commission will therefore conduct a first principles review of class actions and litigation funding in New Zealand to ensure the law in these areas supports an efficient economy and a just society; and is understandable, clear and practicable.
- 9.9 Both objectives will not necessarily be met in all cases. As we discussed in Chapter 5, class actions provide the clearest access to justice benefits in cases where it would not be economic for an individual to bring their own proceeding. However, such a case will increase the court’s workload, compared to the counterfactual of none of those class members bringing a proceeding.⁴ Conversely, class actions provide the greatest benefits for the efficiency and economy of litigation in cases which would otherwise have been litigated individually.
- 9.10 It is less clear to us whether improving incentives to comply with the law should be an objective of a statutory class actions regime or whether it would be better viewed as a “useful by-product”.⁵ While we agree that class actions can play an important role in modifying a defendant’s behaviour and deterring future wrongdoing, we see class actions as primarily fulfilling a compensatory, rather than enforcement, function.⁶ If a class actions regime is designed to meet the objective of improving compliance with the law, this may

³ We note that the Court of Appeal has described access to justice as “far and away the most important” objective of representative actions: *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [54]. The Supreme Court referred to the Court of Appeal’s comment but did not express a view as to the main objective of r 4.24 of the High Court Rules 2016. See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [37]–[40].

⁴ See Craig Jones *Theory of Class Actions* (Irwin Law, Toronto, 2003) at 83 commenting that “[t]he goal of access for underrepresented plaintiffs is, at least in the case of aggregated low-value suits, frequently at odds with the goal of judicial economy”. See also Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 52–60.

⁵ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [115]. See also Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 142–143 and 145 referring to behaviour modification as “essentially an inevitable, albeit important, by-product of class actions”.

⁶ Rachael Mulheron comments that “[c]ompensatory redress is, and always has been, the primary motivator” of class actions regimes, rather than modifying defendant behaviour: Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 79.

result in features of a regime which compromise the ability to fully compensate class members. This can happen, for example, if a class action settlement is allowed to include terms such as the defendant making a substantial payment to charity rather than compensation to individual class members.⁷

- 9.11 One option would be to specify that improving access to justice is the primary objective of the class actions regime, with improving economy and efficiency of litigation and improving compliance with the law as secondary objectives.

QUESTION

Q10

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

BALANCING THE INTERESTS OF PLAINTIFFS AND DEFENDANTS

- 9.12 A class actions regime needs to be fair to all parties involved in the proceedings – primarily plaintiffs and defendants, but potentially also third parties who participate in them. Overseas law reform bodies have seen this as an important consideration when assessing options for class actions reform. The Alberta Law Reform Institute, in assessing the existing law relating to class actions and options for reform, applied the principles that plaintiffs should be able to bring deserving claims and that defendants should be protected from undeserving claims.⁸ Similarly, the Ontario Law Reform Commission considered that analysis of class action models should consider whether they would ensure that “actions are actually commenced in situations where mass wrongs deserve redress” and “class actions that should not be allowed to proceed are effectively weeded out”.⁹
- 9.13 A class actions regime should enable groups with meritorious legal claims to bring these claims before the court. When considering aspects of a regime such as a certification test, consideration needs to be given to how difficult it will be for plaintiffs to bring claims. Aspects of a class actions regime that are likely to be important to plaintiffs include the ability to form a viable class, ensuring features of the regime do not deter litigation funding, and providing safeguards so that a well-resourced defendant cannot wear down plaintiffs with unnecessary procedural steps.
- 9.14 At the same time, defendants need to be protected from unmeritorious or vexatious claims which may be costly to defend and force defendants into settlements of claims

⁷ See Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 121 referring to dozens of Ontario class action settlements which distributed funds to charities with no connection to the subject matter of the class action or the class members. She comments:

From a policy perspective, the payment of a significant settlement award to *any recipient* by a defendant can be justified as serving the deterrence function of class proceedings. Reliance on the deterrence argument alone, however, effectively transforms *cy-près* awards into payment of a fine, and class counsel into a true private attorney general. (emphasis in original).

⁸ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [96]–[97].

⁹ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 291. A third consideration was whether a proposed scheme would protect the interests of absent class members.

they consider defensible.¹⁰ While deterring wrongful conduct may be a legitimate goal for class actions, a class actions regime should not unduly inhibit legitimate business and government activity. From the defendant's perspective, aspects of a regime that will be critical include: having a clear idea of the potential scope of liability, procedural steps which prevent vexatious or unmeritorious claims from going ahead, having some finality to proceedings and assurance that the representative plaintiff has the ability to pay an adverse costs order.

- 9.15 Consideration will also need to be given to a situation where a class action is brought against a particular defendant but there may be multiple potential defendants who could be liable with respect to any damage or loss established through the class action. While general mechanisms already exist which enable a named defendant to join third parties and seek contribution in relation to damage that they may be liable for, the interaction of these mechanisms with a class actions regime may require some consideration to ensure fairness to all parties.

QUESTION

Q11

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

SAFEGUARDING INTERESTS OF CLASS MEMBERS

- 9.16 An unusual feature of class action litigation is the presence of class members.¹¹ These individuals are not parties to the claim yet will be bound by the judgment despite having very little control over the way the litigation is conducted. In our view, a class actions regime must contain safeguards to ensure that the interests of class members are protected. Class members will have differing levels of knowledge and understanding of the litigation. In some cases, a class member might not even be aware of the proceeding.
- 9.17 Key mechanisms for protecting the interests of class members include requirements for notice to potential class members, providing class members with sufficient opportunity to opt in or opt out of the claim, providing an opportunity for a class member to be heard by the court and requiring court approval of any settlement.
- 9.18 Courts have an important supervisory role to ensure that the interests of class members are protected.¹² It has been said that judges may need to play an “unusually active role”

¹⁰ See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 57 commenting that access to justice is a “two-way street” and that class actions jurisprudence must seek to ensure the defendant is protected from unmeritorious claims and can understand and mount a defence to the claim against it.

¹¹ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§ 9:1] observes the following: “[t]he law knows few odder parties than the absent class member in a class action law suit” (footnote omitted).

¹² See for example *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [50] (“It is the Court’s responsibility to protect class members’ interests ...”).

in the control, supervision and disposition of class action proceedings.¹³ The need to protect the interests of class members becomes particularly important in the settlement context where an “adversarial void” can arise because both the plaintiff and defendant are advocating for the settlement to be approved.¹⁴ In the United States, some courts have said the judge has a “fiduciary duty” to class members during settlement.¹⁵ In Australia, the courts have described their role in settlement as “acting akin to a guardian” of class members.¹⁶ In Canada, courts will exercise their broad supervisory jurisdiction to ensure that the interests of class members are protected during settlement.¹⁷

- 9.19 In Aotearoa New Zealand, courts are attuned to the heightened role for courts in litigation on behalf of a group. In *Ross v Southern Response*, the Court of Appeal referred to the court exercising “an appropriate supervisory jurisdiction” in relation to representative actions.¹⁸ It said the court’s role in representative actions included reviewing notices to class members, ensuring that any arrangements with a litigation funder did not amount to an abuse of process and ensuring that any settlement did not involve unfairness to any subset of class members.¹⁹ In the further appeal of that case, the Supreme Court said that courts may need to exercise their protective or supervisory jurisdiction with respect to representative actions.²⁰ The Court of Appeal has also said courts should “exercise a greater supervisory role” with respect to the initial stages of representative actions compared to other cases. This is because the plaintiff is seeking to use a court process to enable it to represent and bind many others.²¹ When a plaintiff seeks to use HCR 4.24, the court will need to exercise “an increased degree of vigilance” when considering potential abuses of its processes.²²

¹³ Australian Law Reform Commission *Access to the Courts – II Class Actions* (ALRC Discussion Paper 11, 1979) at [65]. See also Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 446 noting the “activist role” played by class action judges.

¹⁴ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 93; and Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [22.3].

¹⁵ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§ 13:40]. See also Barbara J Rothstein and Thomas E Willging *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed, Federal Judicial Center, 2010) at 12.

¹⁶ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [22.2].

¹⁷ Garry D Watson (ed) *Ontario Civil Procedure* (online ed, Thomson Reuters) at [R12§37].

¹⁸ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [105].

¹⁹ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [103]–[104].

²⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [81], [85] and [88].

²¹ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [78].

²² *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [77].

- 9.20 The responsibilities attaching to the role of representative plaintiff can provide another safeguard for class members.²³ In some jurisdictions, a representative plaintiff has been held to have fiduciary obligations to class members.²⁴
- 9.21 Lawyers may play an important role in protecting the interests of class members although there is some uncertainty on the nature of the relationship between the lawyer acting for the class and each individual class member. Canadian courts have held that a solicitor-client relationship exists with class members once a class action is certified, although the scope of that relationship is an “area under development”.²⁵ In the United States, the default presumption is that there is a solicitor-client relationship with class members after certification.²⁶ However, courts and the American Bar Association have taken the position that class members are not clients for the purposes of conflict rules.²⁷ In Australia, there is conflicting authority as to whether a lawyer owes a fiduciary duty to class members and, if so, how the lawyer could obtain consent to act in spite of a conflict of interest.²⁸
- 9.22 The Victorian Law Reform Commission has recommended that guidelines should be issued to lawyers on their duties and responsibilities when acting for a class, with specific direction on how to recognise, avoid and manage conflicts of interest.²⁹
- 9.23 We discussed additional considerations that apply in relation to class members in defendant class actions in Chapter 8 (where we also noted that defendant class actions, when permitted in comparable jurisdictions, have been rare).

QUESTION

Q12

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

²³ This is discussed further in Chapter 11.

²⁴ *Dyczynski v Gibson* [2020] FCAFC 120, (2020) 381 ALR 1 at [209] per Murphy and Colvin JJ; and Joseph M McLaughlin *McLaughlin on Class Actions* (online ed, Thomson Reuters) at [§4:27] (citing several United States authorities). See also *Poulin v Ford Motor Co of Canada Ltd* (2008) 301 DLR (4th) 610 (ONSC) at [62] where the responsibilities of the lead plaintiff to class members were said to be “akin to that of a fiduciary”.

²⁵ See Jasminka Kalajdzic “Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis” (2011) 49 Osgoode Hall LJ 1 at 24 citing Paul Perell “Class Proceedings and Lawyers’ Conflicts of Interest” (2009) 35 *Advoc Q* 202 at 213.

²⁶ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§19:2].

²⁷ American Bar Association Model Rules of Professional Conduct 1983, §1.7 comment 25 as cited in William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§19:21].

²⁸ The Federal Court of Australia declined to find that lawyers owe fiduciary duties to class members who are not their clients but did comment that the lawyer had other duties to act in the interests of non-client class members: see *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323, (2016) 335 ALR 439 at [220]. Contrast Simone Degeling and Michael Legg “Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties” (2014) 37 *UNSWLJ* 914 at 923 and 926–928.

²⁹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at 93 and Recommendation 13.

JUST, SPEEDY, INEXPENSIVE AND PROPORTIONATE PROCEDURE

- 9.24 The overarching goal of our civil procedure system, as set out in the High Court and District Court Rules, is “to secure the just, speedy, and inexpensive determination” of proceedings and applications.³⁰ Achieving this goal has value beyond that for the immediate parties to a proceeding as there is a public interest in the efficient use of court time.³¹ This overarching objective has guided courts in their approach to representative actions.³²
- 9.25 The goal of “just, speedy and inexpensive” proceedings is said to reflect the principle of “proportional justice”, with substantive justice now being one consideration to be weighed with others, rather than the paramount consideration.³³ Venning J has suggested that the concept of proportionality could be expressly referred to in the High Court Rules as an overarching and guiding principle. His Honour explained:³⁴
- The time and expense devoted to a proceeding ought to be proportionate to what is at stake in the proceedings and, if possible, take into account the parties’ resources or ability to bring the case to a hearing.
- 9.26 A recent Rules Committee consultation paper on proposed civil procedure reforms suggested that procedures for civil trials should be proportionate to the nature and value of the issues in dispute.³⁵ In *Southern Response v Ross*, the Supreme Court said that questions of proportionality were relevant to the objective of the High Court Rules.³⁶
- 9.27 Rachael Mulheron has observed that the philosophy of “proportionality over perfection” features in a number of class actions regimes. She notes that compromises may be

³⁰ High Court Rules 2016, r 1.2; and District Court Rules 2014, r 1.3. We observe that to some extent, the goals of the High Court Rules may be seen as aspirational, particularly in ensuring that proceedings are speedy and inexpensive. For example, see *Soma v Nath* [2019] NZHC 1088 at [19] per Brewer J:

“Speedy” and “inexpensive” are relative terms. The procedures mandated by the Rules are almost never carried out in an objectively speedy way and in all my years involved in litigation I have never heard parties celebrate them as inexpensive.

³¹ *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 at [27]; and *Parlane v Hayes* [2015] NZCA 341 at [30]–[32].

³² *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [26]; *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [12]–[13], [17] and [26]; *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [130]; *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 271; *Paine v Carter Holt Harvey Ltd* [2019] NZHC 1614 at [15]; and *Smith v Claims Resolution Service Ltd* [2019] NZHC 127 at [40].

³³ Bridgette Toy-Cronin “Keeping Up Appearances: Accessing New Zealand’s Civil Courts as a Litigant in Person” (PhD Thesis, University of Otago, 2015) at 36 and 202–203. She cites the Court of Appeal’s decision in *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 at [26] where the Court commented that the case management regime was designed to achieve the objective of the High Court Rules “by isolating the issues and trying them fairly, swiftly and efficiently, with regards to what is at stake”. See also at [27], where the Court referred to the interests of the immediate parties, litigants in other cases and potential litigants, commenting that all of these interests were relevant and formed part of the interests of justice.

³⁴ Geoffrey Venning “Greater Efficiency in Civil Procedure” (paper presented to New Zealand Bar Association-Australian Bar Association Joint Conference, Queenstown, August 2019) at [20].

³⁵ The Rules Committee *Improving Access to Civil Justice: Initial Consultation with the Legal Profession* (Discussion Paper, 16 December 2019) at [14].

³⁶ LPF Group (a litigation funder that was an intervener in the case) had submitted that given New Zealand’s small size, the cost of resolving matters associated with opt-out proceedings through litigation would be disproportionate. The Court said that the question of proportionality of cost to the size of the claim and the burden on the defendant would be relevant in terms of the objective of securing the just, speedy and inexpensive determination of proceedings: *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [89].

required in class action litigation in the interests of the proceeding as a whole or for the greater good of all court users, such as streamlined procedures for establishing individual claims.³⁷

- 9.28 In some jurisdictions, a concept of proportionality is relevant to whether a matter should be allowed to proceed in class action form. For example, at the certification stage, the United Kingdom Competition Appeal Tribunal must consider the costs and benefits of a matter continuing as a class action.³⁸ Similarly, the Australian Federal Court may direct that a matter no longer proceed as a class action where the likely cost of identifying class members and distributing payments to them would be excessive.³⁹ In the United States, there was a proposal to reform the certification criteria so judges would have to consider “whether the probable relief to individual class members justifies the costs and burdens of class litigation”, although this reform did not proceed.⁴⁰
- 9.29 Proportionality may also be relevant to the way in which proceedings are conducted. In some comparable jurisdictions, general civil procedure rules refer to an overarching concept of proportionality.⁴¹ Some overseas class actions regimes also specifically reflect concepts of proportionality, efficiency and cost-effectiveness. For example:
- (a) In the Australian federal regime, a case may be discontinued as a class action if the procedure “will not provide an efficient and effective means of dealing with the claims of group members”.⁴²
 - (b) Victoria’s Class Action Practice Note states that the procedures are “intended to facilitate the just, efficient, timely and cost-effective conduct of group proceedings”.⁴³
 - (c) In Ontario, when the court is determining individual class member issues, it must “choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties”.⁴⁴
 - (d) In Newfoundland and Labrador, class action rules and procedures must be interpreted and applied in a way that promotes “the effective and economical use of the judicial system”.⁴⁵

³⁷ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 50–52 and 266–268.

³⁸ The Competition Appeal Tribunal Rules 2015 (UK), r 79(2)(b).

³⁹ Federal Court of Australia Act 1976 (Cth), s 33N(1)(a).

⁴⁰ We discuss this in Chapter 10.

⁴¹ For example, see Federal Court of Australia Act 1976 (Cth), s 37M(2)(e); Federal Court Rules 2011 (Cth), r 1.31(2); Rules of Civil Procedure RRO 1990 reg 194 r 1.04(1.1); and The Civil Procedure Rules 1998 (UK), r 1.1(2)(c).

⁴² Federal Court of Australia Act 1976 (Cth), s 33N(1)(c).

⁴³ Supreme Court of Victoria, *Practice Note SC Gen 10 — Conduct of Group Proceedings (Class Actions) (Second Revision)*, 1 July 2020 at [1.3].

⁴⁴ Class Proceedings Act SO 1992 c 6, s 25(3).

⁴⁵ Rules of the Supreme Court SNL 1986 c 42, r 7A.01(4). Rules and procedures must also be interpreted and applied in a way that makes the court system more accessible to the public and ensures that parties responding to a class action are able to present their case fairly to the court.

QUESTION

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?

APPROPRIATE FOR CONTEMPORARY AOTEAROA NEW ZEALAND

- 9.30 A class actions regime needs to be appropriate for contemporary Aotearoa New Zealand. This means that care needs to be taken when considering features of class actions regimes from other jurisdictions. No legal regime is entirely transportable to another jurisdiction and cultural, legal and historical factors will affect the extent to which the design of a class action in one jurisdiction can be successfully transposed to another.⁴⁶ One obvious difference about the Aotearoa New Zealand legal system is that tikanga Māori forms part of the values of our common law.⁴⁷ In the following section of this chapter, we identify some tikanga values that may be relevant to a class actions regime.
- 9.31 Consideration must also be given to features of Aotearoa New Zealand's procedural and substantive law which will impact on the kinds of class action cases that can be brought and the way litigation will be run. For example, a feature of our procedural law is the presumption that the unsuccessful party in litigation is liable to pay adverse costs.⁴⁸ This is a strong disincentive to litigation.⁴⁹ The different courts and tribunals available for certain kinds of claim in Aotearoa New Zealand will also be relevant. Claims that might be brought as a class action in a court of general jurisdiction in other countries might instead proceed in a specialist court or tribunal in Aotearoa New Zealand. These include the Human Rights Review Tribunal, Environment Court, Employment Relations Authority and Waitangi Tribunal. Differences in substantive law include our statutory Accident Compensation scheme which bars actions for damages for personal injuries.⁵⁰
- 9.32 Aotearoa New Zealand's small population size is also relevant. This might affect potential class sizes and accordingly the kinds of cases that are economic to run. This could also make competing class actions less likely and make it easier to notify potential class members of litigation.

⁴⁶ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 369.

⁴⁷ See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [164] per Tipping, McGrath and Blanchard JJ (“... the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values ...”). See also at [94] per Elias CJ (“Maori custom according to tikanga is therefore part of the values of the New Zealand common law”).

⁴⁸ We discuss costs in Chapter 13 of this report, including the issue of whether it is appropriate to retain the adverse costs rule with respect to all aspects of class actions.

⁴⁹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 437.

⁵⁰ Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [2.1]. See Accident Compensation Act 2001, s 317.

QUESTION

Q14

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

RECOGNISING AND PROVIDING FOR TIKANGA MĀORI

- 9.33 Tikanga Māori includes a body of norms and values that guides and directs behaviour. Underpinned by notions of kinship, tikanga governs relationships by providing a “koru ... of ethics”⁵¹ and a shared basis for “doing things right, doing things the right way, and doing things for the right reasons”.⁵² It is also often described as Māori custom law,⁵³ or the “first law of Aotearoa”.⁵⁴ Like the common law, tikanga has evolved over time and continues to adapt to accommodate developments in society and technology.
- 9.34 In our recent report *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara*, the Commission acknowledged the constitutional significance of tikanga in four respects. First, as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa (which was followed by the second, English law). Second, where tikanga values comprise a source of the common law and have been integrated into legislation by statutory reference. Third, in terms of rights and obligations arising under te Tiriti o Waitangi | the Treaty of Waitangi. Fourth, in terms of New Zealand’s international human rights obligations, including under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁵⁵
- 9.35 In a 2001 Study Paper, *Māori Custom and Values in New Zealand Law*, the Commission noted there are a number of central values that underpin the totality of tikanga Māori, including: whanaungatanga (relationships); mana (spiritually sanctioned authority); tapu (spiritual character of all things); utu (reciprocity); and kaitiakitanga (guardianship/stewardship). The paper records that these values in no way form a definitive list and that each tribal grouping would have its own variation of them.⁵⁶ That said, while tikanga practices vary among hapū, iwi and rohe, there is broad consistency on the central and inter-related tenets throughout te ao Māori.
- 9.36 It is foreseeable that Māori may wish to participate in a class action in the representation of their interests as individuals or as part of a wider Māori collective. The potential for

⁵¹ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [126].

⁵² Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 431.

⁵³ See Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 6–7.

⁵⁴ Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) 330 at 330.

⁵⁵ Te Aka Matua o te Ture | Law Commission *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC R144, 2020) at [2.30].

⁵⁶ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [125].

collective action by Māori through a class actions regime and the role of tikanga in identifying the representative plaintiff are considered in Chapter 11. The status of tikanga more generally invites consideration of tikanga in the design of any class actions regime for Aotearoa New Zealand.⁵⁷ Through its status under the common law and its integration in legislation, tikanga has transformed state law through a process that Williams J, writing extrajudicially, has described as part of the development of the third law of Aotearoa or “Lex Aotearoa”.⁵⁸

9.37 Based on our initial research, our preliminary view is that the tikanga concepts of whanaungatanga, kaitiakitanga and mana may be particularly relevant to a class actions regime. We recognise that these are complex concepts which are also inter-woven with other tikanga in the koru of ethics. There is an emphasis in these tikanga principles on relationships and the interests of the collective. A brief introduction to these concepts, and how they might be engaged by a class actions regime, is provided below.

9.38 Whanaungatanga has been described as “the source of the rights and obligations of kinship”.⁵⁹ In *Māori Custom and Values in New Zealand Law*, the Commission commented:

Of all of the values of tikanga Māori, whanaungatanga is the most pervasive. It denotes the fact that in traditional Māori thinking relationships are everything – between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Māori world together is whakapapa or genealogy identifying the nature of relationships between all things. That remains the position today. In traditional Māori society, the individual was important as a member of a collective. The individual identity was defined through that individual’s relationships with others. It follows that tikanga Māori emphasised the responsibility owed by the individual to the collective. No rights enured if the mutuality and reciprocity of responsibilities were not understood and fulfilled.

9.39 A broader understanding of whanaungatanga has developed to encompass, in addition to relationships defined through whakapapa, other kin-like relationships where people become connected through shared experiences. Māmari Stephens suggests the broader base of whanaungatanga has enabled the emergence of a sense of civic obligations whereby Māori individuals and collectives have accepted that decisions could be made on behalf of their groups outside of immediate kin-based connections.⁶⁰

⁵⁷ See also *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [55] (where the Supreme Court notes that where necessary, the representative actions rule should be construed consistently with the tikanga that underpins this history of representative claims brought by individual rangatira).

⁵⁸ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 17.

⁵⁹ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 3.

⁶⁰ Māmari Stephens “Fires Still Burning? Māori Jurisprudence and Human Rights Protection in Aotearoa New Zealand” in Kris Gledhill, Margaret Bedggood and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 99 at [3.3.02].

- 9.40 Kaitiakitanga “denotes the obligation of stewardship and protection”.⁶¹ Williams J, writing extrajudicially, explains:⁶²

No right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource. No relationship; no right. The term that describes the legal obligation is kaitiakitanga. This is the idea that any right over a human or resource carries with it a reciprocal obligation to care for his, her or its physical and spiritual welfare. Kaitiakitanga is then a natural (perhaps even inevitable) off-shoot of whanaungatanga.

- 9.41 Mana has been described as “the source of rights and obligations of leadership”.⁶³ Cleve Barlow noted that the term mana has different meanings. He distinguished between mana atua, mana tūpuna, mana whenua and mana tangata. In Barlow’s view, mana tangata broadly refers to the mana acquired by an individual “according to his or her ability and effort to develop skills and gain knowledge”.⁶⁴ In *Māori Custom and Values in New Zealand Law*, the Commission explained:⁶⁵

Mana is at the heart of historical and modern Māori concepts of leadership. It is defined in the Williams Dictionary of the Māori Language as authority, control, influence, prestige, and power on one hand, and psychic force on the other. The definition conveys the key aspects of the concept. Mana encompasses political power, which is both ascribed through whakapapa and acquired through personal accomplishment. It incorporates the dynamics of earthly politics, and the capacity to articulate the aspirations of the people. It is also a power that has a spiritual aspect to it and is thought of as being received from the atua – “that which manifests the power of the gods”.

- 9.42 The Commission also explained connections between mana and utu. For example, mana was achieved not through the acquisition of wealth but in its distribution among others. In turn, this created reciprocal obligations on recipients who would be expected to respond in due course.⁶⁶
- 9.43 In light of these explanations, it would appear that core tikanga values could be engaged by a class actions regime, particularly given that any such regime would by its nature facilitate a collective approach to seeking justice. Whanaungatanga might emphasise the interests of all class members and their responsibilities towards each other. Relatedly, kaitiakitanga might oblige the class, and the representative plaintiff in particular, to act in the collective interests of the class. The representative plaintiff should have sufficient mana to bring the claim on behalf of the class and undertake the relational responsibilities of the role. Unlike traditional conceptions of mana and utu, the reciprocal obligations established between the representative plaintiff and class and among class members would be finite and task oriented.

⁶¹ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [163].

⁶² Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 4.

⁶³ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 3.

⁶⁴ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991) at 61–62.

⁶⁵ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [137].

⁶⁶ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [158].

QUESTION

Q15

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

NO ADVERSE IMPACT ON OTHER METHODS OF GROUP LITIGATION

- 9.44 As discussed in Chapter 3 of this Issues Paper, there are a number of methods of group litigation in Aotearoa New Zealand. We think it is important to ensure that a class actions regime would not conflict with other means of bringing group litigation or make other legal claims more difficult to run.
- 9.45 One example is Māori legal claims. Rangatira and kaumātua/kuia have traditionally brought legal claims on behalf of their people without formally seeking a representative order.⁶⁷ We are aware of concerns that representation requirements as part of a class actions regime should not impact this ability. We also note the role of the Māori Land Court in determining representation issues and think it would be desirable to have clarity on how this power would interact with class action rules around representation.⁶⁸
- 9.46 Another potential issue is the impact of a class actions regime on judicial review proceedings. As discussed in Chapter 3, a judicial review case brought by a single plaintiff may determine the rights of a large group. Judicial review is designed to be a “simple, untechnical and prompt” procedure and has various features intended to achieve this. The standing requirements for judicial review are not difficult to meet, in order to promote access to justice and advance rule of law values.⁶⁹ As mentioned in Chapter 8, our preliminary view is that judicial review should not be excluded from a class actions regime. However, we are aware of concerns that defendants might seek to have the court apply representation requirements of a class actions regime to judicial review cases brought outside of the class actions regime, which could make it more difficult for plaintiffs to establishing standing.
- 9.47 It is also important to consider whether a class actions regime could have any detrimental impact on regulatory action. For example, the Commerce Commission has a cartel leniency policy in which conditional immunity from prosecution can be offered to the first member of the cartel who tells the Commission about its operation and provides

⁶⁷ This was recognised in *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [494], [673] and [807] per Elias CJ and Glazebrook, Arnold and O’Regan JJ. Note that in the High Court, it was held that Rore Stafford (a kaumātua of Ngāti Rarua and Ngāti Tama) did not have standing to bring the breach of fiduciary claim because there was no evidence he represented those customary groups and he had not made an application for representative status: *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [316].

⁶⁸ See *Te Ture Whenua Maori Act 1993*, s 30. In *Stirling v Maori Land Court* CP11/98, 5 February 1998, the extent to which the Māori Land Court’s jurisdiction under s 30 was ousted, excluded or limited by the High Court’s representation orders was raised as an issue to be determined. (It was not required to be determined on the application for interim relief and there is no substantive judgment).

⁶⁹ See Chapter 3.

evidence.⁷⁰ We are aware of the concern that the advantages provided by this policy could be undermined by the risk of a class action against a cartel member who has come forward.⁷¹

QUESTION

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?

CLARITY ON ISSUES ARISING IN FUNDED CLASS ACTIONS

- 9.48 As discussed in Chapter 3, an increasing number of representative actions have relied on litigation funding. If Aotearoa New Zealand adopts a class actions regime, it seems likely that litigation funding will play a similarly important role in supporting class actions.
- 9.49 Currently, there is no specific regulation of litigation funding and there is a degree of uncertainty as to the permissibility and parameters of litigation funding. In Part B of this Issues Paper, we discuss whether litigation funding is desirable for Aotearoa New Zealand and, if so, how it should be regulated. If litigation funding continues to be available in Aotearoa New Zealand, we think a class actions regime should provide some clarity on issues associated with litigation funding. These issues might include:
- (a) The court's role, if any, with respect to monitoring or approving a litigation funding arrangement in a class action.⁷²
 - (b) Whether it is permissible to have a "closed class" whereby the class definition requires class members to sign up to a litigation funding agreement.⁷³
 - (c) Whether common fund orders or funding equalisation orders should be available to allow the court to require class members to contribute a portion of any settlement towards the funder's commission, even if they have not signed up to the funding agreement. These devices have been developed in other jurisdictions to address the problem of some class members 'free riding' on litigation funding secured by others.⁷⁴
 - (d) The court's powers with respect to litigation funding aspects of a settlement (for example, whether a court should be required to approve the litigation funder's commission).
 - (e) Whether the court should have the power to require a litigation funder to provide security for costs or meet any adverse costs order.

⁷⁰ To Komihana Tauhokohoko | Commerce Commission *Cartel Leniency Policy and Guidelines* (June 2018).

⁷¹ This issue has also been noted by the Australian Competition and Consumer Commission in its submission to the Australian Federal Parliamentary inquiry on litigation funding: Australian Competition and Consumer Commission, Submission No 15 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020).

⁷² See Chapter 15.

⁷³ See Chapter 12.

⁷⁴ See our discussion in Chapter 12.

QUESTIONS

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

INTRODUCTION TO KEY DESIGN QUESTIONS

- 10.1 A statutory class actions regime would need to have many detailed procedural rules. Rachael Mulheron has identified 100 points of class action design, which she groups into four categories:¹
- (a) **At the beginning:** including pleading requirements, certification stage, rules for class membership and who can be the representative claimant.
 - (b) **During the action:** including the process for opting out, court control, how the case is to be conducted and limitation periods.
 - (c) **At the end:** including settlement of a class action, awarding damages, managing individual issues and appeal rights.
 - (d) **Costs and funding:** including whether an adverse costs rule will apply, contingency legal fees and litigation funding.
- 10.2 As we explained in Chapter 1, we felt it would be premature to consider all the details of a statutory class actions regime before we obtained feedback on whether Aotearoa New Zealand should have one. Instead, we consider a small number of critical design questions that would have a significant impact on the shape of a class actions regime and the kind of litigation that it would enable. The design issues we consider are those that overseas jurisdictions have tended to answer in different ways. These are:
- (a) Whether a certification stage is desirable.
 - (b) The threshold legal test for commencing a class action.
 - (c) Who can be a representative plaintiff.
 - (d) How class membership should be determined.
 - (e) Whether to apply the adverse costs rule to class actions.
- 10.3 In this chapter we discuss the first two of these questions.

¹ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 82–93.

CERTIFICATION

- 10.4 A key design question for a class actions regime is whether the court must approve the case proceeding in class action form. This preliminary form of court approval is generally known as certification. Almost all jurisdictions with a class actions regime require a class action to be certified before it can proceed with Australia as a notable exception.² Certification has been described as a “defining moment in the life of a class action”.³ While a plaintiff needs a case to be certified before it can proceed, a defendant wants the class action stopped before it harms its reputation, causes expense and increases the plaintiff’s leverage.⁴
- 10.5 This section discusses how certification has been approached in some comparable overseas jurisdictions and assesses the advantages and disadvantages of having a certification requirement.

Current approach under HCR 4.24

- 10.6 Under High Court Rule 4.24 (HCR 4.24) a plaintiff may either commence a representative action with the consent of all the people who have the same interest in the subject matter of the proceeding,⁵ or as directed by the court on an application made by a party (or intending party).⁶ In the latter case, the court will need to consider whether to make a representation order and this will often require an interlocutory hearing.
- 10.7 The language of HCR 4.24 is sparse, referring to the ability of a person to bring a proceeding “on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding”. When considering an application for a representation order, a key focus for courts is whether the same interest test is met. As we discussed in Chapter 3, the courts have developed a flexible approach to this test which aims to facilitate use of the rule. Courts will also make a preliminary assessment of the merits of a claim. We expand on these points in our discussion of the threshold legal test later in this chapter.

Class actions regimes with certification

- 10.8 Certification of a class action is required in the United States, Canada and the United Kingdom Competition Appeal Tribunal. We briefly outline the certification requirements for each jurisdiction below, with more detail in our discussion on threshold legal tests.

² 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 582 (noting Australia and Sweden as jurisdictions without certification).

³ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 36.

⁴ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 36.

⁵ High Court Rules 2016, r 4.24(a). Consent may be given after the proceedings have been filed: *Visini v Cadman* [2012] NZCA 122, (2012) 21 PRNZ 70 at [20]. However, the proceeding may not be allowed to continue as a representative action if a court later considers that those consenting do not have the necessary common interest: *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [66]–[67]. See also *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005 at [183] (“... consent is not decisive. The Court must be satisfied that there is a common interest”).

⁶ High Court Rules 2016, r 4.24(b).

- 10.9 As the “home of the class action” the United States’ use of a certification requirement has been influential.⁷ There are two parts to the certification test in the United States. First, the claim must meet the requirements of numerosity, commonality, typicality, and adequacy of representation.⁸ Second, the claim must fit into one of the four categories of class action:⁹
- (a) Where it is necessary to avoid the risk of inconsistent or varying adjudications or adjudications adversely affecting non-party class members.
 - (b) Where an individual judgment would be likely to dispose of the interests of the class or substantially impair their ability to protect their interests.
 - (c) A claim for injunctive or declaratory relief.
 - (d) One in which common questions predominate and class action is superior to other methods of adjudication.

If the case satisfies these requirements the court may issue an order certifying it as a class action.¹⁰

- 10.10 The Ontario Law Reform Commission (OLRC) recommended certification in its 1982 report on class actions, noting that the special nature of class actions required a “special judicial filter to weed out” inappropriate cases.¹¹ In 2019, the Law Commission of Ontario (LCO), the OLRC’s successor, endorsed the role of certification, going as far as saying “the debate is not about whether there is a need for a certification test, but rather what form that test should take”.¹² Certification requirements in Canada are relatively uniform across the common law jurisdictions, where the courts focus on five requirements. The case must disclose a cause of action, have an identifiable class, have a common question of law or fact, be the preferable procedure and have an adequate representative plaintiff.¹³ One notable difference is the Ontario class actions regime, which was amended in 2020 to require a class action to be the superior means of determining the claims, as well as requiring the common questions of fact and law predominate over the individual issues.

⁷ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 9.

⁸ United States Federal Rules of Civil Procedure, r 23(a).

⁹ United States Federal Rules of Civil Procedure, r 23(b). For further discussion, see William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:1].

¹⁰ United States Federal Rules of Civil Procedure, r 23(b).

¹¹ Ontario Law Reform Commission *Report on Class Actions* (Volume I, 1982) at 281.

¹² Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 38.

¹³ See Federal Courts Rules SOR/98-106, r 334.16(1); Class Proceedings Act SA 2003 c C-16.5, s 5(1); Class Proceedings Act RSBC 1996 c 50, s 4(1); The Class Proceedings Act CCSM 2002 c C-130, s 4; Class Proceedings Act RSNB 2011 c 125, s 6(1); Class Actions Act SNL 2001 c C-18.1, s 5(1); Class Proceedings Act SNS 2007 c 28, s 7(1); Class Proceedings Act SO 1992 c 6, s 5(1); and The Class Actions Act SS 2001 c C-12.01, s 6(1).

- 10.11 Certification is also a prerequisite for class actions brought in the civil law jurisdiction of Québec, although it is termed ‘authorisation’.¹⁴ Authorisation may be granted if:¹⁵
- (a) the class members’ claims raise identical, similar or related issues of law or fact;
 - (b) the facts alleged appear to justify the conclusions sought;
 - (c) the composition of the class makes it difficult or impracticable to use other methods to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
 - (d) the representative plaintiff is in a position to properly represent the class.
- 10.12 The Supreme Court of Canada has observed that certification is not an assessment of “whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action”.¹⁶ The common law regimes provide that an order certifying a class action is not a determination of the merits.¹⁷
- 10.13 There is also a certification requirement for class actions in the United Kingdom Competition Appeal Tribunal.¹⁸ The United Kingdom Government concluded that certification was an essential part of the “strong safeguards” which would be needed for any opt-out system.¹⁹ The Tribunal may only certify an action where it is satisfied of the adequacy of the representative plaintiff and the claims meet certain eligibility criteria.²⁰ We discuss the test for assessing the representative plaintiff in Chapter 11. Claims will be eligible if they are brought on behalf of an identifiable class of persons, raise common issues and are suitable to be brought in collective proceedings.²¹
- 10.14 When considering whether the claims are suitable to be brought as a class action, the Tribunal must take into account:²²
- (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

¹⁴ Code of Civil Procedure CQLR c C-25.01, art 574. Note that in Québec, authorisation takes place prior to the filing of the claim. This is unlike common law class action proceedings in Canada and other jurisdictions where certification is sought after the proceeding is filed.

¹⁵ Code of Civil Procedure CQLR c C-25.01, art 575.

¹⁶ *Hollick v Toronto (City)* 2001 SCC 68, [2001] 3 SCR 158 at [16].

¹⁷ Class Proceedings Act SA 2003 c C-16.5, s 6(2); Class Proceedings Act RSBC 1996 c 50, s 5(7); The Class Proceedings Act CCSM 2002 c C-130, s 5(2); Class Proceedings Act RSNB 2011 c 125, s 7(2); Class Actions Act SNL 2001 c C-18.1, s 6(2); Class Proceedings Act SNS 2007 c 28, s 8(2); Class Proceedings Act SO 1992 c 6, s 5(5); and The Class Actions Act SS 2001 c C-12.01, s 7(2). See also Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 38.

¹⁸ The Competition Appeal Tribunal Rules 2015 (UK). The Court may only certify the action, according to r 77(1), if it meets the requirements of rr 78 and 79.

¹⁹ Department for Business, Innovation and Skills *Private Actions in Competition Law: A consultation on options for reform – government response* (January 2013) at [5.13] and [5.35]–[5.37].

²⁰ The Competition Appeal Tribunal Rules 2015 (UK), r 77(1).

²¹ The Competition Appeal Tribunal Rules 2015 (UK), r 79(1). See also *Competition Appeal Tribunal Guide to Proceedings* (2015) at [6.37].

²² The Competition Appeal Tribunal Rules 2015 (UK), r 79(2). The Tribunal may also take into account “all matters it thinks fit”.

- (b) the costs and benefits of the proceedings;
 - (c) whether separate claims have already been commenced by class members;
 - (d) the size and nature of the class;
 - (e) whether it is possible to determine whether a person is a member of the class;
 - (f) whether the claims are suitable for an aggregate award of damages; and
 - (g) the availability of any alternative dispute resolution or other means of resolving the dispute.
- 10.15 The proposed representative plaintiff must also be able to demonstrate the claim has a “real prospect of success”.²³

Approach in Australia

- 10.16 None of the Australian class actions regimes have a certification requirement. The Australian Law Reform Commission (ALRC) strongly discouraged a certification requirement in its 1988 report.²⁴ It observed that certification in the United States and Québec had often become “more complex and taken more time than the hearing of the substantive issues” and that and reliance on court discretion resulted in frequent appeals, which caused delay and expense.²⁵ The ALRC considered that so long as the defendant had the right to challenge the validity of the class action procedure at any time and adequate notice was given to class members, there was “no value in imposing an additional costly procedure” such as certification.²⁶ In 2018 both the ALRC and the Victorian Law Reform Commission (VLRC) expressed the view that certification was not necessary for Australian class actions.²⁷ The VLRC considered that a certification requirement would inhibit access to justice by increasing pre-trial complexities and increasing cost and delay. In its view, courts had sufficient powers to manage class actions efficiently and prevent unsuitable class actions from progressing.²⁸ The ALRC said it remained unpersuaded that introducing a certification procedure would enhance class action practice and procedure.²⁹

²³ *Merricks v Mastercard Inc* [2019] EWCA Civ 674 at [44]; and The Competition Appeal Tribunal Rules 2015, r 72(2)(h).

²⁴ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [147].

²⁵ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [146].

²⁶ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [146]–[147]. See also Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 25.

²⁷ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.48]; and Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.57]–[4.59]. The Western Australian Law Reform Commission also did not recommend certification: Law Reform Commission of Western Australia *Representative Proceedings* (LRCWA R103, 2015) at [5.92].

²⁸ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.58].

²⁹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.48].

- 10.17 The Australian regimes do, however, provide mechanisms which allow a defendant to challenge the use of the class action procedure on certain grounds.³⁰ Courts may make an order discontinuing a class action proceeding where:
- (a) there are insufficient class members;³¹ or
 - (b) where the costs of distributing any money paid to class members would be excessive in regard to the total value of the claim;³² or
 - (c) it is in the interests of justice to do so because:³³
 - (i) the costs of a class action are likely to be greater than if it were conducted individually; or
 - (ii) all the relief sought can be obtained by an alternative means; or
 - (iii) a class action will not provide an efficient and effective means of managing the class members' claims; or
 - (iv) it is otherwise inappropriate for the claims to be pursued as a class action.
- 10.18 In New South Wales, Queensland and Tasmania, the use of a class action procedure may also be challenged where “a representative party is not able to adequately represent the interests of the group”.³⁴
- 10.19 Despite the ALRC’s concerns about certification, the courts’ relatively extensive powers to discontinue class actions have been described as “de facto certification”.³⁵

Advantages and disadvantages of certification.

- 10.20 There are two primary advantages of certification. First, it promotes compliance with the rules and objectives of a jurisdiction’s class actions regime. Second, it protects the interests of class members and defendants.
- 10.21 These advantages were identified by the ALRC, which described the objectives of certification as ensuring compliance with the commencement requirements such

³⁰ The Court may also make some of these orders on its own motion. For example, see Federal Court of Australia Act 1976 (Cth), ss 33L and 33N; Civil Procedure Act 2005 (NSW), ss 164 and 166; Civil Proceedings Act 2011 (Qld), ss 103I and 103K; and Supreme Court Civil Procedure Act 1932 (Tas), ss 73 and 75, which allow the court to make orders on their own motion to discontinue a class action where there are fewer than seven class members and where it is in the interests of justice to do so. In Victoria, the court can only make discontinuation orders on their own motion where there are less than seven group members: Supreme Court Act 1986 (Vic), s 33L.

³¹ Federal Court of Australia Act 1976 (Cth), s 33L; Civil Procedure Act 2005 (NSW), s 164; Civil Proceedings Act 2011 (Qld), s 103I; Supreme Court Civil Procedure Act 1932 (Tas), s 73; and Supreme Court Act 1986 (Vic), s 33L.

³² Federal Court of Australia Act 1976 (Cth), s 33M; Civil Procedure Act 2005 (NSW), s 165; Civil Proceedings Act 2011 (Qld), s 103J; Supreme Court Civil Procedure Act 1932 (Tas), s 74; and Supreme Court Act 1986 (Vic), s 33M.

³³ Federal Court of Australia Act 1976 (Cth), s 33N; Civil Procedure Act 2005 (NSW), s 166; Civil Proceedings Act 2011 (Qld), s 103K; Supreme Court Civil Procedure Act 1932 (Tas), s 75; and Supreme Court Act 1986 (Vic), s 33N.

³⁴ Civil Procedure Act 2005 (NSW), s 166; Civil Proceedings Act 2011 (Qld), s 103K; and Supreme Court Civil Procedure Act 1932 (Tas), s 75.

³⁵ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 100; Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 27; and Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 44–45.

numerosity or commonality and protecting the interests of class members and defendants.³⁶ The United Kingdom Civil Justice Council similarly explained that certification plays an important role in protecting the public interest in effective court management and ensuring that parties to the litigation are treated fairly.³⁷ Certification enables the courts to act as a “diligent gatekeeper” of a class action.³⁸ Having a certification stage may also provide an opportunity for the courts to consider how competing class actions should be managed.³⁹

- 10.22 Certification is particularly important in opt-out class actions regimes. It provides a procedural protection for class members who are not actively involved in the litigation and may not even be aware of it. It is also important where a defendant does not actively challenge the plaintiff’s case because otherwise potential deficiencies in the claim may not come to light at an early stage.
- 10.23 Certification may also help mitigate the risks of inadequate representation by representative plaintiffs, possible conflicts of interests between class members and imprecise class definitions which may risk binding too wide a class.⁴⁰ It has also been suggested that certification may facilitate settlement.⁴¹
- 10.24 There has been some dissatisfaction with the lack of certification in Australia, with one judge noting the “disturbing trend” of “numerous interlocutory applications” occurring in Australian class actions.⁴² Such concerns cast some doubt on the ALRC’s view that not requiring certification would avoid unnecessary delays and expense.⁴³ A small number of submitters to the VLRC’s review suggested that a certification stage should be introduced. These submitters said certification could provide a useful point early in the proceedings to deal with procedural matters such as the adequacy of the representative plaintiff, competing class actions and any issues associated with the use of litigation funding.⁴⁴
- 10.25 However, an empirical study of the first 17 years of Australian federal class actions found that the lack of a certification test had not led to a proliferation of additional interlocutory

³⁶ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [145].

³⁷ Civil Justice Council *“Improving Access to Justice through Collective Actions”*: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 152–153.

³⁸ Civil Justice Council *“Improving Access to Justice through Collective Actions”*: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 153.

³⁹ The Australian Law Reform Commission noted that submissions in support of a certification requirement focused on certification as a means of dealing with competing class actions: Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.46].

⁴⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 24.

⁴¹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 25.

⁴² *Bright v Femcare Ltd* [2002] FCAFC 243, (2002) 195 ALR 574 at [160].

⁴³ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 27.

⁴⁴ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.38]–[4.40].

applications.⁴⁵ It also found that for every 10 class actions challenged by a defendant (through a discontinuation provision), eight were allowed to proceed as class actions.⁴⁶ Moreover, only about one-quarter of class actions were subject to discontinuance applications.⁴⁷ It has been noted that while there were initially a number of interlocutory applications, the regime has now matured and is now more settled and streamlined.⁴⁸

- 10.26 The primary disadvantage of certification is that it adds cost and delay to class action proceedings.⁴⁹ Certification has been described as “the chief battle of the litigation”,⁵⁰ and in some instances can turn into a “mini-trial of the merits”.⁵¹
- 10.27 The ALRC suggested that certification is unnecessary because class members’ interests can be adequately protected through other ways, such as the right to opt-out, ensuring adequate notice is given to class members and the ability to apply to replace the representative plaintiff.⁵²
- 10.28 Lee J, a judge of the Australian Federal Court writing extra-judicially, identifies three important advantages of relying on discontinuation powers rather than certification. First, discontinuation powers are only invoked where there is a perceived problem and therefore avoids wasting costs where there is no issue.⁵³ Second, discontinuation challenges can occur at different stages of a proceeding and so can respond more flexibly to issues as they arise.⁵⁴ Third, the flexibility of these provisions means they “transcend ‘problems’ with the proceedings” and provide a useful case management tool even after common issues have been resolved.⁵⁵

⁴⁵ 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. For a brief summary of this article see Vince Morabito “Empirical Perspectives on 25 Years of Class Actions” in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) 43.

⁴⁶ 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 601.

⁴⁷ 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.

⁴⁸ Michael Lee “Certification of Class Actions: A ‘Solution’ In Search of a Problem?” (paper presented to the Commercial Law Association Seminar on Class Actions – Different Perspectives, 20 October 2017) at 12.

⁴⁹ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [146].

⁵⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 25.

⁵¹ Deborah R Hensler “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally” (2017) 65 U Kan L Rev 965 at 972.

⁵² Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [147].

⁵³ Michael Lee “Certification of Class Actions: A ‘Solution’ In Search of a Problem?” (paper presented to the Commercial Law Association Seminar on Class Actions – Different Perspectives, 20 October 2017) at 10.

⁵⁴ Michael Lee “Certification of Class Actions: A ‘Solution’ In Search of a Problem?” (paper presented to the Commercial Law Association Seminar on Class Actions – Different Perspectives, 20 October 2017) at 10.

⁵⁵ Michael Lee “Certification of Class Actions: A ‘Solution’ In Search of a Problem?” (paper presented to the Commercial Law Association Seminar on Class Actions – Different Perspectives, 20 October 2017) at 11.

QUESTION

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)?

THRESHOLD LEGAL TEST FOR CLASS ACTIONS

- 10.29 In this section, we discuss the threshold legal tests that courts apply when deciding whether to certify a class action or, in the case of Australia, discontinue a class action. These are key gatekeeping provisions. They play an important role in protecting class members, defendants and the courts from wasted time and expense. The tests applying to certification has been described as a particularly controversial and partisan topic as different tests can advance or frustrate different policy goals and interests.⁵⁶
- 10.30 Key tests in overseas jurisdictions include:
- (a) Numerosity.
 - (b) Commonality, which sometimes includes a predominance test.
 - (c) Preferability or superiority.
 - (d) A preliminary test of the merits or cost-benefit analysis.
 - (e) A litigation plan.
 - (f) An assessment of any litigation funding arrangements.
 - (g) Adequacy of the representative plaintiff.
- 10.31 We discuss these below, along with the approach that is currently taken in Aotearoa New Zealand to these issues when representative actions are brought under HCR 4.24. We note that the issue of the adequacy of the representative plaintiff is discussed in Chapter 11.
- 10.32 When considering a particular certification test that exists in another jurisdiction, it is important to be aware of how it fits with the jurisdiction's other certification requirements and rules applying to its class actions. For example, while the United States certification criteria can be seen as more stringent than some other jurisdictions, its approach to damages and lack of adverse costs could be said to favour plaintiffs.⁵⁷ Another example is the Ontario class actions regime, where legislators decided to balance the lack of preliminary merits test with an adverse costs regime.⁵⁸ One of our proposed principles for a class actions regime is balancing the interests of plaintiffs and defendants (as we discussed in Chapter 9) and it is important that the certification test as a whole is fair to both plaintiffs and defendants.

⁵⁶ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 36.

⁵⁷ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 47.

⁵⁸ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 38.

Numerosity

10.33 A numerosity requirement imposes a minimum class size as a threshold to justify the use of a class action mechanism. The OLRC described this requirement as essential given that “fundamental to the concept of class actions is the idea that there has been a mass wrong and that relief in the form of a mass remedy is sought”.⁵⁹ There are four different approaches to numerosity:⁶⁰

- (a) **A descriptive numerosity requirement.** A class actions regime could require the class to consist of “numerous persons” or use a similar descriptive requirement. This test was recommended by the OLRC in 1982 but was not adopted by the legislature.⁶¹ While not a class actions regime, a descriptive numerosity requirement is also used for Group Litigation Orders in England and Wales which requires “a number of claims”.⁶²
- (b) **A minimum specified number of plaintiffs.** The Australian class actions regimes specify that a class action may only be commenced where it is shown that seven or more persons have claims against the same person.⁶³ Despite this requirement, Australian courts have a wide discretion to permit a class action with fewer than seven participants to continue.⁶⁴ The ALRC recognised that the use of any minimum figure in this context is “arbitrary”.⁶⁵ Rachael Mulheron criticises both the “artificiality” of relying on a specified minimum number and the lack of cohesion between the apparently strict test and the wide discretion to permit actions which do not meet the test.⁶⁶ She observes that the reluctance of Australian courts to exercise their power to discontinue actions with fewer than seven members suggests the threshold may not actually be setting an effective minimum threshold for numerosity.⁶⁷
- (c) **Impracticability of joinder.** Numerosity in the United States is determined by asking whether “the class is so numerous that joinder of all members is impracticable”.⁶⁸ There is no ‘magic number’ that will satisfy this requirement nor is the size of the class

⁵⁹ Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 326.

⁶⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 116.

⁶¹ Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 331. Instead, the legislature adopted a requirement that there be “an identifiable class of two or more persons”: Class Proceedings Act SO 1992 c 6, s 5(1)(b).

⁶² The Civil Procedure Rules 1998 (UK), r 19.11(1).

⁶³ Federal Court of Australia Act 1976 (Cth), s 33C(1)(a); Civil Procedure Act 2005 (NSW), s 157(1)(a); Civil Proceedings Act 2011 (Qld), s 103B(1)(a); Supreme Court Civil Procedure Act 1932 (Tas), s 66(1)(a); and Supreme Court Act 1986 (Vic), s 33C(1)(a).

⁶⁴ Federal Court of Australia Act 1976 (Cth), s 33L; Civil Procedure Act 2005 (NSW), s 164; Civil Proceedings Act 2011 (Qld), s 103I; Supreme Court Civil Procedure Act 1932 (Tas), s 73; and Supreme Court Act 1986 (Vic), s 33L.

⁶⁵ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [140]. For instance, the Australian Law Reform Commission noted that:

... efficiency may be achieved by grouping as few as two claims but in some cases other procedures such as joinder may be more appropriate if there are only a small number of group members.

⁶⁶ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 119–120.

⁶⁷ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 121.

⁶⁸ United States Federal Rules of Civil Procedure, r 23(a)(1).

alone necessarily determinative.⁶⁹ However, as a general rule, a class of fewer than 20 will have difficulty being certified (absent other reasons why joinder is impractical), while classes of over 40 raise a presumption that joinder is impractical.⁷⁰ There are also some federal statutes which have specific numerosity requirements for particular class action claims in federal courts.⁷¹ Rachael Mulheron has commented that other class actions regimes have avoided this approach to numerosity because of its potential to cause confusion and the disparity as to the size of class that would satisfy the requirement.⁷²

- (d) **A bare threshold test.** The Canadian common law jurisdictions only require “an identifiable class of two or more persons”.⁷³ Similarly, class actions brought in the United Kingdom Competition Appeal Tribunal must consist of “two or more claims”.⁷⁴ The Manitoba Law Reform Commission has observed that this approach “all but remove[s] a numerosity requirement”.⁷⁵ However, it has the benefit of simplicity. It also ensures that, provided there is more than a single identifiable claimant, small yet beneficial class actions are not barred.⁷⁶ It has been said that this low numerosity threshold is unlikely to “open the floodgates of class litigation” given the other certification criteria which can screen out claims.⁷⁷

10.34 In Aotearoa New Zealand, representative actions have proceeded with a range of class sizes, from as few as three group members to as many as 65,000 group members.⁷⁸ The 2019 Rules Committee’s draft proposal to amend the High Court Rules to provide guidance for representative actions included the impracticability of joinder as a threshold

⁶⁹ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:11]–[§3:12]. For example, courts have certified classes with as few as 16 members and declined to certify a class of 258 members.

⁷⁰ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:12]. For those in the ‘grey area’ of 20-40 class members, the courts will be guided by other factors when considering whether joinder is impractical, including judicial economy resulting from multiple cases, where class members are located, financial resources of class members and ability of class members to bring their own claims.

⁷¹ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:17] (referring to the Magnuson-Moss Consumer Product Warranty Act 15 USC §§ 2301 et seq and the Class Action Fairness Act 28 USC §§ 1332(d), 1453 and 1711–1715 which requires 100 plaintiffs to be joined for certain class action claims).

⁷² Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 125–126. Problems appear to arise in particular where “some courts treat the requirement as a simple test of numerosity, whereas other courts consider a much wider range of factors”: at 129.

⁷³ Federal Courts Rules SOR/98-106, r 334.16(1)(b); Class Proceedings Act SA 2003, c C-16.5, s 5(1)(b); Class Proceedings Act RSBC 1996 c 50, s 4(1)(b); The Class Proceedings Act CCSM 2002 c C-130, s 4(b); Class Proceedings Act RSNB 2011 c 125, s 6(1)(b); Class Actions Act SNL 2001 c C-18.1, s 5(1)(b); Class Proceedings Act SNS 2007 c 28, s 7(1)(b); and Class Proceedings Act SO 1992 c 6, s 5(1)(b). Saskatchewan legislation only requires “an identifiable class” and does not impose a two member minimum: The Class Actions Act SS 2001 c C-12.01, s 6(1)(b).

⁷⁴ Competition Act 1998 (UK), s 47B(1).

⁷⁵ Manitoba Law Reform Commission *Class Proceedings* (R100, 1999) at 49.

⁷⁶ Manitoba Law Reform Commission *Class Proceedings* (R100, 1999) at 50.

⁷⁷ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 128.

⁷⁸ See *Cadman v Visini* (2011) 3 NZTR 21-011 (HC) and *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC).

criterion.⁷⁹ The Rules Committee’s 2009 draft Class Actions Bill only permitted class actions where there were seven or more people with claims against the defendant(s).⁸⁰

QUESTION

Q20

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

Commonality

- 10.35 Commonality requires the determination of a question of fact or law that is common among all the class members. Requiring a “nexus of factual or legal issues” between individual claims in order for a case to proceed as a class action is said to be a way of balancing a plaintiff’s wish for a group hearing with a defendant’s desire to have class claims treated individually.⁸¹ Commonality is a necessary element of a class action because the advantages of group litigation can only be gained if class members share a common question of fact and law.⁸² Some jurisdictions also allow sub-classes to deal with issues that are not common to the entire class.⁸³
- 10.36 A key difference between jurisdictions is how significant the common issues must be, with some jurisdictions requiring the common issues to predominate over individual issues or to be substantial. The question of whether there is a significant common issue is interrelated with the issue of whether a class action is the preferable method of resolving the issue. As we discuss below, Canadian jurisdictions consider the question of predominance under the preferability test.

United States

- 10.37 In the United States, federal class actions require “questions of law or fact common to the class”.⁸⁴ The courts look for at least one question of law or fact, the resolution of which will affect all or a significant number of class members.⁸⁵ This requirement is not usually contentious and is generally met by establishing there is a single issue of law or fact that is common across all class members.⁸⁶ In its 2011 decision in *Wal-Mart Stores Inc v Dukes*,

⁷⁹ Rule 4.66(a) of the Draft High Court Rules (Representative Proceedings) Amendment Rules 2019 (PCO 20692/4.2). This provided that the Rules would apply if “the persons comprising the class that the plaintiff proposes to represent are so numerous that, having regard to the nature of the claim, joinder of all members of the class would be impractical”.

⁸⁰ Draft Class Actions Bill 2009 (Parliamentary Counsel Office, PCO 8247/2.13), cl 6(1)(a).

⁸¹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 165.

⁸² William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:18].

⁸³ See for example Class Proceedings Act SO 1992 c 6, s 5(2); Federal Court of Australia Act 1976 (Cth), s 33Q(2); and The Competition Appeal Tribunal Rules 2015 (UK), r 75(3).

⁸⁴ United States Federal Rules of Civil Procedure, r 23(a)(2).

⁸⁵ *Wal-Mart Stores Inc v Dukes* 564 US 338 (2011).

⁸⁶ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:18].

the Supreme Court took a stricter approach to commonality.⁸⁷ This approach has been criticised as being likely to limit the claims that can be brought as class actions.⁸⁸ However, it has been described as an exceptional case and the Court's approach to commonality may have been partly due to the lack of a predominance requirement for that type of claim.⁸⁹

- 10.38 In cases brought under the United States Federal Rules of Civil Procedure (FRCP) 23(b)(3), which are often known as 'money damages' class actions, the plaintiff must also show that the common questions "predominate over any questions affecting only individual members".⁹⁰ Predominance is said to be "the most hotly litigated" of the certification factors applying to claims under FRCP 23(b)(3) and the factor upon which certification usually hinges.⁹¹ The role of the predominance test is to ascertain "whether proposed classes are sufficiently cohesive to warrant adjudication by representation".⁹² The predominance requirement is "far more demanding" than the commonality requirement.⁹³ It considers not just the existence of common issues, but whether these are more prevalent than non-common issues.⁹⁴ Common questions will not predominate where "a great deal of individualised proof" or "a number of legal points" would need to be established after common questions are resolved.⁹⁵ The predominance test involves a pragmatic assessment and it is not a numerical test.⁹⁶
- 10.39 In the United States, the commonality requirement is also linked to the requirement that a representative plaintiff's claim be typical of the class.⁹⁷ We discuss the typicality requirement in our discussion of the representative plaintiff in Chapter 11.

⁸⁷ *Wal-Mart Stores Inc v Dukes* 564 US 338 (2011). The Court stated that it "requires the plaintiff to demonstrate that the class members have suffered the same injury" and not merely having "suffered a violation of the same provision of law. The Court said the claims must depend on a "common contention" and determination of this must "resolve an issue that is central to the validity of each one of the claims in one stroke".

⁸⁸ See for example Marcia L McCormick "Implausible Injuries: *Wal-Mart v Dukes* and the Future of Class Actions and Employment Discrimination Cases" (2013) 62 DePaul L Rev 711 at 728–729.

⁸⁹ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:18] and [§3:22]. The claim was brought as a Rule 23(b)(2) class action. Predominance is only a requirement for claims brought under r 23(b)(3).

⁹⁰ United States Federal Rules of Civil Procedure, r 23(b)(3).

⁹¹ Allan Erbsen "'From 'Predominance' to 'Resolvability': A New Approach to Regulating Class Actions'" (2005) 58 Vand L Rev 995 at 1056.

⁹² *Amchem Products Inc v Windsor* 521 US 591 (1997) at 623.

⁹³ *Amchem Products Inc v Windsor* 521 US 591 (1997) at 623–624.

⁹⁴ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:51].

⁹⁵ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:50].

⁹⁶ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:51].

⁹⁷ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:26].

Canada

- 10.40 All Canadian jurisdictions require claims that raise common issues,⁹⁸ and the threshold for commonality is generally low.⁹⁹ However, in October 2020 Ontario introduced a predominance requirement into its certification test. In order to show that a class action is the preferable procedure for resolving the common issues, the common questions of law or fact must predominate over individual issues.¹⁰⁰ This new predominance requirement has been criticised as likely to make many types of mass wrongs difficult or impossible to litigate as class actions in Ontario.¹⁰¹ Critics have pointed to a number of successful class action cases which could not have been pursued as a class action if there had been a predominance requirement, including litigation about institutional abuse, unpaid overtime and professional negligence.¹⁰² Conversely, supporters of the changes have described it as a “proportionate approach, aimed at reining in the most unworthy or less meritorious class actions”.¹⁰³
- 10.41 In other Canadian jurisdictions, whether the common questions predominate over individual questions is a factor relevant to the preferability enquiry, rather than a mandatory requirement.¹⁰⁴ The other Canadian statutes specifically provide that the commonality requirement may be met whether or not the common issues predominate over individual issues.¹⁰⁵
- 10.42 The Canadian statutes also list certain matters which the court cannot solely rely on to refuse certification. These include where individual assessment of damages will be required after determination of the common issues, the relief relates to separate

⁹⁸ In the common law provinces “common issues” means “(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts”: Federal Class Proceedings Act SA 2003 c C-16.5, s 1; Class Proceedings Act RSBC 1996 c 50, s 1; The Class Proceedings Act CCSM 2002 c C-130, s 1; Class Proceedings Act RSNB 2011 c 125, s 1; Class Actions Act SNL 2001 c C-18.1, s 2; Class Proceedings Act SNS 2007 c 28, s 1; and The Class Actions Act SS 2001 c C-12.01, s 2. In Québec this requirement is phrased as a requirement that “the claims of the members of the class raise identical, similar or related issues of law or fact”: Code of Civil Procedure CQLR c C-25.01, art 575.

⁹⁹ So long as the issue can be manageably resolved at the common issues trial the court can certify the action: Garry D Watson (ed) *Ontario Civil Procedure* (online ed, Thomson Reuters) at [R12§11].

¹⁰⁰ Class Proceedings Act SO 1992 c 6, s 5(1.1).

¹⁰¹ Letter from Andrew Pinto (Chair of the Law Commission of Ontario) to Doug Downey (Attorney General of Ontario) regarding the Class Proceedings Amendments Bill (22 January 2020) at 2. See also the comments of Nye Thomas (Executive Director of the Law Commission of Ontario) to the Standing Committee on Justice Policy concerning the Smarter and Stronger Justice Bill located in (12 June 2020) 19 JP-496.

¹⁰² Class Action Clinic: Windsor Law “Submission to the Standing Committee on Justice Policy on Bill 161” (4 March 2020) at 4.

¹⁰³ Comments of Peter Sahagian (General Counsel, KPMG) to the Standing Committee on Justice Policy concerning the Smarter and Stronger Justice Bill located in (12 June 2020) 19 JP-480.

¹⁰⁴ Federal Courts Rules SOR/98-106, r 334.16(2)(a); Class Proceedings Act SA 2003 c C-16.5, s 5(2)(a); Class Proceedings Act RSBC 1996 c 50, s 4(2)(a); Class Proceedings Act RSNB 2011 c 125, s 6(2)(a); Class Actions Act SNL 2001 c C-18.1, s 5(2)(a); and Class Proceedings Act SNS 2007 c 28, s 7(2)(a). Note that the Manitoba and Saskatchewan legislation provide that when considering commonality, it is not necessary for the common issues to predominate over individual issues: see The Class Proceedings Act CCSM 2002 c C-130, s 4(c); and The Class Actions Act SS 2001 c C-12.01, s 6(1)(c).

¹⁰⁵ Federal Courts Rules SOR/98-106, r 334.16(1)(c); Class Proceedings Act SA 2003 c C-16.5, s 5(1)(c); Class Proceedings Act RSBC 1996 c 50, s 4(1)(c); The Class Proceedings Act CCSM 2002 c C-130, s 4(c); Class Proceedings Act RSNB 2011 c 125, s 6(1)(c); Class Actions Act SNL 2001 c C-18.1, s 5(1)(c); Class Proceedings Act SNS 2007 c 28, s 7(1)(c); and The Class Actions Act SS 2001 c C-12.01, s 6(1)(c).

contracts, different remedies are sought for different class members or where there is a sub-class whose members have different claims or defences with common issues not shared by all class members.¹⁰⁶

Australia

- 10.43 In Australia, class members' claims must arise out of "the same, similar or related circumstances".¹⁰⁷ It is easier to meet the test where class members have the same or similar circumstances. When claims are only "related" they are seen as being on the "outer limits of eligibility".¹⁰⁸
- 10.44 It must also be established that the claims "give rise to a substantial common issue of law or fact".¹⁰⁹ Courts have not taken an overly legalistic approach to determining whether there is a common issue of law or fact and the provision has been construed in light of the objectives of the class actions regime.¹¹⁰ The approach to "substantial" initially caused some confusion, however the High Court of Australia has clarified it means an issue which is "real or of substance" not "ephemeral or nominal", but not one of "special significance".¹¹¹
- 10.45 There do not appear to be any cases in which a representative plaintiff has established one of these commonality tests but not the other.¹¹²

United Kingdom Competition Appeal Tribunal

- 10.46 In the United Kingdom Competition Appeal Tribunal, a claim must "raise common issues".¹¹³ This is defined as "the same, similar or related issues of fact or law," which is the same language used in the Australian regimes.¹¹⁴ However, this approach seems clearer than the

¹⁰⁶ Federal Courts Rules SOR/98-106, r 334.18(a)–(c) and (e); Class Proceedings Act SA 2003 c C-16.5, s 8(a)–(c) and (e); Class Proceedings Act RSBC 1996 c 50, s 7(a)–(c) and (e); The Class Proceedings Act CCSM 2002 c C-130, s 7(a)–(c) and (e); Class Proceedings Act RSNB 2011 c 125, s 9(a)–(c) and (e); Class Actions Act SNL 2001 c C-18.1, s 8(a)–(c) and (e); Class Proceedings Act SNS 2007 c 28, s 10(a)–(c) and (e); and The Class Actions Act SS 2001 c C-12.01, s 10(a)–(c) and (e).

¹⁰⁷ Federal Court of Australia Act 1976 (Cth), s 33C(1)(b); Civil Procedure Act 2005 (NSW), s 157(1)(b); Civil Proceedings Act 2011 (Qld), s 103B(1)(b); Supreme Court Civil Procedure Act 1932 (Tas), s 66(1)(b); and Supreme Court Act 1986 (Vic), s 33C(1)(b).

¹⁰⁸ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at 69 citing *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 (FCA) at 404–405.

¹⁰⁹ Federal Court of Australia Act 1976 (Cth), s 33C(1)(c); Civil Procedure Act 2005 (NSW), s 157(1)(c); Civil Proceedings Act 2011 (Qld), s 103B(1)(c); Supreme Court Civil Procedure Act 1932 (Tas), s 66(1)(c); and Supreme Court Act 1986 (Vic), s 33C(1)(c).

¹¹⁰ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at 71.

¹¹¹ The High Court in *Wong v Silkfield Pty Ltd* [1999] HCA 48, (1999) 199 CLR 255 at [27]–[28]. In a later case, the Victorian Supreme Court described the word substantial as "protean": *Stojanovski v Australian Dream Homes Pty Ltd* [2015] VSC 404 at [45]. For further discussion see Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 115.

¹¹² Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 114.

¹¹³ The Competition Appeal Tribunal Rules 2015 (UK), r 79(1)(b).

¹¹⁴ The Competition Appeal Tribunal Rules 2015 (UK), r 73(2). See also the Competition Act 1998 (UK), s 47B(6).

Australian formulation as the “same, similar or related issues” requirement is definitional rather than being an additional factor.¹¹⁵

Aotearoa New Zealand

- 10.47 HCR 4.24 requires a person to bring a claim “on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding”. Courts have said the ‘same interest’ test is not a high threshold and that a liberal and flexible approach should be taken.¹¹⁶ It is sufficient if there is a significant common interest in the resolution of any question of law or fact arising in the proceeding.¹¹⁷ The court can grant a representative order even if it relates to only some of the issues in the claim and it is not necessary for the common question to completely resolve the case or the question of liability.¹¹⁸
- 10.48 It has been said that the flexible approach taken to the ‘same interest’ requirement has “significantly enhanced the ability of litigants to engage in group litigation in New Zealand”.¹¹⁹ An example of this is *Cridge v Studorp*, where HCR 4.24 has been used to bring claims notwithstanding some significant differences between individual class members’ claims.¹²⁰ However, the same interest requirement also helps to avoid creating an injustice for a defendant.¹²¹ Courts have also said that a representative action should not be allowed if it would deprive a defendant of a defence it could have relied on in individual proceedings or confer a right of action on a represented person who would not have been able to bring that claim in separate proceedings.¹²²
- 10.49 The Rules Committee’s 2019 draft proposal to amend the High Court Rules included a requirement for members of the represented group to have a common interest “in the determination of some substantial issue of law or fact” regardless of whether determining all the issues would require the court to make orders or give directions directions in respect of different parties.¹²³ The Rules Committee’s 2009 draft Class Actions Bill required the claims to be “in respect of, or arise out of, the same, similar or related circumstances” and for there to be “at least 1 substantial common issue of law or fact”.¹²⁴

¹¹⁵ See discussion in Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 114–115.

¹¹⁶ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(g)] and [11(h)]; *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [2] and [129]; and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [10]–[12] and [38].

¹¹⁷ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(d)]; and *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [51] per Elias CJ and Anderson J.

¹¹⁸ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(e)]; and *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [55] and [129]–[131].

¹¹⁹ Anthony Wicks “Class Actions in New Zealand: Is Legislation Still Necessary?” [2015] NZ L Rev 73 at 79.

¹²⁰ See Vicki Waye “Advantages and Disadvantages of Class Action Litigation (and its Alternatives)” (2018) 24 NZBLQ 109 at 115. *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 is a representative action alleging that faulty cladding systems manufactured by Studorp Ltd and James Hardie caused damage to the claimants’ homes.

¹²¹ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [41].

¹²² *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(i)].

¹²³ Rule 4.74(a) of the Draft High Court Rules (Representative Proceedings) Amendment Rules 2019 (PCO 20692/4.2).

¹²⁴ Draft Class Actions Bill 2009 (Parliamentary Counsel Office, PCO 8247/2.13), cl 6(1)(b)–(c).

QUESTIONS

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?

Preferability or superiority

- 10.50 Many jurisdictions require the courts to assess whether a class action is preferable or superior to other possible means of resolving the dispute between the claimants and the defendant(s).¹²⁵ These assessments generally involve the court exercising broad discretion. This broad discretion has been criticised as simply enabling courts to avoid certifying a class action.¹²⁶ However, it can provide an important control on the use of the class actions mechanism to help ensure that the high transaction costs typically associated with such actions are worth incurring. For instance, judicial review may be a preferable procedure in some circumstances.¹²⁷
- 10.51 In the United States, a plaintiff bringing a money damages class action must demonstrate that the class action procedure is "superior to other available methods for fairly and efficiently adjudicating the controversy".¹²⁸ The matters a court will take into account include class members' interests in controlling their own litigation, the nature and extent of any existing litigation on the matter by or against class members, whether it is desirable to concentrate the claims in one judicial forum and the likely difficulties in managing a class action.¹²⁹ The court will compare the proposed class action with other alternative mechanisms including multiple individual actions, joinder, the use of test cases and administrative proceedings.¹³⁰

¹²⁵ Note preferability and superiority appear to be used interchangeably: see Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 220.

¹²⁶ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 219.

¹²⁷ Ontario takes a comparatively restrictive approach in this area: see *Buffett v Attorney General for Ontario* (1998) 42 OR (3d) 53 (ONCJ); and Garry D Watson (ed) *Ontario Civil Procedure* (online ed, Thomson Reuters) at [R12§16].

¹²⁸ United States Federal Rules of Civil Procedure, r 23(b)(3). Note the preferability requirement does not apply to all United States class actions, only claims brought under r 23(b)(3) of the United States Federal Rules of Civil Procedure as opposed to r 23(b)(1) or (2).

¹²⁹ United States Federal Rules of Civil Procedure, r 23(b)(3). Note that while the rule states that these factors can be applied to both predominance and superiority, courts generally only apply these to the superiority test: William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:68].

¹³⁰ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:64].

- 10.52 The Canadian common law jurisdictions require the court to assess whether a class action would be the “preferable procedure” for the resolution of the common issues.¹³¹ A number of the regimes set out a non-exhaustive list of factors to be considered when assessing preferability.¹³² These factors include whether the common questions predominate over individual questions, whether the class action would involve claims that are litigated in other proceedings and whether other means of resolving the claims would be less practical or less efficient.
- 10.53 In 2020, the Ontario class actions legislation was amended to introduce a more stringent superiority requirement.¹³³ A class action now has to be “superior to all reasonably available means of determining the entitlement of the class members to relief ...”.¹³⁴ Additionally, as discussed above, the common issues must predominate over individual issues.¹³⁵ These amendments have been criticised as likely to reduce access to justice and worsen class action delays, inefficiencies and costs.¹³⁶ The superiority requirement has been criticised as raising the standard for certification considerably by requiring a class action to be capable of resolving the class members’ claims entirely and by putting the onus on the plaintiff to prove that none of the alternatives is superior.¹³⁷
- 10.54 When considering certification of a collective action, the United Kingdom Competition Appeal Tribunal must assess whether the claims are “suitable to be brought in collective proceedings”.¹³⁸ The factors the Tribunal must take into account when determining this include: whether the action is “an appropriate means for the fair and efficient resolution of the common issues”,¹³⁹ whether separate similar claims have already been commenced¹⁴⁰ and “the availability of alternative dispute resolution and any other means

¹³¹ Federal Courts Rules SOR/98-106, r 334.16(1)(d); Class Proceedings Act SA 2003 c C-16.5, s 5(1)(d); Class Proceedings Act RSBC 1996 c 50, s 4(1)(d); The Class Proceedings Act CCSM 2002 c C-130, s 4(d); Class Proceedings Act RSNB 2011 c 125, s 6(1)(d); Class Actions Act SNL 2001 c C-18.1, s 5(1)(d); Class Proceedings Act SNS 2007 c 28, s 7(1)(d); and The Class Actions Act SS 2001 c C-12.01, s 6(1)(d). The Québec class actions regime does not include a preferability requirement: Code of Civil Procedure CQLR c C-25.01, art 575.

¹³² The Federal Courts, Alberta, British Columbia, New Brunswick, Newfoundland & Labrador and Nova Scotia have an additional subsection in their certification provision providing a non-exhaustive list of factors to be considered when assessing preferability. See the Federal Courts Rules SOR/98-106, r 334.16(2); Class Proceedings Act SA 2003 c C-16.5, s 5(2); Class Proceedings Act RSBC 1996 c 50, s 4(2); Class Proceedings Act RSNB 2011 c 125, s 6(2); Class Actions Act SNL 2001 c C-18.1, s 5(2); and Class Proceedings Act SNS 2007 c 28, s 7(2).

¹³³ Smarter and Stronger Justice Act SO 2020 c 11, sch 4.

¹³⁴ Class Proceedings Act SO 1992 c 6, s 5(1.1).

¹³⁵ Class Proceedings Act SO 1992 c 6, s 5(1.1).

¹³⁶ Letter from Andrew Pinto (Chair of the Law Commission of Ontario) to Doug Downey (Attorney General of Ontario) regarding the Class Proceedings Amendments Bill (22 January 2020) at 2. See also the comments of Nye Thomas (Executive Director of the Law Commission of Ontario) to the Standing Committee on Justice Policy concerning the Smarter and Stronger Justice Bill located in (12 June 2020) 19 JP-496.

¹³⁷ Class Action Clinic: Windsor Law “Submission to the Standing Committee on Justice Policy on Bill 161” (4 March 2020) at 2.

¹³⁸ The Competition Appeal Tribunal Rules 2015 (UK), r 79(1)(c).

¹³⁹ The Competition Appeal Tribunal Rules 2015 (UK), r 79(2)(a).

¹⁴⁰ The Competition Appeal Tribunal Rules 2015 (UK), r 79(2)(c).

of resolving the dispute”.¹⁴¹ These preferability requirements were considered key to ensuring certification provided an effective safeguard in an opt-out class actions regime.¹⁴²

- 10.55 While Australia does not have a preferability criterion as a part of a commencement test, courts have a discretionary power to order the discontinuation of a class action if it is in the interests of justice to do so.¹⁴³ The grounds for this include where the relief sought can be obtained in a proceeding other than a class action and where a class action “will not provide an efficient and effective means” of dealing with the claims of class members.¹⁴⁴ Because the court must have regard to other procedures for bringing the claim, there are similarities between this power and preferability tests in other jurisdictions.¹⁴⁵
- 10.56 In Aotearoa New Zealand, while there is no express requirement to consider whether a representative action is the preferable or superior way of bringing a claim, courts may often consider other procedures available for bringing the proceeding. For example, in *Cridge v Studorp*, the Court of Appeal commented it was satisfied that a representative order would better achieve the objectives of the High Court Rules than the test case procedure advocated by the defendant. It noted that a test case would involve the same work and judicial resources as a representative action but without the tangible benefit of a decision binding on all.¹⁴⁶ In *Southern Response Earthquake Services v Southern Response Unresolved Claims Group*, the Court of Appeal commented that while it could be argued that all of the claimants should be joined as plaintiffs “there would seem to be no good reason to prefer the procedural complexity of multiple claims over what should be the relative simplicity of a representative claim”.¹⁴⁷

QUESTION

Q23

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

Preliminary merits assessment or cost-benefit analysis

- 10.57 There may be a benefit in having a preliminary merits assessment or a cost-benefit analysis as part of a certification test, given the burden a class action can place on the

¹⁴¹ The Competition Appeal Tribunal Rules 2015 (UK), r 79(2)(g).

¹⁴² Department for Business, Innovation and Skills *Private Actions in Competition Law: A consultation on options for reform – government response* (January 2013) at [5.54]–[5.55].

¹⁴³ Federal Court of Australia Act 1976 (Cth), s 33N; Civil Procedure Act 2005 (NSW), s 166; Civil Proceedings Act 2011 (Qld), s 103K; Supreme Court Civil Procedure Act 1932 (Tas), s 75; and Supreme Court Act 1986 (Vic), s 33N.

¹⁴⁴ Federal Court of Australia Act 1976 (Cth), s 33N(1)(c); Civil Procedure Act 2005 (NSW), s 166(1)(c); Civil Proceedings Act 2011 (Qld), s 103K(1)(c); Supreme Court Civil Procedure Act 1932 (Tas), s 75(1)(c); and Supreme Court Act 1986 (Vic), s 33N(1)(c).

¹⁴⁵ *Bright v Femcare Ltd* [2002] FCAFC 243, (2002) 195 ALR 574 at [74]. See also discussion in Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 221–222.

¹⁴⁶ *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [39].

¹⁴⁷ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [33].

court system.¹⁴⁸ Requiring an initial assessment of a claim can help shield both the courts and defendants from wasted time and expense on unmeritorious actions. However, burdensome preliminary tests may also risk undermining the purpose of class actions.

- 10.58 Class actions regimes in Canada, the United States and Australia do not have threshold tests which expressly require the plaintiff to demonstrate the merits of the claim. The Canadian class actions regimes provide that certification is not a ruling on the merits.¹⁴⁹ In its 2019 report, the LCO recommended against introducing a preliminary merits test to the certification test. It considered this would frustrate the objectives of the class actions regime, would lead to a more expensive and protracted certification stage and would be unlikely to address the issues that defendants complained of.¹⁵⁰ The LCO said a preliminary merits test would frustrate access to justice by requiring courts to make a decision on the substance of an action without the benefit of substantive evidence about the claim.¹⁵¹ It did not think a preliminary merits test would assist with judicial efficiency because it would force courts to assess the substance of all cases at an early stage.¹⁵² The LCO's recommendation was accepted and the recent amendments to the Ontario class actions legislation did not include a preliminary merits assessment.¹⁵³
- 10.59 An application to bring a class action in the United Kingdom Competition Appeal Tribunal must state that the proposed representative plaintiff believes the claims “have a real prospect of success”.¹⁵⁴ When the Tribunal considers whether a class action claim should be brought on an opt-in or opt-out basis, it must take into account the strength of the claims.¹⁵⁵ Assessing the strength of a claim is particularly important in an opt-out proceeding as class members may be unaware of a claim and may not have conducted their own assessment of the merits.¹⁵⁶ The Tribunal will form a high level view of the strength of the claims and does not need to conduct a full merits assessment.¹⁵⁷
- 10.60 Some class actions regimes have a requirement to consider whether the benefits of using the class action procedure outweigh the costs. Australian courts have a power to discontinue a class action where the cost to a defendant of identifying class members and distributing the amounts ordered to be paid “would be excessive having regard to

¹⁴⁸ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 130.

¹⁴⁹ Class Proceedings Act SA 2003 c C-16.5, s 6(2); Class Proceedings Act RSBC 1996 c 50, s 5(7); The Class Proceedings Act CCSM 2002 c C-130, s 5(2); Class Proceedings Act RSNB 2011 c 125, s 7(2); Class Actions Act SNL 2001 c C-18.1, s 6(2); Class Proceedings Act SNS 2007 c 28, s 8(2); Class Proceedings Act SO 1992 c 6, s 5(5); and The Class Actions Act SS 2001 c C-12.01, s 7(2). Note that the Federal regime is silent on this point: Federal Courts Rules SOR/98-106.

¹⁵⁰ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 45.

¹⁵¹ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 44.

¹⁵² Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 45.

¹⁵³ Although, as we have discussed in this chapter, other amendments were made to the certification test which are likely to make it harder for plaintiffs to bring class action claims.

¹⁵⁴ The Competition Appeal Tribunal Rules 2015 (UK), r 75(2)(h).

¹⁵⁵ The Competition Appeal Tribunal Rules 2015 (UK), r 79(3)(a).

¹⁵⁶ Department for Business, Innovation and Skills *Competition Appeal Tribunal (CAT) Rules of Procedure – Government Response* (September 2015) at [3.16]; and Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.39].

¹⁵⁷ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.39].

the likely total of those amounts”.¹⁵⁸ The purpose of this power is to address concerns that small claims could impose a disproportionate expense on defendants and is said to be consistent with the principle that “the law does not concern itself with trifles”.¹⁵⁹ This power has been criticised on the basis that it can leave class members without a remedy just because they are disparate and have small individual claims.¹⁶⁰ The federal provision has not been successfully invoked by the defendant to date.¹⁶¹ Australian courts also have a broad power to discontinue a class action where it is in the interests of justice to do so.¹⁶² One of the grounds is where the costs of continuing the case as a class action are likely to exceed the costs that would be incurred if each class member conducted a separate proceeding.¹⁶³ A defendant who is bringing an application to discontinue on this ground will need evidence of the likely costs and benefits of the proceeding continuing as a class action.¹⁶⁴

- 10.61 When the United Kingdom Competition Appeal Tribunal considers whether a claim is suitable to be brought as a class action, it must consider the costs and benefits of the claim proceeding as a class action.¹⁶⁵ Where the likely legal costs are disproportionate to the likely damages award, the costs of pursuing a class action may outweigh the benefits.¹⁶⁶ When considering whether a class action should be opt-in or opt-out, the Tribunal must consider “the estimated amount of damages that individual class members may recover”.¹⁶⁷
- 10.62 There was a 1996 proposal in the United States that the certification criteria for federal class actions should be amended to require judges to consider “whether the probable

¹⁵⁸ Federal Court of Australia Act 1976 (Cth), s 33M. See also the Civil Procedure Act 2005 (NSW), s 165(b); Civil Proceedings Act 2011 (Qld), s 103J(1)(b); Supreme Court Civil Procedure Act 1932 (Tas), s 74(b); and Supreme Court Act 1986 (Vic), s 33M(b).

¹⁵⁹ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at 206–207.

¹⁶⁰ Vince Morabito “The Federal Court of Australia’s Power to Terminate Properly Instituted Class Actions” (2004) 42 *Osgoode Hall LJ* 473 at 490.

¹⁶¹ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at 203.

¹⁶² Federal Court of Australia Act 1976 (Cth), s 33N(1); Civil Procedure Act 2005 (NSW), s 166(1); Civil Proceedings Act 2011 (Qld), s 103K(1); Supreme Court Civil Procedure Act 1932 (Tas), s 75(1); and Supreme Court Act 1986 (Vic), s 33N(1).

¹⁶³ Federal Court of Australia Act 1976 (Cth), s 33N(1)(a); Civil Procedure Act 2005 (NSW), s 166(1)(a); Civil Proceedings Act 2011 (Qld), s 103K(1)(a); Supreme Court Civil Procedure Act 1932 (Tas), s 75(1)(a); and Supreme Court Act 1986 (Vic), s 33N(1)(a).

¹⁶⁴ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at 217.

¹⁶⁵ The court may take into account “the costs and benefits of continuing the collective proceedings”: The Competition Appeal Tribunal Rules 2015 (UK), r 79(2)(b).

¹⁶⁶ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.37].

¹⁶⁷ The court may take into account:

... whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.

See The Competition Appeal Tribunal Rules 2015 (UK), r 79(3)(b). Given the relatively recent introduction of collective proceedings, it is not yet clear how the Tribunal will interpret and apply these tests: see Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 117.

relief to individual class members justifies the costs and burdens of class litigation”.¹⁶⁸ This proposal was criticised by academics and consumer advocates who feared it would threaten the use of class actions for regulatory enforcement and was ultimately abandoned.¹⁶⁹

- 10.63 In Aotearoa New Zealand, the Court of Appeal has said the court should carry out a provisional appraisal of the merits of the claim before granting leave to bring a representative action.¹⁷⁰ In *Southern Response Earthquake Services v Southern Response Unresolved Claims Group* the Court explained:¹⁷¹

That must be so, as the Court cannot grant leave to the bringing of plainly meritless claims, and so allow those propounding the claim to invite others to join the group represented. But it is highly undesirable that this criterion be seen as creating the need or opportunity for a mini trial at the leave stage, at which the Court receives and reviews evidence on contested fact. Such an approach would be inconsistent with the objectives of the High Court Rules, and would substantially undermine the effectiveness of the r 4.24 procedure.

- 10.64 In addition, the court’s provisional assessment should only involve consideration of the claims as pleaded to ensure that they disclose an arguable case on the facts as pleaded.¹⁷² The court should take a “broad brush impressionistic approach” rather than carrying out a detailed analysis of every allegation.¹⁷³ The plaintiff does not have to provide the facts its case is based upon, but the defendant can bring evidence to refute a “clearly wrong and critical factual allegation”.¹⁷⁴ An analogy can be drawn to the approach to evidence in a strike-out application.¹⁷⁵

QUESTION

Q24

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

¹⁶⁸ Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559, 559 (1996). See also Deborah R Hensler and Thomas D Rowe Jr “Beyond ‘It Just Ain’t Worth It’: Alternative Strategies for Damage Class Action Reform” (2001) 64 LCP 137 at 141.

¹⁶⁹ Deborah R Hensler and Thomas D Rowe Jr “Beyond ‘It Just Ain’t Worth It’: Alternative Strategies for Damage Class Action Reform” (2001) 64 LCP 137 at 142.

¹⁷⁰ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [16]; and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [38(d)].

¹⁷¹ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [16].

¹⁷² *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [17].

¹⁷³ *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].

¹⁷⁴ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [17].

¹⁷⁵ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [17].

Litigation plan

- 10.65 Some jurisdictions require the representative plaintiff to have prepared a litigation plan as part of a certification test. The Canadian regimes require the plaintiff to have a plan for the proceeding that sets out a workable method for advancing the claim on behalf of the class and for notifying class members of the proceeding.¹⁷⁶ Whether the plan is workable involves an assessment of the claim, including the complexity of the litigation, the size of the class, the likelihood of sub-classes and individual issues relating to those sub-classes.¹⁷⁷ Where a court is not satisfied with the litigation plan it may adjourn the certification application pending the submission of a revised plan.¹⁷⁸ A litigation plan does not need to have all the detail for the litigation,¹⁷⁹ but may need to be more precise where complex issues are likely to arise at trial.¹⁸⁰
- 10.66 When the United Kingdom Competition Appeal Tribunal assesses whether a proposed representative plaintiff would fairly and adequately represent the class, it will consider whether there is a satisfactory plan for the class action.¹⁸¹ The plan should include the method for bringing the proceedings on behalf of the class and for notifying the class of the progress of proceedings, governance and consultation procedures which take into account the size and nature of the class and details of arrangements for costs, fees and disbursements.¹⁸² The Tribunal's Guide to Proceedings sets out a detailed list of matters that should be included in the litigation plan, including a sample notice to class members, how discovery of documents will be managed, whether experts will be required, how matters not resolved by the class action will be managed and how any aggregate award of damages would be distributed.¹⁸³
- 10.67 An alternative to having these matters covered in a litigation plan at the certification stage is to address these as part of the case management process. In Australia, class actions practice notes set out a detailed list of matters that are considered at case management

¹⁷⁶ Federal Courts Rules SOR/98-106, s 334.16(1)(e); Class Proceedings Act SA 2003 c C-16.5, s 5(1)(e); Class Proceedings Act RSBC 1996 c 50, s 4(1)(e); The Class Proceedings Act CCSM 2002 c C-130, s 4(e); Class Proceedings Act RSNB 2011 c 125, s 6(1)(e); Class Actions Act SNL 2001 c C-18.1, s 5(1)(e); Class Proceedings Act SNS 2007 c 28, s 7(1)(e); Class Proceedings Act SO 1992 c 6, s 5(1)(e)(ii); and The Class Actions Act SS 2001 c C-12.01, s 6(1)(e).

¹⁷⁷ *Poulin v Ford Motor Co of Canada Ltd* (2006) 35 CPC (6th) 264 (ONSC) at [99].

¹⁷⁸ For example, see *Healey v Lakeridge Health Corp* (2006) 38 CPC (6th) 145 (ONSC).

¹⁷⁹ *Pearson v Inco Ltd* (2006) 79 OR (3d) 427 (ONCA) at [97]. See also *Maxwell v MLG Ventures Ltd* (1995) 7 CCLS 155 (ONCJ).

¹⁸⁰ *Miller v Merck Frosst Canada Ltd* 2013 BCSC 544, [2013] BCJ No 613; aff'd 2015 BCCA 353, (2015) 81 BCLR (5th) 33.

¹⁸¹ The Competition Appeal Tribunal Rules 2015 (UK), r 78(3).

¹⁸² The Competition Appeal Tribunal Rules 2015 (UK), r 78(3)(c).

¹⁸³ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.30].

conferences.¹⁸⁴ In Aotearoa New Zealand, the High Court Rules set out matters that must be addressed in case management conferences for civil litigation generally.¹⁸⁵

QUESTION

Q25

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

Litigation funding arrangements

- 10.68 In Aotearoa New Zealand the courts do not approve litigation funding arrangements when considering applications for leave under HCR 4.24.¹⁸⁶ However, the courts do have a role in ensuring that funding arrangements do not amount to an abuse of process.¹⁸⁷ We discuss the courts' role in representative actions supported by litigation funding in more detail in Chapter 15.
- 10.69 Generally, the adequacy of litigation funding arrangements is not part of the certification tests applied in overseas class actions regimes.¹⁸⁸ However, in Ontario class actions the court must approve a funding agreement or it will have no force or effect.¹⁸⁹ When a representative plaintiff enters into a funding agreement, it must seek approval as soon as practicable and supply a copy to both the court and the defendant.¹⁹⁰ The court may only approve the funding agreement if satisfied that: the agreement, including the indemnity for costs and funding commission, is reasonable; the agreement will not diminish the representative plaintiff's ability to instruct their lawyer or control the litigation; and the funder is financially able to satisfy any adverse costs order to the extent provided in the indemnity.¹⁹¹

¹⁸⁴ Federal Court of Australia, *Practice Note GPN-CA – Class Actions Practice Note*, 20 December 2019; Supreme Court of Victoria, *Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions) (Second Revision)*, 1 July 2020; Supreme Court of New South Wales, *Practice Note No SC GEN 17 – Supreme Court Representative Proceedings*, 31 July 2017; Supreme Court of Queensland *Practice Direction No 2 of 2017 – Representative Proceedings*, 27 February 2017; and Supreme Court of Tasmania, *Practice Direction No 2 of 2019 – Representative Proceedings*, 6 September 2019.

¹⁸⁵ High Court Rules 2016, rr 7.3, 7.3A, 7.4, 7.8, 7.17, and schs 5 and 10.

¹⁸⁶ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [76(a)].

¹⁸⁷ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [86].

¹⁸⁸ Although note in Victoria the plaintiff's solicitor must file a funding information summary statement when commencing a class action: Supreme Court of Victoria, *Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions)*(13 October 2020) at [6]. See also [12]–[13].

¹⁸⁹ Class Proceedings Act SO 1992 c 6, s 33.1(3) A funding agreement is defined as an agreement in which a funder who is not a party to a class action agrees to indemnify the representative plaintiff or provide money to pursue a class action, in return for a share of any monetary award or settlement funds or for any other consideration: s 33.1.

¹⁹⁰ Class Proceedings Act SO 1992 c 6, s 33.1(4). The court must receive an unredacted copy but (s 33.1(6)) but the plaintiff may redact information which may confer a tactical advantage in the copy provided to the defendant (s 33.1(5)).

¹⁹¹ Class Proceedings Act SO 1992 c 6, s 33.1(9)(a). The court must also consider whether the plaintiff received independent legal advice with respect to the funding agreement: s 33.1(10). The Attorney General may also prescribe other factors for the court to consider when approving a funding agreement: ss 33.1(9)(iv) and 38(1).

- 10.70 Funding arrangements may also be relevant to a court’s assessment of whether a representative plaintiff is suitable for the role. For instance, when the United Kingdom Competition Appeal Tribunal considers whether it is “just and reasonable” for an applicant to act as class representative, it must consider whether the person can pay an adverse costs order.¹⁹² The involvement of a third party funder will be relevant to this assessment.¹⁹³ Similarly, assessments of the adequacy of a representative plaintiff in Ontario have made reference to the fact that the representative has successfully applied to the Class Proceedings Fund.¹⁹⁴
- 10.71 Some law reform bodies have suggested the courts should exercise greater oversight of funding arrangements in class actions. For example, the United Kingdom Civil Justice Council suggested the court should have a power to assess funding arrangements in collective proceedings to ascertain whether they are fair and just.¹⁹⁵ The ALRC has recommended a requirement for the court to approve funding agreements in class actions and expressly empowering courts with a statutory power to reject, vary or amend terms of funding agreements.¹⁹⁶

QUESTIONS

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?

OTHER CERTIFICATION MATTERS

- 10.72 The preceding discussion has focused on whether Aotearoa New Zealand should have a certification stage and what the threshold legal tests should be. Other matters that would need to be considered if a class actions regime is adopted include:
- (a) What the evidentiary standard should be for certification. Jurisdictions take different approaches to this. For example, Ontario requires “some basis in fact,” while in the United States, courts often require the plaintiff to prove the certification requirements “by a preponderance of the evidence”.¹⁹⁷

¹⁹² The Competition Appeal Tribunal Rules 2015 (UK), r 78(2)(d).

¹⁹³ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.33].

¹⁹⁴ See *Defazio v Ontario (Ministry of Labour)* (2007) 38 CPC (6th) 223 (ONSC) at [128] and discussion in Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 164.

¹⁹⁵ Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 94. The Civil Justice Council noted a list of factors such an assessment could include, drawing on an article by Rachael Mulheron: see Rachael Mulheron and Peter Cashman “Third Party Funding: A Changing Landscape” (2008) 27 CJQ 312 at [36].

¹⁹⁶ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 14.

¹⁹⁷ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 45–46; and William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§7:21].

- (b) Whether pre-certification discovery should be required and what this should involve.
 - (c) How the court should manage ‘competing’ class actions.
 - (d) Whether there should be rights of intervention (such as by potential class members) when the court considers an application for certification.
 - (e) Appeal rights from certification decisions.
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CHAPTER 11

The representative plaintiff

INTRODUCTION

- 11.1 In this chapter we discuss who should be allowed to be a representative plaintiff in a class action. In particular, we discuss:
- (a) Whether a proposed representative plaintiff's suitability for the role should be assessed when a class action is commenced and what the criteria should be.
 - (b) Whether a representative plaintiff must be a class member.
 - (c) Whether government entities should be allowed to be representative plaintiffs.
 - (d) The potential role of tikanga in determining who can be a representative plaintiff in a class action involving a Māori collective.

ASSESSING THE SUITABILITY OF THE REPRESENTATIVE PLAINTIFF

- 11.2 In Canada, the United States and the United Kingdom Competition Appeal Tribunal, establishing the suitability of the representative plaintiff is part of the certification test. 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.
- 11.3 When considering whether a proposed plaintiff is suitable to represent the class, courts will consider matters such as: whether the plaintiff will fairly and adequately represent the class, whether there is any conflict of interest, whether the plaintiff understands the obligations of the role and whether the plaintiff has sufficient financial resources. Some jurisdictions consider these to be standalone factors and others treat them as part of the adequacy test, as discussed below. The United States also requires the representative plaintiff's claims to be typical of the class.

Adequacy of representation

- 11.4 Adequacy of representation has been described as a “fundamental pillar of the modern class action regime”.¹ It is important that a representative plaintiff adequately represents the class because decisions made in a class action will bind all class members, even though they are not before the court.²
- 11.5 Some Aotearoa New Zealand cases have indicated that a plaintiff in a representative action must show they will fairly and adequately represent the group.³ However adequacy does not appear to have been given detailed consideration.
- 11.6 In Canada, the United States and the United Kingdom Competition Appeal Tribunal, the certification test includes a requirement that the proposed class plaintiff will fairly and adequately represent the interests of the class.⁴ The Canadian Supreme Court has said that the proposed representative does not have to be typical of the class or the best possible representative. However, the court must be satisfied that the proposed plaintiff will “vigorously and capably prosecute the interests of the class”.⁵ Similarly, courts in the United States have said that a representative plaintiff must be able to “advocate vigorously and competently for the interests of the class through supervision of qualified counsel”.⁶
- 11.7 In Australia, where there is no certification requirement, some of the regimes provide that the court may discontinue proceedings if a representative plaintiff is not able to adequately represent the interests of class members.⁷ There are also statutory provisions which allow a representative plaintiff to be replaced if they are not able to adequately represent the class.⁸

¹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 289.

² Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 289.

³ *Beggs v Attorney-General* (2006) 18 PRNZ 214 (HC) at [16]; and *Harding v LDC Finance Ltd (in rec)* HC Christchurch CIV-2008-409-1140, 19 November 2009 at [33]. These cases cite *Saxmere Co Ltd v The Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005, where Miller J referred to the Canadian requirement that a representative must adequately represent the class (as set out by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534).

⁴ In the United States, one of the certification criteria is that “the representative parties will fairly and adequately protect the interests of the class”: United States Federal Rules of Civil Procedure, r 23(a)(4). In Canada, see Federal Courts Rules SOR/98-106, r 334.16(1)(e); Class Proceedings Act SA 2003 c C-16.5, s 5(1)(e); Class Proceedings Act RSBC 1996 c 50, s 4(1)(e); The Class Proceedings Act CCSM 2002 c C-130, s 4(e); Class Proceedings Act RSNB 2011 c 125, s 6(1)(e); Class Actions Act SNL 2001 c C-18.1, s 5(1)(e); Class Proceedings Act SNS 2007 c 28, s 7(1)(e); Class Proceedings Act SO 1992 c 6, s 5(1)(e); and The Class Actions Act SS 2001 c C-12.01, s 6(1)(e). In Québec, the criteria for authorisation includes the requirement that the representative plaintiff is in a position to properly represent the class members: Code of Civil Procedure CQLR c C-25.01, art 575(4). In the UK, there are certain matters that the Tribunal must consider when determining whether the proposed representative would act fairly and adequately in the interest of the class: see The Competition Appeal Tribunal Rules 2015 (UK), rr 78(2)(a) and 78(3).

⁵ *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [41].

⁶ Joseph M McLaughlin *McLaughlin on Class Actions* (online ed, Thomson Reuters) at [§4:27].

⁷ Civil Procedure Act 2005 (NSW), s 166(1)(d); Civil Proceedings Act 2011 (Qld), s 103K(1)(d); and Supreme Court Civil Procedure Act 1932 (Tas), s 75(1)(d).

⁸ Federal Court of Australia Act 1976 (Cth), s 33T; Civil Procedure Act 2005 (NSW), s 171; Civil Proceedings Act 2011 (Qld), s 103P; Supreme Court Civil Procedure Act 1932 (Tas), s 80; and Supreme Court Act 1986 (Vic), s 33T. Commentary on

- 11.8 In 2018, the Victorian Law Reform Commission (VLRC) considered whether the legislation should require a representative plaintiff to prove that they can adequately represent the class. The VLRC decided against this, noting that it could lead to interlocutory disputes and deter class members from taking on the role. It said that consultation had not indicated inadequacy of representation was a systemic issue.⁹
- 11.9 We note that there is a degree of overlap between adequacy of representation and the issues we discuss below. For example, in some jurisdictions, an absence of conflicts of interest forms part of the adequacy test.

Conflicts of interest

- 11.10 A representative plaintiff may not be able to properly fulfil their role where they have a conflict of interest with class members, particularly where this relates to the common issues in the case.¹⁰ Other situations which may give rise to a conflict of interest include: where the plaintiff has some relationship with the defendant or is in collusion with them;¹¹ where the plaintiff is a member of the law firm which seeks to act for the class;¹² where the plaintiff represents a class in more than one proceeding;¹³ and where the remedy sought might harm some class members.¹⁴
- 11.11 Some overseas regimes expressly refer to conflicts of interest in their class action certification requirements. The Canadian regimes (except Québec) have a requirement that the representative plaintiff does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members.¹⁵ Similarly, the United Kingdom Competition Appeal Tribunal must consider whether a person seeking to

the Federal Court provision observes that s 33T has been applied without detailed consideration in the case law but it appears the court will only exercise the power when there is actual incompatibility of interests: Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [20.2].

⁹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.142]–[4.146].

¹⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 277–278. This has been the focus of overseas legislative provisions as discussed below.

¹¹ Rachael Mulheron comments that while these scenarios are often warned against by law reformers, they appear to be relatively uncommon: Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 283.

¹² Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 283.

¹³ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 283.

¹⁴ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 284–285. Mulheron comments that “[t]his potential conflict is as old as the English representative rule itself”.

¹⁵ Federal Courts Rules SOR/98-106, r 334.16(1)(e); Class Proceedings Act SA 2003 c C-16.5, s 5(1)(e); Class Proceedings Act RSBC 1996 c 50, s 4(1)(e); The Class Proceedings Act CCSM 2002 c C-130, s 4(e); Class Proceedings Act RSNB 2011 c 125, s 6(1)(e); Class Actions Act SNL 2001 c C-18.1, s 5(1)(e); Class Proceedings Act SNS 2007 c 28, s 7(e); Class Proceedings Act SO 1992 c 6, s 5(1)(e); and The Class Actions Act SS 2001 c C-12.01, s 6(1)(e). See also Saskatchewan Queen’s Bench Rules 2013, r 3-93(2)(f).

be a class representative has a material interest in relation to the common issues that is in conflict with the interests of class members.¹⁶

- 11.12 In the United States, while Rule 23 of the Federal Rules of Civil Procedure (FRCP 23) does not expressly refer to the absence of a conflict of interest, this is regarded as part of the adequacy test. However, only conflicts that go to the heart of the case will prevent a representative plaintiff from meeting the adequacy test.¹⁷ Similarly, in Australia, the absence of a conflict of interest is not specifically mentioned in legislation but is assessed in terms of the adequacy of representation.¹⁸

Understanding of the role

- 11.13 Taking on the role of representative plaintiff is an important task and, in some jurisdictions, carries fiduciary obligations to class members.¹⁹ It is therefore important that the proposed representative plaintiff is aware of their obligations. Jurisdictions have dealt with this in slightly different ways.
- 11.14 In the United States, a proposed representative plaintiff's knowledge of the case and understanding of their duties as class representative are factors that may be considered under the adequacy test. The person does not need to have robust knowledge of the case, merely some basic knowledge of their role as representative and a commitment to serving in that role.²⁰
- 11.15 Two Canadian regimes require the proposed representative plaintiff to provide an affidavit establishing they are aware of the responsibilities of the role as part of the application for certification.²¹
- 11.16 The United Kingdom Competition Appeal Tribunal will consider a person's suitability to manage collective proceedings as part of the adequacy test.²² It will assess whether the proposed representative plaintiff is able to provide proper instructions to their lawyer and

¹⁶ The Competition Appeal Tribunal Rules 2015 (UK), r 78(2)(b). Examples of when a conflict might arise include where the class representative has a stake in the legal fees incurred on behalf of the class or where the person is a class representative in a separate but related collective action which might affect recovery in the proceeding at issue: Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.31].

¹⁷ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:58].

¹⁸ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [20.1].

¹⁹ In *Dyczynski v Gibson* [2020] FCAFC 120, (2020) 381 ALR 1 at [209], the Federal Court of Australia held that a representative plaintiff has a fiduciary duty toward class members. In the United States, a class representative has a fiduciary duty to promote and protect the interests of the class they represent. Commentary notes that the fiduciary duties definitely arise upon class certification, but it is somewhat unclear what duties apply in the "twilight zone of pre-certification": Joseph M McLaughlin *McLaughlin on Class Actions* (online ed, Thomson Reuters) at [§4:27].

²⁰ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:67].

²¹ These are Saskatchewan and Newfoundland and Labrador. See Saskatchewan Queen's Bench Rules 2013, r 3-93(2); and Rules of the Supreme Court SNL 1986 c 42, r 7A.04(4).

²² Where the proposed class representative is a member of the class, the Tribunal will take into account their suitability to manage the proceedings: The Competition Appeal Tribunal Rules 2015 (UK), r 78(3)(a).

exert sufficient control over the legal work and costs incurred and may require them to demonstrate a basic understanding of the relevant facts and the nature of the claims.²³

- 11.17 The VLRC has suggested that standardised and clear information should be given to all class members about the requirements and responsibilities of the representative plaintiff.²⁴ The Australian Federal Case Management Handbook contains guidance for practitioners on matters to consider when advising a person on whether to be a representative plaintiff.²⁵

Sufficient financial resources

- 11.18 The issue of a representative plaintiff's financial resources has been treated differently in class actions regimes. In regimes where a security for costs application can be made against a representative plaintiff, the financial resources available to the representative tends to be part of the adequacy test. Where costs liability is limited or eliminated by rules whereby parties bear their own costs or by a class action fund, the financial position of a representative plaintiff will be less relevant.²⁶
- 11.19 In Canada, a representative plaintiff's capacity to bear costs is part of the adequacy test.²⁷ However, at least in Ontario, this has largely been overtaken by the costs indemnification that usually occurs (whether by the Class Proceedings Fund, a litigation funder or a law firm).²⁸
- 11.20 The United Kingdom Competition Appeal Tribunal must consider whether the applicant would be able to pay the defendant's costs if ordered to do so, or to provide an undertaking as to damages if an injunction is sought.²⁹ The Tribunal will have regard to the applicant's financial resources including any relevant fee arrangements with its lawyer, third party litigation funder or insurer.³⁰
- 11.21 In the United States, however, courts consider the proposed plaintiff's financial resources to be irrelevant to the adequacy test.³¹ As we explain in Chapter 13, in the United States the unsuccessful party in a class action is not required to pay adverse costs.

²³ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.30].

²⁴ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.155].

²⁵ Law Council of Australia and Federal Court of Australia *Case Management Handbook* (2014) at [13.22].

²⁶ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 297–298.

²⁷ *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [41].

²⁸ Garry D Watson (ed) *Ontario Civil Procedure* (online ed, Thomson Reuters) at [R12§13]. We discuss Ontario's Class Proceedings Fund in Chapter 13.

²⁹ The Competition Appeal Tribunal Rules 2015 (UK), rr 78(2)(d) and 78(2)(e).

³⁰ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.33].

³¹ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:69].

Typicality

- 11.22 In the United States, one of the certification requirements is that the plaintiff's claims are typical of the class.³² This helps ensure the representative plaintiff's interests are aligned with those of the class. Commentary explains that the typicality test is not demanding, and the plaintiff's claims do not need to be identical to that of the class. A plaintiff's claim will be considered 'typical' if it arises from the same event, practice or course of conduct that gives rise to the claims of other class members and the claims are based on the same legal theory.³³ Typicality has some overlap with other certification requirements, namely commonality and adequacy of representation.³⁴
- 11.23 Rachael Mulheron has commented that the absence of a typicality requirement in the Australian or Canadian regimes has not caused difficulties.³⁵

QUESTION

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?

MUST THE REPRESENTATIVE PLAINTIFF BE A CLASS MEMBER?

- 11.24 In some jurisdictions, a representative plaintiff must be a class member. In other jurisdictions, a plaintiff who does not have a cause of action against the defendant (sometimes known as an 'ideological plaintiff') is allowed to commence a class action on behalf of others who do. Ideological plaintiffs can include advocacy groups, charities, non-government organisations, statutory bodies, unions, or individuals who perceive an injustice to others.³⁶
- 11.25 Arguments in support of ideological plaintiffs include:³⁷
- (a) Requiring a representative plaintiff to be a class member does not guarantee they will act in the interests of the other class members as they may be self-interested.³⁸

³² United States Federal Rules of Civil Procedure, r 23(a)(3).

³³ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:29].

³⁴ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§3:30].

³⁵ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 311.

³⁶ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 303.

³⁷ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 304.

³⁸ See also Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 349; and Vince Morabito "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 UBC L Rev 459 at 496:

...the proposition that requiring the class representative to have a personal stake in the outcome of the litigation will ensure that the claims of the class members are vigorously advanced is unpersuasive.

- (b) An organisation such as a consumer group or union may be a capable and well-resourced representative for the members whose interests it was formed to represent.
- (c) Where an organisation is driving the litigation on behalf of unsophisticated class members, it is a pretense to name a class member as the plaintiff.
- (d) It can prevent an individual group member from facing retaliation as a result of being the named plaintiff.
- (e) It is consistent with the goal of increasing access to justice for class members. Potential representative plaintiffs may be deterred by the risk of adverse costs and concerns such as reprisal from a defendant. Expanding the range of possible plaintiffs increases the chance that an individual or organisation will be willing to take on the role.³⁹

11.26 Arguments against allowing ideological plaintiffs include:⁴⁰

- (a) The self-interest of a class member helps to ensure that class members' interests are protected.⁴¹
- (b) Having a non-class member as plaintiff is a significant departure from traditional rules of standing in litigation.
- (c) The absence of ideological plaintiffs has not caused problems in jurisdictions such as Ontario.⁴²
- (d) It could be difficult for the defendant to obtain appropriate discovery if the representative plaintiff does not have a personal claim.

Current approach under HCR 4.24

11.27 In the Supreme Court's decision in *Proprietors of Wakatū v Attorney-General*, one of the issues was standing to bring the claim. The proceedings were for equitable relief and declarations arising from the Crown's alleged breach of trust in failing to preserve Nelson tenths reserves for the customary owners (as identified by the Native Land Court in 1893). The Proprietors of Wakatū (Wakatū), Rore Pat Stafford and the trustees of Te Kahui Ngahuru Trust appealed against the Court of Appeal's determination that only Mr Stafford had standing to bring the proceedings. Wakatū was established to represent the descendants of the customary owners, although the beneficiaries of Wakatū no longer correlate completely with those owners. Te Kahui Ngahuru Trust was established primarily

³⁹ Vince Morabito "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 UBC L Rev 459 at 506.

⁴⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 304.

⁴¹ The Ontario Law Reform Commission described this as the "major argument" in favour of requiring a representative plaintiff to be a member of the class. It noted, however, that self-interest may not ensure adequate representation if a representative plaintiff's individual claim was small. Conversely, if the representative plaintiff had a large claim, self-interest might cause them to advance their own interests to the detriment of class members: Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 349.

⁴² On the other hand, it has been observed that no abuse has resulted in Canadian jurisdictions which have allowed non-class members to bring claims: Vince Morabito "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 UBC L Rev 459 at 500.

to represent descendants of the customary owners who are not included as beneficiaries of Wakatū. The Supreme Court unanimously confirmed that Mr Stafford had standing as a rangatira.⁴³ A majority of the judges considered that Wakatū and the trustees of Te Kahui Ngahuru Trust did not have standing⁴⁴ (with Elias CJ and Glazebrook J dissenting on this point).⁴⁵

- 11.28 While the *Wakatū* case was not brought as a representative claim under HCR 4.24, the judgment of Glazebrook J contains obiter comments about the requirements of this rule. Her Honour observed that it was implicit in HCR 4.24 that a person bringing a claim in a representative capacity must have the same interest in the subject matter as those represented. Her Honour noted that this was the view of the minority of the Supreme Court in *Credit Suisse Private Equity v Houghton*⁴⁶ and that while the majority did not expressly address this point, it appeared implicit from other comments in their judgment.⁴⁷ Glazebrook J reasoned that a more flexible approach was justified in cases involving claims of breach of Crown duty to Māori, and that it should not be necessary for a representative to have the same interest in the subject matter as those represented. Therefore, she would have held that both Wakatū and the trustees of Te Kahui Ngahuru Trust (as well as Mr Stafford) were eligible to bring a representative claim.⁴⁸ In other words, in the context of Māori litigation against the Crown, Glazebrook J could see a role for an ideological representative plaintiff.
- 11.29 However, in *Southern Response Earthquake Services v The Southern Response Unresolved Claims Group*, the Court of Appeal said that a representative plaintiff could not advance claims other than those which its own claim represented.⁴⁹ The Court referred to the possibility of sub-group representative plaintiffs being used, to ensure that all of the claims were represented.⁵⁰

Overseas approaches to ideological representative plaintiffs

- 11.30 In Australia, a representative plaintiff must have a sufficient interest to commence a proceeding against the defendant on their own behalf.⁵¹ However, this has not prevented class actions from being instituted by both a union and the Australian Competition and Consumer Commission (ACCC). Courts have allowed this on the basis that these entities

⁴³ *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [494], [673], [807], [952].

⁴⁴ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [795]–[796], [810] and [952].

⁴⁵ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [492]–[493], [499], [657] and [673].

⁴⁶ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [50]–[55] per Elias CJ and Anderson J.

⁴⁷ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [651] citing *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [50]–[55] and [129].

⁴⁸ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [657]. See also [491] per Elias CJ.

⁴⁹ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [32].

⁵⁰ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [33].

⁵¹ Federal Court of Australia Act 1976 (Cth), s 33D(1); Civil Procedure Act 2005 (NSW), s 158(1); Civil Proceedings Act 2011 (Qld), s 103C(1); Supreme Court Civil Procedure Act 1932 (Tas), s 67(1); and Supreme Court Act 1986 (Vic), s 33D(1).

have statutory standing (under other legislation) to bring claims.⁵² The ACCC's ability to bring class actions is discussed later in this chapter.

- 11.31 Canadian jurisdictions take different approaches on this issue. In the Federal Court and Ontario, the representative plaintiff must be a member of the class.⁵³ The other common law provinces allow a non-class member to be the representative plaintiff if this is necessary to avoid a substantial injustice to the class.⁵⁴ Alberta also allows the court to appoint an incorporated non-profit organisation as a representative plaintiff, where it considers this is appropriate.⁵⁵ In Québec, certain non-class members may apply to represent the class.⁵⁶
- 11.32 Courts in the United States generally require the representative plaintiff to be a member of the class. Some courts have seen this as part of the requirements of standing, typicality and adequacy. Other courts have treated membership of the class as an implicit certification requirement, pointing to the language in FRCP 23 that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members”.⁵⁷
- 11.33 In the United Kingdom Competition Appeal Tribunal, the class representative does not need to be a member of the class and does not need to have a personal claim against the proposed defendant.⁵⁸ Where the proposed representative is an organisation, the Tribunal will consider matters such as its nature, its motivations for being involved and whether any conflict may arise with the interests of class members.⁵⁹ This broader approach to standing appears to be based on an earlier recommendation of the Civil Justice Council.⁶⁰

⁵² Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 306–307; Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 107; Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [5.16]; and *Finance Sector Union of Australia v Commonwealth Bank of Australia* [1999] FCA 1250, (1999) 166 ALR 141 at [18].

⁵³ Federal Courts Rules SOR/98-106, r 334.12(1); and Class Proceedings Act SO 1992 c 6, s 2(1).

⁵⁴ Class Proceedings Act SA 2003 c C-16.5, s 2(4); Class Proceedings Act RSBC 1996 c 50, s 2(4); The Class Proceedings Act CCSM 2002 c C-130, s 2(4); Class Proceedings Act RSNB 2011 c 125, s 3(5); Class Actions Act SNL 2001 c C-18.1, s 3(4); Class Proceedings Act SNS 2007 c 28, s 4(5); and The Class Actions Act SS 2001 c C-12.01, s 4(4).

⁵⁵ Class Proceedings Act SA 2003 c C-16.5, s 2(6). Note also that in Newfoundland and Labrador, the court may appoint a parent, guardian or the Public Trustee as a representative plaintiff (where the members of the class have a disability and none can adequately represent the class) or a public agency or incorporated advocacy group whose mandate is the protection of the rights of a class (where none of the class can adequately represent it): see Rules of the Supreme Court SNL 1986 c 42, r 7A.04(7).

⁵⁶ Code of Civil Procedure CQLR c C-25.01, art 571.

⁵⁷ United States Federal Rules of Civil Procedure, r 23(a).

⁵⁸ Competition Act 1998 (UK), s 47B(8); and The Competition Appeal Tribunal Rules 2015 (UK), r 78(1)(a).

⁵⁹ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.30].

⁶⁰ Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 141–143 (recommending that bodies such as consumer, industry or public interest associations may bring proceedings for collective redress if they can satisfy the court of their ability to act in the best interests of individual claimants). Rachael Mulheron suggests that this recommendation influenced the drafting of the Competition Appeal Tribunal regime: Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 107–108.

QUESTION

Q29

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

A GOVERNMENT ENTITY AS REPRESENTATIVE PLAINTIFF

- 11.34 A related issue is whether a class actions regime should allow government entities to be representative plaintiffs. There are said to be significant advantages to the class when a government entity acts as a representative plaintiff as it will be responsible for matters such as funding, engaging legal representation and adverse costs.⁶¹ We are aware of one case under HCR 4.24 where a government entity has brought a claim in a representative capacity: *Minister of Education v James Hardie*. In that case, the third plaintiff was the Ministry of Education suing on behalf of a number of school Boards of Trustees.⁶²
- 11.35 One scenario where a government entity could take up the role of representative plaintiff is where it has a claim against the defendant itself.⁶³ Class actions regimes in Australia, Canada, the United States and the United Kingdom do not prevent government entities from acting as a representative plaintiff in this scenario.⁶⁴ In Australia, there are a number of examples of a local council being a lead plaintiff in a class action case.⁶⁵ We do not think it would be problematic for a government entity to have the ability to be a representative plaintiff where it has its own claim, so long as it is not obliged to take on this role. In the *Houghton v Saunders* litigation, for example, the Accident Compensation Corporation was among the represented shareholders and could have sought to be the representative plaintiff.⁶⁶
- 11.36 Where a government entity does not have its own claim against a defendant, it may be able to bring a class action as an ideological plaintiff. In some jurisdictions, public

⁶¹ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 225.

⁶² In that case the Ministry of Education was the owner of the land upon which almost all of the buildings were constructed and so was a plaintiff in its own right.

⁶³ Mulheron further divides this into two categories: (a) a situation where the government entity shares the class members' cause of action against the defendant and is seeking the same kind of relief; and (b) a situation where the government entity has a claim against a defendant in its own right which is not shared with other class members, but where common issues of fact or law arise: Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 226.

⁶⁴ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 226.

⁶⁵ Local councils have been lead plaintiffs in several class actions relating to complex financial products and in two consumer protection class actions: Vince Morabito "Government has shelled out \$1.1B in class actions" (23 July 2020) Lawyerly <www.lawyerly.com.au>. See also Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 227.

⁶⁶ See a reference to ACC being a claimant in *Houghton v Saunders* [2019] NZHC 2007 at [10]–[11].

authorities are authorised to bring class actions, including Brazil,⁶⁷ Denmark,⁶⁸ Spain⁶⁹ and Sweden.⁷⁰ Civil law jurisdictions have generally limited standing in class actions to public officials or quasi-public agencies or to pre-existing associations or special purpose foundations, on the assumption they are less likely to be susceptible to conflicts of interest.⁷¹ Deborah Hensler critiques this assumption, noting that officials may be susceptible to political pressures to bring (or not bring) class actions and asserting that “agency problems are inherent in all forms of collective litigation”.⁷²

- 11.37 In Australia, if there are at least seven people with claims against the same defendant, one of them may bring a class action if they have a sufficient interest to commence a proceeding on their own behalf.⁷³ The Federal Court has held that this allows the ACCC to be a representative plaintiff where it has statutory standing to bring a claim under the Trade Practices Act.⁷⁴ We are aware that the ACCC has brought five class actions, with several resulting in financial compensation for class members.⁷⁵ The Australian Securities and Investments Commission (ASIC) also has the ability to bring class actions. Where ASIC carries out an investigation and considers that specified proceedings would be in the public interest, it can bring those proceedings in the name of a person or company.⁷⁶ It has used this power to bring a series of class action proceedings on behalf of investors in the Westpoint group, resulting in almost \$27 million in compensation being paid to class members.⁷⁷ However, despite the successes of these regulators in obtaining

⁶⁷ In Brazil, the parties with standing to bring a class action are the Public Prosecutor’s Office, the Public Defender’s Office, the federal government, states, municipalities and federal districts, government, public administration entities and associations which have protection of collective rights as a purpose: Sérgio Pinheiro Marçal and Lucas Pinto Simão “Brazil” in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 26 at 29.

⁶⁸ The representative plaintiff in an opt-out claim must be a specified government entity – currently the Consumer Ombudsman: Christian Alsøe, Søren Henriksen and Morten Melchior Gudmandsen “Denmark” in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 45 at 50.

⁶⁹ Collective actions can only be brought by consumer organisations and the Public Prosecutor’s Office: Alejandro Ferreres Comella and Cristina Ayo Ferrándiz “Spain” in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 194 at 194.

⁷⁰ Group actions can be commenced by private groups that have a claim, organisations and public authorities: Ola Hansson and Carl Rother-Schirren “Sweden” in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 202 at 202.

⁷¹ Deborah R Hensler “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally” (2017) 65 U Kan L Rev 965 at 973.

⁷² Deborah R Hensler “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally” (2017) 65 U Kan L Rev 965 at 974.

⁷³ Federal Court of Australia Act 1976 (Cth), s 33D(1); Civil Procedure Act 2005 (NSW), s 158(1); Civil Proceedings Act 2011 (Qld), s 103C(1); Supreme Court Civil Procedure Act 1932 (Tas), s 67(1); and Supreme Court Act 1986 (Vic), s 33D(1).

⁷⁴ *Finance Sector Union of Australia v Commonwealth Bank of Australia* [1999] FCA 1250, (1999) 166 ALR 141 at [18]. Note that there have been some differing judicial views on this issue: see *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* [1998] FCA 819, (1998) 156 ALR 273; Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 237–239; and Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [5.15]–[5.16].

⁷⁵ Vince Morabito “Government has shelled out \$1.1B in class actions” (23 July 2020) Lawyerly <www.lawyerly.com.au>.

⁷⁶ Australian Securities and Investments Commission Act 2001 (Cth), s 50. The proceeding may be for (a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation (or examination) related; or (b) recovery of property of the person.

⁷⁷ ASIC brought 10 class actions on behalf of investors in the Westpoint group and secured settlements in nine of these: Vince Morabito “Government has shelled out \$1.1B in class actions” (23 July 2020) Lawyerly <www.lawyerly.com.au>.

compensation for class members, ASIC has not filed a class action since 2009 and the ACCC since 2003.⁷⁸

- 11.38 In Aotearoa New Zealand, the Rules Committee’s 2009 draft Class Actions Bill provided for the Commerce Commission and the Securities Commission (since replaced by the Financial Markets Authority (FMA)) to apply to be a lead plaintiff in a class action where they had not suffered loss or damage themselves (i.e. as an ideological plaintiff).⁷⁹
- 11.39 As discussed in Chapter 3, the Commerce Commission currently has the ability to seek a compensation order on behalf of others under section 43 of the Fair Trading Act 1986. It also has powers to seek damages and other remedies on behalf of a class under the Credit Contracts and Consumer Finance Act 2003. There is no similar power in the Commerce Act 1986, which may reflect the difficulty of determining who ultimately suffers damage in a competition case.⁸⁰ The FMA has broad powers to bring civil proceedings including the ability to act on a representative basis (as we discuss in Chapter 3). Given these powers, we are not sure it is necessary for class actions legislation to provide the Commerce Commission and FMA with a power to be a lead plaintiff. We think it is likely to be regulatory priorities and/or funding constraints that limits regulators from bringing compensation claims on behalf of the public, rather than the absence of powers.

Intervener role

- 11.40 Another role for government entities could be as an intervener in a class action in cases where issues of public importance arise. In Australia, ASIC has an express power to intervene in any proceedings under the Corporations Act 2001⁸¹ and has used this power to successfully challenge a proposed class action settlement on the basis that distribution of the settlement between class members was not fair and reasonable.⁸² In the United States, federal legislation requires a defendant to provide notice of a proposed settlement to relevant federal and state officials, but does not expressly provide officials with standing to object to a settlement.⁸³

⁷⁸ Vince Morabito “Government has shelled out \$1.1B in class actions” (23 July 2020) Lawyerly <www.lawyerly.com.au>. One possible explanation may be the rise in class actions being brought through private initiative.

⁷⁹ Draft Class Actions Bill 2009 (Parliamentary Counsel Office, PCO 8247/2.13) at cls 17–21. These clauses would have amended the Commerce Act 1986, Fair Trading Act 1986, Credit Contracts and Consumer Finance Act 2003, Securities Act 1978 and Securities Markets Act 1988 to enable the Commerce Commission or Securities Commission (as appropriate) to apply to be a lead plaintiff in relation to certain claims under those Acts.

⁸⁰ See letter from Geoff Thorn (General Manager of the Commerce Commission) to the Rules Committee (31 July 2007) noting that the reasons for the relative lack of private damages claims in Aotearoa New Zealand for breach of competition law are uncertain. One obstacle in other jurisdictions is that many competition claims encounter evidential difficulties, particularly in cartel cases where the offending behaviour is covert and hard to detect and where assessment of damages may be complicated by inflated prices being passed on down a vertical chain of purchasers and customers.

⁸¹ Corporations Act 2001 (Cth), s 1330.

⁸² *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [4].

⁸³ Class Action Fairness Act of 2005 Pub L No 109-2, 118 Stat 4 at § 1715(b). See also William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§ 13:26].

- 11.41 In Aotearoa New Zealand, even if a class actions regime does not provide a specific right of intervention in a proceeding, a non-party could seek leave to intervene in usual way.⁸⁴ Te Aka Matua o te Ture | Law Commission has previously noted that Aotearoa New Zealand has a long history of authority for public interest intervention by the Attorney-General.⁸⁵

QUESTION

Q30

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

PROVISION FOR TIKANGA MĀORI TO INFORM WHO CAN BE REPRESENTATIVE PLAINTIFF IN MĀORI COLLECTIVE ACTION

- 11.42 The availability of a class actions regime may be of limited interest to Māori groups given that rangatira and entities such as trusts can generally pursue claims on behalf of the collectives that they represent. The ability of rangatira to take cases on behalf of their people is an important and longstanding tikanga to maintain.⁸⁶ That said, there are some limitations in the current law concerning the recognition of Māori representation and standing which impact on when and how Māori collective litigation can proceed.⁸⁷ While a class actions regime may provide an alternative route for the representation of Māori collective interests, its use in the context of Māori collective litigation also raises a question as to what role tikanga Māori should have in informing who can be the representative plaintiff.⁸⁸
- 11.43 A “class” in an ordinary class action is a group of people defined by their common interest in a legal claim. In a whānau, hapū or iwi setting, collective claims are likely to be defined by the members identifying with the claim as well as with the collective itself through

⁸⁴ It is accepted that r 7.43A(1)(d)–(e) of the High Court Rules 2016 and the inherent jurisdiction enable the High Court to grant leave to a third-party to intervene. Crown Proceedings Act 1950, s 35(2)(h); and High Court Rules 2016, rr 4.27, 7.4 and sch 5(2) are relevant to the Attorney-General’s ability to intervene in proceedings: see *Seales v Attorney-General* [2015] NZHC 828 at [41].

⁸⁵ Te Aka Matua o te Ture | Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [15.44].

⁸⁶ See Chapter 3. The standing of rangatira should not be adversely impacted by a class actions regime in accordance with the no adverse impact principle discussed in Chapter 9.

⁸⁷ See *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [796]–[802] and [810] per Arnold and O’Regan JJ, and [952] per William Young J (rejecting the standing of Wakatū and the trustees of Te Kahui Ngahuru Trust to represent descendants of customary owners of certain land). Compare [490]–[491] per Elias CJ and [657] and [668]–[673] per Glazebrook J (proposing a more flexible approach and noting the appellants’ submission that decisions on the appropriate plaintiff or plaintiffs should be “decided according to tikanga, which is part of the values of New Zealand common law”). For discussion, see Karen Feint “A Commentary on the Supreme Court Decision of Proprietors of Wakatū v Attorney-General” (2017) 25 Wai L Rev 1 at 14–15. We also note that under current law there may be issues as to who may benefit from relief notwithstanding the standing thresholds being met.

⁸⁸ In *Whakatane District Council v Keepa* HC Rotorua M7/00, 27 June 2000, Paterson J held that Mr Keepa was an appropriate representative defendant of owners of Māori land on the ground he had applied to the Māori Land Court to have the matter at issue decided. Mr Keepa objected that his authority did not extend to High Court proceedings and asked for a further hui to enable the question of representation to be addressed. His request was denied.

kinship. One potential consequence is that a person who can meet the general requirements for a representative plaintiff may not have a mandate, in terms of tikanga, to represent the people they purport to represent. Another is that a person who does not meet all the requirements for a representative plaintiff may have a mandate, in terms of tikanga, to represent those people. The boundaries of any mandate may not be drawn precisely and may overlap with mandates held by others. The issue is significant in the sense that any judgment arising from a class action may have inter-generational effects for those people and their descendants.⁸⁹

- 11.44 In light of this, it may be appropriate to consider the role of tikanga Māori in evaluating the representativeness of an intended plaintiff pursuing a class action on behalf of a Māori collective, 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.⁹⁰
- 11.45 In terms of existing statutory precedents, the Marine and Coastal Area (Takutai Moana) Act 2011 includes various provisions that acknowledge customary rights as being rights which are held in accordance with tikanga.⁹¹ If an application for an order recognising a customary right is made, the applicant’s mandate to represent the customary owners may need to be established. For example, in *Re Tipene* the High Court determined that the applicant for a recognition order had demonstrated his authority to make the application.⁹² The Court considered a number of factors, including support for the application among interested parties and the applicant’s knowledge of the claimed area and his understanding of tikanga.⁹³
- 11.46 Section 30 of Te Ture Whenua Maori Act 1993 empowers the Māori Land Court to advise other courts as to who are the most appropriate representatives of a class or group, and to determine, by order, who are the most appropriate representatives for the purpose of proceedings in those courts.⁹⁴ Commentary on section 30 suggests that the people involved should be encouraged to resolve representation questions among themselves,⁹⁵ although in many if not most cases the matter is before the Court because a decision is required.

⁸⁹ Te Aka Matua o te Ture | Law Commission *Waka Umanga: A proposed law for Māori governance entities* (NZLC R92, 2006) at [4.55].

⁹⁰ See Chapter 9 for a brief description of whanaungatanga and mana. If a decision is made to have defendant class actions, then the question will arise as to whether tikanga has a role in determining who is an appropriate defendant in this context. See Chapter 8 regarding defendant class actions.

⁹¹ For example, see Marine and Coastal Area (Takutai Moana) Act 2011, ss 9 and 58.

⁹² *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 at [175]–[176].

⁹³ *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559. An iwi, hapū or whānau group seeking recognition of their protected customary rights or customary marine title may appoint a person (or a legal entity) as their representative: Marine and Coastal Area (Takutai Moana) Act 2011, s 9 definition of “applicant group”. An application made on behalf of “all Māori” was struck out as it fell outside the definition of applicant group in *Re Paul* [2020] NZHC 2039.

⁹⁴ For background, see Te Aka Matua o te Ture | Law Commission *Determining Representation Rights under Te Ture Whenua Maori Act 1993: An Advisory Report for Te Puni Kōkiri* (NZLC SP8, 2001).

⁹⁵ John Burrows (ed) *Land Law* (online ed, Thomson Reuters) at [ML5.13(4)]. The Court itself has suggested that representation should depend on due process of consultation according to tikanga (among other factors): see *Ngāti Paoa Whānau Trust* (1995) 96A Hauraki MB 15 (96A H 15).

- 11.47 If a question of tikanga arises, the High Court may state a case for the opinion of the Māori Appellate Court.⁹⁶ We have heard that this can be a time-consuming and expensive process. It has been suggested to us that the High Court could appoint a tikanga adviser to assist decision-making if needed. There is precedent for this approach in the Marine and Coastal Area (Takutai Moana) Act 2011.⁹⁷ We think such mechanisms should be used as a last resort, for example, if the evidence needs to be assessed by a person with specialist expertise, given the potential for delay and added cost. We have also heard during our preliminary discussions that reasonably liberal rights of intervention on the question of certification, from both inside and outside the proposed class, may be necessary to ensure a full hearing of representation questions.

QUESTION

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?

OTHER REPRESENTATIVE PLAINTIFF MATTERS

- 11.48 The preceding discussion sets out what we see as the main questions regarding a representative plaintiff that need to be decided. Other matters that would need to be considered if a class actions regime is adopted include:
- (a) The situations in which a representative plaintiff may be substituted.⁹⁸
 - (b) Whether a regime should provide for sub-classes with a sub-class representative plaintiff for each. This might be appropriate where there are common issues not shared by all class members.⁹⁹
 - (c) Methods of lessening the burden on the representative plaintiff, such as having a litigation committee formed from a group of class members to take responsibility for important decisions during the litigation.¹⁰⁰

⁹⁶ Te Ture Whenua Maori Act 1993, s 61.

⁹⁷ Marine and Coastal Area (Takutai Moana) Act 2011, s 99(1)(b) expressly enables the Court to obtain the advice of a pūkenga who has knowledge and experience of tikanga. A pūkenga could alternatively be appointed by the Court as an expert under r 9.36 of the High Court Rules 2016 or the Court's inherent jurisdiction: see *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [36]. Specialist advisors can be used in other contexts: see for example Commerce Act 1986, ss 77–78.

⁹⁸ We note that the Court granted an application to substitute a representative plaintiff in *Nireaha Tamaki v Baker* (1902) 22 NZLR 97 (SC).

⁹⁹ We note that sub-classes are provided for under the Australian, Canadian, United States and United Kingdom Competition Appeal Tribunal Regimes.

¹⁰⁰ We understand that this approach has been taken in some representative actions in New Zealand, including in *Strathboss Kiwifruit v Attorney-General*, *Cridge v Studorp Ltd* and the early stages of *Houghton v Saunders*. See *Strathboss Kiwifruit Ltd v Attorney-General* [2019] NZHC 62 at [49]–[56]; *Houghton v Saunders* [2015] NZCA 141 at [21]; and *Houghton v Saunders* [2019] NZHC 2567 at [49].

- (d) Whether the representative plaintiff should be entitled to an incentive payment or award to compensate them for their time and effort spent on the proceedings.¹⁰¹
 - (e) Whether there should be any restriction on lawyers recruiting representative plaintiffs.¹⁰²
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¹⁰¹ Jurisdictions have taken differing approaches to this. In the United States, an incentive award is paid to the representative plaintiff in most class action cases, with an average award of USD\$10,000–\$15,000: William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§ 17:1]. Canadian courts have been cautious about awarding incentive payments and it is generally accepted that a representative plaintiff should only receive additional compensation where they have provided services over and above the usual duties of a representative plaintiff: Janet Walker (ed) *Class Actions in Canada: Cases, Notes, and Materials* (2nd ed, Emond Publishing, Toronto, 2018) at 129. In Australia, courts have enabled payments to be made to representative plaintiffs, sub-group representatives and class members who are actively involved in the litigation to reimburse them for their time and expenditure on the litigation: Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [22.22]; and Vince Morabito *Common Fund Orders, Funding Fees and Reimbursement Payments* (An Evidence-Based Approach to Class Action Reform in Australia, January 2019) at 21.

¹⁰² In Canada, for example, courts have expressed concerns about recruitment of class action plaintiffs by lawyers because it may result in a plaintiff being essentially a passive placeholder while the case is driven by an entrepreneurial lawyer: Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 81–83.

CHAPTER 12

Membership of the class

INTRODUCTION

- 12.1 In this chapter we discuss how membership of the class should be determined in a class action proceeding. Rachael Mulheron has observed that the method of determining who is a member of a class and who will be bound by a class action judgment is “the most crucial” issue in the design of a class regime and possibly the most controversial.¹ It involves the policy question of whether a person’s legal rights should be determined without their express consent to participate in the proceeding.²
- 12.2 There are many different ways a class can be constituted.³ In this Issues Paper we focus our discussion on three approaches: the opt-in approach, the opt-out approach and allowing either opt-in or opt-out (or a universal approach) depending on the case. Under an opt-in approach, potential class members must affirmatively opt into the class action by taking a prescribed step by a certain date in order to be bound by any judgment on the common questions in the proceeding, or by a settlement.⁴ Under an opt-out approach, all people who fall within the description of the class are bound by the class action judgment or settlement unless they take a prescribed step by a certain date to exclude themselves from the proceeding.⁵ As we discuss below, in most cases an opt-out proceeding will need to convert to an opt-in proceeding at some point in the litigation

¹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 29 (citing several law reform body reports).

² Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 29.

³ Rachael Mulheron observes that while law reform bodies often describe the decision between opt-in or opt-out as the most important issue, the choice is actually more complicated than that. She sets out 10 different mechanisms by which the class can be comprised. These are: a purely opt-in class; a purely opt-out class; a compulsory class; a compulsory class from which opt-outs are permitted by judicial discretion; an opt-out mechanism which can be made compulsory by judicial discretion; opt-in or opt-out depending on the court’s discretion; default is opt-in unless the court decides opt-out is more appropriate; a compulsory class or an opt-out class which must convert to opt-in following judgment or settlement to achieve finality for class members; opt-out mechanism for the principal class with a specified sub-class required to opt-in; and opt-out class which converts to opt-in prior to judgment on the common issues or settlement. See Rachael Mulheron “Opting in, Opting Out, and Closing the Class: Some Dilemmas for England’s Class Action Lawmakers” (2011) 50 CBLJ 376 at 379–407.

⁴ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 29.

⁵ Rachael Mulheron “Opting in, Opting Out, and Closing the Class: Some Dilemmas for England’s Class Action Lawmakers” (2011) 50 CBLJ 376 at 384.

so that individual issues can be determined. Under a universal or compulsory approach, there is no opportunity to opt into or out of the claim.

AOTEAROA NEW ZEALAND APPROACH

- 12.3 All of the early Aotearoa New Zealand representative actions were brought on a ‘universal basis’, which means they were brought on behalf of all members of a defined class without first obtaining their consent or providing any opportunity for them to remove themselves from the proceedings.⁶ This included some cases with large classes. For example, one case was brought against the Attorney-General on behalf of 65,000 people who were applicants for a Special Benefit.⁷
- 12.4 As explained in Chapter 3, High Court Rule 4.24 (HCR 4.24) sets out two ways of bringing a representative action. First, a claim can be brought with the consent of the other persons with the same interest.⁸ The wording of the rule indicates that consent is required from *all* of those with the same interest, not just the group of people who wish to bring the class action.⁹ Second, a claim can be brought with the court’s leave and “as directed by the court” following an application by an intended representative plaintiff.¹⁰
- 12.5 In cases where the court’s leave has been required, a practice developed in Aotearoa New Zealand of the courts making orders allowing representative actions to proceed on an opt-in basis. This practice can be traced back to the High Court’s decision in *Houghton v Saunders*.¹¹ In that case, the plaintiff sought to bring a representative action on behalf of over 3,600 shareholders in the failed Feltex Carpet Company and successfully made a without notice application for a representation order on an opt-out basis. This was the first time that an opt-out order had been made in Aotearoa New Zealand.¹²
- 12.6 The defendants applied to review the opt-out order. The High Court held it should not have been made and replaced it with an opt-in order.¹³ In the Court’s view, “an opt out procedure represents too radical a departure from the existing Rules”.¹⁴ Without

⁶ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [82].

⁷ *Ankers v Attorney-General* (1995) 8 PRNZ 455 (HC).

⁸ High Court Rules 2016, r 4.24(a).

⁹ High Court Rules 2016, r 4.24(a) provides:

One or more persons may sue or be sued on behalf of, or for the benefit of, *all persons with the same interest* in the subject matter of a proceeding — (a) with the consent of the other persons who have the same interest. (emphasis added)

See also *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [28] where the Court of Appeal commented that “[p]lainly it was not feasible for Mr and Mrs Ross to consent to the consent of every member of the class to a representative claim,” so they required leave to bring the claim under r 4.24(b) of the High Court Rules 2016.

¹⁰ High Court Rules 2016, r 4.24(b).

¹¹ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC).

¹² *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [28].

¹³ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [168].

¹⁴ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [165].

legislative change, the Court had to work within the existing High Court Rules, which only contemplated opt-in proceedings.¹⁵

- 12.7 After this decision, representative actions proceeded on an opt-in basis and the issue of whether opt-out proceedings should be available did not come before the courts for another decade.¹⁶ In *Ross v Southern Response*, the plaintiff unsuccessfully sought an order that the representative proceeding be brought on an opt-out basis.¹⁷ However, this was overturned on appeal. The Court of Appeal held that there was no jurisdictional barrier to making an opt-out order under HCR 4.24.¹⁸ The Court also commented that a judge does not have to make either an opt-out or opt-in order and it remains possible for a claim to be brought on a universal basis.¹⁹ The Court's decision was upheld on appeal. The Supreme Court said that the Court was correct to conclude that opt-out orders should be made in appropriate cases.²⁰ It commented that an opt-out approach was "generally consistent" with the objectives of HCR 4.24 and that it had advantages in improving access to justice in particular.²¹
- 12.8 Courts have explained that an opt-in or opt-out mechanism does not define the class of persons with the same interest on whose behalf proceedings are brought. Rather, these are mechanisms that the court may use to limit membership of the class.²²

OVERSEAS APPROACHES

- 12.9 Rachael Mulheron observes that opt-out proceedings are the "clearly preferred choice in modern common law systems".²³ However, as discussed below, an opt-in approach is more common in European regimes.
- 12.10 In Australia, a deliberate policy choice was made to have an opt-out regime and consent to be a class member is not required,²⁴ except in the case of Government class members.²⁵

¹⁵ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [165].

¹⁶ Note that in *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 the majority appeared to accept that both opt-in and opt-out orders might be available, but this was not an issue the Court needed to decide. See at [163] and [168].

¹⁷ *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288.

¹⁸ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [81] and [111].

¹⁹ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [83].

²⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [89].

²¹ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [40].

²² *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [164]–[165]; and *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [83].

²³ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 35.

²⁴ Federal Court of Australia Act 1976 (Cth), s 33E; Civil Procedure Act 2005 (NSW), s 159; Supreme Court Act 1986 (Vic), s 33E; Civil Proceedings Act 2011 (Qld), s 103D; and Supreme Court Civil Procedure Act 1932 (Tas), s 68.

²⁵ Written consent is required before any of the following can become a group member: the Commonwealth, a State or Territory; a Minister of the Commonwealth, a State or a Territory; a body corporate established for a public purpose by law (other than an incorporated company or association); or an officer of the Commonwealth or of a state or territory (in their official capacity). The Victorian legislation also includes a judge, magistrate or other judicial officer in this list. See Federal Court of Australia Act 1976 (Cth), s 33E(2); Civil Procedure Act 2005 (NSW), s 159(2); Supreme Court Act

When the federal class action legislation was introduced to Parliament, the Attorney-General explained that an opt-out regime was preferred on equity and efficiency grounds.²⁶

- 12.11 All of the Canadian class actions regimes are opt-out,²⁷ although in two provinces non-residents must opt into proceedings.²⁸ An opt-out approach was also recommended by the Ontario Law Reform Commission in its 1982 report.²⁹ It considered that silence did not mean that class members were uninterested in proceedings and so class members should not be denied the potential benefits of a class action by failing to act.³⁰
- 12.12 In the United States, an opt-out approach is used.³¹ However, there are three kinds of class action cases that can be brought on a universal or compulsory basis, where there is no requirement to provide an opportunity to opt out.³² These types of case are: incompatible standards class actions,³³ limited fund class actions³⁴ and injunctive class actions.³⁵ The reason for the lack of mandatory opt-out for these kinds of class actions is that the class members' interests are interlocked and so it may be impractical to opt out.³⁶ An example is a school desegregation case where, as success would likely lead to an integration of the public schools, it would be hard for a class member to practically opt out of the outcome.³⁷

1986 (Vic), s 33E(2); Civil Proceedings Act 2011 (Qld), s 103D(2); and Supreme Court Civil Procedure Act 1932 (Tas), s 68(2).

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3175 (Michael Duffy, Attorney-General).

²⁷ Federal Courts Rules SOR/98-106, r 334.21(1); Class Proceedings Act SA 2003 c C-16.5, s 17(1) and (2); Class Proceedings Act RSBC 1996 c 50, s 16(1); Class Proceedings Act CCSM 2002 c C-130, s 16; Class Proceedings Act RSNB 2011 c 125, s 18(1); Class Actions Act SNL 2001 c C-18.1, s 17(1); Class Proceedings Act SNS 2007 c 28, s 19(1); Class Proceedings Act SO 1992 c 6, s 9; The Class Actions Act SS 2001 c C-12.01, s 18; and Code of Civil Procedure CQLR c C-25.01, art 580.

²⁸ These are New Brunswick, and Newfoundland and Labrador: Class Proceedings Act RSNB 2011 c 125, s 18(3); and Class Actions Act SNL 2001 c C-18.1, s 17(2).

²⁹ Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at Recommendation 1 and 491.

³⁰ Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 485. One of the agreed parameters for the Ontario Attorney General's Advisory Committee on Class Action Reform was that the procedure would feature an opt-out rule: *Report of the Attorney General's Advisory Committee on Class Action Reform* (Ministry of the Attorney General, February 1990) at 6.

³¹ Money damages class actions are brought under r 23(b)(3) of the United States Federal Rules of Civil Procedure as opposed to r 23(b)(1) or (2).

³² United States Federal Rules of Civil Procedure, r 23(c)(2)(A).

³³ United States Federal Rules of Civil Procedure, r 23(b)(1)(A). This type of class action is where the prosecution of:

... separate actions by or against individual members of the class would create a risk of incompatible standards of conduct for the adverse party due to inconsistent or varying adjudications with respect to individual members of the class.

³⁴ United States Federal Rules of Civil Procedure, r 23(b)(1)(B). This type of class action is where an individual judgment would, as a practical matter, dispose of the interests of other class members or would substantially impair/impede their ability to protect their interests.

³⁵ United States Federal Rules of Civil Procedure, r 23(b)(2). This type of class action is where a party has taken, or refused to take, action with respect to the class and injunctive relief (or similar) is appropriate with respect to the whole class.

³⁶ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:1].

³⁷ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§4:1].

- 12.13 The United Kingdom Competition Appeal Tribunal can specify that proceedings are to be either opt-in or opt-out.³⁸ The Tribunal will consider factors such as the strength of the claim (which is generally required to be more immediately apparent in an opt-out claim) and whether it is practicable for the claim to be brought as an opt-in claim, particularly in light of the expected individual damages (with a general preference for opt-in where practicable).³⁹
- 12.14 In Europe, most countries follow an opt-in approach. A 2018 European Commission report noted that of the European Union member states with compensatory collective redress mechanisms, 13 states used an opt-in mechanism, four states allowed both opt-in and opt-out, and two states only used an opt-out mechanism.⁴⁰ The European Commission has recommended that an opt-in regime should be preferred.⁴¹ Christopher Hodges indicates that the preference for an opt-in approach in European civil law jurisdictions reflect the “conceptual confusion” of accommodating collective litigation within legal systems that are based on individual rights.⁴²

OPT-IN PROCEEDINGS

- 12.15 The main advantages and disadvantages of the opt-in approach are discussed below. In short, opt-in proceedings ensure that class members have actively consented to the proceedings, which tends to result in much smaller classes. It has been observed that proponents of the opt-in approach tend to place a high value on “individualised litigant autonomy” as well as protecting class members and defendants.⁴³

Advantages of opt-in proceedings

- 12.16 A key advantage of an opt-in approach is that it enables potential litigants to make their own informed decision about whether to participate in litigation, which supports the goals of freedom of choice and individual autonomy. However, Vince Morabito critiques this

³⁸ Competition Act 1998 (UK), s 47B(7)(c). Note that if a proceeding is opt-out, there is an exception for class members residing outside the United Kingdom, who must opt-in: s 47B(11)(b).

³⁹ The Competition Appeal Tribunal Rules 2015 (UK), r 79(3); and Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.39].

⁴⁰ *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)* (European Commission, COM(2018) 40, January 2018) at [2.3.1]. States using opt-in mechanisms include Austria, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Malta, Poland, Romania, Spain, and Sweden. States using opt-in and opt-out include Belgium, Bulgaria, Denmark, and the United Kingdom (we note that since this document was published, the United Kingdom has ceased being a member state). States using only opt-out mechanisms include the Netherlands and Portugal.

⁴¹ *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)* (European Commission, COM(2018) 40, January 2018) at [2.3.1].

⁴² Christopher Hodges “From class actions to collective redress: a revolution in approach to compensation” (2009) 28 CJQ 41 at 44.

⁴³ Scott Dodson “An Opt-In Option for Class Actions” (2016) 115 Mich L Rev 171 at 187.

idea and argues it fails to embrace a fundamental feature of class actions, namely allowing litigants to bring proceedings on behalf of others.⁴⁴

- 12.17 Under an opt-in regime, individuals will only be bound by a class action if they intend to be and there is no risk of a proceeding binding an individual who was unaware that it was occurring.⁴⁵ This was the rationale for the European Commission’s recommendation that member states use an opt-in mechanism.⁴⁶ The seriousness of this risk will differ according to the matter at issue. For example, if someone is unintentionally bound by a decision about a low value consumer issue (say, a defective appliance worth \$50), this is unlikely to be a major concern. However, it would be more concerning if someone were bound by a legal decision about a significant asset (such as their house or their retirement savings) when they were unaware of the proceedings.
- 12.18 There may be some types of cases where an opt-in approach is particularly appropriate. For example, in cases involving allegations of physical or sexual abuse it may be important to ensure that individuals have consented to the litigation.⁴⁷ As discussed below, the Supreme Court has said that an opt-in approach is likely to be appropriate where the class size is small and there is a “natural community of interest” or where there is a real prospect that some class members may suffer adverse consequences from participating in proceedings.⁴⁸ An opt-in approach appears to have worked well in *Scott v ANZ Bank*, a case brought by investors in Ross Asset Management, with over 90 per cent of investors reported to have opted into the proceedings.⁴⁹ Because Ross Asset Management was in liquidation, the representative plaintiffs were able to obtain the liquidators’ assistance in notifying investors of the opt-in proceeding. Generally, Aotearoa New Zealand’s small size may make it easier to alert potential class members of a class action than in other jurisdictions.
- 12.19 It has also been suggested that an opt-in approach is likely to meet certification requirements more easily because of the “greater cohesion and stronger representational qualities” of opt-in classes.⁵⁰ In the United Kingdom Competition Appeal Tribunal, for example, a more stringent assessment of the merits is likely to apply to a proposed opt-out claim. This stringent approach is not needed with a proposed opt-in claim because

⁴⁴ Vince Morabito “Opt In or Opt Out? A Class Dilemma for New Zealand” (2011) 24 NZULR 421 at 440.

⁴⁵ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [239].

⁴⁶ It said that exceptions to this principle should be justified by “reasons of sound administration of justice”. It cited cross-border cases as an example where opt-out proceedings could be particularly problematic: *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)* (European Commission, COM(2018) 40, January 2018) at 13.

⁴⁷ Rachael Mulheron “The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis” (2009) 15 Colum J Eur L 409 at 427.

⁴⁸ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [97]–[98].

⁴⁹ Rob Stock “Victims of David Ross seek \$80 million in damages from ANZ” (26 February 2020) Stuff <www.stuff.co.nz>.

⁵⁰ Scott Dodson “An Opt-In Option for Class Actions” (2016) 115 Mich L Rev 171 at 174.

the class members have chosen to join the proceedings and will have conducted their own assessment of the strength of the claim.⁵¹

- 12.20 As the opt-in process is generally managed by the lawyer acting for the class, signing a retainer agreement can be part of the opt-in requirements. This ensures that there is a solicitor-client relationship with each class member and that matters such as the scope of the retainer and fees are clear. It also ensures that communications between the lawyer and class members attract legal privilege.
- 12.21 An opt-in approach is also able to avoid the problem of ‘free riders’ with respect to litigation funding. As part of the opt-in procedure, group members can be required to sign up to any litigation funding agreement or other arrangements for meeting the costs of proceeding.⁵² We understand this is generally what happens in Aotearoa New Zealand with representative actions at present. However, it is not inevitable that this is the case and an opt-in claim could be formulated without a requirement to sign up to litigation funding.⁵³
- 12.22 Another benefit of an opt-in approach is that the size of the class is clear, which can help the defendant to calculate its potential liability and can make the litigation more manageable for them.⁵⁴

Disadvantages of opt-in proceedings

- 12.23 The main disadvantage of opt-in proceedings is that they typically involve a smaller class size, which may undermine some of the objectives of class actions, namely achieving economies of scale and access to justice. The smaller size is because opt-in regimes require class members taking active steps to join the proceeding and many will fail to do so. Rachael Mulheron discusses the available empirical data on opt-in and opt-out rates in different jurisdictions and concludes that “participation rates are skewed very much in favour of the opt out”.⁵⁵ Similarly, Vince Morabito’s research on class actions in the Australian Federal Court has found low participation rates when opt-in devices are used, compared to the participation rate of over 86 per cent under an opt-out rule.⁵⁶ The situation will differ from claim to claim. As we have noted above, in the *Scott v ANZ Bank*

⁵¹ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.39].

⁵² See for example Deborah R Hensler “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally” (2017) 65 U Kan L Rev 965 at 978 commenting that third-party funding works particularly well in opt-in regimes and that in opt-out regimes the practical effect of third-party funding is to convert the class action to an opt-in procedure.

⁵³ This point is noted in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [110]. See also *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [54] which refers to the proceeding being funded on an “open class” basis.

⁵⁴ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 30. These arguments are critiqued in Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 481–482.

⁵⁵ Rachael Mulheron “The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis” (2009) 15 Colum J Eur L 409 at 433–434. For example, data on 37 English group litigation cases showed that 32 had an opt-in rate of less than 50 per cent, with eight cases having an estimated opt-in rate of less than 10 per cent: at 433.

⁵⁶ Vince Morabito “Opt In or Opt Out? A Class Dilemma for New Zealand” (2011) 24 NZULR 421 at 437–440.

- representative action, over 90 per cent of investors are reported to have opted into the claim.⁵⁷
- 12.24 The smaller class size may make potential class actions uneconomic, particularly where individual damages claims are modest.⁵⁸ Deborah Hensler and Thomas Rowe comment that making class actions reliant on class members having significant individual claims would subvert one of the key purposes of collective action.⁵⁹ Under an opt-in regime, it may be necessary for lawyers and/or funders to engage in a substantial and costly ‘book building’ exercise up front to ensure that there is a sufficient claim size to proceed.⁶⁰
- 12.25 Because an opt-in approach relies on people receiving the notice of the class action and taking active steps to join the proceeding, it may deny access to justice to those who are unaware of the proceeding or who fail to opt in because of economic, psychological or social barriers.⁶¹ Rachael Mulheron has identified a range of reasons why litigants do not opt into proceedings, including limited understanding of the legal system, fear of shame or stigmatisation, concern about reprisals from defendants and concern about the cost implications.⁶² Some have questioned the notion that failing to opt into a process means a preference not to participate.⁶³ As the Court of Appeal observed in *Ross v Southern Response*, “[e]ven where a class member considers that it is in their interests to participate in the proceedings, the significance of inertia in human affairs should not be underestimated”.⁶⁴
- 12.26 An opt-in approach can also undermine access to justice because it requires potential class members to take an affirmative step to join the proceeding at an early stage when they may know little about the claim.⁶⁵ In contrast, as discussed below, while most opt-out claims eventually require individual claims to opt-in, this is at a much later stage and the class member will have a much clearer idea of the implications of doing so.⁶⁶
- 12.27 There is also a risk of multiple opt-in proceedings over the same issue, which could be inefficient and more expensive for defendants. However, Aotearoa New Zealand’s

⁵⁷ See Rob Stock “Victims of David Ross seek \$80 million in damages from ANZ” (26 February 2020) Stuff <www.stuff.co.nz>.

⁵⁸ Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 47.

⁵⁹ Deborah R Hensler and Thomas D Rowe Jr “Beyond ‘It Just Ain’t Worth It’: Alternative Strategies for Damage Class Action Reform” (2001) 64 LCP 137 at 145–146.

⁶⁰ Vicki Waye and Vince Morabito “When Pragmatism Leads to Unintended Consequences: A Critique of Australia’s Unique Closed Class Regime” (2018) 19 Theo Inq L 303 at 315–316.

⁶¹ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [240]. See also Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 480. See also our discussion on barriers to bringing litigation in Chapter 5.

⁶² Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 75; and Rachael Mulheron *Reform of Collective Redress in England and Wales: A Perspective of Need* (Research paper for submission to the Civil Justice Council of England and Wales, November 2008) at 32–34.

⁶³ Deborah R Hensler and Thomas D Rowe Jr “Beyond ‘It Just Ain’t Worth It’: Alternative Strategies for Damage Class Action Reform” (2001) 64 LCP 137 at 146. They draw an analogy with research on parental consent to student testing, where most of those who failed to sign up did not object but had not received the consent form, lost it or were too busy to fill it out. See also Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 479–480.

⁶⁴ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [98].

⁶⁵ Ontario Law Reform Commission *Report on Class Actions* (Volume II, 1982) at 468.

⁶⁶ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [118].

experience with opt-in representative actions has not shown this to be a common occurrence. The only example we are aware of is the two opt-in representative actions brought in relation to the collapse of CBL Insurance.⁶⁷ We also note that the risk of multiple class actions is not entirely removed under an opt-out regime, particularly where ‘closed classes’ are allowed, as we discuss below.⁶⁸ Under both opt-in and opt-out approaches, there may also be individual proceedings brought by those who do not wish to be part of the class action, and there are examples of this in Aotearoa New Zealand.⁶⁹

OPT-OUT PROCEEDINGS

- 12.28 The key advantages and disadvantages of an opt-out mechanism are discussed below. Because opt-out proceedings can overcome social and psychological barriers to joining litigation, class size tends to be much larger and this can make a greater range of claims economic. However, opt-out claims carry the risk of binding unknowing litigants to the outcome of a decision. It has been said that proponents of opt-out claims tend to devalue individual litigant autonomy, instead prioritising the ability of class actions to enable group claims and promote efficiency.⁷⁰
- 12.29 It should be noted that in most cases, an opt-out proceeding will need to convert to an opt-in proceeding at some point so that individual claims can be determined. In *Ross v Southern Response*, if the proceeding reaches a ‘stage two’ hearing to determine relief, class members will need to opt in and to provide information relevant to their individual claim.⁷¹ Rachael Mulheron observes that there are essentially only three situations where an opt-out proceeding will not need to convert to opt-in. These are: where the class loses on the common issues, where damages are awarded on an aggregate basis and where damages can be awarded without class members taking proactive steps because the defendant has the information to make direct credits or refunds.⁷²

Advantages of opt-out proceedings

- 12.30 The Court of Appeal said in *Ross v Southern Response* that an opt-out approach was “likely to significantly enhance access to justice”.⁷³ The Supreme Court agreed that an

⁶⁷ We understand that the High Court has allowed both to proceed as representative actions.

⁶⁸ In *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [100] the Court noted that an opt-out approach did not preclude the possibility of parallel claims. Claimants could opt out and bring their own claim or participate in another opt-in claim. The Supreme Court noted that the issue of competing claims could arise under both an opt-in and an opt-out approach: *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [87]–[88].

⁶⁹ For example, there are both individual proceedings and a representative action filed in relation to Southern Response’s management of insurance claims in Christchurch: see *Southern Response Earthquake Services Ltd v Dodds* [2020] NZCA 395; and *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126.

⁷⁰ Scott Dodson “An Opt-In Option for Class Actions” (2016) 115 Mich L Rev 171 at 186.

⁷¹ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [10]. See also *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [35].

⁷² Rachael Mulheron “The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis” (2009) 15 Colum J Eur L 409 at 431.

⁷³ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [98].

opt-out approach has advantages in improving access to justice.⁷⁴ As discussed earlier in this chapter, there are many barriers which can prevent class members from taking the positive step of joining a class action. For example, they may simply be too busy to respond to the notice, they may not understand the notice, or they may distrust the legal system. An opt-out approach can ensure that these barriers do not prevent a person from having their claims considered by the court and potentially obtaining redress.⁷⁵

- 12.31 In particular, opt-out proceedings may facilitate class actions where each individual's claim is small, and so they may not have been motivated to opt in. In such a case, the collective amount of harm may be large and worthy of redress.
- 12.32 The class size is likely to be larger under an opt-out regime because participation is the default and opt-out rates are generally low.⁷⁶ The larger class size means that claims are more likely to be economically viable for litigation funders and are therefore more likely to proceed. Other benefits of large classes include helping to level the playing field by ensuring 'strength in numbers', being able to raise public awareness more easily and making it easier to meet any numerosity requirements for certification.⁷⁷
- 12.33 Another advantage is that opt-out claims will strengthen incentives for insurers and other large entities to comply with the law, by increasing the likelihood they will be held to account for breaches of obligations to large numbers of people.⁷⁸ An opt-out approach may serve the deterrent objective of tort law by ensuring that defendants must face the full measure of damages they have caused.⁷⁹ An opt-out approach may also be less costly and more efficient for defendants as there is less likelihood of multiple class actions (although, as noted above, competing representative actions have been rare in Aotearoa New Zealand). As we note above, under both opt-in and opt-out approaches, there is a risk of individual proceedings brought by those who do not wish to be part of the class action.

Disadvantages of opt-out proceedings

Denial of individual autonomy

- 12.34 An opt-out proceeding involves people being part of litigation that they have not expressly consented to. As the High Court commented in *Houghton v Saunders*, "[t]he notion that someone can become a party to a court proceeding without their consent is

⁷⁴ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 162 at [40].

⁷⁵ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [237]. See also *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [98] as cited in *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 162 at [40].

⁷⁶ See Thomas E Willging, Loral L Hooper and Robert J Niemic *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center, 1996) at 52 (finding that in 75 per cent of cases, less than 1.2 per cent of class members opted out); and Vince Morabito "Opt In or Opt Out? A Class Dilemma for New Zealand" (2011) 24 NZULR 421 at 438 (the average opt-out rate in Australia Federal Court class actions is around 13 per cent).

⁷⁷ Scott Dodson "An Opt-In Option for Class Actions" (2016) 115 Mich L Rev 171 at 185.

⁷⁸ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [99].

⁷⁹ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [237].

somewhat alien to our way of thinking”.⁸⁰ Opt-out proceedings might be seen to violate principles of freedom of choice and individual autonomy.⁸¹ On the other hand, the ability to opt out also promotes individual autonomy.⁸² The Australian Law Reform Commission (ALRC) has observed that there is no difference in principle between exercising freedom of choice as to whether to commence a proceeding and exercising freedom of choice as to whether to continue one.⁸³

- 12.35 In *Mobil Oil Australia Pty v The State of Victoria*, the High Court of Australia rejected a constitutional challenge to the Victorian class actions regime.⁸⁴ One of the challenged aspects was that a person did not need to give their consent in order to be a group member. The decision of Gaudron, Gummow and Hayne JJ commented at [51]:

Although a proceeding under Pt 4A may affect the rights both of those who know of and support the prosecution of the proceeding and of those who do not know of it, Pt 4A does not compel the unwilling to continue to remain a group member. The unwilling may seek to opt out.

- 12.36 The Federal Court of Australia also rejected a constitutional challenge to the federal class actions regime in *Femcare v Bright*.⁸⁵ One argument was that the legislation infringed the autonomy of class members as they could be unwillingly “dragged by others into public legal processes”.⁸⁶ In rejecting this submission, the Court said it overlooked the legislative provisions that were designed to preserve individual class members’ freedom of choice, including the ability to opt out of the claim.⁸⁷
- 12.37 Nonetheless, it might be seen as unfair to require a class member to go to the effort of removing themselves from litigation which they have done nothing to promote.⁸⁸ It can also be argued that opt-out claims are paternalistic because they involve a default presumption that a claim is in the best interests of others.⁸⁹ The ALRC dismissed this argument, commenting that many people are unaware of their rights or how to enforce them and that it was not paternalistic to provide access to a remedy that would otherwise be denied.⁹⁰

⁸⁰ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [157].

⁸¹ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [238].

⁸² See Vince Morabito “Opt In or Opt Out? A Class Dilemma for New Zealand” (2011) 24 NZULR 421 at 440–441.

⁸³ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [126]. See also Vince Morabito “Opt In or Opt Out? A Class Dilemma for New Zealand” (2011) 24 NZULR 421 at 441.

⁸⁴ *Mobil Oil Australia Pty Ltd v The State of Victoria* [2002] HCA 27, (2002) 211 CLR 1. The appellant argued that provisions of Part 4A of the Supreme Court Act 1986 (Vic) were invalid because they exceeded the territorial limits on the legislative power of the state (arising under the Constitution or otherwise) and because they were inconsistent with the requirements for the exercise of judicial power by the Supreme Court arising under the Constitution: at [1].

⁸⁵ *Femcare Ltd v Bright* (2000) 100 FCR 331 (FCA) (sitting as the Full Court).

⁸⁶ *Femcare Ltd v Bright* (2000) 100 FCR 331 at [36] (sitting as the Full Court).

⁸⁷ *Femcare Ltd v Bright* (2000) 100 FCR 331 at [86] (sitting as the Full Court).

⁸⁸ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 37.

⁸⁹ A similar point is made in Andrew Beck “Opt Out Is In: The New Class Action Regime” [2019] NZLJ 356 at 369:

A patronising approach which operates on the basis that someone else has decided what is beneficial does not sit easily with the current thinking that individuals ... should be allowed to determine their own best interest.

⁹⁰ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 122.

12.38 A class member who fails to opt out of a class action within the prescribed time will be bound by the result (and precluded from bringing their own proceeding).⁹¹ There is a risk that a class member will have been unaware of the proceeding and lose their right to bring a claim. This could be a particular risk in Māori collective litigation because a decision could bind an iwi or hapū far beyond the lives of its current members.⁹² We discussed whether a tikanga-based assessment of the representative plaintiff in such cases may mitigate this risk in Chapter 11.

Natural justice considerations

12.39 It has been argued that an opt-out approach may breach the right to natural justice in section 27(1) of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) because a class member could be precluded from bringing their own claim by a class action they were unaware of.⁹³

12.40 Section 27(1) guarantees every person:

the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

12.41 The two fundamental principles of natural justice are that persons whose rights are being determined are given (a) adequate notice and an opportunity to be heard; and (b) a disinterested and unbiased decision-maker.⁹⁴ The former principle is most relevant to this argument.

12.42 Clearly the right to natural justice is engaged where an individual has a claim encompassed in an opt-out class action. However, as the Supreme Court has observed:⁹⁵

... the content of the right to natural justice...is always contextual. The question is what form of procedure is necessary to achieve justice without frustrating the apparent purpose of the legislation.

12.43 Certainly the right to be heard is of particular importance in judicial proceedings.⁹⁶ But whether an opt-out class action is inconsistent with an individual's right to natural justice will also depend on other factors such as the nature of the rights and interests at issue,

⁹¹ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [238].

⁹² See Te Aka Matua o te Ture | Law Commission *Waka Umanga: A proposed law for Māori governance entities* (NZLC R92, 2006) at [4.55] ("Traditionally, the members of a tribe are not confined to the living but pre-eminently include the tribal forebears and the generations to come").

⁹³ In *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 the appellant (Southern Response) submitted that in the absence of adequate notice, determining the rights of class members who are unaware of the claim might infringe s 27(1) of the New Zealand Bill of Rights 1990. As discussed below, the Supreme Court considered that natural justice concerns could be met by notice provisions.

⁹⁴ *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11] per Glazebrook and Hammond JJ.

⁹⁵ *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120] per McGrath and Blanchard JJ, supported by Glazebrook J at [281]. See also Matthew Smith *NZ Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [49.4.2]; and Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [25.1].

⁹⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [25.4.4].

the potential effect of the court's determination on those rights and interests and the wider public interest in facilitating access to justice in the courts. Even if an opt-out class action does limit an individual's right to natural justice, that limitation will not necessarily breach the Bill of Rights Act, because (as noted) section 5 provides that rights may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".⁹⁷

- 12.44 Two points are relevant to assessing whether an opt-out approach breaches the right to natural justice under section 27 or is a justified limitation on that right under section 5. First, opt-out class actions enable claims to proceed which would not be viable for an individual to pursue, thus providing access to substantive justice where it might otherwise be denied. The Civil Justice Council, which advises on civil justice in England and Wales, took the view that opt-out class actions would not infringe the right to a fair trial, commenting:⁹⁸

A mechanism which increases effective access to justice to a class of citizens who would previously [have] none, albeit through a mechanism which eschews the traditional method of requiring the individuals concerned to take active steps to assert their right to effective access to justice, cannot legitimately be said to breach Article 6(1) ECHR.

- 12.45 Second, an opt-out regime could require class members to be given adequate notice of the class action, which advises of their ability to opt out of proceedings and explains any opportunities to be heard. The courts could have a role in supervising the way that notice is provided to class members to promote consistency with the requirements of section 27(1) in the given context.⁹⁹
- 12.46 Providing adequate notice to class members is seen as an essential safeguard for opt-out class actions regimes in other jurisdictions. Class actions regimes in Australia,¹⁰⁰

⁹⁷ To constitute a justified limitation the measure must be sufficiently important to justify the limitation on the right; rationally connected to the objective it is intended to serve; should constitute a minimal impairment on the right; and the limitation must be proportional to the significance of the objective. See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] as per Tipping J. The prescribed by law requirement will be more easily met by a statutory class actions regime than by the current case by case development of HCR 4.24.

⁹⁸ Civil Justice Council "*Improving Access to Justice through Collective Actions*": *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 148–149. Although the wording of s 27(1) of the New Zealand Bill of Rights Act 1990 is not closely aligned to Art 6(1) of the European Convention of Human Rights (or the equivalent provision in the International Covenant on Civil and Political Rights, Art 14.1), they both guarantee fairness in the determination of a person's rights. The essential point here, that unless one can access the justice system one cannot have their rights determined in accordance with the Art 6(1) guarantee, would apply equally in the New Zealand context.

⁹⁹ *Waitemata Health v Attorney-General* [2001] NZFLR 1122 (CA) at [96]–[108] per Elias CJ for the majority and [111]–[116] per Tipping J. Elias CJ observed that a failure to comply with mandatory statutory notice requirements "will lead to a remedy in the Courts" and, unless the statutory provisions are exhaustive, the common law will supplement the provision to achieve procedural fairness: at [98]. Tipping J also observed that where an order a tribunal might make "could have a detrimental effect on the rights, interests or obligations of someone who is not an immediate party to the proceedings, it should ordinarily inquire whether the person wishes to be heard on the matter", even if the statutory scheme does not expressly provide for this: at [113]–[114]. Ignoring third parties' interests would be inconsistent with s 27(2) of the New Zealand Bill of Rights Act 1990: at [113]–[114].

¹⁰⁰ Federal Court of Australia Act 1976 (Cth), s 33X(1)(a); Civil Procedure Act 2005 (NSW), s 175(1)(a); Civil Proceedings Act 2011 (Qld), s 103T(1)(a); Supreme Court Civil Procedure Act 1932 (Tas), s 84(1)(a); and Supreme Court Act 1986 (Vic), s 33X(1)(a).

Canada,¹⁰¹ the United States¹⁰² and the United Kingdom Competition Appeal Tribunal¹⁰³ all require class members to be given notice that a proceeding has been commenced and of their right to opt out. Class actions regimes generally have requirements about what the notice should contain (so that it is easily understandable) and how notice should be provided (to ensure that it reaches as many class members as possible).

- 12.47 In *Phillips Petroleum Co v Shutts*, the United States Supreme Court rejected the argument that the due process clause of the Constitution required class members to affirmatively opt into the class. It held that a procedure where a descriptive notice was sent to each class member with an explanation of the right to opt out satisfied due process requirements.¹⁰⁴ In *Southern Response v Ross*, the Supreme Court cited *Phillips Petroleum v Shutts* in support of its view that natural justice concerns in the context of opt-out representative actions can be addressed through the provision of adequate notice.¹⁰⁵

Uncertain relationship between lawyer and class members

- 12.48 A further issue with opt-out proceedings is that all class members will not necessarily have signed an agreement with the lawyer acting for the class. Indeed, the lawyer may not even know how many class members there are. This may cause some uncertainty about whether the lawyer has a lawyer-client relationship with class members.¹⁰⁶ In Aotearoa New Zealand, a retainer agreement may be implied and does not have to be recorded in writing.¹⁰⁷ Nonetheless, it may be preferable to have a retainer agreement which is express and recorded in writing so that the basis upon which the lawyer is acting is clear. The New Zealand Law Society has previously expressed the view that, absent legislative and regulatory reform, group members who have not engaged with the lawyers acting for the plaintiff should not be considered clients of the lawyer in any meaningful sense. Rather, it suggested that group members would need to be protected by a combination of the lawyer's duties to the Court and the Court's supervisory role in representative actions.¹⁰⁸

¹⁰¹ Federal Courts Rules SOR/98-106, r 334.32(5); Class Proceedings Act SA 2003 c C-16.5, s 20(6); Class Proceedings Act RSBC 1996 c 50, s 19(6)(g); The Class Proceedings Act CCSM 2002 c C-130, s 19(6); Class Proceedings Act RSNB 2011 c 125, s 21(6); Class Actions Act SNL 2001 c C-18.1, s 19(6); Class Proceedings Act SNS 2007 c 28, s 22(6); Class Proceedings Act SO 1992 c 6, s 17(5); Code of Civil Procedure CQLR c C-25.01, art 579; and The Class Actions Act SS 2001 c C-12.01, s 22(1).

¹⁰² Notice of a claim and the ability to opt out is mandatory in relation to class actions brought under r 23(b)(3) (sometimes known as 'money damages claims'): United States Federal Rules of Civil Procedure, r 23(c)(2)(B). Where a class action is brought under 23(b)(1) or (b)(2), the court *may* order notice of certification and an opportunity to opt out, but this is not mandatory: r 23(c)(2)(A).

¹⁰³ The Competition Appeal Tribunal Rules 2015 (UK), r 81.

¹⁰⁴ *Phillips Petroleum Co v Shutts* 472 US 797 (1985) at 811–813.

¹⁰⁵ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [56].

¹⁰⁶ See also our discussion of the uncertain relationship between lawyers and class members in Chapter 9.

¹⁰⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 1.2 definition of "retainer".

¹⁰⁸ New Zealand Law Society submission as intervenor in *Southern Response Earthquake Services v Ross* (16 March 2020).

Free riders

- 12.49 Another difficulty associated with opt-out proceedings is the issue of ‘free riders’. In an opt-in proceeding, signing an agreement with a litigation funder can be part of the process to join the claim.¹⁰⁹ Since class members are automatically part of the claim in an opt-out process, there is no precondition that they must have signed an agreement with any entity funding the proceeding. This may lead to unfairness because class members who have signed the funding agreement will have to pay a percentage of any damages award or settlement funds to the litigation funder, while the other class members will not. In *Southern Response v Ross*, the Supreme Court accepted that the issue of free riders was likely to be more problematic in opt-out proceedings.¹¹⁰
- 12.50 In Australia, several methods have been developed to respond to this issue.
- (a) **Closed classes:** The class is defined as only those claimants who have entered into a retainer agreement with a particular law firm and/or a particular litigation funding agreement.¹¹¹ While this approach does mitigate the free rider problem, courts have noted that it reduces the level of access to justice that Parliament intended with the opt-out procedure.¹¹² It also increases the risk of multiple class actions.¹¹³ We note that the ALRC has recommended a legislative amendment to prevent closed classes, so that class members are not required to sign up with a particular lawyer or funder to participate.¹¹⁴ A closed class opt-out class action in fact seems similar to an opt-in approach, since it requires some proactive steps from class members to be part of the claim. One innovation is that courts will sometimes open a class briefly before settlement (to allow further class members to sign the relevant agreement and join the proceeding) before closing it again.¹¹⁵
- (b) **Funding equalisation orders:** These deduct an amount from the settlement payments of non-funded members that is equivalent to the funding commission deducted from funded members’ awards. This ensures that class members are treated the same, regardless of whether they signed the funding agreement. The

¹⁰⁹ However, if an opt-in proceeding is brought on an ‘open class’ basis (where class members are not required to enter into a funding agreement to opt into the proceeding) then a free rider issue will arise. This point is noted in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [110].

¹¹⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [86].

¹¹¹ See *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200, (2007) 164 FCR 275. Vicki Waye and Vince Morabito “When Pragmatism Leads to Unintended Consequences: A Critique of Australia’s Unique Closed Class Regime” (2018) 19 *Theo Inq L* 303 at 306–307.

¹¹² *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200, (2007) 164 FCR 275 at [117].

¹¹³ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [195]–[196]; and Vicki Waye and Vince Morabito “When Pragmatism Leads to Unintended Consequences: A Critique of Australia’s Unique Closed Class Regime” (2018) 19 *Theo Inq L* 303 at 309.

¹¹⁴ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at 94.

¹¹⁵ Vicki Waye and Vince Morabito “When Pragmatism Leads to Unintended Consequences: A Critique of Australia’s Unique Closed Class Regime” (2018) 19 *Theo Inq L* 303 at 314.

amount deducted from non-funded members is pooled and distributed back (pro rata) to all class members at settlement approval.¹¹⁶

- (c) **Common fund orders:** These require all class members to contribute a proportion of their settlement amount to the litigation funder, even if they have not signed a funding agreement.¹¹⁷ As a condition of making a common fund order, the court may defer setting the funding fee to be charged to class members until later in the proceedings.¹¹⁸ In a 2019 decision, the High Court of Australia held that certain provisions of the Federal and New South Wales legislation do not confer power to make common fund orders.¹¹⁹ However, subsequent decisions of the Federal Court of Australia suggest that common fund orders may be made at settlement under another provision, although the position remains somewhat unsettled.¹²⁰ In *Ross v Southern Response*, the representative plaintiff has applied for a common fund order.¹²¹ The High Court has yet to determine this application.

12.51 We will consider whether any of these mechanisms are appropriate for Aotearoa New Zealand in developing proposals for a statutory class actions regime, if an opt-out regime is preferred.

ALLOWING A CHOICE OF APPROACHES

12.52 A third option is to have both opt-in and opt-out approaches available, as well as a universal approach, so the court can decide which is appropriate in a particular case. This is currently the approach in Aotearoa New Zealand, where it is possible to bring proceedings on either an opt-out, opt-in or a universal basis under HCR 4.24.¹²² The United Kingdom Competition Appeal Tribunal allows either opt-in or opt-out proceedings.¹²³ It was also the approach favoured by the Rules Committee in its 2009 Class Actions Bill.¹²⁴

¹¹⁶ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.86]. The first funding equalisation order was made in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19.

¹¹⁷ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.87]. The first approval of a common fund order was made by the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191.

¹¹⁸ For instance, at settlement or at the point of distribution of damages: see *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [79].

¹¹⁹ *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627.

¹²⁰ See *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 at [50]–[55]; and *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 at [72]–[74]. See also Federal Court of Australia, *Practice Note GPN-CA – Class Actions Practice Note*, 20 December 2019 at [15.4]. Compare *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [405] and [418].

¹²¹ See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [62].

¹²² See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [89] and [100].

¹²³ The Competition Appeal Tribunal Rules 2015 (UK), rr 75(2)(f), 79(3), 80(f), 80(h) and 82. Note that the Civil Justice Council recommended allowing claims to proceed on either an opt-in or opt-out basis: see Civil Justice Council *“Improving Access to Justice through Collective Actions”: Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at Recommendation 3.

¹²⁴ As we noted in Chapter 4, the Government chose not to progress this draft Bill.

- 12.53 If multiple approaches are available, a class actions regime could specify that one approach is the default.¹²⁵ The United Kingdom Competition Appeal Tribunal has a general preference for proceedings to be opt-in where practicable.¹²⁶ In *Ross v Southern Response*, the Court of Appeal indicated that opt-out is likely to be the appropriate approach in most cases.¹²⁷ However, the Supreme Court did not express a preference for opt-out proceedings, saying that:¹²⁸
- ...it is a question of considering the relevant factors in light of what will best meet the permissible objectives of the representative action in the particular case.
- 12.54 Where different approaches are available, it may be helpful for a class actions regime to specify particular criteria for the court to apply. When the United Kingdom Competition Appeal Tribunal is deciding whether to make a proceeding opt-in or opt-out, it may take into account “all matters it thinks fit” with two specific factors listed.¹²⁹ The first factor is the strength of the claim, with a more stringent standard for opt-out cases because class members will be part of the case by default and so may not carry out their own assessment of the strengths of the case.¹³⁰ The second factor is whether it is practicable for the proceedings to be brought as opt-in proceedings, in light of circumstances such as the estimated individual damages.¹³¹
- 12.55 An opt-in approach may be appropriate where the class is small but each class member has suffered a high level of loss or where it is straightforward to identify and contact class members.¹³² The Rules Committee indicated that an opt-in procedure might be appropriate in cases where there is a small number of claimants (for example, seven to 10) and each has a large claim (of say \$150,000 to \$200,000), whereas an opt-out approach might be appropriate where there is a large group of people who each have a small claim (for example, \$3,000 to \$5,000).¹³³
- 12.56 In *Southern Response v Ross*, the Supreme Court set out the following principles to assist a court when determining whether an opt-in, opt-out or universal approach is appropriate for a claim under HCR 4.24:

¹²⁵ For example, in Denmark, opt-in is the default approach unless the court decides that opt-out is more appropriate. Only public authorities specifically authorised by law can bring opt-out claims. At present, only the Consumer Ombudsman has been authorised to act as a representative in an opt-out class action: Christian Alsøe, Søren Henriksen and Morten Melchior Gudmandsen “Denmark” in Camilla Sanger (ed) *The Class Actions Law Review* (4th ed, Law Business Research, London, 2020) 45 at 45 and 50.

¹²⁶ Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.39].

¹²⁷ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [109] (“... we anticipate that opt out orders will be the norm ...”) and at [111] (“[i]n most cases there will be compelling access to justice reasons for making an opt out order”).

¹²⁸ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [95].

¹²⁹ The Competition Appeal Tribunal Rules 2015 (UK), r 79(3).

¹³⁰ The Competition Appeal Tribunal Rules 2015 (UK), r 79(3)(a); and Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.39].

¹³¹ The Competition Appeal Tribunal Rules 2015 (UK), r 79(3)(b); and Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.39].

¹³² Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.39].

¹³³ Rules Committee *Class Actions for New Zealand: A Second Consultation Paper* (October 2008) at [11]–[13].

- (a) In general, the court should adopt the approach proposed by the representative plaintiff unless there is good reason not to.¹³⁴
- (b) The court should consider the relevant factors in light of what will meet the objectives of HCR 4.24 in a particular case.¹³⁵ These objectives are: improving access to justice, facilitating efficient use of judicial resources and strengthening incentives for compliance with the law.¹³⁶
- (c) An opt-in approach should be favoured where there is a real prospect that some class members may end up worse off or adversely affected by proceedings. This would include the potential for a counterclaim.¹³⁷
- (d) An opt-in approach may be preferable where the class size is small, relative to other claims, and there is a natural community of interest. In such a case, it is likely to be easier to contact class members. However, class size will not necessarily be determinative.¹³⁸
- (e) Whether a class member's participation is required at stage two may be relevant to the approach to stage one. If continuing an opt-out approach at stage two would lessen the benefits of the proceeding or increase any unfairness or prejudice, this could be a factor suggesting that opt-out is not appropriate for stage one.¹³⁹
- (f) A universal approach may be appropriate when the only remedy sought is a declaration or injunction and the outcome will affect all class members identically. In such a case it may be impractical or almost impossible to provide the necessary notice.¹⁴⁰

Advantages and disadvantages of allowing different approaches

12.57 A key benefit of allowing different methods of determining class membership is that the court can decide which approach suits the particular circumstances of the case.¹⁴¹

12.58 However, having different approaches available creates uncertainty for litigants as they do not know in advance which procedure will be followed.¹⁴² It could also lead to litigation over which approach should apply, leading to increased cost and delay.¹⁴³ However, a

¹³⁴ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [95]. It said this would meet concerns that requiring claims to proceed on an opt-out basis could create barriers to access to justice because litigation funders may not wish to fund opt-out claims in the absence of legislation dealing with common fund orders or funding equalisation orders.

¹³⁵ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [95].

¹³⁶ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [37] and [40].

¹³⁷ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [97].

¹³⁸ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [98].

¹³⁹ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [99].

¹⁴⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [100]. As we discuss above, in the United States it is not necessary to provide an opportunity to opt out of this type of claim.

¹⁴¹ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [241]. See also Scott Dodson "An Opt-In Option for Class Actions" (2016) 115 Mich L Rev 171 at 173–174 (observing that the 'one size fits all' premise of the debate ignores the reality that some class actions might best suit opt-out while others might suit opt-in).

¹⁴² Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [242].

¹⁴³ Alberta Law Reform Institute *Class Actions* (Final Report 85, 2000) at [242]. See also Vince Morabito "Opt In or Opt Out? A Class Dilemma for New Zealand" (2011) 24 NZULR 421 at 435–436.

class actions regime could provide guidance as to the circumstances in which an opt-in or opt-out approach is likely to be appropriate, such as the Supreme Court did in *Southern Response v Ross*. This might help to minimise interlocutory disputes over this issue.

QUESTIONS

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?

Other issues relating to class composition

12.59 The preceding discussion set out what we see as the main design features relating to how membership of a class is determined. Other matters that would need to be considered if a class actions regime is adopted include:

- (a) Whether there should be particular rules for how a class should be defined.¹⁴⁴
- (b) Whether the lawyer acting for the plaintiff class should be regarded as having a lawyer-client relationship with class members.
- (c) Whether sub-classes should be allowed so the court can consider issues which are common to a sub-set of the class.
- (d) Whether special rules are needed for certain categories of potential class members, such as government actors, children, people without legal capacity or people outside the jurisdiction.
- (e) Whether future claimants can be included in the class, such as someone who has been exposed to a particular substance but has not yet experienced any injury.¹⁴⁵
- (f) The requirements for notifying potential class members of a class action. Overseas class actions regimes have detailed provisions on when notice is to be given to class members, what must be contained in notices and how notices are to be distributed to class members.
- (g) How the class should be 'closed'. This involves converting an opt-out proceeding into an opt-in proceeding so that individual class members can register their desire to participate in an assessment of their individual issues.¹⁴⁶

¹⁴⁴ Issues that have arisen in other jurisdictions include class descriptions which are 'over-inclusive' and too wide and class definitions which contain subjective criteria and are too narrow: see Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 323.

¹⁴⁵ See discussion of this issue in Joseph M McLaughlin *McLaughlin on Class Actions* (online ed, Thomson Reuters) at [§4:4].

¹⁴⁶ Jurisdictions have dealt with the issue of class closure differently. Canadian regimes have legislative provisions while the United States and Australia have relied on courts to resolve these matters as they have arisen. See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 363.

CHAPTER 13

Adverse costs

INTRODUCTION

- 13.1 In this chapter we discuss whether an adverse costs rule should apply to class actions in Aotearoa New Zealand.
- 13.2 The extent to which the unsuccessful party should be liable for the successful party’s legal costs is an important feature of a class actions regime. The Ontario Law Reform Commission (OLRC) observed in its 1982 report that the question of costs was the “single most important issue” it had considered in designing a class actions procedure. It explained that “the matter of costs will not merely affect the efficacy of class actions, but will determine whether this procedure will be utilized at all”.¹

APPROACH TO COSTS IN AOTEAROA NEW ZEALAND

- 13.3 A general principle of civil litigation in Aotearoa New Zealand is that the unsuccessful party must pay costs to the successful party in a proceeding or interlocutory application.² We refer to this principle as adverse costs; other common terms include loser pays or costs that follow the event.³
- 13.4 An order to pay adverse costs does not seek to compensate the successful party for the actual costs they incurred. Instead, the costs provisions in the High Court Rules aim to allow the successful party two-thirds of the costs considered reasonable for the proceeding or the particular step.⁴ Adverse costs orders are discretionary and the court can award no costs, reduced costs or increased costs if appropriate.⁵ The costs provisions in the High Court Rules apply to representative actions and have resulted in some significant adverse costs orders.⁶

¹ Ontario Law Reform Commission *Report on Class Actions* (Volume III, 1982) at 647.

² High Court Rules 2016, r 14.2(1)(a).

³ In Canada, it is sometimes referred to as ‘two-way costs shifting’ because both an unsuccessful plaintiff and an unsuccessful defendant can be ordered to pay adverse costs.

⁴ High Court Rules 2016, r 14.2.1(d) and (e). According to McGechan on Procedure, this approach aims to balance objectives such as: access to justice; avoiding the successful party being seriously out of pocket; encouraging attempts to resolve disputes outside of court; encouraging engaging counsel of the right skill level and discouraging an unnecessary “Rolls Royce” approach; and removing incentives for impecunious potential litigants to pursue hopeless cases. See Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR14.2.01].

⁵ See High Court Rules 2016, rr 14.1, 14.6 and 14.7.

⁶ See for example *Houghton v Saunders* [2015] NZHC 548 (defendants awarded costs of \$3.066 million).

APPROACH IN OTHER JURISDICTIONS

- 13.5 Australia also applies an adverse costs rule, including in relation to its class actions regimes.⁷ In general, it is a matter of judicial discretion whether to order adverse costs in class actions, so adverse costs will not always be ordered against the unsuccessful party.
- 13.6 A ‘no costs’ rule applies to class actions in the United States, meaning the successful party is generally not entitled to claim costs from the unsuccessful party. We discuss the no costs rule in more detail below.
- 13.7 The Canadian jurisdictions have taken different approaches, with several provinces retaining an adverse costs rule for class actions and others adopting a no-costs rule.⁸ This was despite the OLRC’s recommendation of a no costs rule for class actions (with some exceptions) because it considered individuals would be deterred from bringing class actions if they had the risk of adverse costs.⁹
- 13.8 In England and Wales, the court has discretion as to whether costs are payable and the amount.¹⁰ If the court does decide to make a costs order, the general rule is that the unsuccessful party must pay costs to the successful party, although the court may make a different order.¹¹ While there is no general statutory rule in the United Kingdom Competition Appeal Tribunal that the unsuccessful party should pay costs to the successful party, the Tribunal has taken the approach that this should be its starting point.¹²

⁷ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [1.86]; and Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 443–444.

⁸ Ontario, Alberta, New Brunswick, Nova Scotia, Saskatchewan and Québec apply an adverse costs rule. See Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 150–151. Note that Québec’s costs rules limit claims to the small claims tariff. Federal Court, British Columbia, Manitoba and Newfoundland and Labrador apply a no costs rule, as we discuss below.

⁹ Ontario Law Reform Commission *Report on Class Actions* (Volume III, 1982) at 704–709 and 749. It proposed that costs could not be awarded to a party at the certification or common questions stage except (a) at certification in situations where it would be unjust to deprive the successful party of costs (because no reasonable plaintiff or lawyer should have attempted to obtain certification); and (b) where there was vexatious, frivolous or abusive conduct by a party. (Note commissioners were divided on this, with one commissioner favouring legislation which expressly left the entire question of costs to the judge – see 703). Jasminka Kalajdzic comments that costs was the most divisive issue in the entire consultation process carried out by the Attorney General’s Advisory Committee on Class Action Reform. The Committee rejected the Ontario Law Reform Commission’s approach in favour of retaining an adverse costs rule. See Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 152.

¹⁰ The Civil Procedure Rules 1998 (UK), r 44.2(1).

¹¹ The Civil Procedure Rules 1998 (UK), r 44.2. See also Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [7-007].

¹² *Merricks v Mastercard Inc* [2017] CAT 27 at [16]; and Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [11-143]–[11-146]. Note that when making a costs order, the Tribunal may take into account (among other factors) “whether a party has succeeded on part of its case, even if that party has not been wholly successful”: The Competition Appeal Tribunal Rules 2015 (UK), r 104(4)(c).

REPRESENTATIVE PLAINTIFF LIABLE FOR ADVERSE COSTS

- 13.9 It is the representative plaintiff who has costs liability in cases under High Court Rule 4.24 (HCR 4.24). Members of the represented group (who are not technically parties) are generally not exposed to the risk of an adverse costs order.¹³ If an amendment to proceedings might create personal costs liability for those members, then the court can give them a further opportunity to opt out.¹⁴ We are aware of one representative action where the court departed from the general principle that group members are not individually liable for costs, however this appears to be due to the particular facts of the case.¹⁵ The court could potentially make a non-party costs order against a group member, although we are not aware of this having occurred in a representative action to date.¹⁶
- 13.10 Similarly, in overseas class actions regimes, it is the representative plaintiff who is liable for any adverse costs. In Australia, class actions legislation provides that the court may not award costs against a class member (except in the case of issues determined on a sub-group or individual basis).¹⁷ Most of the Canadian class actions statutes specify that class members, other than the representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.¹⁸
- 13.11 Having to bear the risk of adverse costs creates a significant financial disincentive to taking on the role of representative plaintiff.¹⁹ Rachael Mulheron has observed that concerns that class actions would be rare in jurisdictions which retained adverse costs

¹³ *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [108]; *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) at [211]; *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 26 May 2010 at [43]; and *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [164].

¹⁴ *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 26 May 2010 at [45].

¹⁵ *Hedley v Kiwi Co-Operative Dairies Ltd* (2000) 15 PRNZ 210 (HC) at [26]–[38]. The proceedings had originally been filed with 258 plaintiffs (with joint and several liability for costs) and a representative order was sought to change their status. The Court granted the representation order on the basis that the represented persons would remain jointly and severally liable for costs, saying it was unacceptable that the representative plaintiff should have sole costs liability, given his financial situation and the size of the claim. The Court rejected the plaintiff's suggestion that represented persons' liability for costs should be limited to a pro rata basis as this would require the defendant to enforce costs judgments against over 250 people.

¹⁶ The principles applying to non-party costs orders are discussed in Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HRPt14.09].

¹⁷ Federal Court of Australia Act 1976 (Cth), s 43(1A); Civil Procedure Act 2005 (NSW), s 181; Civil Proceedings Act 2011 (Qld), s 103ZB; Supreme Court Civil Procedure Act 1932 (Tas), s 89A; and Supreme Court Act 1986 (Vic), s 33ZD.

¹⁸ Class Proceedings Act RSBC 1996 c 50, s 37(4); The Class Proceedings Act CCSM 2002 c C-130, s 37(4); Class Proceedings Act RSNB 2011 c 125, s 39(2); Class Actions Act SNL 2001 c C-18.1, s 37(4); Class Proceedings Act SNS 2007 c 28, s 40(4); Class Proceedings Act SO 1992 c 6, s 31(2); and The Class Actions Act SS 2001 c C-12.01, s 40(3). In Québec, the certification notice to class members must state that no class member other than the representative plaintiff or an intervenor may be required to pay costs: Code of Civil Procedure CQLR c C-25.01, art 579(6). The Federal Courts Rules apply a no costs rule to class actions except that the Court has full discretion to award costs with respect to the determination of individual class member claims: Federal Courts Rules SOR/98-106, r 334.39(2). The only provincial class proceedings statute that does not expressly address the exposure of class members to costs liability is Alberta: Class Proceedings Act SA 2003 c C-16.5.

¹⁹ As was said in one Canadian case, discussing the practice of indemnities:

The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars.

See *Dugal v Manulife Financial Corp* 2011 ONSC 1785, (2011) 105 OR (3d) 364 at [28].

rules have not materialised and representative plaintiffs are still willing to bring proceedings. However, she comments that the utility of class actions in different jurisdictions has largely been driven by mechanisms that have been introduced to reduce costs exposure, such as exceptions to the adverse costs rule, limitations on the level of costs awarded and third parties providing a costs indemnity (whether a public fund or commercial funder).²⁰

- 13.12 In practice, a representative plaintiff is likely to seek a costs indemnity from class members or a litigation funder (or in some jurisdictions, from a law firm). Ontario and Québec have class proceeding funds which can indemnify a representative plaintiff against an adverse costs order, as we discuss later in this chapter.

ADVANTAGES AND DISADVANTAGES OF ADVERSE COSTS IN CLASS ACTIONS

- 13.13 An adverse costs rule can have the benefits of compensating successful litigants for some of their costs (including successful plaintiffs), encouraging parties to settle, discouraging frivolous or vexatious claims and discouraging inappropriate litigation behaviour.²¹
- 13.14 However, an adverse costs rule in a class actions context can also have negative implications for access to justice.²² It may deter potential class actions from proceeding, particularly in public interest cases.²³ A desire to avoid adverse costs awards may also affect litigation decisions. For example, a plaintiff may decide not to pursue particular interlocutory applications or might abandon an appeal in exchange for the defendant not pursuing costs.²⁴ While in other jurisdictions a representative plaintiff will generally obtain a costs indemnity (such as from a litigation funder, law firm, after-the-event insurer or public fund), this will come at a cost to the class in the form of an increased fee or share of damages being paid to the indemnifier.²⁵
- 13.15 Thus, there are two opposing views about adverse costs in class actions: either they deter meritorious litigation and thwart access to justice, or they are vital for preventing meritless litigation. Discussing these two positions, Jasminka Kalajdzic comments that Ontario's experience shows that the adverse costs rule does not spell the demise of class actions and that resourceful lawyers can find ways to counter the disincentive posed by the risk of an adverse costs order. Similarly, she considers that fears of a flood of frivolous claims

²⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 445.

²¹ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 78.

²² Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 167.

²³ Consultation by the Law Commission of Ontario indicated the primary reason for public interest class actions not being pursued was the risk of adverse costs: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 81.

²⁴ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 80 citing evidence of plaintiffs agreeing not to pursue appeals in exchange for the defendant not enforcing an adverse costs order.

²⁵ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 167; Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 80; and Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.18].

in no costs regimes have been exaggerated. She notes that class action lawyers, who tend to work on a contingency fee basis, have no incentive to invest time in claims that have little or no prospect of success. Further, even in jurisdictions that have a no costs rule, costs for improper or meritless claims still tend to be available.²⁶

- 13.16 Capital Strategic Advisors (CSA) comments that from an efficiency perspective, an adverse costs rule alters the allocation of the private costs of the litigation among the litigants, but it does not directly alter the overall social cost of the litigation. However, it does indirectly alter social costs by altering whether litigation occurs and the likelihood of settlement.²⁷ CSA’s analysis shows that an adverse costs regime may deter plaintiffs who have low confidence in their prospects of succeeding as well as highly risk-averse plaintiffs. It is also likely to deter frivolous or vexatious plaintiffs. However, where a plaintiff has strong prospects of success, an adverse costs regime is likely to increase the incentive for commencing litigation.²⁸

SOME OPTIONS FOR REFORM

- 13.17 Given the potential for an adverse costs rule to negatively impact on the ability to bring litigation, we seek feedback on whether it is appropriate for all class action cases. We discuss below several alternatives to, or variations on, the adverse costs rule for class actions:
- (a) A no costs rule for all of the proceeding.
 - (b) A no costs rule for certain stages of the proceeding.
 - (c) A rule where only one party can be liable for adverse costs.
 - (d) A different costs scale for class actions.
 - (e) Specifying the considerations to be taken into account when determining costs.
- 13.18 We also consider whether a class actions fund which indemnifies the representative plaintiff against the risk of adverse costs could mitigate the potential impacts of the adverse costs rule.

No costs rule

- 13.19 An alternative to an adverse costs rule is a no costs rule, where the successful party is generally not entitled to claim costs from the unsuccessful party. A no costs rule applies to most civil litigation in the United States, including in class actions litigation (and is sometimes known as the ‘American rule’).²⁹ Although adverse costs is the general rule in Canadian civil litigation, the Federal Court, British Columbia, Manitoba and Newfoundland

²⁶ Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 166–167.

²⁷ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 20.

²⁸ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 21–22.

²⁹ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004) at 439–440; David F Herr *Annotated Manual for Complex Litigation* (online ed, Thomson Reuters) at [§14]; and William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§15:25].

and Labrador have adopted no costs rules for class actions.³⁰ Class actions regimes with a no costs rule generally set out limited situations where costs may be ordered. For example, in the Canadian jurisdictions with no cost rules for class actions, adverse costs can be ordered if a party has engaged in vexatious, frivolous or abusive conduct, made an improper or unnecessary application or taken a step to create delay, increase costs or for another improper purpose or where there are exceptional circumstances which make it unjust to deprive the successful party of costs.³¹

- 13.20 A no costs rule provides significant protection to a representative plaintiff because it largely removes the risk of having to pay adverse costs. It may therefore remove some of the barriers to class actions. On the other hand, the rule also prevents a successful plaintiff from recouping its legal costs from the defendant and it is possible that a significant proportion of any damages award will be needed to pay for legal fees.³² It also allows defendants to bring a series of interlocutory applications with no risk of an adverse costs award.³³
- 13.21 However, the representative plaintiff may also be incentivised to drive up a defendant's litigation costs (such as asking for extensive discovery) without any risk of having to pay for those costs.³⁴ The Law Commission of Ontario (LCO) concluded there was no evidence that meritless claims had proliferated in the no costs jurisdictions and noted that truly frivolous claims could still be subject to a costs order.³⁵

No costs for certain stages of proceeding

- 13.22 Another option is to have a no costs rule applying to certain stages of the proceeding. In its 2019 report, the LCO considered three reform options whereby the costs rules would differ depending on the stage of the proceeding. These were:³⁶
- (a) No costs for interlocutory proceedings and adverse costs for merits determinations.
 - (b) Adverse costs for proceedings prior to certification and no costs for certification and post-certification.

³⁰ Federal Courts Rules SOR/98-106, r 334.39(1); Class Proceedings Act RSBC 1996 c 50, ss 37(1)–37(2); The Class Proceedings Act CCSM 2002 c C-130, ss 37(1)–37(2); and Class Actions Act SNL 2001 c C-18.1, ss 37(1)–37(2).

³¹ Federal Courts Rules SOR/98-106, r 334.39(1); Class Proceedings Act RSBC 1996 c 50, s 37(2); The Class Proceedings Act CCSM 2002 c C-130, s 37(2); and Class Actions Act SNL 2001 c C-18.1, s 37(2) (note the language differs slightly from the provincial provisions but is similar in effect). Note also that the no costs rule applies from the certification motion onwards, so costs can be awarded on pre-certification motions: Janet Walker (ed) *Class Actions in Canada: Cases, Notes, and Materials* (2nd ed, Emond Publishing, Toronto, 2018) at 200.

³² Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 436.

³³ Janet Walker (ed) *Class Actions in Canada: Cases, Notes, and Materials* (2nd ed, Emond Publishing, Toronto, 2018) at 200.

³⁴ Brian T Fitzpatrick "Can the Class Action Be Made Business Friendly?" (2018) 24 NZBLQ 169 at 176. Fitzpatrick comments: The loser-pays rule makes both sides of the litigation worry about how much the litigation is costing their opponents. This tends to keep the expenses symmetric by making litigants think twice before they make their opponents do something.

³⁵ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 83–84.

³⁶ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 82–86. Note the report also considers the option of no costs.

- (c) No costs for certification and related proceedings and adverse costs for everything else.

13.23 The LCO favoured the last option and recommended amending Ontario’s class actions regime to provide for no costs for certification and related applications. An adverse costs rule would continue to apply to all other aspects of the proceeding.³⁷ It favoured this reform because certification was a procedural step required by the legislation that was not related to the merits of the action and the potential for an adverse costs order for certification was a major barrier. The LCO considered that a no costs rule for certification would improve access to justice, especially for public interest class actions. It would reduce the risk to lawyers and third party funders, which should reduce their fees and thus increase the share of damages available to the class.³⁸ However the Government did not adopt this recommendation.³⁹

One-way costs shifting

13.24 Another possibility is a ‘one-way’ costs shifting rule, where the defendant but not the plaintiff is liable for adverse costs if they are unsuccessful. Rachael Mulheron has observed that this approach has been discussed and critiqued but not adopted in any of the jurisdictions she compares.⁴⁰ The Australian Law Reform Commission (ALRC), for example, considered such a rule would be inequitable and that defendants should not be deprived of their entitlement to claim costs while remaining liable to pay the plaintiff’s costs.⁴¹

13.25 In England and Wales, there is qualified one-way costs shifting for personal injury and fatal accident cases.⁴² In the United States there are a number of statutes which provide an exception to the no costs rule by giving the court the authority to order an award of legal fees against the unsuccessful party. Examples are the Civil Rights Attorney’s Fee Awards Act 1976, the Clean Air Act 1963, the Consumer Product Safety Act 1972, the Securities Act 1993 and the Social Security Act 1935.⁴³ Under these statutes, it is generally only a losing defendant who will face an order to pay costs. Otherwise the risk of adverse costs would undercut the public policy objectives of encouraging private enforcement of statutory and constitutional rights and increasing the cost of violating these statutes.⁴⁴

³⁷ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 100 and Recommendation 40.

³⁸ Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 86.

³⁹ Smarter and Stronger Justice Act SO 2020 c 11. The Government did not publish a response to the Law Commission of Ontario’s report so we are unaware of its rationale for rejecting this recommendation.

⁴⁰ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 436.

⁴¹ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [264].

⁴² The Civil Procedure Rules 1998 (UK), rr 44.13–44.17.

⁴³ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§15:25]–[§15:26].

⁴⁴ William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§15:32]; and David F Herr *Annotated Manual for Complex Litigation* (online ed, Thomson Reuters) at [§14.13].

Different costs scale or maximum costs order

- 13.26 A further option would be to apply a different costs scale to class actions. A regime could provide that costs are only to be assessed on a minimal costs scale, which would reduce the burden of an adverse costs rule.⁴⁵ For example, Québec has an adverse costs rule for class actions but based on a small claims court tariff, so the risk of adverse costs does not provide a significant disincentive to bringing a class action.⁴⁶ In Australia, there is a power in the Federal Court Rules to apply for an order specifying the maximum costs payable for a proceeding.⁴⁷
- 13.27 Conversely, it could be that the general costs scale does not sufficiently cover the steps that are required in a class action and a more extensive scale is required.⁴⁸

Specifying considerations to be taken into account

- 13.28 Another option is to set out specific considerations that a court may take into account when determining costs in a class action. We note that the High Court Rules already allow the court to refuse or reduce the costs payable on the basis that the proceeding involved a matter of public interest.⁴⁹
- 13.29 The Ontario class actions legislation provides that when the court is exercising its costs discretion, it may consider “whether the proceeding was a test case, raised a novel point of law or involved a matter of public interest”.⁵⁰ There are similar provisions in Alberta, Saskatchewan and Nova Scotia.⁵¹ Ontario courts have said that a factor to be applied in fixing costs is that a fundamental objective of the class actions legislation is to provide enhanced access to justice.⁵²
- 13.30 The Victorian Law Reform Commission (VLRC) recommended that when a court is deciding whether to make an adverse costs order (or a security for costs order) in a class action, it should be able take into account the function of class actions in providing access to justice, whether the case is a test case or involves a novel area of law and whether the

⁴⁵ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 451.

⁴⁶ Janet Walker (ed) *Class Actions in Canada: Cases, Notes, and Materials* (2nd ed, Emond Publishing, Toronto, 2018) at 201.

⁴⁷ Federal Court Rules 2011 (Cth), r 40.51.

⁴⁸ For example, while there is ordinarily no time allowance for providing particulars in the High Court, the Court considered this was appropriate in *Strathboss*. In that case, the particulars ordered were extensive and were needed (in part) because of the representative nature of the claim and the different groups within the represented class: *Strathboss Kiwifruit Ltd v Attorney-General* [2019] NZHC 62 at [38]–[39].

⁴⁹ High Court Rules 2016, r 14.7(e). The litigant must have acted reasonably in the conduct of the proceeding.

⁵⁰ Class Proceedings Act SO 1992 c 6, s 31(1).

⁵¹ Class Proceedings Act SA 2003 c C-16.5, s 37; Alberta Rules of Court AR 124/2010, r 10.32 (note the Alberta factors are applied when deciding whether to award costs against an unsuccessful representative party); The Class Actions Act SS 2001 c C-12.01, s 40(2); and Class Proceedings Act SNS 2007 c 28, s 40(3). In Alberta and Saskatchewan the court may also take into account access to justice factors when determining whether to award costs. In Nova Scotia, the court may also consider whether a cost award would further judicial economy, access to justice or behaviour modification.

⁵² *Pearson v Inco Ltd* (2006) 79 OR (3d) 427 (ONCA) at [13].

class action involves a matter of public interest.⁵³ It considered this could reduce the risk of adverse costs, which would make the role of representative plaintiff less daunting and encourage third parties to provide financial support.⁵⁴ This proposed amendment was not included in the Victorian Government's recent amendments to the class actions legislation.⁵⁵

Class actions fund to provide an adverse costs indemnity

- 13.31 One way of mitigating the impact of an adverse costs rule is to have a means of indemnifying the representative plaintiff against an adverse costs award. As noted, an indemnity will sometimes be provided by a litigation funder, the plaintiff's law firm or after-the-event insurance. In some jurisdictions, a class proceedings fund can provide an indemnity.
- 13.32 In Ontario, a Class Proceedings Fund was established when the class actions regime was introduced, as a way of addressing the barriers to litigation created by the adverse costs rule.⁵⁶ The Fund provides financial support to approved class action plaintiffs for legal disbursements and indemnifies plaintiffs for adverse costs.⁵⁷ It does not provide funding for legal fees⁵⁸ and class action lawyers in Ontario typically work on a contingency fee basis.⁵⁹ The initial capital for the Fund came from a \$500,000 grant from the Law Foundation of Ontario. It receives ongoing funding through a 10 per cent levy on any awards or settlements received by funded plaintiffs, plus a return of any funded disbursements.⁶⁰ A Class Proceedings Committee is responsible for deciding whether applicants will receive support from the Fund. Considerations include the strength of the case, the scope of the public interests involved, the plaintiff's fundraising efforts, likelihood of certification as a class action and availability of funds at the time of

⁵³ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.116]–[5.124] and Recommendation 29.

⁵⁴ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.119].

⁵⁵ Justice Legislation Miscellaneous Amendments Act 2020 (Vic). We are unaware of any Government response explaining why this proposal was not adopted.

⁵⁶ Law Society Act RSO 1990 c L-8, s 59.1; Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 153–154. According to the *Report of the Attorney General's Advisory Committee on Class Action Reform* (Ministry of the Attorney General, February 1990) at 59:

... [t]he answer to accessibility is not the removal of all risk of the obligations for costs, but rather, the support of worthwhile class proceedings through assistance with disbursements and protection against adverse costs awards.

⁵⁷ Law Society Act RSO 1990 c L-8, s 59.1(2).

⁵⁸ Law Society Act RSO 1990 c L-8, s 59.3(2).

⁵⁹ See Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 76 noting that outside of Québec, all class counsel are compensated on a contingency fee basis.

⁶⁰ The Fund's levy is calculated in accordance with reg 10 of O Reg 771/92 (Class Proceedings) issued under the Law Society Act RSO 1990 c L-8.

application.⁶¹ The Fund's most recent figures show that in 2017, funding was granted to 18 of the 27 applications received.⁶²

- 13.33 Québec also has a class action fund, known as the 'Fonds',⁶³ which was established in 1978. Representative plaintiffs may receive an indemnity for adverse costs as well as funding for legal fees and disbursements.⁶⁴ The Fonds has a variety of funding sources, including retaining a percentage of any recovery made in any class action (funded or not).⁶⁵ The criteria for funding includes consideration of the merits of the case and whether it could be brought without assistance from the Fonds.⁶⁶ In the 2018/2019 financial year, the Fonds agreed to fund 227 of the 560 applications it received. Catherine Piché has argued that the Fonds provides significant access to justice to Québec litigants, as well as acting as a "de facto screener of class actions".⁶⁷ She has observed that once it is announced that the Fonds will be funding a case "a strong indication will be sent to the legal community and to the parties that the case is well worth litigating".⁶⁸
- 13.34 In 1988, the ALRC recommended that a public fund be established to indemnify representative plaintiffs in class actions for adverse costs as well as provide funding for legal costs.⁶⁹ It considered a fund would acknowledge that "there is a public purpose to be served by enhancing access to remedies where this is cost effective, especially where many people have been affected".⁷⁰ It was envisaged that the fund would be self-financing to some extent, although it was also expected to receive any money that remained unclaimed from eligible class members.⁷¹ This recommendation was not implemented. Since then, Australian practitioners, judges and academics have reiterated the need for a public fund to assist representative plaintiffs with the costs of bringing litigation and mitigate the burden of adverse costs.⁷²

⁶¹ See *Edwards v Law Society of Upper Canada* (1995) 36 CPC (3d) 116 (Ontario Class Proceedings Committee) at 116–118. *Edwards* is a decision of the Class Proceedings Committee which outlines the Committee's approach to applications and is referred to on the Law Foundation of Ontario's website as a source of guidance for applicants. See The Law Foundation of Ontario "Class Proceedings Fund: Application Process" <<https://lawfoundation.on.ca>>.

⁶² The Law Foundation of Ontario *Catalyst for a Stronger Nonprofit Justice Sector: 2018 Annual Report* (January 2020) at 34.

⁶³ This is short for Fonds d'aide aux actions collectives.

⁶⁴ Act respecting the Fonds d'aide aux actions collectives CQLR c F-3.2.0.1.1, Arts 27 and 29. Note that there is a maximum hourly rate at which legal fees are funded (\$100 per hour for senior lawyers and \$40 per hour for junior lawyers), which is significantly below the market rate: Catherine Piché "Public Financiers as Overseers of Class Proceedings" (2016) 12 NYU JLB 779 at 802.

⁶⁵ The other sources of funding are: annual Government subsidies, reimbursement of funds paid (from costs awarded paid by unsuccessful defendants) and interests on investments. See Catherine Piché "Public Financiers as Overseers of Class Proceedings" (2016) 12 NYU JLB 779 at 797–798.

⁶⁶ Act respecting the Fonds d'aide aux actions collectives CQLR c F-3.2.0.1.1, Art 23.

⁶⁷ Catherine Piché "Public Financiers as Overseers of Class Proceedings" (2016) 12 NYU JLB 779 at 804.

⁶⁸ Catherine Piché "Public Financiers as Overseers of Class Proceedings" (2016) 12 NYU JLB 779 at 804–805.

⁶⁹ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [306]–[314].

⁷⁰ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [308].

⁷¹ Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [312]; Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.127].

⁷² Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.128].

SECURITY FOR COSTS

- 13.35 If the adverse costs rule applies to all or part of a class action proceeding, then the representative plaintiff may be required to provide security for those costs. The High Court Rules provide that the court may order security for costs if it is just, and a plaintiff is out of Aotearoa New Zealand or there is reason to believe the plaintiff will be unable to pay the defendant's costs if unsuccessful.⁷³ Courts have also used the inherent jurisdiction to order security for costs in cases involving a litigation funder.⁷⁴ This is discussed in detail in Chapter 15. We are not aware of security for costs being ordered in any representative action that does not involve a litigation funder.⁷⁵
- 13.36 An issue which has arisen in Australia is whether a class member can be required to contribute to security for costs, with different approaches being taken by courts.⁷⁶ The VLRC summarises some of the problems with requiring class members to contribute to security for costs. These include the risk of excluding individuals without resources from accessing justice, the potential that a case will be brought to an end if class members cannot raise sufficient security for costs, forcing the representative plaintiff to accept a poor settlement and making proceedings more expensive and time-consuming initially. The VLRC recommended amending the legislation to specify that the court may not order a class member to provide security for costs. It commented that class members had no obligation to pay adverse costs orders and no control over the litigation.⁷⁷

QUESTIONS

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?

⁷³ High Court Rules 2016, r 5.45.

⁷⁴ This is discussed further in Chapter 15.

⁷⁵ We are aware of an application for security for costs in one non-funded representative action that has been adjourned: *Smith v Claims Resolution Service Ltd* [2019] NZHC 1013 at [27]–[33].

⁷⁶ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [33.7]–[33.9]. The Federal Court has held that security for costs can be awarded against class members, while the Victorian Supreme Court has held that it cannot. In New South Wales, it has been held that while security for costs cannot be ordered against class members, this does not preclude ordering security against a representative plaintiff which may need to be satisfied by class members. The different approaches reflect differences in the statutory language.

⁷⁷ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.113] and Recommendation 28.

Part B

Litigation Funding



CHAPTER 14

Introduction to litigation funding

INTRODUCTION

14.1 In this chapter, we describe:

- (a) How litigation funding works, including what it is, who uses it, how funders select cases for funding, and key terms in funding agreements.
- (b) The litigation funding market in Aotearoa New Zealand.

HOW LITIGATION FUNDING WORKS

What is litigation funding?

- 14.2 At its simplest, 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 (litigation funding). Typically, the funder agrees to cover the plaintiff's own costs (i.e. lawyers' fees and disbursements) as well as the other party's costs if the case is unsuccessful (adverse costs).
- 14.3 Litigation funding 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 an agreed percentage of any amount recovered by the funded party. This commission may vary depending on the stage at which the matter resolves, with a lower percentage if it resolves at an earlier stage and a higher percentage if it resolves later. Sometimes the commission is set as a multiple of the costs incurred by the funder or is limited by reference to such multiple of costs.
- 14.4 Litigation funding is constantly developing to meet the needs of the market. It has evolved from a niche product to fund litigation for capital-constrained plaintiffs to a more encompassing risk-hedging mechanism that is also attractive to well-resourced plaintiffs.¹ Litigation funding encompasses a range of funding options:

¹ Franca Ciambella and Charlie Morris "Seats of power" (2020) 127 *Litigation Funding* 18 at 18. Other arrangements are possible, for example, the agreement to participate in future joint ventures underpinning a non-party's funding of Waitangi Tribunal proceedings discussed in *Tahi Enterprises Ltd v Taua* [2018] NZHC 516. Because our review is focussed on commercial litigation funding, we do not examine other types of support that people may provide in respect of litigation.

- (a) **Full funding for a one-off matter.** This is where the funder pays all of the funded plaintiff's legal costs (including solicitors' fees, barristers' fees, independent experts' fees, court fees and other disbursements) and agrees to cover any adverse costs payable to the defendant if the case is unsuccessful. Full funding is often used in representative and class actions. It may also be used by insolvency practitioners on behalf of creditors, or by companies in respect of commercial disputes.
- (b) **Partial funding.** This is where funding is only required for aspects of a case, for example to cover disbursements or satisfy a security for costs order. Partial funding may be favoured by companies who want to share the risks of the litigation with the funder.
- (c) **Portfolio funding.** This is where a company or law firm bundles multiple disputes into a portfolio and uses that portfolio as collateral for litigation funding.² It is sometimes known as corporate portfolio finance or law firm financing. If some of the cases in the portfolio are unsuccessful, the funder is still entitled to be repaid from any of the cases in the portfolio that are successful (in other words, the investment is cross-collateralised). This means litigation funding is less risky for funders, which enables them to offer lower commissions. Portfolio funding may therefore be more affordable than one-off litigation funding.

- 14.5 Different funding products may be suited to different jurisdictions. In Aotearoa New Zealand and Australia, where contingency fees are prohibited (except in Victoria)³ and an adverse costs regime operates, it may be difficult for plaintiffs to pursue cases without full litigation funding. Further, the prohibition on contingency fees means the use of portfolio funding by law firms (law firm financing) is uncommon. By contrast, in the United States contingency fees are prevalent and adverse costs are rare. Therefore, partial funding is more common than full funding, and law firm financing is more common.⁴
- 14.6 Portfolio funding is a product that has emerged overseas but has not, to our knowledge, been used in Aotearoa New Zealand to date.⁵ It is likely that only a small number of companies would have the number of disputes to warrant corporate portfolio finance and, as we note below, law firm financing is generally only available in jurisdictions that allow contingency fees. From our conversations with litigation funders, we understand there is some appetite for portfolio funding in Australia, however it is still relatively new. It appears to be used more in the United Kingdom, Europe, and the Middle East.
- 14.7 Funders may play a more active or passive role in the conduct of the litigation, depending on the terms of the litigation funding agreement and the jurisdiction in which they are operating. A passive funder chiefly pays the bills for litigation expenses, whereas an active

² Nick Butcher "Litigation funding and class actions: What's happening in New Zealand?" (2019) 929 *LawTalk* 66 at 73; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [1.40].

³ In Victoria, lawyers have been permitted to charge contingency fees since 30 June 2020: Justice Legislation Miscellaneous Amendments Act 2020 (Vic), s 5.

⁴ See for example Charles Agee and Gretchen Lowe "Litigation Finance Buyer's Guide" (Westfleet Advisors, 17 November 2019) at 7–8.

⁵ In August 2020 DLA Piper (an international law firm with offices in Aotearoa New Zealand) announced an arrangement with Litigation Capital Management to offer its clients access to "£150m for funding large-scale litigation and arbitration". This funding is "intended to be available [to DLA Piper clients] in all applicable international jurisdictions". Clients of DLA Piper in Aotearoa New Zealand will be able to access funding through this portfolio funding structure: DLA Piper "DLA Piper and LCM Collaborate With new third-party funder for DLA Piper clients" (13 August 2020) <www.dlapiper.com>.

funder also has input into decisions about the conduct of the litigation. Funders may take a more active role in representative actions and class actions because the representative plaintiff may have weaker incentives to monitor and direct the lawyer (given they share any sum recovered with the class).

Who uses litigation funding?

Plaintiffs in representative actions and class actions

- 14.8 Litigation funding is sometimes available to plaintiffs in representative actions and class actions. In these cases, the individual claims may be relatively small and uneconomic to pursue individually through the courts, but collectively they are economic to pursue through the courts and sufficiently profitable for funders.
- 14.9 In many cases, representative actions and class actions may not be able to proceed without litigation funding.⁶ Individual class members may not have the resources to fund litigation or may be deterred by the risk of an adverse costs order. The arrival of litigation funders in Aotearoa New Zealand has led to an increase in representative actions.⁷

Insolvency practitioners on behalf of creditors

- 14.10 Where resources to pursue litigation are limited, insolvency practitioners can use litigation funding to recover assets and revenue arising from insolvency for the benefit of creditors. Litigation funding enables them to provide creditors with a distribution from existing funds and use a litigation funder's capital to fund litigation to recover additional assets and revenue. Litigation funding has its origins in the insolvency context,⁸ and claims arising out of insolvent companies continue to be an important area of activity.⁹

Companies with commercial claims

- 14.11 Companies with meritorious commercial claims can use litigation funding to manage the risks and costs of litigation more effectively, and free up capital. Even well-capitalised companies with potentially valuable claims may choose not to pursue them, because litigation expenditure can negatively affect the company's net income. Litigation funding takes litigation expenses off the company's balance sheet and converts activities that could have decreased profitability into assets. Companies may prefer litigation funding over other financing options for a number of commercial reasons, which are discussed in Chapter 17.
- 14.12 LPF Group, a funder based in Aotearoa New Zealand, has said it is increasingly receiving applications from reasonably-sized commercial companies that could afford their own

⁶ Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132 at 151.

⁷ Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132 at 151–152.

⁸ The first English decision to approve litigation funding was *Seear v Lawson* (1880) 15 Ch D 426 (CA). In Australia, the legitimacy of litigation funding arrangements was first established in the insolvency context in *Movitor Pty Ltd (Receivers and Manager Appointed) (in liq) v Sims* (1996) 64 FCR 380 (FCA). That decision created the opportunity for litigation funders to develop their business model in Australia. Similarly, in New Zealand the first use of litigation funding we have identified was in the insolvency context in *Re Nautilus Development Ltd (in liq)* [2000] 2 NZLR 505 (HC).

⁹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [2.7].

litigation costs, but recognise that litigation funding is simply another asset on their balance sheet which allows them to employ capital efficiently across their business.¹⁰ Capital Strategic Advisors (CSA) suggests litigation funding may be useful to small and medium sized enterprises who otherwise would not contemplate litigation because of their limited ability to absorb adverse shocks.¹¹

Law firms charging contingency and conditional fees

- 14.13 In jurisdictions that allow lawyers to charge contingency fees, such as the United States and the United Kingdom, litigation funding may be used by law firms. This is often referred to as law firm financing. Because contingency fees are only paid if a case is successful, law firms running cases on a contingency basis must incur unbilled time and out-of-pocket expenses. It may require the firm to take on debt. Law firm financing provides a facility that is secured against the firm's potential fee income in a portfolio of cases. It allows the firm to monetise its anticipated fee income to smooth cash flows, mitigate risk and offer alternative fee arrangements.
- 14.14 Law firm financing can also work for firms that predominately charge conditional fees, such as large personal injury firms in Australia that work on a no win, no fee basis. However, we understand that law firm financing does not feature much in Australia and we are not aware of it being available in Aotearoa New Zealand.

Others?

- 14.15 Litigation funding of defendants, or defence-side litigation funding, is possible in theory. For example, where a defendant has a compelling counterclaim.¹² In jurisdictions where law firm financing is available (usually those that allow contingency fees), a law firm might receive financing for a portfolio of cases comprising both plaintiff and defence-side cases. However, plaintiff-side litigation is a much more natural fit for litigation funders due to the relative ease of defining 'success'. We are not aware of defence-side funding in Aotearoa New Zealand, and Australian-based funders we spoke to indicated it is rare.
- 14.16 Some kinds of cases are unlikely to be commercially viable for funders to fund. Litigation funding may, for instance, have limited application to public interest litigation, or where non-monetary relief is sought.¹³ In response to these limitations, some non-profit organisations and litigation funds have emerged overseas that apply a similar funding models but without the profit motive. Examples include Ontario's Class Proceeding Fund, discussed in Chapter 13, and the Public Interest Advocacy Centre in Australia.¹⁴

¹⁰ Nick Butcher "Litigation funding and class actions: What's happening in New Zealand?" (2019) 929 LawTalk 66 at 73.

¹¹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 53.

¹² See discussion in Adrian Chopin "Litigation funding: no longer sitting on defence" (12 April 2019) Thomson Reuters Dispute Resolution Blog <<http://disputeresolutionblog.practicallaw.com>>.

¹³ Although note there are some instances of litigation funding occurring for non-financial motives: see Kaja Zaleska-Korziuk "When the Good Samaritan Pays: The Phenomenon of Strategic Third-Party Funding" (2018) 18 *Asper Rev Int'l Bus & Trade L* 160.

¹⁴ For information about the Public Interest Advocacy Centre see <<http://piac.asn.au>>. In 2008, the Victorian Law Reform Commission recommended the creation of a self-funding Justice Fund to financially assist parties with meritorious cases

How do funders select cases for funding?

- 14.17 The process of finding claims to fund varies between different funders. Some will wait to be approached by the plaintiff or the plaintiff’s lawyer, while others will actively seek out funding opportunities.¹⁵ For example, in our preliminary conversations with some funders that operate in Aotearoa New Zealand, we were told that a funder may hear about a potential case from the media and then discuss the case among its network of lawyers to assess whether the case is worth investigating further.
- 14.18 The process a funder will undertake to decide whether to fund a claim will vary according to the type of funding product being sought. In general, a funder will undertake an initial screening. For cases that pass the initial screening, more extensive due diligence will follow.¹⁶ Because funders work on a non-recourse basis, they have an incentive to take a conservative approach.¹⁷
- 14.19 Key factors that a funder will examine during the initial screening include:
- (a) **The merits of the case.** A funder will be concerned to ensure the claim has merit. Some funders require the applicable legal principles to be clear.¹⁸ Some funders may also seek an independent review of the merits from a senior lawyer.¹⁹
 - (b) **Estimated quantum of the case.** A funder will assess the estimated costs of the proceedings against the estimated value of the claim to determine whether the case meets its requirements for a return on its investment (funders will either specify a minimum claim size or a return that is a multiple of the funding sought). Some funders have indicated that they will also want to ensure the plaintiff will receive a fair share of the proceeds.

in the public interest, in conjunction with law firms charging on a no win, no fee basis. The recommendation was not implemented: see Victorian Law Reform Commission *Civil Justice Review: Report* (January 2008) at 12–13 and ch 10.

¹⁵ For example, an investigation is currently being conducted by Russell McVeagh, funded by Omni Bridgeway, to bring a potential representative action on behalf of persons with interests in buildings comprised of combustible panel cladding. There is no representative plaintiff named as yet. Omni Bridgeway (previously called IMF Bentham) was already funding an action in Australia for the same issue when the investigation was announced: see Omni Bridgeway “New Zealand Combustible Cladding Action” <<http://portal.omnibridgeway.com>>; and Rob Stock “Class action by owners of buildings clad in ‘combustible’ panels being lined up” (25 November 2019) <www.stuff.co.nz>.

¹⁶ See Nick Butcher “Litigation funding and class actions: What’s happening in New Zealand?” (2019) 929 *LawTalk* 66 at 71; Jonathan Woodhams “A Funder’s Perspective” (speech to Lights, Funding, Action: A Closer Look at Litigation Funding and Class Actions, Auckland, 18 June 2020); and Woodsford Litigation Funding “A Practical Guide to Litigation Funding” <<http://woodsfordlitigationfunding.com>>.

¹⁷ Jonathan Woodhams “A Funder’s Perspective” (speech to Lights, Funding, Action: A Closer Look at Litigation Funding and Class Actions, Auckland, 18 June 2020).

¹⁸ Angela Parlane “Lights, Funding, Action: A Closer Look at Litigation Funding and Class Actions” (paper presented to Lights, Funding, Action: A Closer Look at Litigation Funding and Class Actions, Auckland, 18 June 2020). This requirement can be seen in the due diligence process for some funders who operate in New Zealand: see for example LCM “LCM’s Funding Criteria” <www.lcmfinance.com>; and Litigation Lending Services “What We Do” <www.litigationlending.com.au>.

¹⁹ Adina Thorn “Counsel perspective on litigation funding” (paper presented to Perspectives on Group Litigation and Litigation Funding, Auckland, June 2015).

- (c) **Enforceability against the defendant.** A funder will examine the defendant's likely ability to pay any damages and costs ordered against it and, if the defendant is based overseas, the enforceability of any such order.²⁰
- (d) **The plaintiff's legal representation.** A funder will usually assess the quality of the legal advice which has already been given to see if the plaintiff's lawyer is realistic about the merits of the case.²¹ If a plaintiff proposes a legal team to conduct the litigation, a funder will consider that team's legal experience in the relevant area of law and whether the funder believes it can have a good relationship with that team.²² Some funders will seek the right to appoint the plaintiff's legal team under the funding agreement (as discussed below).
- 14.20 It has been estimated that fewer than 10 per cent of cases considered by litigation funders will pass initial screening and proceed to the formal due diligence phase.²³ During formal due diligence, a funder may seek a period of exclusivity to review the merits of the case in more detail without the plaintiff or their lawyer, seeking funding from other sources.²⁴ In this more detailed assessment, the funder will engage in further conversation with the plaintiff and its legal team to seek the best understanding of the case as possible. It may seek further advice from a senior lawyer, economic adviser and/or investment adviser.²⁵
- 14.21 If the funder believes the application meets its requirements, it will initiate negotiations over the terms of the funding agreement. In total, the due diligence process, including the initial screening, is said to take between three to six months.²⁶

Key terms in funding arrangements

- 14.22 Funding agreements are complex. Although most agreements will address common issues, how those issues are addressed will vary between funders. On some issues the variations are significant. As noted above, some funding agreements will contain terms that give funders a more active role in the conduct of the litigation than others, for example with respect to important financial decisions such as settlement. The following is a brief indication of the subjects that are usually addressed in funding agreements and the range of provisions in relation to them:

²⁰ Adina Thorn "Counsel perspective on litigation funding" (paper presented to Perspectives on Group Litigation and Litigation Funding, Auckland, June 2015); Woodsford Litigation Funding "A Practical Guide to Litigation Funding" <<http://woodsfordlitigationfunding.com>>; Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-082]; and LCM "LCM's Funding Criteria" <www.lcmfinance.com>.

²¹ Jonathan Woodhams "A Funder's Perspective" (speech to Lights, Funding, Action: A Closer Look at Litigation Funding and Class Actions, Auckland, 18 June 2020); and Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-082].

²² Angela Parlane "Lights, Funding, Action: A Closer Look at Litigation Funding and Class Actions" (paper presented to Lights, Funding, Action: A Closer Look at Litigation Funding and Class Actions, Auckland, 18 June 2020).

²³ Jonathan Woodhams "A Funder's Perspective" (speech to Lights, Funding, Action: A Closer Look at Litigation Funding and Class Actions, Auckland, 18 June 2020); and Woodsford Litigation Funding "A Practical Guide to Litigation Funding" <<http://woodsfordlitigationfunding.com>>.

²⁴ Woodsford Litigation Funding "A Practical Guide to Litigation Funding" <<http://woodsfordlitigationfunding.com>>.

²⁵ Woodsford Litigation Funding "A Practical Guide to Litigation Funding" <<http://woodsfordlitigationfunding.com>>.

²⁶ Westfleet Advisors *Guide to Litigation Financing* (2018) at 11. Westfleet Advisors suggest using a broker can speed up this process.

- (a) **Funding process.** Funding agreements include terms that set out the funder's obligations to make payments and how and when funding is provided to the plaintiff. These terms may require the funder to pay the plaintiff's reasonable legal fees and other amounts as set out in an agreed budget or may subject each payment to the funder's specific approval. The funding terms will also clarify the funder's liability to cover security for costs and any adverse costs orders — funders will usually accept responsibility to pay these. Funding may be structured as an advance which is repayable in the event of a successful resolution of the claim. The funding of any appeal or defence of any appeal may be subject to further negotiation.
- (b) **Funder's entitlements.** These terms specify the funder's entitlement to be paid from any amount awarded to the plaintiff by the court or from any settlement reached. Typically, the funder will be entitled to have its costs repaid first, and then take its agreed commission from the remaining amount. The commission is usually expressed as a percentage of the sum recovered. To secure its entitlements, the funding agreement may require the plaintiff to grant a charge over the legal claim in favour of the funder, or execute a mortgage over specified property. In Chapter 21, we discuss whether the amounts of funder commissions should be addressed by regulation.
- (c) **Appointment of lawyers.** Some funding agreements include provisions that entitle the funder to retain the services of the same lawyer acting for the plaintiff, to assist in the appointment of the plaintiff's lawyer or to replace and appoint the plaintiff's lawyer. Where the agreement provides for the same lawyer to act for both the plaintiff and the funder, it may include additional provisions addressing conflicts of interest. For example, the agreement might require the lawyer to accord priority to instructions given by the plaintiff or acknowledge that the lawyer may give advice contrary to the interests of the funder. Some funding agreements specify that the funder will not retain the plaintiff's lawyer or will not retain the services of a lawyer in relation to the claim at all.
- (d) **Settlement.** Funding agreements will often specify that any dispute over whether a settlement offer should be accepted will be referred to a senior lawyer for advice as to whether the offer is fair and reasonable.
- (e) **Non-monetary settlement.** Funding agreements may also include terms that address how a non-monetary settlement offer can be accepted by the plaintiff. For example, acceptance may be subject to the funder's consent or to the conversion of the offer into a monetary sum for the purpose of calculating the funder's entitlement to its commission. A non-monetary settlement may, for example, include a transfer of property or provision of services.
- (f) **Termination.** Funding agreements will include provisions on termination. These vary in terms of the discretion that a funder has to terminate an agreement without cause and the extent of the funder's liability for costs accrued up the date of termination. Typically, an agreement will require the funder to remain liable for accrued costs if the agreement is terminated without cause, and in most cases, agreements will also require the funder to remain liable for accrued costs if the agreement is terminated with cause. Termination events usually include material adverse developments in the litigation or breach by the plaintiff of a term of the agreement.

- (g) **Cooling off.** Some funding agreements will include a cooling off period of around two to three weeks after the agreement has been signed in which the plaintiff can terminate the agreement.
- (h) **Disputes and governing law.** Funding agreements invariably include provisions on dispute resolution procedures and governing law, but they differ markedly in approach. Some agreements will require disputes to be resolved through mediation and then arbitration if necessary, while others will require expert determination or litigation. Most agreements we have reviewed provide for Aotearoa New Zealand law to govern.

THE LITIGATION FUNDING MARKET IN AOTEAROA NEW ZEALAND

14.23 The market for litigation funding in Aotearoa New Zealand is relatively small compared to jurisdictions like Australia and England and Wales. In this section, we provide some information on funded cases and funders we have identified as operating in Aotearoa New Zealand. We also briefly compare the market in Aotearoa New Zealand with comparable jurisdictions.

Funded cases in Aotearoa New Zealand

- 14.24 We have identified 40 cases in Aotearoa New Zealand in which the plaintiff received litigation funding, all of which appear to have been funded on a full funding for a single matter basis.²⁷ These cases have been identified from judgments, media reports and information on funders' websites. It is likely there are other funded cases where information is not available, and our case count is likely to be conservative. Until the Supreme Court's 2013 judgment in *Waterhouse v Contractors Bonding*, there was no obligation on a funded party to disclose the fact that they were receiving litigation funding.²⁸ Furthermore, litigation funding is generally only visible when it is noted in a court judgment (unless it is publicly acknowledged or advertised by the funded party or the funder).²⁹ Cases that settle prior to a judgment or where the funding is not noted in a judgment are not readily identifiable. As a result, the litigation funding market is relatively opaque.
- 14.25 The earliest use of litigation funding we have identified was in an insolvency proceeding in 2000.³⁰ Although claims arising out of insolvent companies continue to be an important area of activity for litigation funders, the use of litigation funding has since expanded into other contexts, including representative actions, commercial disputes and insurance claims.

²⁷ Note that *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245 and *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 are counted as both representative actions and insurance proceedings below.

²⁸ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 139, [2014] 1 NZLR 91 at [66]–[72]. The Court held that a funded plaintiff must disclose the identity and location of any litigation funder and the funder's amenability to the jurisdiction of the New Zealand courts.

²⁹ Note this may happen in representative actions where the representative plaintiff and funder may be trying to attract other potential claimants to opt into their action.

³⁰ *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC).

Representative actions

14.26 We have identified ten representative actions supported by litigation funding, with the first filed in 2008.³¹ Many of these actions are ongoing. They comprise five consumer claims, three shareholder claims, one investor claim and one claim against the Government:

- (a) *Houghton v Saunders* was filed in 2008 on behalf of over 3,600 shareholders in the failed Feltex Carpet Company, alleging that the prospectus issued by Feltex was misleading in a number of respects. The High Court struck out the case on 14 July 2020.³² That decision was appealed and a decision from the Court of Appeal is pending.³³ Litigation funding is managed by Joint Action Funding Ltd.³⁴ At one stage, the proceeding was funded by Harbour Litigation Funding, a global funder based in London.
- (b) *Cooper v ANZ Bank New Zealand* was filed in 2013 on behalf of 13,500 customers of National and ANZ banks in relation to bank fees.³⁵ It was funded by Australian-based funder, Litigation Lending Services. The case was settled.
- (c) *Strathboss Kiwifruit v Attorney-General* was filed in 2015 by kiwifruit growers against the Crown alleging negligence in allowing the bacterial kiwifruit vine disease Psa-V into Aotearoa New Zealand.³⁶ The proceedings are being funded by LPF Group and are ongoing.
- (d) *Southern Response Unresolved Claims Group v Southern Response Earthquake Services* was filed in 2015 on behalf of 27 Christchurch homeowners in relation to unresolved insurance claims following the 2010–2011 Christchurch earthquakes.³⁷ The proceedings were funded by Litigation Lending Services. The case was settled.
- (e) *Cridge v Studorp* was filed in 2015 on behalf of a group of homeowners against Studorp and James Hardie in relation to allegedly defective cladding products, Harditex and Titan Board.³⁸ The proceedings are funded by an Australian-based funder, Claims Funding Australia.
- (f) *Ross v Southern Response* was filed in 2018 on behalf of around 3,000 Christchurch homeowners alleging Southern Response misled them about the full extent of their entitlements to compensation under their insurance policies following the Christchurch earthquakes.³⁹ The proceedings are funded by Claims Funding Australia.

³¹ We are also aware of a representative action which was filed in 2020 (a shareholder representative action relating to Intueri Education Group) but we understand the court has not yet decided whether this can proceed under r 4.24 of the High Court Rules 2016: see Reweti Kohere “Let Intueri class action go to trial, defendants argue” *The National Business Review* (New Zealand, 24 November 2020). This claim is being funded by LPF Group Ltd.

³² *Houghton v Saunders* [2020] NZHC 1088 at [92].

³³ *Houghton v Saunders* [2020] NZHC 2030 at [3].

³⁴ *Houghton v Saunders* [2009] NZCCLR 13 (HC).

³⁵ *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827.

³⁶ *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69.

³⁷ *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245.

³⁸ *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281.

³⁹ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126.

In November 2020, the Supreme Court confirmed the case can proceed on an opt-out basis.⁴⁰

- (g) *Paine v Carter Holt Harvey* was filed in 2018 on behalf of 117 building owners against Carter Holt Harvey in relation to an allegedly defective cladding product, Shadowclad.⁴¹ The proceedings are funded by Harbour Litigation Funding and are ongoing.
- (h) *Scott v ANZ Bank New Zealand* was filed in 2019 on behalf of investors in the collapsed Ross Asset Management (RAM) Ponzi scheme. The investors claim ANZ is responsible for their losses because it knew their investment money was being applied for purposes other than the terms on which RAM held the money. The proceedings are ongoing and are funded by LPF Group.
- (i) *TEA Custodians v Wells* was filed in 2019 against the failed insurer CBL, its directors and related trustees on behalf of large institutional shareholders.⁴² The proceedings are funded by LPF Group and are ongoing.
- (j) *Livingstone v CBL Corp* was filed in 2019 in relation to the same set of facts as *TEA Custodians Ltd v Wells*. The proceedings are being brought against CBL Corporation by overseas institutional shareholders and individual investors.⁴³ The proceedings are being funded by Omni Bridgeway, a funder listed on the Australian Securities Exchange, and are ongoing.

14.27 We are also aware of litigation funding being used to support two group proceedings, although these claims were not filed as representative actions:

- (a) *Pepperwood Mews* was filed in 2011. The claim related to alleged structural and weathertightness defects and was brought by a body corporate and 32 individual unit owners. The claim alleged negligence in respect of defendants Auckland Council and Housing New Zealand. The claim was funded by LPF Group and was settled prior to trial.
- (b) *White v James Hardie* was filed in 2015 on behalf of a group of plaintiffs alleging that products and exterior cladding systems manufactured and supplied by the James Hardie Group were defective. The proceedings are funded by Harbour Litigation Funding and are ongoing.

⁴⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126. We discuss opt-in and opt-out mechanisms in Chapter 12.

⁴¹ *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478.

⁴² *TEA Custodians Ltd v Wells* CIV-2019-485-642 (ongoing proceedings).

⁴³ *Livingstone v CBL Corp Ltd* CIV-2019-404-2727 (ongoing proceedings).

Insolvency proceedings

- 14.28 We are aware of at least 11 insolvency cases supported by litigation funding,⁴⁴ the earliest of which was filed in 1999.⁴⁵ They include *Mainzeal Property and Construction Limited v Yan (Mainzeal)* and *PricewaterhouseCoopers v Walker (PwC v Walker)*.⁴⁶
- 14.29 In *Mainzeal*, LPF Group is funding a liquidator action against the former directors of Mainzeal, which collapsed in 2013 owing more than \$110 million to unpaid subcontractors and creditors. The liquidators allege that the directors breached their duties under the Companies Act 1993, recklessly allowing the company to trade while it was insolvent. In February 2019, the High Court found the directors of Mainzeal negligent in allowing the company to trade while insolvent and awarded damages of \$36 million.⁴⁷ The decision is under appeal.
- 14.30 In *PwC v Walker* the liquidators of Property Ventures Limited (PVL) obtained funding from LPF Group Ltd. The liquidators alleged that PricewaterhouseCoopers (PwC) was in breach of contract and negligent in carrying out its functions as auditor of PVL and its subsidiaries.⁴⁸ They alleged that had PwC carried out its work properly the insolvency would have become apparent much sooner and avoided trading losses said to amount to as much as \$302 million.⁴⁹
- 14.31 PwC sought a stay of proceedings claiming the combined effect of the funding agreement and other transactions amounted to an assignment of PVL's bare causes of action to LPF Group Ltd. After hearing argument but before judgment was delivered the parties settled the claim. Nonetheless, the Supreme Court delivered judgment, with the majority noting it would have held the funding arrangements did not amount to an impermissible assignment.⁵⁰ The total settlement amount is unknown.

Insurance proceedings

- 14.32 We have identified 15 funded insurance claim cases (funded predominantly by two insurance claims management services, Claims Resolution Services and Risk Worldwide

⁴⁴ *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC); *Re Gellert Developments Ltd (in liq)* (2001) 9 NZCLC 262,714 (HC); *Computer Training Services Ltd v Universal Data Systems Ltd* (2001) 15 PRNZ 401 (HC); *Parkhouse Joinery Ltd v Parkinson* HC Christchurch CP109/01, 5 February 2002; *Kings Wharf Coldstore Ltd (in rec and in liq) v Wilson* (2005) 2 NZCCLR 1042 (HC); *AMP Capital Investments No 4 Ltd v IBS Group Ltd (in liq)* [2009] NZCCLR 19 (HC); *ALF No 9 Pty Ltd v Ellis* HC Wellington CIV-2009-485-435, 13 October 2009; *Capital & Merchant Finance Ltd v Perpetual Trust Ltd* [2015] NZHC 1233; *Walker v Forbes* [2015] NZHC 1730, [2015] 3 NZLR 831; *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255; and *Cain v Mettrick* [2019] NZHC 802, [2019] NZAR 668.

⁴⁵ *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC).

⁴⁶ *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255; and *PricewaterhouseCoopers v Walker* [2017] NZSC 1151, [2018] 1 NZLR 735.

⁴⁷ *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255 at [459].

⁴⁸ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735. See Chapter 15 for a full discussion of this case.

⁴⁹ *PricewaterhouseCoopers v Walker* [2016] NZCA 338 at [6].

⁵⁰ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [77]–[96].

Ltd/My Insurance Claim).⁵¹ This figure may underrepresent the number of insurance claims managed by these companies as not all claims progress to court or result in a judgment.

Other proceedings

14.33 Other funded proceedings in Aotearoa New Zealand have included a claim for negligence and breach of fiduciary duty,⁵² a statutory demand for repayment of a loan,⁵³ a relationship property claim⁵⁴ and a land claim.⁵⁵

Funders operating in Aotearoa New Zealand

14.34 We have identified five domestic based litigation funders⁵⁶ and six overseas-based funders operating in Aotearoa New Zealand.⁵⁷

14.35 The five domestic funders are general funders (LPF Group and Tempest Litigation Funders), insurance claim managers and funders (Claims Resolution Services⁵⁸ and Risk Worldwide/My Insurance Claim), and a single purpose funder (Joint Action Funding Ltd).

14.36 The six overseas-based funders are all general funders, Claims Funding Australia Pty Ltd (Australia), Court House Capital (Australia), Harbour Litigation Funding (United Kingdom), LCM (Australia), Litigation Lending Services Ltd (Australia) and Omni Bridgeway (previously IMF Bentham – Australia).

⁵¹ *Domenico Trustee Ltd v Tower Insurance Ltd* [2014] NZHC 2657; *Pearce v Tower Insurance* [2014] NZHC 2849; *East v Medical Assurance Society New Zealand Ltd* [2014] NZHC 3399; *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2015] NZHC 1444; *Avondale Golf Club Inc v Lumley General Insurance (NZ) Ltd* [2015] NZHC 1627; *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245; *Zygodlo v The Earthquake Commission* [2016] NZHC 1699; *Driessen v The Earthquake Commission* [2016] NZHC 1048; *Sadat v Tower Insurance Ltd* [2017] NZHC 1550; *Sii v Earthquake Commission* [2017] NZHC 2469; *Deo Gratias Developments Ltd v Tower Insurance Ltd* [2018] NZHC 1881; *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288; *Goodier v The Earthquake Commission* [2018] NZHC 2980; *Bligh v Earthquake Commission* [2018] NZHC 2102; and *Settlers Crescent Partnership v IAG New Zealand Ltd* [2018] NZHC 2775. Note that *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* and *Ross v Southern Response Earthquake Services* are also counted as representative actions above.

⁵² *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

⁵³ *Sage Securities Ltd v Rood* HC Wellington CIV-2009-485-1150, 11 November 2009.

⁵⁴ *Patel v Patel* [2014] NZHC 2410.

⁵⁵ *Williams v Auckland Council* [2015] NZCA 479, (2015) 7 NZ ConvC 96-013.

⁵⁶ Claims Resolution Services, Joint Action Funding Ltd, LPF Group Ltd, Risk Worldwide / My Insurance Claim and Tempest Litigation Funders. Risk Worldwide and My Insurance Claim appear to be related entities. The 2019 Annual Report for Shine Justice Ltd (an Australian publicly traded company which owns both Risk Worldwide and My Insurance Claim) noted that Risk Worldwide “continued to operate in the loss adjusting and insurance policy recovery business in New Zealand, with a focus on residential claims under the brand ‘My Insurance Claim’”: Shine Corporate Ltd *Annual Report* (2019) at 32.

⁵⁷ Claims Funding Australia Pty Ltd (Australia), Court House Capital (Australia), Harbour Litigation Funding (United Kingdom), LCM (Australia), Litigation Lending Services Ltd (Australia) and Omni Bridgeway (previously IMF Bentham – Australia). In a 2017 publication the Institute of Directors identified a UK based funder, Vannin Capital, as active in New Zealand: see Institute of Directors *Litigation funding: friend or foe?* (DirectorsBrief, Issue 3, September 2017) at 1. However, we have not identified any cases funded by Vannin Capital and so do not include it.

⁵⁸ Claims Resolution Services, not to be confused with the Greater Christchurch Claims Resolution Services, also trades under the name Earthquake Services. Both Claims Resolution Services and Earthquake Services are owned by The Staples Group Ltd.

General funders

- 14.37 The general funders offer non-recourse funding in return for a commission which is normally calculated as an agreed percentage of any sum recovered or a multiple of the funding provided. General funders ordinarily cover all the costs associated with the litigation including legal fees, disbursements, expert costs, security for costs and any adverse costs.
- 14.38 LPF Group is the largest litigation funder based in Aotearoa New Zealand and was founded in 2009. It has funded 24 cases, 17 of which have been resolved.⁵⁹ Several have been high profile cases, including four significant representative actions.⁶⁰ LPF Group advertises that it will consider funding claims where the claim amount is \$2 million or higher. Tempest Litigation Funders advertises itself as providing litigation funding and debt buying services. It will consider funding applications for cases where the claim amount is between \$200,000 and \$2 million. However, we have not yet identified any cases it has funded.⁶¹
- 14.39 Of the six overseas based funders we know to be operating in Aotearoa New Zealand, five are based in Australia and one is based in London. One is publicly listed.⁶² These funders typically only accepts claims of significant value.⁶³ Litigation Lending Services, for example, advertises a minimum claim size of \$1 million and LCM advertises a minimum claim size of \$5 million. Harbour Litigation Funding does not stipulate a minimum claim size but indicates that for claims valued below £20 million, the claim value to claim budget ratio must generally be at least 10/1.⁶⁴ Omni Bridgeway requires the same 10/1 value to budget ratio for most claims.⁶⁵

Insurance claim managers and funders

- 14.40 Claims Resolution Services and Risk Worldwide/My Insurance Claim only fund litigation as part of their insurance claims management service. They offer insurance claim assessments and advocacy services for people and organisations who wish to contest the adequacy of insurance loss assessments. Claims Resolution Services and Risk

⁵⁹ LPF Group Ltd “What We Do” <www.lpfgroup.co.nz>.

⁶⁰ Notable cases LPF has funded include *PricewaterhouseCoopers v Walker* [2016] NZCA 338 (a large insolvency case relating to the collapse of the Property Venture Limited group of companies); *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255 (an insolvency case against the former directors of the Mainzeal property and construction company); *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 (a negligence case against the government in relation to the Psa outbreak, a bacterial kiwifruit vine disease); and three representative actions: two shareholder actions, one against CBL Corporation Limited (ongoing) and one against Intueri Education Limited, and an investor action *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906 (on behalf of investors who lost money in the Ross Asset Management Ponzi scheme).

⁶¹ For further information about Tempest Litigation Funders, see their website <www.tempest.net.nz>.

⁶² Omni Bridgeway is listed on the ASX as OBL: ASX “Omni Bridgeway Limited: OBL” <www2.asx.com.au>.

⁶³ Claims Funding Australia does not specify a minimum claim size.

⁶⁴ For instance, a claim valued at \$10 million could receive funding where the estimated budget necessary to bring the claim is \$1 million: Harbour Litigation Funding “Criteria” <www.harbourlitigationfunding.com>.

⁶⁵ Omni Bridgeway “Commercial Litigation Funding” <www.omnibridgeway.com>. Note Omni Bridgeway specifies funding for patent judgments requires a claim to budget ratio of 20/1. Funding for appeals requires a 4/1 ratio.

Worldwide were founded shortly after the Christchurch earthquakes.⁶⁶ Like general litigation funders, they only take a commission in the event of a successful outcome. The commission may be calculated as a percentage of the total settlement or as percentage of the amount recovered over and above the insurer's original assessment.⁶⁷ Claims management services will often resolve disputes through negotiation with the client's insurer. These companies may fund legal proceedings if a satisfactory outcome cannot be achieved through negotiation. On these occasions, claims management services are broadly similar to services offered by a general litigation funder.⁶⁸ We understand that Claims Resolution Services is no longer accepting new cases for funding.

Single purpose funders

14.41 Joint Action Funding was incorporated in 2007.⁶⁹ It was “formed for the purpose of partly funding and managing” the *Feltex* representative action,⁷⁰ and to date has only funded the *Feltex* proceeding.⁷¹ As a result of difficulties raising funds to cover legal costs and provide security for costs for the stage two hearing to determine damages, it raised capital through Collinson Crowdfunding.⁷²

Comparison with other jurisdictions

14.42 The litigation funding market is still relatively small in Aotearoa New Zealand. This is particularly obvious when comparing the market in Aotearoa New Zealand to the much larger and more established funding market in Australia.⁷³ LPF Group is the only funder of a significant size based in Aotearoa New Zealand. The other well-established funders operating in Aotearoa New Zealand are based in Australia or London.

14.43 As we discuss below, one likely reason the market in Aotearoa New Zealand is still relatively small is that the lack of regulation and explicit endorsement of litigation funding by the courts means there is still some uncertainty about its legal status. From a funder's

⁶⁶ Claims Resolution Services was founded in 2012 and Risk Worldwide in 2011. As noted above, Risk Worldwide changed branding and focus and now appears to primarily operate as My Insurance Claim, which was incorporated in July 2018: Shine Corporate Ltd *Annual Report* (2018) at 28.

⁶⁷ See *Avondale Golf Club Inc v Lumley General Insurance (NZ) Ltd* [2015] NZHC 1627 at [16].

⁶⁸ Note, however, Claims Resolution Services did not provide adverse costs cover for plaintiffs. We do not know whether Risk Worldwide / My Insurance Claim offer adverse costs cover for plaintiffs it funds.

⁶⁹ Note JAFL Litigation Funding Partners Limited was incorporated in February 2020 as part of efforts to crowdfund security for costs and the pending stage two trial in the *Feltex* litigation.

⁷⁰ *Joint Action Funding Limited v Eichelbaum* [2016] NZHC 2919 at [3]. Note that the initial stages of the *Feltex* proceeding were funded by Harbour Litigation Funding until late 2015.

⁷¹ The High Court struck out the case on 14 July 2020, although this decision was appealed and a decision from the Court of Appeal is pending: *Houghton v Saunders* [2020] NZHC 1088; and *Houghton v Saunders* [2020] NZHC 2030.

⁷² See Collinson Crowdfunding “JAFL Partners Crowdfunding Campaign” <www.ccfl.co.nz>.

⁷³ The ALRC estimated there were approximately 25 active litigation funders in the Australian market in its 2018 discussion paper and in its 2019 report it stated a further 15 entities were registered with ASIC, apparently in anticipation of entering the market: Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [1.12]; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.16]. Note the proliferation of litigation funding in Australia has not been without controversy. There is currently an ongoing Parliamentary Inquiry into litigation funding and the regulation of the class action industry, due to report on 7 December 2020: Parliament of Australia “Litigation funding and the regulation of the class action industry” <www.aph.gov.au>.

perspective, uncertainty increases the risk and expense of funding litigation. It may lead to challenges to funding arrangements, adding cost and delay to the resolution of claims.

- 14.44 In addition, as discussed in Part A of this Issues Paper, a significant difference between Aotearoa New Zealand and comparable jurisdictions is the lack of a rules-based class actions regime. Representative actions currently rely on a rule in the High Court Rules.⁷⁴ In contrast, many overseas jurisdictions have introduced detailed class actions regimes.⁷⁵ In Australia, for instance, funded class actions in the 2018/2019 financial year reportedly represented 72 per cent of all class actions commenced.⁷⁶ Although the number of funded representative actions being brought in Aotearoa New Zealand is increasing, it is still relatively low. The lack of clarity around some aspects of representative actions may be disincentivising both potential representative plaintiffs and litigation funders.
- 14.45 Another reason for the small market may be that meritorious cases simply do not meet the investment criteria of litigation funders, including in relation to minimum claim size or enforceability.
- 14.46 The small market may also reflect that litigation funding is reasonably new and unfamiliar. Some Australian funders have told us they are surprised they do not receive more requests for funding from Aotearoa New Zealand. One funder was particularly surprised not to have received more funding applications in the context of insolvency. Funders consider that a lack of awareness may be contributing to the relatively slow uptake. Some funders acknowledged they have not done much marketing in Aotearoa New Zealand but intend to do more if and when the law around litigation funding and class actions is more settled.
- 14.47 As discussed above, the notable absence of some funding products such as portfolio funding for law firms and companies may be explained by the fact that Aotearoa New Zealand does not allow lawyers to charge contingency fees. Additionally, there is an absence of large plaintiff-oriented law firms which would typically be best placed to make use of law firm litigation funding products.⁷⁷ The absence of portfolio funding may also be a consequence of the relatively small number of Aotearoa New Zealand businesses with a large enough number of disputes to contemplate portfolio funding.

⁷⁴ High Court Rules 2016, r 4.24.

⁷⁵ For instance see Federal Court of Australia Act 1976 (Cth), pt IVA; Supreme Court Act 1986 (Vic), pt 4A; and Class Proceedings Act SO 1992 c 6. Some regimes have inserted more detailed rules into their equivalent court rules: see Federal Courts Rules SOR/98-106, pt 5.1; United States Federal Rules of Civil Procedure, r 23; and The Competition Appeal Tribunal Rules 2015 (UK), pt 5.

⁷⁶ King & Wood Mallesons *The Review: Class Actions in Australia 2018/2019* (2019) at 5.

⁷⁷ This may in part be due to the ACC prohibition on actions for personal injury: see Accident Compensation Act 2001, s 317.

CHAPTER 15

Regulation of litigation funding

INTRODUCTION

- 15.1 In this chapter, we discuss the regulation of litigation funding, with a focus on the limited extent to which litigation funding is regulated in Aotearoa New Zealand. We canvas:
- (a) The torts of maintenance and champerty.
 - (b) Judicial consideration of modern litigation funding arrangements in relation to:
 - (i) The court's role in funded non-representative actions;
 - (ii) The court's role in funded representative actions; and
 - (iii) Disclosure of litigation funding arrangements.
 - (c) General powers of the court to control funded proceedings.
 - (d) Statutes that may apply to litigation funding.
 - (e) The regulation of litigation funding in some comparable jurisdictions.

LITIGATION FUNDING IN AOTEAROA NEW ZEALAND IS NOT SPECIFICALLY REGULATED

- 15.2 In contrast to some comparable jurisdictions, litigation funding in Aotearoa New Zealand is not specifically regulated. Instead, litigation funding is regulated to a limited extent by:
- (a) The torts of maintenance and champerty;
 - (b) General principles that have developed through the courts; and
 - (c) General statutes that may apply to litigation funding.

The torts of maintenance and champerty remain part of our law

- 15.3 The torts of maintenance and champerty — which for centuries have prohibited litigation funding — have not been abolished in Aotearoa New Zealand. Maintenance is where a person, without lawful justification, assists a party to a civil action to bring or defend the action, and this causes damage to the other party.¹ Champerty is a form of maintenance

¹ Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1061; and The Law Commission (England and Wales) *Proposals for Reform of the Law Relating to Maintenance and Champerty* (LC007, 1966) at [9].

where the person provides financial assistance in return for a share of any recovery.² Maintenance and champerty were never criminalised in Aotearoa New Zealand, however the Supreme Court has confirmed that the torts, and the public policy that underpins them, remain part of our law.³

- 15.4 The policy of the torts is to protect the integrity of the courts, protect the party facing the maintained litigation and, to some extent, protect those whose litigation is being maintained.⁴ The policy concerns appear to be threefold:
- (a) First, a third party might procure litigation (including by “officious” or unscrupulous means)⁵ or attempt to influence litigation for their own end — for example to harm an opponent, obtain an advantage, or profit from a litigation funding arrangement.⁶
 - (b) Second, the maintainer might not assume liability for costs if the claim fails, leaving the defendant with no recourse if the plaintiff is impecunious.⁷
 - (c) Third, the courts’ function in the vindication of wrongs is at risk of misuse.⁸
- 15.5 Breach of the torts can give rise to a claim for damages by the non-funded party (who is caused harm by the funded litigation) against the litigation funder.⁹ Where a breach is established, the agreement itself, being contrary to public policy, may also be unenforceable.¹⁰
- 15.6 To our knowledge, there are no examples in Aotearoa New Zealand of funder control giving rise to a claim based on the torts. Nor are there any examples of a litigation funding agreement being deemed unenforceable as contrary to public policy. In *Saunders v*

² Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [59.18.4.01].

³ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [25]–[26]. See also *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [111]; and *Gavin v Powell* [2020] NZHC 1224 at [65].

⁴ See *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [121] per Elias CJ.

⁵ In *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 (CA) at 1014, Fletcher Moulton LJ stated:

[Maintenance] is directed against wanton and officious inter-meddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.

⁶ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 1; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.43]. In *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [121], Elias CJ affirmed that:

...the mischief with which the law of champerty and maintenance is concerned ... with [is] the conduct of litigation “for their own interests” by those otherwise unconnected with the claim and with no existing property interest to protect.

⁷ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.43]. In *Alabaster v Harness* [1895] 1 QB 339 (CA) at 342 (emphasis added) Lord Esher MR suggested the reason for preventing third party assistance in litigation was because it:

...seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful.

⁸ See *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [115] per Elias CJ (referring to trafficking in litigation).

⁹ *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [12].

¹⁰ Contract and Commercial Law Act 2017, ss 71, 73 and 75–76.

Houghton, in the context of a representative action, the Court of Appeal engaged with the question of whether and when litigation funding may be unlawful:¹¹

We have concluded that, like the common law of Australia and that of Canada, the common law of New Zealand should refrain from condemning [a proposal for litigation funding] as tortious or otherwise unlawful maintenance and champerty where:

- (a) the court is satisfied there is an arguable case for rights that warrant vindicating;
- (b) there is no abuse of process; and
- (c) the proposal is approved by the court.

- 15.7 As this comment indicates, the courts in Aotearoa New Zealand have preferred to consider litigation funding arrangements through an abuse of process lens, rather than through the mechanism of maintenance and champerty.
- 15.8 The High Court in *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council*,¹² and the Supreme Court in *Waterhouse v Contractors Bonding*,¹³ have respectively explained the reasons for preferring an abuse of process approach.
- 15.9 In *Auckland City Council as Assignee of Body Corporate 16113*, the High Court noted a trend “in which the courts have declined to use the ancient mechanism of champerty or maintenance to prevent claims from being pursued where there was no powerful public policy factor justifying that course”.¹⁴ The Court agreed with authorities “which have emphasised the public policy factor of access to justice as telling against the use of champerty and maintenance to prevent (otherwise) justifiable claims from proceeding”.¹⁵ The Court concluded that it would be desirable to “let maintenance and champerty fall into disuse” as the court has “ample jurisdiction to prevent an abuse of its processes to address perceived exploitation of the vulnerable, without recourse to such ancient remedies”.¹⁶
- 15.10 In *Waterhouse v Contractors Bonding*, the Supreme Court considered when a litigation funding arrangement may amount to an abuse of process justifying a stay of proceedings.¹⁷ The Court noted that the rule against assignments of bare causes of action “had its origins in the torts of maintenance and champerty but now seems to have an

¹¹ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [79].

¹² *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [45]–[46].

¹³ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [56]–[59].

¹⁴ *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [43].

¹⁵ *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [36] and [49].

¹⁶ *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [45]–[46].

¹⁷ Commenting on *Waterhouse v Contractors Bonding*, Elias CJ in *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [120] said it was:

... not necessary in *Waterhouse* to consider at any length the reasons which might make a litigation funding agreement contrary to public policy although the case suggests that control of the litigation and profit share are likely to be important in any such consideration.

At [111] she said the Court’s approach in *Waterhouse* was “tentative and cautious” and that it is still “a matter of some controversy whether and when litigation funding arrangements may offend against the policies which are suspicious of maintenance of litigation for profit”.

independent existence of its own”.¹⁸ The Court concluded that “if a funding agreement 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”.¹⁹

- 15.11 The Supreme Court said it preferred to frame the test for abuse of process relating to litigation funding in this way, rather than by reference to general public policy concerns based on maintenance and champerty.²⁰ The Court agreed with the High Court of Australia’s decision in *Campbells Cash and Carry Pty v Fostif Pty* that any alleged rule of public policy based on the old torts would be highly uncertain and “would readily yield no rule more certain than the patchwork of exceptions” that existed in the law of maintenance and champerty at the beginning of the 20th century.²¹
- 15.12 Thus, while the torts of maintenance and champerty may be available to regulate litigation funding, the courts will prefer more conventional mechanisms such as a stay of proceedings for an abuse of process. In Chapter 16, we discuss the uncertainty about the contemporary relevance and impact of maintenance and champerty.²² The courts have recognised that litigation funding may have an increasingly important role to play in ensuring access to justice.²³ At the same time, the courts have acknowledged that litigation funding arrangements should be approached with some care, and that there is still force in the concerns underlying the law of maintenance and champerty.²⁴ In Chapter 18, we consider how these tensions may be resolved.

JUDICIAL CONSIDERATION OF MODERN LITIGATION FUNDING ARRANGEMENTS

- 15.13 The courts have adopted a cautiously permissive approach to litigation funding.²⁵ The courts have also acknowledged they may need to have a greater role in overseeing litigation funding in the context of representative actions.

The court’s role in funded non-representative actions

- 15.14 *Waterhouse v Contractors Bonding* is the leading decision on litigation funding in non-representative actions.²⁶ In that case, the funded plaintiffs brought proceedings against Contractors Bonding in relation to a failed insurance business.²⁷ Contractors Bonding

¹⁸ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

¹⁹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

²⁰ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [58].

²¹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [59] citing *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [86] per Gummow, Hayne and Crennan JJ.

²² *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [111] per Elias CJ.

²³ See Chapter 1. See also *Houghton v Saunders* [2009] NZCCLR 13 (HC) at [177]; and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28] and [77].

²⁴ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [116] per Elias CJ; and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [27] and [77].

²⁵ See *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

²⁶ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

²⁷ *Waterhouse v Contractors Bonding Ltd* HC Auckland CIV-2010-404-3074, 13 December 2010.

applied for a stay of proceedings until the plaintiff's litigation funding agreement, as well as information about the funder and its relationship with the plaintiffs, was disclosed.

- 15.15 With respect to the court's role in funded non-representative actions, the Supreme Court held that the role of courts is to "adjudicate on any applications brought before them in a proceeding".²⁸ It is not the role of the courts "to act as general regulators of litigation funding arrangements" or to assess the fairness of any bargain between a funder and plaintiff.²⁹ The Court also stressed it is not the courts' role to give prior approval to funding arrangements.³⁰ The Court commented that if such approval is considered desirable, it is a matter for legislation or regulation.³¹
- 15.16 At the same time, the Supreme Court accepted that a funding agreement may be relevant in any application by the non-funded party for a stay of proceedings on the ground of abuse of process.³² The existence of a litigation funder may also be relevant in any application for security for costs or for non-party costs against a funder.³³

The court's role in funded representative actions

- 15.17 As discussed in Part A, a representative action is where a group of people with claims sharing a common legal or factual issue have their claims determined in a single proceeding. A representative action can either be brought with the consent of those with the same interest or with the leave of the court.³⁴ Representative actions are brought under High Court Rule 4.24 (HCR 4.24).
- 15.18 When considering whether to grant leave for a representative action under HCR 4.24, the Court of Appeal has said it is not the role of the courts to approve litigation funding agreements, and any decision to grant leave should not be taken as an endorsement of any litigation funding arrangements.³⁵ The Court of Appeal in *Southern Response Earthquake Services v Southern Response Unresolved Claims Group* explained:³⁶

There is nothing in r 4.24 which enables a court to approve funding arrangements or communications, and in the absence of rules creating a regime for approval, the status of any such approval would be uncertain ... There must also be questions about the institutional capacity of the courts to approve such arrangements in what is at best, in this

²⁸ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [29].

²⁹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [28] and [48]. However, the Court was clear it was not commenting on the appropriate role for the courts in representative actions: see [28].

³⁰ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [28]. Note previously in the insolvency context the High Court had suggested that it would be prudent for assignees of liquidators to obtain court approval of the Court when entering into a funding agreement by applying to the Court for directions: see *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC) at [27].

³¹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [34].

³² *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [29] and [31].

³³ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [29].

³⁴ High Court Rules 2016, r 4.24.

³⁵ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [76(a)].

³⁶ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [79].

country, a developing market for litigation funders, and given the absence of any detailed rules of procedure or legislation as exist in other jurisdictions. Rule 4.24 cannot bear the weight of a complex funding approval scheme.

- 15.19 The Court of Appeal was concerned to avoid the risk that prospective members of the represented group would be “falsely reassured by the Court’s approval” and not undertake their own due diligence to protect their interests.³⁷
- 15.20 The Court of Appeal nevertheless acknowledged there is good reason why funding arrangements and communications with prospective group members should be supervised.³⁸ This is because the representative plaintiff is seeking to invoke HCR 4.24 to “enable one plaintiff to represent, and to bind, many”.³⁹
- 15.21 The court also has a role in ensuring that funding arrangements do not amount to an abuse of process,⁴⁰ and will not grant leave to bring a representative action where such arrangements would enable or further an abuse of its process.⁴¹ For example, if a funding arrangement entails a bare assignment of the represented group’s claims, that would amount to an abuse of process which the court could not sanction.⁴² Similarly, if a representative action is marketed to prospective litigants with misleading statements, the court will be concerned not to allow its processes to be used to facilitate that misleading conduct.⁴³ The court will want to see detail of the funding arrangement and information provided to prospective class members, to reassure itself that there is nothing obviously unfair, oppressive or misleading about the arrangement.⁴⁴
- 15.22 The High Court has said that if the representative plaintiff enters any new funding arrangements for a later stage of the proceedings, then it must be advised of this.⁴⁵

Disclosure of funding arrangements

- 15.23 The Supreme Court in *Waterhouse v Contractors Bonding* articulated principles applicable to the disclosure of funding arrangements. First, it held that a funded litigant

³⁷ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [81].

³⁸ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [78].

³⁹ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [78].

⁴⁰ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [86].

⁴¹ Alternatively, the Court might make the grant of leave conditional upon the correction of the harm: see *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [78] and [82].

⁴² *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [78].

⁴³ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [78].

⁴⁴ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [81].

⁴⁵ *Houghton v Saunders* [2019] NZHC 1061 at [53]–[55].

must disclose the following information to the court and to the non-funded party when litigation is commenced:⁴⁶

- (a) the fact that there is a litigation funder involved and the funder's identity; and
- (b) whether or not the funder is subject to the jurisdiction of the New Zealand courts.

- 15.24 The Supreme Court explained that the non-funded party needs to know these matters before it can decide whether to make an application for a stay on abuse of process grounds.⁴⁷ In principle, the courts and the other party or parties are entitled to know the identity of the "real parties" to the litigation.⁴⁸
- 15.25 Second, the Court said it is not necessary to disclose the financial means of the funder, as the legitimate interest of the non-funded party in this issue can be met by an application for security for costs.⁴⁹
- 15.26 Third, there is no general obligation to disclose the terms on which the funding can be withdrawn.⁵⁰ Such information could give a tactical advantage to the non-funded party as it could put them in a position to precipitate the withdrawal of funding.⁵¹ However, the Court left open the possibility that disclosure of the terms of withdrawal may be appropriate 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).⁵² The Court also left open the question of whether the terms of possible withdrawal may be relevant to an application for security for costs.⁵³
- 15.27 Fourth, the Court also noted that the funding agreement itself should be disclosed to both the court and the non-funded party where an application has been made to which the litigation funding arrangement may be relevant.⁵⁴ This may include an application for a stay of proceedings on the ground of abuse of process, an application for a non-party costs order, and an application for security for costs.⁵⁵ Where disclosure does occur, the agreement should be redacted to protect privileged matters or those which might give a tactical advantage to the non-funded party.⁵⁶ There is otherwise no general obligation to disclose the agreement.⁵⁷

⁴⁶ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [67]–[69]. The Court rejected the argument that the disclosure of the funding agreement should only be available to the court in the first instance, noting that the adversarial system requires and benefits from submission being available to all parties: at [75].

⁴⁷ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [67] and [69].

⁴⁸ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [68].

⁴⁹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [70].

⁵⁰ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [71].

⁵¹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [71].

⁵² *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [72].

⁵³ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [72].

⁵⁴ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [73].

⁵⁵ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [73].

⁵⁶ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [73].

⁵⁷ See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [86] (noting it would be "premature" to say there is an expectation that a funding agreement should be disclosed where the court grants leave for a representative action under HCR 4.24(b)).

GENERAL MECHANISMS AVAILABLE TO THE COURT TO MANAGE FUNDED PROCEEDINGS

Stay of proceedings

- 15.28 As noted above, the courts in Aotearoa New Zealand have preferred to consider litigation funding arrangements through an abuse of process lens, rather than through the torts of maintenance and champerty.
- 15.29 The High Court has power to order a stay of proceedings for abuse of process under the High Court Rules or in its inherent jurisdiction.⁵⁸ The purpose of the power is to prevent misuse of the court's procedure in a way which would be manifestly unfair to a party to litigation or would otherwise bring the administration of justice into disrepute.⁵⁹
- 15.30 In *Waterhouse v Contractors Bonding*, the Supreme Court considered when a litigation funding arrangement may amount to an abuse of process justifying a stay of proceedings. It said categories of conduct that may attract the intervention of the court on traditional abuse of process grounds include proceedings that:
- (a) deceive the court, are fictitious, or a mere sham;
 - (b) use the process of the court in an unfair or dishonest way, for some ulterior or improper purpose or in an improper way;
 - (c) are manifestly groundless, without foundation or serve no useful purpose; and
 - (d) are vexatious or oppressive.
- 15.31 In addition, the Supreme Court found that a litigation funding arrangement can be challenged as an abuse of process if the arrangement effectively assigns a bare cause of action in circumstances where that is impermissible.⁶⁰ In assessing whether a litigation funding arrangement effectively amounts to an assignment of a bare cause of action, the Court said regard should be had to the arrangement as a whole, including the level of control and profit share of the funder, as well as the role of the lawyers.⁶¹ There will not, however, be an abuse of process where the effective assignment under a funding agreement is in favour of a party with a genuine commercial interest.⁶²
- 15.32 Whether a litigation funder's level of control (and profit share) was an impermissible assignment of a bare cause of action was squarely at issue in *PricewaterhouseCoopers v Walker*.⁶³ That case involved a claim by liquidators of Property Ventures Limited (PVL) against PricewaterhouseCoopers (PwC) as auditor of PVL, as well as against former directors of PVL. The liquidators obtained litigation funding for the proceeding; however, the funding agreement was contingent on the funder acquiring a first ranking security interest in all or substantially all of the proceeds of the claim under a general security

⁵⁸ High Court Rules 2016, r 15.1(3); and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30].

⁵⁹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30] citing *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 (HL) at 536 per Lord Diplock.

⁶⁰ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

⁶¹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

⁶² *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [73]–[74] and [77]. See *Trendtex Trading Corp v Credit Suisse* [1980] QB 629 (CA) at 654–655; *Samy Trustee Ltd v Pauanui Dream Estate Ltd* [2020] NZHC 2118 at [25]; and *Day v The Official Assignee as Liquidator of GN Networks Ltd (in liq)* [2016] NZHC 2400 at [67]–[73].

⁶³ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [3].

agreement. PwC applied to the High Court for a stay of proceedings, claiming the combined effect of the funding agreement and the general security agreement was that the funder had effectively taken assignment of PVL's causes of action against PwC and the other defendants, and that this amounted to an abuse of process. The High Court and Court of Appeal declined to stay the proceedings.

- 15.33 On appeal, the question for the Supreme Court was whether the Court of Appeal erred in upholding the High Court's refusal to stay the proceedings. After the Supreme Court heard the appeal, but before it delivered its judgment, the parties settled their dispute. The question of stay was therefore moot, and the Court formally dismissed the appeal.
- 15.34 Nevertheless, a majority proceeded to deliver judgment on the basis the issues were important and had been fully argued before the Court.⁶⁴ The majority said it would have dismissed the appeal for a stay, based on undertakings the funder made in Court to the effect it would not exercise its powers of enforcement under the general security agreement to take control of the proceedings, and that in the event of a successful outcome, the funder would provide some level of return for unsecured creditors of PVL and its subsidiaries.⁶⁵ The majority considered that, in the absence of these undertakings, it was arguable the combined effect of the funding agreement and the general security agreement gave the funder a level of control and profit that amounted to an impermissible assignment of PVL's causes of action.⁶⁶ However, the funder's undertakings reduced its level of control and profit share to the extent that these concerns were removed.⁶⁷
- 15.35 Elias CJ dissented. In terms of a litigation funder's control, she commented that "[t]o be objectionable such control must be beyond that which is reasonable to protect money actually advanced or committed to by the litigation funder".⁶⁸ In this case she considered the funder's control over settlement or discontinuance to be "substantial" when compared to other funding agreements the courts had seen.⁶⁹ She considered the funder's powers to approve, remove and substitute lawyers seemed to give the funder control of legal representation and, through it, the conduct of the litigation.⁷⁰ Elias CJ provisionally concluded that the funding arrangements had been set up to conduct the

⁶⁴ Elias CJ would have declined to issue judgment as the controversy between the parties was no longer a live one and there was no point of statutory interpretation or a question of law to be authoritatively resolved. Elias CJ was also concerned that the scope of the argument on appeal had been constrained by an apparent concession that the funding agreement was itself unobjectionable. She considered it well arguable that the funding agreement was unlawful, given the extent of control permitted to the funder. Had settlement not been reached, she would have required the parties to address the Court further on whether the funding agreement itself was contrary to law and, if so, whether the proceedings should have been stayed on that basis. See *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [109]–[112] and [135].

⁶⁵ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [91].

⁶⁶ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [82].

⁶⁷ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [91].

⁶⁸ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [122].

⁶⁹ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [126].

⁷⁰ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [128].

litigation in the funder’s own interests despite it having no existing interest in the litigation.⁷¹ She continued:⁷²

...If so, the litigation funding arrangement amounts to the transfer of a bare cause of action for profit and is champertous. It would constitute trafficking in litigation, which I do not think this Court should acquiesce in without further consideration and full argument.

- 15.36 This case demonstrates that funder control and remuneration could remain contentious issues if a court is asked to directly consider whether litigation funding may amount to an impermissible assignment or abuse of process.
- 15.37 More recently, the High Court granted a stay of proceedings in *Cain v Mettrick* on the basis that a litigation funding agreement between the liquidator of two insolvent companies and a funder was an impermissible assignment of a bare cause of action for profit.⁷³ The agreement provided that, if the funder did not agree to a settlement proposal, the funder could opt to provide the insolvent companies with the same return on the same terms as the proposed settlement, following which the companies would be obliged to continue with the proceeding.⁷⁴ The companies could not then accept or make any settlement offer and would receive a reduced share of any excess proceeds.⁷⁵ The High Court held that the effect of the funding agreement was that the companies would be required to continue with litigation they would not otherwise have wished to pursue, meaning the litigation would be conducted substantially by and for the benefit of the litigation funder.⁷⁶ The Court noted, however, that the stay order was only required for so long as the impugned aspects of the agreement remained in place.⁷⁷

Strike out proceedings

- 15.38 The court also has the power to strike out proceedings that are an abuse of the process of the court.⁷⁸ Proceedings can only be struck out if the causes of action are so clearly untenable that they cannot possibly succeed.⁷⁹ The Court of Appeal has confirmed the jurisdiction to strike out proceedings “is one to be exercised exceedingly sparingly, and

⁷¹ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [134].

⁷² *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [134].

⁷³ *Cain v Mettrick* [2020] NZHC 2125 at [65] and [85]. The litigation was being funded by Winton Capital Ltd through PLF Services Ltd. Winton Capital specialised in managing and acquiring distressed assets and property developments. It had not previously been involved in litigation funding of this kind but had looked into such opportunities. It was approached by the liquidators to fund the proceedings and saw this as an opportunity to make a return on its investment. The High Court considered Winton had no problematic motives.

⁷⁴ *Cain v Mettrick* [2020] NZHC 2125 at [62].

⁷⁵ *Cain v Mettrick* [2020] NZHC 2125 at [62].

⁷⁶ *Cain v Mettrick* [2020] NZHC 2125 at [62].

⁷⁷ *Cain v Mettrick* [2020] NZHC 2125 at [73]. The Court said the liquidators’ claims would be able to proceed if the funding agreement was varied, or PLF obtained court approval to the assignment under section 260A of the Companies Act, or fresh funding arrangements were made. On 1 October 2020, the Otago Daily Times reported that the stay of proceedings had been lifted: Mark Price “Boult’s stay of proceedings in Stonewood case lifted” *Otago Daily Times* (online ed, Otago, 1 October 2020).

⁷⁸ High Court Rules 2016, r 15.1(1).

⁷⁹ *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321 at [9] citing *Attorney-General v Price & Gardner* [1998] 1 NZLR 262 at 267.

only in a clear case”.⁸⁰ The purpose of the power is “fundamentally to avoid the misuse of judicial processes which tend to undermine confidence in the administration of justice”.⁸¹

- 15.39 In *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council*, the High Court was asked to strike out proceedings on the grounds that an assignment of claims by the original plaintiffs to the Auckland City Council was champertous.⁸² The original plaintiffs, a body corporate and individual unit holders, sought damages against a number of defendants, including the Council, for losses caused by severe water ingress. The Council elected to settle with the original plaintiffs for \$3 million, in consideration for an assignment of their causes of action against the remaining defendants. Under the terms of the settlement agreement, any recovery over \$3 million would be paid to the original plaintiffs. The remaining defendants applied for an order to strike out the proceedings on the grounds that the Council’s arrangement with the original plaintiffs was champertous and contrary to public policy.
- 15.40 The High Court dismissed the strike out application, noting the Council had “a genuine commercial interest” in completing the settlement and taking assignment of the claims.⁸³ It noted the settlement was advantageous to both the Council and to the original plaintiffs, and there was no prejudice to the other defendants.⁸⁴
- 15.41 We are not aware of any proceedings that have been struck out on account of litigation funding arrangements amounting to an abuse of process. We think it is unlikely the courts would strike out proceedings on account of issues with the funding agreement, as the strike out mechanism is directed at issues with the cause of action itself. Problems with the funding agreement can be addressed through a stay of proceedings, and if the funding issues are resolved, there would be no reason why an otherwise valid claim should not proceed.

Security for costs

- 15.42 Security for costs in the High Court is governed by High Court Rule 5.45 (HCR 5.45). Security may be awarded where it is just, and either the plaintiff is not resident or incorporated in Aotearoa New Zealand, or there is reason to believe they would be unable to pay the defendant’s costs if unsuccessful. A security for costs order gives the defendant some protection against the risk a plaintiff will not meet an adverse costs order. The amount of a security for costs order may increase as the amount at stake grows with the progress of the proceedings or may be reduced as more is learned about the case. Where a court orders the plaintiff to pay security for costs, the plaintiff must either pay that sum into court or provide security for that sum to the satisfaction of the court or

⁸⁰ *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321 at [9] citing *Attorney-General v Price & Gardner* [1998] 1 NZLR 262 at 267.

⁸¹ *Dotcom v District Court at North Shore* [2018] NZCA 442, [2018] NZAR 1859 at [16] citing *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at 9.

⁸² *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [6].

⁸³ *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [47].

⁸⁴ *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [47]–[53].

Registrar.⁸⁵ The court may stay the proceeding until the sum is paid or the security is given.⁸⁶

15.43 The court may also exercise its inherent jurisdiction to order security for costs in a representative action supported by a litigation funder, even if the representative plaintiff is resident in Aotearoa New Zealand.⁸⁷ In *Saunders v Houghton*, the Court of Appeal said this use of the court’s inherent jurisdiction is justified because making representation orders in cases supported by funders substantially and radically alters the balance between plaintiffs and defendants.⁸⁸ The Court suggested an order for security may “protect a defendant against the effect of a procedure which could otherwise be oppressive,” and may therefore be “the price of the privilege” to bring a representative action supported by litigation funding.⁸⁹

15.44 The evolving practice is for funders of representative actions to provide security for costs in most cases.⁹⁰ The Court of Appeal in *Saunders v Houghton* explained that this is because a funder has no personal right at stake, takes part in the proceeds of the claim, and is motivated by the financial considerations that gave rise to the common law tort of champerty.⁹¹ Further, the amount of security is likely to be substantial and will tend towards relatively full security.⁹²

15.45 Subsequently, in *Houghton v Saunders*, the Court of Appeal explained:⁹³

[The fact a party is supported by a litigation funder] may justify increased security on the ground that courts should be readier to order security where a non-party who stands to benefit from the litigation is not interested in having rights vindicated but rather is acting in pursuit of profit. 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.

15.46 The court is also likely to order a litigation funder to provide substantial security for costs in non-representative actions. In *Walker v Forbes*, a complex commercial dispute, the High

⁸⁵ High Court Rules 2016, r 5.45(3)(a).

⁸⁶ High Court Rules 2016, r 5.45(3)(b).

⁸⁷ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [35]–[36]. The Court of Appeal referred to s 16 of the Judicature Act 1908 which confirmed the ongoing inherent jurisdiction of the High Court. This provision is now found in the Senior Courts Act 2018, s 12.

⁸⁸ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [36].

⁸⁹ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [36]. See further discussion on this area in Chris Nicoll “Non-Party Costs and Security Where Litigation Funders are Involved” (2018) 24 NZBLQ 237.

⁹⁰ *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [79]. See also *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [36]. Because representative actions may be split into staged trials, security for costs may similarly be staggered rather than ordered as one lump sum: see Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR5.45.09(1)].

⁹¹ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [36].

⁹² *Houghton v Saunders* [2013] NZHC 1824 at [125]; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [79]; and *Walker v Forbes* [2017] NZHC 1212 at [33] and [71]. See also *Houghton v Saunders* [2013] NZHC 1824 at [125], where the High Court said: “security for costs provided by a funded claimant should tend towards relatively full security for defendants”.

⁹³ *Houghton v Saunders* [2015] NZCA 141 at [11].

Court held that “the existence of a litigation funder is a very significant factor that influences the exercise of the discretion in favour of making a substantial order for security”.⁹⁴ The Court noted that commercial ventures generally require an investor “to take risks and to incur expenditure as the price to be paid for the chance of success”.⁹⁵ Therefore, a litigation funder who stands to receive a portion of the proceeds of a successful claim should be required, as a matter of policy, to contribute significantly to the defendant’s costs if the claims are unsuccessful.⁹⁶

- 15.47 Proceedings funded by overseas-based funders may also attract an order for security for costs. Although HCR 5.45 does not explicitly refer to litigation funding as a ground for an order for security, the High Court in *White v James Hardie New Zealand* held that litigation supported by an overseas funder engaged the “evident policy” in HCR 5.45 concerning overseas-based plaintiffs.⁹⁷ He said such funders should not be able to effectively transfer the risk of costs and potentially the burden of enforcement to the defendants.⁹⁸
- 15.48 The simplest form of security is bank bond or guarantee.⁹⁹ However, alternative security for costs arrangements have been made in the context of funded litigation. For instance, in *Houghton v Saunders* portions of security were provided by the largest claimants within the represented group in the form of cash or a bank bond, with the defendant also receiving a guarantee from the director of the litigation funding company that was instrumental in organising the proceedings.¹⁰⁰ Earlier in that same proceeding the representative plaintiff arranged security for costs by having a funder lodge funds in the trust account of the plaintiff’s solicitor.¹⁰¹
- 15.49 To date, courts have not accepted the provision of an after-the-event insurance (ATE insurance) policy or a deed of indemnity from an ATE insurer to the defendant as an adequate form of security. ATE insurance is a form of legal expenses insurance, purchased after a dispute has arisen, to indemnify the insured party in the event of an adverse costs order. The High Court rejected ATE insurance as an adequate form of security in both *Houghton v Saunders* and *White v James Hardie New Zealand*, citing concerns about the potential for ancillary litigation seeking to enforce such policies and their enforceability where the funder and insurance provider are not based in Aotearoa New Zealand.¹⁰²

⁹⁴ *Walker v Forbes* [2017] NZHC 1212 at [71].

⁹⁵ *Walker v Forbes* [2017] NZHC 1212 at [33].

⁹⁶ *Walker v Forbes* [2017] NZHC 1212 at [33].

⁹⁷ *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [13].

⁹⁸ *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [13].

⁹⁹ Bank guarantee was relied upon in *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [90].

¹⁰⁰ *Houghton v Saunders* [2019] NZHC 2007 at [47]–[51].

¹⁰¹ *Houghton v Saunders* [2014] NZHC 21 at [4]–[8]. Harbour Litigation Funding only provided funding until late 2015.

¹⁰² *Houghton v Saunders* [2013] NZHC 1824 at [115]. See also the later judgment *Houghton v Saunders* [2019] NZHC 2007 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].

Non-party costs order

- 15.50 The courts appear to be willing to order security for costs directly against litigation funders.¹⁰³ In exceptional circumstances, a court can make a costs award against a non-party litigation funder who takes an active role in proceedings,¹⁰⁴ even in the absence of an abuse of process or any impropriety.¹⁰⁵ A litigation funder will ordinarily agree to pay costs as part of the funding arrangements and the financial implications of a non-party costs order may not be significant for this reason. That said, any non-party costs being awarded directly against a funder may carry a reputational risk for that funder. In this sense the possibility of non-party costs may discipline the amount of control that a funder seeks to assert in any proceeding.
- 15.51 The leading case on non-party costs orders is the 2004 decision of the Privy Council in *Dymocks Franchise Systems (NSW) v Todd (No 2)*.¹⁰⁶ When assessing an application for a non-party costs order, the key questions for the court will be whether the funder is gaining access to the court for its own purposes and is in effect the “real party” to the litigation,¹⁰⁷ and whether in all the circumstances it is just to make the order.¹⁰⁸
- 15.52 Under the principles outlined in *Dymocks*, a litigation funder may be liable for costs if the litigation would not have been undertaken without their involvement,¹⁰⁹ and if they substantially control or benefit from the proceedings.¹¹⁰ Given that a litigation funder always stands to benefit financially from the proceedings and will usually exercise at least some control over them, it has been suggested that something more than profit and control may be required for funders to be liable for non-party costs.¹¹¹ Situations might include where a funder exercises control over the proceedings to the effective exclusion of the plaintiff, or where it was clear at the time of filing that the funded claim was not

¹⁰³ In accordance with *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145: see *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52]–[53] and note the Supreme Court’s comment that “there is nothing in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* to suggest that third party costs orders against funders are limited to the funding provided”.

¹⁰⁴ High Court Rules 2016, r 14.1 provides that costs are at the discretion of the court. In *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 (HC), the High Court followed *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 (HL) and held that non-parties could be ordered to pay costs where justice so required. That decision has been followed in the New Zealand courts and was authoritatively confirmed by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145. See also the discussion in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52] and [64].

¹⁰⁵ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52]; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [33]; and *Poh v Cousins & Associates* HC Christchurch CIV-2010-409-2654, 4 February 2011 at [36].

¹⁰⁶ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145. The Supreme Court recognised *Dymocks* as the leading cases on non-party costs in *Mana Property Trustee Ltd v James Developments Ltd (No 2)* [2010] NZSC 124, [2011] 2 NZLR 25 at [11].

¹⁰⁷ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [25].

¹⁰⁸ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [25].

¹⁰⁹ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [20].

¹¹⁰ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [25].

¹¹¹ Adina Thorn and Rohan Havelock “New Zealand” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 121 at 128.

tenable and litigation should have been avoided.¹¹² Conduct in the nature of impropriety may also be a persuasive reason for an order of non-party costs.¹¹³ A precondition to making a non-party costs order is proof that the funder's control caused loss.¹¹⁴

- 15.53 An example of a court ordering non-party costs against a litigation funder for supporting a meritless claim is the High Court decision, *Bligh v Earthquake Commissioner*, arising out of an unsuccessful claim against EQC and IAG for earthquake damage.¹¹⁵ In this case, the funder had assessed the plaintiff's house as requiring a rebuild when in fact no earthquake damage had been proved. By the time the funder belatedly agreed winning was doubtful, the plaintiff refused to settle. The funder exercised its contractual right to withdraw on the morning the trial was to commence. With funding withdrawn, the plaintiff's lawyer withdrew, and the plaintiff did not appear. The trial was aborted.
- 15.54 With the benefit of new representation, the plaintiff revived his claim. Subsequently, EQC and IAG sought costs against the funder and plaintiff for wasted costs in preparation of the aborted trial. The High Court ordered the funder to pay non-party costs on a joint and several basis with the plaintiff.¹¹⁶ In reaching that decision, the Court was influenced by the funder's contractual right to significant control of the proceedings as well as its failure to address reports obtained during the course of the litigation.¹¹⁷
- 15.55 The Court also noted that the funder was dealing with "a client who was vulnerable by virtue of his financial position and poor health".¹¹⁸ Further, the funder had encouraged the plaintiff into litigation by providing a report which promised a rebuild and had bolstered the plaintiff's view that litigation was desirable over the course of three years. The funder could not reverse its advice to the plaintiff one week before the trial and not take responsibility for the proceeding based on its earlier advice.¹¹⁹ The interests of justice supported the making of an order for non-party costs against the funder.¹²⁰
- 15.56 Subsequently, the funder applied to the High Court for review of non-party costs decision. In *Falloon (as executors of the estate of the late Bligh) v Earthquake Commission*, the High Court upheld the decision to award non-party costs against the funder but quashed the finding that the funder and the plaintiff were jointly and severally liable to EQC and

¹¹² Adina Thorn and Rohan Havelock "New Zealand" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 121 at 128 citing *Poh v Cousins & Associates* HC Christchurch CIV-2010-409-2654, 4 February 2011. The authors note this situation will be rare, as funders will ordinarily conduct thorough due diligence on the merits of the claim and its prospects of success before agreeing to provide funding.

¹¹³ *Poh v Cousins & Associates* HC Christchurch CIV-2010-409-2654, 4 February 2011 at [36] citing *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 (HC) at 764.

¹¹⁴ *Falloon (as executors of the Estate of the Late Bligh) v The Earthquake Commission* [2020] NZHC 874 at [71].

¹¹⁵ *Bligh v Earthquake Commission* [2019] NZHC 2236.

¹¹⁶ *Bligh v Earthquake Commission* [2019] NZHC 2236 at [139] and [151].

¹¹⁷ *Bligh v Earthquake Commission* [2019] NZHC 2236 at [148]–[149]. See also at [114], where the Court commented:

...having recommended the proceeding, funded the proceeding, selected the solicitors, nominated some of the experts and committed to providing advice in respect of the proceeding, [the funder] had real control and responsibility for the proceedings.

¹¹⁸ *Bligh v Earthquake Commission* [2019] NZHC 2236 at [137].

¹¹⁹ *Bligh v Earthquake Commission* [2019] NZHC 2236 at [137].

¹²⁰ *Bligh v Earthquake Commission* [2019] NZHC 2236 at [139].

IAG, and varied the non-party costs awards in several respects.¹²¹ The plaintiff remained liable for a portion of the costs of the proceeding. In upholding the non-party costs order, the Court was influenced by the fact that the agreement between the funder and the plaintiff gave the funder “considerable control”.¹²² This included provisions allowing the funder to act in the plaintiff’s best interests and to terminate the agreement where the plaintiff rejected the funder’s advice.¹²³ Finally, a non-party costs order was appropriate because the funder had given “such strong and incorrect advice” to the plaintiff that his home was a rebuild when in fact earthquake damage had not been proven.¹²⁴

STATUTES THAT MAY REGULATE LITIGATION FUNDING

- 15.57 The statutes discussed below have an uncertain application to litigation funding. As they were not drafted to regulate litigation funding, their application to litigation funding appears to be somewhat awkward. General statutes are unlikely to provide a complete regulatory response to the concerns discussed in this Issues Paper in relation to litigation funding.
- 15.58 Litigation funders may be subject to the provisions of the Fair Trading Act 1986, if they are providers of services in trade. Although the courts have not to date considered the application of the Act to litigation funding, “services” is defined broadly to include the conferring of rights or benefits under a contract for which remuneration is payable in the form of a levy or similar exaction.¹²⁵ At a high level, the definition fits with the concept of litigation funding. If applicable, the Act prohibits funders from engaging in misleading or deceptive conduct, making unsubstantiated claims or false representations, and engaging in unfair practices.¹²⁶ The Act provides redress against funders in relation to, for example, representations they make when marketing and negotiating litigation funding arrangements. It is not possible to contract out of the obligations in the Act, except in business-to-business transactions that meet certain requirements.¹²⁷
- 15.59 The Consumer Guarantees Act 1993 will apply to litigation funding arrangements if they are services that are “ordinarily acquired for personal, domestic, or household use or consumption”.¹²⁸ It is unclear whether litigation funding falls within these categories. If it

¹²¹ *Falloon (as executors of the Estate of the Late Bligh) v The Earthquake Commission* [2020] NZHC 874 at [95].

¹²² *Falloon (as executors of the Estate of the Late Bligh) v The Earthquake Commission* [2020] NZHC 874 at [74].

¹²³ *Falloon (as executors of the Estate of the Late Bligh) v The Earthquake Commission* [2020] NZHC 874 at [72]–[74]. Other grounds for the decision included that the claimant was unlikely to have commenced the claim regardless of whether the funder provided funding, and that the funder stood to benefit from the proceeding, as its agreement with the claimant entitled it to 10 per cent of any sum recovered.

¹²⁴ *Falloon (as executors of the Estate of the Late Bligh) v The Earthquake Commission* [2020] NZHC 874 at [80].

¹²⁵ “Services” is defined to include rights, benefits, privileges or facilities that are (or are to be) provided, granted, or conferred, including under a contract for the performance of work (including work of a professional nature) and contracts that confer rights, benefits or privileges in return for remuneration in the form of a royalty, tribute, levy, or similar exaction: Fair Trading Act 1986, s 2 definition of “services”. See also Adina Thorn and Rohan Havelock “New Zealand” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 121 at 123 suggesting that the Act will apply to litigation funding.

¹²⁶ Fair Trading Act 1986, pt 1.

¹²⁷ Fair Trading Act 1986, ss 5C and 5D.

¹²⁸ Consumer Guarantees Act 1993, s 2 definitions of “services” and “consumer”.

does, the Act guarantees those services will be carried out with reasonable care and skill and will be fit for any particular purpose made known to the funder (unless the plaintiff does not rely on the funder's skill or judgement, or it is not reasonable for the plaintiff to do so).¹²⁹ It also contains guarantees as to time for completion and price, but only to the extent those matters are not dealt with by the contract.¹³⁰ Redress options include requiring the failure to be remedied if possible,¹³¹ or if the failure is substantial or cannot be remedied, cancelling the contract or obtaining damages in compensation for any reduction in value in the service paid or payable.¹³² In addition, the consumer may be able to obtain damages for any reasonably foreseeable loss or damage resulting from the failure.¹³³

- 15.60 The Credit Contracts and Consumer Finance Act 2003 protects consumers when they borrow money or purchase products or services on credit.¹³⁴ It requires creditors to manage credit contracts responsibly and disclose adequate information to consumers to enable them to make informed choices, know what they are agreeing to, and keep track of their debts. It also provides remedies in relation to oppressive conduct by creditors. The case law does not indicate whether a litigation funding arrangement is “credit contract”¹³⁵ or a “consumer credit contract” under the Act.¹³⁶ Litigation funding differs from standard lending or credit facilities in that the funded party is not required to pay interest and is only required to repay the funder if the litigation is successful. Some of the Act's language and provisions are therefore an awkward fit for litigation funding, such as provisions about payments and interest charges.¹³⁷
- 15.61 The Financial Markets Conduct Act 2013 (FMC Act) regulates financial products and services. The courts in Aotearoa New Zealand have not considered whether litigation funding falls within the FMC Act's definition of a “financial product” (for example, as a “managed investment scheme”).¹³⁸ If litigation funders are brought within the scope of the FMC Act's regulatory regime, they would be subject to fair dealing, disclosure,

¹²⁹ Consumer Guarantees Act 1993, ss 28 and 29.

¹³⁰ Consumer Guarantees Act 1993, ss 30 and 31.

¹³¹ Consumer Guarantees Act 1993, s 32(a).

¹³² Consumer Guarantees Act 1993, s 32(b).

¹³³ Consumer Guarantees Act 1993, s 32(c).

¹³⁴ Credit Contracts and Consumer Finance Act 2003, s 3.

¹³⁵ A “credit contract” is a contract under which “credit” is or may be provided and includes transactions that are in substance and effect a credit contract: Credit Contracts and Consumer Finance Act 2003, s 7. The definition of “credit” includes a right granted under a contract to “purchase ... services and defer payment for that purchase (in whole or in part)”: Credit Contracts and Consumer Finance Act 2003, s 6(c).

¹³⁶ A “consumer credit contract” is defined in Credit Contracts and Consumer Finance Act 2003, s 11. It provides that a credit contract is a consumer credit contract if: the debtor is a natural person; the credit is “wholly or predominantly for personal, domestic, or household purposes”; the contract provides for interest charges, credit fees, or a security interest; when the contract is entered into the creditor is in the business or practice of providing credit or the contract results from an introduction of one party to another party by a paid adviser or broker.

¹³⁷ See for example Credit Contracts and Consumer Finance Act 2003, pt 2 sub-pts 5 and 7.

¹³⁸ The definition of “financial product” includes “a managed investment product”: Financial Markets Conduct Act 2013, s 7(1)(c). A “managed investment product” in turn includes an interest in a “managed investment scheme”: Financial Markets Conduct Act 2013, s 8(3). A “managed investment scheme” is defined in Financial Markets Conduct Act 2013, s 9(1).

governance, licensing, and reporting requirements. In Chapter 23, we consider whether funders should be subject to the FMC Act's "managed investment scheme" requirements. We note that the regulatory settings for managed investment schemes were not designed with the regulation of litigation funding and funded litigation in mind. Further, litigation funding does not pose the same risks to participants (plaintiffs) or the financial markets as other financial investments, such as where money is raised from retail investors as an investment.

- 15.62 The Financial Service Providers (Registration and Dispute Resolution) Act 2008 requires all "financial service" providers with a place of business in Aotearoa New Zealand to register on the Financial Service Providers Register.¹³⁹ The purpose of the register is to enable the public to access information about financial service providers and enable financial service providers to be regulated. If a financial service is provided to a "retail client", the provider must belong to a dispute resolution scheme.¹⁴⁰ Dispute resolution schemes provide free dispute resolution services to consumers,¹⁴¹ and there are four approved dispute resolution schemes under the Act.¹⁴² The courts have not to date considered whether litigation funding is a "financial service" requiring domestic funders to comply with the Act, however litigation funders would fall within that definition if they are "a creditor under a credit contract" (see discussion above). At the time of writing, two of the five domestic based funders we have identified are registered on the Financial Service Providers Register.¹⁴³

REGULATION OF LITIGATION FUNDING IN SOME COMPARABLE JURISDICTIONS

England and Wales

- 15.63 England and Wales is said to be the most expensive and riskiest litigation market in the world.¹⁴⁴ The complexity of High Court proceedings in London especially drives "eye-watering expense", and the financial risk is exacerbated by the adverse costs implications of losing a case.¹⁴⁵ Leslie Perrin, chairman of Calunius Capital LLP,¹⁴⁶ has reported that London-based litigation funders are increasingly looking for opportunities in jurisdictions where litigation and arbitration are more predictable and manageable.¹⁴⁷ Most of the

¹³⁹ Financial Service Providers (Registration and Dispute Resolution) Act 2008, ss 8A and 11.

¹⁴⁰ Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 48. A "retail client" is "any person who receives a financial service who is not a wholesale client": s 49(1).

¹⁴¹ Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 63(1).

¹⁴² Banking Ombudsman, Insurance and Financial Services Ombudsman, Financial Services Complaints Ltd, and Financial Dispute Resolution Services: New Zealand Companies Office "Choosing a Dispute Resolution Scheme (DRS)" Financial Service Providers Register <<http://fsp-register.companiesoffice.govt.nz>>.

¹⁴³ LPF Litigation Funding Limited and Claims Resolution Service Limited.

¹⁴⁴ Leslie Perrin "England and Wales" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 53 at 54.

¹⁴⁵ Leslie Perrin "England and Wales" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 53 at 54.

¹⁴⁶ Calunius Capital LLP is a London based litigation funder.

¹⁴⁷ Leslie Perrin "England and Wales" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (2nd ed, Law Business Research, London, 2018) 48 at 49.

funding that occurs in London is in the context of commercial litigation and arbitration, and funded litigants are usually commercially sophisticated.¹⁴⁸

- 15.64 Maintenance and champerty were abolished as torts and crimes by the Criminal Law Act 1967.¹⁴⁹ However, section 14(2) of the Act preserved “any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal”.¹⁵⁰ This means litigation funding arrangements may be unenforceable for reasons of public policy. In practice, litigation funding has become increasingly mainstream and it now seems clear that funding agreements will not be struck down simply because the funder is to share in the proceeds.¹⁵¹ Rather, the question will be whether the funder has excessive control of the litigation or is entitled to an excessive share of any recovery.¹⁵²
- 15.65 In 2009, Lord Justice Jackson’s influential *Review of Civil Litigation Costs: Final Report* recommended that litigation funders be regulated in the first instance by a voluntary code (drafted by the Civil Justice Council in conjunction with litigation funders), but said statutory regulation may be required if the use of litigation funding expands.¹⁵³ Lord Justice Jackson’s recommendation was implemented.¹⁵⁴ The Association of Litigation Funders (ALF) was formed in 2011 and the Ministry of Justice charged it with delivering self-regulation of the industry. While membership is voluntary, there may be reputational incentives to belong. The ALF is funded through membership subscriptions.
- 15.66 All ALF members must abide by the *Code of Conduct for Litigation Funders*, published by the Civil Justice Council in 2011 (the ALF Code).¹⁵⁵ It sets out best practice and standards of behaviour for ALF members. Failure to comply may lead to expulsion or sanctions.¹⁵⁶ Among other things, the ALF Code contains provisions aimed at restricting funder control of litigation, ensuring funders maintain access to adequate financial resources to fulfil their financial commitments, and specifying how disputes will be resolved.

¹⁴⁸ Leslie Perrin “England and Wales” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (2nd ed, Law Business Research, London, 2018) 48 at 49.

¹⁴⁹ Criminal Law Act 1967 (UK), s 14(1).

¹⁵⁰ Criminal Law Act 1967 (UK), s 14(2).

¹⁵¹ Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-055].

¹⁵² Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-056]–[8-062]; and Leslie Perrin “England and Wales” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (2nd ed, Law Business Research, London, 2018) 48 at 50.

¹⁵³ Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 118–121.

¹⁵⁴ Courts and Legal Services Act 1990 (UK), s 58AA.

¹⁵⁵ Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018).

¹⁵⁶ Association of Litigation Funders *Rules of the Association* (July 2016) at r 30; and Association of Litigation Funders *Complaints Procedure for Litigation Funders* (October 2017) at [25].

15.67 Discussions about whether litigation funding should be regulated by statute have been ongoing.¹⁵⁷ However, in January 2017 the Government said it still did not consider the case had been made to move away from voluntary regulation.¹⁵⁸

Australia

15.68 The market for litigation funding has matured rapidly in Australia.¹⁵⁹ In June 2018, the Australian Law Reform Commission estimated there were approximately 25 litigation funders operating in Australia.¹⁶⁰ Competition between funders is said to have placed downward pressure on funders' commissions and made terms more competitive.¹⁶¹

15.69 Australia inherited the torts of maintenance and champerty from England but has evolved towards an acceptance of litigation funding to facilitate access to justice.¹⁶² The Australian Federal Court first established the legitimacy of litigation funding in 1996 in the insolvency context.¹⁶³ In 2006, the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (Fostif)* confirmed the legitimacy of litigation funding beyond the insolvency context.¹⁶⁴ It established that litigation funding arrangements, of the kind regularly used in class actions, are enforceable and are not contrary to public policy¹⁶⁵ — at least in states where maintenance and champerty have been abolished.¹⁶⁶

15.70 Since *Fostif*, litigation funding has been utilised in a broad range of civil and commercial contexts.¹⁶⁷ The conditions that are said to have allowed litigation funding to flourish

¹⁵⁷ See Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-071]–[8-075].

¹⁵⁸ This statement was made by Lord Keen of Elie on 24 January 2017 in response to a written Parliamentary question from Lord Hodgson of Astley Abbots concerning civil proceedings and third party financing (UIN HL4216 tabled on 19 December 2016). For further discussion, see Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-073], n 189.

¹⁵⁹ Nick Rowles-Davies *Third Party Litigation Funding* (Oxford University Press, Oxford, 2014) at [1.25].

¹⁶⁰ Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at 16.

¹⁶¹ Jason Geisker and Dirk Luff "Australia" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 1 at 19. In our preliminary conversations with some Australian litigation funders, we were told that competition in the market has brought the price of litigation down for consumers.

¹⁶² For more detailed discussion of maintenance and champerty in Australia see Chapter 18.

¹⁶³ *Movitor Pty Ltd (Receivers and Manager Appointed) (in liq) v Sims* (1996) 64 FCR 380 (FCA).

¹⁶⁴ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386. The first funder involvement in a class action began in December 2001 when a wholly owned subsidiary of what is now Omni Bridgeway supported a class action in a Waterfront industrial claim. The class action was settled with approval from the Federal Court in 2002: see Vince Morabito *Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (Second Report, An Empirical Study of Australia's Class Action Regimes, September 2010) at 37.

¹⁶⁵ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.50].

¹⁶⁶ The dispute in *Fostif* arose under the New South Wales legislation, and the High Court declined to comment on the status of maintenance and champerty in Australian jurisdictions where the torts have not been statutorily abolished: *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [85] per Gummow, Hayne and Crennan JJ. The torts of maintenance and champerty have not been abolished in Queensland, Western Australia or the Northern Territory.

¹⁶⁷ Jason Geisker and Dirk Luff "Australia" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 1 at 2.

include the opt-out class actions model, the high costs involved in conducting large class actions, the adverse costs rule, the lack of a public fund or other mechanism to fund class actions and the general prohibition on lawyers charging contingency fees.¹⁶⁸

- 15.71 Until recently, litigation funding has been largely unregulated in Australia. In response to a series of decisions between 2009 and 2012, which held that litigation funding potentially triggered the application of the Corporations Act 2001 (Cth),¹⁶⁹ the Government legislated to exempt litigation funders from financial services legislation on the condition that funders had necessary processes in place to manage conflicts of interest.¹⁷⁰ Aside from funders listed on the Australian Stock Exchange, funders were therefore free from mandatory licensing, financial disclosure requirements, reporting obligations and prudential supervision.¹⁷¹ The exemptions reflected the government’s view at the time that the requirements in the Corporations Act were not appropriate for litigation funding schemes (in effect, class actions), and its objective “to ensure that consumers do not lose this important means of obtaining access to the justice system”.¹⁷²
- 15.72 Since 22 August 2020, however, class action funders operating in Australia have been required to hold an Australian Financial Services Licence and comply with the managed investment scheme requirements of the Corporations Act.¹⁷³ The federal government has explained these reforms are a response to the “inequities and risk of consumer harm” posed by the lack of regulation of class action funding.¹⁷⁴ The new regulatory requirements are discussed in more detail in Chapter 23.
- 15.73 In March 2020, the federal government also announced an inquiry into “all aspects of the class action system, including whether further regulation of litigation funders is needed to improve justice outcomes”.¹⁷⁵ The inquiry is due to report in December 2020.

Canada

- 15.74 Litigation funding is still a developing industry in Canada. Maintenance and champerty were abolished as crimes in 1953.¹⁷⁶ However, under the Act Respecting Champerty RSO

¹⁶⁸ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.76].

¹⁶⁹ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, (2009) 180 FCR 11; and *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2011] NSWCA 50, (2011) 276 ALR 138.

¹⁷⁰ Corporations Amendment Regulation 2012 (No 6) (Cth). See also Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013).

¹⁷¹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at xvi.

¹⁷² Corporations Amendment Regulation 2012 (No 6) (Cth) (explanatory statement).

¹⁷³ Corporations Amendment (Litigation Funding) Regulations 2020 (Cth). Operators of class action litigation funding schemes are generally required to register as managed investment schemes under ch 5C of the Corporations Act 2001 (Cth) and obtain an Australian Financial Services Licence in accordance with ch 7 of that Act.

¹⁷⁴ Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (explanatory statement).

¹⁷⁵ Attorney-General for Australia and Minister for Industrial Relations “Committee to examine impact of litigation funding on justice outcomes” (press release, 5 March 2020).

¹⁷⁶ Criminal Code SC 1953-54 c 51, s 8 abolished all common law crimes in 1953.

(1897) (the Champerty Act), champerty remains a tort in all Canadian jurisdictions except Québec.

- 15.75 As in other jurisdictions, the Canadian courts carved out exceptions to the general rules against maintenance and champerty,¹⁷⁷ which left open the possibility of ‘proper’ litigation support to facilitate access to justice.¹⁷⁸ Initially the courts opened the door to contingency fee arrangements,¹⁷⁹ which paved the way for litigation funding in class actions.¹⁸⁰ More recently, the courts have developed the law on litigation funding in single-party commercial litigation¹⁸¹ and insolvency proceedings.¹⁸²
- 15.76 There is no specific regulation of litigation funding in Canada, except in Ontario in the class actions context. Since October 2020, funding agreements in this context are “subject to the approval of the court, obtained on a motion of the representative plaintiff made as soon as practicable after the agreement is entered into, with notice to the defendant”.¹⁸³ A funding agreement that is not approved by the court is of no force or effect.¹⁸⁴ The representative plaintiff must provide a copy of the funding agreement to the judge, and a copy to the defendant (subject to permissible redactions of information that may confer a tactical advantage on the defendant).¹⁸⁵ The court must not approve the funding agreement unless it is satisfied, among other things, that the agreement (including the indemnity for costs and funding commission) is fair and reasonable, the agreement will not diminish the representative plaintiff’s ability to instruct the lawyer or control the litigation, and the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided.¹⁸⁶

¹⁷⁷ As champerty is a “subspecies” of maintenance, there cannot be champerty without maintenance: *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (ONCA) at [34].

¹⁷⁸ The concept of champerty in Canadian law invokes the concept of proper and improper motives underpinning litigation funding: Hugh A Meighen “Canada” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 39 at 41.

¹⁷⁹ *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (ONCA). Shortly after that case, Ontario passed O Reg 195/04 (Contingency Fee Agreements) issued under the Solicitors Act RSO 1990 c S-15.

¹⁸⁰ *Metzler Investment GMBH v Gildan Activewear Inc* (2009) 81 CPC (6th) 384 (ONSC); and *Dugal v Manulife Financial Corp* 2011 ONSC 1785, 105 OR (3d) 364.

¹⁸¹ *Schenk v Valeant Pharmaceuticals International Inc* 2015 ONSC 3215, (2015) 74 CPC (7th) 332.

¹⁸² *9354-9186 Québec inc v Callidus Capital Corp* 2020 SCC 10, 444 DLR (4th) 373.

¹⁸³ Class Proceedings Act SO 1992 c 6, s 33.1(2).

¹⁸⁴ Class Proceedings Act SO 1992 c 6, s 33.1(3).

¹⁸⁵ Class Proceedings Act SO 1992 c 6, s 33.1(4)-(7). Further, the representative plaintiff must notify the court and the defendant if the approved funding agreement is terminated or the funder becomes insolvent: Class Proceedings Act SO 1992 c 6, s 33.1(15).

¹⁸⁶ If costs are ordered to be paid by the representative plaintiff, the defendant has the right to recover the costs directly from the funder to the extent of the indemnity provided under the funding agreement: Class Proceedings Act SO 1992 c 6, s 33.1(11). Further, the defendant is entitled, on motion, to obtain from the funder security for costs to the extent of the indemnity provided under the funding agreement if (a) the funder is resident outside Ontario; (b) the defendant has an order against the funder in the same or another proceeding that remain unpaid; or (c) there is good reason to believe the funder has insufficient assets in Ontario to pay the costs: Class Proceedings Act SO 1992 c 6, s 33.1(12).

- 15.77 To date, litigation funding in Canada has been most utilised in class actions.¹⁸⁷ In this context, the courts exercise a supervisory role over litigation funding arrangements and the law has consolidated into a clear set of principles.¹⁸⁸ The courts have held that a funder's motives will be crucial to the assessment of whether a funding arrangement is champertous.¹⁸⁹ Whether a funder is actuated by a proper or improper motive will largely depend on whether the funder's commission is fair and reasonable in the circumstances.¹⁹⁰
- 15.78 That said, litigation funding has not developed alongside class actions to the same extent as in Australia.¹⁹¹ One reason is that all Canadian provinces allow lawyers to charge contingency fees. Jasminka Kalajdzic has recently said that contingency fees are the "engine that drives class actions",¹⁹² although the profits class action lawyers derive from acting on a contingency basis have been controversial.¹⁹³
- 15.79 The models of litigation funding in Canada reflect this availability of contingency fees. A common form of litigation funding involves a law firm acting on a contingency fee basis and a litigation funder agreeing to pay the plaintiff's disbursements and indemnify the plaintiff in the event of an adverse costs order, in exchange for a share of any recovery.¹⁹⁴ Alternatively, litigation funders may offer law firms a financing facility, cross-collateralised against a portfolio of the firm's contingency cases, to mitigate cash flow challenges.¹⁹⁵ Full funding for one-off cases is also available, however it is more expensive.

Singapore

- 15.80 Until recently, almost all funding arrangements in Singapore were unenforceable on public policy grounds.¹⁹⁶ The exceptions appear to have been for funding in bankruptcy and

¹⁸⁷ Michael Molavi "Law's Financialization: Litigation Finance and Multilayer Access to Justice in Canada" (2018) 33 CJLS 425 at 426. All Canadian provinces, except Prince Edward Island, have passed class action statutes: Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 4.

¹⁸⁸ For a summary of useful judicial commentary from 2009 to 2015, see Hugh A Meighen "Canada" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 39 at 43–45.

¹⁸⁹ *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (ONCA) at [27], [75] and [80]; and *Metzler Investment GMBH v Gildan Activewear Inc* (2009) 81 CPC (6th) 384 (ONSC) at [44]–[45].

¹⁹⁰ *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (ONCA) at [76]. See also *Houle v St Jude Medical Inc* [2017] ONSC 5129, 9 CPC (8th) 321 at [63].

¹⁹¹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at 44.

¹⁹² Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 127 as cited in Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at 197.

¹⁹³ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at 197; Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 6; and Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 71.

¹⁹⁴ *9354-9186 Québec inc v Callidus Capital Corp* 2020 SCC 10, 444 DLR (4th) 373 at [93] citing *Dugal v Manulife Financial Corp* 2011 ONSC 1785, 105 OR (3d) 364.

¹⁹⁵ See our discussion of portfolio funding arrangements in Chapter 14.

¹⁹⁶ Matthew Secomb, Adam Wallin and Gabriella Richmond "Singapore" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 171 at 172.

insolvency proceedings.¹⁹⁷ In early 2017, however, Singapore legislated to expressly permit third-party funding, but only for international arbitration and related proceedings. A series of legislative amendments introduced a framework for third-party funding in this context. In late 2019, the Singapore Ministry of Law announced it was intending to extend its funding framework to domestic arbitration, certain proceedings in the Singapore International Commercial Court and mediations connected with these proceedings.¹⁹⁸ There are also indications that the funding framework may be extended to litigation.¹⁹⁹ As a result of the reforms, several funders have opened permanent offices in Singapore and the market for third-party funding is said to be developing at “a blistering pace”.²⁰⁰

15.81 Singapore’s framework for regulating third party funding of arbitration and related proceedings includes a relatively light statutory framework, regulations and best practice guidelines and practice notes. Key features include:

- (a) Abolishing liability in tort for maintenance and champerty, while preserving “any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal”.²⁰¹
- (b) Defining permissible funding arrangements in the Civil Law Act 1999 and Civil Law (Third-Party Funding) Regulations 2017.²⁰²
- (c) Amendments to the Legal Profession Act and the Legal Profession Rules 2015 aimed at controlling lawyer-client conflicts of interest.²⁰³

¹⁹⁷ *Re Fan Kow Hin* [2018] SGHC 257 at [5]; *Solvadis Commodity Chemical Gmbh v Affert Resources Pte Ltd* [2018] SGHC 210 at [60]; Gian Marco Solas *Third Party Funding: Law, Economics and Policy* (Cambridge University Press, Cambridge, 2019) at 78 citing *Re Vanguard Energy Pte Ltd* [2015] SGHC 156; and Franca Ciambella and Charlie Morris “Seats of power” (2020) 127 *Litigation Funding* 18 at 19.

¹⁹⁸ K Shanmugam, Minister for Law and Home Affairs “Keynote Speech at Grand Opening of Maxwell Chambers Suites by Minister K Shanmugam” (Singapore, 8 August 2019); and K Shanmugam, Minister for Law and Home Affairs “Speech by Minister (Law and Home Affairs) K Shanmugam at the Opening Ceremony of Law Society at Maxwell Chamber Suites” (Singapore, 10 October 2019).

¹⁹⁹ Gian Marco Solas *Third Party Funding: Law, Economics and Policy* (Cambridge University Press, Cambridge, 2019) at 71–72; Franca Ciambella and Charlie Morris “Seats of power” (2020) 127 *Litigation Funding* 18 at 19; and Matthew Secomb, Adam Wallin and Gabriella Richmond “Singapore” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 171 at 180.

²⁰⁰ Gian Marco Solas *Third Party Funding: Law, Economics and Policy* (Cambridge University Press, Cambridge, 2019) at 71; Rodney Keong “Paving the way for third-party dispute resolution funding” (22 November 2018) International Law Office <www.internationallawoffice.com>; but contrast Woodsford Litigation Funding “Litigation Funding in Singapore” <<http://woodsfordlitigationfunding.com>>.

²⁰¹ Civil Law Act 1999 (Singapore), s 5A(1)–(2).

²⁰² The Civil Law Act 1999 (Singapore) defines permissible funding arrangements as contracts “under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings”: s 5B(2). A “qualifying Third-Party Funder” excludes non-commercial funders: Civil Law Act 1999 (Singapore), s 5B(10). The Civil Law (Third-Party Funding) Regulations 2017 (Singapore) prescribe the qualifications and requirements funders must satisfy to be a qualifying Funder, the dispute resolution proceedings in which funding is permitted, and requirements regarding the provision and manner of funding; regs 3–4.

²⁰³ Legal Profession Act 2009 (Singapore), ss 107(3A) and (3B); and Legal Profession (Professional Conduct) Rules 2015 (Singapore), ss 107(3A) and (3B). See also Gian Marco Solas *Third Party Funding: Law, Economics and Policy* (Cambridge University Press, Cambridge, 2019) at 74; and Matthew Secomb, Adam Wallin and Gabriella Richmond “Singapore” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 171 at 177.

- (d) A Guidance Note for lawyers advising or acting for funded clients issued by the Law Society of Singapore.²⁰⁴
- (e) Guidelines for funders produced by the Singapore Institute of Arbitrators (SIArb), which set expectations of transparency and accountability between funders of Singaporean arbitration proceedings and funded party.²⁰⁵
- (f) A Practice Note on Arbitrator Conduct in Cases Involving External Funding produced by the Singapore International Arbitration Centre (SIAC).²⁰⁶

15.82 A funder that fails to comply with the requirements for a “qualifying Third-Party Funder” under the Civil Law Act and Civil Law (Third-Party Funding) Regulations 2017 will not be able to enforce its rights under the funding agreement.²⁰⁷ However, a funder may apply for relief where it can show its non-compliance was accidental or inadvertent, or because it would otherwise be just and equitable to grant relief.²⁰⁸

Hong Kong

15.83 Litigation funding is still generally prohibited in Hong Kong as it is considered to infringe the torts of maintenance and champerty. As in other jurisdictions, there are some limited exceptions.²⁰⁹ In June 2017, however, Hong Kong passed an Ordinance to expressly permit third party funding for arbitrations and mediations, and establish a process for issuing a code of practice and an advisory body to monitor and review the operation of the code.²¹⁰ This followed recommendations by the Law Reform Commission of Hong Kong, which concluded that the reform was “necessary to enhance Hong Kong’s competitive position as an international arbitration centre”.²¹¹

²⁰⁴ Law Society of Singapore *Third-Party Funding* (Guidance Note 10.1.1, 25 April 2017). The Note covers matters such as referring or introducing a funder to a client, advising the client on confidentiality and privilege in relation to documents they disclose to the funder, and managing conflicts of interest.

²⁰⁵ Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [1.3]. The Guidelines cover matters such as steps to be taken before executing a funding agreement, matters to be addressed in agreements, funders’ financial obligations, approaches to issues of confidentiality and privilege, conflicts of interest and control.

²⁰⁶ Singapore International Arbitration Centre *Practice Note: Administered Cases under the Arbitration Rules of the Singapore International Arbitration Centre – On Arbitrator Conduct in Cases Involving External Funding* (PN – 01/17, 31 March 2017). The Practice Note sets out standards of practice and conduct to be observed by arbitrators and includes provisions on impartiality and independence, disclosure (including the disclosure of potential arbitrator conflicts) and costs. The Practice Note supplements arbitrators’ obligations under the Arbitration Rules of the Singapore International Arbitration Centre. The Singapore International Arbitration Centre also published investment arbitration rules which include provisions on third party funding: Singapore International Arbitration Centre *Investment Rules* (1 January 2017), rr 24(l), 33.1 and 35.

²⁰⁷ Civil Law Act 1999 (Singapore), s 5B(3)–(4).

²⁰⁸ Civil Law Act 1999 (Singapore), s 5B(5)–(6).

²⁰⁹ The exceptions were set out in *Unruh v Seeberger* [2007] HKCFA 10, (2007) 10 HKCFAR 31 at [92]–[98] and include: (a) where the funder has a pre-existing relationship with the claimant and a legitimate interest in the outcome of the litigation, (b) where the claimant has a meritorious case but does not have the resources to proceed, and (c) where liquidators use funding to fund insolvency proceedings. Litigation funding is most used in the insolvency context.

²¹⁰ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. Sections 98K and 98L provide the common law offences of maintenance and champerty do not apply in relation to third party funding of arbitration. Section 98M provides that ss 98K and 98L “do not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal”.

²¹¹ Law Reform Commission of Hong Kong *Third Party Funding for Arbitration* (Report, October 2016) at [2.6].

- 15.84 In February 2019, Hong Kong’s *Code of Practice for Third Party Funding in Arbitration* (HK Code) came into force.²¹² It applies to “third party funders”, defined broadly to include both professional funders and individuals.²¹³ The HK Code sets out the practices and standards with which funders of arbitration are ordinarily expected to comply, addressing matters such as capital adequacy, confidentiality, disclosure, conflicts of interests and guidelines around funding arrangements. The HK Code is materially similar to the ALF Code in England and Wales but differs in certain respects.²¹⁴
- 15.85 The operation of the HK Code is monitored by an advisory body, appointed by the Secretary for Justice.²¹⁵ However, the HK Code does not provide for robust enforcement and failure to comply with it will not result in judicial or other proceedings.²¹⁶

Abu Dhabi Global Market Courts and Dubai International Financial Centre

- 15.86 The United Arab Emirates is a civil law-based legal system, except in respect of two independent financial free zones, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM).²¹⁷ The DIFC and ADGM form separate jurisdictions and have their own common law court system, with international judges from England and other Commonwealth countries as well as Emirati judges.²¹⁸ DIFC law is modelled closely on English common law and the ADGM applies English common law directly.²¹⁹
- 15.87 The DIFC and ADGM courts have taken their cue from England and Wales, where the law on maintenance and champerty has evolved to the extent that litigation funding is now regarded as generally acceptable as a matter of public policy, provided the funder does not exercise too much control over the litigation or stand to gain more financially from

²¹² Hong Kong Code of Practice for Third Party Funding of Arbitration 2018. We also note that in 2018, the Hong Kong International Arbitration Centre also published its 2018 HKIAC Administered Arbitration Rules, which include provisions relating to the disclosure of third party funding agreements: see Hong Kong International Arbitration Centre *2018 Administered Arbitration Rules* (2018) at [44.1].

²¹³ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98J.

²¹⁴ Unlike the Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018), the HK Code is binding on all “third party funders”, it includes provisions requiring funders to maintain effective procedures for managing conflicts of interest, and it requires disclosure of the fact of funding and identify of the funder to the other party to the arbitration and the arbitration body.

²¹⁵ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98X.

²¹⁶ A court or tribunal can however take into account any failure to comply with the Hong Kong Code if it is relevant to a question the court or tribunal is deciding: see Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98S.

²¹⁷ There are various other free zones in the United Arab Emirates, which have their own regulations and procedures, but are governed by United Arab Emirates federal law and do not have their own court systems. They fall under the jurisdictional supervision of the court system of the emirate in which they are located.

²¹⁸ Jonathan Brown and Raymond Kisswany “Conducting litigation in United Arab Emirates” (25 July 2019) Lexology <www.lexology.com>. The Dubai International Financial Centre Courts began operations in 2006. The Abu Dhabi Global Market Courts have been fully operational since May 2016.

²¹⁹ Robyn Waller and Courtney Rothery “United Arab Emirates: The Lawfulness of Third Party/Litigation Funding of Arbitration and Litigation in the UAE” (2 May 2019) Mondaq <www.mondaq.com>.

the litigation than the funded party.²²⁰ The ADGM and DIFC courts have recently issued rules for litigation funding.²²¹

- (a) In the ADGM courts, regulations and *Litigation Funding Rules* apply to all litigation funding agreements and set out requirements that litigation funders and funding agreements must satisfy to be enforceable. These cover matters such as the funder's commission, capital adequacy, and managing conflicts of interest.²²²
 - (b) The DIFC courts also have rules in relation to litigation funding, which include obligations on funded parties to disclose the fact of litigation funding and the funders' identity to every other party and the DIFC Registry,²²³ as well as standards expected of legal practitioners acting in funded proceedings.²²⁴ Funders are not subject to any regulation, however the courts have inherent jurisdiction to order costs against third parties (including funders) where appropriate.²²⁵
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²²⁰ Robyn Waller and Courtney Rothery "United Arab Emirates: The Lawfulness of Third Party/Litigation Funding of Arbitration and Litigation in the UAE" (2 May 2019) Mondaq <www.mondaq.com>.

²²¹ Andrew Mackenzie and Lina Bugaighis "Third party funding in the UAE" *Global Arbitration News* (online ed, United Arab Emirates, 25 April 2019); and Carolina Ramirez *On the Rise: Third Party Funding in the Middle East* (Vannin Capital, In Conversation Series No V, February 2018).

²²² ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, reg 225; and Abu Dhabi Global Market Courts Litigation Funding Rules 2019.

²²³ Dubai International Financial Centre Courts *Practice Direction No 2 of 2017 – Third Party Funding in the DIFC Courts* (PD 2/2017, 14 March 2017) at [4]–[6].

²²⁴ For example, legal practitioners shall not be swayed from duties to the client by any instructions or interest of the funder, they are required to advise funded clients about the effects of funding agreements, and they are prohibited from receiving referral fees or benefits from the funder (unless full disclosure is made in writing): Dubai International Financial Centre Courts *Order No 4 of 2019 – Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts* (September 2019) at [12(E)], [17(B)] and [18(D)].

²²⁵ Dubai International Financial Centre Courts *Practice Direction No 2 of 2017 – Third Party Funding in the DIFC Courts* (PD 2/2017, 14 March 2017) at [9].

CHAPTER 16

Problems with the lack of regulatory certainty

INTRODUCTION

- 16.1 In this chapter, we discuss problems with the regulatory status quo, including:
- (a) Uncertainty about whether litigation funding is contrary to maintenance and champerty and whether the policy behind maintenance and champerty is still relevant.
 - (b) Uncertainty about the parameters within which litigation funders can operate.
 - (c) The impact of the uncertainty on the litigation funding market.
- 16.2 Similar issues may arise in relation to the charging of contingency fees by lawyers, and to third party funding of arbitral proceedings, however, we do not discuss these in this Issues Paper. We note the anomaly of asking whether litigation funders should be able to charge percentage-based commissions but not also asking whether lawyers should be allowed to charge on this basis. We have focussed our review on litigation funding because the terms of reference and the concerns that gave rise to them relate to litigation funding. Contingency fees (which are prohibited in Aotearoa New Zealand)¹ concern how lawyers may charge for their services in wider circumstances. As we note in our Introduction, additional considerations would arise with respect to the regulation of lawyers' fees that would require different and extensive consultation with the legal profession.

UNCERTAINTY ABOUT WHETHER LITIGATION FUNDING IS CONTRARY TO MAINTENANCE AND CHAMPERTY

- 16.3 In the absence of any specific regulation of litigation funding, the courts in Aotearoa New Zealand have adopted a cautiously permissive approach to litigation funding.² However some uncertainty remains about whether and when litigation funding agreements are contrary to the policy behind the torts of maintenance and champerty, which have historically prohibited litigation funding and still remain part of our law.

¹ Lawyers and Conveyancers Act 2006, ss 333–334.

² *PricewaterhouseCoopers v Walker* [2016] NZCA 338 at [14].

- 16.4 As we discussed in Chapter 15, the policy behind the torts of maintenance and champerty is to protect the integrity of the courts and the party facing the maintained litigation and, to some extent, to protect those whose litigation is being maintained.
- 16.5 There is a tension between the torts and litigation funding, in the sense that litigation funding has an increasingly important role to play in ensuring access to justice.³ In her dissenting judgment in *PricewaterhouseCoopers v Walker (PwC v Walker)*, Elias CJ said “it is a matter of some controversy” whether and when litigation funding arrangements may offend against the torts and the policy underpinning them.⁴

Is the policy behind maintenance and champerty still relevant?

- 16.6 Maintenance and champerty have their origins in late medieval England.⁵ A strict rule against maintaining litigation developed in order to protect the integrity of the judicial process.⁶ The concerns that gave rise to this strictness became less acute as the courts became more standardised in their approach and function, and acquired greater powers to prevent abuses of their processes.⁷ Today the courts have wide powers to stay or dismiss proceedings that are frivolous, vexatious or otherwise an abuse of process.
- 16.7 Increasingly, the policy against maintaining legal actions is being eroded by access to justice considerations. As the torts are based on notions of public policy, the circumstances in which funding or subsidising litigation is justified have evolved to reflect changing social attitudes.⁸ Numerous exceptions to the prohibition on maintaining legal actions have emerged, including in relation to the provision of financial support by relatives, friends or trade unions, subrogation under insurance policies, and the assignment of causes of action which are ancillary to property interests.⁹
- 16.8 Some jurisdictions have gone further and abolished the torts altogether (while retaining the ability to find litigation funding arrangements invalid if they are contrary to public

³ See Chapter 1. See also *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [177]; and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28] and [77].

⁴ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [111] per Elias CJ.

⁵ The doctrines are said to be “so old that their origins can no longer be traced”: *Giles v Thompson* [1994] 1 AC 142 (HL) at 153 per Lord Mustill. Some sources attribute their origins to the Statute of Westminster, The First 1275 (Eng) 3 Edw I c 25: Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.17]; The Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Discussion Paper, 2019) at 6; and Gian Marco Solas *Third Party Funding: Law, Economics and Policy* (Cambridge University Press, Cambridge, 2019) at 24. Some trace their origins even further back to Athenian and Roman law: see Max Radin “Maintenance by Champerty” (1935) 24 CLR 48.

⁶ New South Wales Law Reform Commission *Barratry, Maintenance and Champerty* (NSWLRC DP36, 1994) at [2.9].

⁷ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 1 citing *Giles v Thompson* [1994] 1 AC 142 (HL) per Sir Thomas Bingham MR; Gian Marco Solas *Third Party Funding: Law, Economics and Policy* (Cambridge University Press, Cambridge, 2019) at 26; and Glen Anderson “The *Trendtex* Principle in Australian Law: Context and Recent Developments” (2016) 40(2) UWAL Rev 85 at 87.

⁸ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [115].

⁹ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [115]. See also *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [253]; and The Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Discussion Paper, 2019) at 8.

policy or otherwise illegal). In *Houghton v Saunders*, the High Court commented on these developments, saying:¹⁰

... there has been a dramatic change in attitude, with some jurisdictions abolishing the tort of champerty altogether and courts generally adopting a much more liberal and relaxed approach, to the point where many authorities appear actively to support litigation funding as a matter of public policy.

16.9 As in other jurisdictions, the courts in Aotearoa New Zealand have recognised that the cost of litigation is beyond the means of most New Zealanders and that litigation funders may have an increasingly important role to play in ensuring access to justice.¹¹ In *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council*, the High Court commented that access to justice and the desirability of promoting settlement of litigation were reasons for reconsidering the public policy-based rules of the torts.¹² Further, the Court said it has ample jurisdiction to prevent abuses of its process without recourse to ancient remedies, and it would favour letting maintenance and champerty fall into disuse.¹³

16.10 Similarly, in *Saunders v Houghton* the Court of Appeal suggested access to justice considerations may necessitate a relaxation of the torts, at least in the context of representative actions:¹⁴

...the interests of justice can require the court to unshackle itself from the constraints of the former simple rule against champerty and maintenance. Access to justice is a fundamental principle of the rule of law. It can require flexibility to meet the harsh reality of the current cost to the injured party of litigation, which is often more than a would-be plaintiff can sensibly be expected to bear. The result would be a failure of justice: a plaintiff with merits can be excluded from relief against the defendant who has committed a legal wrong.

16.11 At the same time, the courts in Aotearoa New Zealand have also acknowledged that there is still force in the concerns underlying maintenance and champerty, and that litigation funding arrangements should be approached with some care.¹⁵ In *Waterhouse v Contractors Bonding*, Glazebrook J accepted the importance of access to justice, but observed that this justification for litigation funding can be exaggerated.¹⁶ Similarly, in her dissenting judgment in *PwC v Walker*, Elias CJ reiterated that the torts of champerty and maintenance have not yet been abolished, and cautioned there is still need for full argument in Aotearoa New Zealand on the reasons that might make litigation funding

¹⁰ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [176].

¹¹ 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 ...

See also *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28] and [77].

¹² *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [17].

¹³ *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [45]–[46].

¹⁴ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28].

¹⁵ See *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [116]; *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [41]–[42]; and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [27] and [77].

¹⁶ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [41]–[42].

agreements contrary to public policy.¹⁷ She also intimated that, in the absence of statutory regulation, litigation funding carries a risk of oppression, which justifies close scrutiny of funding arrangements by the courts to prevent civil claims being treated as negotiable interests.¹⁸

UNCERTAINTY ABOUT THE PARAMETERS WITHIN WHICH LITIGATION FUNDERS CAN OPERATE

16.12 As noted above, the courts have adopted a cautiously permissive approach to litigation funding in the absence of any specific regulation of litigation funding, and in light of the torts of maintenance and champerty. However, to the extent that litigation funding is permissible, the absence of any specific regulation also means the parameters within which litigation funders should operate are unclear. For example, with respect to key terms of litigation funding agreements, and the standards of behaviour and capital adequacy expected of litigation funders.

IMPACT OF UNCERTAINTY ON THE LITIGATION FUNDING MARKET

16.13 Uncertainty about the permissibility and parameters of litigation funding is a problem because it may impact on the pricing and availability of litigation funding in Aotearoa New Zealand. If a funding agreement is deemed unenforceable, proceedings are stayed on abuse of process grounds, or damages are payable for breach of the torts of maintenance and champerty, particularly after the proceeding has been brought to a successful conclusion, the funder will risk losing any possibility of earning a return on its investment.

16.14 Uncertainty about the parameters of acceptable litigation funding may also increase the risk of challenges to funding agreements, adding cost and delay to the resolution of claims. This risk and expense may also impact on the availability and pricing of litigation, which in turn may negatively impact access to justice for plaintiffs. Further, the absence of regulation may also mean there is inadequate accountability and transparency around the operation of litigation funders and funding arrangements.

TIME TO CONSIDER LITIGATION FUNDING

16.15 More broadly, the uncertainties discussed in this chapter raise rule of law concerns in the sense that predictability and transparency of laws that apply or may apply to litigation funding are currently lacking. Because of the uncertainties, in the following chapters we go on to consider whether Aotearoa New Zealand should expressly permit litigation funding and clarify its parameters.

16.16 In Chapter 17, we consider the advantages and disadvantages of litigation funding, and give the preliminary view that litigation funding is desirable in principle and should be expressly permitted, so long as the concerns with litigation funding can be adequately managed.

¹⁷ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [111].

¹⁸ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [116] and [121].

- 16.17 In Chapter 18, we discuss whether and how law in relation to maintenance and champerty should be reformed, in order to clarify the permissibility of litigation funding.
- 16.18 In Chapters 19–22, we consider specific concerns with litigation funding including funder control, conflicts of interests, funder profits and capital adequacy. We ask how these concerns can best be managed.
- 16.19 In Chapter 23, we consider whether there should be regulation and oversight of litigation funding to respond to the concerns discussed in Chapters 19–22 and to clarify the parameters within which litigation funders can operate. We seek feedback on the form of any regulation and oversight.
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CHAPTER 17

Advantages and disadvantages of litigation funding

INTRODUCTION

- 17.1 In this chapter, we look at the potential advantages of litigation funding:
- (a) Improving access to justice.
 - (b) Reducing the risks of litigation.
 - (c) Allowing plaintiffs to stay focussed on activities other than litigation.
 - (d) Expanding financing options in respect of litigation.
 - (e) The availability of a funder's litigation expertise.
 - (f) Providing confidence for defendants.
- 17.2 We also consider potential disadvantages of litigation funding, including:
- (a) The risk that the court system may become burdened with an increase in litigation, in particular, additional representative or class actions.
 - (b) The risk of encouraging meritless litigation.
 - (c) Impacts on the availability and pricing of directors and officers liability insurance.
- 17.3 We conclude by expressing the preliminary view that litigation funding is desirable in principle and should be permitted, provided the particular concerns with litigation funding discussed in Chapters 19–22 can adequately be managed.

ADVANTAGES OF LITIGATION FUNDING

Improving access to justice

- 17.4 Litigation funding is not a 'silver bullet' for the access to justice concerns discussed in Chapter 1. Litigation funders are profit-driven entities. They speculate on the uncertainty

of litigation in return for a commission.¹ In *Waterhouse v Contractors Bonding*, the Supreme Court noted that funders will only fund claims where the projected return is sufficient to offset the costs of litigation and the risks of failure. It cautioned that the access to justice justification for litigation funding can be exaggerated and is “not a general panacea to offset rising costs of litigation”.²

- 17.5 As we noted in Chapter 14, litigation funding may therefore have limited application to public interest litigation, or proceedings where non-monetary relief is sought (which may include, for example, kaupapa inquiries in the Waitangi Tribunal), as these kinds of claims are unlikely to be economically viable for funders.³ In some comparable jurisdictions, public and non-profit funds have attempted to address this gap, by applying similar funding models but without the profit motive. Some examples of non-profit funding for representative and class actions are discussed in Chapter 13. Non-profit litigation funds that not limited to representative and class actions, include Western Australia’s Civil Litigation Assistance Scheme⁴ and the Australian Public Interest Advocacy Centre.⁵
- 17.6 Litigation funding does, nevertheless, have some role in improving access to justice.⁶ By alleviating the costs and risks of litigation, it can facilitate access to the court system to enable plaintiffs to seek redress.⁷ In Australia, and England and Wales, it is reported that litigation funding has enabled numerous plaintiffs to bring claims they would not otherwise have contemplated because of credit constraints and the financial risks of losing.⁸ The role of litigation funders is said to be particularly important in jurisdictions that have an

¹ Malcolm Stewart “Class Actions and Litigation Funding” (2018) 24 NZBLQ 212 at 221.

² *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [41].

³ Although note there are some instances of litigation funding occurring for non-financial motives: see Kaja Zaleska-Korziuk “When the Good Samaritan Pays: The Phenomenon of Strategic Third-Party Funding” (2018) 18 *Asper Rev Int’l Bus & Trade L* 160.

⁴ Western Australia’s Civil Litigation Assistance Scheme is an avenue to obtain legal aid funding for civil litigation. Further information about the scheme is available at Legal Aid Western Australia “Home” <www.legalaid.wa.gov.au>.

⁵ For information about the Public Interest Advocacy Centre see <<http://piac.asn.au>>. In 2008, the Victorian Law Reform Commission recommended the creation of a self-funding Justice Fund to financially assist parties with meritorious cases in the public interest, in conjunction with law firms charging on a no win, no fee basis. The recommendation was not implemented: see Victorian Law Reform Commission *Civil Justice Review: Report* (January 2008) at 12–13 and ch 10.

⁶ See Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 607.

⁷ Capital Strategic Advisors (CSA) also notes that litigation funding, by alleviating credit constraints and reducing risk for plaintiffs, is likely to have efficiency benefits. The counterfactual for this analysis is zero third-party funding. CSA also suggests litigation funding may facilitate claims that a plaintiff subjectively may not perceive as having a high chance of success, but that funders (with their wider experience and more specialised knowledge of litigation) recognise as having a positive expected value. While funders carefully select the cases they fund, their expertise in judging the expected value of claims means they may also be less risk adverse than some plaintiffs. See Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 51–58.

⁸ See for example Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [1.29]; Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [2.1]; Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 607; and Rupert Jackson *Review of Civil Litigation Costs: Preliminary Report* (Volume One, May 2009) at 160.

adverse costs regime, such as Aotearoa New Zealand.⁹ In his *Review of Civil Litigation Costs*, Jackson LJ said:¹⁰

It is now recognised that many claimants cannot afford to pursue valid claims without third party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third party funding has a part to play in promoting access to justice.

- 17.7 Similarly, in Aotearoa New Zealand there is a growing awareness that the high costs and risks of litigation mean litigation funding may become increasingly necessary. The courts have acknowledged access to justice may be a good reason not to condemn litigation funding arrangements as champertous and unlawful.¹¹ In *Houghton v Saunders*, the High Court commented:¹²

In an age when 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.

- 17.8 Where there is an inequality of arms between the parties because one party is better resourced than the other, litigation funding can help to “level the playing field”.¹³ The balance of resources is fundamental to the parties’ negotiating power in settlement discussions. In *Waterhouse v Contractors Bonding*, the Supreme Court cautioned that litigation funding may “exacerbate the risk of defendants being faced with unmeritorious claims and forced into unjustified settlements”.¹⁴ On the other hand, an insufficiently resourced plaintiff may settle at undervalue if defence tactics exhaust their limited resources.¹⁵ Litigation funding may bolster the credibility of a plaintiff proceeding to trial and judgment because the defendant appreciates that the plaintiff has the resources to see the case through and recognises the merits of the case have been objectively assessed by a third party.¹⁶

- 17.9 As we discussed in Chapter 5 in the context of class actions, access to justice includes not only access to courts but also access to substantively just outcomes. Substantive justice will depend on the compensation a funded plaintiff receives and whether the funder’s commission is fair and reasonable. In *Houghton v Saunders*, the High Court accepted that the importance of access to justice for a plaintiff may be “diluted” where a

⁹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [1.29].

¹⁰ Rupert Jackson *Review of Civil Litigation Costs: Preliminary Report* (Volume One, May 2009) at 160.

¹¹ For example, see *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28] and [77]; *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [176]–[177]; *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245 at [89]; and *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [16]–[17].

¹² *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [177].

¹³ Andrew Saker “Litigation funders level the playing field” (4 August 2020) Omni Bridgeway <www.omnibridgeway.com>; Malcolm Stewart “Class Actions and Litigation Funding” (2018) 24 NZBLQ 212 at 222–223; Andrew Hooker “Andrew Hooker on why litigation funding is needed to level the playing field between the haves and the have nots” (4 December 2017) Interest <www.interest.co.nz>; Bill Wilson “Insights from a litigation funder” (2016) 888 LawTalk 27 at 27; and Rupert Jackson *Review of Civil Litigation Costs: Preliminary Report* (Volume One, May 2009) at 163.

¹⁴ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [42].

¹⁵ See Malcolm Stewart “Class Actions and Litigation Funding” (2018) 24 NZBLQ 212 at 222–223.

¹⁶ Rupert Jackson *Review of Civil Litigation Costs: Preliminary Report* (Volume One, May 2009) at 163.

substantial sum of any award will be paid to a litigation funder.¹⁷ Funder profits are discussed in more detail in Chapter 21.

- 17.10 Two particular types of cases that may be unable to proceed without litigation funding are representative actions and class actions, and insolvency proceedings.

Representative actions and class actions

- 17.11 In many cases representative and class actions would be unable to proceed without litigation funding.¹⁸ The financial risks a representative plaintiff takes on are disproportionate to both the risks that other class members carry, and also to the value of their own claim.¹⁹
- 17.12 We are aware of 44 cases in which the High Court has allowed a case to proceed as a representative action under High Court Rule 4.24 (HCR 4.24) or earlier rules.²⁰ Of these, 10 were supported by litigation funding — the first was filed in 2008.²¹ We are also aware of litigation funding being used to support two further group proceedings that were not filed as representative actions. These 12 cases are discussed in Chapter 14.
- 17.13 In Australia, in the year ending 30 June 2019, 72 per cent of Australian class actions filed were funded by litigation funders.²² According to empirical research by Vince Morabito, a number of Australian class actions would not have been brought without litigation funding.²³ The Australian Law Reform Committee acknowledged that over the five-year period from 2013 to 2018, litigation funding had improved access to justice in a narrow category of cases, most noticeably shareholder and investor class actions.²⁴ However, in

¹⁷ *Houghton v Saunders* [2020] NZHC 1088 at [74].

¹⁸ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 151.

¹⁹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.8] noting that in *Camping Warehouse v Downer EDI (Approval of Settlement)* [2016] VSC 784, the average payout per class member was expected to be \$633.29, whereas the legal fees were \$2.85 million. See also Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [3.49].

²⁰ The material in this section is based on our own research, as well as the helpful empirical research conducted by Nikki Chamberlain: see Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132. We are aware of three cases where a representative action is reported to have been filed, but there is not yet a decision available as to whether the case can proceed in a representative form. These are a proceeding brought by shareholders of Intueri Education Group against some of the former directors of the company and two proceedings related to the collapse of insurance company CBL Corporation.

²¹ *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) (this is the first of the many decisions in the prolonged Feltex litigation). The litigation was initially managed and funded by Joint Action Funding Ltd. Harbour Litigation Funding funded part of the proceeding but ceased funding in late 2015. Joint Action Funding Ltd has remained involved.

²² King & Wood Mallesons *The Review: Class Actions in Australia 2018/2019* (2019) at 5.

²³ Vince Morabito “Empirical Perspectives on 25 Years of Class Actions” in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) 43 at 48.

²⁴ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [1.30]. Of the 71 funded claims filed in the Federal Court from 2013 to 2018, 52.1 per cent (37) were claims by shareholders, and 23.9 per cent (17) were claims by investors. This compares with 5.6 per cent (4) four consumer protection and product liability class actions that were funded, and 4.2 per cent (3) mass tort claims.

the year to 13 June 2019, 16 consumer class actions were filed in Australia.²⁵ Consumer class actions are now the most common form of new class action case in Australia.²⁶ These have included claims of modest individual value.

- 17.14 In Aotearoa New Zealand, Nikki Chamberlain has observed that prior to the arrival of litigation funding, it was often not economically feasible to bring a “low-stake” representative action, particularly given the risk of adverse costs.²⁷ Chamberlain considers the rise of the consumer representative actions in particular can be attributed to the arrival of litigation funders.²⁸
- 17.15 Although there have still been relatively few consumer representative actions in Aotearoa New Zealand (six that we are aware of, as discussed in Chapter 3) this is an area where litigation funding may be able to facilitate access to justice in future.

Insolvency proceedings

- 17.16 Litigation funding may provide access to justice for an insolvent company and its creditors by allowing insolvency practitioners to use the funder's capital to pursue claims on their behalf. Where resources to pursue litigation are limited, access to litigation funding may mean meritorious litigation does not need to be abandoned or settled for under-value. This is beneficial to creditors, particularly unsecured ones, who otherwise are likely to be left without an avenue to recover their debt.
- 17.17 Litigation funding had its origins in insolvency proceedings, and this continues to be an important area of activity for litigation funders. As noted in Chapter 14, we are aware of at least 11 insolvency cases that have been funded by litigation funding,²⁹ the earliest was filed in 1999.³⁰

Reducing risks of litigation

- 17.18 Litigation funders are increasingly providing litigation funding to companies and, in some jurisdictions, law firms. Even if these entities are not credit-constrained, they may use litigation funding to reduce the risks of litigation.³¹ Capital Strategic Advisors (CSA) explains that small and medium-sized enterprises can be especially risk adverse if they

²⁵ King & Wood Mallesons *The Review: Class Actions in Australia 2018/2019* (2019) at 4. These include product liability claims relating to the Essure contraceptive device, Hardi spray units, faulty airbags and aluminium composite panel cladding; claims relating to add-on car insurance; a claim by the taxi industry against Uber; and claims relating to banking charges and legal fees.

²⁶ Allens *Class Action Risk 2020* (March 2020) at 3 and 6.

²⁷ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 151.

²⁸ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 152.

²⁹ *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC); *Re Gellert Developments Ltd (in liq)* (2001) 9 NZCLC 262,714 (HC); *Computer Training Services Ltd v Universal Data Systems Ltd* (2001) 15 PRNZ 401 (HC); *Parkhouse Joinery Ltd v Parkinson* HC Christchurch CP109/01, 5 February 2002; *Kings Wharf Coldstore Ltd (in rec and in liq) v Wilson* (2005) 2 NZCCLR 1042 (HC); *AMP Capital Investments No 4 Ltd v IBS Group Ltd (in liq)* [2009] NZCCLR 19 (HC); *ALF No 9 Pty Ltd v Ellis* HC Wellington CIV-2009-485-435, 13 October 2009; *Capital & Merchant Finance Ltd v Perpetual Trust Ltd* [2015] NZHC 1233; *Walker v Forbes* [2015] NZHC 1730, [2015] 3 NZLR 831; *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255; and *Cain v Mettrick* [2019] NZHC 802, [2019] NZAR 668.

³⁰ *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC).

³¹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 53.

are owner-operated, have limited retained earnings or liquid assets, and/or its managers are highly specialised in a small market. CSA suggests that litigation funding allows the plaintiff to make litigation decisions as if it were risk neutral. This is likely to be particularly significant for costly litigation, because the larger the risk relative to the party's ability to absorb it, the higher the risk aversion.³²

Allowing plaintiffs to stay focussed on activities other than litigation

17.19 CSA also observes that litigation funding may allow businesses to stay focused on their core business. This may be a commercial advantage, because managing litigation until the claim is resolved could be costly for businesses if it distracts them from focusing on high-return activities. CSA suggests litigation funders' expertise could be particularly valuable to businesses who lack in-house legal expertise or trusted external legal counsel.³³ Apart from businesses, other plaintiffs may also benefit from litigation funding where it allows them to focus on their professional or personal lives and activities other than litigation.

Expanding financing options in respect of litigation

17.20 Companies and law firms may prefer litigation funding over other funding options for commercial reasons. Litigation funder Omni Bridgeway identifies the following commercial advantages of litigation funding:³⁴

- (a) Compared to a bank loan with interest, capital from a litigation funder only needs to be repaid if the case is successful. As it is non-recourse (a commission is only payable if the litigation is successful), it mitigates the company's litigation costs and risks.
- (b) It delivers an immediate accounting benefit. Whereas a loan adds to the company's operating expense and reduces profit, litigation funding can be treated as revenue. Litigation costs are also removed from the company's balance sheet, releasing capital for other priorities.
- (c) It is a flexible form of finance that can be used for litigation or any other purpose the company deems necessary during a lengthy case, for example to defray operation expenses or fund other litigation.

17.21 However, given the typical commissions charged, litigation funding is also a relatively expensive form of finance, at least for one-off disputes. The affordability and commercial advantages of litigation funding may be stronger in situations where there is a portfolio of claims. As noted in Chapter 14, we are not aware of any companies or law firms using portfolio funding in Aotearoa New Zealand. It is likely that only a small number of companies would have the number of disputes to warrant portfolio funding, and law firms typically only use portfolio funding in jurisdictions that permit lawyers to charge contingency fees. This is not the case in Aotearoa New Zealand.

³² Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 53.

³³ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 53–54.

³⁴ Omni Bridgeway "A cost-benefit analysis of litigation finance" (25 April 2019) <www.omnibridgeway.com>.

- 17.22 Nevertheless, litigation funding may still provide commercial advantages to companies for one-off disputes. Jonathan Woodhams, Executive Director of LPF Group, has recently stated:³⁵

We've had a number of applications from reasonably-sized commercial organisations that recognise that litigation is simply another asset on their balance sheet and that having it funded allows them to employ capital efficiently across their business. Cost of a case is a big consideration and strategically they might be better to fund a case with someone else's money. They also recognise they might get a better outcome too. They don't want to tie their money up in litigation.

Availability of a funder's litigation expertise

- 17.23 Many of those working for litigation funders are lawyers who have extensive experience of conducting commercial litigation. They may bring this experience and expertise to bear when evaluating applications for funding and assisting with the legal and resolution strategy of the cases they fund.³⁶
- 17.24 Even if a litigation funding agreement is not concluded, the funder's due diligence may benefit the plaintiff by giving them a more objective perspective of the claim, a clearer understanding of the claim's strengths and weaknesses, a commercial assessment of the claim quantum and duration, and an understanding of the likelihood or difficulty of enforcement and recovery.³⁷ If a litigation funding agreement is concluded, the plaintiff has the benefit of the funder's ongoing assistance with claim strategy, if required, and the funder's oversight of budgets and timeframes.³⁸ Funders may negotiate litigation budgets with the plaintiff's lawyers and ensure, so far as possible, that legal costs and strategies are proportionate to the sums at stake.³⁹ This oversight can increase the overall efficiency of the case by introducing commercial considerations that aim to reduce costs.⁴⁰
- 17.25 In the context of representative or class actions, funders can also play a role in identifying, contacting, and organising members of the class, where it might not otherwise be feasible for the group to do so itself.⁴¹ In our preliminary conversations with litigation funders, we

³⁵ Nick Butcher "Litigation funding and class actions: What's happening in New Zealand?" (2019) 929 LawTalk 66 at 73.

³⁶ See Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 59; Finn Brooke and Andreas Heuser "Litigation funding: Two perspectives – the funder and the lawyer" *New Zealand Lawyer* (Wellington, 23 March 2012) at 25; John Pierce and David Burnett "The Emerging Market for Litigation Funding" *The Hedge Fund Journal* (online ed, London, June 2013); Bill Wilson "Insights from a litigation funder" (2016) 888 LawTalk 27 at 28; and Ashurst "Litigation funding" (18 June 2019) <www.ashurst.com>.

³⁷ Finn Brooke and Andreas Heuser "Litigation funding: Two perspectives – the funder and the lawyer" *New Zealand Lawyer* (Wellington, 23 March 2012) at 25.

³⁸ Finn Brooke and Andreas Heuser "Litigation funding: Two perspectives – the funder and the lawyer" *New Zealand Lawyer* (Wellington, 23 March 2012) at 25.

³⁹ Omni Bridgeway, Submission No 73 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (17 June 2020) at 6.

⁴⁰ Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) at [11] citing Law Council of Australia *Regulation of third party litigation funding in Australia* (Position Paper, June 2011) at [4]. See also Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 62–63.

⁴¹ Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 607.

heard that representative plaintiffs and class members often have no experience of litigation and appreciate having access to the funder's litigation experience and expertise.

- 17.26 As the Supreme Court pointed out in *Waterhouse v Contractors Bonding*, these benefits of litigation funding depend on the motives and integrity of the funder and lawyers involved:⁴²

...the existence of a litigation funder might mean that litigation is conducted in a professional manner with more of an eye to the potential risks and benefits of the litigation but that depends on the commercial ability, integrity and motives of the funder, as well as on the motives and integrity of the lawyers involved.

Confidence for defendants

- 17.27 Litigation funding may (perhaps counterintuitively) offer some additional security to a defendant. As noted by the Australian Productivity Commission, the involvement of a reputable litigation funder may give a defendant confidence that, in the event they successfully defend the claim, the funder will have sufficient resources to comply with any adverse costs orders.⁴³ We further discuss capital adequacy and the responsibilities of litigation funders in respect of adverse costs in Chapter 22.

DISADVANTAGES OF LITIGATION FUNDING

Increasing the workload of the courts

- 17.28 Since litigation funding can enable plaintiffs to bring claims which they otherwise would not pursue, any increase in the market for litigation funding – which is likely if regulatory settings are permissive – can be expected to result in additional claims being filed in court, thereby increasing the courts' workload.
- 17.29 As we explained above, litigation funding may result in more representative or class action claims being filed. As we explored in Part A of this Issues Paper, the size and complexity of representative and class action cases often requires significant case management.⁴⁴ If the number of representative or class actions increases, this could result in a reduction in the overall number of cases progressing through the courts at any one time, unless there is an increase in the capacity of the court system.
- 17.30 However, it is difficult to quantify this impact. There is a lack of complete data on the number of cases that have received litigation funding in Aotearoa New Zealand, but it seems likely that the figure, as a percentage of total filings, remains very low. Even major funders like IMF Bentham (now Omni Bridgeway) in Australia have only funded a total of 192 cases to completion in their nearly 20 year history.⁴⁵ The Australian Productivity

⁴² *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [43].

⁴³ Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 622.

⁴⁴ The Australian Law Reform Commission noted this point and also observed that class action proceedings typically take around two and a half years to resolve, with many lasting significantly longer: Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.14]. For further discussion see Chapter 6.

⁴⁵ IMF Bentham Ltd *Annual Report 2019* (2019) at 3.

Commission noted in 2014 that the number of additional claims encouraged by the provision of litigation funding is extremely small – constituting less than 0.1 per cent of the overall civil litigation market by volume.⁴⁶ At these levels, funded claims are likely to represent a small fraction of total civil claims, even taking into account an expansion of the litigation funding market. In Aotearoa New Zealand, there is a lack of complete data on the number of cases that have received litigation funding, but it seems likely that the number of funded cases, as a percentage of total filings, remains very low.

- 17.31 It is also possible that an increase in availability of litigation funding may not increase the overall number of cases filed because funders could move from being plaintiff focused to targeting funding to large law firms and companies through portfolio funding.⁴⁷ It is possible that funders could prioritise portfolio funding arrangements, on the theory that funders will be motivated to direct their investments to the highest value claims. Representative and class action claims are often high value, however, which makes it difficult to predict the extent to which funders will prefer one type of claim over the other. As noted earlier, portfolio funding has not, to our knowledge, been used in Aotearoa.
- 17.32 In Chapter 6, in relation to class actions, we expressed our view that objecting to class actions on the basis that they increase the courts' workload misses the point that they are designed to improve access to the courts. Likewise, an increase in litigation as a result of litigation funding is not itself a reason to object to litigation funding. Nonetheless, whether and how the court system can respond to any increased demands will determine how a change in the availability of litigation funding will impact the system's efficiency and accessibility. If no additional resources are provided, two possible consequences are longer wait times and higher court fees. This may not impact on the courts but may impact negatively on access to justice.⁴⁸

The risk of an increase in meritless cases

- 17.33 In *Waterhouse v Contractors Bonding*, Glazebrook J noted a concern that “[t]he availability of litigation funding could exacerbate the risk of defendants being faced with unmeritorious claims”.⁴⁹ A litigation funder could, for example, attempt to force a settlement by leveraging the other party's desire to avoid expending resources on defending a meritless claim.
- 17.34 As profit driven entities, commercial funders argue they have no reason to fund meritless cases as these will not return them a profit. It has also been said that, through their due diligence processes, commercial funders may contribute to a decrease in the number of

⁴⁶ Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 618.

⁴⁷ Sean Thompson, Dai Wai Chin Feman and Aaron Katz “United States” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 217 at 218.

⁴⁸ See Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 56.

⁴⁹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [42]. See also *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [31] noting that:

It is thus conceivable that, unless there is a suitable order for security for costs, an unscrupulous funder might orchestrate a class action on an insubstantial basis with a view to extorting an unjustified settlement from the defence.

meritless cases reaching court.⁵⁰ CSA also notes that economic analysis of litigation funding is generally not supportive of concerns about meritless claims.⁵¹ It reiterates that funders are in the business of making profits from financing litigation, and funding meritless claims would mean investing in claims with a low probability of success.⁵² Funders that have an ongoing presence in the market face strong financial and reputational incentives to avoid meritless claims.⁵³

17.35 Our preliminary view is that the risk of litigation funding leading to an increase in meritless cases appears to be low, given the profit motive of funders. The courts are of course alive to the misuse of their processes and have developed a number of mechanisms to prevent vexatious or meritless cases from being pursued. These were explored in detail in Chapter 15 and include:

- (a) **Preliminary appraisal of merits of a representative action:** In *Earthquake Services v Southern Response Unresolved Claims Group*, the Court of Appeal held that a provisional appraisal of a representative action is needed, to ensure leave is not granted to “plainly meritless claims”.⁵⁴
- (b) **Stay of proceedings:** A court can order a stay of proceedings to prevent them from continuing without the leave of the court.⁵⁵ This power allows the court to prevent misuse of its procedures.⁵⁶ A court may order a stay if the conduct of a third party (such as a litigation funder) is “seriously burdensome, prejudicial or damaging” or “productive of serious and unjustified trouble and harassment”.⁵⁷
- (c) **Striking out proceedings:** A case can be struck out if it does not disclose a reasonably arguable cause of action or is frivolous or vexatious.⁵⁸
- (d) **Security for costs:** A court may order security for costs where it is just, and the plaintiff is based overseas or impecunious.⁵⁹ In cases where a litigation funder is involved in representative litigation, the High Court has ordered security for costs in reliance on its inherent jurisdiction.⁶⁰

⁵⁰ See Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 117; and Wayne Attrill *Ethical Issues in Litigation Funding* (12 November 2008) at 11.

⁵¹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 57.

⁵² Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 57.

⁵³ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 57.

⁵⁴ *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [16]. See also *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [42]; and *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [29]–[30] (the standard may increase if the litigation is funded). For further discussion see Chapters 9 and 15.

⁵⁵ High Court Rules 2016, r 15.1(3); and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30].

⁵⁶ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [28] as cited by the New Zealand Supreme Court in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [32].

⁵⁷ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [28] as cited by the New Zealand Supreme Court in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [32]. See also *Cain v Mettrick* [2020] NZHC 2125 at [65]. For further discussion see Chapters 15 and 21.

⁵⁸ High Court Rules 2016, r 15.1(1). For further discussion see Chapter 15.

⁵⁹ High Court Rules 2016, r 5.45.

⁶⁰ *Houghton v Saunders* [2015] NZCA 141 at [11]. For further discussion see Chapter 15.

- (e) **Indemnity costs:** Indemnity costs are a complete reimbursement of all legal costs incurred by the successful party.⁶¹ These costs are only awarded in truly exceptional cases and usually require exceptionally bad behaviour.⁶²
- (f) **Non-party costs orders:** In exceptional circumstances, a court can also make a costs order against a non-party, which could include a litigation funder.⁶³

Impact on directors and officers liability insurance

- 17.36 If litigation funding increases the number of representative and/or class actions, especially shareholder actions, this may impact on the availability and pricing of directors and officers liability insurance (D&O insurance).
- 17.37 D&O insurance is a form of liability insurance designed to protect company directors and senior employees against personal loss arising from liabilities incurred in the performance of their duties. D&O insurance also provides cover for reasonable costs of defending a claim.⁶⁴

Trends in the Australasian D&O insurance market

- 17.38 It has been reported that the insurance market operating across both Aotearoa New Zealand and Australia has ‘hardened’ in recent years.⁶⁵ A ‘hard’ insurance market refers to an “upswing in a market cycle, when premiums increase and the availability of most types of insurance decreases”.⁶⁶
- 17.39 In Aotearoa New Zealand, D&O insurance premiums for some organisations doubled in 2019.⁶⁷ This mirrors the similar increases in premiums that have occurred in Australia over the last decade. Marsh (a large insurance broker and risk adviser) has reported an average increase of over 250 per cent for ASX200 companies between 2011 and 2018 and a further 118 per cent rise in 2019, and commented there were no signs of these increases

⁶¹ High Court Rules 2016, r 14.6.

⁶² *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [28]; *Hedley v Kiwi Co-Operative Dairies Ltd* (2000) 15 PRNZ 210 (HC) at [8]; and *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [6]. For further discussion see Chapter 6.

⁶³ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145; and *Bligh v Earthquake Commission* [2019] NZHC 2236. See also Chapter 15.

⁶⁴ In 2013, the Supreme Court confirmed a statutory charge under s 9(1) of the Law Reform Act 1936 applies to the entire insured sum where the policy limit was inclusive of defence costs: *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156, [2014] 1 NZLR 304. Some D&O insurance providers in New Zealand now offer a companion defence costs policy to ensure that, where the main sum is subject to a statutory charge, insurance can still be accessed to meet any defence costs: see *Zurich Companion Directors and Officers Defence Costs and Expenses Insurance: Fact Sheet* (2012).

⁶⁵ Institute of Directors New Zealand, MinterEllisonRuddWatts; and Marsh *Directors and Officers Insurance: Trends and Issues in Turbulent Times* (June 2019) at 4.

⁶⁶ International Risk Management Institute “Glossary: Hard Market” <www.irmi.com>.

⁶⁷ Institute of Directors New Zealand, MinterEllisonRuddWatts and Marsh *Directors and Officers Insurance: Trends and Issues in Turbulent Times* (June 2019) at 4. This appears to be a recent trend with previous accounts of D&O insurance noting little change in pricing: see Guy Narburgh and Sally-Anne Ivimey “Side by Side (A, B and C): Securities Class Actions and D&O Insurance” in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) 371.

slowing.⁶⁸ Marsh also observed increases, although less dramatic, in the average price of commercial insurance premiums worldwide.⁶⁹

- 17.40 Two further trends have been observed. First, a narrowing in D&O insurance policy coverage, including “targeted uplifts in retentions, restrictions in coverage terms and withdrawal ... [and] lower limits being offered”.⁷⁰ This also appears to be a global trend.⁷¹
- 17.41 Second, the availability of D&O insurance appears to be decreasing. The Institute of Directors has noted a “withdrawal of capacity” in the Aotearoa New Zealand D&O insurance market,⁷² which is consistent with reduced availability of D&O insurance cover for ASX listed companies.⁷³ Notably, one insurer, Allianz Global Corporate & Specialty, ceased to underwrite long-tail financial risks in Australia and Aotearoa New Zealand in September 2019.⁷⁴
- 17.42 The increasing cost, narrower coverage and decreasing availability of D&O insurance described above may in turn impact the desirability of directorships and senior management positions. It has been suggested that the difficulties companies face in obtaining meaningful D&O coverage will result in them struggling to attract, retain, and develop capable and experienced directors and officers.⁷⁵

Is litigation funding to blame?

- 17.43 Several sources point to the increasing use of litigation funding in shareholder representative or class action litigation as a factor impacting D&O insurance and

⁶⁸ Marsh Pty Ltd, Submission No 14 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 2. See also Marsh *The D&O Insurance Wave: Staying Above Water* (December 2019).

⁶⁹ Marsh *Insights: Global Insurance Prices Continue to Rise for Tenth Consecutive Quarter* (May 2020) at Figure 1.

⁷⁰ Institute of Directors New Zealand, MinterEllisonRuddWatts and Marsh *Directors and Officers Insurance: Trends and Issues in Turbulent Times* (June 2019) at 4. In a D&O insurance policy a retention is often used in place of a deductible/excess: the retention is the amount that the insured party must pay themselves before being able to draw on the insurance cover.

⁷¹ Aon reported in the second quarter of 2019 that 70.6 per cent of D&O insurance policies were renewed with the same deductible and 66 per cent at the same limit and deductible which suggested tightening terms and conditions: Aon *Quarterly D&O Pricing Index: Second Quarter 2019* (July 2019) at 8 as cited in Allianz *Directors and Officers Insurance Insights 2020* (2020) at 6.

⁷² Institute of Directors New Zealand, MinterEllisonRuddWatts and Marsh *Directors and Officers Insurance: Trends and Issues in Turbulent Times* (June 2019) at 4.

⁷³ Marsh Pty Ltd, Submission No 14 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 2.

⁷⁴ A long-tail financial risk is a liability (to the insurer) for claims that do not proceed to final settlement until a length of time beyond the policy year. This will include D&O insurance claims where prolonged litigation means final settlement of insurance claims may not occur until years after notification: “Allianz to exit Australia and NZ long-tail risk” (3 July 2019) Insurance News <www.insurancenews.com.au>.

⁷⁵ See Group of 100, Submission No 95 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (8 July 2020) at 2; Australian Institute of Company Directors, Submission No 40 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 9; and Business Council of Australia, Submission No 86 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (June 2020) at 5.

contributing to the hardening of the Australasian market.⁷⁶ In Australia, Marsh has described the rising cost of D&O insurance as being closely correlated to an increase in the number and size of shareholder class actions in Australia since 2011, noting that all such class actions filed in the period 2013–2018 were funded.⁷⁷ Marsh also estimated that shareholder class action claims between 2001 and 2018 cost insurers in excess of A\$1 billion.⁷⁸

- 17.44 However, Vince Morabito’s research shows that in over 75 per cent of Australian shareholder class actions between 1992 and 2019, no action was taken against individual directors.⁷⁹ He further notes that directors were defendants in only 10 per cent of shareholder class actions filed in the 2018–2019 financial year.⁸⁰ Most shareholder claims were brought against the companies themselves. This has led to a suggestion that insurance coverage of company liability in respect of shareholder claims might be priced separately, so that D&O insurance coverage for director liability (and company indemnification of its directors) could be offered profitably.⁸¹
- 17.45 Directors have been defendants in two representative actions in Aotearoa New Zealand.⁸² We note that the Financial Markets Authority (FMA) has stated “that there has been very little evidence in New Zealand of an opportunistic class action culture developing in relation to director liability, but we will keep this position under review”.⁸³
- 17.46 It is also possible that the substantive law governing liability for continuous disclosure breaches is driving changes in the D&O insurance market. The Australian Institute of

⁷⁶ For example, see “D&O’s at risk from new liabilities and litigation culture” Actuarial Post <www.actuarialpost.co.uk>; Stefania Davi-Greer, Terry FitzGerald and Matthew Lamplugh “Exposures for directors and officers (D&Os) continue to evolve globally” *Financier Worldwide* (online ed, United Kingdom, June 2019); and Institute of Directors, MinterEllisonRuddWatts and Marsh *Under pressure – D&O insurance in a hard market: Trends and insights* (September 2020) at 3.

⁷⁷ Marsh Pty Ltd, Submission No 14 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 2. See also Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.24].

⁷⁸ Marsh *Insights: Shareholder class actions shaping the future of Australia’s D&O insurance landscape* (August 2018) at 4 (figures as at June 2018). Another report estimates that insurers had paid AUD\$1.28 billion in securities class action settlements and defence costs since 1999, while the average total cost to an insurer for a class action case (settlement plus defence costs) has been calculated as AUD\$40 million: see XL Catlin and Wotton + Kearney *Show me the money! The impact of securities class actions on the Australian D&O Liability insurance market* (September 2017) at 9 and 11.

⁷⁹ Vince Morabito *Shareholder class actions in Australia – myths v facts* (An evidence-based approach to class action reform in Australia, November 2019) at 19.

⁸⁰ Vince Morabito *Shareholder class actions in Australia – myths v facts* (An evidence-based approach to class action reform in Australia, November 2019) at 19.

⁸¹ In other words, ‘Side C’ insurance could be separated out from D&O insurance policies, although this could lead to lawyers and funders adding claims against directors in an attempt to access Side A (director) and Side B company indemnification of directors) insurance: Michael Legg and James Metzger “Submission to Australian Law Reform Commission: Inquiry into Class Action Proceedings and Third-Party Litigation Funders Project” (27 July 2018) at 4 as discussed Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [9.88].

⁸² The proceedings in *Houghton v Saunders*, and one of the *CBL* actions (funded by LPF Group). Notably the other action being brought against CBL is not pursuing actions against the directors, only the company.

⁸³ Te Mana Tatai Hokohoko | Financial Markets Authority “FMA statement on director liability and continuous disclosure” (press release, 17 June 2020).

Company Directors has suggested that the combination of strict continuous disclosure laws and a facilitative class actions regime in Australia means there is a risk that a class action can be filed following any significant shift in a listed company's share price.⁸⁴ Therefore, the strictness of disclosure laws may play a role in enabling class actions which impact on D&O insurance policies. Nevertheless, whether liability for breaches of continuous disclosure obligations is set at an appropriate level is a question properly assessed by reference to the substantive law on continuous disclosure, not the procedure by which such claims are brought. We note that an industry led-working group initiated by the NZX and the FMA recommended the Ministry for Business, Innovation and Employment review settings around director liability for continuous disclosure in Aotearoa New Zealand.⁸⁵ The Australian Law Reform Commission (ALRC) also made a similar recommendation regarding Australian disclosure laws in a 2018 report.⁸⁶

- 17.47 The market for D&O insurance may also be impacted by any increase in funded insolvency proceedings. This is because a D&O insurance policy may be one of the few avenues left for creditors seeking to recover money from a company in liquidation. A notable example of this occurring in Aotearoa New Zealand is LPF Group's funding of a liquidator's claim against the directors of Mainzeal.⁸⁷ While the judgment is under appeal, the \$36 million judgment in the High Court could incentivise more funders to also look to fund further insolvency claims.⁸⁸
- 17.48 Other factors entirely separate to litigation funding may also play a role in changes to the D&O insurance market. For instance, a possible "historical under-pricing of D&O" insurance.⁸⁹ Omni Bridgeway has suggested that the increases in insurance premiums reflect the market catching up to more appropriate premium levels.⁹⁰ The increased risk of regulatory and legal action following Australia's Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry has also significantly impacted D&O insurance.⁹¹ This demonstrates the complexity of attributing changes in the D&O insurance market to any one source like litigation funding of shareholder claims. The fact that changes in the Australian D&O insurance market are more dramatic than global trends may suggest that other factors unique to Australia may also be having an impact.

⁸⁴ Australian Institute of Company Directors, Submission No 40 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) at 3.

⁸⁵ Capital Markets 2029 *Growing New Zealand's Capital Markets 2029* (September 2019) at 36–38.

⁸⁶ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 24.

⁸⁷ *Mainzeal Property and Construction Ltd (In liq) v Yan* [2018] NZHC 2470.

⁸⁸ Partridge Advisory "Why Mainzeal is potential game changer" (2 September 2019) <www.partridgeadvisory.com>.

⁸⁹ XL Catlin and Wotton + Kearney *Show me the money! The impact of securities class actions on the Australian D&O Liability insurance market* (September 2017) at 15. Marsh *The D&O Insurance Wave: Staying Above Water* (December 2019) at 1. See also Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [1.74].

⁹⁰ See IMF Bentham "Submission to Australian Law Reform Commission: Inquiry into Class Action Proceedings and Third-Party Litigation Funders Project" (6 August 2018) at [2.26]–[2.31] (note that Omni Bridgeway was then called IMF Bentham).

⁹¹ James Fernyhough "Royal commission fears spark mass insurance exclusions" *Financial Review* (online ed, Sydney, 2 January 2019).

17.49 While litigation funding may be a factor in the hardening market for D&O insurance in Aotearoa New Zealand and Australia, we have not yet seen robust evidence in support of those claims. We are also mindful that the impact of litigation funding could be exaggerated if a significant portion of it is simply displacing self-funding of litigation that would occur anyway. The ALRC described this as “the canary in the coal mine”.⁹² In other words, it is clear something is not quite right but the evidence is not yet available to establish precisely what.

OVERALL MERITS OF LITIGATION FUNDING

17.50 Our preliminary view is that litigation funding is desirable in principle, provided the particular concerns discussed in Chapters 19–22 can be adequately managed. In our preliminary discussions, no one has suggested that litigation funding should be prohibited. In our view, the advantages of litigation funding, particularly its potential to improve access to justice in some cases, outweigh its potential impacts. The risk of litigation funding leading to an increase in unmeritorious claims appears to be low, given the profit motive of litigation funders. Although litigation funding may be impacting on D&O insurance, it is not easy to separate out the effects of litigation funding from other factors contributing to this change.

QUESTIONS

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?

⁹² Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [9.81].

CHAPTER 18

Reforming maintenance and champerty

INTRODUCTION

- 18.1 In the previous chapter, we expressed our preliminary view that litigation funding should be expressly permitted in Aotearoa New Zealand. If this is to occur, the tension between litigation funding and the torts of maintenance and champerty needs to be resolved. In this chapter, we consider four options for reforming the torts:
- (a) Retaining the torts in their current form and allowing the courts to clarify and develop the law.
 - (b) Retaining the torts but carving out a statutory exception for litigation funding agreements that meet certain requirements.
 - (c) Abolishing the torts.
 - (d) Abolishing the torts but retaining the courts' ability to find a funding agreement unenforceable on grounds of public policy or illegality.

SHOULD THE TORTS OF MAINTENANCE AND CHAMPERTY BE RETAINED IN THEIR CURRENT FORM?

- 18.2 In Chapter 16, we discussed the uncertainty about whether and when litigation funding is contrary to the torts of maintenance and champerty, and whether the policy behind the torts is still relevant. We also noted this uncertainty may have a chilling effect on litigation funding, impacting on its availability and pricing. If the policy underlying maintenance and champerty remains sound and the torts do not cause sufficient inconvenience to necessitate reform, Aotearoa New Zealand could retain the torts in their current form. The courts could be left to develop the law and clarify whether and when litigation funding is contrary to the policy behind maintenance and champerty. This approach can be seen to some extent in Canada and Queensland, Australia.
- 18.3 In Canada, maintenance and champerty were abolished as crimes in 1953 (because the Criminal Code Revision Committee considered them to be “obsolete and archaic”)¹ but

¹ A J MacLeod and J C Martin “Offences and Punishments under the New Criminal Code” (1955) 33 Can Bar Rev 20 at 23–24.

they remain actionable in tort.² That said, the tort of champerty typically has had the effect of acting as a shield against the enforcement of champertous agreements, rather than serving as the basis of an action for damages.³

- 18.4 The Canadian courts have carved out exceptions to the general rules against maintenance and champerty, which leave open the possibility of “proper” litigation support.⁴ In the early 2000s, jurisprudence developed in the context of contingency fee arrangements,⁵ and later in the context of class actions,⁶ that significantly enhanced the prospect of litigation funding by recognising its role in promoting access to justice. The law on third party funding in single-party cases remained relatively underdeveloped until 2015, when the courts drew on the permissive jurisprudence regarding litigation funding of class actions and applied it to ordinary commercial litigation.⁷
- 18.5 In the class actions context, the law has consolidated into a clear set of principles.⁸ The courts have held that a funder’s motives will be crucial to the assessment of whether a funding arrangement is champertous.⁹ Whether a funder is actuated by a proper or improper motive will largely depend on whether the funder’s commission is fair and reasonable in the circumstances.¹⁰
- 18.6 In Ontario, in the class actions context, the Ontario Superior Court of Justice in *Houle v St Jude Medical Inc (Houle)* held that the court must also be satisfied of the following criteria when approving a litigation funding arrangement:¹¹
- (a) The agreement must be necessary to provide access to justice;
 - (b) The access to justice facilitated by the funding agreement must be substantively meaningful;
 - (c) The agreement must be fair and reasonable and facilitate access to justice, while protecting the interests of defendants; and

² See the Criminal Code SC 1953-54 c 51, s 9 abolished all common law crimes in 1953; and the Statute of Champerty RSO 1897 c 327.

³ Hugh A Meighen “Canada” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 39 at 41.

⁴ Hugh A Meighen “Canada” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 39 at 41.

⁵ *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (ONCA).

⁶ *Metzler Investment GMBH v Gildan Activewear Inc* (2009) 81 CPC (6th) 384 (ONSC); and *Dugal v Manulife Financial Corp* 2011 ONSC 3147.

⁷ *Schenk v Valeant Pharmaceuticals International Inc* 2015 ONSC 3215, (2015) 74 CPC (7th) 332. See also *Seedlings Life Science Ventures, LCC v Pfizer Canada Inc* 2017 FC 826, (2017) 152 CPR (4th) 319.

⁸ For a summary of useful judicial commentary from 2009 to 2015, see Hugh A Meighen “Canada” in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 39 at 43–45.

⁹ *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (ONCA) at [27], [75] and [80]; and *Metzler Investment GMBH v Gildan Activewear Inc* (2009) 81 CPC (6th) 384 (ONSC) at [44]–[45].

¹⁰ *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (ONCA) at [76].

¹¹ *Houle v St Jude Medical Inc* 2017 ONSC 5129, (2017) 9 CPC (8th) 321.

- (d) The funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching and champertous.
- 18.7 The Ontario Class Proceedings Act SO 1992 c 6 was recently amended so that litigation funding agreements in class actions are now subject to the approval of the court. The court must be satisfied that certain conditions, which largely reflect those developed by the Court in *Houle*, are met. We discussed these conditions in more detail in Chapter 15.
- 18.8 In Queensland, where the torts of maintenance and champerty have not been abolished, the Supreme Court of Queensland upheld a finding that maintenance was established in *JC Scott Constructions v Mermaid Waters Tavern Pty (JC Scott)*.¹² This case provides one clear, albeit rare, illustration of the harm that the tort of maintenance was intended to address. It is also an example of the courts clarifying what is required to establish the tort.
- 18.9 In *JC Scott*, the Court upheld the finding that the defendant had stirred up litigation between subcontractors and the plaintiff with the goal of causing financial loss to the plaintiff. In explaining the law, the Court commented that the mere loan of a sum of money, which the lender knows will be used to finance litigation, is not by itself maintenance. There must, in addition, be “intermeddling” or a “stirring up of litigation”.¹³ This behaviour must be officious, in the sense that there is no lawful justification for the maintainer’s interference (such as the defence of their legitimate and genuine business interests). On the facts, the defendant’s conduct went well beyond any legitimate and genuine interest, since the “manifest object of the whole arrangement was to embarrass the plaintiff financially and if possible to procure its winding up and so prevent prosecution of the plaintiff’s claim”.¹⁴
- 18.10 However, it may be necessary to reform maintenance and champerty if the policy behind the torts is no longer relevant or if the torts are having a chilling effect on the availability and pricing of litigation funding. Our preliminary conversation on this issue elicited mixed views.

SHOULD THERE BE A STATUTORY EXCEPTION FOR SOME LITIGATION FUNDING ARRANGEMENTS?

- 18.11 The second option we have identified is to retain the torts but create an exception in legislation for litigation funding arrangements that comply with specified requirements. This would leave the torts in place as a bar against litigation funded for improper purposes, while clarifying the kinds of litigation funding that will not offend against maintenance and champerty.
- 18.12 In Hong Kong, for example, maintenance and champerty remain part of the law as torts (as well as indictable offences at common law punishable by imprisonment and fine), and

¹² *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 (QSC).

¹³ *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 (QSC) at 429.

¹⁴ *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 (QSC) at 430.

litigation funding is generally not permitted.¹⁵ However, litigation funding is now expressly permitted for arbitration and related mediation and court proceedings, following promulgation of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. The Ordinance provides that the torts and the common law offences of maintenance and champerty “do not apply” in relation to third party funding of arbitration.¹⁶ These exceptions are subject to “any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal”.¹⁷ The exceptions reflect that Hong Kong is a major international centre for international arbitration.¹⁸

- 18.13 In Aotearoa New Zealand, the Rules Committee drafted a Class Actions Bill and Rules in 2009 to introduce a class actions mechanism. The draft Bill, which was never progressed, would have created an exception to the torts of maintenance and champerty for litigation funding of class actions. Part 5 of the draft Bill provided:

Subsidising Litigation

22 Maintenance and champerty restricted

The common law torts of maintenance and champerty do not apply to a class action.

23 Contracts to finance actions

A contract between a litigation funder and another person in respect of a class action or proposed class action is not illegal, or unenforceable as contrary to public policy, by reason only of the fact that it contains an undertaking to finance the commencement or continuation of that action.

24 Abuse of process

Nothing in section 22 or section 23 affects the power of the court to prohibit or control an action that constitutes an abuse of the process of the court.

- 18.14 The Rules Committee’s Class Actions Sub-Committee considered whether the draft Bill should provide only that the torts do not apply in relation to class actions, or whether it should go further and abolish the torts completely. The Sub-Committee was divided on this issue. Some members considered it desirable to abolish the torts completely and rely on the abuse of process mechanism, which would avoid the anomaly of partially abolishing the torts for the purposes of class actions. However, other members were concerned that it was going beyond the scope of the draft Class Actions Bill to abolish the torts generally, even if that change were desirable in principle. Furthermore, the issue of abolishing the torts had not specifically been consulted on.
- 18.15 We note there is already a statutory exception to maintenance and champerty in the Lawyers and Conveyancers Act 2006. Section 334(1) provides that a conditional fee agreement that complies with the requirements of that subsection will not be an illegal contract or an unenforceable contract just because the lawyer’s remuneration is dependent on the outcome of the matter. Section 334(2) provides:

¹⁵ Three limited exceptions to this general prohibition were set out in *Unruh v Seeberger* (2007) 10 HKCFAR 31 at [92]–[98]. They include: ‘common interest’ cases, involving third parties with a legitimate interest in the outcome of the litigation; cases where ‘access to justice’ considerations apply; and a miscellaneous category, including insolvency litigation. Litigation funding is mostly used in insolvency cases.

¹⁶ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, ss 98K–98L.

¹⁷ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98M.

¹⁸ The Ordinance came into force on 1 February 2019.

If a conditional fee agreement is, by virtue of subsection (1), not an illegal contract or an unenforceable contract, a lawyer does not by entering into that agreement make himself or herself liable to proceedings founded on the tort of maintenance or the tort of champerty.

- 18.16 If maintenance and champerty are retained and a statutory exception is created for litigation funding that complies with specified requirements, our preliminary view is that there would be no reason to restrict the exception to litigation funding of class actions. Litigation funding is used in a variety of contexts and may pose less of a concern in single-party cases than in class actions, particularly where the contracting parties are both commercially sophisticated.

SHOULD THE TORTS OF MAINTENANCE AND CHAMPERTY BE ABOLISHED?

- 18.17 Another option is to abolish the torts of maintenance and champerty. The torts have been abolished in comparable jurisdictions such as England and Wales,¹⁹ Singapore,²⁰ and the Australian states of Victoria, New South Wales, South Australia, Australian Capital Territory and Tasmania.²¹ However, most of these jurisdictions have preserved the court’s ability to find a funding agreement unenforceable if it is contrary to public policy or otherwise illegal.
- 18.18 By contrast, the torts of maintenance and champerty have not been abolished in other comparable jurisdictions such as Canada, Ireland, Hong Kong, and the Australian states of Queensland, the Northern Territory, and Western Australia — although the Law Reform Commission of Western Australia is currently considering whether the torts of maintenance and champerty should be abolished or modified.²²
- 18.19 In Aotearoa New Zealand, Te Aka Matua o te Ture | Law Commission considered whether the torts of maintenance and champerty should be abolished in its 2001 report, *Subsidising Litigation*. Although nearly all submitters urged abolition, at the time the Commission favoured preserving the torts for several reasons. It noted the risk that people may be prepared to employ aggressive litigious processes against business rivals.²³ In terms of alternatives, the Commission did not think that non-party costs orders would be able to adequately compensate parties for some types of loss.²⁴ The Commission also considered the torts were more certain than the tort of abuse of process.²⁵ Finally, the Commission also considered no great simplification of the law would be achieved by following the approach in England and Wales and in some Australian

¹⁹ Criminal Law Act 1967 (UK), ss 13–14.

²⁰ Civil Law Act 1999 (Singapore), ss 5A–5B.

²¹ Victoria was the first state to do so in 1969. New South Wales later followed suit, as did South Australia, the Australian Capital Territory, and Tasmania. See Wrongs Act 1958 (Vic), s 32; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), ss 3–4; Civil Liability Act 2002 (NSW), sch 2 cl 2; Criminal Law Consolidation Act 1935 (SA), sch 11; Civil Law (Wrongs) Act 2002 (ACT), s 221; and Civil Liability Act 2002 (Tas), s 28E(ba) and (bb).

²² Law Reform Commission of Western Australia “Project No 110 – Maintenance and Champerty in Western Australia” <www.lrc.justice.wa.gov.au>.

²³ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 10.

²⁴ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 10.

²⁵ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 11.

jurisdictions of abolishing the torts while preserving the underlying public policy issues in their application to contract legality.²⁶

- 18.20 As noted, in 2009 the Rules Committee also considered whether the torts should be abolished in the context of its work on a draft Bill and Rules to govern class action procedure, but did not reach a consensus on the issue.
- 18.21 In Chapter 16, we considered whether the policy behind maintenance and champerty is still relevant. We noted that our courts have expressed a range of views. While some judgments favour letting the torts fall into disuse, others acknowledge the legitimacy of the concerns underlying the torts, and caution against restricting their scope without full argument on the reasons that might make litigation funding arrangements contrary to public policy. The key questions to resolve are whether anything would be lost by abolishing the torts, and how any impacts of abolition could be mitigated.

What would be lost if the torts were abolished?

- 18.22 It is difficult to assess what might be lost if the torts of maintenance and champerty were abolished because the torts have been so rarely used. In Aotearoa New Zealand, there is no reported case of a successful claim in tort founded on maintenance and champerty. One could assume this means the torts are now irrelevant. The authors of *Todd on Torts* suggest that “[w]idening justifications for supporting actions, and the lack of decisions in New Zealand imposing liability, suggest that little would be lost by [abolishing the torts]”.²⁷ However, as the authors acknowledge, this perspective is not universally held.²⁸ As the Commission speculated in its 2001 report, the lack of cases “does not establish that the tort fails by its very existence to function as a deterrent”.²⁹
- 18.23 One of the concerns with abolishing the torts is that they may have a wider impact which goes beyond litigation funding and abolishing them may have unforeseen consequences.³⁰ The torts may provide a remedy for those subjected to vexatious litigation. Although the possibility of third parties funding litigation in order to harm an opponent may appear remote,³¹ the Queensland case of *JC Scott* provides one clear illustration of the harm that maintenance was intended to address.³²
- 18.24 As discussed above, the Supreme Court of Queensland in *JC Scott* upheld a finding that the defendant had stirred up litigation between subcontractors and the plaintiff with the goal of causing financial loss to the plaintiff. This included procuring the winding up of the plaintiff to prevent prosecution of the plaintiff’s claim against the defendant for damages for breach of contract. Relying on the tort of maintenance, the plaintiff successfully

²⁶ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 11.

²⁷ Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [18.4.04].

²⁸ See for example New South Wales Law Reform Commission *Barratry, Maintenance and Champerty* (NSWLRC DP36, 1994).

²⁹ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 11.

³⁰ Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 124.

³¹ The Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Discussion Paper, 2019) at 20.

³² *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 (QSC).

obtained damages for loss suffered because of the funded litigation. The loss was the cost of refinancing when litigation led the plaintiff's banker to refuse to provide bank guarantees and an overdraft facility.

- 18.25 The Commission discussed *JC Scott* in its 2001 report. It expressed concern that abolishing the torts of maintenance and champerty in Aotearoa New Zealand would leave those in similar situations to that in *JC Scott* without adequate redress. Although a non-party costs order may be available, the loss suffered may go beyond costs, as occurred in *JC Scott*. The Commission speculated that if the facts in *JC Scott* arose and the tort of maintenance had been abolished, the affected party's only recourse would be in the less certain tort of abuse of process.³³
- 18.26 We therefore turn to consider whether current law concerning the court's power to stay proceedings for abuse of process could mitigate the impacts of abolishing the torts.

How could impacts of abolishing maintenance and champerty be mitigated?

- 18.27 The High Court has the power to stay a proceeding for abuse of process.³⁴ The general principles on which the court may intervene were explained by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*, who said the power could be used by a court:³⁵

... to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.

- 18.28 In a 2008 decision, *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council*, the High Court commented that it would be desirable to “let maintenance and champerty fall into disuse” as the court has “ample jurisdiction to prevent an abuse of its processes to address perceived exploitation of the vulnerable, without recourse to such ancient remedies”.³⁶
- 18.29 More recently, the Supreme Court in *Waterhouse v Contractors Bonding* considered the circumstances in which a litigation funding agreement may amount to an abuse of the court's process justifying a stay of proceedings.³⁷ It broadly defined categories of conduct that may attract the intervention of the court on traditional grounds to include proceedings that:³⁸

³³ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 11.

³⁴ High Court Rules 2016, r 15.1(1). See also District Court Rules 2014, r 15.1(1). In *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30] the Supreme Court accepted that the power, under the High Court Rules or the inherent powers of a court, to stay a proceeding for abuse of process is not limited to the narrow tort of abuse of process.

³⁵ *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 (HL) at 536.

³⁶ *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [45]–[46].

³⁷ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

³⁸ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [27] citing IH Jacob “The Inherent Jurisdiction of the Court” (1970) 23 CLP 23 at 43.

- (a) Deceive the court, are fictitious or a mere sham.
 - (b) Use the process of the court in an unfair or dishonest way, for some ulterior or improper purpose or in an improper way.
 - (c) Are manifestly groundless, without foundation or serve no useful purpose.
 - (d) Are vexatious or oppressive.
- 18.30 In addition, the Supreme Court found that a litigation funding arrangement can be challenged as an abuse of process if the funding arrangement effectively assigns a bare cause of action in circumstances where that is impermissible.³⁹ In assessing whether a litigation funding arrangement effectively amounts to an assignment of a bare cause of action, the Court said regard should be had to the arrangement as a whole, including the level of control and profit share of the funder, as well as the role of the lawyers acting.⁴⁰ The Court noted that the rule against assignments of bare causes of action “had its origins in the torts of maintenance and champerty but now seems to have an independent existence of its own”.⁴¹
- 18.31 In addition to a stay of proceedings for abuse of process, an opponent who suffers damage because of meddlesome litigation procured by a funder may seek a non-party costs order against that funder. The Commission considered this remedy in its 2001 report but noted that an opponent’s loss may extend beyond costs (see discussion above). We discuss non-party costs orders in more detail in Chapter 15.

SHOULD THE COURT’S ABILITY TO FIND A CONTRACT UNENFORCEABLE ON GROUNDS OF PUBLIC POLICY OR ILLEGALITY BE PRESERVED?

- 18.32 Another option is to abolish the torts of maintenance and champerty while preserving, through legislation, “any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal”, or words to similar effect (a preservation provision). This option leaves open the possibility of a court finding particular litigation funding arrangements to be invalid as an abuse of process, for example, while making it clear that the mere fact of litigation funding is not of itself an abuse of process.
- 18.33 As we noted above, the torts of maintenance and champerty have been abolished in England and Wales,⁴² Singapore,⁴³ and the Australian states of Victoria, New South Wales,

³⁹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

⁴⁰ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57]. There will not be an abuse of process where the effective assignment under a funding agreement is in favour of a party with a genuine commercial interest: *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [77]. See also *Trendtex Trading Corp v Credit Suisse* [1980] QB 629 (CA) at 645; and *Samy Trustee Ltd v Pauanui Dream Estate Ltd* [2020] NZHC 2118 at [25].

⁴¹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57] citing the discussion in Stephen Todd “Parties” in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) Ch 23 at [23.12]; Marcus Smith and Nico Leslie *The Law of Assignment* (2nd ed, Oxford University Press, Oxford, 2013) at [23.54]–[23.56]; and RP Balkin and JLR Davis *Law of Torts* (4th ed, LexisNexis Butterworths, Chatswood (NSW), 2009) at [25.40]–[25.41] and [29.22].

⁴² Criminal Law Act 1967 (UK), ss 13–14.

⁴³ Civil Law Act 1999 (Singapore), ss 5A–5B.

South Australia, Australian Capital Territory and Tasmania.⁴⁴ Most of these jurisdictions preserve the court's ability to find that a funding agreement is unenforceable if it is contrary to public policy or otherwise illegal.

- 18.34 The courts in Australia and England and Wales have taken different approaches to the scope that might be given to public policy and illegality in this context. The High Court of Australia in *Campbells Cash and Carry Pty v Fostif Pty (Fostif)* held that the terms of a litigation funding arrangement, which gave the funder control of the litigation and would yield a significant profit, did not constitute an abuse of process or warrant condemnation as being contrary to public policy.⁴⁵ The Court stated:⁴⁶

That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?

- 18.35 The Court declined to formulate an overarching rule of public policy that would bar the prosecution of an action in which the funder shares in the proceeds of the litigation, or would bar the prosecution of certain actions according to the level of the funder's control or reward.⁴⁷ The decision in *Fostif* unequivocally concluded that litigation funding arrangements of the kind regularly used in class actions are enforceable and are not contrary to public policy – at least in those states where both the crime and torts of maintenance and champerty have been abolished.⁴⁸
- 18.36 This is different from the position in England and Wales. There, if a funder has excessive control over the litigation or is entitled to an excessive share of any recovery, this is likely to lead to a finding of champerty within the limits of the preservation provision in section 14(2) of the Criminal Law Act 1967 (UK).⁴⁹
- 18.37 In Aotearoa New Zealand, the Commission's 2001 report rejected the option of abolishing the torts of maintenance and champerty subject to a preservation provision.⁵⁰ As noted

⁴⁴ Victoria was the first state to do so in 1969. New South Wales later followed suit, as did South Australia, the Australian Capital Territory, and Tasmania. See Wrongs Act 1958 (Vic), s 32; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), ss 3–4; Civil Liability Act 2002 (NSW), sch 2 cl 2; Criminal Law Consolidation Act 1935 (SA), sch 11; Civil Law (Wrongs) Act 2002 (ACT), s 221; and Civil Liability Act 2002 (Tas), s 28E(ba) and (bb).

⁴⁵ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [92].

⁴⁶ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [89].

⁴⁷ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [91].

⁴⁸ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.50]. See also *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [93]–[95].

⁴⁹ Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-055]–[8-057]. See also Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.48].

⁵⁰ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 7.

above, it concluded that no great simplification of the law would be achieved by following these precedents.⁵¹ However, since that report, a body of case law has developed in Australia and England and Wales, which elaborates on what may be achieved by the adoption of a preservation provision.

- 18.38 The Law Reform Commission of Western Australia is currently considering this option. In its 2019 discussion paper, *Maintenance and Champerty in Western Australia*, it also noted that a proviso like that adopted in England and Wales and other Australian jurisdictions would have the advantage of having a body of case law behind it to clarify its meaning.⁵²

QUESTIONS

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?

⁵¹ Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 11.

⁵² The Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Discussion Paper, 2019) at 34.

CHAPTER 19

Funder control of litigation

INTRODUCTION

19.1 In this chapter, we consider:

- (a) The concern with funder control of litigation.
- (b) The level and kinds of funder control, influence, and participation that may be appropriate.
- (c) Whether existing mechanisms for managing funder control are adequate.
- (d) Whether the concern regarding funder control can be managed through minimum contract terms.

WHAT IS THE CONCERN WITH FUNDER CONTROL?

19.2 Control of litigation by a third party is one of the key concerns underlying maintenance and champerty.¹ The concern is that a third-party maintainer will attempt to control the funded claim for their own ends.² Such behaviour could be seen to undermine the integrity of the court system. Further, the prospect of losing control of the direction of the case or its resolution to decide when to stop can be unsettling for claimants.

19.3 However, litigation funders have a legitimate commercial interest in protecting their investments. Funders want to be kept informed of important developments in the litigation and most will also expect to be consulted before major decisions are taken, particularly in relation to settlement.³ They may also want to approve or choose the legal team responsible for conducting the case. Funders are unlikely to invest in litigation if they are not allowed some measure of control to protect their investments.

¹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [45].

² In *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [65], the High Court explained:
... concern remains to ensure that funders do not have control over claimants' causes of action so as to pursue and determine them in their own interests, rather than facilitating pursuit by those who are entitled to assert the causes of action.

³ Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-059].

- 19.4 In *Waterhouse v Contractors Bonding*, the Supreme Court acknowledged the tension between ensuring claimants retain meaningful control over their claim and the vindication of their rights, and the legitimate business interests of litigation funders in protecting their investments. The Court accepted that:⁴

... 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.

WHAT KINDS OF FUNDER CONTROL MAY BE APPROPRIATE?

- 19.5 In some circumstances, it may be difficult to pinpoint where proper consultation with funders ends and improper control begins.⁵ The line between acceptable and unacceptable funder control is inevitably a matter of degree and may vary depending on the nature of the funded plaintiff or the nature of the funded litigation. For example, funders may prefer to exercise more control in funded representative actions than in funded commercial disputes. In the former, the funded plaintiffs may have little or no litigation experience, whereas funded plaintiffs who are commercial parties are likely to be more experienced and engaged in the litigation.⁶ The funder's expertise may be of value to inexperienced plaintiffs; at the same time, such plaintiffs may also be less likely to be able to effectively protect their own interests.⁷

- 19.6 In Aotearoa New Zealand, the question of how much funder control is appropriate has been considered in the context of applications for stays of proceedings. When considering whether a litigation funding agreement amounts to an abuse of process justifying a stay, the courts will look at the funding arrangements as a whole, including the funder's control of the litigation (as well as its profit share and the role of the lawyers acting).⁸ In *PricewaterhouseCoopers v Walker (PwC v Walker)*, Elias CJ suggested that:⁹

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

- 19.7 Comparable jurisdictions have taken different views on the extent to which funder control is acceptable. Australian courts have taken the most liberal view. In *Campbells Cash and Carry Pty v Fostif Pty (Fostif)*, the High Court of Australia held that an arrangement to fund a class action did not constitute an abuse of process or warrant condemnation as being contrary to public policy, even though its terms gave the funder predominant

⁴ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [46]. See also *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [66] where Dobson J said it would be "somewhat naive to expect that he who pays the piper will not have some ability to call the tune". See also *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [89] and [91].

⁵ Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-059].

⁶ Nick Rowles-Davies *Third Party Litigation Funding* (Oxford University Press, Oxford, 2014) at 220. This is consistent with our preliminary conversations with litigation funders.

⁷ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 62–63.

⁸ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

⁹ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [122].

control of the litigation (and would yield the funder a significant profit).¹⁰ The Court said it is “hardly surprising” that someone who funds litigation would wish to control the litigation.¹¹

- 19.8 Following *Fostif*, Australian funders have been able to exercise considerable control over funded class actions. Indeed, it is common practice for the participating class to cede control of the proceedings to the funder who then provides day-to-day instructions to the lawyer.¹² Claimants may still be asked to provide input into the bigger decisions, such as settlement decisions. If the claimant’s instructions are contrary to the funder’s instructions, the lawyer must follow the claimant’s instructions.¹³
- 19.9 In our preliminary conversations with some Australian funders, we were told that class members appreciate the hands-on role of litigation funders in Australian class actions, as funders have considerable litigation experience whereas most class members have none. Outside of class actions, we were told that funders tend to have less day-to-day involvement in funded litigation and perform more of a strategic oversight role, as claimants are generally more commercially sophisticated and engaged.
- 19.10 Other comparable jurisdictions have often taken a more cautious approach, where funders who take (or appear to take) too much control of the litigation risk the funding arrangement being found to be champertous and contrary to public policy. Jurisdictions with codes of conduct or guidelines for third party funders tend to reflect this caution in their rules or guidance.
- 19.11 In Canada and England and Wales, for example, funders are often wary of taking what the courts might consider to be an unacceptable level of control of the litigation.¹⁴ The degree of control exercised by a funder over a class action proceeding remains a factor in considering whether or not the funding arrangement is champertous and unenforceable.¹⁵
- 19.12 The view that funders should not take too much control is reflected in the *Code of Conduct for Litigation Funders* of the Association of Litigation Funders of England and Wales (ALF Code). The ALF Code provides: “A Funder... will not seek to influence the

¹⁰ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [88] per Gummow, Hayne and Crennan JJ.

¹¹ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [89] per Gummow, Hayne and Crennan JJ.

¹² Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.58] citing Jason Betts, David Taylor and Christine Tran “Litigation Funding for Class Actions” in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) 205 at 211.

¹³ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.71(c)].

¹⁴ Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at [8-057].

¹⁵ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.59]; and Nick Rowles-Davies *Third Party Litigation Funding* (Oxford University Press, Oxford, 2014) at [10.72].

Funded Party’s solicitor or barrister to cede control or conduct of the dispute to the Funder”.¹⁶

ARE EXISTING MECHANISMS TO MANAGE FUNDER CONTROL ADEQUATE?

Powers of the court to manage proceedings

19.13 In this section we consider whether the concern about funder control can be managed through the court’s powers to:

- (a) Order a stay of proceedings.
- (b) Strike out proceedings.
- (c) Order a funder to pay non-party costs.

19.14 These powers were explored in detail in Chapter 15.

Stay of proceedings

19.15 Proceedings can be stayed to prevent them from continuing without the leave of the court.¹⁷ This power allows the court to prevent misuse of its procedures.¹⁸ A court may order a stay if the conduct of a third party (such as a litigation funder) is “seriously burdensome, prejudicial or damaging” or “productive of serious and unjustified trouble and harassment”.¹⁹

19.16 As discussed in Chapter 15, the question of funder control of proceedings could remain a contentious issue if a court is asked to directly consider whether litigation funding is an impermissible assignment of a bare cause of action or an abuse of process.

19.17 In *PwC v Walker*, the majority of the Supreme Court was satisfied that the funder could not exercise inappropriate control, based on undertakings the funder made to the Court.²⁰ The majority considered that, in the absence of these undertakings, it was arguable the funder had a level of control and profit that amounted to an impermissible assignment of PVL’s causes of action.²¹ Elias CJ considered that the funder could exercise inappropriate control despite the undertakings, and regarded the funder’s control over settlement or discontinuance to be “substantial” when compared to other funding agreements the courts had seen.²² Given this case, the parameters of court oversight of funder control through the power to stay proceedings remain somewhat uncertain.

¹⁶ Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.3].

¹⁷ High Court Rules 2016, r 15.1(3); and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30].

¹⁸ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [28] as cited by the New Zealand Supreme Court in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [32].

¹⁹ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [28] as cited by the New Zealand Supreme Court in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [32]. See also *Cain v Mettrick* [2020] NZHC 2125 at [65].

²⁰ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [91].

²¹ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [82].

²² *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [126].

Striking out proceedings

19.18 A case can be struck out if it does not disclose a reasonably arguable cause of action or is frivolous or vexatious.²³ We are not aware of any proceedings that have been struck out on account of litigation funding arrangements amounting to an abuse of process. We think it is unlikely the courts would strike out proceedings on account of issues with the funding agreement, as the mechanism is directed at issues with the cause of action itself.

Non-party costs orders

19.19 To a limited extent, concerns about funder control may be managed by non-party costs orders. In exceptional circumstances, the court can make a costs award against a non-party litigation funder who takes an active role in proceedings,²⁴ even in the absence of an abuse of process or any impropriety.²⁵ Any non-party costs being awarded directly against a funder may carry a reputational risk for that funder. For this reason, the possibility of non-party costs may discipline the amount of control that a funder seeks to assert in any proceeding.²⁶

Maintenance and champerty

19.20 In addition to these powers, the courts could rely on the torts of maintenance and champerty. However, these torts have not been used to date in Aotearoa New Zealand, and in the previous chapter we identified several options for reform that would either abolish or limit the future relevance of these torts to litigation funding arrangements.

Tax law

19.21 Tax law may also constrain the control that overseas-based funders have over a claim. To avoid double taxation on litigation funding activities in Aotearoa New Zealand and in their home jurisdiction, an overseas-based funder may seek a product ruling from the Commission of Inland Revenue. Harbour Litigation Funding has sought three product rulings under the Tax Administration Act 1994, which confirm that its funding commissions will not be subject to taxation in Aotearoa New Zealand.²⁷ A condition of these product

²³ High Court Rules 2016, r 15.1(1).

²⁴ High Court Rules 2016, r 14.1 provides that costs are at the discretion of the court. In *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 (HC), the High Court followed *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 (HL) and held that non-parties could be ordered to pay costs where justice so required. That decision has been followed in the New Zealand courts and was authoritatively confirmed by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145. See also the discussion in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52] and [64].

²⁵ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52]; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [33]; and *Poh v Cousins & Associates* HC Christchurch CIV-2010-409-2654, 4 February 2011 at [36].

²⁶ See *Bligh v Earthquake Commission* [2019] NZHC 2236.

²⁷ *Product Ruling – BR PRD 15/04 of Te Tari o te Rōia Tāke Matua | Office of the Chief Tax Counsel* (6 November 2015); *Product Ruling – BR PRD 18/02 of Te Tari o te Rōia Tāke Matua | Office of the Chief Tax Counsel* (23 February 2018); and *Product Ruling – BR PRD 18/04 of Te Tari o te Rōia Tāke Matua | Office of the Chief Tax Counsel* (19 September 2018).

rulings is that Harbour will not exercise control over the litigation it is funding.²⁸ There is therefore a significant commercial incentive for those seeking to benefit from similar tax rulings to avoid controlling the proceedings they fund in Aotearoa New Zealand.

- 19.22 We are not aware of any other overseas-based funders obtaining a product ruling. This may be due to the existence of double tax agreements with other countries, including Australia and the United Kingdom,²⁹ which would govern funders situated in those jurisdictions.³⁰ There may also have been situations where funders have applied for a private ruling rather than a public product ruling.³¹

OPTION FOR REFORM – MINIMUM CONTRACT TERMS

- 19.23 One option for managing funder control is to encourage or require litigation funders to include minimum terms in their litigation funding agreements.
- 19.24 The use of minimum contract terms to manage funder control has been adopted in the ALF Code, by the Abu Dhabi Global Market Courts and, in the arbitration context, in Singapore and Hong Kong. Examples of minimum terms from these precedents include terms that:
- (a) Provide the funder will not seek to influence the plaintiff or the plaintiff’s lawyer to give control or conduct of the litigation to the funder.³²
 - (b) Provide the funder will not take any steps that cause or are likely to cause the funded party’s legal representation to act in breach on their professional duties.³³
 - (c) Set out the funder’s role in decisions about whether to settle the proceedings and on what terms.³⁴
 - (d) Set out the circumstances in which the funder may terminate the litigation funding agreement and that the funder shall not be entitled to terminate funding except in

²⁸ *Product Ruling – BR PRD 15/04 of Te Tari o te Rōia Tāke Matua | Office of the Chief Tax Counsel* (6 November 2015) at 5; *Product Ruling – BR PRD 18/02 of Te Tari o te Rōia Tāke Matua | Office of the Chief Tax Counsel* (23 February 2018); and *Product Ruling – BR PRD 18/04 of Te Tari o te Rōia Tāke Matua | Office of the Chief Tax Counsel* (19 September 2018).

²⁹ See Double Taxation Relief (Australia) Order 2010, sch 1; and Double Taxation Relief (United Kingdom) Order 1984, sch 1. For a full list of double tax agreements see Te Tari Taake | Inland Revenue “Tax Treaties” <www.taxpolicy.ird.govt.nz>.

³⁰ See Te Tari Taake | Inland Revenue *Binding rulings: How to get certainty on a tax position* (IR715, February 2020) at 11. Note Harbour Litigation Funding’s fund in the three product rulings discussed above is located in the Cayman Islands.

³¹ Tax Administration Act 1994, ss 91E(1) and 91EC(1).

³² For example, Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.3]; Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.9]; Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 9(1)(b); and Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [6.1.4].

³³ For example, Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.2]; Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.9(2)]; Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 9(1)(a); and Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [6.1.1].

³⁴ For example, Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [11.1]; Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 10; and Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [7.1.1].

those specified circumstances.³⁵ The specified circumstances may be left to the funder and plaintiff to agree upon,³⁶ or the circumstances may be prescribed.³⁷ For example, that the funder may only terminate funding if:³⁸

- (i) it reasonably ceases to be satisfied about the merits of the dispute;
- (ii) reasonably believes that the dispute is no longer commercially viable; or
- (iii) reasonably believes there has been a material breach of the funding agreement by the funded party.

(e) Set out the process for resolving disputes between the funder and the funded party about settlement or termination of funding (or any dispute).³⁹ The process may be left to the funder and funder party to agree upon, or the process may be prescribed. For example, that a binding opinion shall be obtained from a Queen’s Counsel.⁴⁰

19.25 Minimum contract terms could be imposed on funders as mandatory requirements with consequences for non-compliance,⁴¹ or as non-binding guidance.⁴² They could be established by legislation, court rules,⁴³ or through industry self-regulation.⁴⁴

19.26 Mandatory terms would be the most certain way to ensure that the terms are actually reflected in litigation funding agreements. An advantage of using minimum contract terms to manage funder control is that they vest a right of enforcement in the party most affected, the plaintiff. At the same time, the plaintiff may lack the means to enforce compliance, especially given their reliance on litigation funding in the first place to pursue their claim.

19.27 To overcome this difficulty, compliance with mandatory minimum contract terms could potentially be overseen by the courts. Regulations could empower the courts to vary the terms of the funding agreement to comply with the minimum terms (or require funders to amend any terms that give them too much control) and could specify consequences for non-compliance. Alternatively, compliance with mandatory minimum contract terms could

³⁵ For example, Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [11.2] and [12]; Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 11; and Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.13]–[2.14].

³⁶ For example, Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 11.

³⁷ For example, Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [11.2]; and Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.13].

³⁸ For example, Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [11.2]; and Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.13].

³⁹ For example, Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 10; and Hong Kong Code of Practice for Third Party Funding in Arbitration at [2.17].

⁴⁰ For example, Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [13.2].

⁴¹ For example, Abu Dhabi Global Market Courts Litigation Funding Rules 2019. The Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) is binding on members of the Association of Litigation Funders.

⁴² For example, in the arbitration context, Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017).

⁴³ For example, Abu Dhabi Global Market Courts Litigation Funding Rules 2019.

⁴⁴ For example, Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018); and Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017).

potentially be overseen by a new statutory body, or an industry body. The form of any regulation and oversight of litigation funding is considered in more detail in Chapter 23.

- 19.28 It may be that minimum terms are unnecessary in cases where a sophisticated plaintiff seeks litigation funding as an alternative form of finance for commercial reasons. In such cases, the funder and plaintiff are likely to be able to negotiate terms on an even playing field, particularly if there is a competitive litigation funding market. On the other hand, there may be advantages in adopting a consistent approach to regulation of litigation funding in all cases. For instance, a consistent approach may increase certainty and transparency with respect to litigation funding arrangements and minimise the need for court scrutiny.

QUESTIONS

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

INTRODUCTION

- 20.1 In funded litigation there is a tripartite relationship between the funder, the funded plaintiff, and their lawyer. In many instances the interests of all three will align. However, in some circumstances their interests may diverge and conflict. Conflicts of interest may arise:
- (a) between a litigation funder and funded plaintiff (funder-plaintiff conflicts of interest); and
 - (b) between a lawyer and their client in funded proceedings (lawyer-plaintiff conflicts of interest).
- 20.2 In this chapter, we consider how potential conflicts of interest in litigation funding arrangements can best be managed.

FUNDER-PLAINTIFF CONFLICTS OF INTEREST

What is the concern?

- 20.3 Often the interests of the funder and the funded plaintiff are likely to align since both parties will want an inexpensive and efficient resolution of the dispute for the highest settlement or damages award possible.¹ For example, the funder and the plaintiff have a shared interest in reducing legal fees. It has been suggested that a funder may be able to use their position as a repeat purchaser of legal services to obtain those services at a lower rate which is advantageous to the plaintiff.²
- 20.4 However, their interests might diverge and potentially come into conflict at certain points during the proceedings. For instance, the plaintiff may wish to advance particular causes of action that the funder believes lack merit, or personal factors such as the stress of litigation may affect how the plaintiff wants to act.

¹ See IMF Bentham Ltd “Submission to Victorian Law Reform Commission: Litigation Funding and Group Proceedings Project” (6 October 2017) at [3.17]; and Nick Rowles-Davies *Third Party Litigation Funding* (Oxford University Press, Oxford, 2014) at [10.74].

² See Vicki Waye “Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs” (2007) 19(1) Bond LR 225 at 241; and Wayne Attrill *Ethical Issues in Litigation Funding* (12 November 2008) at 15. See also Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 59.

- 20.5 Given their role in funding a plaintiff's litigation costs, a litigation funder will inevitably have some influence and control over proceedings, and the plaintiff will likely depend on the funding provided. This dynamic creates a risk that a funder may use its influence and control to protect its interests at the expense of the plaintiff's interests when those interests begin to diverge.
- 20.6 Misaligned interests between a funder and plaintiff are particularly likely to arise and create problems where one wishes to settle but the other does not.³ As discussed in Chapter 14, funding agreements may include provisions for resolving disagreements about whether to settle. Funding agreements may also entitle the litigation funder to withdraw funding, with or without cause. Such termination provisions can create subtle forms of pressure on plaintiffs and influence the power dynamics in settlement discussions.

Potential for conflict when plaintiff is motivated to settle

- 20.7 Unlike funders, plaintiffs may not always be motivated solely by claim maximisation.⁴ For instance, a plaintiff may, for the sake of certainty, or to avoid further litigation and delay, wish to accept a settlement offer for less than the projected full claim value. However, settlement at this lesser sum may not allow the funder to make a (sufficient) profit from its investment.⁵ Additionally, a plaintiff may wish to accept alternative settlement offers including goods or services which may not be attractive to a funder who will want a cash settlement.⁶ The plaintiff may want to settle the claim quickly or even withdraw; however, this may not align with the interests of the funder who is driven to maximise profit.

Potential for conflict when funder is motivated to settle

- 20.8 Just as stress and other factors may influence how a plaintiff wants to pursue or settle a claim, external factors (separate from the management of an individual case) may likewise place pressure on the funder to settle a claim or pursue a different course from that initially contemplated. In the context of Australian class actions, Michael Legg observes:⁷

Litigation funders are profit-oriented entities that fund a portfolio of cases to further their own commercial interests, including the interests of their investors, which may conflict with the interests of group members.

³ See Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper* (July 2017) at [3.62]; and Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at 72 (recounting reports of funders placing pressure on solicitors to settle class action proceedings prematurely). See also Wayne Attrill "The regulation of conflicts of interest in Australian litigation funding" (2013) 2 JCVLP 193 at 200 noting that:

... settlement has long been identified as a potential conflict "hot spot" given the risk that funders (or lawyers or representatives) might seek to force a settlement on the claimants in order to advance the funders', lawyers', or representatives' own interests.

⁴ Vicki Waye "Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19(1) Bond LR 225 at 237.

⁵ Vicki Waye "Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19(1) Bond LR 225 at 237.

⁶ Vicki Waye "Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19(1) Bond LR 225 at 238. See also Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 60.

⁷ Michael Legg "Class Action Settlements in Australia — The Need for Greater Scrutiny" (2014) 38 MULR 590 at 593.

20.9 A single case will likely only be one (potentially small) part of a funder's overall investments. Wider commercial pressures may affect the funder's interest in or ability to continue with that case. For instance, an immediate problem with cash flow could result in a funder wanting to accept an early but low settlement offer.⁸ Similarly, a funder may be tempted to settle early where a successful resolution may assist their financial position and be useful for attracting additional funds from new investors.⁹ While accepting such an offer could be in the interests of a funder (and its investors), it could come at the expense of the plaintiff who otherwise may have been able to get a greater amount if they were able to continue with the litigation.

Are existing mechanisms for managing funder-plaintiff conflicts adequate?

Parties negotiate their own contract terms

20.10 Currently, funders and plaintiffs are responsible for negotiating funding agreements privately as they see fit, including terms about how any conflicts of interests will be managed.

20.11 Maintaining the status quo would mean the parties to a funding agreement are free to strike the bargains they deem necessary to protect themselves from potential conflicts of interest. A plaintiff may seek legal advice on the proposed terms, and benefit from legal representation in any negotiations. While this might provide adequate protection for commercially sophisticated or experienced parties, there is a danger that inexperienced plaintiffs may not be able to afford a lawyer and may not adequately foresee the risks of conflicts of interest or have the ability to assess the terms they agree to. This can create an asymmetry of bargaining power between the funder and claimant.

20.12 In relation to representative and class actions, the relative passivity of class members and their dependency on litigation funding can further elevate the risk of their interests not being adequately protected for the duration of the litigation. For these reasons, we think contractual autonomy is unlikely to meet the concern in all situations.

Options for reform

20.13 In this section we outline three options for better managing the risk of funder-plaintiff conflicts of interests:

- (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.

20.14 We discuss the general form of regulation in more detail in Chapter 23. Broadly, compliance with these options could be overseen by an industry body, a regulator or the courts.

⁸ John Walker "Policy and Regulatory Issues in Litigation Funding Revisited" (2014) 55 CBLJ 85 at 97.

⁹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 60.

Minimum contract terms

- 20.15 The first option is to require (or encourage) litigation funders to include minimum terms to manage funder-plaintiff conflicts of interest in their funding agreements. For instance, minimum terms that:
- (a) Include a procedure for managing conflicts of interest.¹⁰
 - (b) Prohibit any discretionary right for a funder to terminate the funding agreement.
 - (c) State that the funder may only withdraw funding and terminate the agreement in specified circumstances, for instance, if the funder: reasonably ceases to be satisfied about the merits of the dispute; reasonably believes that the dispute is no longer commercially viable; or reasonably believes that there has been a material breach of the agreement by the plaintiff.¹¹
 - (d) Include 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.¹²
 - (e) Include a general procedure for resolving disputes, including in relation to proposed settlement agreements.¹³
 - (f) Oblige 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.¹⁴
 - (g) Give the plaintiff a right to terminate the funding agreement if the above terms are not complied with.
- 20.16 As noted, the relative passivity of class members and their dependency on litigation funding can elevate the risk of their interests not being adequately protected for the duration of the litigation. Therefore, additional terms may be required in the context of representative or class actions. For example:
- (a) A cooling-off period in which members of the represented group or class have an opportunity to seek legal advice.¹⁵

¹⁰ To similar effect, see the Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 9(2) (which deals with funding agreements involving more than one claimant); and the Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.6]–[2.7].

¹¹ See Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [11.2]; and the Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.13].

¹² In Australia, RG 248 provides that the regulator will “expect the funder and/or lawyer will consider” various terms for the funding agreement. This proposed standard for reviewing and deciding on settlement offers is modelled on [RG 248.71(d)]: Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.71].

¹³ See, to similar effect but in the international commercial arbitration context Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [6.2.3].

¹⁴ See Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.6] and [2.7(4)(b)].

¹⁵ See Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.71(b)].

- (b) An obligation to disclose any proposed settlement to all members of the represented group or class.¹⁶
- 20.17 In some comparable jurisdictions, similar terms are imposed on funders either as mandatory requirements under court rules,¹⁷ or as non-binding guidance under a regulatory measure.¹⁸ Minimum contract terms to manage funder-plaintiff conflicts of interest could also be established by legislation or through industry self-regulation. We note there are no minimum contract terms for managing funder-plaintiff conflicts in the *Code of Conduct for Litigation Funders*, with which members of the England and Wales Association of Litigation Funders are required to comply (ALF Code).
- 20.18 The most certain way to ensure that the terms are reflected in funding agreements would be to adopt them as mandatory terms. An advantage of using minimum contract terms to manage funder-plaintiff conflicts of interest is that they vest a right of enforcement in the party most affected, the claimant. At the same time however, the plaintiff may lack the means to enforce the terms, especially given their reliance on litigation funding in the first place to pursue their primary claim.
- 20.19 To overcome this difficulty, compliance with minimum mandatory terms could potentially be overseen by the courts. The courts could, for example, be empowered to vary the terms of the funding agreement to comply with the minimum terms.

Conflicts management policy

- 20.20 An alternative approach is to require funders to maintain an adequate conflicts management policy.
- 20.21 Australia provides an interesting example. In 2013, the Australian Government introduced regulations exempting litigation funders from financial services regulation on the condition that funders maintain procedures to effectively manage conflicts of interest.¹⁹ The Australian Securities and Investments Commission's (ASIC) Regulatory Guide 248 (RG 248) provides guidance on how funders can comply with the obligation to maintain adequate practices for managing and disclosing conflicts of interest. RG 248 is limited in its application to the funding of class actions ("litigation funding schemes") and insolvency cases.²⁰ Failure to maintain adequate practices for managing conflicts is an offence.²¹
- 20.22 New regulations came into effect on 22 August 2020 requiring funders operating litigation funding schemes to hold an Australian Financial Services Licence and comply with the

¹⁶ See Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.71(e)].

¹⁷ The approach is taken in the Abu Dhabi Global Market Courts Litigation Funding Rules 2019.

¹⁸ This approach is taken for Singaporean arbitration under the Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017). See also Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.71].

¹⁹ Corporations Regulations 2001 (Cth), r 7.6.01AB(4).

²⁰ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013).

²¹ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.1].

managed investment scheme requirements in the Corporations Act 2001 (Cth).²² RG 248 will continue to apply to funders of class actions and insolvency proceedings.

- 20.23 Under RG 248, litigation funders are responsible for determining their own conflicts management policy on the basis that each funder is best placed to know how conflicts of interest might arise in the context of its business operations. RG 248 sets out some practices for managing conflicts, but they are not intended to be exhaustive.
- 20.24 RG 248 stresses the importance of disclosure as a “key mechanism” for managing potential and actual conflicts of interest.²³ It also states ASIC’s expectation that “disclosure of conflicts of interest will be ongoing throughout”,²⁴ and that all disclosures will be “timely, prominent and specific”.²⁵ Disclosure “may be given in writing or verbally”, but if given verbally, “appropriate records of the disclosure should be retained”.²⁶
- 20.25 In terms of settlements, RG 248 provides that any settlement terms should be approved by counsel (or senior counsel, if involved), and lists factors for counsel to consider when assessing whether a settlement is fair and reasonable.²⁷ RG 248 also deals with minimum terms that funders are expected to include in funding agreements concerning conflicts management. These include those listed above.²⁸
- 20.26 In 2015, the Australian Treasury suggested that the approach taken by the Government and ASIC had been successful in maintaining access to justice.²⁹ This was evidenced by an increase in the number of class actions filed and the number of funders active in the market. The Australian Treasury also reported that the cost of compliance with RG 248 was relatively low.³⁰ However, stakeholders were divided in their support for RG 248, with some claiming that the regulation did not provide any additional benefit to plaintiffs and instead had increased the cost of litigation funding. Further, they commented that RG 248

²² Corporations Amendment (Litigation Funding) Regulations 2020 (Cth). After some initial confusion, the Government clarified that the changes are confined to class action litigation funders and do not affect funders of insolvency litigation or single plaintiff claims.

²³ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.51].

²⁴ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.56].

²⁵ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.59].

²⁶ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.57]. Some commentators have noted that conflict management procedures which stress the importance of disclosure, such as RG 248, may be ineffective. For example, Vince Morabito and Vicki Waye suggest that “disclosing conflicts of interest rarely enhances rational consumer decision making”: Vince Morabito and Vicki Waye “Seeing past the US bogey – Lessons from Australia on the funding of class actions” (2017) 36 CJK 213 at 235.

²⁷ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.94]–[RG 248.95].

²⁸ RG 248 provides that the regulator will “expect the funder and/or lawyer will consider” various terms for the funding agreement: Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.71].

²⁹ Australian Government Treasury *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)* (October 2015).

³⁰ Australian Government Treasury *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)* (October 2015) at [85].

did not provide a mechanism to enforce the requirement to have procedures in place to address conflicts of interest.³¹

- 20.27 In 2018, the Victorian Law Reform Commission reflected this concern in its consultation paper on litigation funding and group proceedings and questioned whether the “light touch” approach to regulation was enough to protect plaintiffs in class actions.³²
- 20.28 The Australian Law Reform Commission (ALRC) has observed that there is no way to determine whether or to what extent funders are following the guidance and obligations in RG 248. It recommended strengthening RG 248 by requiring funders of class actions to report annually to the regulator on their compliance with the obligation to implement adequate practices and procedures to manage conflicts of interest.³³ The ALRC noted that this reporting requirement, in isolation, may not be an effective tool against misconduct. Nevertheless, it believed reporting may help to prevent more overt breaches and could both promote investigation by a regulator where required and create a compliance-focused culture among litigation funders.³⁴ The ALRC recognised that the additional reporting requirement would require more resources for the regulator and could increase the costs of funding. It commented that, assuming funders are already compliant, the burden should be a small one.³⁵
- 20.29 Hong Kong’s *Code of Practice for Third Party Funding of Arbitration* (HK Code) requires funders to maintain effective procedures for managing conflicts of interests on substantially the same terms as RG 248.³⁶ The HK Code requires the procedures to be written, implemented and regularly reviewed (at intervals no greater than 12 months).³⁷ The HK Code is binding on all third-party funders,³⁸ although it does not provide for robust enforcement and failure to comply with it will not result in judicial or other proceedings.³⁹
- 20.30 We note that the ALF Code does not address conflicts of interest. Nonetheless, industry self-regulation would be one approach to implementing a requirement to maintain such policies. As discussed in Chapter 23 however, the litigation funding industry in Aotearoa New Zealand may be too small for self-regulation.

³¹ Australian Government Treasury *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)* (October 2015) at [64].

³² Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper* (July 2017) at [3.77].

³³ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 15.

³⁴ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.114].

³⁵ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.115].

³⁶ Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.6]–[2.7].

³⁷ Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.7(2)]–[2.7(3)].

³⁸ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98J.

³⁹ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98S.

Regulate funder control

- 20.31 While there may be many potential conflicts of interests between the funder and plaintiff, whether those *potential* conflicts become *actual* conflicts of interest will largely depend on the amount of control held by either party.⁴⁰ For instance, an entirely passive funder who has no control over the conduct of a proceeding cannot take decisions which, although in its own interests, may be against the interests of the plaintiff. In most cases however, funders are not entirely passive.
- 20.32 One option therefore is to have broader constraints on the amount of control a funder may exercise in a proceeding. Mechanisms for managing the level of control funders have in funded litigation are discussed in Chapter 19. However, the risk of conflicts of interest between funders and plaintiffs may not be able to be completely managed through regulating funder control. As noted, subtler forms of influence may be exerted even by a relatively passive funder, particularly if it retains the ability to terminate funding in a wide range of circumstances. Real consequences can flow from these pressures even where there is no explicit power for a party to act contrary to the interests of the other.

QUESTIONS

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?

⁴⁰ Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.13(c)].

LAWYER-PLAINTIFF CONFLICTS OF INTEREST

What is the concern?

20.33 The relationship of trust and confidence between lawyer and client is an essential tool for safeguarding the plaintiff's interests in funded litigation.⁴¹ It is a relationship that "must never be abused".⁴² However, litigation funding arrangements can complicate that relationship. Under a conventional retainer, the lawyer owes professional obligations to the client when providing legal services and the client pays the lawyer directly for those services. This straightforward exchange between the obligations owed and fees paid is interrupted in funded litigation, because while the lawyer still owes duties to the plaintiff, the lawyer's fees are usually paid by the funder.

20.34 In addition, the potential for conflicts of interest may arise from:

- (a) the lawyer's reliance upon the funder for the continuation of litigation;
- (b) the lawyer's desire to cultivate or maintain an ongoing relationship with the funder in the hope of securing future work; and/or
- (c) any commercial ties that develop between the lawyer and the funder (for example, where the lawyer has a financial interest in the funder).

20.35 The potential for conflicts of interest can exist in even the simplest funding arrangements. As Vicki Waye observes:⁴³

... although the legal practitioner may be solely employed by the claimholder, the legal practitioner is beholden to the litigation funder for the payment of client legal fees and has an incentive to please the litigation funder in order to attract repeat work. In some cases the litigation funder may even appoint the claim holder's legal advisers and representatives.

20.36 It should not be assumed that a funder's and lawyer's interests will always be aligned and in conflict with the plaintiff's. Nevertheless, the potential for a lawyer to favour the interests of the funder is significant. As discussed above, the funder and the plaintiff may have different interests at different stages of litigation. Conflict-prone stages include determining the litigation strategy or deciding whether to settle a claim. During these stages, the lawyer may be incentivised to protect or promote their own interests by advising or persuading the plaintiff to adopt the funder's preferred course of action.

20.37 Conflicts of interest between a lawyer and plaintiff in funded litigation are most likely to arise situations where the lawyer has an ongoing relationship with the funder, owes duties to both the funder and the plaintiff, and where the funder exerts control over litigation.⁴⁴

⁴¹ Wayne Attrill *Ethical Issues in Litigation Funding* (12 November 2008) at 15.

⁴² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 5.1.

⁴³ Vicki Waye "Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19(1) Bond LR 225 at 236–237.

⁴⁴ These three situations are explicitly identified by the Australian Securities and Investments Commission. See Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.13].

20.38 These situations are reported to be more common and more pronounced in class actions.⁴⁵ In Australia, it has been reported that lawyers and funders collaborate in the instigation of class actions, including in the selection of an appropriate representative plaintiff.⁴⁶ Furthermore, as we discuss in Chapter 12, a lawyer's duties to class members or members of a represented group are uncertain.

Ongoing relationship between lawyers and funders

20.39 Lawyers and funders can have a relationship beyond any given case. A lawyer and funder may work with each other over the course of multiple cases and may thereafter recommend each other to their clients. Such relationships may become problematic if the lawyer has a significant commercial interest in maintaining that relationship.⁴⁷ Some funders may also make funding conditional on only certain lawyers acting for the funded plaintiff. A lawyer who knows that a funder has identified them as a preferred lawyer, or who has consistently worked with a funder, may have an incentive to favour the interests of a funder in order to retain a mutually beneficial relationship. Even if the lawyer is not retained by the funder (see below), they may internalise the funders' interests to some degree.⁴⁸ This may result in a loss of focus by the lawyer on the plaintiff's interests.

Duties owed to both funder and plaintiff

20.40 Some funders may enter into contractual agreements with both the funded plaintiff and the lawyer who acts for the funded plaintiff. This enables the funder to give instructions to the lawyer in relation to the funded proceedings. The prevalence of contractual relationships between funders and lawyers appears to vary across comparable jurisdictions. For example, they are said to be uncommon in Australia (at least for single party litigation),⁴⁹ but commonplace in England.⁵⁰ We understand that the practice is uncommon in Aotearoa New Zealand.

20.41 If a lawyer owes duties to two parties with different interests, they may be unable to discharge their duties to one party without breaching their duties to the other. For example, the lawyer may think that the funder's due diligence documents that they have access to and which outline the funder's view of the case would help obtain a settlement for the plaintiff, but the funder may regard the documents as confidential.⁵¹ Alternatively,

⁴⁵ The Victorian Law Reform Commission commented that it had "been told that in class actions it is common for at least one, if not all, of these factors to exist": Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper* (July 2017) at [3.58].

⁴⁶ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper* (July 2017) at [3.62].

⁴⁷ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 62.

⁴⁸ Capital Strategic Advisors comments that "at worst, the funder becomes the lawyer's client": Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 59.

⁴⁹ Jason Geisker and Dirk Luff "Australia" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 1 at 8. See also Wayne Attrill "The regulation of conflicts of interest in Australian litigation funding" (2013) 2 JCivLP 193 at 199.

⁵⁰ Nick Rowles-Davies *Third Party Litigation Funding* (Oxford University Press, Oxford, 2014) at [1.29].

⁵¹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper* (July 2017) at [3.62].

the lawyer may receive information from the plaintiff that could cause the funder to withdraw from the funding agreement; however, by passing the information to the funder the lawyer would be breaching client confidentiality.⁵²

- 20.42 Other terms of the funding agreement which modify the lawyer-client relationship may also make it more difficult for the lawyer to act in the plaintiff's best interests. For example, waivers of confidentiality or agreements to share information may make it more difficult for the plaintiff to speak candidly about their interests. The lawyer will still have duties to the plaintiff, while knowing that the ordinary lawyer-client relationship has, for practical purposes, been hollowed out by the funding agreement.⁵³
- 20.43 While informed consent may be given for the lawyer to act for both funder and plaintiff, consent does not resolve the problem of how the lawyer can discharge their obligations to both parties in the event of a conflict. Under the current law, terminating one of the retainers may be the only option.⁵⁴
- 20.44 In the insurance context, it is common for the same lawyer to be retained by both the insurer and insured during litigation, and for the insurer to have significant control over the course of litigation.⁵⁵ While the insurance context may provide a useful comparison, it is not directly analogous. This is because the insurer's insurance rights and obligations with respect to the insured will generally not depend on the outcome of the litigation.

Funder controls litigation

- 20.45 A lawyer's duties to their client may be compromised if the client is a funded plaintiff and the funder is able to control the course of litigation. We discuss the issue of control more fully in Chapter 19. As explained in that chapter, a funder will typically be involved in the supervision of proceedings and can exert control through provisions in the funding agreement that enable the funder, for example, to withdraw funding. If the funder exercises control over the litigation, this may make the incentives or opportunities for the funded plaintiff's lawyer to prefer the funder's interests or preferred course of action more pronounced.
- 20.46 A plaintiff may have also very little involvement with their case if the funder takes over the day-to-day running of the case in collaboration with the claimant's lawyer.⁵⁶ This distancing of the plaintiff from their own case may disincentivise their lawyer from properly ascertaining or advising them about which strategies are in their best interests. Again, the lawyer will still have duties to the plaintiff but, practically speaking, may lack a relationship.

⁵² See Vicki Waye "Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19(1) Bond LR 225 at 238.

⁵³ There may however be limits to how far a lawyers duties can be waived. Vicki Waye suggests that it may be contrary to public policy to waive fiduciary duties under a retainer if this renders the client a merely "nominal claim holder... without any right to be consulted regarding the institution of proceedings, settlement, or other fundamental matters that run contrary to client interests". See Vicki Waye "Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19(1) Bond LR 225 at 241.

⁵⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 6.1.

⁵⁵ Vicki Waye "Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19(1) Bond LR 225 at 235 and 243–248.

⁵⁶ See Jason Geisker and Dirk Luff "Australia" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 1 at 8–9.

Are existing mechanisms for managing lawyer-plaintiff conflicts adequate?

20.47 Lawyers are subject to extensive duties regarding conflicts of interest. The *Rules of conduct and client care for lawyers* (2008) include duties on a lawyer to:

- (a) not act or continue to act for a client if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of the client (Rule 5.4);
- (b) disclose to the client any interest that touches on the matter in respect of which legal services are required, irrespective of whether a conflict exists (Rule 5.4.1);
- (c) not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious, and the interests of the lawyer and the client correspond in all respects (Rule 5.4.2);
- (d) not engage in a business or professional activity other than the practice of law where the business or professional activity would or could reasonably be expected to compromise the discharge of the lawyer's professional obligations (Rule 5.5);
- (e) not directly or indirectly offer to, or receive from, a third party any reward or inducement in respect of any advice given, referrals made, or any work done for a client (Rule 5.9); and
- (f) not act for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients (Rule 6.1).

20.48 There is, however, some uncertainty about how these duties would or should apply when issues arise in funded proceedings. It seems clear that non-disclosure to a plaintiff of arrangements between the lawyer and the funder would breach the lawyer's fiduciary duties to the plaintiff.⁵⁷ We are aware of only one case under the *Rules of conduct and client care for lawyers* involving a lawyer's conduct with respect to a litigation funding agreement but the case did not explicitly address the issue of lawyer-plaintiff conflicts of interest.⁵⁸ As noted above and discussed in Chapter 12, there is also uncertainty regarding the obligations of lawyers to group members in the representative and class actions contexts.

Options for reform

20.49 In this section we outline three broad options for better managing the risk of lawyer-plaintiff conflicts of interests:

- (a) Encourage or require funders to include minimum terms in their funding contracts.
- (b) Create professional rules or guidelines for lawyers acting in funded proceedings.
- (c) Prohibiting activities that are likely to give rise to lawyer-plaintiff conflicts of interest.

⁵⁷ The Western Australia Supreme Court ruled that the lawyer had breached their fiduciary duty in failing to disclose that the funding agreement provided the lawyer with a 20 per cent reduction in fees if the case was unsuccessful, and a 25 per cent uplift if the claim was successful: *Clairs Keeley (a Firm) v Treacy* [2003] WASCA 299, (2003) 28 WAR 139 at [28]–[29].

⁵⁸ The Committee determined that, in the particular circumstances, it was not unreasonable for the lawyer not to have advised the client about the possibility of funding being withdrawn: *National Standards Committee v Shand* [2019] NZLCDT 2 at [36]–[39] and [56].

Minimum contract terms

- 20.50 As with funder-plaintiff conflicts of interest, one option is to require (or encourage) litigation funders to include minimum terms to manage lawyer-plaintiff conflicts of interest in their funding agreements. For instance, minimum terms that:
- (a) Limit the situations in which funding can be withdrawn, to reduce the incentive on a lawyer to advise the client to follow the funder’s preferred course of action to keep proceedings afoot.
 - (b) If a lawyer enters into retainer agreements with both a funded plaintiff and the funder, provide that the lawyer’s professional and fiduciary duties to the plaintiff are to be prioritised over duties to the funder, and specifically, that the plaintiff’s instructions are to be prioritised over those of the funder.⁵⁹
 - (c) Prevent the funder from taking any steps that would cause or be likely to cause the lawyer to act in breach of their professional duties to the plaintiff.
 - (d) Prevent the funder from seeking to influence the lawyer to cede control over the conduct of the litigation to the funder.⁶⁰
- 20.51 Such minimum terms could be contained within legislation, guidelines, or an industry code of practice. The form of regulation and oversight of litigation funders, and their merits and disadvantages, are discussed in Chapter 23.

Professional rules or guidelines for lawyers requiring disclosure and consent

- 20.52 New professional rules or guidelines could be developed to manage the risk of conflicts between lawyers and plaintiffs in the specific context of funded litigation. Such rules or guidelines could clarify the relationship between a lawyer and members of a represented group in a representative or class action (if those members have not entered into a retainer with the lawyer). They could also define and require disclosures of relevant conflicts of interest and require informed consent and independent advice in respect of such conflicts before the lawyer can continue to act.
- 20.53 Adopting rules rather than guidelines would have the advantage that lawyers’ professional obligations in funded litigation would derive from the same source as their general professional obligations, that is, the *Rules of conduct and client care for lawyers*. On the other hand, guidelines may be more flexible and adaptable in light of the evolving practice in this area and leave more scope for the courts to exercise their inherent jurisdiction and powers to manage proceedings in individual cases. We note that the Victorian Law Reform Commission recommended that guidelines be developed for lawyers on their duties and responsibilities to class members in class actions, to “provid[e] specific direction on the recognition, avoidance and management of conflicts of

⁵⁹ See Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.9]; Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) at [RG 248.71(c)]; and Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [2.101].

⁶⁰ See Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.2]–[9.3]; Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 9(1)(a); and Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.6(3)].

interest”.⁶¹ The recommendation was aimed at class proceedings (whether funded or not).⁶²

- 20.54 Disclosure of the nature and extent of a lawyer’s relationship with a funder facilitates transparency and reduces the potential for mistrust on the part of plaintiffs. Disclosure may also enable plaintiffs to better protect their interests while also increasing the likelihood of detecting inappropriate relationships. A general obligation to disclose relationships with a funder to the plaintiff allows the plaintiff to decide whether to retain the lawyer before any proceedings are formally commenced.⁶³ Favouring disclosure over prohibition also allows plaintiffs to choose for themselves whether they disapprove of a lawyer’s relationship with a funder. Disclosure would reinforce the lawyer’s existing fiduciary duties to avoid conflicts of interest.⁶⁴ However, disclosure has been criticised for providing plaintiffs with a false sense of security.⁶⁵ Moreover, it may do little to reduce misaligned incentives.
- 20.55 Disclosure may have a particular role to play in representative or class actions given that members of a represented group are less able to protect their interests on a day-to-day basis. The ALRC has recommended that the initial notice sent to class members should be required to describe the obligation on lawyers to avoid and manage conflicts of interest.⁶⁶ Even so, it may be difficult if not impossible to obtain informed consent from all class members in the context of class actions.⁶⁷

Prohibiting lawyers from holding interests in funders

- 20.56 Additional professional rules could also be incorporated into the *Rules of conduct and client care for lawyers* to prohibit lawyers from investing in funders, holding office, or having other interests in litigation funders.⁶⁸
- 20.57 Solicitors and law firms in Singapore have been prohibited from having financial interests in litigation funders or receiving commissions, fees or a share of litigation proceeds.⁶⁹ This has also been recommended by the ALRC. Specifically, the ALRC recommended the

⁶¹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at Recommendation 13.

⁶² Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at 93.

⁶³ Wayne Attrill “The regulation of conflicts of interest in Australian litigation funding” (2013) 2 J CivLP 193 at 198–200.

⁶⁴ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper* (July 2017) at [3.4]–[3.5].

⁶⁵ Vince Morabito and Vicki Waye “Seeing past the US bogey – Lessons from Australia on the funding of class actions” (2017) 36 C JQ 213 at 235.

⁶⁶ See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 22 and [7.162]–[7.169].

⁶⁷ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.131].

⁶⁸ The Australian Law Reform Commission’s view is that “not all conflicts can be managed, and unmanageable conflicts should, where possible, be prohibited”. See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [7.121].

⁶⁹ Legal Profession (Professional Conduct) Rules 2015 (Singapore), r 49B. See also Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 13.

Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matter in which the solicitor or law firm is acting. The ALRC's reasons for recommending this were threefold. First, in a class action, due to the constitution of the class, it may not be possible to receive the fully informed consent of each member of the class, although informed consent may be given by the representative plaintiff. Second, so long as contingency fees remain prohibited, permitting solicitors to have financial and other interests in a third-party litigation funder may facilitate an informal contingency fee arrangement. Third, the potential for unmanageable conflicts of interest to arise is heightened if a solicitor or law firm has a financial interest in a litigation funder.⁷⁰

20.58 As noted, requiring a lawyer to disclose any relationship with the funder may not be sufficient to protect the plaintiff's position. A further option would be to prohibit lawyers from taking instructions from both plaintiff and funder in funded litigation. Such a rule would obviate the need for minimum contract terms that address the potential for a lawyer to have conflicting duties to different plaintiffs. On the other hand, if the funder is required to retain its own lawyer, this may create some confusion and inefficiency in the management of the litigation.

QUESTIONS

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?

⁷⁰ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 21 and [7.150]–[7.155].

CHAPTER 21

Funder profits

INTRODUCTION

- 21.1 Profiting from funding another party’s litigation is one of the primary concerns underpinning the torts of maintenance and champerty. In Aotearoa New Zealand, the courts may stay proceedings where a litigation funding agreement amounts to an assignment of a bare cause of action, and Supreme Court has said the “profit share of the funder” is one of the key factors in that assessment.¹
- 21.2 In this chapter, we discuss:
- (a) The concerns that excessive funder profits risk:
 - (i) diminished substantive justice for funded plaintiffs; and
 - (ii) misuse of the proper functions of the courts.
 - (b) As options for reform:
 - (i) facilitating increased competition in the litigation funding market;
 - (ii) court supervision of funder commissions; and
 - (iii) regulation of funder commissions.

WHAT IS THE CONCERN?

- 21.3 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 an expensive product for consumers,² particularly when compared to more familiar types of secured finance, such as loans secured by mortgages.
- 21.4 It is not easy to draw a line between what is an acceptable level of funder profit and what is excessive. The Supreme Court commented generally on this in *Waterhouse v*

¹ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57]. The other factor the courts will consider is the “level of control able to be exercised by the funder”: at [57]. We discuss funder control in Chapter 19.

² This is especially true as funders often also indemnify plaintiffs against adverse costs orders.

Contractors Bonding, saying “whether a bargain is fair assumes the existence of an ascertainable objective standard against which fairness is to be measured”.³

- 21.5 Another difficulty is that most settlements are confidential. Class actions in some overseas jurisdictions can, however, provide a useful point of reference because the requirement for court approval of settlements often means funders’ commissions are publicly available. In Australia, in the period from January 2013 to December 2018, the median funding commission charged by litigation funders in class actions, as a percentage of settlement funds, was 25.5 per cent.⁴ This is in addition to repayment for capital invested (for example, legal fees). The Australian Law Reform Commission (ALRC) noted in a 2018 report that the median return to class members in federal class actions in that same period was 51 per cent in funded proceedings and 85 per cent in unfunded proceedings.⁵ We note that high legal practitioner fees also play a role in diminishing the total amounts available for settlement.⁶
- 21.6 Omni Bridgeway suggests that it is more helpful to look to a funder’s return to investors rather than its return in individual cases, so as to properly take into account the wider operating costs of funding.⁷ While most litigation funders maintain privacy in respect of their profits, some publicly listed funders are relatively transparent.⁸ Omni Bridgeway, for instance, reported returns to shareholders of 19.5 per cent per annum over the last decade. It noted that, while this exceeds the 30-year average total shareholder return of nine per cent, it is comparable to returns of other successful ASX listed companies.⁹ However, noting the relativities in investor profit margins provides little guidance when considering the integrity and perception of the court process.

Impact of excessive funder profits on achieving substantive justice

- 21.7 Litigation funders can enable plaintiffs to bring litigation they might not otherwise have been able to afford. However, there is a concern that this benefit may come at too high a price.¹⁰ Where there is an imbalance in bargaining power because plaintiffs are dependent on litigation funding to pursue their claim, plaintiffs may be unable to effectively negotiate a fair and reasonable funding commission. There is a risk that

³ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [48].

⁴ The figure median figure was 26 per cent in funded *federal* class actions: Vince Morabito *Common Fund Orders, Funding Fees and Reimbursement Payments (An Evidence-Based Approach to Class Action Reform in Australia, January 2019)* at 12.

⁵ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.49].

⁶ This point was made by Omni Bridgeway in its submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into litigation funding and the regulation of the class action industry. It noted that “if the real concern is with returns to group members, the size of the costs of litigation and potential adverse costs orders should also be examined”: Omni Bridgeway, Submission No 73 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (17 June 2020) at 5.

⁷ Omni Bridgeway, Submission No 73 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (17 June 2020) at 10–11.

⁸ Malcolm Stewart “Class Actions and Litigation Funding” (2018) 24 NZBLQ 212 at 221.

⁹ Omni Bridgeway, Submission No 73 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (17 June 2020) at 11.

¹⁰ Wayne Attrill *Ethical Issues in Litigation Funding* (12 November 2008).

significantly diminished returns to plaintiffs will impact their ability to achieve substantive justice.

- 21.8 This concern may be more likely to arise in representative actions, for example where the plaintiffs may be less commercially astute and may have no experience in civil litigation. Where the plaintiff is commercially sophisticated, there may be less concern.¹¹

Impact of excessive funder profits on the proper functioning of the courts

- 21.9 Excessive commissions may corrode public perceptions of the civil justice system. If a claimant's compensation is substantially diminished because of their reliance on litigation funding, perceptions about the quality of justice achieved by them through the courts may also be diminished. In the context of class actions, one Australian commentator has observed:¹²

To the casual observer of the legal system, representative proceedings are associated with extraordinarily high legal costs and lucrative returns to litigation funders. The procedural reforms [which introduced class actions] are therefore seen as having less to do with improving access to justice than with commercialising litigation and over-generously rewarding law firms for representing successful parties.

- 21.10 There is a further risk that the integrity of the court process will be affected by excessive funder profits. The courts provide a venue where individuals can enforce and defend their substantive rights. This core function may be diminished where, rather than adjudicating on rights, the court process primarily serves the economic purposes of removed third parties. Elias CJ in *PricewaterhouseCoopers v Walker* observed:¹³

[I]t is ... 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.

- 21.11 She also described the situation where a bare cause of action “is effectively permitted to be bought and sold for the gain it returns to the funder” as risking the “misuse of the function of the courts in vindication of wrongs”.¹⁴

A secondary market?

- 21.12 Securitisation of funding agreements, where funders package their investments for sale either directly or indirectly in a secondary market,¹⁵ may also pose a concern. It has been said that securitisation entails the “unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation”.¹⁶ For

¹¹ See our discussion of access to substantive justice in Chapter 5.

¹² Ronald Sackville “Law and Poverty: A Paradox” (2018) 41 UNSWLJ 80 at 93. See also *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in liq) (No 3)* [2017] FCA 650 at [126].

¹³ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [116] per Elias CJ (dissenting).

¹⁴ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [121].

¹⁵ See Gian Marco Solas *Third Party Funding: Law, Economics and Policy* (Cambridge University Press, Cambridge, 2019) at [4.2.1.1.2.5].

¹⁶ *Stoczni Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at [61] as cited in Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [2.52].

example, a funder might sell its interest to a hedge fund.¹⁷ Litigation in this context constitutes a further step away from the courts' function of vindicating wrongs and accordingly may undermine public perceptions of the legitimacy of the courts.¹⁸ There is a growing secondary market in litigation funding in the United States¹⁹ and, more recently, in the United Kingdom.²⁰ We are not aware of any secondary market in litigation funding in Aotearoa New Zealand.

EXISTING MECHANISMS TO MANAGE FUNDER PROFITS

Stay of proceedings

- 21.13 The prohibition against assignments of bare causes of action is one possible way to meet the concern that funders will profit excessively from funding litigation.²¹ The profit share of a funder is a factor which the courts will consider when determining whether a litigation funding agreement amounts to an impermissible assignment of a bare cause of action, justifying a stay of proceedings.²² The courts may be reluctant to assess a funders' profit share however, without before knowing the amount that will be recovered and the costs incurred in recovering it.²³
- 21.14 A funder's desire to avoid a stay may provide some measure of control against the risk of funders charging profits that do not fairly reflect their risk in funding the litigation, or contribution to the resolution of the claim. We discuss the general power of the court to order a stay of proceedings in funded proceedings in detail in Chapter 15.
- 21.15 In addition to a stay, the courts could rely on the torts of maintenance and champerty. However, these torts have not been used to date in Aotearoa New Zealand, and in Chapter 18 we identified several options for reform that would either abolish or limit the future relevance of these torts to litigation funding arrangements.

OPTIONS FOR REFORM

- 21.16 We think the effectiveness of the existing stay of proceedings mechanism is questionable, given the lack of a clear body of case law to guide funder behaviour. In this section, we outline three reform options for managing funder profits.

¹⁷ Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (2nd ed, Law Business Research, London, 2018) at vi.

¹⁸ Justice O'Regan cited this possibility as a future regulatory challenge which may arise with the maturation of the litigation funding market: Mark O'Regan "Speech to the New Zealand Insurance Law Association Conference" (Wellington, 14 September 2017).

¹⁹ Sean Thompson, Dai Wai Chin Feman and Aaron Katz "United States" in Leslie Perrin (ed) *The Third Party Litigation Funding Law Review* (3rd ed, Law Business Research, London, 2019) 217 at 218.

²⁰ Kathryn Gaw "First secondary market trade of litigation funding assets completes" *Peer2Peer Finance News* (online ed, United Kingdom, 25 September 2020).

²¹ For a full discussion of prohibitions against assignments of bare causes of action and how it relates to the torts of maintenance and champerty see Chapter XX.

²² *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [57].

²³ *PricewaterhouseCoopers v Walker* [2016] NZCA 338 at [31]; and *Cain v Mettrick* [2020] NZHC 2125 at [64].

Facilitating increased competition in the litigation funding market

- 21.17 Facilitating increased competition in the litigation funding market is a market-centred approach to managing excessive funder profits. In Australia, competition among litigation funders, particularly with respect to class actions, has played a role in a “downward trend in funding rates”.²⁴ Competition between funders may, in addition, help to make funding rates more uniform. Competition could also help to address the imbalances in bargaining power discussed above. Clarifying the law to expressly permit litigation funding and define the parameters of acceptable funding arrangements may facilitate competition in the market.
- 21.18 At the same time, there is a risk that increased regulation could hamper market entry and therefore competition.²⁵ If regulation is too onerous, litigation funders may be deterred from funding litigation in Aotearoa New Zealand. There may also be other factors which could hamper competition. The funding market is small and expansion may to be constrained by a small population size and the limited number of viable cases for funding. It may be some time before the funding market is mature enough for competition to be an effective control on the price of funding.
- 21.19 A public class actions fund could potentially increase competition.²⁶ We discuss such funds in Chapter 13.

Court supervision of funding commissions

- 21.20 In overseas class actions regimes, the courts typically take a supervisory role and have greater case management powers compared to single-plaintiff litigation.²⁷ This often includes powers to exercise some control over litigation funding commissions. The courts’ ability to vary funders’ commissions may be an important way to protect the interests of potentially vulnerable plaintiffs. We discuss two methods of court supervision: common fund orders, and the requirement for court approval of settlements.
- 21.21 In Australia, the courts developed common fund orders to respond to the inequities posed by free riders (class members who do not sign a funding agreement and therefore do not contribute to funding costs).²⁸ Common fund orders require all members of the class to contribute equally to the funding costs regardless of whether they actually entered into a funding agreement with the litigation funder.²⁹

²⁴ *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 at [54].

²⁵ See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [1.41].

²⁶ Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) at [108].

²⁷ For further information about the courts’ supervisory and case management role in class actions, see Chapter 2.

²⁸ Prior to the development of common fund orders the courts had made ‘equalisation orders’ after settlement or judgment. Under an equalisation order the funder’s commission, due from all class members who had signed the funding agreement, would be split pro rata across the entire class so that the funding costs were split evenly. Under this arrangement the funder would receive no more than they would be entitled to under the executed funding agreements. See *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19.

²⁹ See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191.

- 21.22 Up until late 2019, common fund orders were made on the condition that the courts could review the funding commissions to ensure they were reasonable. The Federal Court of Australia proposed that permitting funders to charge a “commercially realistic but reasonable percentage funding commission” would enhance access to justice and encourage open class actions.³⁰ Even so, evaluating a commission on these terms would be difficult.
- 21.23 In December 2019, the High Court of Australia held that the courts do not have the power to make common fund orders under certain provisions of the existing statutory class actions regime.³¹ Prior to that decision, both the ALRC and the Victorian Law Reform Commission had recommended amending the Federal and Victorian class actions regimes to expressly provide those courts with the power to make common fund orders.³² This was also complementary to the ALRC’s recommendation that the Courts have an express power to reject, vary or amend the terms of third-party litigation funding agreements.³³
- 21.24 Court approval of settlements in class actions could be another possible control on funder profits. Court approval of settlements is a key feature of overseas class actions regimes.³⁴ In Aotearoa New Zealand, the Supreme Court has said that as a general rule, court approval to settle a proceeding should be a condition of granting leave to bring an opt-out representative action.³⁵
- 21.25 In some jurisdictions, when a court considers whether to approve a class action settlement, it will often consider the reasonableness of litigation funding commissions.³⁶ Court oversight of funding commissions at this stage can provide an important defence

³⁰ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [205]. For further discussion see also at [82]. An application for a common fund order is pending in Aotearoa New Zealand: see *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [62].

³¹ *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627. Common fund orders had been previously made on the ground that they were “appropriate or necessary to ensure that justice is done in the proceeding”: Federal Court of Australia Act 1976 (Cth), s 33ZF; and Supreme Court Act (Vic), s 33ZF. The High Court of Australia held in *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [53] that a common fund order was beyond the scope of these sections:

The making of a CFO is not apt to ensure that justice is done in the proceeding by regulating how the matter is to proceed; to the contrary, an application for a CFO is centrally concerned to determine whether the proceeding is viable at all as a vehicle for the doing of justice between the parties to the proceeding. That is a question outside the concerns of ss 33ZF and 183.

³² See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.27]–[4.35] and Recommendation 3; and Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [3.73]–[3.98] and Recommendation 8. The Victorian Law Reform Commission, which also recommended introducing contingency fees for lawyers acting in class actions, recommended that the power to make common fund orders also apply to such fees: at [5.100].

³³ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.35].

³⁴ Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 39.

³⁵ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [83].

³⁶ Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [22.20]; The Competition Appeal Tribunal Rules 2015 (UK), r 94(9); and the United States Federal Rules of Civil Procedure, r 23(e)(2)(C)(ii). See discussion in William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at [§13:54].

against the risk that funders could take an excessive proportion of a class member's settlement sum.

- 21.26 Both 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. That said, there is a risk that greater supervisory powers to amend funder' commissions would increase uncertainty for funders.³⁷ Increased uncertainty, and the risk of hindsight colouring assessments of what is a reasonable commission, may undermine the viability of funding. However, provided court reviews of commissions recognise the importance of funding in enabling class actions and the interest in ensuring funding remains commercially viable, this risk may be surmountable.

Regulation of commissions

- 21.27 Another way to manage the risk of excessive funding commissions is to directly regulate the commissions that funders can charge. Regulation could, for example, place restrictions on how the commission can be calculated or cap funding commissions (either at a fixed percentage, or on a sliding scale). We have identified two options:

- (a) **Requiring commissions to be proportionate to the funder's investment.** This aims to ensure litigation funding commissions remain proportionate to the amount invested, mitigating the risk of funders extracting windfall gains at the expense of plaintiffs. In the Abu Dhabi Global Market Courts, regulations specify the way a funders' commission can be calculated. There, the sum payable to the funder "must consist of any costs payable ... together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services".³⁸ In addition, the sum "must not exceed such percentage of the anticipated expenditure as may be prescribed by the Chief Justice".³⁹ This suggests funders will not be permitted to charge commissions based on damages awarded.⁴⁰
- (b) **A commission cap.** Funders' commissions could be capped at fixed maximum percentage of any settlement or award. A fixed commission cap could apply in relation to all funded proceedings, or in relation to particular kinds of proceedings where funded plaintiffs may be more vulnerable or less commercially astute. A fixed cap in a representative or class action could help ensure that the litigation primarily benefits class members rather than litigation funders. A fixed cap is, however, a blunt measure. It would provide a baseline level of security for funded litigants, but it could make it difficult for funders to manage their risk. The combination of a poorly performing case and a fixed cap could result in funders being unable to fully recoup their legal expenditure, let alone make a profit. This could increase uncertainty for funders and consequentially have a chilling effect on the availability and pricing of

³⁷ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.85]–[6.86].

³⁸ ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, reg 225(3)(e).

³⁹ ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, reg 225(3)(f). We have been unable to ascertain whether any amount has been prescribed for this purpose.

⁴⁰ James Foster, Courtney Rothery and Jennifer Al-Salim "United Arab Emirates" in Steven Friel and Jonathan Barnes (eds) *Litigation Funding: 2020* (4th ed, Law Business Research, London, 2019) 85 at 86.

funding. In its 2018 discussion paper, the ALRC sought feedback on the option of imposing a statutory cap on any contingency fees and funders' commissions. It proposed a cap of 49.9 per cent of settlement or judgment. However, the ALRC did not retain the proposal in its final report, after its study of class actions indicated the median percentages of settlement funds received by funders and class members was around 30 per cent and 51 per cent respectively.⁴¹

QUESTIONS

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)?

⁴¹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [3.49]. See discussion in 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 (forthcoming).

CHAPTER 22

Capital adequacy of litigation funders

INTRODUCTION

22.1 In this chapter, we consider:

- (a) The concern that funders may have insufficient resources to fulfil their financial commitments and the implications of a funder's failure to meet those commitments for funded plaintiffs, defendants, and others.
- (b) Whether the courts' existing ability to order security for costs adequately manages this concern.
- (c) As possible options for reform:
 - (i) strengthening the security for costs mechanism.
 - (ii) imposing capital adequacy requirements on funders.

WHAT IS THE CONCERN?

22.2 The principal financial obligation of a litigation funder is its obligation to pay the plaintiff's legal costs (comprising the plaintiff's lawyer's fees and expenses). A funder may also agree to meet any security for costs or adverse costs which are ordered against the plaintiff.

22.3 The primary concerns are that a funder's failure to maintain adequate capital will mean:¹

- (a) the funded plaintiff's claim will be discontinued, and they may be left with a substantial and unexpected liability for legal expenses and any adverse costs; and
- (b) a successful defendant may be left with a significant loss in terms of unpaid costs if the funder and the funded plaintiff are unable to meet an adverse costs order.

22.4 Other consequences may also follow. For instance, the funded plaintiff's lawyer may be left out of pocket for any unpaid work.² Further, the funded proceedings may be

¹ John Walker "Policy and Regulatory Issues in Litigation Funding Revisited" (2014) 55 CBLJ 85 at 101.

² Michael Legg "Regulations needed for litigation funders who can't pay out when cases fail" *The Conversation* (online ed, Australia, 15 February 2017); and *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119 at [43] and [51].

discontinued, having wasted judicial resources.³ To some extent, a funder’s failure to fulfil its financial obligations may negatively impact the litigation funding industry, and reputable funders may therefore have an interest in ensuring the capital adequacy of other funders operating in the market.

- 22.5 Litigation funders may become unable to meet their financial obligations for a variety of reasons including poor financial management and unwise investment decisions. Even when well-managed, litigation funding is an inherently risky form of investment which typically does not provide a return for several years.⁴ Funded litigation, particularly funded representative or class actions, can be expensive, uncertain and protracted.⁵ Within this uncertainty, there is also an inherent tension between investing cash and holding reserves. That is, a funder will be motivated to invest money in a new case notwithstanding that the same money could potentially be required to meet the funder’s obligations in an existing case.
- 22.6 To our knowledge, there have been two instances in Australia and one possible example from Aotearoa New Zealand of litigation funders failing to meet their financial obligations. In Australia, the equine influenza class action was a funded class action against the federal government for negligently failing to prevent the equine influenza virus from escaping a quarantine station.⁶ Partway through proceedings, the overseas funder became bankrupt amid allegations its parent company was engaged in fraudulent activities.⁷ The plaintiffs negotiated a settlement for no compensation, with each side bearing its own costs. The Federal Court observed that the benefit of substance achieved by the plaintiffs was avoiding “the possibility of a very substantial adverse costs order being made against them”.⁸ The plaintiff law firm was left “out-of-pocket to the tune of many millions of dollars”.⁹ The second instance in Australia was a class action that was discontinued without any order as to costs.¹⁰ An affidavit filed in that action records “I was then advised ... [by the solicitor for the funder] that the funder was insolvent or otherwise unable or unwilling to continue to provide funding for the proceeding”.¹¹
- 22.7 In Aotearoa New Zealand, the *Feltex* representative action is also at risk of being discontinued due to difficulties experienced by the funder in satisfying a security for costs

³ Timothy Lou “Into the Shadows: Shadow Banking and the Prudential Regulation of Litigation Funders” (2014) 14 *MLSJ* 73 at 84.

⁴ Sarah O’Brien “Litigation financing may tempt investors with high returns. What to know before buying in” *CNBC* (online ed, United States, 25 June 2020).

⁵ Andrew Saker “Litigation funding reforms in Australia must strike the right balance” *The Global Legal Post* (online ed, London, 1 September 2020).

⁶ *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119.

⁷ Michael Legg “Regulations needed for litigation funders who can’t pay out when cases fail” *The Conversation* (online ed, Australia, 15 February 2017); David Marchant “Argentum Capital litigation fund financed by £90 m Ponzi scheme” (18 February 2014) *OffshoreAlert* <www.offshorealert.com>; and Ben Butler “Ponzi scheme claims against litigation funder of equine class action” *The Sydney Morning Herald* (online ed, Sydney, 22 February 2014).

⁸ *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119 at [6].

⁹ *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119 at [43].

¹⁰ *Calinoiu v QLD Law Group – A New Direction Pty Ltd* [2019] FCA 2194.

¹¹ See discussion Vince Morabito and Michael Duffy “An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions” [2020] *NZ L Rev* 377 at 403, n 137 (forthcoming).

order. In August 2018, the Supreme Court held that the prospectus for shares in Feltex Carpets Limited contained an untrue statement, which constituted misleading conduct under the Fair Trading Act 1986 (the stage one decision). The Supreme Court referred the matter back to the High Court for determination of whether the untrue statement caused loss (stage two). In June 2019, the High Court ordered that security for costs be provided in the sum of \$1.65 million for the stage two proceeding. Despite assurances as to compliance with the order, security for costs was not arranged,¹² leading the Court to comment that:¹³

The pattern is sufficient to justify a healthy level of scepticism that [the funder] can perform its obligations as funder to arrange security for costs and to fund pursuit of the stage two claims.

- 22.8 On 14 February 2020, the defendants applied for the proceedings to be permanently stayed or struck out. Shortly afterwards, on 20 February, the plaintiffs' lawyer filed a memorandum in his capacity as an officer of the Court, without instructions or authority from the plaintiffs, conveying concern at the funder's inability to pay security for costs or to pay the costs associated with running the litigation, and that such inability was putting at risk the claims of more than 3,600 plaintiffs without their knowledge that their claims were in jeopardy.¹⁴ He proposed the funder be given a limited time in which to comply and, if it could not perform, he sought a period of time for the plaintiffs to arrange alternative funding.
- 22.9 Despite being given further opportunities to do so, and in spite of the funder launching an equity crowdfunding campaign to raise funds, the funder failed to provide security within the timeframe directed by the Court and was struck out.¹⁵ The strike-out decision has been appealed.¹⁶

DOES SECURITY FOR COSTS ADEQUATELY MANAGE THE CONCERN?

- 22.10 Currently, concerns regarding a funder's capital adequacy are addressed primarily through the security for costs procedure.
- 22.11 A defendant can reasonably assume that a plaintiff who requires litigation funding to bring their claim will be unable to satisfy an adverse costs order if the funder fails to meet this expense. A security for costs order affords the defendant a degree of protection against that risk. It requires the plaintiff to deposit a sum that the judge considers sufficient into court, or to provide security for that sum to the satisfaction of the judge or registrar (for example, by way of a bank bond or guarantee).¹⁷ As discussed in Chapter 15, the High Court may order security for costs under High Court Rule 5.45 (HCR 5.45) where it is just, and either the plaintiff is resident or incorporated outside of Aotearoa New Zealand or

¹² *Houghton v Saunders* [2020] NZHC 1088 at [8] and Appendix.

¹³ *Houghton v Saunders* [2020] NZHC 1088 at [8].

¹⁴ *Houghton v Saunders* [2020] NZHC 1088 at [12].

¹⁵ *Houghton v Saunders* [2020] NZHC 1088 at [82]; and *Houghton v Saunders* [2020] NZHC 2030 at [71].

¹⁶ *Houghton v Saunders* [2020] NZHC 2030 at [3].

¹⁷ High Court Rules 2016, r 5.45(3)(a).

there is reason to believe that they will be unable to pay the defendant's costs if unsuccessful.¹⁸

22.12 As also discussed in Chapter 15, the court may exercise its inherent jurisdiction to order security for costs in representative actions supported by litigation funders, even if the plaintiffs are natural persons resident in Aotearoa New Zealand.¹⁹ In addition, the High Court has held that proceedings funded by an overseas-based funder may attract a security for costs order, reflecting the “evident policy” in HCR 5.45.²⁰

22.13 In general, therefore, the fact that proceedings are funded by a litigation funder is likely to influence the court to exercise its discretion to order security for costs. Further, the quantum is likely to be substantial and will tend towards relatively full security.²¹ In *Houghton v Saunders*, the Court of Appeal stated:²²

[The fact a party is supported by a litigation funder] may justify increased security on the ground that courts should be readier to order security where a non-party who stands to benefit from the litigation is not interested in having rights vindicated but rather is acting in pursuit of profit. 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.

22.14 Nevertheless, security for costs may not adequately manage the concern that a funder may have insufficient resources. First, from the perspective of the defendant, security for costs is still a matter for the court's discretion and, as noted, HCR 4.45 does not explicitly contemplate the provision of security in funded proceedings, whether the funder is based locally or overseas.

22.15 Second, from the perspective of funders, providing (substantial) security for costs can significantly increase the cost of funding litigation if the funder is also paying an upfront premium for after-the-event (ATE) insurance. This expense may be of greater concern to funders who have a small capital base and are funding smaller claims. We understand that, in Australia, a security for costs order may be satisfied by an ATE insurer providing an unconditional and irrevocable deed of indemnity directly to the defendant. Funders prefer this option over providing security for costs because it is convenient, cost effective and frees up their capital for other investments. However, there are also concerns with this approach because most ATE insurance comes from London, and therefore a defendant may be required to litigate in a foreign jurisdiction to recover against the security provided.

22.16 Third, from the perspective of the funded plaintiff, security for costs does not alleviate the risk that the funded claim will be discontinued if the funder is unable to fulfil its financial commitments, potentially leaving the plaintiff with a substantial and unexpected liability

¹⁸ High Court Rules 2016, r 5.45(1); and Senior Courts Act 2016, s 12. In the District Court, a power to order security is contained in the District Court Rules 2014, r 1.10.

¹⁹ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [36].

²⁰ *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [13].

²¹ *Houghton v Saunders* [2013] NZHC 1824 at [125]; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [79]; and *Walker v Forbes* [2017] NZHC 1212 at [33] and [71].

²² *Houghton v Saunders* [2015] NZCA 141 at [11].

for any outstanding legal expenses and any adverse costs in excess of the security provided.

OPTIONS FOR REFORM

22.17 There are several possible options for reform to manage capital adequacy concerns.

Strengthening the security for costs mechanism

- 22.18 One option is to strengthen the security for costs mechanism with respect to some or all kinds of funded litigation through a presumption or requirement that litigation funders will provide security for costs in funded proceedings, and/or through a requirement that security for costs must be in a form which is directly enforceable in Aotearoa New Zealand.
- 22.19 In 2018, the Australian Law Reform Commission (ALRC) recommended “a statutory presumption that third-party litigation funders who fund [class actions] will provide security for costs in any such proceedings in a form that is enforceable in Australia”.²³ The recommendation was intended to give defendants greater comfort that capital will be available to cover their costs in the event that they are successful, and to protect consumers (being the representative plaintiff and class members) from the principal financial risk that they will incur losses if a funder becomes insolvent during the course of the litigation.²⁴
- 22.20 The ALRC explained that a statutory presumption that funders will provide security in class actions was intended to respond to concerns that security will only be given when sought by the defendants and that it is at the discretion of the courts.²⁵ The ALRC said a statutory presumption would shift the onus from the defendant, who is ordinarily required to satisfy the court that security should be required, to the representative plaintiff (in reality, the funder) if they wish to rebut the presumption.²⁶ It considered a statutory presumption was preferable to a mandatory requirement because it retains the court’s discretion and ensures the presumption can be rebutted in suitable cases, such as where the matter is in the public interest.²⁷
- 22.21 The recommendation that security must be in a form that is enforceable in Australia was designed to respond to concerns that the types of security being provided by funders are less secure than a bank guarantee and would put the defendant to considerable cost

²³ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 12.

²⁴ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.51]–[6.52].

²⁵ 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].

²⁶ The Australia Law Reform Commission also recommended that class members, including the representative plaintiff, should be protected by a prohibition on the third-party funder seeking contributions to the security from class members: Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.48].

²⁷ 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].

if they sought to call on the security.²⁸ The ALRC explained that, in at least one case, a court had approved security for costs being provided by way of a deed of indemnity from an ATE insurer in the United Kingdom, together with the payment of a sum into court for the purpose of covering the enforcement costs of the deed in the United Kingdom.²⁹ The ALRC noted that the provision of indemnities from ATE insurers to satisfy security for costs orders was a recent development in Australia. The ALRC did not consider it was reasonable “as a matter of public policy” that a defendant be required to litigate in a foreign jurisdiction in order to recover against the security for costs provided.³⁰

- 22.22 At the time of writing, the Australian Government has not responded to (or implemented) the ALRC’s recommendation.³¹ From our preliminary conversations with some Australian funders, we understand that the courts in Australia may still approve a deed of indemnity from an ATE insurer as sufficient security. However, funders cannot simply point to the fact that they have ATE insurance in place, as a defendant is not a party to the insurance policy.³² Rather, the ATE insurer must provide an unconditional and irrevocable deed of indemnity directly to the defendant.³³
- 22.23 Ontario recently added a provision to its statutory class actions regime that entitles defendants to obtain security from funders in a class action.³⁴ Defendants are entitled, on motion, “to obtain from the funder security for costs to the extent of the indemnity provided”, if the funder is ordinarily resident outside Ontario, the defendant has an order against the funder for costs in the same or another proceeding that remain unpaid, or there is a good reason to believe that the funder has insufficient assets in Ontario to pay the costs.³⁵
- 22.24 In Aotearoa New Zealand, the courts have expressed concerns about security for costs being satisfied by the plaintiff pointing to an ATE insurance policy. In *Houghton v Saunders*, the High Court canvassed concerns about the enforceability of such policies where the funder and insurer are not based in the jurisdiction, the possibility of the policy being cancelled by the insurer for breach by the insured and uncertainty about the

²⁸ 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].

²⁹ 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] 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.

³⁰ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.51].

³¹ A media release from the Attorney-General’s Department in March 2020 indicated the Government would “shortly release its response to the ALRC inquiry”: Attorney-General for Australia and Minister for Industrial Relations “Committee to examine impact of litigation funding on justice outcomes” (press release, 5 March 2020). The Government recently imposed new regulatory requirements on funders of class actions, and the House referred to the Parliamentary Joint Committee on Corporations and Financial Services an inquiry into litigation funding and the regulation of the class action industry for report by 7 December 2020.

³² *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699.

³³ LCM “Security for Costs – No Shortcuts Allowed” (29 June 2017) <www.lcmfinance.com> discussing *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699.

³⁴ Class Proceedings Act SO 1992 c 6, s 33.1.(12).

³⁵ Class Proceedings Act SO 1992 c 6, s 33.1.(12).

solvency of the insurer.³⁶ The Court held that the terms of the policy in question did not constitute adequate security and directed that the plaintiff provide a form of security “that is unconditionally enforceable ... in New Zealand”, on the making of demand by any one or more of the defendants.³⁷ In *White v James Hardie New Zealand*, the High Court went further, noting that “whatever its terms”, an ATE insurance policy does not offer defendants the same security as a payment into court, and “raises the potential for ancillary litigation when there should be none”.³⁸

- 22.25 We are not aware of any cases in Aotearoa New Zealand where the court has considered whether a deed of indemnity from an ATE insurer directly to a defendant can satisfy an order for security, although similar concerns might apply. To our knowledge, there are no ATE insurers based in Aotearoa New Zealand and very few in Australia. Most appear to be London-based. This would mean that in most (if not all) funded litigation, a deed of indemnity from an ATE insurer would not be enforceable in Aotearoa New Zealand. Instead, it would need to be enforced through ancillary litigation in another jurisdiction.

Introducing capital adequacy requirements

- 22.26 In this section, we consider whether litigation funders operating in Aotearoa New Zealand should be subject to capital adequacy requirements and, if so, what those requirements should be, who should oversee compliance with them, and what consequences should follow from non-compliance.

Should litigation funders operating in Aotearoa New Zealand be subject to capital adequacy requirements?

- 22.27 As mentioned above, security for costs cannot protect a funded plaintiff from the unpaid legal fees of its own solicitors in the event that a litigation funder fails. This is particularly concerning in the context of representative and class actions because the financial risks a representative plaintiff takes on are disproportionate to both the risks that other class members carry and the value of their own claim.³⁹
- 22.28 One option for managing the risk of funders failing to meet their financial obligations is to impose minimum capital adequacy requirements. Broadly, such requirements would oblige a funder to maintain a minimum amount of available capital. The amount could be calculated as a proportion of the funder’s total financial commitments across its investments, although a fixed dollar amount is also used in some jurisdictions (as discussed below).
- 22.29 Capital adequacy requirements may help protect both the funded plaintiff and the defendant in funded proceedings. For instance, such a requirement may:

³⁶ *Houghton v Saunders* [2013] NZHC 1824 at [112]–[121].

³⁷ *Houghton v Saunders* [2013] NZHC 1824 at [119] and [121].

³⁸ *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].

³⁹ Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.8] noting that in *Camping Warehouse v Downer EDI (Approval of Settlement)* [2016] VSC 784, the average payout per class member was expected to be \$633.29, whereas the legal fees were \$2.85 million. See also Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [3.49].

- (a) Make litigation funders more resilient to unexpected losses.
 - (b) Help to manage the risk that new entrants to the funding market will not appreciate the cost of conducting large, complex litigation (like class actions).
 - (c) Help to manage the risk of opportunism and the rush to fund court actions.
 - (d) Reassure funded plaintiffs (and those contemplating litigation funding) that the funder has sufficient funds to be able to finance the case for its entirety, as well as any other cases the funder has in its portfolio, and to also indemnify the plaintiffs in the event of an adverse costs order.
- 22.30 On the other hand, capital adequacy requirements may not be conducive to a competitive market if overseas-based funders are unwilling to bring their capital into the jurisdiction.⁴⁰ Capital adequacy requirements may create a barrier to entry and may advantage some incumbents in the market. Such barriers may be justified to ensure that only reputable and capable funders enter the market.⁴¹ That said, the funding market in Aotearoa New Zealand is already relatively small, with very few locally based funders.⁴²
- 22.31 The ALRC favoured capital adequacy requirements in a 2018 discussion paper but did not recommend them in its final report. It 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.⁴³ However, we note 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.⁴⁴ In other words, the court may not be in a position to assess a funder’s overall capital position in light of its potential liabilities.
- 22.32 The ALRC’s examination has been overtaken by recent events. Outside the class actions context, litigation funders operating in Australia are not subject to any capital adequacy requirements, and indeed are not subject to any specific regulation. However, as of 22 August 2020, class action litigation funders are required to hold an Australian Financial Services Licence (AFSL) and comply with managed investment scheme requirements.⁴⁵ Like any other AFSL holder, litigation funders are subject to the obligations set out under the licence instrument itself, and the general obligations under section 912A of the

⁴⁰ Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [3.61] citing Litigation Funding Solutions “Submission to Victorian Law Reform Commission: Litigation Funding and Group Proceedings Project” (22 September 2017).

⁴¹ Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 632.

⁴² For further discussion about litigation funding market in Aotearoa New Zealand, see Chapter 14.

⁴³ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.34] and [6.37].

⁴⁴ Australian Institute of Company Directors “Submission to Victorian Law Reform Commission: Litigation Funding and Group Proceedings” (6 October 2017) at 3; and Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [3.46]–[3.49]. In New Zealand, see also *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [70].

⁴⁵ Corporations Amendment (Litigation Funding) Regulations 2020 (Cth). See also Josh Frydenberg (Treasurer of the Commonwealth of Australia) “Litigation funders to be regulated under the Corporations Act” (press release, 22 May 2020).

Corporations Act 2001 (Cth). One of those obligations is to “have available adequate resources ... to provide the financial services covered by the licence and to carry out supervisory arrangements”.⁴⁶ The Australian Securities & Investments Commission (ASIC), the body that oversees AFSL holders, recently said this requirement is “not designed to address the risk that a litigation funder does not have adequate resources to continue funding a prolonged class action to its conclusion or to meet or provide security for an adverse costs order in legal proceedings”.⁴⁷ Rather, the purpose of ASIC’s financial requirements is that AFSL holders have sufficient financial resources to conduct their financial business in compliance with the Act and provide a financial buffer that decreases the risk of disorderly or non-compliant wind-up if the business fails.⁴⁸ The base level financial requirements for AFSL holders are set out in Regulatory Guide 166 *Licensing: Financial Requirements* and include a standard solvency and positive net assets requirement, a cash needs requirement, and an audit requirement.⁴⁹

- 22.33 As we discuss below, funders are subject to capital adequacy requirements in a number of overseas jurisdictions including England and Wales (albeit only funders belonging to the Association of Litigation Funders), the Abu Dhabi Global Market Courts and, in the arbitration context, Singapore and Hong Kong. Canada, like Aotearoa New Zealand, has not specifically regulated litigation funding and funders are therefore not subject to any capital adequacy requirements.
- 22.34 Our preliminary conversations with litigation funders based in Aotearoa New Zealand and Australia indicated general support for appropriate capital adequacy requirements or at least acknowledged there was a conversation to be had. At the same time, some funders noted there have been few examples of funders failing to meet their financial obligations to date.⁵⁰

What capital adequacy requirements, if any, would be appropriate?

- 22.35 While capital adequacy requirements may respond to the concerns in this chapter, they could also stifle competition and limit the availability of litigation funding and access to justice. Assessing the right level of adequate capital to maintain will likely also be complex given the uncertainty of litigation and the funder’s associated liabilities.
- 22.36 In overseas jurisdictions, capital adequacy requirements generally include a combination of minimum capital requirements, auditing requirements, and continuous disclosure obligations. Approaches to capital adequacy and the related obligations on funders include requirements to:

⁴⁶ Corporations Act 2001 (Cth), s 912A(1)(d).

⁴⁷ Australian Securities & Investments Commission, Submission No 39 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (June 2020) at [106].

⁴⁸ Australian Securities & Investments Commission, Submission No 39 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (June 2020) at [104].

⁴⁹ Australian Securities & Investment Commission *Licensing: Financial requirements* (Regulatory Guide 166, September 2017).

⁵⁰ See discussion above at [22.6]–[22.9].

- (a) Maintain at all times access to adequate financial resources to meet the obligations of the funder to fund all the disputes they have agreed to fund.⁵¹
- (b) Maintain the capacity to pay all debts when they become due and payable.⁵²
- (c) Maintain the capacity to cover all the funder's aggregate funding liabilities under all of its funding agreements for a minimum period.⁵³
- (d) Maintain access to a minimum amount of capital and/or a minimum amount in managed or qualifying assets.⁵⁴
- (e) Accept a continuous disclosure obligation in respect of capital adequacy, including a specific obligation to promptly notify the oversight body and/or the funded party and/or the funded party's lawyer if the funder reasonably believes that its representations in respect of capital adequacy are no longer valid because of changed circumstances.⁵⁵
- (f) Undertake to be audited annually by a recognised national or international audit firm and provide the oversight body with a copy of the audit opinion within a specified time, and/or reasonable evidence from a qualified third party that the minimum capital adequacy requirement is satisfied.⁵⁶
- (g) Comply with any rules of the oversight body as to capital adequacy as amended from time to time.⁵⁷

⁵¹ This obligation is found in England and Wales in the Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.4]. In Singapore, this is not part of the statutory regime regulating third-party funders of arbitration proceedings, however there is best practice guidance to this effect in the Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [4.3].

⁵² This requirement is found in England and Wales in the Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.4.1.1]. It is also found in the Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.5(1)(a)]. There is guidance to this effect in the Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [4.3(a)].

⁵³ A minimum period of 36 months is prescribed in both England and Wales in the Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.4.1.2] and in Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.5(1)(b)]. There is also guidance to this effect in the Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [4.3(b)], although no minimum period is prescribed.

⁵⁴ Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.4.2]; Association of Litigation Funders *Rules of the Association* (July 2016), r 3.15.1; Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 4(1)(b); Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.5]; and Civil Law (Third-Party Funding) Regulations 2017 (Singapore), reg 4(1)(b).

⁵⁵ Obligations to this effect can be found in England and Wales, Hong Kong and the Abu Dhabi Global Market Courts. See Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.4.3]; Association of Litigation Funders *Rules of the Association* (July 2016), r 3.15.2; Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.5(4)]; and Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 14. There is also guidance to this effect in Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [4.1].

⁵⁶ There are provisions to this, or similar, effect in England and Wales, Hong Kong and Singapore. See Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.4.4]; Association of Litigation Funders *Rules of the Association* (July 2016), r 3.15.3; Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.5(4)]; and Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [4.2].

⁵⁷ There is a provision to this effect in England and Wales in the Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.5].

- (h) Test its exposures whenever it makes a new commitment under a litigation funding agreement and thereafter at regular intervals with respect to ongoing commitments.⁵⁸
- 22.37 A key challenge is how to formulate a minimum capital requirement, for example by specifying a particular amount, or by specifying an amount correlated to all or a certain proportion of funder's financial commitments. Specifying a particular amount provides a baseline and would be simple to administer and audit. However, a specific amount might not correlate to a funder's actual risk and expenditure. Correlating minimum capital requirements to funders' investments would more accurately reflect funders' risk but might be more difficult and more costly to administer and audit.
- 22.38 There is also a question as to what any minimum specified amount should be, or what the correlation between a funder's financial commitments and its capital adequacy should be. In England and Wales, the Association of Litigation Funders (ALF) *Code of Conduct for Litigation Funders* requires members of the ALF to maintain access to £5 million of capital (or such other amount as stipulated by the ALF).⁵⁹ It has been suggested that this is not a large sum in the context of the litigation funding industry: the majority of funders belonging to the ALF operate with capital of more than £30 million under management.⁶⁰ The Abu Dhabi Global Market Courts *Litigation Funding Rules 2019* (ADGMC Rules) state that a litigation funder must have "qualifying assets" of not less than USD\$5 million (or the equivalent amount in foreign currency) at the time a funding agreement is made and for the duration of the proceedings.⁶¹ The Hong Kong *Code of Practice for Third Party Funding in Arbitration* requires funders to maintain access to a minimum of HK\$20 million of capital.⁶² In Singapore, regulations require funders to have a paid-up share capital of not less than S\$5 million (or the equivalent amount in foreign currency) or not less than S\$5 million (or the equivalent amount in foreign currency) in managed assets.⁶³
- 22.39 There is a further question whether minimum capital adequacy requirements should be able to be satisfied if the funder's capital is held in another jurisdiction, or whether onshore capital adequacy requirements are appropriate.

Who should oversee any capital adequacy requirements?

- 22.40 In Chapter 23, we analyse options for the form of any regulation and oversight of litigation funding. Nevertheless, because capital adequacy concerns may require a particular response, we briefly comment here on the oversight of capital adequacy requirements in some overseas jurisdictions.

⁵⁸ There is a provision to this effect in Association of Litigation Funders *Rules of the Association* (July 2016), r 3.15.6.

⁵⁹ Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.4.2]. See also Association of Litigation Funders *Rules of the Association* (July 2016), r 3.15.1.

⁶⁰ Nick Rowles-Davies *Third Party Litigation Funding* (Oxford University Press, Oxford, 2014) at [9.21].

⁶¹ Abu Dhabi Global Market Courts *Litigation Funding Rules 2019*, r 4(1)(b). "Qualifying assets" are cash and cash equivalents including, without limitation, monies and assets contracted to the funder under a contract for fund management, and, in the case of an incorporated company, paid-up share capital: r 4(2).

⁶² Hong Kong *Code of Practice for Third Party Funding of Arbitration 2018* at [2.5(2)].

⁶³ Civil Law (Third-Party Funding) Regulations 2017 (Singapore), reg 4(1)(b). The term "managed assets" is defined in r 4(2)–(3).

- 22.41 **Industry-based oversight.** The ALF oversees compliance with the *Code of Conduct for Litigation Funders* (ALF Code), including compliance with capital adequacy requirements. This model of industry self-regulation means that only funders belonging to the ALF are subject to capital adequacy requirements and industry oversight.
- 22.42 In *Rowe v Ingenious Media Holdings Plc*, the High Court of Justice (England and Wales) recently suggested that a funder’s membership of the ALF, and the pressure which that puts on it to comply with the ALF Code, is not by itself sufficient to ensure that, if a funder were facing a large liability for costs, the money would be forthcoming.⁶⁴ As we discuss in Chapter 23, given the relatively small size of the litigation funding market in Aotearoa New Zealand, the constitution of a local industry association may be impractical.
- 22.43 **Court oversight.** In Singapore, legislation and regulations prescribe capital adequacy requirements for funders of arbitration and related proceedings. Compliance is overseen to the extent that courts may find a funding arrangement to be unenforceable if a funder fails to satisfy the prescribed capital adequacy requirements.⁶⁵
- 22.44 One of the difficulties with this option is that courts are unlikely to be in a position to see or evaluate a funder’s financial commitments and adequacy across all its investments.⁶⁶ The courts may be able to overcome this difficulty by obtaining assistance from a qualified expert. We note, however, that a court could only provide oversight of a funder’s capital adequacy on a case-by-case basis. Further, this option would not have the advantage of giving potential consumers of litigation funding confidence in the funder’s ability to fulfil its financial promises until after the consumer has entered a funding agreement and litigation is on foot.
- 22.45 **A new oversight body.** In Hong Kong, the capital adequacy requirements in the *Code of Practice for Third Party Funding in Arbitration* are monitored by an advisory board, comprising three senior Hong-Kong based lawyers appointed by the Secretary of Justice.⁶⁷ In Chapter 23, we discuss the option of a new statutory body in Aotearoa New Zealand to oversee any regulation of litigation funding.
- 22.46 **Existing regulatory body.** Aotearoa New Zealand could alternatively follow Australia in requiring litigation funders to obtain a licence from a regulatory body, such as the Financial Markets Authority. As a requirement of holding a licence, funders would be required to comply with any financial requirements of that licence.
- 22.47 Lord Justice Jackson in his 2009 *Review of Civil Litigation Costs* initially considered that “capital adequacy was a matter of such pre-eminent importance that it should be the subject of statutory regulation”, and that “[t]he natural body to undertake such regulation is the Financial Services Authority”.⁶⁸ However, the Financial Service Authority (FSA) persuaded Jackson LJ that it could not regulate funders’ capital adequacy without also subjecting the litigation funding industry to the same comprehensive set of regulations

⁶⁴ *Rowe v Ingenious Media Holdings Plc* [2020] EWHC 235 (Ch) at [106].

⁶⁵ See Civil Law Act 1999 (Singapore), s 5B; and Civil Law (Third-Party Funding) Regulations 2017 (Singapore), reg 4.

⁶⁶ See *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [70].

⁶⁷ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98X.

⁶⁸ Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 121.

that it applies to providers of financial services. Jackson LJ considered this to be a disproportionate regulatory burden.⁶⁹ Further, the FSA did not consider litigation funding to be an area of particular risk to consumers.⁷⁰ Ultimately, the ALF was established to self-regulate litigation funding. Similar considerations may apply in Aotearoa New Zealand except, as mentioned, industry self-regulation may be less feasible due to our smaller market.

What consequences should follow from non-compliance with any capital adequacy requirements?

- 22.48 We set out below some of the possible consequences for non-compliance with capital adequacy requirements in comparable jurisdictions. The appropriate consequences will largely depend on the body that oversees compliance with any capital adequacy requirements.
- 22.49 In England and Wales, where litigation funding is self-regulated by the industry, a consequence for failing to comply with capital adequacy requirements in the ALF Code may be suspension or expulsion from the ALF.⁷¹ This occurred in 2014, when Argentum Capital Limited offered to withdraw its membership from the ALF amid allegations its parent company was engaged in fraudulent activities.⁷² The ALF accepted that offer.⁷³ In addition, failure to comply with the ALF Code may lead to financial penalties or sanctions. The ALF may impose sanctions including a fine, a private or public warning (including where appropriate recommendations as to future practice), or suspension or expulsion from the ALF.⁷⁴ However, the maximum amount of any fine is just £500, which is too insignificant by itself to encourage compliance.
- 22.50 In Australia, where class action litigation funders are now required to hold an AFSL, civil penalties for failing to comply with the obligations set out in the licence or the general obligations under the Corporations Act 2001 (Cth) may be more significant.⁷⁵
- 22.51 In the Abu Dhabi Global Market (ADGM) Courts, a funder's failure to comply with the capital adequacy requirements in the ADGM Courts *Litigation Funding Rules 2019* may mean a litigation funding agreement is unenforceable.⁷⁶ Similarly in Singapore, if a funder fails to comply with the requirements to be a "qualifying Third-Party Funder", the funder

⁶⁹ Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 121.

⁷⁰ Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 121.

⁷¹ Association of Litigation Funders *Rules of the Association* (July 2016), r 3.15.4; and Association of Litigation Funders *Complaints Procedure for Litigation Funders* (October 2017) at [25(4)]–[25(5)].

⁷² Michael Legg "Regulations needed for litigation funders who can't pay out when cases fail" *The Conversation* (online ed, Australia, 15 February 2017); David Marchant "Argentum Capital litigation fund financed by £90 m Ponzi scheme" (18 February 2014) *OffshoreAlert* <www.offshorealert.com>; and Ben Butler "Ponzi scheme claims against litigation funder of equine class action" *The Sydney Morning Herald* (online ed, Sydney, 22 February 2014).

⁷³ Association of Litigation Funders "Notice Regarding Argentum Capital Limited" (20 May 2014) <<http://associationoflitigationfunders.com>>.

⁷⁴ Association of Litigation Funders *Complaints Procedure for Litigation Funders* (October 2017) at [25].

⁷⁵ Australian Securities & Investments Commission "Fines and penalties" (3 July 2020) <<http://asic.gov.au>>.

⁷⁶ ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, reg 225(1).

will not be able to enforce its rights under the funding agreement.⁷⁷ However, a funder may apply for relief where it can show its non-compliance was accidental or inadvertent, or because it would otherwise be just and equitable to grant relief.⁷⁸ Unenforceability of the funding agreement will in any event be of limited comfort to a funded plaintiff or defendant who is left out of pocket.

QUESTIONS**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?

⁷⁷ Civil Law Act 1999 (Singapore), s 5B(3)–(4).

⁷⁸ Civil Law Act 1999 (Singapore), s 5B(5)–(6).

CHAPTER 23

Regulation and oversight

INTRODUCTION

23.1 In this chapter, we consider:

- (a) Whether and to what extent the concerns with litigation funding warrant regulation and oversight of litigation funding and/or litigation funders.
- (b) What overarching structure any regulatory regime should take.
- (c) Who should oversee compliance with any regulatory regime.

WHY REGULATE LITIGATION FUNDING?

Should there be regulation and oversight of litigation funding? If so, why?

- 23.2 Litigation funders and funding arrangements are not specifically regulated in Aotearoa New Zealand. This, combined with tension between litigation funding and the torts of maintenance and champerty, means there is some uncertainty about the permissibility and parameters of litigation funding.
- 23.3 From the perspective of funders, uncertainty increases the risk and expense of funding litigation. It may lead to challenges to funding arrangements, adding cost and delay to the resolution of claims. These costs will be passed on to users of litigation funding. From their perspective, the lack of regulation means there is uncertainty about how litigation funders operate and the standards that should be expected of them.
- 23.4 Regulation would improve transparency and ensure funders are subject to appropriate scrutiny and accountability. Any regulation would also be aimed at improving justice outcomes and addressing the concerns with litigation funding discussed in Chapters 19–22. That is, concerns about funder control of litigation, the potential for conflicts of interest, funder profits and capital adequacy requirements.
- 23.5 In Australia, concerns about the “extraordinary profits” being made by litigation funders have called attention to the need for greater regulation of the industry.¹ In March 2020, the Australian federal government announced an inquiry into “all aspects of the class action system, including whether further regulation of litigation funders is needed to

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).

improve justice outcomes”.² Federal Attorney-General, Christian Porter QC MP explained the need for the inquiry, saying:³

There is growing concern that the lack of regulation governing the booming litigation funding industry is leading to poor justice outcomes for those who join class actions, expecting to get fair compensation for an injury or loss.

23.6 The inquiry is due to report in December 2020. In the meantime, the federal government announced that litigation funders would be subject to stringent new regulatory requirements.⁴ From 22 August 2020 class action funders operating in Australia must hold an Australian Financial Services Licence (AFSL) and comply with the managed investment scheme regime in the Corporations Act 2001 (Cth).⁵ The government explained these reforms were a response to the “inequities and risk of consumer harm” posed by the lack of regulation of class action funding.⁶

23.7 The conduct of litigation funders, while mediated by the role of barristers and solicitors as officers of the court,⁷ has a direct bearing on the reputation of the justice system. Elias CJ in *PricewaterhouseCoopers v Walker* argued there is a public interest in preventing the development of an unregulated market in litigation funding.⁸ She said:⁹

... in the absence of statutory regulation [litigation funding for profit] 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.

23.8 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 concerns we discussed in Chapters 19–22, warrant a regulatory response. Additional objectives of any regulation will partly depend on the form of regulation. For example, under an industry self-regulation model, objectives may include promoting the credibility and reputation of the litigation funding industry and cooperation among its members. Regulation of litigation funding as a financial service may have a stronger emphasis on consumer protection and promoting a fair and transparent market.

What kinds of litigation funding should be subject to regulation and oversight?

23.9 The need for regulation may depend on the nature of the funded proceeding or the nature of the funded plaintiff.

² Attorney-General for Australia and Minister for Industrial Relations “Committee to examine impact of litigation funding on justice outcomes” (press release, 5 March 2020).

³ Attorney-General for Australia and Minister for Industrial Relations “Committee to examine impact of litigation funding on justice outcomes” (press release, 5 March 2020).

⁴ Josh Frydenberg (Treasurer of the Commonwealth of Australia) “Litigation funders to be regulated under the Corporations Act” (press release, 22 May 2020).

⁵ Corporations Amendment (Litigation Funding) Regulations 2020 (Cth).

⁶ Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (explanatory statement).

⁷ See for example *Houghton v Saunders* [2020] NZHC 1088 at [12].

⁸ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [116].

⁹ *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [121].

- 23.10 In Australia, the recent reforms to regulate litigation funders are directed at litigation funding of class actions. As noted above, Australia's regulatory response arose out of concerns about inequities and risks of consumer harm in class actions, and the potential for poor justice outcomes. In Aotearoa New Zealand, the courts have also indicated that funded representative actions may justify greater supervision than funded single-party proceedings to ensure the protection of all parties (including class members who are not before the court but will have their rights determined by the proceedings).¹⁰
- 23.11 However, reforms could equally be directed at the nature of the funded plaintiff. Concerns about consumer harm and justice outcomes (for example, funder profits and control) could arise in any case where the funded plaintiff is a consumer, irrespective of whether the proceeding is a class action or a single-party claim. And those concerns may not exist to the same extent in proceedings involving commercially sophisticated plaintiffs.
- 23.12 At the same time, some concerns may be common to all kinds of funded proceedings and all users of litigation funding. For example, a funder's capital adequacy or the risk of conflicts of interest may always warrant regulation.

OPTIONS FOR REFORM

- 23.13 In this section we discuss the following options for the form that regulation of litigation funders could take, and the options as to which body may be best placed to oversee any regulation.¹¹ Specifically, we consider:
- (a) Industry-based self-regulation and oversight.
 - (b) Managed investment scheme requirements overseen by the Financial Markets Authority (FMA).
 - (c) Tailored licensing requirements overseen by the FMA or another regulator.
 - (d) Tailored statutory rules overseen by a new oversight body.
 - (e) Court approval of litigation funding agreements.
- 23.14 Broadly, the issue with industry self-regulation is that it is voluntary, while the issue with statutory regulation concerns who would be the regulator. Court approval would be limited to dealing with funding arrangements as and when funded litigation commences.

Industry-based self-regulation and oversight

- 23.15 Industry self-regulation, sometimes called voluntary regulation, would involve inviting litigation funders operating in Aotearoa New Zealand to develop their own industry standards, and to form an industry association responsible for overseeing compliance with those standards. Membership of the industry association could either be voluntary or could be made a statutory requirement in order for a funder to enter into any litigation funding agreement. The standards of the association could be binding on members, and

¹⁰ See *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [63]; *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [86]; and *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [78].

¹¹ Capital Strategic Advisors also prepared a high-level assessment of the strengths and weaknesses of different regulatory approaches. See Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 72.

the association could impose sanctions for non-compliance. The association could be funded by the litigation funding industry, through member subscriptions.

- 23.16 Even if membership of an industry association is voluntary, there may be reputational incentives for funders to belong. Those accessing litigation funding may prefer to work with a funder who has committed to abide by industry standards and is subject to sanctions for non-compliance. However, voluntary industry self-regulation and oversight is unlikely to mitigate or manage the risk of opportunistic funders.
- 23.17 Industry self-regulation and oversight is the model currently used in England and Wales. In Jackson LJ's Review of Civil Litigation Costs in 2009, he concluded statutory regulation was not required, because litigation funding was still nascent in England and Wales.¹² He recommended litigation funders be regulated in the first instance by "a satisfactory voluntary code, to which all litigation funders subscribe".¹³ However, he considered statutory regulation may be required in future if the use of litigation funding expands.¹⁴
- 23.18 Following Jackson LJ's report, the Association of Litigation Funders (ALF) was formed in 2011. The Ministry of Justice (UK) charged the AFL with delivering self-regulation of the industry. The ALF is funded through the subscriptions of its members. Membership is voluntary, but members must abide by the ALF's *Code of Conduct for Litigation Funders* (the ALF Code).¹⁵ The ALF Code sets out best practice and standards of behaviour. Failure to comply may lead to expulsion or sanctions.¹⁶ The content of the ALF Code covers (among other things) capital adequacy and funder control. Since the ALF was formed, there have been ongoing discussions about whether litigation funding should be regulated by statute in England and Wales.¹⁷ However, there are no indications that reform is imminent.¹⁸
- 23.19 Industry self-regulation and oversight may be appropriate in Aotearoa New Zealand, given the industry is still nascent. However, the market in Aotearoa New Zealand is much smaller than in England and Wales, and most funders currently operating in this country are based overseas. For these reasons, the constitution of a local industry association may be impracticable.

¹² Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 119 and 121.

¹³ Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 119.

¹⁴ Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 119.

¹⁵ Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018).

¹⁶ Association of Litigation Funders *Complaints Procedure for Litigation Funders* (October 2017) at [25] sets out the sanctions available in respect of breaches of the Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018).

¹⁷ See Damian Grave, Maura McIntosh and Gregg Rowan (eds) *Class Actions in England and Wales* (Sweet & Maxwell, London, 2018) at 360–364; The Law Society (England and Wales) *Access to Justice Review* (March 2010) at [4.16]; and Rupert Jackson *Review of Civil Litigation Costs: Final Report* (December 2009) at 5.

¹⁸ For further discussion on the regulation of litigation funding in England and Wales, see Chapter 15.

Managed investment scheme requirements

The Financial Markets Conduct Act 2013

23.20 Another option is to bring litigation funding within the scope of the Financial Markets Conduct Act 2013 (FMC Act), by designating a funding arrangement as a managed investment scheme and therefore a financial product for the purposes of the FMC Act.

23.21 The FMC Act regulates financial products and services and is overseen by the FMA. Bringing litigation funding within the scope of the FMC Act regulatory regime could strengthen consumer protections and increase transparency around litigation funding arrangements. As providers of financial products, funders would (among other things) be subject to fair dealing, disclosure, governance, licensing, and reporting requirements (including financial resource and reporting requirements).

23.22 The courts in Aotearoa New Zealand have not considered whether litigation funding falls within the current definition of a “financial product” — for example, as a “managed investment scheme” — for the purposes of the FMC Act.¹⁹ A “managed investment scheme” is defined in section 9(1):²⁰

managed investment scheme means a scheme to which each of the following applies:

(a) the purpose or effect of the scheme is to enable persons taking part in the scheme to contribute money, or to have money contributed on their behalf, to the scheme as consideration to acquire interests in the scheme; and

(b) those interests are rights to participate in, or receive, financial benefits produced principally by the efforts of another person under the scheme (whether those rights are actual, prospective, or contingent, and whether they are enforceable or not); and

(c) the holders of those interests do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).

23.23 If litigation funding is brought within the definition of “managed investment scheme”, funders would be required to hold a market services licence and comply with the FMC Act’s rules and requirements for providers of financial products.²¹ For example:

(a) Part 2 of the FMC Act provides for fair dealing in relation to financial products or services by prohibiting misleading or deceptive conduct, false or misleading representations, unsubstantiated representations, and offers of financial products in the course of unsolicited meetings.²²

(b) Part 3 provides for disclosure of offers of financial products, including requirements for Product Disclosure Statements for certain offers, rules in relation to advertising for those offers, and ongoing disclosure to investors.

¹⁹ The Financial Markets Conduct Act 2013 definition of “financial product” includes “a managed investment product”: s 7(1)(c). A “managed investment product” in turn includes an interest in a “managed investment scheme”: s 8(3).

²⁰ This definition is subject to exclusions set out in s 9(2) of the Financial Markets Conduct Act 2013. A scheme that only involves the management of separate and direct interests in underlying property is not a “managed investment scheme”. Certain discretionary investment management services and insurance contracts are also excluded.

²¹ Te Mana Tatai Hokohoko | Financial Markets Authority has the authority to designate products into the appropriate category: Financial Markets Conduct Act 2013, s 562.

²² Financial Markets Conduct Act 2013, s 5(1)(b) and pt 2.

- (c) Part 4 covers governance of financial products, including managed investment schemes. It requires managed investment schemes to be registered (online on the Disclose Register) before a regulated offer can be made under the scheme.²³ It also requires registered schemes to meet key common governance and reporting requirements, and provides for the manager and supervisor of a registered scheme to owe statutory duties of care to investors.²⁴
- (d) Part 6 deals with licensing and other regulation of market services. Among other things, it requires any person acting as a manager of a registered managed investment schemes (other than a “restricted scheme”) to hold a market services licence.²⁵ Failure to hold a licence may result in civil liability, including pecuniary penalties.

23.24 To obtain a market service licence, a manager of a registered managed investment scheme must submit a licence application to the FMA for assessment and approval. Applicants must show they meet (or will meet) the requirements in section 396 of the FMC Act, and the conditions of the licence.²⁶ The minimum standards applicants must meet relate to:²⁷

- (a) **Character.** Directors and senior managers must be fit and proper persons to hold their respective positions.
- (b) **Capability.** The organisation must have the right mix of people with the right skills and experience, in the right roles, to monitor the licensed business properly and efficiently.
- (c) **Operational infrastructure.** There must be a plan to set up and administer the managed investment scheme appropriately. Minimum standards must be met with respect to advertising and disclosure, selecting and monitoring investments, custody, asset valuations, pricing, scheme administration, material issues and complaints, staffing and supervision, outsourcing, records, and IT systems.

²³ Financial Markets Conduct Act 2013, s 125(1); and New Zealand Companies Office “Disclose Register” <www.disclose-register.companiesoffice.govt.nz>.

²⁴ Financial Markets Conduct Act 2013, s 124(1)(b) and (c).

²⁵ Financial Markets Conduct Act 2013, s 388(a). Section 388(a) provides that a person acting as “a manager of a registered scheme (other than a restricted scheme)” must hold a market services licences that covers that service. Section 6 defines “registered scheme” as “a managed investment scheme that is registered on the register of managed investment schemes”. A “restricted scheme” is defined in s 6 as:

... a scheme that is registered on the register of managed investment schemes as a KiwiSaver scheme, a superannuation scheme, or a workplace savings scheme and that is identified as a restricted scheme on that register.

²⁶ The licence is subject to: a condition that the licensee or authorised body may, under the licence, only provide the market service to which the licence relates and for which each person is authorised under the licence; any standard conditions imposed by the Te Mana Tatai Hokohoko | Financial Markets Authority (FMA) and specific conditions imposed by the FMA on a case-by-case basis; and any conditions imposed by regulations: Financial Markets Conduct Act 2013, ss 402 and 403. For further information on standard conditions imposed by the FMA see Te Mana Tatai Hokohoko | Financial Markets Authority “Standard Conditions for managed investment scheme manager licences” (31 March 2016) <www.fma.govt.nz>.

²⁷ For further information, see Te Mana Tatai Hokohoko | Financial Markets Authority “Licensing Application Guide: Managed investment scheme (MIS) manager” (November 2014) <www.fma.govt.nz>.

- (d) **Financial resources.** Applicants must have adequate financial resources to effectively perform the licensed service at all times and must maintain an appropriate level of professional indemnity insurance cover for the business.
 - (e) **Governance.** Applicants must have a high-level body responsible for overseeing compliance with the market services licence obligations and ensure appropriate risk management.
 - (f) **Culture.** Applicants must have governance and compliance arrangements that promote a customer-focused culture and ensure appropriate risk management and fair treatment of investors.
 - (g) **Compliance.** Applicants must have adequate and effective arrangements for challenging and testing their own compliance, the compliance framework and the outcomes.
- 23.25 In addition, the applicant must also show they are, or will be, a registered financial services provider under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.²⁸
- 23.26 Part 6 imposes operational reporting obligations on licence holders. For example, section 412 requires every licensee to report certain matters to the FMA as soon as practicable, including any contravention (or likely contravention) of a licence obligation, or any material change of circumstances.
- 23.27 The FMA has various powers in case a licensee breaches the licence obligations or in case of a material change of circumstances in relation to the licence, which include censuring the licensee, requiring an action plan, giving the licensee a direction, and suspending, amending, or cancelling the licence.²⁹ In some situations, contravening the Act's provisions may give rise to civil liability, including a pecuniary penalty.³⁰
- 23.28 Part 7 of the Act sets out financial reporting obligations.³¹ These obligations relate to accounting records,³² and the preparation, audit, and lodgement of financial statements.³³ Certain contraventions of financial reporting obligations may give rise to civil liability, including a pecuniary penalty.³⁴

²⁸ Financial Markets Conduct Act 2013, s 396(e).

²⁹ Financial Markets Conduct Act 2013, s 414.

³⁰ Financial Markets Conduct Act 2013, s 449.

³¹ Financial Markets Conduct Act 2013, s 451.

³² Financial Markets Conduct Act 2013, pt 7 sub-pt 2.

³³ Financial Markets Conduct Act 2013, pt 7 sub-pt 3.

³⁴ Financial Markets Conduct Act 2013, s 461M.

Australia

- 23.29 Since 22 August 2020, class action litigation funders operating in Australia have been required to comply with the managed investment scheme requirements of the Corporations Act 2001 (Cth) and to hold an AFSL.³⁵
- 23.30 Prior to 22 August 2020, litigation funders were exempt from the “managed investment scheme” definition and from financial services regulation, on the condition that funders had necessary processes in place to manage conflicts of interest.³⁶ The exemptions, which were introduced in 2012, were a response to earlier Federal and Court and High Court decisions which found that litigation funding potentially triggered the application of the Corporations Act.³⁷ The exemptions reflected the government’s view at the time that the requirements in the Corporations Act were not appropriate for litigation funding schemes (in effect, class actions), and the government’s objective “to ensure that consumers do not lose this important means of obtain access to the justice system”.³⁸ Since 2012, however, the significant profits achieved by funders and the risk of consumer harm in funded proceedings led to calls for greater regulation of litigation funding and culminated in the 22 August 2020 reforms and the Parliamentary Inquiry, discussed above.
- 23.31 The new requirements for litigation funders operating a managed investment scheme under the Corporations Act include a range of good governance obligations, including obligations to act in the best interest of the members and, if there is a conflict of interests, give priority to the members’ interests.³⁹
- 23.32 In addition, like all AFSL holders, class action litigation funders must meet certain requirements including:⁴⁰
- (a) good character and competence licensing requirements;
 - (b) financial requirements, including certain capital adequacy requirements;⁴¹
 - (c) obligations to maintain adequate arrangements to manage conflicts of interest and risks;⁴² and

³⁵ Corporations Amendment (Litigation Funding) Regulations 2020 (Cth). Operators of class action litigation funding schemes are generally required to register as managed investment schemes under Corporations Act 2001 (Cth), ch 5C and obtain an Australian Financial Services Licence in accordance with Corporations Act 2001 (Cth), ch 7.

³⁶ Corporations Amendment Regulation 2012 (No 6) (Cth). See also Australian Securities & Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013).

³⁷ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, (2009) 180 FCR 11; and *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2011] NSWCA 50, (2011) 276 ALR 138.

³⁸ Corporations Amendment Regulation 2012 (No 6) (Cth) (explanatory note).

³⁹ Corporations Act 2001 (Cth), pts 5C.1 and 5C.2.

⁴⁰ Corporations Act 2001 (Cth), pt 7.6.

⁴¹ See Australian Securities & Investment Commission *Licensing: Financial requirements* (Regulatory Guide 166, September 2017).

⁴² See Australian Securities & Investment Commission *Risk management systems of responsible entities* (Regulatory Guide 259, March 2017).

- (d) maintain adequate professional indemnity insurance requirements.⁴³

Difficulties in applying managed investment scheme requirements to litigation funders

- 23.33 Both the FMC Act and the Australian financial services and managed investment scheme regulation were not specifically designed to regulate litigation funding. In the context of the Australian laws, the Australian Securities and Investments Commission (ASIC) has said the application of the requirements to litigation funders may not achieve the outcomes being sought.⁴⁴ It has noted that, although there is considerable interest in the commissions and profit margins of funders and the risk of default by funders, “the financial services licensing and managed investment scheme regimes do not extend to price or prudential regulation”.⁴⁵ Further, ASIC has acknowledged it may be difficult for litigation funders to comply with certain obligations under the Act, such as the requirement to provide a Product Disclosure Statement (PDS) (which does not work easily with open class actions) and the rules in relation to withdrawal from managed investments schemes.⁴⁶
- 23.34 To address these difficulties and ensure a smooth transition to the new regulatory regime for litigation funding, ASIC has issued ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787. This instrument includes relief from:
- (a) the obligation to give a PDS to “passive” members of open litigation funding schemes,⁴⁷ so long as the PDS is available on the funder’s website;
 - (b) the obligation to regularly value scheme property;
 - (c) the statutory withdrawal procedures for members who opt out of a class action under court rules; and
 - (d) the requirement to disclose detailed fees and costs information and information about labour standards or environmental, social or ethical concerns.
- 23.35 ASIC has also issued a “no-action position”, stating that ASIC will not take action if a funder of an open class actions fails to comply with the obligation (under Chapter 2C of the FMC Act) to set up and maintain a register of members of the litigation funding scheme.⁴⁸ This

⁴³ See Australian Securities & Investment Commission *Compensation and insurance arrangements for AFS licensees* (Regulatory Guide 126, July 2020).

⁴⁴ Australian Securities & Investments Commission “Opening Statement by ASIC Deputy Chair, Daniel Crennan QC at the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into litigation funding and the regulation of the class actions industry” (Parliament House, Canberra, 29 July 2020).

⁴⁵ Australian Securities & Investments Commission “Opening Statement by ASIC Deputy Chair, Daniel Crennan QC at the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into litigation funding and the regulation of the class actions industry” (Parliament House, Canberra, 29 July 2020).

⁴⁶ Australian Securities & Investments Commission “Opening Statement by ASIC Deputy Chair, Daniel Crennan QC at the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into litigation funding and the regulation of the class actions industry” (Parliament House, Canberra, 29 July 2020).

⁴⁷ A litigation funding scheme is generally an arrangement where a group of plaintiffs (the class action members), a law firm and a litigation funder collaborate to pursue a class action. Passive members are members who have not entered into a funding agreement with the funder or a retainer or costs agreement with the law firm providing services for the purpose of the scheme, or otherwise notified the funder or firm that they agree to participate in the scheme.

⁴⁸ Australian Securities & Investments Commission “No-action position for responsible entities of certain registered litigation funding schemes in relation to member registers” (press release, 21 August 2020).

recognises the “practical difficulty” funders may face in maintaining member registers in relation to class actions in which there are passive general members who cannot be individually identified.⁴⁹

- 23.36 In considering whether litigation funding should be designated a managed investment scheme and therefore a financial product for the purposes of the FMC Act,⁵⁰ we note that the regulatory settings for managed investment schemes were not designed with the regulation of litigation funding and funded litigation in mind. Further, litigation funding does not pose the same kind of risks to participants (claimants) as financial investments such as a shareholding, because it is non-recourse funding (a funded plaintiff will only be required to pay a commission if its claim is successful; there is no upfront financial commitment).
- 23.37 On the other hand, having all financial service providers covered by the same regime would encourage coherence.⁵¹

Tailored licensing requirements overseen by the FMA (or other existing regulator)

- 23.38 A variation to applying the FMC Act’s managed investment scheme requirements is that litigation funders could be subject to modified or new licensing requirements and be monitored by the FMA (or another existing regulator).
- 23.39 In 2014, Australia’s Productivity Commission recommended the government should establish a tailored licence for litigation funders.⁵² It suggested the licence should be designed to ensure the funder holds adequate capital relative to its financial obligations and properly informs clients of relevant obligations and systems in place for managing risks and conflicts of interest.⁵³ It recommended that “the appropriate licence conditions should be determined by a proper consultation process regarding draft licence regulations”.⁵⁴ Further, it said that responsibility for administering the licence scheme should be clearly allocated to a single regulator, but only after a licence is developed.
- 23.40 In 2018, the Australian Law Reform Commission (ALRC) returned to the question of licensing litigation funders. In its discussion paper on class actions and litigation funding, the ALRC proposed that litigation funders should be subject to a “unique litigation funding licence that would sit outside the AFSL regime but impose comparable obligations”.⁵⁵ It

⁴⁹ Australian Securities & Investments Commission “No-action position for responsible entities of certain registered litigation funding schemes in relation to member registers” (press release, 21 August 2020).

⁵⁰ Te Mana Tatai Hokohoko | Financial Markets Authority has the authority to designate products into the appropriate category: Financial Markets Conduct Act 2013, s 562.

⁵¹ Capital Strategic Advisors *The economics of class actions and litigation funding* (6 November 2020) at 81. See also Financial Markets Conduct Bill 2011 (342-1) (explanatory note) at 1.

⁵² Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 633 and Recommendation 18.2.

⁵³ Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 631–633.

⁵⁴ Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2 at 633 and Recommendation 18.2.

⁵⁵ Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [3.4].

said “a unique litigation funding licence would enable a bespoke regulatory regime to be designed and implemented to address the risks associated with litigation funding”.⁵⁶ The ALRC said it had considered, as an alternative whether it would be appropriate to require litigation funders to hold an AFSL, but it considered a tailored regime would be more appropriate. It explained:⁵⁷

... Leaving aside technical arguments as to whether litigation funding is a financial product within the meaning of the Corporations Act, most of the obligations imposed on AFS licensees under section 912A of the Corporations Act are appropriate for litigation funders. However, ASIC has developed, through a suite of regulatory guides, a comprehensive compliance regime and, at this level of detail, a fit for purpose compliance regime for litigation funders would appear more appropriate. While it would potentially be possible to require litigation funders to hold an AFSL and adapt the compliance obligations to the business of litigation funder [sic], this is less straightforward and would potentially create confusion and uncertainty for existing AFS licensees.

- 23.41 The ALRC expressed the tentative view that the regulator of any new licensing regime should be ASIC, as the regulator of the AFSL regime. It also suggested “legal profession regulators” might be appropriate regulators of litigation funders, but noted “they do not currently have regulatory oversight of sophisticated financial arrangements and there are difficulties of uniformity given that the legal profession is not regulated nationally”.⁵⁸
- 23.42 While submissions strongly favoured licensing,⁵⁹ the ALRC ultimately did not recommend this in its final report.⁶⁰ It was persuaded by a submission from ASIC that the benefits of a licensing regime would not outweigh the regulatory costs of imposing a licensing regime.⁶¹ The ALRC concluded that the same level of consumer protection could be achieved through recommendations to improve court rules and procedure, oversight and security for costs.⁶²
- 23.43 In sum, the advantage of this approach would be the tailoring of licensing to the issues raised by litigation funding. This should improve certainty and transparency in the application of the licensing requirements to litigation funders. A disadvantage includes the added regulatory burden in the administration of a licensing system which is tailored to a relatively small number of funders operating in the Aotearoa New Zealand market.

⁵⁶ Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [3.4].

⁵⁷ Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [3.6].

⁵⁸ Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [3.7].

⁵⁹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.27] and [6.31].

⁶⁰ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.34].

⁶¹ Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.32]–[6.34].

⁶² Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.37].

Tailored statutory regime with new oversight body

- 23.44 A further option is the creation of a tailored statutory regime and a new statutory body to undertake oversight of and compliance with that regime. A new statutory regime could clarify the parameters for acceptable litigation funding arrangements, set minimum terms for funding agreements and minimum standards of behaviour and resources for litigation funders, impose consequences for non-compliance and establish an oversight body.⁶³
- 23.45 This option would increase the transparency of funding arrangements and the accountability of funders, and provide greater certainty for consumers, funders, and courts. A tailored statutory regime could better address specific concerns with litigation funding, as compared with the option of applying an existing regulatory regime to litigation funders such as the general financial markets regulatory regime, even in modified form, as discussed above. Further, a tailored statutory regime would have the advantage of applying to all litigation funders falling within its defined scope, as compared with the option of industry regulation (also discussed above) which applies only to funders who choose to abide by it.
- 23.46 The statutory regime could authorise a new advisory body to oversee funders' compliance with the regime. In Hong Kong, an Ordinance was passed to expressly permit third-party funding for arbitrations and mediations, establish a process for issuing a code of practice (the HK Code), and establish an advisory body to monitor and review the operation of the HK Code.⁶⁴ The Ordinance authorises the Secretary for Justice to appoint an advisory body, comprising three senior Hong-Kong based lawyers.⁶⁵ While Hong Kong's advisory body does not appear to monitor compliance with the HK Code (it only reviews and monitors the operation of the HK Code),⁶⁶ it would be possible to establish and authorise a new body to oversee such compliance.

Court approval of litigation funding arrangements

- 23.47 A final reform option to consider is that the courts could be required to approve funding arrangements in some or all funded proceedings. The Court approval could sit alongside the regulatory measures described above. It may not be appropriate for all litigation funding arrangements to be approved, for example, where the agreement is between a litigation funder and a commercial party. Approval may, however, be appropriate in representative or class actions or in any single party funded proceedings involving

⁶³ See Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at ch 20 for discussion of matters to consider in deciding whether a new public body should be established to perform a new regulatory function.

⁶⁴ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. The content of the Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at is set out in Chapter 15.

⁶⁵ Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98X.

⁶⁶ The Hong Kong Code (the Code) does not provide for robust enforcement. Failure to comply with a provision of the Code does not, of itself, render any person liable to any judicial or other proceedings. However, the Code is admissible in evidence in proceedings before any court or arbitral tribunal, and any compliance or failure to comply with a provision of the code of practice may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal: Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, s 98S.

consumers. In other words, the test for when court approval is required could depend on the nature of the proceeding or the nature of the plaintiff.

- 23.48 A requirement that some or all litigation funding arrangements be approved by the court could potentially be included in the High Court Rules 2016, alongside the criteria for approval. Alternatively, as we discuss below, court approval of funding arrangements in class actions could be addressed in any statutory class actions legislation.
- 23.49 If a statutory class actions regime is adopted, one option may be to require the courts to assess the adequacy of any litigation funding arrangements as part of any preliminary approval to bring the case as a class action. The preliminary approval could include certain conditions that litigation funding arrangements and litigation funders would need to satisfy. A 2008 report by the Civil Justice Council (UK) *Improving Access to Justice through Collective Actions* recommended that, as part of the legal threshold test for collective actions, “it ought to be permissible for the court to assess those arrangements in order to ascertain whether they are fair and just”.⁶⁷ The report suggested factors that could guide that assessment, such as the funder having sufficient resources to meet its commitments, being willing and able to meet any adverse costs order, and not charging an inordinately high commission.⁶⁸
- 23.50 We note that the adequacy of litigation funding arrangements is not generally part of threshold legal test applied in overseas class actions regimes.⁶⁹ One notable exception is Ontario where the court must approve a funding agreement or it will have no force or effect.⁷⁰ When a plaintiff enters into a funding agreement, they must seek court approval as soon as practicable and provide a copy to both the court and the defendant.⁷¹ The court may only approve a funding agreement if it satisfied that the agreement, including the indemnity for costs and funding commission, is fair and reasonable, the agreement will not diminish the representative plaintiff’s ability to instruct their lawyer or control the litigation, and the funder is financially able to satisfy any adverse costs order to the extent provided in the indemnity.⁷² The legislation also enables the Attorney General to prescribe other factors for the court to consider when approving a funding agreement.⁷³
- 23.51 Common fund orders, which were typically made at an early stage in Australian class actions, could also potentially provide a form of court oversight and approval of litigation

⁶⁷ Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 94.

⁶⁸ Civil Justice Council “*Improving Access to Justice through Collective Actions*”: *Developing a More Efficient and Effective Procedure for Collective Actions* (Final Report, November 2008) at 95.

⁶⁹ For further discussion, see Chapter 9.

⁷⁰ Class Proceedings Act SO 1992 c 6, s 33.1(3). For further discussion, see Chapter 15.

⁷¹ Class Proceedings Act SO 1992 c 6, s 33.1(4). The court must receive an unredacted copy (s 33.1(6)) but the plaintiff may redact information which may confer a tactical advantage in the copy provided to the defendant (s 33.1(5)).

⁷² Class Proceedings Act SO 1992 c 6, s 33.1(9)(a). The court must also consider whether the plaintiff received independent legal advice with respect to the funding agreement: s 33.1(10). Defendants are also entitled to obtain security for costs from the funder to the extent of the indemnity provided under an approved funding agreement if: the funder is ordinarily resident outside Ontario; the defendant has an order against the funder for costs in the same or another proceeding that remain unpaid in whole or in part; or there is a good reason to believe that the funder has insufficient assets in Ontario to pay costs: s 33.1(12).

⁷³ Class Proceedings Act SO 1992 c 6, ss 33.1(9)(iv) and 38(1).

funding.⁷⁴ While the High Court of Australia has since ruled that the Federal and New South Wales class action legislation does not confer the power to make such orders,⁷⁵ the ALRC and Victorian Law Reform Commission both previously recommended courts be given an express statutory power to make common fund orders.⁷⁶ Following the High Court's decision, the current status of common fund orders is unclear with a lack of judicial consensus as to whether common fund orders can be made at settlement with the narrower purpose of reviewing funding commissions only.⁷⁷

QUESTIONS

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?

⁷⁴ We discuss common fund orders in Chapter 21. See also *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [167].

⁷⁵ *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627.

⁷⁶ See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 3 and [4.27]–[4.35]; and Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at Recommendation 8 and [3.73]–[3.98].

⁷⁷ Vince Morabito and Michael Duffy “An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions” [2020] NZ L Rev 377 at 399 (forthcoming) citing *Lenthall v Westpac Banking Corp (No 2)* [2020] FCA 423, (2020) 144 ACSR 573 at [12] and [21]; *Mckay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 at [31]; and *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579. Compare *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [72]–[74], [405] and [418]; *Pearson v State of Queensland (No 2)* [2020] FCA 619 at [275]; and *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 at [50]–[55].

Appendix

TERMS OF REFERENCE

Class actions enable a group of people with similar claims against the same defendant to have their claims determined in one legal proceeding. Litigation funding is where a third-party with no pre-existing interest in the litigation agrees to fund it, sometimes in exchange for a fee if the action is successful and nothing if the action is lost. Litigation funding is not limited to class actions, but many class actions would be unable to proceed without litigation funding.

The law on class actions and litigation funding in Aotearoa New Zealand is uncertain. High Court Rule 4.24 allows one or more persons to sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding (commonly referred to as a “representative proceeding”). However, unlike many other jurisdictions, Aotearoa New Zealand does not have a detailed class actions regime. Nor is there specific regulation of litigation funding in Aotearoa New Zealand. The courts have been cautious in permitting litigation funding, as the torts of maintenance and champerty have traditionally restricted its use.

A key benefit of establishing clearer regimes for class actions and litigation funding would be to enhance access to justice. The Commission will therefore conduct a first principles review of class actions and litigation funding in Aotearoa New Zealand to ensure the law in these areas supports an efficient economy and a just society; and is understandable, clear and practicable.¹

The Commission’s review will include, but not be limited to, consideration of the following matters:

Class Actions

- Whether and to what extent the law should allow class actions;
- If class actions should be allowed, how they should be regulated, for example in relation to:
 - the scope of a class actions regime;
 - the criteria and process for commencing a class action, including how a “class” should be defined;
 - management of class action proceedings; and
 - damages, costs and settlement.

¹ Letter from Minister responsible for the Law Commission to President of the Law Commission regarding Annual Expectations for 2018/2019 (14 May 2018).

Litigation Funding

- Whether and to what extent the law should allow litigation funding, having regard to the torts of maintenance and champerty;
- The role of the courts, if any, in overseeing litigation funding arrangements;
- Whether and to what extent litigation funders and/or funding arrangements should be regulated, for example in relation to:
 - the nature and extent of the litigation funder's recovery;
 - the powers and responsibilities of litigation funders;
 - the potential for conflicts of interest; and
 - disclosure requirements.

For the purposes of this review, litigation funding does not include civil legal aid. The Commission will consult with the public, experts, Māori and other stakeholders during the review.
