Te Aka Matua o te Ture
Law Commission

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Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa

Class Actions and Litigation Funding

Executive Summary

Executive summary

INTRODUCTION

1. Te Aka Matua o te Ture | Law Commission has undertaken a review of class actions and litigation funding. The review has taken place within a wider context of ongoing and pressing concern about financial, social and other barriers to accessing civil justice in Aotearoa New Zealand.
2. At present, Aotearoa New Zealand does not have class actions legislation. Rule 4.24 of the High Court Rules 2016 (HCR) allows a person to sue (or be sued) on behalf of, or for the benefit of, all persons with the same interest in the proceeding. This rule is increasingly being used to bring large, complex cases which are similar in nature to class actions. However, the representative action procedure was not designed for litigation of this kind. As a result, there has been extensive litigation on procedural issues, which has caused delay for parties and required considerable court resources. We have concluded that a statutory class actions regime will be clearer, more certain and more accessible. This in turn will improve access to justice for New Zealanders.
3. Aotearoa New Zealand also currently lacks specific regulation of litigation funding. The torts of maintenance and champerty, which have historically prohibited litigation funding, remain part of our law. Consequently, there is uncertainty about when and how litigation funding may be provided. This may impact on the availability and affordability of litigation funding and provide insufficient protection for funded plaintiffs. We have concluded that specific regulation is desirable to address these issues and to assure the integrity of the court system. With specific regulation in place, the torts of maintenance and champerty should be abolished.

STATUTORY REGIME FOR AOTEAROA NEW ZEALAND

4. Existing methods of group litigation in Aotearoa New Zealand, including the representative actions rule in HCR 4.24, are insufficient. We recommend the creation of a class actions regime, including a Class Actions Act as the principal source of law in relation to class actions. In addition, specific class actions rules in the High Court Rules will be necessary to address more detailed matters of procedure. We explain our view that class actions will improve access to justice and allow multiple claims to be managed in an efficient way and recommend these should be the statutory objectives of class actions. We also discuss the potential disadvantages of class actions and explain how many of these can be mitigated by the design of the regime.
5. In developing our proposals, we have been guided by the principles that a class actions regime should:
    a. Consider the interests of both plaintiffs and defendants.

b. Safeguard the interests of class members.

c. Consider the principle of proportionality, meaning that the time and cost of litigation should be proportionate to what is at stake.

d. Strike an appropriate balance between flexibility and certainty.

e. Be appropriate for contemporary Aotearoa New Zealand.

f. Recognise and reflect relevant tikanga Māori.

g. Not adversely impact on other methods of group litigation.

h. Provide clarity on issues arising in funded litigation.

6. We recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider amending the representative actions rules in HCR 4.24 and District Court Rule 4.24 to provide they should not be used when a class action would be a more appropriate procedure. This is to avoid the risk of these rules being used to circumvent the protections of a class actions regime.

7. While some jurisdictions have provided for defendant class actions, we recommend the Class Actions Act should only apply to plaintiff class actions.

KEY ACTORS IN A CLASS ACTION

Class members

8. A defining feature of a class action is the presence of class members. They are not parties to the litigation and have little control over how the class action is conducted but will be bound by the outcome. It is therefore essential that a class actions regime includes safeguards to protect the interests of class members and many features of the class actions regime we recommend provide for this.

The representative plaintiff

9. In a class action, the plaintiff is a representative plaintiff. There are two important dimensions to the representative plaintiff's role. First, the representative plaintiff, like an ordinary plaintiff, is a party to the proceeding and has a claim against the defendant. Second, the representative plaintiff represents the other class members.

10. We recommend the representative plaintiff should be responsible for making decisions about the conduct of the class action and giving informed instructions to the lawyer acting for them and the class. We prefer this to the approach of governance and decision-making in a class action being vested in a group such as a litigation committee.

11. We consider a representative plaintiff should have an overarching duty to act in what they believe to be the best interests of the class. This duty should be specified in the Class Actions Act. We recommend the Act also specify the representative plaintiff does not owe fiduciary duties to class members. There are a number of responsibilities associated with the role of representative plaintiff, such as taking the steps necessary to progress the class action and meeting any order for adverse costs. These responsibilities arise primarily from being a party to the proceeding, but their extent is amplified because they are bringing the litigation on behalf of a large group of class members as well as themselves.

12. The role of representative plaintiff is significant, and we have accordingly identified some ways of supporting a person in the role. The Class Actions Act should provide the

representative plaintiff with a statutory immunity from claims by a class member with respect to their duty unless they have acted recklessly or in wilful default or bad faith. We also recommend a proposed representative plaintiff must receive independent legal advice on the duty and responsibilities of the role.

The defendant

13. The role of a defendant in a class action does not differ substantially from normal litigation. However, the nature of a class action can give rise to challenges in responding to the litigation and can increase the financial risks and potential liability for defendants. We recommend some measures to respond to these issues, such as enabling a defendant to obtain information on class members who have opted in or opted out and a presumption that in funded class actions, a litigation funder will provide security for costs.

The court

14. The court will have a more active role in class actions than in most other litigation to ensure the interests of class members are adequately protected. Stages of a class action that require additional court oversight include the requirement for a proceeding to be certified in order to proceed as a class action, court approval of notices to class members and court approval of settlement. The need for this oversight may require extensive judicial resources. We have accordingly made various recommendations to allow the court to manage class actions in an efficient way.

COMMENCING A CLASS ACTION

15. We recommend the Class Actions Act should not restrict class actions to certain areas of the law or type of claim and that class actions should be able to be commenced in Te Kōti Matua | High Court with respect to claims where the High Court has existing jurisdiction. We do not recommend class actions be available in the District Court, Environment Court or Māori Land Court. However, we recommend the Government consider developing class actions rules for the employment jurisdiction.
16. To commence a class action, we recommend there must be a proposed representative plaintiff acting on behalf of a class comprising at least two other class members. Each claim must raise a common issue of fact or law, to ensure a single judgment will determine an issue for all class members and prevent disparate claims from being grouped together.
17. We recommend the representative plaintiff should be a class member, in accordance with normal standing rules. There are benefits to having a representative plaintiff who has their own claim at stake, including demonstrating that the class action is supported by a genuine claimant who is motivated by a desire to resolve their legal claim. We think a state entity should be able to bring a class action as representative plaintiff either where it is a class member or where another Act enables it to do so.
18. When a class action is commenced, we recommend the limitation periods applying to the claim of each person falling within the proposed class should be suspended. The Class Actions Act should specify a list of circumstances that will lead to limitation periods starting to run again.

CONCURRENT CLASS ACTIONS

19. Having concurrent (or competing) class actions relating to the same dispute is generally undesirable as this may lead to increased costs for all parties, inefficient use of court resources, increased burden on defendants, confusion for class members and the risk of inconsistent court rulings on the same issue. We recommend there should be a 90-day deadline to commence a concurrent class action, which will enable the court to consider the certification applications of concurrent class actions together. If more than one concurrent class action meets the certification test, we recommend the court must decide which of those class actions will be certified. When making its decision, we recommend the court should consider which approach will best allow class member claims to be resolved in a just and efficient way. If more than one concurrent class action is certified, the court should have the power to make orders for the efficient management of those proceedings.

CERTIFICATION OF CLASS ACTIONS

20. We recommend the Class Actions Act should require a proceeding to be certified in order to proceed as a class action. While class actions may provide improved access to justice, they also place a significant burden on defendants and the court system as they are usually expensive and lengthy. Class actions also risk insufficient protection of class members' interests. We therefore think it is appropriate for a proceeding to have to meet a certification test before it is allowed to proceed as a class action.

21. We recommend that in order for a proceeding to be certified as a class action, the court must be satisfied that:

    a. The proceeding discloses a reasonably arguable cause of action.

    b. There is a common issue of fact or law in the claim of each class member.

    c. The representative plaintiff is suitable and will fairly and adequately represent the class.

    d. Class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members.

    e. The opt-in or opt-out mechanism proposed for the proceeding is an appropriate means of determining class membership.

22. We consider that both opt-in and opt-out class actions should be allowed in Aotearoa New Zealand. We consider there are advantages and disadvantages to both forms of class action and our proposed certification test will allow flexibility to determine which is appropriate for a particular case.

THE CLASS

Rules for particular class members

23. We recommend additional rules for certain categories of class members. First, we think that people who reside outside Aotearoa New Zealand should only be able to join a class action if they opt in. This approach responds to the difficulty in providing adequate notice of an opt-out class action to those outside Aotearoa New Zealand. It may also facilitate recognition and enforcement of the court's judgment in other jurisdictions.

24. Ministers of the Crown and government departments should only become a class member if they opt in. A key rationale for opt-out class actions is to provide access to justice. However, this is unlikely to apply to the Crown because it has sufficient resources for litigation.

25. We also recommend rules on class members who are minors or who are considered to lack sufficient decision-making capacity with respect to a particular step. We do not favour a rule where a litigation guardian must be appointed for such a class member as we think it will depend on the class member involved and the consequences of taking, or not taking, a particular step. We therefore recommend that class members (and potential class members) are not required to have a litigation guardian solely because they are under the age of 18 years or are considered to lack sufficient decision-making capacity with respect to a step in a class action proceeding (unless the court orders otherwise). However, the court should have a power to make any order it considers appropriate to protect the interests of such class members.

The relationship between the lawyer and class members

26. We consider that, after certification, the representative plaintiff's lawyer should be regarded as the lawyer for the class. As the lawyer will be carrying out legal work on behalf of the entire class, they should not be regarded as solely the representative plaintiff's lawyer. Class members will be bound by the outcome of the litigation and they should be able to rely on the lawyer to conduct the litigation in a way that advances their interests and complies with ethical and professional obligations.

27. We think the lawyer-class relationship that arises upon certification needs to be prescribed by legislation and recommend the Lawyers and Conveyancers Act 2006 should be amended to mandate this relationship. We also recommend that Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) consider what amendments may be needed to the *Rules of conduct and client care for lawyers* to clarify the obligations of lawyers acting in class actions.

STEPS DURING A CLASS ACTION

Notice to class members

28. Class members need to be notified of particular stages in a class action in order to make informed decisions about their participation. We recommend a list of events that should require notice to class members, with the court retaining a discretion to order that notice is not required. The initial notice in a class action will inform potential class members that a class action has been certified and there is an opportunity to opt into or opt out of the class action. We make detailed recommendations about the contents of this notice. We also recommend the court should approve the contents of notices before they are sent to class members and should have a broad discretion to order any method of notice that it considers appropriate in the circumstances.

Case management and discovery

29. Class actions will need close case management to ensure they proceed efficiently and in a way that protects the interests of class members. We recommend the Rules Committee

consider developing a schedule to the High Court Rules listing the matters to be discussed at case management conferences for class actions.

30. We consider it would be desirable to have a specific rule empowering the court to order one or more class members to provide discovery. We do not think the non-party discovery rule is well suited to class members, as it is designed to apply to persons who are not part of the litigation. We also recommend a defendant should be able to seek an order for information resulting from the opt-in or opt-out process, such as the number of class members.

Sub-classes

31. We recommend the Class Actions Act should empower a court to order a sub-class to be created in two situations. The first category is where there is a conflict of interest between different groups of class members, such as where the relief sought by some class members could harm the interests of other class members. In this case, we think a sub-class representative plaintiff will usually be needed and they should instruct a lawyer in relation to sub-class issues. The second category is where there is an additional issue shared by a group of class members, but it does not give rise to a conflict.

Staged hearings

32. In a class action, there will generally be both common and individual issues to resolve. It will often be appropriate for the court to have staged hearings, with common issues considered together and individual issues considered together. We recommend the Class Actions Act should empower the court to make orders for the efficient hearing of a class action, including an order that the hearing should be heard in stages and an order as to which issues should be determined at each stage.

Determining individual issues

33. If the representative plaintiff obtains a successful judgment on the common issues, the individual issues in the proceeding will need to be determined. We think the Class Actions Act should empower the court to determine issues on an individual basis and to give directions with respect to determination of those issues. We think it is desirable for the court to have flexibility as to how individual issues are determined to ensure this occurs in a fair and efficient way. This could include appointing an expert to enquire into individual issues, giving directions as to the way or form in which evidence on individual issues may be given and ordering individual issues to be determined through a non-judicial process.

COST SHARING ORDERS

34. In an opt-out class action, a problem can arise where only some class members are contractually required to contribute to the costs of the proceeding, but all class members benefit from any settlement or damages award. To mitigate this, we recommend the court should have the power to order that the litigation costs of a class action (including the legal fees and funding commission) be equitably spread among all class members, even if they have not signed up to the litigation funding agreement. We call this a cost sharing order.

35. We consider the court should have flexibility as to the terms of the cost sharing order. This will allow the court to either require all class members to contribute a share of their settlement or damages award to cover the costs of the proceeding, or to give a share of

their settlement or damages award to class members who have signed a funding agreement with the funder.

36. To limit the risk of cost sharing orders facilitating windfall profits for funders, we think the court should also be empowered to set a provisional funding commission (or range of commissions) when granting an application for a cost sharing order that enables the funder to receive a funding commission from class members who have not signed a litigation funding agreement. The court should also have the power to vary that funding commission at a later date to ensure it is fair and reasonable in light of the actual costs and circumstances of the class action.

CLASS ACTION JUDGMENTS, RELIEF AND APPEALS

Class action judgments

37. The ability of a judgment on common issues to bind all class members is a central feature of a class actions regime. If class members were not bound by this judgment, the common issues would not be resolved, and the efficiencies of a class actions regime would not be achieved. We recommend the Class Actions Act should specify that a judgment is binding on class members, with respect to the common issues as set out in the certification order.

Aggregate monetary relief

38. Where there are many class members, it may not be practicable or efficient for the court to assess each class member's claim for damages individually. We therefore recommend the court should have the power to make an aggregate assessment of the monetary relief to which the class is entitled and make an order for this amount. In order for the court to make an aggregate assessment of monetary relief, it should be satisfied it can make a reasonably accurate assessment of the amount, but it should be not necessary for an individual class member to establish the amount of loss or damage they have suffered.

39. We recommend the court should have the power to make any orders for the distribution of an award of aggregate monetary relief that it considers appropriate, including appointing an administrator to distribute the award. We also recommend a distribution outcome report should be filed with the court once the process has been completed.

Alternative distribution

40. In some jurisdictions, monetary relief may be paid to an organisation or charity associated with the claim rather than to class members. This is known overseas as cy-près damages, but we prefer the term 'alternative distribution'.

41. We think it is preferable for relief, where possible, to be distributed to class members. We recommend alternative distribution should only be available where it is not practical or possible to distribute the amount to individual class members or the costs of doing so would be disproportionate. If the court orders alternative distribution of an award, it should usually be paid to a eligible charity or organisation whose activities are related to the claims in the class action and whose activities are likely to directly or indirectly benefit class members.

Appeal rights in class actions

42. Some aspects of a class action proceeding are unique and require tailored appeal rules. One is the court's decision on certification. We recommend the plaintiff and defendant should be able to appeal this decision as of right as the implications of certification will be significant to both. However, we recommend that leave should be required to appeal a decision not to certify more than one concurrent class action. We also recommend the parties should be able to appeal a court's decision declining to approve a settlement with leave of the court.

43. We do not think class members should have any rights of appeal. While an individual class member may disagree with the representative plaintiff's decision not to appeal a decision, allowing them to bring an appeal could have significant consequences for other class members. However, we recognise the importance of the judgment on common issues to class members. If the representative does not appeal this judgment, or abandons the appeal, we recommend a class member should be able to apply to replace the representative plaintiff for the purpose of bringing an appeal.

SETTLEMENT OF A CLASS ACTION

44. We consider court approval should be required in order for the settlement of a class action to be binding. This should apply whether the class action is opt-in or opt-out and whether the settlement is reached before or after certification. Court approval of settlement is an important part of the court's supervisory role to protect the interests of class members, who are unlikely to be involved in negotiating the settlement but will be bound by its terms and conditions.

45. When a court is deciding an application to approve a class action settlement, we recommend it consider whether the settlement is fair, reasonable and in the interests of the class. In applying the test, we recommend the court consider the following factors:

    a. The terms and conditions of the proposed settlement.

    b. Any legal fees and litigation funding commission that will be deducted from relief paid to class members.

    c. Any information that is readily available to the court about the potential risks, costs and benefits of continuing with the proceeding.

    d. Any views of class members.

    e. Any steps taken to manage potential conflicts of interest.

    f. Any other factors it considers relevant.

46. We recommend class members should have an opportunity to file a written objection to the settlement. In addition, the court should have a power to appoint a court expert or counsel to assist if it considers this will assist it to determine whether to approve a settlement.

47. We do not recommend a general right for class members to opt out of a settlement as this could cause significant uncertainty and prevent class actions from being settled. Instead, we recommend a class member should only be able to opt out of a settlement where this is permitted by the settlement agreement, or the court considers the interests of justice require it. We also recommend a potential class member should only be able to opt into a settlement on these same grounds.

48. We consider the court should retain jurisdiction to oversee the administration and implementation of the settlement, as part of its ongoing role to protect the interests of class members. As part of this, the court should have a power to make any orders it considers appropriate for the administration and implementation of a class action settlement. We also recommend a settlement outcome report be filed with the court within 60 days of the settlement implementation process being completed, or at a later time if allowed by the court.

49. The defendant may also want to reach a settlement with an individual class member. We recommend two protections with respect to individual settlements. First, if a defendant wishes to communicate with class members about individual settlements after certification, we think the defendant should be required to include some court-approved standard text about the class action in that communication. Second, we recommend the defendant must seek approval of individual settlements reached after certification where the number of settlements means there is a realistic prospect that they will effectively dispose of the class action.

Discontinuance of a class action

50. When a class action is discontinued it will bring the proceeding to an end for class members and so we consider court approval should be required. A discontinuance will not extinguish class members claims like a settlement will and so we consider a lesser threshold is appropriate. We recommend the court consider whether discontinuing a class action would prejudice the interests of class members.

ADVERSE COSTS

51. We consider the usual adverse costs rule should apply to class actions, which means the successful party in a proceeding or interlocutory application will normally be entitled to an award of costs. While the risk of adverse costs may be a barrier to litigants wanting to commence a class action, we are not convinced that removing the adverse costs rule from class actions is likely to make class action proceedings more feasible.

52. The representative plaintiff will be liable for any adverse costs award in favour of the defendant since they are a party to the litigation. We anticipate a representative plaintiff would generally obtain an indemnity for adverse costs, such as from a litigation funder. Class members will generally not be liable for costs since they are not a party to the litigation. We consider it would be desirable for the High Court Rules to provide clarity on the limited situations when a class member could be ordered to pay costs.

ABOLISHING MAINTENANCE AND CHAMPERTY

53. We think litigation funding is desirable for Aotearoa New Zealand in principle. While litigation funding is not a ‘silver bullet’ for the significant access to justice issues facing Aotearoa New Zealand, it has an important role to play in improving access to justice. It can allow plaintiffs to bring claims they could not, or would not, have brought for financial or other reasons. It can also help to level the playing field in litigation against well-resourced defendants. In our view, the statutory class actions regime we recommend would have limited practical utility without litigation funding.

54. We think the law should clarify that litigation funding is permitted by abolishing the torts of maintenance and champerty. These torts, which have historically prohibited litigation funding, act as an impediment to access to justice. The policy rationales for the torts, to protect members of society from malicious litigation and to assure the integrity of the courts, remain important but can be addressed in other ways. For example, through appropriate and transparent regulation of litigation funding, and the court's general powers to stay or dismiss proceedings that are an abuse of its process.

MODELS FOR REGULATION AND OVERSIGHT OF LITIGATION FUNDING

55. There is a need for further regulation and oversight of litigation funding in Aotearoa New Zealand. Currently, litigation funding is not specifically regulated and there is uncertainty about the extent to which it is permitted. This may reduce the availability and affordability of litigation funding, and increase the risk of challenges to funding agreements. It may also mean that plaintiffs are not adequately protected against the risks that can arise in funded proceedings. For example, in relation to funder control of litigation, conflicts of interest, funder profits and funder capital adequacy. We consider the need for further regulation and oversight of litigation funding is strongest in the class actions context.

56. We think the objectives for permitting and regulating litigation funding should be improving access to justice, while assuring the integrity of the court system. In developing our recommendations, we were guided by the following principles:

    a. To facilitate access to courts, the litigation funding market should be sustainable, competitive and promote consumer confidence.

    b. To ensure substantively just outcomes in class actions, the costs of litigation funding to representative plaintiffs and class members and the terms of litigation funding agreements should be fair and reasonable.

    c. To assure the integrity of the court system, and recognise defendant concerns in funded proceedings, the involvement and role of litigation funders in funded proceedings should be appropriate and transparent.

57. We discuss various models for regulation and oversight, including industry self-regulation and oversight, or licensing requirements overseen by an appropriate regulator. However, we conclude that the concerns with litigation funding can best be addressed through regulation and court oversight of funding agreements in class actions, alongside professional regulation of lawyers acting in funded proceedings and changes to strengthen the security for costs mechanism. We think this approach is the most practical and proportionate response to the concerns with litigation funding.

Disclosure of funding agreements

58. In all funded proceedings, we think there should be a requirement for plaintiffs to disclose their funding agreement to the court and the defendant, with redactions to protect privileged matters or those which might confer a tactical advantage on the defendant. This will assist the defendant to make informed choices about whether to apply for security for costs, or a stay of proceedings on abuse of process grounds. Transparency will also provide greater assurance in the integrity in the court system.

SECURITY FOR COSTS

59. In response to defendant concerns about litigation funding, we make a number of recommendations to strengthen the security for costs mechanism in funded proceedings. A funder's failure to maintain adequate capital may mean a successful defendant is left with a significant loss if the funder and the funded plaintiff are unable to meet an adverse costs order. This risk is greatest for defendants in class actions, as class actions tend to be significantly more expensive and protracted than ordinary proceedings.

60. We do not think the existing security for costs mechanism in HCR 5.45 adequately protects defendants in funded proceedings or promotes efficiency and economy in litigation. Security is currently ordered at the discretion of the courts, and only if sought by the defendant. If the funder is based overseas, a successful defendant may be put to the additional expense, risk and inconvenience of litigation in a foreign jurisdiction to enforce the security provided. Further, HCR 5.45 only empowers the court to order a plaintiff to provide security, which does not accurately reflect the dynamics of some funded proceedings. In class actions, for example, the funder is usually contractually responsible for paying the full costs of the litigation including any security for costs. We think defendants, particularly in funded class actions, need greater certainty that capital will be available to cover their costs in the event they are successful.

61. We recommend the Rules Committee consider developing a rebuttable presumption that funded representative plaintiffs will provide security for costs in class actions. We also recommend a rebuttable presumption that security for costs, in all funded proceedings, will be provided in a form that is enforceable in Aotearoa New Zealand. Finally, we recommend that the court, in all funded proceedings, should be expressly empowered to order costs, including security for costs, directly against the litigation funder.

PROFESSIONAL REGULATION OF LAWYERS IN FUNDED PROCEEDINGS

Lawyer-plaintiff conflicts of interest

62. The relationship of trust and confidence between lawyer and client is an essential tool for safeguarding the plaintiff's interests in litigation. However litigation funding can complicate that relationship, because while the lawyer owes duties to the plaintiff, the lawyer's fees are paid by the funder.

63. Conflicts of interest between a lawyer and funded plaintiff can arise where the lawyer has (or wants to cultivate) an ongoing relationship with the funder, owes duties to both the funder and the plaintiff, or where the funder exerts control over the litigation. Conflicts may also arise from any commercial ties between the lawyer and the funder. Conflict-prone stages of funded litigation include determining the litigation strategy and 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. Conflicts can arise in any funded case and are not limited to funded class actions.

64. To address these concerns, we recommend NZLS consider amending the *Rules of conduct and client care for lawyers* to clarify how conflicts of interest should be avoided and managed in funded proceedings, including conflicts arising from a lawyer or law firm having financial or other interests in a funder that is financing the same matter in which they are acting.

Plaintiff's potential liability for unpaid costs

65. A funder's failure to fulfil its financial obligations may mean the plaintiff is left with a substantial and unexpected liability for any unpaid legal costs or adverse costs in excess of any security provided. This risk is particularly concerning in class actions, as the legal costs will be disproportionate to the value of the representative plaintiff's own claim, and to the risks that other class members carry.

66. We recommend NZLS should consider amending the *Rules of conduct and client care for lawyers* to prohibit lawyers from claiming unpaid legal fees and expenses from the representative plaintiff. We think a prohibition will protect representative plaintiffs, and may also encourage best practice. For example, it may incentivise lawyers to ensure that any expert fees, and their own fees, are paid up front or in regular instalments by the funder. It may also encourage lawyers to only recommend funders to their clients that, in their assessment, are competent and financially stable.

COURT OVERSIGHT OF FUNDING AGREEMENTS AND COMMISSIONS

67. We recommend litigation funding agreements should be subject to court approval in class actions. This responds to concerns about funder control of litigation, conflicts of interest between the funder and the representative plaintiff, and excessive funder profits that may significantly diminish returns to the class. We think court approval will protect the interests of the representative plaintiff and class members, and ensure that litigation funding provides meaningful access to justice. It also will provide assurance in the integrity of the court system, and improve transparency and funder accountability in class actions.

68. Given the often commercial nature of other funded proceedings, we consider that most individual funded plaintiffs are likely to be sophisticated and able to protect their interests when negotiating funding agreements. Therefore we do not recommend court approval of funding agreements outside the class actions context.

69. We recommend that court approval of the funding agreement should occur early in the class action, and the funder should be unable to enforce the funding agreement against the representative plaintiff or class members unless the agreement has been approved. The court may only approve a funding agreement if it is satisfied that the representative plaintiff has received independent legal advice on the funding agreement and the agreement as a whole is fair and reasonable. We discuss various factors the court may consider when assessing the fairness and reasonableness of the funding terms and the funding commission. We also recommend a power for the court to appoint an expert if this will assist it to determine whether a funding commission is fair and reasonable.

REDUCING BARRIERS TO ACCESS TO JUSTICE FOR CLASS MEMBERS

70. Throughout this review, we have discussed some of the access to justice barriers for potential representative plaintiffs and class members. The costs of litigation, especially legal fees, mean that seeking redress through the courts is beyond the means of most New Zealanders. The adverse costs rule may also act as a barrier to accessing the courts.

71. While litigation funding can remove or reduce these barriers in some cases, it is only likely to be available in cases that are sufficiently profitable for a litigation funder. It is unlikely to be available in public interest litigation, or where the relief sought is non-monetary.

72. We consider a public class action fund could have significant access to justice benefits, particularly given the pressures on the legal aid system and the fact that legal aid is unlikely to be available for many of the individual claims that make up a class action. We discuss how a class action fund could be administered and funded.

73. We also recognise that, while class members have a largely passive role in the litigation, there are certain stages where they can take an active step in the litigation, such as deciding whether to opt in or opt out and considering whether to object to a settlement. Class members need sufficient understanding of these stages to be able to participate in them and may need assistance to take particular steps. We recommend Te Tāhu o te Ture | Ministry of Justice consider producing a clear and accessible online guide to assist class members to understand the class action process. It could also explore options for providing free legal advice to class members, for example through support for a class actions law clinic.