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Submission to Law Commission Issue Paper 45

Class Actions and Litigation Funding

11/03/2021

About Chapman Tripp

1 Chapman Tripp acts on Aotearoa New Zealand's most significant commercial disputes and has substantial experience across the full range of dispute resolution mechanisms, including international arbitration, arbitration and mediation. The firm's litigators have a strong track record before the High Court, Court of Appeal, the Supreme Court, and the Privy Council.

2 Chapman Tripp has acted on funded claims, both for and against funded parties, and on representative action proceedings, including:

2.1 *Cridge & Ors v Studorp Ltd & Anor*: we acted for the defendants in a representative action involving over 150 homeowners that went to trial in 2020

2.2 *White & Ors v James Hardie New Zealand & Ors*: we are acting for the defendants in a multi-plaintiff action involving over 1,200 homeowners that is due to go to trial in 2021, and

2.3 *Waitakere Group Limited & Ors v James Hardie New Zealand & Ors*: we are acting for the defendants in a multi-plaintiff action involving 5 retirement villages that is due to go to trial in 2023.

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Summary of submission

Class actions

4 Group litigation in Aotearoa New Zealand has been limited by:

4.1 procedural uncertainty, leading to increased cost, and

4.2 insufficient economic incentives for litigation funders due to classes being small by international comparison, reflecting the size of the Aotearoa New Zealand economy and, until recently, the unavailability of "opt-out" actions.

5 We support the introduction of a dedicated class action legislative regime, provided there is appropriate court supervision of the establishment of the class. Rigour in determining the common issue and setting the procedural framework at the outset lowers cost, increases efficiency and improves access to justice. This regime should take into account tikanga Māori as appropriate.

6 Given the heavier expected workload from new cases, the courts should be funded appropriately to provide sufficient case management in the early stages of a case.

7 Class actions arising from the same or similar events raise the risk of significantly increased costs for defendants, and a greater drain on Court resources, if the actions are not case-managed together and with sufficient consideration of the burdens on defendants' witnesses and experts. We consider that the Court's existing consolidation and case management powers are sufficient if these issues are addressed at the first case management conference, the certification stage, and as the proceedings develop. One way that these risks can be addressed is through the adoption of a standstill period and selection hearing as recently recommended in Australia.

8 The new class action regime should not be a replacement for appropriate regulatory enforcement and use of existing powers to seek compensatory orders. Industry regulators can often achieve more holistic outcomes through a combination of education, enforcement and compensation than a class action alone.

9 We support the continuation of a limited representative actions regime for smaller claims, drafted to prevent larger claims from using it to avoid any regulatory safeguards in the class action regime.

10 A dedicated class action regime may increase insurance costs as more cases are filed but the legal costs of defending these claims should be reduced with a more efficient process. We note that insurance costs have already been increasing for our clients due to the greater number of Aotearoa New Zealand representative actions and the continued growth of litigation funding.

11 The class action regime needs to recognise the high costs involved in defending these claims. The current adverse costs regime needs to be amended to reflect the fact that current cost awards are only a small portion of actual legal costs, especially in complex representative actions.

12 We agree that Court approval should be sought for settled opt-out class actions.

Litigation funding

13 Encouraging litigation funding in Aotearoa New Zealand, subject to appropriate safeguards, is likely to improve access to justice for both individuals and corporates, and is unlikely to lead to an increase in meritless cases.

14 We consider that the torts of maintenance and champerty should be abolished, subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality.

15 A tailored statutory regime should be established introducing some minimum baselines (using those introduced in the UK's ALF Code), including:

15.1 restrictions on funder control over key strategic decisions, and in particular the decision to settle or discontinue a proceeding

15.2 prohibitions on the funder from having a discretionary right to terminate funding, and limiting circumstances in which termination is permissible

15.3 wide-ranging procedures for resolution of disputes between funders and plaintiffs (beyond existing clauses that provide for resolution by a senior lawyer nominated by the funder, who is not required to be independent)

15.4 terms requiring lawyers to prioritise their professional and fiduciary duties to the plaintiff(s) above any duties owed to the funder, and requirements that funders establish conflicts management policies

15.5 prohibitions on solicitors and law firms having financial and other interests in a funder funding litigation on which that law firm or solicitor is acting

15.6 a requirement that:

(a) a litigation funder must provide security, together with a presumption that full security is to be provided

(b) any security provided should be in a form enforceable in Aotearoa New Zealand, and enforceable without the need for any ancillary litigation (whether in Aotearoa New Zealand or overseas), and

15.7 minimum capital adequacy requirements for funders.

16 There should be clear consequences for non-compliance with those minimum baselines. Compliance can be overseen by a combination of the Courts and existing bodies (such as the Financial Markets Authority (*FMA*) and the Ministry of Justice). At this stage, we do not consider that any new statutory bodies need be created. Industry regulation is unlikely to be sufficient given the nascent Aotearoa New Zealand litigation funding market. It would be sensible for a further review of the regime five years after its commencement.

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PART A: CLASS ACTIONS

Chapter 4 (Qs 1-2): Problems with using the representative actions rule for group litigation

The greatest challenge with relying on HCR 4.24 for group litigation has been the uncertainty, cost and delay in developing representative action processes through case law. More contested interlocutory applications have been required than we consider would be expected under a dedicated class action regime.

While acting for defendants on representative actions, we have also experienced the inefficiencies caused from a poorly defined common issue or differentiated class of plaintiffs. Group litigation is most efficient when common issues are defined clearly at an early stage. To the extent that there are differences between groups within the plaintiffs, these should be acknowledged through sub-classes.

Chapter 5 (Q3): Advantages of class actions

The key advantages of a formal class actions regime are improved access to justice and increased efficiency and economy of litigation. Justice is achieved when meritorious claims can be heard and resolved in a cost-effective and timely manner.

We consider that strengthened incentives to comply with the law will only be a small and incidental advantage of any formal class action regime. From our experience, our clients take their compliance obligations seriously and seek to employ best practice to the fullest extent possible. We do not consider that the existence of a formal class action regime will deter conscious illegal activity. This activity is often in regulated sectors with strong existing civil and/or criminal sanctions.

We consider that a formal class actions regime is best focused on compensation, achieving wider outcomes in cases not already covered in a regulatory regime, and improving the ability of plaintiffs to bring claims.

Chapter 6 (Q4): Disadvantages of class actions

Our greatest concern with class actions is the prospect of large, amorphous claims being filed with the aim of placing financial pressure on commercial defendants and their insurers to settle purely to avoid the cost and delay of litigation. This can be addressed through a rigorous class action and case management regime that requires plaintiffs to focus their claims at an early stage and manages competing or overlapping class actions. We discuss this further below.

Our clients report that insurance costs in Aotearoa New Zealand have been increasing significantly over recent years as more representative actions have been filed and litigation funding has grown, both in Australia and Aotearoa New Zealand. Premiums are increasing and the scope of insurance is decreasing with new exclusions, in particular relating to majority shareholder class actions.

The introduction of a formal class action regime may further increase these costs if the regime allows ad hoc and poorly developed overlapping class actions to flourish.

Chapter 7 (Q5): A statutory class actions regime for Aotearoa New Zealand

Aotearoa New Zealand should have a statutory class actions regime. A statutory regime would provide more procedural certainty and allow legitimate claims to be brought in a coherent, appropriate way with procedures to help manage the size of the class action.

A regime also allows deliberate policy decisions to be made around how to balance the interests of plaintiffs and defendants. This balance is difficult to achieve in the current court-run regime as the courts will often only be asked to address a limited set of issues in any one application or proceeding. As the Commission identifies in its paper, it is important that all aspects of the regime are considered in the round.

Chapter 8 (Qs 6-9): Scope of a statutory class actions regime

A class action regime that is general in scope would be most appropriate. Given Aotearoa New Zealand's volume of civil litigation, smaller regimes for different areas of law may not get sufficiently tested in order to provide certainty to parties. Having all cases based on the same framework allows court guidance to be developed more quickly.

We do not consider that a formal class action regime will be cost-efficient in District Court proceedings. To the extent that representative actions are still required for smaller claims, then the existing DCR4.24 can remain. As set out below, we consider there are valid reasons for retaining a representative action procedure alongside a formal class action regime.

There is no need to change existing Māori Land Court practice.

The class actions regime does not need to be available in the Employment Court. Any large collective claims are likely to be pursued by a union, otherwise the representative action procedure is sufficient.

The representative actions rule should be retained alongside a class actions regime. The representative actions rule may still be appropriate for smaller groups of plaintiffs, but there should be an option for parties to apply to the Court to have a proceeding brought into the class actions regime. There should also be an ability to test whether proposed class actions are appropriate in a certification stage. This would prevent parties using the representative actions rule to avoid the requirements and protections of a class actions regime.

Chapter 9 (Qs 10-18): Principles for a statutory class actions regime

Objectives

The objectives of a statutory class actions regime should be to improve access to justice and the efficiency of group litigation. Both of these objectives are extensions of the existing objective of the High Court Rules to promote the just, speedy and inexpensive determination of any proceeding.

We do not believe there is a need for a primary objective. Given the resources and time that class actions can require, both from the parties and the courts, it is appropriate for access to justice to be tempered by a focus on economy and efficiency.

Essential features for balancing interests of plaintiffs and defendants

A class actions regime should facilitate plaintiffs to bring meritorious claims. This can be encouraged (and unmeritorious claims, or claims brought primarily to obtain a settlement, discouraged) by building in requirements to provide information to support the merits of a claim at an early stage. As discussed below, in our view, a class actions regime should include a merits review as part of a certification process.

Requiring reasonable detail in the statement of claim, along with initial discovery, would encourage an early focus on merits and enable the parties and court to better assess the claim. These obligations apply to all claims, but should be carefully enforced in class actions.

Appropriate case management needs to take into account the practical burden on the participants in the litigation. The courts need to manage competing or overlapping concurrent class actions closely as they can place significant strain on the availability of defendants' fact and expert witnesses (especially if those

witnesses are required to be in a court hearing for one matter, while completing evidence on another related proceeding).

Costs are also important. As for other forms of litigation, adverse costs regimes help to discourage unmeritorious claims, and claims brought to force settlements. They also encourage proportionality, discouraging claims that are low value and complex or otherwise expensive to progress.

Essential features for protecting interests of class members

The interests of class members are best protected at the certification stage of any class action. This can be achieved in the Court's review of any litigation funding arrangements, the suitability of the representative plaintiff (including any conflict issues), and the plaintiff's litigation plan.

Class member interests are also protected by requiring court supervision of settlement agreements to ensure that there is no prejudice to a sub-set of the plaintiff class.

Proportionality

Proportionality is an appropriate principle for a class actions regime. Proportionality should be considered at the certification stage and throughout case management. As with all aspects of litigation, the aim is for efficiency so the courts should consider time and cost issues to ensure procedural matters are dealt with appropriately given the proceeding's characteristics.

Unique features of litigation in Aotearoa New Zealand to be considered

The smaller scale of class actions due to the size of the population (even with the change to opt out proceedings) ought to be considered in designing the regime. Given the push for economic viability, we expect there to be a push to draw classes as wide as possible. Therefore, greater focus is required on assessing commonality and defining the scope of the class, or sub-classes, in each case.

Influence of tikanga Māori

Te Ao Māori is a mandatory consideration the Commission must take into account when making recommendations.[1] We consider that the proposed class action regime should not be so rigid as to preclude the ability to adapt to tikanga Māori values should the litigation be brought by a Māori group.

We consider tikanga Māori will be most relevant to an assessment of proposed representatives of a particular class, and whether they have the support of the people they are proposing to represent. We give more detail on this particular issue below in response to Chapter 11 and Question 31.

We refer to the writings of Hon Sir Justice Joe Williams ("Lex Aotearoa" (2013) 21 Waikato Law Review 1) and Boast, Frame and Meredith (Te Mātāpunenga (Victoria University Press, Wellington, 2013)) as influential publications about the origins and meanings of tikanga Māori concepts and their place in the legal system of Aotearoa. We also note the Law Commission's own research in relation to the Custom Law Project which commenced in 1995, and the ongoing work of the Commission's Māori Liaison Committee.

Impact of class actions on other kinds of group litigation or regulatory activities

The courts should have the power to determine the appropriate procedure for group litigation – including bringing claims into a class actions regime, however they were commenced, or refusing certification and requiring proceedings from named plaintiffs.

There is a risk that a class actions regime could lead regulators to allocate budget away from enforcement matters. We consider that would be detrimental for the operation of regulated industries in Aotearoa New Zealand, removing access to a range of enforcement tools, alongside education and engagement on best practice. Simply leaving consumers to improve regulated behaviour through class action

[1] Law Commission Act 1985, s 5(2)(a).

proceedings would be inefficient and would often fail to address matters holistically. In addition, the transaction costs associated with class action proceedings will ultimately be borne by consumers of regulated services through prices. Relative to public enforcement, private enforcement in this context essentially imposes a tax on all Aotearoa New Zealand consumers.

Issues arising in funded class actions to be addressed in a class actions regime

The most important aspects of funded class actions to be addressed are (1) control of the litigation, (2) conflicts of interest between funders, solicitors and class members, (3) "free-riding".

List of principles to guiding development of a class actions regime

We agree with the Commission's list of principles, provided that (g) (that there not be an adverse impact on other methods of bringing collective litigation), still allows for competing class actions to be managed, however they are brought (therefore pulling other types of proceedings into the class actions regime).

Chapter 10 (Qs 19-27): Certification and threshold legal test

Certification requirement

A class action regime should include a certification requirement. A certification step is a necessary requirement to ensure that the procedural benefits of group litigation are not lost through inefficiencies caused by loosely-defined classes and common issues.

We have referred above to the risks of overlapping or competing class actions and their impacts on both the courts and defendants. One way that these risks can be mitigated is through including a standstill period and selection hearing as recently proposed by the Parliamentary Joint Committee on Corporations and Financial Services in Australia.

Numerosity requirement

A class actions regime should not contain a numerosity requirement. Adopting an arbitrary number of plaintiffs as a threshold for access to the regime does not add value to the process. Instead, the number of plaintiffs is a consideration in the Court's assessment of whether the class action regime is appropriate for that particular proceeding.

Application of commonality test to a class actions regime

We acknowledge that the "same interest" test only requires a significant common interest in the resolution of a question of law or fact in a proceeding. However, as the Commission notes, from our experience in *Cridge v Studorp* there are costs in terms of procedural approach, clarity and efficiency when there are significant differences between individual class members' claims.

If the current test is to remain, the common issues and the allocation of common (stage 1) and individual (stage 2) issues need to be clearly defined in each case.

To the extent that there are differences between plaintiff groups, but there is efficiency in hearing their claims together, then formal sub-classes should be identified and case managed appropriately.

Establishing that common issues in a class action are substantial or that they 'predominate' over individual issues

A representative plaintiff should not have to establish that the common issues in a class action are substantial or that they 'predominate' over individual issues. The representative plaintiff should just have to establish that it is appropriate in the interests of access to justice/economy and efficiency for those common issues to be determined in one proceeding. Even if the common issues are limited, it may be most efficient to have them addressed in a short stage 1 process on a class action basis, before individual issues are addressed at stage 2.

Establishing that a class action is the preferable or superior procedure

A representative plaintiff should have to establish that a class action is the preferable or superior procedure for resolving the claim. This should not be a difficult bar and should be considered alongside other issues of commonality.

Preliminary merits or costs/benefits assessment

A court should be required to conduct a preliminary merits assessment of a class action or an assessment of the costs and benefits. The "real prospect of success" test seems appropriate.

Requiring an assessment of the merits is an important protection for opt-out plaintiffs who may be unaware of the proceeding. They should not lose their rights to a poorly run claim.

Given the time and cost involved in defending large scale representative proceedings, it is appropriate that the plaintiffs' case is well-formed at the outset. Should the plaintiffs' case vary substantially over the course of the proceeding, any benefits from the certification stage are also lost.

Provision of litigation plan

A litigation plan could provide further protections for class members as the representative plaintiff must give the Court details about how they will represent the class, and how consultation and decisions will be undertaken. To the extent it addresses sub classes and the specific issues of each subclass, it would also provide further detail to help define common issues beyond what may be set out in a statement of claim. As noted in the Law Commission paper, these matters could be the subject of case management conferences, but we suggest a litigation plan provides useful discipline for a plaintiff filing a claim, and allows the parties to better assess the nature and scope of the proceedings at an early stage.

Funding arrangements as part of a threshold legal test for class action

A court should consider funding arrangements as part of a threshold legal test for a class action, for protection of both the interests of class members and defendants.

Other threshold legal tests

A statutory class actions regime should have a further threshold legal test – does the proposed proceeding meet the objectives of the class action regime?

Chapter 11 (Qs 28-31): The representative plaintiff

A court should consider the representative plaintiff's suitability for the role as part of the threshold legal test for a class action.

We consider that ideological representative plaintiffs should be able to proceed if their role meets the objectives of the regime to facilitate access to justice and there are appropriate protections in place for class members. The proceeding should not be for the financial benefit of an ideological plaintiff lacking any common interest with the plaintiff class.

We consider that the government entities that are most likely to take action on behalf of a class already have the necessary regulatory powers to act on a representative basis.

Plaintiff seeking to represent interests of a whānau, hapū or iwi

Representativeness by an individual of the Māori group or entity they represent is a complex matter that has been treated inconsistently by the Courts. Representativeness is a matter of *mana motuhake* (autonomy) and may involve questions of *whakapapa* (genealogy), matters which the High Court has very recently held may not be determined by the Courts.[2] In cases where *whakapapa* is not contested, the Supreme Court has held that an individual may represent the

[2] *Ngawaka v Ngāti Rehua Ki Aotea Trust Board & Ors* [2021] NZHC 291.

interests of several hapu on the basis that an individual's "*customary authority as an acknowledged kaumatua of part of the collective customary owners [of land] permits him to bring a representative claim without the need to seek a representative order*".[3]

Notwithstanding these issues, representativeness of Māori groups may be readily assessed if, for example, the post-settlement governance entity (*PSGE*) of an iwi or hapu is involved in the class action. Those PSGEs ordinarily identify their beneficiaries by reference to a particular *tupuna* (ancestor). For example, the Ngāti Whātua Ōrākei Trust Deed defines "Ngāti Whātua Ōrākei" as "*the members of the hapu, being the toto (blood) descendants of their common ancestor Tuperiri*".

Chapter 12 (Qs 32-33): Membership of the class

Different approaches to determination of class membership should be available, not just on an opt-in or opt-out basis.

Chapter 13 (Qs 34-36): Disadvantages of class actions

The adverse costs rules should be retained but there is a strong need to update the existing scale costs regime to achieve their stated purpose of reimbursing two-thirds of actual costs. Representative proceedings have involved substantial extra costs over many years with the burden often falling hardest on the defendants, given the greater discovery and evidential costs.

[3] *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 (SC) at [494].

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PART B: LITIGATION FUNDING

Chapter 17 (Qs 37-38): Advantages and disadvantages of litigation funding

Our view is that the advantages of litigation funding outweigh its disadvantages, subject to addressing the issues raised in our comments below. Creating conditions that will increase competition in the market will result in better funding options and lower costs for litigants. It will also bring Aotearoa New Zealand in line with other comparable jurisdictions which have more developed litigation funding industries.

The most important advantage of permitting litigation funding is improving access to justice. Although this may not be the primary driver of litigation funders, their involvement allows plaintiffs to bring proceedings when they otherwise may not have been able to. This is particularly the case in class actions or insolvency proceedings.

More generally, litigation funding can contribute to development of the law as funded litigants are often more willing to test novel legal principles.

Litigation funding may in theory assist corporate plaintiffs to stay focussed on their business or provide balance sheet advantages, but we are not aware of such use of litigation funding in Aotearoa New Zealand to date, and we think it is unlikely to be a significant driver in Aotearoa New Zealand in the future.

We acknowledge the risk that an increase in litigation funding would add to the significant workload of the Aotearoa New Zealand courts. But the greater issue would seem to be whether there is an increase in meritless cases. We consider this unlikely as funders do careful due diligence in our experience and are unlikely to want to invest in such cases (both from a financial return and reputational perspective).

Similarly, any such increase in workload can be mitigated by minimising inefficient and unproductive procedural skirmishes. The introduction of a dedicated class action regime (covered earlier in this submission) would help with that.

Chapter 18 (Qs 39-41): Reforming maintenance and champerty

We consider that the torts of maintenance and champerty should be abolished, subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality.

The negative effects of abolition would appear to be limited:

- as the Law Commission's report notes, there has been no successful claim in Aotearoa New Zealand founded on maintenance and champerty, and few cases appear to have been brought on the basis of those torts
- we are not aware of any instances of businesses pursuing litigation against business rivals "*hiding behind nominal litigants*" (which appears to have been the Law Commission's primary concern about abolition in 2001)
- even if such a situation arose, the preservation provision would allow the Court to render any funding agreement motivated by such collateral purpose unenforceable on grounds of public policy
- the High Court would also retain its ability to stay a proceeding for abuse of process. The Supreme Court's decision in *Waterhouse v Contractors Bonding* has provided some certainty about when a litigation funding agreement may amount to an abuse of process.[4] The Supreme Court expressly acknowledged

[4] *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [31].

the use of Court processes for some ulterior or improper purpose as justifying intervention.

We do not consider it necessary to be prescriptive about when a funding agreement is contrary to public policy. The courts will be assisted in assessing whether such grounds are made out by reference to relevant Australian and English case law. The Supreme Court's outline of circumstances in which a litigation funding agreement may amount to an abuse of process is a helpful starting point.

If the torts of maintenance and champerty were to be retained, then a statutory exception for litigation funding would be appropriate. If that approach were to be followed, we agree that there is no reason to restrict that exception to the funding of class actions. We anticipate that the exception criteria would largely follow *Waterhouse* and the public policy and illegality cases in other jurisdictions.

Chapter 19 (Qs 42-44): Funder control of litigation

Funder control of litigation is a key concern with litigation funding. Some minimum baseline protections are required. The predominant purpose of litigation should be redress for a plaintiff, rather than return on investment for a funder. Accordingly, the funder should not have dominant control over key strategic decisions, and in particular the decision to settle or discontinue a proceeding.

It may be reasonable for the funder to have greater control of day-to-day decisions in a class action, and less control where a sophisticated plaintiff is being funded. On that front, it will come down to the circumstances in each specific case.

Many funding agreements do not give funders unilateral decision-making powers in respect of settlement and termination of funding. But such clauses cannot counter the commercial reality of funder control of litigation, particularly in a typical funding scenario where the plaintiff is less experienced than the funder, or is a diffuse group, or both.

We see merit in establishing a statutory regime introducing a set of minimum terms in line with the UK's ALF Code (as set out in [19.24] of the Law Commission report), and in particular:

- prohibiting the funder from having a discretionary right to terminate funding, and limiting circumstances in which termination is permissible
- appropriately restricting the funder's role in key strategic decisions, including settlement decisions, and
- setting out a wide-ranging process for resolving disputes between funders and plaintiffs. Existing clauses that provide for resolution of such disputes by a senior lawyer, typically nominated by the funder, are insufficient, particularly where there is no requirement for that lawyer to be independent.

They should not be non-binding guidance. Compliance with the minimum terms should be overseen by the Courts and existing agencies (such as the FMA and the Ministry of Justice), with clear consequences for non-compliance. At this stage, we do not consider that any new statutory or industry bodies need be created.

Chapter 20 (Qs 45-50): Conflicts of interest

The best way to address funder-plaintiff conflicts of interest is through a statutory regime requiring funding agreements to contain clear minimum terms on control and dispute resolution. A requirement for funders to establish a conflicts management policy should be part of that regime.

In the class action context, a 'cooling off' period for the class to take legal advice would be merited. But we do not consider that there ought to be a fixed obligation to disclose any proposed settlement to all members. If the plaintiff class has a representative, or a committee, given responsibility to progress the litigation from

the plaintiffs' perspective, it should be their decision whether an offer ought to be put to the entire class.

The risk of lawyer-plaintiff conflicts of interest is mitigated by the introduction of a statutory regime requiring minimum terms to limit funder control of litigation and a funder's ability to terminate funding, as set out above.

But that does not resolve the potential for conflicts created by historical business relationships between the funder and the lawyers, or those created by direct contract between the funder and the lawyer.

A statutory regime providing for the minimum terms set out in [20.50] of the Law Commission report would be merited. In particular, it would be appropriate to have clear terms requiring lawyers to prioritise their professional and fiduciary duties to the plaintiff(s) above any duties owed to the funder.

In addition, we consider that solicitors and law firms ought to be prohibited from having financial and other interests in a funder funding litigation on which that law firm or solicitor is acting.

Chapter 21 (Qs 51-53): Funder profits

In a mature and competitive funding market, funder profits would be primarily an issue for the plaintiff(s) and the funder to agree. In the absence of such competition (arguably the case in Aotearoa New Zealand at the moment), regulation is needed to ensure that funders' profits do not overtake justice as the primary purpose of litigation

We consider that the Courts should be empowered to vary funder commissions under their power to stay proceedings for abuse of process. That is particularly relevant where an imbalance of power and an abuse of it by the funder are apparent. We anticipate this type of review would primarily be required in a class action context, where an imbalance of power between plaintiff and funder is more likely.

Any such review ought to take place towards the start of a proceeding. Leaving it to the Court's approval of a settlement in class actions would be too late, and would run the risk of collapsing an otherwise agreed settlement.

Other regulators (such as the FMA) should also have the power to review funder commissions as needed.

Restricting commissions by proportion to investment or to a percentage cap would be blunt instruments and may result in certain claims that have merit going unfunded. Each case is different and raises different risks for a funder, justifying variable rates.

If a fixed commission cap were to be introduced, we would recommend that the percentage be based on any proceeds after legal fees and disbursements. That would take away the concern at [21.27(b)] about funders in a successful case being unable to even recoup their legal expenditure.

Chapter 22 (Qs 54-57): Capital adequacy

Security for costs

A statutory requirement should be put in place requiring a litigation funder to provide security, together with a presumption that full security is to be provided. Defendants already being put to the burden of defending typically significant and complex claims should generally be entitled to protection in the event they are successful, without the additional cost and effort of having to apply for full security. The onus should be on the litigation funder and plaintiff to justify departure from full security being awarded.

The security requirements should be that:

- the security is provided in a form enforceable in Aotearoa New Zealand. A successful defendant should not be limited to the uncertain recourse of enforcing in a foreign jurisdiction, and
- the security should not require ancillary litigation to enforce, whether in Aotearoa New Zealand or overseas.

ATE insurance is a helpful additional safeguard for funders but should not result in a funder being able to avoid providing security in the form of payment into court or a bank guarantee.[5]

Capital adequacy of funders

The capital adequacy of funders is clearly a major issue given the scale of litigation that they typically fund, and the burden that imposes on defendants. We are aware of at least one funder that uses subsidiary SPVs to fund particular litigation, giving rise to concerns about the adequacy of that SPV.

Security for costs, in line with the requirements set out above, will in some cases provide sufficient protection to defendants. But security may not be adequately set in the first place, or adequately revisited as the litigation develops, making it entirely possible that a successful defendant suffers a shortfall because the funding vehicle has no further funds.

Accordingly, we consider that the tailored statutory regime we have referred to above should impose minimum capital adequacy requirements on litigation funders. A good starting point would be the ALF obligation to maintain at all times access to adequate financial resources to meet the funders' obligations to fund all disputes the funder has agreed to fund. In the Aotearoa New Zealand context, the funder needs to demonstrate that such access is available from Aotearoa New Zealand, including in any enforcement context.

Chapter 23 (Qs 58-60): Regulation and oversight

We have set out in our earlier answers those concerns with litigation funding that we consider warrant a regulatory response.

A tailored statutory regime should be established providing for minimum baselines concerning funder control, conflicts of interest, security for costs and capital adequacy. We see no need at this stage for a new oversight body. Oversight from a combination of the courts, the FMA and the Ministry of Justice ought to be sufficient in the first instance. We would recommend further reviewing this approach five years after the commencement of the regime.

We do not consider that industry self-regulation would be sufficient, given the nascent Aotearoa New Zealand litigation funding market.

[5] See *White v James Hardie New Zealand Ltd* [2019] NZHC 188 at [15], by reference to *Michael Phillips Architects Ltd v Riklin* [2010] EWHC 834 (TCC).


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