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Review of Class Actions and Litigation Funding
Law Commission
PO Box 2590
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Meredith Connell submission on *Class Actions and Litigation Funding | Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* (NZLC IP45, 2020)

1 Introduction and overview

1.1 Please find below Meredith Connell's submission on *Class Actions and Litigation Funding | Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* (NZLC IP45, 2020).

1.2 We act for a diverse range of clients, including the Commerce Commission, the Financial Markets Authority, other government ministries, departments, and organisations, and an array of private clients. We act routinely in cases concerning multiple claimants with common factual or legal issues, including:

(a) *Scott & Ors v ANZ Bank New Zealand Ltd* (CIV-2019-485-376) (whether the defendant is liable to the beneficiaries of its customer in dishonest assistance, knowing receipt, and negligence);

(b) *TEA Custodians Limited v Wells & Ors* (CIV-2019-485-642) (whether the defendants are liable for false or misleading statements made in connection with an initial public offering of shares);

(c) *Commerce Commission v Viagogo AG* (CIV-2018-404-2659) (whether the defendant has made false and misleading representations on its ticket reselling website contrary to the Fair Trading Act 1986);

(d) *Commerce Commission v Harmoney Ltd* (CIV-2016-404-2125) (whether a fee charged by the defendant to lenders via a peer-to-peer lending platform was a credit fee for the purpose of the Credit Contracts and Consumer Finance Act 2003);

(e) *McGougan v DePuy International Ltd* (CIV-2015-485-1049) (whether individuals in Aotearoa New Zealand could bring compensatory claims in Aotearoa New Zealand for personal injury suffered in Aotearoa New Zealand, covered by ACC, where the conduct giving rise to their claims occurred in another jurisdiction); and

(f) *Ministry of Education & Ors v Carter Holt Harvey Ltd* (CIV-2013-404-1899) (whether the defendant was liable to the Ministry of Education and school boards of trustees in tort,

under the Fair Trading Act, or Consumer Guarantees Act 1993 for manufacturing an allegedly defective cladding product).

1.3 We have, and continue to, act for and against parties with funding support from litigation funders and for and against insurers and insured parties.

1.4 Our submission focuses on six issues. In summary, we submit that:

(a) There are problems with using HCR 4.24 for group litigation. Chief among those problems is the uncertainty that it creates for actual and intended parties.

(b) A clear and robust statutory class actions regime is desirable.

(c) The class actions statutory regime should apply generally, while recognising that class actions will be but one tool available to improve access to justice and to deter alleged misconduct.

(d) Any gatekeeping requirements (whether certification of the proceeding or enabling a defendant to apply to discontinue a class action proceeding) should not be burdensome.

(e) Representative plaintiffs and litigation committees can enhance the expeditious conduct of a class action.

(f) Details of any court-approved settlement should be confidential unless the parties expressly agree otherwise.

1.5 We would be happy to discuss any aspect of our submission with the Commission.

2 There are problems with using HCR 4.24 for group litigation

2.1 We agree with the Commission that there are a number of problems associated with using HCR 4.24 to pursue class action style claims.[1]

2.2 In our view, the chief problem is the lack of certainty that HCR 4.24 provides to parties (actual and intended), both at the commencement of a representative proceeding, and over the life of that proceeding, including any appeals. We agree with the Commission's list of problems arising from a lack of certainty at paragraph 4.22 of the Issues Paper.

2.3 Additional problems include prospective class members declining to opt in, or choosing to opt out of a representative proceeding because of:

(a) concern about potential costs exposure (even where the representative plaintiff/s obtain an indemnity from a funder and/or after the event insurance for any adverse costs award);

(b) uncertainty about the existence or status of competing class actions involving the same claimant class; and/or

(c) confusion about the class action procedure generally.

2.4 It is difficult to assess the full impact of these problems. The quantitative indicators described at paragraph 4.23 of the Issues Paper only tell part of the story. For example, we are aware that:

[1] Issues Paper, ch 4.

(a) potential costs exposure remains a significant concern for potential claimants in funded actions even after the Court of Appeal's endorsement in *Ross v Southern Response Earthquake Services Ltd* of the High Court's statement in *Houghton v Saunders*;[2] and

(b) while the presence of a significant number of interlocutory applications in a particular representative proceeding may reflect the existence of procedural uncertainties, the inverse is not necessarily true. The absence of interlocutory applications is more likely to reflect other matters, such as the parties' strategic considerations and their assessment of how best to balance risk, timing considerations, and use of resources. Currently, both representative plaintiffs and defendants are required to make choices about the conduct of a proceeding in light of the existing uncertainty, without the benefit of a statutory regime.

2.5 Accordingly, although there has been an increase in the number of representative proceedings filed over time, we consider it is likely that had a statutory class actions regime been in place:

(a) more claimants would have participated the proceedings filed to date; and

(b) a greater number of proceedings would have been filed.

2.6 In short, while it is difficult to assess the full impact of the problems associated with procedural uncertainties, we are concerned that their impact should not be understated.

3 A clear and robust statutory class actions regime is desirable

3.1 We support the Commission's preliminary view that a statutory class actions regime is desirable as means of addressing the uncertainties associated with HCR 4.24, and better achieving the objectives of class actions. We comment on specific aspects of a potential statutory regime in Parts 4 to 7 below.

4 The class actions statutory regime should apply generally with clearly expressed general purposes

4.1 As the application of HCR 4.24 demonstrates, a range of different class action style proceedings have been, and should continue to be, brought in Aotearoa New Zealand. We favour a general class actions regime. We do not consider that the class actions regime in Aotearoa New Zealand should be restricted to particular areas of the law.

4.2 It is, of course, likely that certain kinds of claims will be particularly suited to a class actions regime. In Australia, for example, there has been to date a particular focus on securities class actions. Many of these class actions allege misleading or deceptive conduct by a company, or breaches of a listed company's continuous disclosure obligation, that have resulted in claimants acquiring securities when they would not have done so but for the alleged conduct, or at a higher price than they otherwise would have paid. These claims are relatively uncomplicated to prove: they do not require proof of intent, and causation of loss need not be established on an individual basis.[3]

4.3 Class actions will not, however, be appropriate for every type of case. The different possible consumer credit claims demonstrate this:

(a) Consumer credit claims raising common factual and legal issues where all claimants have suffered the same loss, and where that loss is obvious or easy to calculate (such as the imposition of a fixed fee), will be well-suited to a class action where there is sufficient scale.

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2 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431 at [116] and *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [164].

3 Michael J Legg "Shareholder Class Actions in Australia – The Perfect Storm?" (2008) 31 UNSWLJ 669 at 674 and 681–683.

(b) In contrast, where claimants have suffered losses that are difficult to assess, it will be harder to efficiently prove those losses across the claimant class. For example, where a defendant unlawfully repossesses consumer goods from a number of debtors, the circumstances of the breaches, and the value of the consumer goods at the time they were repossessed, may be difficult to assess without evidence from each claimant. In situations like this, it may be that a regulator is better-placed to take a criminal proceeding against the defendant to seek to punish and deter the misconduct, and to seek reparation in respect of particular victims as well as a fine.

4.4 In short, class actions will be but one tool in the proverbial toolbox available to improve access to justice and to deter alleged misconduct.

4.5 In our view, the fact that certain types of claims may or may not be particularly suited to class action proceedings has two legislative design implications.

4.6 First, the statutory regime should be robust and general, applying across all substantive areas of the law, with clearly expressed general purposes. This will encourage its widest use over time as the learnings from cases in respect of its obvious uses are able to be translated to situations that are not currently envisaged.

4.7 Second, to avoid unintended consequences and inconsistency with other claims, the statutory regime should not be more expansive than is required to address those purposes, and should not duplicate the existing "armoury" of court rules available to address both class and non-class actions.[4]

5 Any gatekeeping requirements (certification or discontinuance) should not be burdensome

5.1 As with HCR 4.24, the courts should have an express means of determining whether a class action involves a properly constituted claimant class.

5.2 We favour a statutory gatekeeping mechanism enabling a defendant to challenge the use of the class action procedure on particular grounds, as opposed to a certification mechanism, for the reasons identified at paragraphs 10.25 to 10.28 of the Issues Paper. We consider that mechanisms for challenge should:

(a) be limited only to matters that are not already provided for in court rules and a court's inherent jurisdiction and powers (including case management and interlocutory applications); and

(b) promote access to justice and the expeditious conduct of litigation, and the just, speedy, and inexpensive determination of class action proceedings.

5.3 In keeping with that approach, we consider that a defendant could apply for an order discontinuing a class action proceeding where:

(a) claims are not brought on behalf of an identifiable class of persons; and/or

(b) there is no significant common interest in the resolution of any question of law or fact arising from the proceeding.[5]

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4 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, (2020) ANZ Insurance Cases 62-253 at [41].

5 *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.

5.4 We make the following comments about the other potential threshold criteria described in the Issues Paper:

(a) **Numerosity**: Given Aotearoa New Zealand's relatively small population, a numerosity requirement is an unnecessary impediment to plaintiffs seeking to commence class actions. Any numerosity requirement in the form of a minimum number of claimants will be arbitrary. In any event, the additional procedural steps and costs associated with commencing a class action - as opposed to an "ordinary" non-class proceeding - mean that very small claimant classes are unlikely to be attractive to prospective claimants or litigation funders.

(b) **Preliminary merits assessment**: A class action-specific preliminary merits assessment is not desirable for three reasons.

(i) First, existing court rules and the courts' inherent jurisdiction enable defendants to test the merits of a proceeding. For example, a defendant may:

(A) seek further particulars of a claim;[6]

(B) request that a representative plaintiff remedy any defects in initial disclosure, and seek an order requiring compliance with a representative plaintiff's initial disclosure obligations;[7] and

(C) apply to strike out or stay all or part of a pleading if it does not disclose a reasonably arguable cause of action, or is an abuse of the court's process.[8]

(ii) Second, requiring an additional preliminary merits assessment would prejudice claimants by subjecting their claims to greater scrutiny than if each claimant had filed a statement of claim individually.

(iii) Third, as a practical matter, where a litigation funder is involved, the funder is incentivised to assess the merits of the claim before a proceeding is commenced, and throughout the proceeding.[9]

(c) **Preferability/superiority**: Any preferability or superiority test creates a real risk that the merits and economics of a claim are subject to a degree of scrutiny that no other claim is subject to. This has procedural and resourcing implications, and ultimately will impact on access to justice and deterrence.

Given regulator action will be an option in many cases in Aotearoa New Zealand, any such test should expressly only consider actions that the claimants have control over. That is, the independent (and resource constrained) actions of regulators cannot be seen as an alternative way of resolving a claim. Even where a regulator chooses to take action, whether before or after the filing of the class action, claimants should not be fettered given the different (although likely complementary) interests.

(d) **Litigation plan**: The class action statute or the High Court Rules could promote the just, speedy, and inexpensive determination of a class action proceeding by providing a detailed list of matters to be considered at case management conferences for class action

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6 HCR 5.21.

7 See, for example, *Watherston v PGW Rural Capital Ltd* [2019] NZHC 22.

8 HCR 15.1. In addition, a Registrar may refer a proceeding tendered for filing that is plainly an abuse of process to a Judge, and the Judge may strike out or stay the proceeding: HCR 5.35A and 5.35B.

9 As noted in the Issues Paper at paragraphs 14.17 to 14.21.

proceedings, consistent with the Australian approach described at paragraph 10.67 of the Issues Paper.

(e) **Litigation funding arrangements**: We have acted both for and against funded parties. Our experience is that transparency about any insurance or litigation funding arrangements assists the efficient conduct and resolution of disputes (including enabling resolution before proceedings are filed). We are concerned that arrangements with litigation funders are already subject to a degree of scrutiny and transparency not required of insurance arrangements. In order to ensure that any class action regime does not entrench unprincipled distinctions, the position of insurers should be considered at the same time, and in the same way, as litigation funders.

That said, our view is that litigation funders should be subject to regulation (as indeed insurers are). While insurance is an international market and sophisticated industry participants may choose to contract with overseas providers, litigation funding for class actions needs to serve the needs of consumers and, therefore, consideration should be given to ensuring such funding arrangements are practicably enforceable by claimants in New Zealand. For example, any arrangements should at minimum be subject to the laws of New Zealand, justiciable in the courts of New Zealand, and service provided for in New Zealand.

6 Representative plaintiffs and litigation committees can enhance the expeditious conduct of a class action

6.1 There are good reasons for representative plaintiffs to be class members, including that they are:

(a) a party to the proceeding, and as such should have standing;

(b) aware of and should seek to protect class member interests; and

(c) better placed to seek and receive discovery than a person who is not a class member.

6.2 In keeping with this approach, we consider that representative plaintiffs should generally represent the interests of the claimant class, including by being able to prosecute at least one pleaded cause of action.

6.3 In our view, there is an important distinction between:

(a) the representative plaintiff or plaintiffs who should effectively represent the common factual and legal issues in dispute (including any subclasses); and

(b) the governance arrangements for the class.

6.4 The Issues Paper notes that formation of a litigation committee may lessen the burden on the representative plaintiff.[10] In our experience, a litigation committee formed around a group of class members (including some but not necessarily all representative plaintiffs) is highly effective at protecting claimant interests and promoting the efficient conduct of a representative proceeding.

6.5 Specifically, a committee offers the following advantages:

(a) Members of a committee can be selected for particular skills and expertise that will promote the efficient conduct of the litigation, including (for example) legal or accounting

[10] Issues Paper, paragraph 11.48(c).

experience, risk management skills, and professional or personal experience of the facts giving rise to the dispute.

(b) Given that range of skills and experience, a committee is likely to be better able than a representative plaintiff or plaintiffs (who are necessarily chosen by reference to the factual or legal claims) to:

(i) represent the interests of and communicate with a diverse range of claimants;

(ii) negotiate with and manage any matters arising between the claimants and any funder; and

(iii) choose and instruct counsel both as to overall strategy and day-to-day case management matters.

6.6 Accordingly, in our view, any class action regime should:

(a) clearly distinguish between the role of the representative plaintiff or plaintiffs and the governance arrangements for the class; and

(b) permit the responsibilities and risks of those two roles to be entirely separated in accordance with appropriate arrangements.

7 Details of any court-approved settlement should be confidential unless the parties agree otherwise

7.1 We do not take issue with settlement agreements being required to be approved by the court per se.

7.2 However, we are concerned that this is an example of a rule with one purpose that may have unintended consequences. There is often value for parties to a settlement to have all, or aspects, of that settlement remain confidential. That is the case even where a large number of people may need to know some or all of the details. Accordingly, we suggest that the details of any court-approved settlement should be kept confidential, as would be the default position in the settlement of a non-class action proceeding, unless the parties expressly agree to do otherwise.

Yours faithfully
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