CLASS ACTIONS AND LITIGATION FUNDING

Bell Gully submission on the Law Commission's Issues Paper

Introduction

Bell Gully welcomes the opportunity to provide our comments on Te Aka Matua o te Ture / Law Commission's Issues Paper on Class Actions and Litigation Funding.

Bell Gully agrees with the Commission's preliminary view that, in some circumstances, class actions can improve access to justice and facilitate efficiency and economy of litigation. However, we also agree with the view that there are often disadvantages to class actions, including the risk of unmeritorious claims, and of litigation funders and plaintiff lawyers pursuing their own commercial interests over the interests of the claimants whom they purport to represent. In our view, it is important to design a regime that fairly balances these risks and interests.

Further, a class action regime contains hidden costs that should be fully assessed in weighing the benefits and detriments of such a regime. For example, if consumers bring a class action against a corporate defendant and achieve a settlement, the cost of that settlement is a cost of business to the defendant that will be passed on to current consumers. That remains the case even if the defendant is insured, as an increase in insurance payouts leads to higher premiums, the cost of which are again a cost of business that are passed on to current consumers. Further, research of out of Australia suggests that close to 50% of the settlement payout goes to funders and plaintiffs' lawyers, rather than class members.[1] We believe the Commission ought to bear these realities in mind when it is assessing a class action regime.

We set out below our views on a number of the key questions that the Commission has asked. These comments are largely based on our practical experience, having acted in a number of significant class actions in New Zealand including *Houghton v Saunders* (the Feltex class action), *Cooper v ANZ Bank New Zealand Ltd* (the bank fees class action), *The Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* and *Fullarton v Arowana International Ltd* (Quantum Education IPO class action).

1 The Australia Law Reform Commission Report 134, Integrity, *Fairness and Efficiency - An inquiry into Class Action Proceedings and Third-Party Litigation Funders*, December 2018 at p.85 (showing that the median settlement return for securities class actions in Australia from 2013-2018 was 51% to the class and 49% to the funders and lawyers). The report of the Australian Parliamentary Joint Committee on Corporation and Financial Services, *Litigation Funding and the regulation of the class action industry* (December 2020) points to data that from 2001 to 2020, the portion of the gross settlement of funded class actions going to lawyers and litigation funders was 41.4% (report at P.36)

Problems with the representative actions rule for group litigation

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

1. We have had significant involvement in the courts' development of a class action regime under HCR 4.24 through our role representing the defendant directors in the *Feltex* proceeding. As the Commission notes, that case involved a considerable number of interlocutory applications, in part because of a lack of detail in HCR 4.24 and the absence of any precedent (for example, in relation to security for costs, disclosure of funding agreements, discovery of opt-in forms, how limitation periods work across different opt-in dates etc). That body of case law, and other cases that have followed, have now given plaintiffs and defendants some guidance as to how the rule should be applied.

2. However, there are important public policy objectives to consider in the design of any class action regime. In our view, these issues are best considered in the context of a review such as that currently being undertaken by the Law Commission, rather than by incremental development of a class action regime under HCR 4.24 through case law. There are also important outstanding questions that HCR 4.24 does not deal with, like how to deal with competing class actions, that should be addressed as part of a comprehensive regime.

Advantages of class actions

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?

3. We agree that, in some circumstances, an appropriately designed class actions regime can both improve access to justice and improve the efficiency and economy of litigation, for the reasons highlighted in the Commission's report.

4. In terms of access to justice though, we note, as the High Court did in the *Feltex* proceeding, that access to justice may be "diluted" where a litigation funder receives a substantial amount of any settlement award.[2] Access to justice must be looked at from all angles, including from the perspective of defendants; who should be protected from meritless claims which may be costly to defend, or protected from being forced into settlement of claims they consider defensible. As Professor Rachael Mulheron describes it, access to justice is a "two-way street".[3]

5. We do not think that providing incentives for compliance (or deterrence for non-compliance) is an appropriate factor to consider in designing a class actions regime. As the ALRC has said in relation to the Australian regime, the primary goal of the regime was to enable people to access legal remedies; any deterrent effect on respondents' behaviour was only incidental. In short, we agree with the Commission's view that the class actions regime ought to primarily fulfil a compensatory rather than an enforcement function.

Disadvantages of class actions

Do you have any concerns about class actions? In particular, do you have concerns about:

a. The impact of 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?

2 *Houghton v Saunders* [2020] NZHC 1088 at [74].
3 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 57.

6. We have concerns about class actions that we discuss in more detail in response to specific questions in the issues paper.

7. Although class actions undoubtedly provide access to justice for some, the impacts on New Zealand businesses should not be overlooked. In particular, we are concerned that there is already significant pressure on New Zealand directors, and some empirical evidence of difficulties in recruiting directors because of the class action risk.[4] That is a significant concern because it is in the public interest to have qualified and capable people wanting to fulfil those roles.

8. In our view, it would be wrong to judge a regime by its good intentions ("access to justice") rather than real world results. The report published in December 2020 by the Australian Parliamentary Joint Committee on Corporations and Financial Services, entitled "*Litigation Funding and the regulation of the class action industry*" provides a good summary of some of our concerns around class actions by reference to the position that has evolved in Australia. In particular:

   a. There is evidence that shareholder class actions in Australia have led to a significant increase in D&O insurance premiums, and an inability to attract directors and senior managers due to the class action risk;[5]

   b. Australia's "light touch" on regulation of litigation funders has led to a situation where "genuinely wronged class action members [are] getting the raw deal of significantly diminished compensation for their loss, as bigger and bigger cuts are awarded to generously paid lawyers and funders";[6]

   c. There is an asymmetry of information between market participants. Specifically:[7]

      Mum and dad investors signing up to a litigation funding agreement as part of a class action can never hope to have the sophisticated understanding of corporate law or financial products that their lawyers and funders possess. If this asymmetry is not addressed to protect the interests of class members, increasing competition from more funders entering the market will not deliver lower prices for consumers. This is borne out by experience: the entrance of more players from the international litigation funding industry has done little to dent the spectacular returns earned by funders.

   d. There is also an issue of transparency with the Joint Committee noting that "the operations of many funders are highly opaque, including their ultimate owners, the amount of tax they pay in Australia, and even their returns."[8]

9. The Joint Committee concluded that "having considered the evidence put to it, [it] considers the concerns about the class action and litigation funding industries to be wellfounded."[9] It made a number of recommendations for reform, some of which we address in our submissions.

10. A further concern in New Zealand relates to the recent changes to the continuous disclosure rules for listed companies, making it much easier to bring claims against listed companies. We believe that the Commission ought to consider this as part of its review. We note the Australian Parliamentary Joint Committee observation about the ease with which shareholder class actions may be triggered by an alleged breach of Australia's continuous disclosure provisions, and its recommendation that temporary amendments made to the law in 2020 (to raise the bar for establishing a continuous disclosure breach) ought to be made permanent.[10]

11. The New Zealand class action and litigation funding industries are at a much less developed stage than in Australia. In designing a regime for New Zealand, we strongly recommend looking to Australia and to seek to prevent some of the same issues arising here.

A statutory class actions regime for Aotearoa New Zealand

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

12. We support a statutory class actions regime that effectively balances the competing interests discussed in this paper. A statutory regime is likely to provide greater certainty than the present approach of relying on

4 Institute of Directors New Zealand and ASB Director Sentiment Survey 2019 (21 November 2019) at 8.
5 *Ibid*
6 Australian Parliamentary Joint Committee on Corporations and Financial Services *Litigation Funding and the regulation of the class actions industry* (December 2020), Executive Summary at xiii.
7 *Ibid*
8 *Ibid*
9 *Ibid.* at xvi.
10 *Ibid.* at xx.

incremental judicial development of a class action regime. It also allows for a comprehensive review of the relevant policy issues in the design of such a regime.

Scope of a statutory class actions regime

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

13. Given the potential breadth of class actions, it is worth considering whether it would be efficient to limit these actions to particular areas of the law where there might be efficiencies in grouping smaller claims together. Consumer claims might be one such example. We think this warrants further consideration by the Commission.

Should a class actions regime include defendant class actions?

14. We agree that it is too difficult to adapt the rules to cover defendant class actions. We think that the position reached in Australia (i.e. to not provide for defendant class actions) is the correct one. We agree with the ALRC that retaining the representative action rule (which allows one or more persons to "sue or be sued on behalf of" those with the same interest) will retain a means of pursuing multiple defendants.

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

15. We agree that the representative actions rule should be retained alongside a class actions regime. We consider that the rule may continue to be useful in some specific areas, such as in trusts and estates disputes, or if the statutory class actions regime had a minimum number of class members (as in Australia).

16. However, if High Court Rule 4.24 is retained, it should be clearly delineated from a class action so that it is not used as a means of avoiding the class action criteria and allowing a class action to proceed through a 'backdoor'.

Principles for a statutory class actions regime

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

17. We agree that access to justice and efficiency and economy of litigation should be some of the objectives of a statutory class action regime, but we do not believe they should be the only objectives. Nor do we believe that they rank any more highly than fairness to defendants, which is an equally important objective in a system of equal justice.

18. Importantly, claimants should not get a free pass just because they are a group and are therefore seen as having an access to justice right. Claimants must establish that they are entitled to exercise that right. For example, there may be important differences between those in the claimant group. Defendants are entitled to rely on the law as it stands to challenge whether these differences mean it is unjust to have to deal with all claimants in the same way.

19. Defendants also need to be protected from unmeritorious claims. Based on our experience, there is a real risk of a flood of claims targeted at defendants perceived as having deep pockets (e.g. banks, insurers, publicly listed companies) if the regime only looks to facilitate class actions and does not build in steps to: (i) stop vexatious or unmeritorious claims going ahead; and (ii) ensure either the representative plaintiff has the ability to pay an adverse costs, or there is a responsible and solvent funder behind the plaintiff who will do so.

20. In our view, class certification and controls around the litigation funder are ways to achieve these objectives. We address these further below.

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

21. We believe appropriate class certification is essential to protect class members. We address this in the class certification section below.

22. We strongly believe there is a need to protect class members from having their claims being taken out of their hands by litigation funders, from being misinformed by funders about claim prospects, and from paying disproportionate proceeds to funders. We are aware of instances where for example:

a. funders have represented to potential class members that they are in line to obtain large amounts in compensation without adequately explaining how that will be diminished by the funders' own fees and legal costs, or what the risks and downsides of the claims are; and

b. when it became apparent to the funder that the outcome might be less favourable for the claimants than hoped, or the case was harder than originally envisaged, the funder pulled out leaving claimants in a difficult position.

23. Another interest that needs protecting is the ability of the class members to obtain appropriately independent advice. In exactly the same set of circumstances, some plaintiff lawyers tell class members that they act for the funder and to get independent advice about the funding agreement, whereas other lawyers will tell class members that they can advise them directly. We think it is imperative that class members are getting independent and objective advice. The roles of lawyers in litigation funded class actions need to be clearer.

24. Another important feature in protecting class members is court approval of any settlement of class action claims. At settlement time, our experience is that interests can diverge between representative claimants, others in the claimant group, litigation funders and even the claimants' lawyers. This dynamic is difficult for defendants to deal with and risks outcomes that are not in the best interests of the class members as a whole. As in the United States, Canada and Australia, and as the Court of Appeal and Supreme Court said in *Ross v Southern Response Earthquake Services Ltd*, the Court has a supervisory jurisdiction to protect the interests of class members, including in respect of settlement of the class claims. In our view, that ought to be formalised in any statutory class action regime. We think court approval of class action settlement agreements is particularly important feature of any opt-out proceeding where there is the potential to bind class members who have no actively elected to be part of the proceeding in the first place.

25. The Australian Parliamentary Joint Committee recommends that the Court should require detailed information to accompany an application for approval of a class action settlement (Recommendation 17). We agree with this list of information which includes: (i) details of class members (numbers before opting-out, numbers who have opted-out, numbers who have registered, those who are funded versus unfunded); (ii) the identify and location of the litigation funder; (iii) the amount of security for costs paid; (iv) the estimated value of the claims at the outset and at the time of settlement; (v) the settlement sum; (vi) the funding commissions payable under any litigation funding agreements; (vii) total costs broken down between legal fees, counsel's fees, expert fees and disbursements; (viii) any costs order paid in the proceedings; (ix) payments to representative plaintiffs; and (x) the average payment to all class members.

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

26. We believe that proportionality is an appropriate principle for a class actions regime and that cases ought to be discontinued as a class action if the procedure will not provide an efficient and effective means of dealing with the claims of group members (as is the position under the Australian Federal regime). In our view, the best approach is for the Court to consider that question at certification stage (as the UK Competition Appeals Tribunal does).

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?

27. We do have concerns about the impact of regulatory activities on class actions, given overseas experience shows that litigation funded class actions tend to follow closely behind regulatory action. One way to manage these concerns would be to require a stay of any civil class action until the regulatory process has been completed. Then a class action for the balance of any remaining claims could proceed afterwards.

Certification and threshold legal test

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)

28. We strongly support a requirement for class certification. We agree with the view that this can be designed to provide substantial protection for the interests of both plaintiffs and defendants,[11] by:

11 At [10.20].

a. ensuring meritorious claims can be brought and frivolous or vexatious claims are prevented from being brought;

b. preventing conflicts of interest between class members by allowing for the early identification of the need for, and definition of, any subclasses, and the appointment of subclass representatives; and

c. ensuring that the representative plaintiff has the necessary acumen, resources, and funding to prosecute the proceeding efficiently, justly, and in the best interests of the proposed class (especially in the case of opt-out class actions).

29. We do not consider that these objectives are best met by leaving it to defendants to challenge whether the class action has properly been brought, as the ALRC has suggested.[12] In our view this wrongly reverses the onus that usually falls on a plaintiff in proceedings (or an applicant in an application for interlocutory relief) and does not sit consistently with the fundamental principles underpinning our system of justice. If claimants choose to bring a class action and there is a *prima facie* case for such, it ought to be up to the claimants to persuade the Court of that, rather than the defendants to persuade them otherwise. The alternative could see corporate defendants viewed as having "deep pockets" defending a plethora of ill-conceived and unmeritorious claims. As the Australian Parliamentary Joint Committee notes, "if the criteria and process to commence a class action sets the bar too low to commence a class action, the class action system can be susceptible to exploitation for financial gain."[13]

30. In our view class certification need not be anything akin to a full merits hearing, but should at least involved a more detailed filing and a more rigorous examination by the Court than the current application for an order under HCR 4.24. We consider that the certification stage should include:

a. a commonality test that requires common issues to predominate over individual issues;

b. consideration of whether there is an adequate (precise and unambiguous) class definition, including consideration of whether there needs to be sub-classes within the claimant group to recognise factual or legal distinctions between different class members;

c. a preliminary merits assessment to determine whether there is an arguable case on the facts as pleaded and that a reliable damages model can be applied to the entire class;

d. a proportionality assessment, to ensure that the time and expense of the class action is not out of proportion to the outcome sought, and that the outcome sought is worthwhile/in the public interest;

e. an assessment of any applicable funding arrangements (for example, ensuring they are free of conflicts of interest, that they contain a mechanism to deal with disputes around settlement if they arise, that they allow a fair process if the funder withdraws, and that they do not contain unreasonable litigation funding commissions);

f. a requirement that the proposed representative plaintiff establishes their suitability to act as class representative (including that they can best represent the interests of the class and have the financial resources to meet any adverse costs award), which ought to be considered in light of a litigation plan provided by the proposed representative;

g. a presumption that the class action will proceed on an opt-in basis, with the proposed class representative entitled to seek to demonstrate that an opt-out action would be more appropriate in the circumstances;

h. where there is more than one class action filed in respect of the same matter, consideration of which action ought to proceed (on the basis that it is inefficient and serves no party's interest to have a regime of potentially competing class actions working their way through the courts).

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

31. We would support a numerosity requirement as in Australia. We believe the number should be around the same (seven or more).

Should the commonality test that applies to representative actions under HCR 4.24 apply to a class action regime? If not, how should this test be amended?

32. In our view, the threshold under both the current HCR 4.24 and the draft Class Action Bill ("at least 1 substantial

12 At [10.27] and [10.28].

13 Australian Parliamentary Joint Committee on Corporations and Financial Services *Litigation Funding and the regulation of the class actions industry* (December 2020) at xvi.

common issue of law or fact") is too low. There is the potential to bring many disparate claims together and to manufacture a similarity, when really the only thing in common is that there is the same defendant. Such claims are almost impossible for defendants to deal with.

33. We are in favour of a test like the United States where plaintiffs must show that common issues predominate over individual issues. In such cases there is clear logic and fairness to bringing the proceeding as a class action, and it is feasible for defendants to direct their resources to those predominant common issues (as opposed to grappling with a plethora of individual issues).

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

34. As above, we believe the representative plaintiff should have to establish that common issues predominate over individual issues.

35. In addition, within that single proceeding, there ought to be sub-classes as appropriate to deal with important factual and legal distinctions between class members. Without that, defendants may be disadvantaged in being unable to exercise legitimate defences where those defences only apply to some class members and not others.

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

36. In our view, a prospective class representative should be required to establish that a class action is a preferable or superior procedure for bringing the relevant claim(s). This is particularly (but not only) the case for opt-out class actions. The members of the proposed class ought not to lose their right to prosecute their own claims, or become bound by a judgment in a proceeding commenced by another person (not necessarily with their knowledge) without the representative plaintiff setting out the advantages of bringing the proceeding in that way.

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

37. We agree with the view that requiring an initial assessment of a claim can help to protect the interests of the Court and defendants from wasted time and expense.[14] However, we would add that it can also help protect class members from investing themselves in litigation which could potentially go on for years when there was no realistic prospect of success at the outset.

38. We also consider that a merits test will assist the Court and claimants to consider the respective merits of competing class actions arising out of the same circumstances. An initial assessment might assist in ensuring the most meritorious class action proceeds.

39. However, we also agree that the initial assessment ought not to be unduly burdensome (while at the same time requiring the claimant to show at least an arguable case). We agree (in part) with the approach set out by the Court of Appeal in *Southern Response Earthquake Services v Southern Response Unresolved Claims Group*:[15]

> A provisional assessment requires no more than consideration of the claims as pleaded, to ensure that on their face they disclose an arguable case on the facts as pleaded. In Saunders v Houghton (No. 2) this Court approved the approach of French J who adopted a "broad brush impressionistic approach" to that issue, rather than a detailed analysis of every allegation. Such an assessment does not require an applicant to prove the facts upon which its claim is based, but it would allow a defendant to refute through the production of evidence a clearly wrong and critical factual allegation; the receipt of evidence in support of a strike-out application provides a useful analogy.

40. In our view the threshold standard should be at least the strike-out application standard. The "broad brush impressionistic approach" of French J in Saunders v Houghton (No. 2) appears to be something below that. Having at least a strike-out standard is particularly important in a small market like New Zealand where the commencement of a class action can cause businesses significant reputational, commercial and brand damage irrespective of the merits of the class action.

14 Commission report at [10.57].
15 [2017] NZCA 489, [2018] 2 NZLR 312 at [17].

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

41. We are in favour of requiring a representative plaintiff to produce a litigation plan before a class action can be certified. We believe it should be similar to that specified in the United Kingdom Competition Appeal Tribunal (CAT) Rules and include:[16]

    i. a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

    ii. a procedure for governance and consultation which takes into account the size and nature of the class; and

    iii. an estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.

42. The CAT *Guide to Proceedings,* which is a practice direction, notes that the plan "should explain how the proposed class representative and its lawyers intend to ensure that the collective proceedings will be effectively and efficiently pursued in the interests of the class, referring to the issues likely to arise in the particular case".[17] It also usefully illustrates the detail that could be included, as the Commission has noted.[18]

43. A litigation plan is in the interests of the proposed class. A representative plaintiff ought not to take on lightly the responsibility of progressing a claim on behalf of (potentially) thousands of individuals. A litigation plan requires a representative plaintiff to undertake sober consideration of how to run the proceeding in the best interests of the class – and will flag to the Court at an early stage whether there are reasonable doubts about whether representative plaintiff is suitable to represent the class and run the proceeding efficiently.

44. A plan is also beneficial to a defendant. It ought to help protect them from being subject to a poorly run proceeding, which unnecessarily creates financial and other costs for both parties.

45. The Commission has raised the possibility that the matters covered in the litigation plan could be addressed as part of the case management process (as in Australia).[19] However, in our experience, there would be efficiencies in requiring plaintiffs to address these matters early on rather than issues arising (and defendants raising objections) as the matter progresses. The plan will obviously evolve and we also see a role for careful case management as the matter progresses (including additions and modifications to the plan as appropriate).

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

46. Yes, we believe the Court should consider whether the funding arrangements in place are appropriate with regard to the interests of the class (e.g., in terms of the funder's level of control over the proceeding) and the interests of the defendant(s) (e.g., in terms of whether there is adequate provision for adverse costs awards). We discuss funding arrangements further in the section on costs below.

The representative plaintiff

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?

47. We consider that the representative plaintiff's suitability for the role should be part of the threshold legal test, as it is under the Canadian, United States, and United Kingdom class action regimes.

48. In particular, we agree with the view quoted by the Commission that adequacy of representation is fundamental to the operation of a modern class actions regime.[20] For the reasons noted by the Commission, we consider that it is necessary in order to properly protect the interests of plaintiffs and defendants. In short:

    a. the representative plaintiff ought to have to – and be able to – justify being empowered to take the necessary decisions to commence and manage litigation on behalf of potentially thousands of others, some of whom (in the case of opt-out proceedings) may not even be aware of the litigation;

16 Rule 78(3)(c) of the CAT Rules.
17 CAT *Guide to Proceedings* at [6.30].
18 At [10.66]
19 At [10.67]
20 At [11.4].

b. testing the suitability of the representative plaintiff will be particularly important to identify any conflicts of interest and the need for any sub-class representatives (who should also need to prove that they would be suitable); and

c. as already noted, defendants should have an opportunity at the earliest stage to assess whether the proceeding will be run efficiently and, importantly, confirm that the representative has the necessary funding in place to satisfy any adverse costs award.

49. In terms of the criteria that should apply, we consider that an overall test of whether the proposed representative plaintiff will fairly and adequately represent the interests of the class is appropriate (again, consistent with the Canadian, United States, and United Kingdom class action regimes).[21] The Court should be empowered to consider a range of identified factors in determining that question, including the matters outlined in the paragraph above.

50. We note the Victorian Law Reform Commission's view that a test for whether the representative plaintiff is adequate may produce interlocutory disputes and deter class members from taking on the role.[22] However, such concerns should not be overstated. In practice, the requirement for suitability should incentivise those advising and arranging a class action (e.g., lawyers and funders) to ensure that the representative will be beyond challenge. For example:

a. in the first case brought under the United Kingdom regime, the claim involved pricing for mobility scooters.[23] The class representative was the General Secretary of the National Pensioners Convention (an umbrella organisation for around 1,000 pensioners' groups across the UK which campaigns about issues of concern to older people); and

b. in the second case, the claim involved (in very broad terms) charges for the use of debit or credit cards.[24] The class representative is a qualified solicitor, former Chief Ombudsman, trustee of a legal charity, and had been appointed CBE for services to the financial services industry.

51. Moreover, interlocutory disputes are an ordinary part of most high value proceedings. They can serve a useful purpose in terms of resolving important procedural and substantive issues early on in a proceeding (something which can assist all parties in narrowing issues for trial and assessing their prospects of success).

52. Based on our experience, we think it unlikely that truly suitable class representatives might be deterred from acting or decline to act because they would have to justify their suitability.

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

53. We support an approach as in Australia, where a representative plaintiff must have sufficient interest on their own behalf in order to commence a proceeding against the defendant. Otherwise, there is a risk that the regime becomes hijacked by interest groups endeavouring to make a point, rather than by those whose rights and interests are personally affected and who have a self-interest in protecting the class. To allow otherwise is too significant a departure from the traditional rules of standing. There is no clearly identified need for such a departure.

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

54. In our view (and consistent with the above) a government entity should only take up the role of representative plaintiff where it has a claim against the defendant itself, i.e., where it shares the class members' cause of action against the defendant and is seeking the same kind of relief.

When a plaintiff wants to represent the interests of a whanau, hapu or iwi should the court inquire into their suitability to represent the group in terms of tikanga Māori?

55. We see merit in applying tikanga Māori to questions of suitability in appropriate cases and see that as consistent with the principles of the Treaty of Waitangi.

Membership of the class

21 At [11.6].
22 At [11.8].
23 *Gibson v Pride Mobility Products Ltd* [2017] CAT 9.
24 The latest judgement in this case is *Mastercard Inc v Merricks* [2020] UKSC 51.

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

56. We believe that opt-in class actions should be the default and opt-out only available in exceptional circumstances.

57. We have concerns about opt-out class actions because they fit uncomfortably with the choice litigants have in any other context, i.e., the choice to bring proceedings to vindicate a wrong or seek compensation, and the ability to have a say in how that proceeding is run or at least have some visibility over that.

58. There is a greater need to protect the interests of the class in an opt-out class action than an opt-in class action (and all the more so in a universal action). A representative plaintiff should not lightly be able to represent and bind the class without their active consent. This is a strong reason to make opt-in the default approach, as it is in the United Kingdom. As the CAT Guide to Proceedings records:[25]

> Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. …
>
> The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members.

59. The CAT Rules also contain additional protection for foreign domiciled members of the class: even in an opt-out claim, a class member who is domiciled overseas will not be bound unless they opt-in.[26] This highlights that there can also be jurisdictional issues that affect whether an opt-out claim is appropriate.

60. Based on our experience, one of the strongest arguments for opt-in proceedings is the fact that those opting-in usually sign a retainer agreement with legal counsel, creating a direct solicitor-client relationship and protecting class members in that way.

61. Finally, there is a real risk that if opt-out proceedings are the norm, this will encourage funders to issue such proceedings irrespective of the merits, knowing that the breadth of the proceeding will create significant pressure on defendants to settle.

62. However, if the Commission is minded to allow opt-out class actions, in our view these should be limited in the way that the CAT guide sets out. In short, opt-in should be the default, with opt-out only available in exceptional cases.

If the court is required to decide whether class memberships should be determined on an opt-in, opt-out or universal basis, what criteria should it apply? Should there be a default approach?

63. We refer to the CAT Guide discussed above and our view that opt-in proceedings ought to be the default, unless there are compelling reasons otherwise.

64. We disagree with a presumption in favour of whatever approach the class representative proposes. The class representative will not necessarily approach the issue in terms of what is the most efficient and just outcome in the proceeding (even when they are a suitable class representative).

65. We believe the Court ought to address these questions of class membership at certification stage considering things like amounts at issue, matters to be determined, nature and size of the class and whether they are contactable etc).

Adverse costs

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

66. We do not believe that the risk of adverse costs awards has impacted class actions in New Zealand to date

25 *CAT Guide to Proceedings* at [6.39] (emphasis added).
26 See section 47B(11) of the Competition Act 1998, and rule 80(1)(h)(iii) and 82(1)(b)(ii) of the CAT Rules

given these actions have largely been brought by well-resourced litigation funders who have indemnified the representative plaintiff (who carries the liability for costs). Litigation funders have presumably been willing to take on the risks of an adverse costs award for the perceived profit at stake. We are not aware of any evidence to suggest that other non-litigation funded class actions have failed to proceed because of a concern about adverse costs awards.

67. To ensure fairness to all sides, the courts ought to continue to monitor and enforce a regime of security for costs (staged as the proceeding progresses) and adverse costs awards, including against claimants (funded or otherwise). Where claimants have pursued frivolous claims or either party has failed to comply with court orders or behaved in an obstructive manner, courts should have the discretion (as they ordinarily do) to award indemnity costs and ensure some discipline in the administration of justice. The *Feltex* case provides a good example of why such rules are needed (this is discussed further in response to questions around security for costs below).

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

68. Our view is that the adverse costs rule should be retained in its current form, with a new scale of costs developed for class actions to reflect their size and the increased time it takes to complete each step. In our experience, scale costs under the High Court Rules are often well below what parties' actual costs are, and even more so in complex class actions. A new scale could also address class certification which is a more significant step than the interlocutory applications currently envisaged in the HCR.

69. Further, we agree with the conclusions reached by the Australian Parliamentary Joint Committee including that:[27] (i) litigation funding agreements for class actions must expressly provide a complete indemnity in favour of the representative plaintiff against an adverse costs order; (ii) the legislative regime should include a statutory presumption that a litigation funder in a class action provide security for costs; (iii) there ought to be statutory reform so that litigation funding agreements must be approved by the court to be enforceable and the court may amend the terms of any such agreement where the interests of justice require; and (iv) the law be amended to provide that the court can make a costs order against a litigation funder.

70. In terms of the costs options presented by the Commission in its Issues Paper:

    a. ***No costs rule.*** We see no principled basis on which class actions should be different from any other proceeding where a plaintiff pursues what he/she believes to be just, but in doing so must take on the risk of costs if unsuccessful (or a party making an interlocutory application must consider the risk of an adverse costs award). Removing those safeguards risks frivolous claims and an attempt by parties to drive up the other side's litigation costs because they do not have to pay for them. We consider such a reform (if adopted) would be unjust and we would strongly oppose it.

    b. ***No costs for certain stages of the proceeding.*** We repeat the points above. The prospect of an adverse costs award enforces a certain discipline on parties and we see no principled reason why that might be appropriate for only some stages of a proceeding and not others.

    c. ***One-way costs shifting.*** We disagree with the position that a defendant may be liable for adverse costs if unsuccessful but a plaintiff may not. We agree with the view of the ALRC that such a rule would be inequitable. If fact, we would see such a rule as diametrically opposed to the fundamental principle of equal treatment of parties and we would strongly oppose any such proposal.

    d. ***Different costs scale or maximum costs order.*** As stated above, our experience is that the general costs scale does not sufficiently cover the steps that are required in a class action. In our view, any class action regime should recognise the court's discretion to order increased costs where scale costs are an inadequate reflection of the complexity and time involved in the particular step in the proceeding.

Advantages and disadvantages of litigation funding

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

71. The most important advantage is similar to that for class actions generally, being access to justice. Funders

27 Australian Parliamentary Joint Committee on Corporations and *Financial Services Litigation Funding and the regulation of the class actions industry* (December 2020) at xxiv - xxv.

obviously provide access to capital to make it possible to bring proceedings, including instructing legal counsel and providing security for costs. They also provide experience in terms of organising and guiding claims.

72. The disadvantages include the risk the funder takes a disproportionate share of the claim recovery and/or fails to act in best interests of class members (for example, pursues a settlement at a convenient point for a figure which is not in the claimants' best interests, just to "get a deal done").

Is litigation funding desirable for Aotearoa New Zealand in principle?

73. We have concerns about how litigation funding is working in practice. Our view is that it ought to be subject to the sort of regulation we discuss further below.

74. In making the comments we do about litigation funding, we want to make it clear that we accept that: (i) there is a role for litigation funding; and (ii) that there are many responsible funders in the market. Our comments are directed at the need for regulation and supervision generally, rather than a criticism of the concept of litigation funding or the behaviour of any particular funder.

Reforming Maintenance and Champerty

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?

75. Our perception is that for the most part, these torts do not have any practical impact so far as litigation funding is concerned (or at least so far as responsible litigation funding is concerned – see our comments below regarding the *Cain* judgment).

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?

76. Our view is that the principles from the torts of maintenance and champerty ought to (and do) still exist in some form and should be left intact. The *Cain v Mattrick* [2020] NZHC 2125 case provides a good example of why that is so. In that case the Court held that a clause in a litigation funding agreement between the plaintiff liquidators (the Companies) and the litigation funder (PLF Services) amounted to an assignment of a bare cause of action. Essentially this clause enabled the litigation funder to pursue litigation against the wishes of the plaintiff. There was no third party or independent dispute resolution process to consider the plaintiffs' interests and to act as a safeguard on the litigation funder's profit motivation. Associate Judge Paulsen ordered a stay on the basis that "the funding agreement, contrary to law, confers on PLF control of this litigation that goes beyond what is reasonable to protect its investment" (at [72]).

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?

77. The *Cain* case shows that a sensible balance can exist between accepting litigation funding in principle, but subject to the courts' scrutiny in order to protect the interests of claimants. Our view is that the torts should be retained, subject to an exception for litigation funding arrangements approved by the court.

Funder Control of Litigation

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

78. Our concerns (based on our experience) include:

a. **Lack of transparency.** We have concerns around a lack of transparency as to who the ultimate funder is (a concern addressed by the High Court in another one of the *Cain v Mettrick* cases[28] where the funder was a nominee company only). There has also been an unwillingness on the part of plaintiff lawyers and funders to give class information to defendants, for example, information about when class members purchased shares or opted-in to the proceedings. This makes it very difficult for defendants to properly assess the scope of the claim that they face and their available defences.

b. **Overcompensation.** We have seen instances where funders have taken substantial portions of sums recovered including over 50% in one non-class action example. There is a real risk that funders seek similar recoveries in class actions also. The Australian Parliamentary Joint Committee report repeatedly refers to the fact that funders in Australia have become overcompensated and claimants have suffered as a result. The Committee has recommended consultation on setting a statutory minimum return for class members.

c. **Biased or unbalanced communications.** Both the *Cooper v ANZ* and the *Feltex* proceedings involved instances where the plaintiff's lawyers and funder were communicating with the claimant group in a way which gave undue prominence to the prospects of success. In the *Feltex* proceeding,[29] the High Court held that the purpose of the opt-in notice was to "inform, not recruit" (at [27]) and that it "should not be a vehicle for debating the merits of the claim" (at [30]). In *Cooper v ANZ*,[30] the Court required the plaintiffs to edit their opt-in notices by: (i) deleting text that read like the Court was endorsing the claim; and (ii) removing the link to the claim website because it advocated the claim rather than providing class members with the information they required to make an informed decision about whether they wished to opt-in to the proceeding (see [16] to [20]). In *Southern Response Earthquake Services Ltd v The Southern Response Unresolved Claims Group,* the Court of Appeal observed that the funder's promotion of the class action on a "no win, no fee" basis was "ill-advised" and, for some potential claimants, "misleading".[31] The courts in these cases have recognised a real risk here. If people are signing up to claims in their names, they should not just be sent sales talk touting success (like they are buying a piece of exercise equipment). They ought to get the information they need to make a balanced assessment about their involvement or otherwise, including in relation to the funders' fees. That applies to communications with both existing class members and potential class members (for example, in the marketing, promoting or advocating for the initiation of the class). In our view, this is a real issue with funder and plaintiff lawyer behaviour.

d. **Conflicts of interest between funder and plaintiff.** Settlement in particular can be a difficult dynamic for class action defendants because it seems in many cases like it is a numbers game for the funder rather than the usual settlement discussion redressing a personal claim. If the claim appears likely to be defeated, the funder can be quite willing to abandon a claim as long as it is not out of pocket for legal fees. Alternatively, a plaintiff may wish to accept a settlement offer to avoid further litigation and delay, but the funder is not happy because settlement at this amount will not provide a sufficient return on the funder's investment.

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

79. The only existing mechanism is to leave it to defendants to object and then the courts to decide according to what has been done in previous cases. However, the courts are often sceptical of the reasons why a defendant is raising an issue. We would therefore support the development of a clear set of criteria for Court approval of funding arrangements and settlement agreements, which would empower the Court to look closely at these issues.

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?

80. We support a Code of Conduct for litigation funders and/or minimum contract terms in litigation funding agreements. Whatever form this takes, there should be a set of principles with the force of law and overseen by the courts. We do not believe guidelines or industry self-regulation are sufficient tools to address the issue. A set of mandatory rules would provide clarity to litigants about the boundaries the funder must operate within and address some of the concerns about funder behaviour we have discussed above.

28 *Cain v Mettrick* [2019] NZHC 802.
29 *Houghton v Saunders* HC Christchurch CIV 2001-409-348, 19 May 2010
30 *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 3116.
31 [2017] NZCA 489 at [106], [107]

81. In terms of the principles to be adopted, we agree with the suggestions at paragraphs 19.24, 20.15 and 20.50 of the Commission's report. In addition, we would add a requirement that communications by the funder and funder lawyers to the class fairly present the risks of litigation as well as potential rewards (and the funder's cut of those rewards) and be designed "to inform, not recruit".

Funder conflicts of interest

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

82. Conflicts of interest are a significant concern and have become particularly problematic in Australia. We agree with the observations of the Australian Parliamentary Joint Committee which noted:[32]

> The interests of a litigation funder, lawyer and representative plaintiff differ and, at times, conflict. The level of power and influence litigation funders have in class actions gives rise to situations where their financial interests trump those of the representative plaintiff and class members. …
>
> The detriment to the representative plaintiff and class members when their lawyer also has an interest in the litigation funder financing the class action can be so significant that arrangements of this nature should be prohibited.
>
> In addition to conflict of interest obligations, litigation funders should be required to meet the same standards of conduct obligations that are already imposed on parties to a class action and their lawyers. The committee recommends augmenting the standards to which parties, lawyers and funders are held, and broadening the range of penalties available to the Federal Court for non-compliance.

83. As our class action numbers grow in New Zealand, we ought to look to avoid the issues that have arisen in Australia. To that end we agree with the recommendations of the Australian Parliamentary Joint Committee. One of those recommendations was to amend the Solicitors' and Barristers' Conduct Rules to prevent conflicts of interest between the duties lawyers have to their clients, and their obligations to the litigation funder. Our Lawyers and Conveyancers Act (Lawyer's Conduct and Client Care) Rules 2008 should be similarly reviewed and amended.

84. Relatedly, and as we have noted above, we see the need for claimants to obtain independent legal advice when entering into funding agreements and do not see how lawyers engaged by and taking instructions from the funder (even if nominally through the representative plaintiff) can be in a position to provide that independent advice. The solution might be to make available an independent barrister also paid by the funder, but serving a very specific independent role and not acting as counsel in the proceedings going forward (except in so far as he/she might re-engage to provide independent advice to claimants during any settlement process).

85. In terms of the options the Commission has presented, we agree with the concept of minimum contract terms for a funder to manage potential conflicts of interest, including where they wish to withdraw and during the settlement process. The courts could safeguard this through their role in approving funding agreements at a certification stage.

Funder profits

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

86. As noted, we believe there is a risk that claimants are signing away vast portions of their litigation returns not fully understanding that that is what they are doing. Inevitably the returns that funders require on their investment (and hence the percentage of any settlement or judgment they take) will creep up over time. This makes it even more important to address now.

87. Indeed, the position in Australia highlights this risk, with the Joint Parliamentary Committee concluding:[33]

> Greater oversight by, and interventionist powers for, the Federal Court are required to constrain the large portions of settlement sums that are obtained by litigation funders by way of reimbursement of fees and commissions.
>
> To complement the financial services regulation of litigation funding in class actions, the committee recommends

32 Australian Parliamentary Joint Committee on Corporations and Financial Services *Litigation Funding and the regulation of the class actions industry* (December 2020) at xix.

33 Australian Parliamentary Joint Committee on Corporations and Financial Services *Litigation Funding and the regulation of the class actions industry* (December 2020) at xviii.

expanded and strengthened powers for the Federal Court to regulate litigation funding fees. Critical to this reform is assistance from financial experts to assist the Federal Court in ensuring that fees are reasonable, proportionate and fair. Increased transparency through appropriately measured public disclosure of transaction costs and division of a settlement would also aid in achieving this objective.

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

88. No, we are not. We believe the class action regime should require the courts to assess the reasonableness of litigation funding commissions (for example, when the court is certifying the class, when it is approving class action settlements, or when it is making common fund orders in opt-out class actions). As a first step though, we think the Commission ought to explore a statutory cap on funders' commissions (as the Joint Parliamentary Committee has recommended in Australia). That may be easier than leaving this in the hands of the courts to assess. Equally it may be difficult to arrive at a figure for a cap that suits all cases. This is something that should be explored further.

Capital adequacy of litigation funders

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

89. We do not have any specific concerns about the capital adequacy of the class action funders that are known to us in the New Zealand market. However, that is not to say there is no risk here, particularly if it is not clear who the ultimate funder is so that capital adequacy is unable to be assessed.

90. The issue of funder identity arose in *Cain v Mettrick* [2019] NZHC 802 for example, where there was an application seeking disclosure of the "real [litigation] funder" in circumstances where only a nominee company name had been given. The application succeeded on the basis the Court held "the defendant and the Court are entitled to greater information regarding the identity of the litigation funder beyond the name of the nominee company" (at [36]). Disclosure was ordered of (i) the persons beneficially entitled to the shares in the nominee company; (ii) the persons beneficially entitled to the services fee from the resolution sum; and (iii) their location and amenability to the jurisdiction of New Zealand courts (at [39]). In our view these are all important factors to understand in addition to (or as part of) assessing the capital adequacy of litigation funders. (The *Cain* case was not a class action, but highlights an issue that could equally arise in the class action context.)

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

91. To some extent, but this needs to be strictly enforced and claimants (both funded and unfunded) need to be held to account if security is not provided or there are delays in advancing the proceeding. In our view, the *Feltex* claimants were given too many accommodations. As the Commission notes, those proceedings were filed in 2008. In 2019, the proceedings were set to head to a "stage two" trial to determine what loss (if any) investors had suffered. However, the claimants failed to pay the security for costs which were owing prior to commencement of that fixture, and asked for the fixture to be vacated while they secured funding (their litigation funder had pulled out by this point). The fixture ended up being vacated twice. In a May 2020 High Court judgment[34], Dobson J set out a summary of all the different promises and periodic reports of progress the claimants had made to ostensibly arrange security for costs. None of this had come to anything. The High Court therefore made unless orders striking out proceedings unless by a certain date, (i) the claimants paid security for costs; and (ii) senior counsel for the claimants confirmed that, in his opinion, the claimants were adequately resourced to prepare for and present all aspects of their stage two claims.

92. The claimants appealed and made further promises to the Court of Appeal about obtaining security for costs and funding for the stage two claims, none of which came to anything. In December 2020, the Court of Appeal upheld the High Court's strike out order (*Houghton v Saunders* [2020] NZCA 638). As the Court of Appeal noted (at [83] to [84]):

> [The claimants'] multiple unsuccessful attempts to provide an acceptable form of security are consistent with the pattern noted by the High Court Judge, and confirm the Judge's scepticism about their ability to provide the required security for costs. There is no reason to think that they will be able to comply with the order made as long ago as June 2019 at any time in the foreseeable future.
>
> It cannot be the case that claimants in a representative proceeding are allowed unlimited time to prosecute their claim,

34 [2020] NZ HC 1088 at [92].

> free of the disciplines that apply to any other litigant. That would be not be consistent with the public interest in the effective administration of justice. It would be profoundly unfair to the defendants in such a claim. Defendants are no less entitled to access to justice than plaintiffs. For a defendant, one very important element of access to justice is the hearing and determination of the claims against them in a timely manner. It is oppressive and unfair for claims to be left hanging over the head of a defendant for an unnecessarily protracted period.

93. The Court of Appeal further noted (at [89])

> … it is clearly contrary to the public interest to permit this proceeding to continue to absorb the finite resources of the courts, to the detriment of other litigants for a further – potentially lengthy period…

94. In our submission, this was the right outcome in the end (and we acknowledge that we previously acted for the Feltex directors). However, in our view the time taken to get to this point was too long. The defendant directors, some of whom retired years ago and are in their 70s and 80s, and one of whom is still an active director, have been dragged through almost 13 years of litigation that has come to nothing. This has been hanging over their heads since 2008. They have incurred substantial legal costs, including in the phase since 2019 trying to get security for costs (which took almost two years in itself). We understand that the claimants have sought leave to appeal the strike out judgment to the Supreme Court, so the saga continues.

95. The courts are very focussed on protecting the interests of class action claimants which is of course a worthy goal, but the claimants in *Feltex* were given opportunity after opportunity to advance their claim. We must not lose sight of the fact that class action defendants are often individuals (like the Feltex directors) who have their professional and personal lives affected by these actions, or are companies who can have their reputations tarnished and resources diverted while they try and deal with these claims.

96. The short point is that we believe security for costs should be mandatory in funded class actions (which is effectively the position now anyway, but should be spelt out in any new regime). Proceedings ought to be struck out if security is not provided.

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?

97. We believe there should be a requirement to provide security for costs in a form enforceable in Aotearoa New Zealand.

Regulation and oversight

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

98. We agree with the Commission's preliminary view that regulation of litigation funders would improve transparency and ensure that funders are subject to appropriate scrutiny and accountability. We think all of the concerns discussed warrant this response (including funder profits, funder control of the proceedings/conflict of interest, capital adequacy of funder etc).

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?

99. We do not think that voluntary industry self-regulation provides adequate incentives for funders to address the issues of concern discussed. We also see limited scope for a voluntary scheme in a small market like New Zealand with mostly overseas based funders.

100. In terms of fitting litigation funders into managed investment scheme requirements or tailored licensing requirements, we would need to consider the detail of how that would work, but in principle we are not opposed to this. It may be a vehicle for ensuring important minimum requirements for litigation funders including good character and competence, capital adequacy, and maintaining adequate arrangements to manage conflicts of interest and risk. We note, however, that there have been difficulties in Australia trying to fit litigation funders into the regime for an Australian Financial Services Licence and within the requirements of a Managed Investment Scheme. The recent comments of the Parliamentary Joint Committee suggest that a fit for purpose regime for litigation funders is the better option.[35]

101. A new statutory regime in New Zealand could set out parameters for acceptable litigation funding arrangements (among other things), but we also think it important (for the reasons discussed), that the court also approves funding arrangements in all class action proceedings, i.e., prior to or as part of the certification process (as is the position in Ontario). The statutory regime could form the criteria against which the court makes that assessment.

35 See the Joint Committee's report at pp. 311-312.

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