

CLASS ACTIONS – LAW COMMISSION

SUBMISSIONS BY TOM WESTON QC ON ISSUES PAPER 45

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Introduction

- 1 The Commission's Issues Paper posits a large number of questions in respect of which the Commission has a particular interest. In reality, though, the Issues Paper, and the list of questions (extensive though they are), only just scratch the surface of the topic of class actions. Class actions are an enormously complex area of the law with difficulties ranging from those of policy to those of regulatory design (and pretty much everything in between). Issues of substantive law (e.g. limitation) are also engaged. In this area, like most in the law, the devil is always in the detail. But the Issues Paper operates at a level of generality. Inevitably, in answering some of the questions about policy, it is necessary to think about detail – which is not always easy in the absence of a draft regime. I realise that was not the point of the Paper, but it may limit the usefulness of some of the responses.
- 2 I want to start by addressing some general issues before turning to the particular questions. In responding to the Issues Paper, I draw upon my experience as counsel for defendants in two funded class actions (*Feltex* and *Ross v Southern Response*). Inevitably, my experience, and the comments following, reflect the fact that I have acted for defendants. Nevertheless, and to be quite clear about it, this submission reflects my own views and not those of my clients.

First principles?

- 3 The Commission's Terms of Reference require it to conduct a first principles review of class actions and litigation funding. It is not clear to me that the Commission has done this (other than in relation to the Maori-dimensions of class actions). I appreciate that a significant amount of work has been undertaken to prepare the Issues Paper. Nevertheless, this has not been a first principles review.
- 4 The Commission appears to have taken the current position in New Zealand (most recently as updated in *Ross v Southern Response*) as a starting point and looked forward from there. It has not explicitly questioned whether class actions are economically and socially desirable. It has taken the frequent references to "access to justice" found in cases and the literature as a given. It has relied upon legal scholars such as Mulheron and Morabito who, in large measure, can be classed as advocates for class actions.
- 5 I respectfully suggest a harder look is required. In the following section of my submissions, I pressure-test the concept of "access to justice". For the reasons identified below, I do think there are grounds to be sceptical of at least some of the benefits normally argued to favour class actions.

Access to justice?

- 6 The acknowledgement in paragraph 3 of the Executive Summary to the Issues Paper is apt. There, a commentator's scepticism is noted: class actions enable litigation to be advanced which would not otherwise be brought. But the more difficult question is whether that litigation is socially useful.

- 7 And, in addition, I suggest it should be asked whether such litigation is *economically* useful. Not every wrong should lead to litigation. Bad manners or immoral behaviour will not generally justify litigation. Equally, I suggest, not every trivial infringement of some legal right should usefully be the subject of litigation. By its very nature, the legal system rations availability to legal resources. We cannot conceive of a system where legal representation is free (and limitless) and where Judge-time, equally, is immediately available (and also limitless). Access to justice (assuming that this means access to the courts to vindicate legal rights) is inherently rationed. In my opinion, that is appropriate. Otherwise, everything could be litigated. The more difficult issue is to address where the line should be drawn and, for our purposes, whether class actions generate an excess of benefit over cost.
- 8 The Commission identifies access to justice as the primary advantage of a class action (Executive Summary, paragraphs 12 and 19; Report, paragraphs 9.6 and 9.11). That reflects statements in *Ross v Southern Response*. For myself, and having been counsel in that case, I regard these assertions, effectively, as slogans. The expression “*access to justice*” is a brave rallying cry but, I suggest, needs to be reviewed critically. Before I make some comments on this, I identify some passages in the Issues Paper where access to justice is addressed (together with some brief comments as appropriate):
- Paragraphs 1.9-1.15: access to justice concerns the ability of people to vindicate civil law rights. There is an acknowledgement (1.15) that litigation funding is available only in a limited range of cases which may pose a significant obstacle to the viability of a class action in some cases. As I observe below, while this limitation is acknowledged, the consequences do not appear to be developed.
 - Paragraphs 4.19, 5.22 and 5.23: procedural uncertainty may, of itself, restrict access to justice. This, I think, is a critical acknowledgement. I do not believe the Court of Appeal nor the Supreme Court in *Ross v Southern Response* gave appropriate weight to it. If there are to be class actions on an opt-out basis then, plainly, there must be a legislative regime.
 - Paragraphs 5.5-5.9: class actions have the potential to improve access to the courts but it is only one of many mechanisms which may improve access to the courts.
 - Paragraphs 5.24 and 5.25: an acknowledgement there is limited evidence as to the extent to which class members achieve compensation (or other forms of substantive justice) through participation in a class action. Surely, such an acknowledgment is a major negative which should be unpacked by the Commission? This is particularly the case in relation to trivial claims (for example, see that identified in paragraph 6.8 of the Issues Paper) which are unlikely to result in any real benefit to individual claimants. Rather, such a class action is simply a wealth transfer from a defendant to a funder. There may be a deterrent effect as a consequence but it is impossible to say that this is providing access to justice. Similar acknowledgements can be found in the Issues Paper at paragraph 6.53 and 6.54. It seems unlikely that there will be real benefits to a wide range of prospective claimants.
 - Paragraphs 7.30-7.33: an acknowledgement that only certain types of claims tend to be pursued and others are deemed uneconomic. Securities/shareholder class actions, in Australia, predominate.

- Paragraph 12.13: noting the statements made by the Court of Appeal and the Supreme Court in *Ross v Southern Response*, assertions made without further explanation or discussion.
- Paragraphs 16.7-16.11: reviewing whether maintenance and champerty should be abolished on the basis they have been eroded by access to justice considerations. It is interesting that the reservation of Glazebrook J (noted in the Issues Paper at 16.11) was not carried through into the Supreme Court Judgment of *Ross v Southern Response*.
- Paragraph 17.4-17.6: an acknowledgement that litigation funding is not a silver bullet for access to justice concerns. Nevertheless, litigation funding does have some role to play in improving access to justice.

- 9 The summary, as above, may not capture every reference to access to justice in the Issues Paper. However, I hope have accurately summarised the overall thrust of the paper. If I have, it can be seen that access to justice considerations provide only meagre support for the existence of class actions. There is little to suggest that, in a broad sense, class actions do provide greater access to the courts (other than in very specific areas) and, further, that they provide real returns to the claimants. Moreover, the focus (in Australia) upon shareholder/securities class action appears simply to effect wealth transfers from low-level shareholders to funding entities. See the discussion in the ALRC 2018 Report at chapter 9.
- 10 Funders, inevitably, characterise class actions as providing access to justice, glossing over how they pick and choose amongst available claims. It is important that their claims are closely scrutinised and tested. There is, in my opinion, a significant gap between the rhetoric and the reality.
- 11 If the Commission does undertake such an examination then I suggest there may be less ready acceptance about the desirability of class actions generally. I believe it is important that this fundamental analysis is undertaken. I have no doubt that class actions will benefit lawyers but I have considerable doubts beyond that.

Answers to individual questions

- 12 I now turn to individual questions organised by reference to particular Chapters.

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?
- A1. The biggest problem has been the procedural uncertainty resulting from the absence of a statutory regime. This has resulted in huge expense for both sides of the argument in *Ross v Southern Response*. In part, that is because the lack of a regime in New Zealand necessitate consideration of the varying regimes around the globe – a time consuming and difficult exercise.
- The absence of clear procedures has also resulted, in my experience, in a reluctance by the Court to discipline tardy plaintiffs (*Feltex*).
- There is a lack of certainty around limitation rules as they relate to class actions.

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

A2. I think the question should be put the other way – how many claims are likely to be brought as a class action? In my opinion, there is a comparatively small range. That is because class actions are expensive and, in the absence of contingent fee arrangements in New Zealand, are dependent upon funders. Funders will only pursue claims where damages outcomes can be obtained and where the total sums involved are significant.

Claims against Government/Crown entities are likely to increase. The Crown is an easy target – in part because of the Official Information Act which simplifies pre-litigation investigation.

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?

A3. I have already addressed access to justice above. As noted there, I am sceptical of claims that class actions (generally) significantly improve access to justice.

The second claimed advantage is that of efficiency and economy of litigation. In the absence of a legislative regime there is no efficiency and no economy. A legislative regime would improve each feature although I think it is important to acknowledge that class actions, inherently, are not efficient and may not be economic. In Australia, for example, it is trite to say that class actions are time consuming and expensive and the payments made to funders/lawyers exhaust a large percentage of any return to the claimants. In my experience, most new developments in procedural law are justified on the basis they improve efficiency and economy – and most entirely fail in that ambition (tailored discovery of documents is just one recent example).

Class actions certainly strengthen incentives to comply with the law. Indeed, of the three features listed, this seems to me the most real. But, as I said at the outset, many class actions simply result in wealth transfers from defendants to funders. That hardly seems to be socially advantageous.

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?
- A4. I think there is little doubt that development of class actions will place an increased burden on the Court with a consequential need to provide additional resources. Indeed, on the theory followed by the Commission (class actions enhance access to justice), it must be assumed that there will be more cases before the courts. If that assumption is correct, then there will need to be more Judges and more support staff made available. That should be explicitly acknowledged.

My experience is that class actions have a significant impact upon defendants. If Southern Response had been a private entity without insurance then it may well have been crippled by the extreme costs of the exercise involved in *Ross v Southern Response*. The defendants in *Feltex* were fortunate to be insured – but the personal costs from over ten years of extensive litigation have been significant. There is too little recognition that access to justice also includes the right of defendants to have access to justice.

The power of the court to strike out a claim (Issues Paper 6.25) is, in my experience, a very slight discipline in this area. The courts are reluctant to terminate class actions.

The fourth item raised above – class members' interests - is a very complex one. The relationship between class members and the representative plaintiff needs to be specifically provided for – as does the relationship between the lawyers acting for the representative plaintiff and the other class members. There is a real prospect that, at least in part, the interests of the lawyers and class members will diverge (funding and fees).

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?
- A5. It is inefficient for class actions in New Zealand to be subject only to r4.24 and the inherent jurisdiction of the High Court. If there are to be class actions recognised in this country then there must be a written regime providing for this. While there are a range of forms that could be adopted (for example, the use of Practice Notes) the safest and best approach is to adopt a statutory regime. That would avoid any arguments about jurisdiction. Moreover, the statutory process would ensure appropriate checks and balances are examined as part of the statutory drafting process.

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?
- A6. No strong view although a general approach appears best.

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

A7. I believe the class actions regime should be restricted to the High Court.

Q8. Should a class actions regime include defendant class actions?

A8. I do not have a strong view either way but believe that a class actions regime should exclude defendant class actions.

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

A9. Agree that there appears to be little to be gained from keeping the representative action procedure if there is to be a statutory class action established.

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?

A10. As discussed, at the outset, I am unpersuaded by the claimed three key advantages of class actions. As earlier expressed, I believe claims that class actions improve access to justice are overdone and that the current state of uncertainty in relation to procedure does not promote efficiency and economy of litigation. The option discussed in paragraph 9.11 is, without more, meaningless.

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

A11. One of the big decisions to be made is whether there should be a certification test and, if so, what form it should take. The US certification test is a major (and expensive) litigation exercise in and of itself. Is that appropriate in New Zealand? If not, then what sort of certification test required? See further discussion below at A19.

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

A12. I believe that a statutory regime should specify the relationship between class counsel and absent class members which would include if and to what extent fiduciary duties are owed (and for what functions as undertaken by counsel). Moreover, it would be sensible to specify the extent to which the representative plaintiff binds other claimants including in relation to stage 2 issues (that is, the non-common issues). The question of settlement raises particular problems in this regard.

As noted at 9.21, there is considerable uncertainty overseas as to the extent to which class counsel actually represent class members. That uncertainty is counter-productive. See also A32 below.

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?

- A13. Proportionality is an appropriate principle. The discussion at paragraph 9.28 is endorsed.
- Q14. Are there any unique features of litigation in Aotearoa New Zealand that need to be considered when a class action regime is designed?
- A14. Issues arising in relation to Maori concerns (e.g. land) are obviously distinct and need to be specifically addressed in New Zealand. The observation at paragraph 9.32, that New Zealand has a small population is, in fact, support for opt-in procedures rather than opt-out procedures (as LPF argued in the Supreme Court – but the Supreme Court did not agree).
- Q15. To what extent, and in what ways, should tikanga Māori should influence the design of a class actions regime?
- A15. The observations in paragraph 9.43 are well made but care needs to be taken in adopting cultural standards applicable in Maori affairs and inserting them, without more, into a statutory scheme. My experience in the Cook Islands, where Maori customary standards are included in the written Constitution, but without definition or clarity, is that this simply is productive of further litigation.
- 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?
- A16. I have reservations as to whether the statements made in paragraph 9.45 are actually correct but I do not have sufficient insight into the wider issues to provide any helpful submission on that.
- There is no other comment that I can provide.
- 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?
- A17 & 18. The issues raised in paragraph 9.49 are critical and should be addressed in any statutory regime. There is considerable complexity in relation to some of these issues. See further discussion below.

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)?
- A19. I believe a certification requirement would be sensible but, assuming that is accepted, there should be specific procedures associated with it. I doubt whether the elaborate procedures in the US are appropriate in NZ.
- I agree that the certification process should ensure that common issues of fact and law predominate over individual issues. *Feltex*, in my opinion, was a case where that was the case. *Ross* is far more marginal in that regard – the stage 2 issue are quite significant. If the stage 1 issues do not predominate, then there is a real risk that a class action will simply be a device intended to pressurise the defendant into settlement.

If there is not a certification process, then the Australian procedure (right of entry with subsequent right to challenge) is an obvious second-best approach.

- Q20. Should a class actions regime contain a numerosity requirement? If so, what should this be?
- A20. Yes, there should be a numerosity requirement. I have no strong view as to what it should 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?
- A21. Predominance requirement already addressed in A19 above.
- 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?
- A22. Yes, as above.
- Q23. Should a representative plaintiff have to establish that a class action is the preferable or superior procedure for resolving the claim?
- A23. Yes
- Q24. Should a court be required to conduct a preliminary merits assessment of a class action or an assessment of the costs and benefits?
- A24. I doubt this would be necessary as a discrete factor – and it is effectively undertaken if there is a predominance assessment.
- Q25. Should a representative plaintiff be required to provide a litigation plan?
- A25. No strong view.
- If there is a certification threshold then, effectively, a representative plaintiff is required to provide a litigation plan.
- Q26. Should a court consider funding arrangements as part of a threshold legal test for a class action?
- A26. Yes, most definitely.
- Q27. Should a statutory class actions regime have any other threshold legal tests?
- A27. I cannot think of any other issues.

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?
- A28. No strong views.
- Q29. Should a representative plaintiff be a class member or should ideological plaintiffs be allowed?

- A29. The representative plaintiff should be a class member. While I can understand that there may be an advantage, in some limited cases, from having an ideological plaintiff, I think the risks outweigh the likely benefits. An ideological plaintiff has no real skin in the game. It is likely to tilt the playing field substantially in favour of the plaintiffs.
- Q30. When should a government entity be able to bring a class action as representative plaintiff?
- A30. Only with specific empowering legislation.
- 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?
- A31. There needs to be some specific process designated for this. I do not think it is enough to say, as Williams J did in the Supreme Court, that, in New Zealand, Chiefs have traditionally represented their iwi. That may be so in some cases but it will not be so in all cases. And simply to say that the process should be that in customary law begs the question (some of the problems with this addressed in paragraph 11.47). By way of further example, similar processes were enshrined in Cook Islands law. However, when I was Chief Justice it was also the case that there were disputes about the content of customary law and there was no effective means to resolve those disputes for the purposes then of informing the common law otherwise dependent upon establishing the customary law.

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?
- A32. While the horse may now have bolted (following the Supreme Court's decision), I would still prefer that, in New Zealand, we have an opt-in approach because that is the cleanest and most straightforward mechanism. Moreover, it seems to work in our small country (acknowledged in 12.18). While there are costs involved in a book-building exercise, I think the benefits outweigh the costs.
- I am opposed to having a range of possible approaches to be ascertained in the discretion of the Court. That simply makes a further ground of argument inevitable. I do not think a default option solves that particular problem.
- I have some comments upon specific paragraphs in the Issues Paper as now discussed. If New Zealand is to have an opt-out mechanism, there need to be clear rules around when and how that might convert to an opt-in approach. As acknowledged in 12.29, that is likely to be required at stage 2. It may also be required at settlement. The various procedures devised in Australia (12.50) are all attempts to solve the various issues. In my opinion, the legislative scheme should address all of these rather than leaving it to the Courts to resolve on an ad hoc basis.
- Paragraph 12.21 refers to the argument that an opt-in claim can be formulated without a requirement to sign up to litigation funding. I think that argument is rubbish. I do not think that such an arrangement does amount to opt-in.

In paragraph 12.47 there is a reference to *Phillips Petroleum v Shutts*. However, it is important to appreciate that, in that case, the 1500 class members who could not be served with a notice were subsequently excluded from the class action (p813). The Supreme Court appears to have overlooked this.

12.48 is a further reference in the Issues Paper to the uncertain relationship between class counsel and class members. As submitted above (A12), this relationship definitely needs to be clarified and then specified.

I agree that paragraph 12.59 lists further issues relating to class composition which need to be addressed (some of which overlap with the above).

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?

A33. See above.

CHAPTER 13: DISADVANTAGES OF CLASS ACTIONS

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

A34. The risk of adverse costs is one of the factors that actually evens the playing field out (otherwise tilted in favour of the plaintiffs). Contrary to the first sentence of paragraph 13.14 of the Issues Paper, access to justice involves consideration of the position of each of the plaintiffs but also the defendant. See also the Issues Paper at 15.43 acknowledging the importance of ordering security for costs.

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

A35. See above.

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?

A36. Nothing in addition to that otherwise set out in this submission.

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?

A37 & A37 As a general point, first, there is little benefit in establishing a class action regime without also addressing funding. One goes with the other. That does not make litigation funding “desirable”. It is just that there is little point thinking about class actions without also thinking about funding.

In paragraph 14.41 of the Issues Paper there is a reference to *Feltex* and the funding in *Feltex*. *Feltex* is a good case study of what can go wrong with funding and how

there needs to be much stricter regulation around litigation funding in New Zealand.

In paragraph 17.35 of the Issues Paper, there are references to seeking a stay of proceedings and to striking out proceedings. As submitted elsewhere, my experience in *Feltex* is that courts are extremely reluctant to resort to such procedures when it comes to class actions that are funded. The *Feltex* case shows that, in reality, there is little discipline for a funder. That needs to be remedied.

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?

A39 - A41: I do not have strong views on the continuing existence of these torts but observe that there appears to be a fundamental inconsistency between maintaining their existence and the encouragement of class actions.

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?

A42 - A44 The reality is that funders have a significant influence over litigation even if, as a matter of form, they are held at arms-length from the litigation. I believe it is crucial that there should be automatic disclosure of funding agreements/arrangements.

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-claimant 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?

A44 - A47 I believe there are real conflicts that need to be managed. The three suggestions in Q47 would be one way to address the problems. It may also be necessary to require that a representative plaintiff obtain separate advice in relation to the funding agreement before entry into same.

In relation to 20.10 it is perhaps naive to suggest that a plaintiff actually negotiates a funding agreement. Generally speaking, the terms are set by the funder.

- Q48. What concerns, if any, do you have about lawyer-client 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-client 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?

A48 – A50 Class-counsel have significant conflicts of interest and duty. The extent of any conflicts of interest will turn upon the fee arrangements in the instant case. Conflicts of duty arise from duties owed funders, to the representative plaintiff, and to unrepresented class members. The law in relation to the professional obligations of class-counsel is entirely unsatisfactory and should be clarified. If class-counsel owes fiduciary duties to the representative plaintiff then, to what extent, are fiduciary duties (or other duties) owed to unrepresented class members? These issues should not simply be left for judicial development.

New professional rules/guidelines should be developed which mesh in with any legislative regime.

CHAPTER 21: FUNDER PROFITS

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

A51. I have real concerns. Profits can be extreme. Funders justify these by referring to high risk but, in reality, many of the claims brought by funders are comparatively low risk.

It is naïve to assume that the court can, in any real way, manage the quantum of funding commissions. Just because funding commissions are normally claimed in the range of 20-40% of recoveries does not somehow justify that as a realistic benchmark. Indeed, the court has no real way of assessing what is an appropriate commission.

In many cases, a funding commission will represent an unjustified wealth transfer from mum and dad investors (in the case of non-disclosure cases against companies) or the tax payer (claims against Crown entities).

I agree with the observations set out in the Issues Paper at 21.9. It is correct that such wealth transfers have less to do with access to justice (and vindicating wrongs) than effecting wealth transfers to corporate funders.

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

A52. No. As above, the court does not have the tools properly to manage these problems.

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)?

A53. The court already has power to vary funder commissions but it is not a jurisdiction that is easy to exercise. Inevitably, at the point of a settlement, there is a conflict between class-counsel (seeking to maximise fees/funding commission) and a representative plaintiff and the unrepresented class. The interests of the representative plaintiff and the class may not necessarily coincide if the representative plaintiff is to receive a payment for undertaking the role as representative.

CHAPTER 22: CAPITAL ADEQUACY

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

A54. *Feltex* demonstrates the risks if there is not capital adequacy.

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

A55. No. See *Feltex*.

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?

A56. Security for costs even if ordered, will not necessarily be a satisfactory response. See *Feltex*.

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?

A57. Litigation funders in New Zealand should be subject to regulation including minimum capital adequacy requirements.

CHAPTER 23: REGULATION AND OVERSIGHT

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

A58. I agree with paragraph 23.8 of the Issues Paper. I also support the position in Ontario referred to in paragraph 23.50 of the Paper.

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?