15 March 2021

Commissioner Amokura Kawharu
New Zealand Law Commission
Level 9, 70 The Terrace
Wellington 6011
New Zealand

Email: **cal@lawcom.govt.nz**

Ref. Aotearoa New Zealand Law Commission Consultation on Class Actions and Litigation Funding

Dear Commissioner,

We have pleasure in enclosing a joint submission on behalf of the Antitrust Litigation Working Group of the Antitrust Committee of the International Bar Association (IBA).

The Co-chairs and representatives of the Antitrust Committee would be delighted to discuss the enclosed submission in more detail with the representatives of the Law Commission.

Yours sincerely,

Daniel G. Swanson

Co-Chair Antitrust Committee

Thomas Janssens

Co-Chair Antitrust Committee

IBA ANTITRUST COMMITTEE COMMENTS ON THE NEW ZEALAND LAW COMMISSION'S CONSULTATION AND ISSUES PAPER ON CLASS ACTIONS AND LITIGATION FUNDING IN AOTEAROA NEW ZEALAND

I. INTRODUCTION

The International Bar Association ("IBA") is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at http://ibanet.org.

The IBA's Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The comments set out in this document have been prepared by the Litigation Working Group of the IBA's Antitrust Section (Antitrust Litigation Working Group or "ALWG") and draw on that combined experience.

The ALWG understands that, to date, New Zealand has not had a class actions regime and the ALWG commends the New Zealand Law Commission ("Law Commission") for presenting an Issues Paper on class actions and litigation funding and seeking feedback as to whether a statutory regime is desirable for Aotearoa New Zealand.

We understand that the preliminary view of the Law Commission is that a statutory class actions

regime is desirable because:

1. The representative actions rule in New Zealand is inadequate for modern group litigation;
2. Class actions may improve access to justice, improve efficiency and economy of litigation and strengthen incentives for compliance with the law;
3. Many of the potential disadvantages of class actions can be mitigated with careful design; and
4. A statutory regime would provide greater certainty on the rules for group litigation.

The ALWG welcomes the opportunity to provide the Law Commission with comments on the Issues Paper and the proposal to introduce a statutory class actions regime. These comments are intended to assist in decision making about the introduction of a regime, and in refining the scope of the regime.

II. EXECUTIVE SUMMARY

This submission offers comments and views regarding certain sections of the Issues Paper and does not attempt to cover the field. Some of the matters raised in the Issues Paper are unique to New Zealand law and culture and we are of the view that those matters are better analysed and addressed by New Zealanders who have an appreciation of local circumstances and context. However, we have addressed some of the broader questions that have been posed in the Issues Paper, as set out below:

1. The advantages and disadvantages of class actions (question 3);
2. Concerns about class actions (question 4);
3. Whether a class actions regime should be general in scope or whether it should be limited to particular areas of law (question 6);
4. Which features of a class action regime are essential to ensure the interests of claimants and defendants are balanced (question 11);
5. Which features of a class actions regime are essential to ensure the interests of class members are protected (question 12);
6. Should a class actions regime include a certification requirement? Or whether it a court should have additional powers to discontinue a class action (as in Australia) (question 19);
7. The features of a representative claimant (questions 28, 29 and 30);
8. Whether class membership should be determined on an opt-in or opt-out basis, or whether different approaches should be available (question 32); and
9. The potential advantages and disadvantages of litigation funding and whether it is desirable for Aotearoa New Zealand, including whether a court should consider funding arrangements as part of a threshold test for a class action (questions 26, 37 and 38).

These questions are addressed in turn below.

III. COMMENTS ON THE QUESTIONS SET OUT ABOVE

Question 3 - Advantages of Class Actions

The provision of access to justice is the defining characteristic of any class actions regime. The view of the ALWG is that a regime that provides for collective action by parties who may not otherwise seek, or be capable of seeking, redress is of benefit to society as a whole. Further, class action regimes that provide for litigation funding increase access to justice by provisioning actions that may not otherwise be taken forward. Comments concerning litigation funding are addressed later in this submission.

Accordingly, the ALWG is supportive of the introduction of a class regime in New Zealand, noting that it is also important that in any regime there are sufficient processes to allow courts to identify at an early stage those claims that are properly grounded, and address those claims that might be improper in that they may not provide class members with proper, or any, redress for loss or damage or in the alternative, be unmeritorious and result in unfairness to defendants. This is a fine balance which must take into account the rights of all parties to such litigation and ensure that while access to justice is assured, the regime does not incentivise, or permit, the bringing forward of unfounded claims. Further comments concerning these matters are addressed later in this paper.

As to whether a class actions regime is likely to improve efficiency and economy of litigation, the ALWG is of the view that the introduction of a regime is unlikely to result in fewer cases overall being brought thus bringing efficiencies or economies to the court system, although this view could not be readily tested by empirical evidence. We are also of the view that class actions, by their very nature, are likely to bring complexities to the court given the need for commonalities between multiple claimants, and potentially, defendants.

One area in which there are unlikely to be economies is where competing claims are brought for the same conduct. Such contests are more likely to result in the use of additional court resources, including appellate resources, to resolve which claim should proceed. This is an issue which is currently the subject of judicial consideration in Australia in relation to 5 competing class actions brought against AMP in which each claimant has sought a stay of proceedings commenced by other claimants.[1] The matter has progressed through the Supreme Court of New South Wales,

[1] *Wigmans v AMP Limited & Ors*, S67/2020 (HCA); *Marion Antoinette Wigmans v AMP Limited & Anor* [2019] NSWCA 243

the Court of Appeal of New South Wales, and the High Court of Australia. The question the High Court is considering is whether the lower courts erred in adopting a multifactorial comparison between claims (as opposed to deciding the matter on the basis of assessing the likely return to class members as between competing actions). The judgment is anticipated to be handed down on 10 March 2021. There is another notable and ongoing dispute currently taking place in the UK: two claims have been brought against international banking entities in relation to manipulation of foreign exchange markets. The contest is to be decided by reference to which representative would be "the most suitable". Given these issues, the ALWG considers this to be a neutral factor.

The ALWG does not support the view that it is the purpose of a class actions regime to strengthen incentives to comply with the law. To the extent that persons do not comply with the law resulting in claims for loss or damage, that is an inevitable consequence of non-compliance, which could, depending on the conduct, result in either regulators or claimants, or both, seeking redress or penalties. The ALWG accepts that, while as a practical matter some entities may take into account class action risk when considering whether to undertake certain conduct, it is unlikely in the ALWG's view that, in those discreet circumstances, the class action risk will be more influential than the potential for penalties or other censure for breach of the law. On many occasions the potential for class action risk would not be apparent in any event (for example, at the time of the launch of a new product that proves to be defective)[2].

Question 4 - Potential Concerns about a Class Action

As noted above, the ALWG is supportive of the introduction of a class actions regime in Aotearoa New Zealand. To the extent that there are concerns about the ramifications of such a regime, it is our view that these can be managed through the inclusion of checks and balances which ensure both parties' interests are protected. To the greatest extent possible these checks and balances should be contained in the foundational documents for the class action regime (whether legislation or regulations) and developed further by way of court practice note.

To address the specific issues raised by the Law Commission, the ALWG is of the view that the introduction of a class actions regime in other jurisdictions has not led to an appreciable burden on the courts.

Certainly this has been the Australian experience where a general regime has been in place for more than 25 years. While class actions are now a standard feature of the legal landscape, ranging

[2] Current examples of large class actions brought with respect to defective products where the defect was not apparent at the time the product was launched are the class actions brought concerning Takata airbags (the subject of international recall) and the case against Johnson & Johnson/Ethicon with respect to pelvic mesh products.

from investor or shareholder actions to industrial liability, tortious actions and consumer protection issues, the statistics from the courts suggest that they are not burden on the judicial system. Presently the Federal Court of Australia is managing 122 class actions across all of its registries.[3] In 2020, 38 class actions were commenced: 14 in New South Wales, 16 in Victoria, 3 in Queensland, 4 in South Australia and 1 in Western Australia.[4] This is against a backdrop of around 4,469 cases being managed by the Federal Court in the 2019/2020 year.[5] Class actions are thus a small percentage of cases overall. Further, the Federal Court has a goal of completing 85% of cases within 18 months. The Federal Court is meeting that goal, and more, by case managing around 93% of cases to resolution within that time frame.[6] This suggests that the Australian Federal Court is not overwhelmed by class action litigants. To the extent that there may be a concern that class actions require more case management and therefore use of court time and resources, in the experience of the ALWG, case management is required in any complex proceeding, including those brought by regulators or which are strongly contested between private parties. There is no fundamental distinction which could, or should, be drawn.

These statistics also indicate that there could not have been an appreciable impact on defendants as a consequence of the introduction of a class actions regime in Australia.

There a couple of further matters which the ALWG believes merit consideration which are:

- whether class actions could have an impact on the business environment, and what that impact may be; and
- whether class actions do in fact deliver justice to group members.

In relation to the former, there is a risk that businesses will treat the potential for a class action as a cost of doing business - a "class action tax" - that needs to be accounted for in corporate actions. Some entities may take into account class action risk when considering whether to undertake certain conduct - potentially leading those companies to over compensate to ensure that they are adequately "insured" or protected. Such insurance could take the mode, for example, of higher pricing to consumers or more stringent terms and conditions, which would be a negative outcome stemming from the introduction of a regime. Taking such steps however, would also require an entity to have an appreciation of the consequences of their conduct. To the extent that they may hold such an appreciation, the ALWG considers that they would also be likely to factor in regulatory or compliance risk, thus reducing the incentive to "tax" specifically for class actions.

[3] https://www.fedcourt.gov.au/law-and-practice/class-actions/class-actions
[4] https://www.fedcourt.gov.au/law-and-practice/class-actions/class-actions
[5] https://www.fedcourt.gov.au/__data/assets/pdf_file/0017/80117/AR2019-20.pdf at p12.
[6] https://www.fedcourt.gov.au/__data/assets/pdf_file/0017/80117/AR2019-20.pdf at p13.

Accordingly, the ALWG does not believe that this factor should be heavily weighted in the decision to introduce a class actions regime.

In relation to the issue of whether class actions deliver justice to group members, such concerns can be addressed by designing specific requirements for the payment of damages as part of the distribution of any settlement or judgment fund.

The Israeli legislator, for example, recognises the practical issues around the identification of class members, potentially leading to situations where the establishment of mechanism for locating the eligible class members, and for payment, is expensive and inefficient. Under section 20(c) of the Class Actions Law, should the court find that financial compensation to the members of a class is not practical, whether because it is not possible to identify them and to make the payment at a reasonable cost, or for any other reason, the court may order the grant of any other remedy to the class, or to the general public. Under this process the court can order the allocation of money to a designated fund out of which payment can be made to injured parties who prove their claim, or to a public welfare foundation which operates in an area close to the subject of the class action.

Difficulties in ensuring there is justice for group members can also be ameliorated through upfront disclosure, or consideration, of funding arrangements to ensure that claimant law firms are not compensating themselves at the expense of group members and clients. This may entail a greater degree of judicial oversight of the arrangements between claimant law firms, funders (to the extent they may be involved) and group members. These issues will be further examined below. However, it is the ALWG's view that this issue can be managed, and therefore should not be of negative impact.

Question 6 - Whether a Regime should be General in Scope

As noted above, it is the view of the ALWG that a regime that provides for collective action by parties who may not otherwise seek, or be capable of seeking, redress is of benefit to society as a whole. In particular, the ALWG submits that the regime should aim to deal with categories of claims that raise the same or similar legal issues and seek to be a cost efficient means of bringing claims (thus avoiding cases where the costs of an individual bringing a claim would significantly outweigh the likely damages award for any individual claimant). There is particular merit in ensuring that collective actions can be brought for breaches of competition law as the objective of competition or antitrust law is to ensure that consumers are protected.[7] Ergo, anti-competitive

[7] See s 1A of the New Zealand Commerce Act 1986: "*The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand*". See also s 2 of the Australian *Competition and Consumer Act 2010 (Cth)*: "*The object of this Act is to enhance the welfare of Australians through the promotion of competitive and fair trading and provision for*

conduct is harmful or likely to cause harm to consumers who, alone, are unlikely to have sufficient resources to bring claims for redress.

We note that class actions may be particularly suited to claims where aspects of the underlying conduct have been the subject of prior investigation and decision by competition authorities. Where those decisions are binding on the courts as to the existence of an infringement (as they are, for example, in England & Wales) it may enable collective actions to focus largely on questions of causation and quantum (rather than the underlying factual allegations). Since the introduction of opt-out collective actions for breaches of competition law in England & Wales in 2015 we note that a number of claims have been pursued on a follow-on basis arising from decisions of the European Commission including, for example, *Merricks, Trucks Claim Limited* and *Forex,* although the regime also permits standalone collective actions.

We also note that the Law Commission has already reflected on the United Kingdom Government's decision to reject a general collective action regime and indicated that its preliminary view is that a general, rather than a sectoral class actions regime would be preferable for New Zealand.[8] While the ALWG's expertise is principally in antitrust litigation, we note that even in the UK (where the regime is principally limited to competition law claims) there are an increasing number of group actions being brought for other causes of action such as misuse of private information or data protection laws. One prominent claim is *Lloyd v Google LLC* [2019] EWCA 1599 where the claimant is seeking damages against Google for allegedly tracking browser-generated information of 4.4m iPhone users to sell to advertisers. The Court of Appeal allowed that case to proceed as a representative action in the UK courts, although that decision is the subject of an ongoing appeal to the Supreme Court.

As for categories of claim that, like competition law claims are likely to raise similar issues, an Australian empirical analysis published in 2017 concluded that in the period 1 June 1992 - 31 May 2017, the top five substantive claims advanced by class action litigants in both Federal and State Courts were, as a percentage of all class action claims brought in that period:

- claims by investors - ~19%;
- claims by shareholders - ~16%;
- product liability claims - ~14%;
- claims by employees - ~11%; and
- mass tort claims - ~10.5%.[9]

consumer protection".

[8] Law Commission, Issues Paper: Class Actions and Litigation Funding, [8.5] to [8.9].

[9] Professor V. Morabito, *An Empirical Study of Australia's Class Action Regimes*, (5th Report, July 2017) available from:

Consumer protection claims ran 6th in this study's list.

Question 11 - Essential Features of a Class Actions Regime for Balance

In the view the ALWG, there are two essential features that assist in maintaining balance, as discussed below.

First, from the perspective of the claimants it is essential that, to achieve the objective of access to justice there should be as few requirements as possible to commence a class action. For example, section 33C(1) of the *Federal Court of Australia Act 1976 (Cth)* (**FCAA**) provides for 3 basic requirements:

- seven or more persons have claims against the same person; and
- the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims of all those persons give rise to a substantial common issue of law or fact.

These requirements have been read broadly:

- all class members must have a claim against all defendants, but the claims need not be identical against all defendants;
- the "same, similar or related circumstances" requirement has been interpreted liberally so that some relationship between the claims of each of the class members must exist but need not be identical; and
- the "substantial common issue of law or fact" requirement is not onerous as "substantial" has not been interpreted as a significant issue but instead an issue that is "real or of substance"[10], ie, not trivial or engineered.

In Australia, the requirements for commencement of a class action in the Federal Court are therefore simple and achievable. Similarly, in order for the Tribunal in the UK to certify claims as eligible for inclusion in collective proceedings they must be:

- brought on behalf of an identifiable class of persons;
- raise common issues; and

http://globalclassactions.stanford.edu/sites/default/files/documents/Morabito_Fifth_Report.pdf

[10] *Wong v Sikfield Pty Ltd* [1999] HCA 48; 199 CLR 255, at paragraph 28 (**Wong**).

- be suitable to be brought in collective proceedings.[11]

In the balance, however, are the defendants' interests, which must also be considered. For that reason, it is the ALWG's view is that, to ensure fairness, early examination of the merits of the claim to ensure that a claim *should* go forward is also an essential feature. Again, to use Australia as an example, section 33N of the FCAA gives the judicial officer powers to order that a proceeding no longer continue where they are satisfied it is in the interests of justice to so order because:

- the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
- all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
- the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

It is questionable, however, whether these powers are suitable for use at an early stage in the proceedings as the evaluation of these matters is likely not possible.[12] In particular, in the view of the ALWG it should not be incumbent on the respondent, as it is in Australia, to raise and be put to proof on establishing that the proceedings ought not be brought as a class action. That is, these provisions may not be fit for the purpose of **early stage** intervention.

Accordingly, the ALWG respectfully submits that careful consideration be given to the defendant's side of the equation when considering how a regime should be structured so as to ensure fairness overall. In the ALWG's view a requirement that an action be certified is one methodology which provides a level of oversight at an early stage which would fulfil this requirement. Certification is discussed further below.

[11] CAT Rules 2015 Rule 79(1).

[12] See discussion in *Wong* at paragraph 26 in which it was said that "[a]t *a stage when a question arises under these provisions, particularly 33N, it is more likely that issues will have been clarified and, if there be pleadings, have been joined*".

Question 12 - Essential Features of a Class Action Regime to Protect the Interests of Class Members

The ALWG submits that key to the protection of the interests of class members is reducing the potential for conflict between funders (who invest in the action for economic gain but without whom some actions may not progress), lawyers (who act in order to be compensated, including where they act on a "no win, no fee" basis[13]) and class members who are hopeful of redress or an accounting for loss or damage but are unlikely to have any input into either the running of the case or decisions about settlement.

The essential feature of a regime in light of the potential for conflict between these parties is an allowance for active judicial oversight beyond the procedural aspects of the suit and into the financial arrangements that exist between the parties to ensure that group members, if the claim is successful, are likely receive compensation. Such oversight should also extend to ensuring there is not differential treatment between group members to the extent that only some class members may have entered into a funding agreement with the funder and therefore may be liable for payment of the funder's share.

In Australia, the issue of differential treatment between class members has, since 2016 been ameliorated via the use of "common fund orders" ("CFO") at the commencement of a proceeding which obliged all group members to pay their proportionate share of a litigation funder's commission out of the proceeds of a judgment or settlement, whether or not the members had entered into a funding agreement. However, in late 2019, the High Court of Australia ruled that the relevant sections of the *Federal Court Act 1976 (Cth)* and the *Civil Procedure Act 2006 (NSW)* did not give the Courts power to issue a CFO.[14] That is, the powers of the court were inadequate to ensure a fair distribution of the costs of the litigation between group members with the result that free riding was permissible.

The consequence of that decision had the potential to be more profound. Funders no longer had certainty at the outset of a proceeding about a claim for a proportion of the total of any settlement or judgment amount as a return on the funds they invested but would be limited to recouping their costs of litigation and any commission payable from class members who had entered into a funding arrangement. That raised questions: would funders be less likely to fund litigation? Or if they chose to do so, would they resort to first building a "book" of claimants sufficient to ensure a return on investment? Would it lead to closed classes (ie, only members who had signed a funding arrangement)?

[13] In Australia, "no win - no fee" arrangements permit an uplift fee on successful outcome of up to 25%.
[14] See *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.

Further judicial consideration however, has led to a more nuanced view: that the High Court's decision left the door open to the making of CFOs on settlement or judgment instead of commencement, or in the alternative, the making of a "funding equalisation order" ("FEO") being a costs spreading mechanism in which funding costs incurred by group members who entered into funding arrangements with the funder are redistributed pro-rata between all group members[15] removing the inequities between class members. The Federal Court also updated its class actions practice note to say that the parties to a class action "may expect" the Court to "*make an appropriately framed order to … equitably and fairly … distribute the burden of … reasonable litigation funding charges or commission, amongst all persons who have benefited from the action*".[16] This appears to permit at least FEOs, and potentially CFOs providing they are not made at the commencement of the action.

The debate illustrates the importance of ensuring a balanced approach: as noted above, funders assist in providing access to justice. Absent a degree of certainty of return for funders, it could be expected that they may be deterred from funding particularly where the anticipated judgment amount per group member is likely to be low. Equally, it cannot be the case that the regime operates to create certainty by permitting a return that may incentivise unmeritorious claims, including by treating lawyers in an advantageous way vis-à-vis group members.[17] Finally, there must also be parity between class members - both in the overall result of the action and in any burdens that the action imposes.

While the ALWG does not express any views as to the precise mechanisms by which this balance could be achieved, it notes that permitting court oversight of key steps including funding arrangements, legal costs (to deter over-servicing but noting that courts are not pricing regulators) and ensuring that the costs of litigation will be shared amongst group members equally are key features that will protect class members interests. Consideration should also be given to *when* a court may use relevant powers (ie, whether limiting the use of powers to orders made at settlement or judgment alone is sufficient to address the upfront deterrence risk that otherwise may arise).

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[15] See *Clime Capital Limited v UGL Pty Limited* [2020] FCA 66.

[16] Federal Court of Australia Class Actions Practice Note (GPN-CA), [15.4] see https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca

[17] Concerns about the actions of lawyers and counsel in the class action environment have been particularly acute in Australia in recent years. In the *Banksia Securities* class action, a group member challenged a claims for costs and commission of A$17m (out of a settlement of A$64m) made by the funder, Australian Funding Partners Limited, and Senior Counsel (whose wife, it turned out, held a stake in the funder). The resulting investigation uncovered what was described as a "fraudulent scheme" with the result that the relevant counsel, leading Victorian Silk Norman O'Bryan SC has been struck from the roll. See public reporting on the issue here: https://www.afr.com/companies/financial-services/the-bewildering-demise-of-norman-o-bryan-sc-20200731-p55h9t

Further comments about litigation funding are in included in this submission further below.

Question 19 - Certification Requirements

As noted above, the ALWG considers that it is also important that in any regime there are sufficient processes to allow courts to identify at an early stage those claims that are properly grounded, and address those claims that might be improper in that they may not provide class members with proper, or any, redress for loss or damage or in the alternative, result in unfairness to defendants. This is a fine balance. For these reasons the ALWG considers that there are compelling reasons for implementing certification requirements for collective actions.

We agree with the Law Commission, that certification is particularly important in opt-out class action regimes. Claims brought on an opt-out basis have the potential to seek redress on behalf of very large numbers of people who play no role in those proceedings and the costs of responding to an opt-out class action may be very considerable for defendants. It is therefore important, in the ALWG's view that the courts are able to, at an early stage, ensure that those proposing to act as representatives are appropriate; that the claims are brought on behalf of an identifiable class of persons; and that the claims raise common issues. We note that there are a number of factors considered by the UK Competition Appeal Tribunal in assessing whether claims are suitable to be brought as collective proceedings, which the Law Commission summarised at paragraph 10.14 of its Issues Paper. We also note that the Tribunal has the power to determine whether proceedings should be opt-in or opt-out and that it may take into account the strength of the claims. The implication of this is that weaker claims may not be permitted to proceed on an opt-out basis.

Certification also provides the court with an opportunity for additional oversight over the way in which an opt-out collective proceeding will proceed, for example, relating to how notice is provided to potential class members. The Competition Appeal Tribunal in the UK is required to approve the form and manner of the notice to potential class members. This is particularly important in ensuring that (a) class members who want to opt out of any opt-out claim have the opportunity to do so, and (b) class members understand that they will be bound by any judgment on common issues. The ALWG considers that this is particularly important where class actions have the potential to determine outcomes for claimants who may not be involved in (or even aware of) the proceedings.

While the ALWG acknowledges that certification may, in principle, add cost and delay, this is ultimately dependent on the standard of certification applied. In our view it is therefore not a persuasive argument against certification. Furthermore, we consider that the additional cost and

delay should be balanced against the potential costs associated with unmeritorious or improperly constituted claims proceeding and the benefits of involving the Court at an early stage in scrutinising the parameters of the proposed claim along with the manner in which it is to proceed. In terms of the standard to be applied at the certification stage the ALWG notes that there are a range of potential models which may be considered which have been well-canvassed in the Law Commission's paper.

In Israel the Class Actions Law determines a list of cumulative conditions for certification. One of the conditions is that "*a class action is the efficient and fair way to determine the dispute, given the circumstances of the matter*". This condition has been interpreted as comprising two requirements with the onus of proof being on the claimant: fairness and efficiency. When the court examines this condition it may consider, *inter alia*, whether other possible ways of determining the dispute exist.

We note that the Law Commission makes a number of comments about the approach taken in the UK. In that regard, there has been a lengthy four-year battle on the threshold for certification resulting in a judgment of the Supreme Court in *Mastercard v Merricks* [2020] UKSC 51. At first instance the Tribunal refused to certify the claim on the basis that the claimant class was not suitable for an aggregate award of damages, and the proposed distribution of any award did not satisfy the compensatory principle in common law. That decision was overturned by the Court of Appeal in a judgment ultimately upheld by the Supreme Court.

We respectfully submit that there are some important principles arising from the Supreme Court's judgment which the New Zealand government may wish to consider in setting any threshold for certification:

- The Supreme Court found that courts should not deprive individual claimants of a trial merely because there are issues with quantification, provided there is a triable issue that the claimant has suffered more than nominal loss. If these issues would not have prevented an individual consumer's claim from proceeding to trial, then Tribunal should not have stopped the collective proceedings claim. In the ALWG's view, it is worth ensuring that any certification requirements for collective actions do not impose a greater burden on claimants than they would an ordinary claimant whereby they are required to demonstrate how they would calculate an aggregate award of damages.
- The Supreme Court also found that the requirement for a claim to be "suitable" for collective proceedings and "suitable" for aggregate damages meant suitable relative to individual proceedings. We note that the Law Commission referred to the suitability requirement set out in the Tribunal's rules at paragraphs 10.13, 10.14, 10.54 and 10.61. In

view of the Supreme Court's judgment the definition of "suitable" is very narrowly circumscribed.

- In addition, the Supreme Court considered that the most serious error was that the Tribunal was wrong to consider that difficulties with incomplete data and interpreting data are a good reason to refuse certification. Civil courts and tribunals frequently face problems with quantifying loss and the Tribunal owed a duty to the class to carry out this task, particularly where there was a realistically arguable case that some loss was suffered. In the ALWG's view, it is worth ensuring that challenges with the quantification of damages do not necessarily prevent a collective action from being certified.
- In terms of distributing any aggregate damages award, the Supreme Court also criticised the Tribunal in requiring the claimants to propose how they were going to distribute damages to take account of the loss suffered by each class member. The Supreme Court found that a central purpose of the power to award aggregate damages in collective proceedings was to avoid the need for an individual assessment of loss.

Questions 28, 29 and 30 - Features of Representative Claimants

The balance between achieving adequate access to justice for claimants and protecting general public and defendants' interests requires, in the ALWG's view, that the features of the representative claimants be considered as part of the legal test for class certification. In our opinion, it is essential to consider, as part of the certification process, the suitability of the representative claimant (and the representative's lawyer), in order to ensure adequate representation of the members of the represented class and of the public interest in general.

Within this examination, we suggest that the following factors may be relevant in deciding whether the representative claimant is truly representative:

- The representative (a person or a corporation) has a personal cause of action (unless filed by organization or public authority, if that is to be permitted in the regime).
- The condition for a personal cause of action may serve, in many cases, as a screening mechanism for identifying those actions which truly represent a real group who had suffered damage, rather than an action which aims to serve the representative or his/her lawyer only. On the other hand, this condition should not be decisive, as a representative plaintiff might be replaced, even during the proceeding.[18]
- There is a reasonable basis to assume that the interest of class members will be represented

[18] An example of where this occurred in Australia was in the air cargo class action, resolved in mid-2014, where the original representative claimant, De Brett Seafood Pty Limited, was replaced midway through the proceedings by J Wisbey & Associates Pty Limited.

and conducted in an appropriate manner and in good faith (such as to avoid a conflict of interests). The court, however, may nevertheless certify a class action if this condition has not been satisfied if the matter can be resolved by replacing the plaintiff or his/her lawyer. This may entail some consideration of the representative's lawyer as she/he is responsible for representing the interests of the class members and the public. Clearly those firms with experience in taking and succeeding in class actions will have an advantage in that their previous efforts will resonate with the court.

In addition, the ALWG is supportive of the idea of enabling ideological plaintiffs to file class actions, with some limitations. The Israeli approach in this regard suggests a balanced arrangement. While the default is that the plaintiff should be a class member, the regime also enables the following entities to file a class action:

- Public authorities: in a matter pertaining to their public purposes; and
- An organisation which acts to advance a public purpose, such as an organization for consumer protection, in a matter pertaining to its public purpose, but only if a genuine difficulty exists for a person with a personal cause of action to file a certification motion.

The ALWG respectfully suggests that it is preferable that government entities be able to bring a class action in a matter pertaining to their public purposes, as they are bound to represent the general public interests', especially in precedential or complex cases. Difficulties may arise in seeking to distinguish between "genuine" ideological organizations and opportunistic organizations that may seek to profit by using class actions to impose pressure on defendants to settle[19].

Question 32 - Class Membership

The ALWG considers that determining class membership on an opt-out basis is preferable as it is more likely to promote access to justice. It does so by including class members who cannot be identified or who could otherwise not be engaged due to economic, social, knowledge or geographic barriers. An opt-out system is also a more efficient use of court resources by reducing the incidence of multiple actions and provides final resolution for defendants.

However, there may be some circumstances where class closure is appropriate and necessary to provide certainty for parties pursuing settlement or to otherwise facilitate the resolution of a dispute. While the Australian Law Reform Commission ("ALRC") has recently recommended

[19] See comments in the section concerning litigation funding further below, in particular under the heading "*Providing access to justice*".

that relevant federal legislation be amended so that all representative proceedings are initiated as open class actions,[20] the ALRC did not propose any amendment to prevent class closure orders. Rather, the ALRC considered that the court is best placed to determine whether class closure is appropriate in the circumstance of the particular dispute, and recommended publication of guidance on the criteria a court will apply in determining whether class closure orders are appropriate.[21] This approach strikes a reasonable balance between the need to ensure access to justice and facilitating the just and efficient resolution of disputes.

Questions 26, 37 and 38 - Litigation Funding

In this section the ALWG addresses the following questions posed by the Issues Paper:

> *26. Should a court consider funding arrangements as part of a threshold legal test for a class action?*
> *37. Which of the potential advantages and disadvantages of permitting litigation funding do you think are most important, and why?*
> *38. Is litigation funding desirable for Aotearoa New Zealand in principle?*

Whether or not a court should consider funding arrangements as part of a threshold legal test for a class action assumes that litigation funding is desirable in principle; whether or not litigation funding would be desirable must be considered in light of its potential advantages and disadvantages.

Providing access to justice

Proponents of third-party litigation funding emphasise that it provides access to justice by reducing the cost burden on a party in two ways. First, a party can commence proceedings without fear of becoming subject to an adverse costs order. In a jurisdiction such as Aotearoa New Zealand where the general principle of civil litigation is that the unsuccessful party must pay the costs of the successful party, this benefit can remove a substantial impediment to litigation. This benefit is amplified for class action plaintiffs: in Australia, available data relating to plaintiff legal costs for class action settlements between 2001 and 2020 indicates that plaintiff

[20] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC Report 134) (24 January 2019), available from: https://www.alrc.gov.au/publication/integrity-fairness-and-efficiency-an-inquiry-into-class-action-proceedings-and-third-party-litigation-funders-alrc-report-134/ (accessed 4 March 2021), [4.4].
[21] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC Report 134) (24 January 2019), available from: https://www.alrc.gov.au/publication/integrity-fairness-and-efficiency-an-inquiry-into-class-action-proceedings-and-third-party-litigation-funders-alrc-report-134/ (accessed 4 March 2021), [4.23].

law firms in funded actions charged fees ranging from A$725,000 to over A$20m.[22] Defendant legal costs may be similar. Even assuming that defendants could only recover a portion of these costs, the total potential liability for legal costs for a typical plaintiff would be prohibitive and a strong disincentive to commence proceedings.

Second, litigation funders can finance the involvement of law firms who a plaintiff would not have engaged for cost reasons and who would otherwise not have acted on a "no win no fee" basis. Adequate legal representation is a key part of ensuring access to justice, and it may not be available without third party litigation funding.

This advantage can however be overstated, and the fundamental nature of litigation funding (being a business model directed to securing the highest possible return on investment) can be obscured by focusing on alleviation of the cost burden for *some* parties. If litigation funding improves access to justice, it only does so to the extent that this access satisfies the investment criteria for the fund. A critical view of litigation funding would suggest that the criteria is geared toward maximising return. In the US, for example, where the litigation funding industry has grown substantially over the past 10 years, the US Chamber of Commerce Institute for Legal Reform criticises litigation funding for facilitating major mass tort proceedings where "*lawyers amass as many "faceless clients as possible" without adequately investigating the merit of the claims*".[23] The preference for actions with a large potential classes can be observed in Australia, where securities class actions and class actions concerning financial products continue to make up over half the number of new claims filed each year.[24]

A less cynical view is that the application by litigation funders of rigorous investment criteria ensure that only strong claims are funded, and that funders are likely to avoid unmeritorious claims on the basis that such claims are higher risk and offer a poor return on investment.

The reality is likely somewhere in the middle, and will depend on the litigation culture of a particular jurisdiction. Unmeritorious claims are less likely to be attractive in jurisdictions where adverse cost orders are common. However, the high rate of settlements in the class action context

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[22] Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Litigation Funding and the Regulation of the Class Action Industry (16 June 2020) (available from: https://www.lawcouncil.asn.au/publicassets/e8a8ce0e-35b0-ea11-9434-005056be13b5/3832%20-%20Litigation%20funding%20and%20the%20regulation%20of%20the%20class%20action%20industry.pdf), Attachment A (accessed 2 March 2021).

[23] US Chamber Institute for Legal Reform, *Selling more lawsuits, buying more trouble* (January 2020), available from: https://instituteforlegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later/ (accessed 2 March 2021), 13.

[24] King and Wood Mallesons, *The Review: Class Actions in Australia 2019-2020* (2020), (available from: https://images.comms.kwm.com/Web/DabservPtyLtd/%7B0e6f165d-8d32-4301-ba90-140c06b39e19%7D_01731_The-Review_Class-Actions-in-Australia-2020_Dig_v2.pdf), 4.

in Australia suggests that class action defendants (which are typically corporations or governments) have little appetite to defend any claims, including potentially unmeritorious claims.

As noted in the Issues Paper,[25] litigation funders can also play an important and beneficial role in the conduct of litigation, by applying their legal expertise and knowledge to scrutinise legal strategy and legal costs. In the class action context, in which lead plaintiffs do not typically have a sophisticated understanding of the law, this oversight can play an important role in facilitating the best outcome for a class.

Risks of pursuing justice for profit

Many of the advantages of third-party litigation funding have corresponding disadvantages that must be weighed against the benefits. As noted above, the availability of funding will inevitability lead to an increase in claims of all types, including potentially unmeritorious claims (although, as noted in the Issues Paper, it is difficult to quantify this effect in the absence of a court judgment).[26] The likelihood of this occurring increases where litigation funders are not subject to any standards concerning their conduct. Egregious examples of unmeritorious claims that have been facilitated by litigation funding have been documented in the US, where the litigation funding industry is subject to few regulations.[27]

An increase in litigation activity caused by the availability of litigation funding also has a predicable but still notable effect on the functioning of the court system as a whole. It has been argued that litigation funding can lead to slower case processing, larger backlogs and increased spending by the courts,[28] however, recent data cited above from the Federal Court in Australia, where the litigation funding market is well developed, indicates that the court continues to meet its efficiency targets. This suggests that any impact can be mitigated. It must be noted, however, that in the class action context, litigation funding can lead to an increase in the number and complexity of interlocutory disputes directly related to the funder (including in relation to the terms of the litigation funding agreement, orders relating to the funding commission, security for costs, etc).

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[25] Law Commission, Issues Paper: Class Actions and Litigation Funding, [17.23].
[26] Law Commission, Issues Paper: Class Actions and Litigation Funding, [6.23].
[27] US Chamber Institute for Legal Reform, *Selling more lawsuits, buying more trouble* (January 2020), available from: https://instituteforlegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later/ (accessed 2 March 2021).
[28] David Abrams and Daniel Chen, "A Market for Justice: A First Empirical Look at Third Party Litigation Funding" (January 2012) University of Pennsylvania Law School, available at https://www.law.upenn.edu/cf/faculty/dabrams/workingpapers/MarketforJustice.pdf (accessed 2 March 2021).

The level of funding commission is also a concern, particularly in the class action context. Data on the rate of funding commission over time is readily available in Australia and reveals a median percentage of 25% paid to funders out of the proceeds of class action settlement between 2001 and 2020.[29] Although the Law Council of Australia suggests that greater competition between funders improved outcomes for class action plaintiffs over the period, commissions in some Australian class action settlements were over 30%, and the total amount paid to lawyers and funders was over 40% of the settlements paid in the period. These outcomes raise real questions about fairness to claimants, in circumstances where their total claim is already discounted for litigation risk at settlement, and is further eroded by legal fees and funding commissions. In contrast, the same Law Council data suggests litigation funders achieve a return of up to 3x their investment or more (assuming that that legal fees account for the majority of their investment).[30]

In these circumstances it is crucial that funding arrangements are closely scrutinised, at least at settlement but ideally earlier. At the very least, funding arrangements should be disclosed to potential class members and the court upon the action being commenced.

The most significant disadvantage arising from litigation funding is, as noted above, the risk of a conflict between the interests of the funder and the interests of plaintiffs. This risk is structural and unavoidable without adequate regulatory controls or oversight. It arises from three key factors:

- the funder's degree of control over litigation – the extent to which a funder can exercise control and issue instruction will likely depend on the terms of the litigation funding agreement and the sophistication of the funded party. In a class action context, lead plaintiffs are likely to be legally unsophisticated and guided by the advice of their legal representatives;
- the relationship between the funder and the law firms – funders may influence the choice of law firm on actions that they fund, with some funders in Australia working with same law firm across multiple actions; and
- in a class action context, funders may have control over the framing of the claim and the selection of the representative plaintiff. If so, funders may be inclined to select an unsophisticated and compliant representative who is unlikely to conflict with the interests

[29] Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Litigation Funding and the Regulation of the Class Action Industry (16 June 2020) (available from: https://www.lawcouncil.asn.au/publicassets/e8a8ce0e-35b0-ea11-9434-005056be13b5/3832%20-%20Litigation%20funding%20and%20the%20regulation%20of%20the%20class%20action%20industry.pdf), 7 (accessed 2 March 2021).

[30] See, for example, the settlement (currently subject to a dispute) in *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653, in which legal fees were $5m and the funding fees were $13.3m, and the settlement in *Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719, in which the legal fees were $2.66m and the funding fees were $13.47m.

of the funder. This risk is amplified in circumstances where a lead plaintiff may have a fiduciary responsibility to class members (as is the case in Australia and other jurisdictions).

This conflict cannot be completely mitigated by a regime allowing class members to object to class action settlements (although this is a key part of any fair class actions regime). We consider ways to manage these risks below.

Mitigating risk

Notwithstanding the risks of litigation, it is our view that, on balance, the advantages of litigation funding outweigh the disadvantages provided that there is appropriate regulation and oversight, particularly in a class action context.

However, it is not clear that considering funding arrangements as part of a **threshold** legal test for a class action is the most effective way to manage those risks. Certainly, the disclosure of litigation funding agreements (to the class, the court and opposing parties) at an early stage in the proceeding should be required. This disclosure is mandated across all Australian jurisdictions that provide for representative proceedings[31] and is a key difference to the US approach, where disclosure of funding arrangements is not required in all jurisdictions[32] and litigation funding is largely unregulated.

The Federal Court of Australia also requires that litigation funding agreements disclose legal costs and litigation funding charges and include provisions for managing conflicts of interest,[33] with the failure to do so relevant to settlement approval.

The requirement to disclose the litigation funding agreement to the court and other parties provides an incentive to ensure that the terms are reasonable. No Australian jurisdictions require approval of a litigation funding agreement as part of a threshold test and the ALWG does not suggest that approval should be required. A threshold test for litigation funding may be undesirable in circumstances where:

[31] See, for example, Federal Court of Australia Class Actions Practice Note (GPN-CA) Section 5; Supreme Court of New South Wales Practice Note SC Gen 17, [7.2]; Supreme Court of Victoria Practice Note SC Gen 20 Conduct of Group Proceedings (Class Actions) (Second Revision), [12] and [13]; Supreme Court of Queensland Practice Direction 2 of 2017 (Representative Proceedings), [7.2].
[32] See US Chamber Institute for Legal Reform, *Selling more lawsuits, buying more trouble* (January 2020), available from https://instituteforlegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later/ (accessed 2 March 2021).
[33] Federal Court of Australia Class Actions Practice Note (GPN-CA), [5.3], [5.9].

- the reasonableness of some terms (particularly relating to commission rate) may be difficult to assess at the start of a class action, without understanding the risk that the funder will assume, potential costs and size of the class (assuming an opt out class action regime);
- to the extent that litigation funders are required to comply with minimum requirements as to terms relating to conflicts of interest and disclosure of costs arrangements, it is possible to mandate those requirements without requiring the court to specifically consider and approve litigation funding arrangements. Doing so may add a costly and unnecessary step to the proceedings;
- requiring the court to approve a litigation funding agreement may be perceived as an endorsement of the funder. A better approach would be for the court to exercise ongoing oversight over funder conduct as part of its overall management of a matter; and
- adding an arguably unnecessary procedural step could cause delays and give rise to interlocutory disputes that would be best dealt with at settlement.

In the view of the ALWG, the risks associated with litigation funding in class actions are best dealt with as follows, although this is a matter for the Law Commission to decide:

- mandating disclosure of litigation funding agreements at an early stage;
- mandating minimum terms for litigation funding agreements (including terms relating to the management of conflicts of interest);
- empowering courts to approve litigation funding agreements (including funding commissions) at settlement, including a power to vary such arrangements; and
- ensuring that litigation funders and class action lawyers understand and comply with their obligations to avoid conflicts of interest and act in the best interests of the class. As noted in the Issues Paper, different jurisdictions have taken a number of approaches to this.

Some funders are subject to licensing requirements overseen by a corporate regulator. For example, litigation funders in Australia are considered managed investment schemes and are required to hold a financial services license overseen by the Australian Securities Investment Commission ("ASIC"). Some funders (such as Omni Bridgeway) are publicly listed and are regulated as publicly listed entities by the Australian ASX, the US Securities and Exchange Commission and the UK Financial Conduct Authority. In the view of the ALWG, corporate regulators are ill equipped to address the specific risks arising from litigation funding. The then deputy chair of the Australian corporate regulator, ASIC, suggested as much in his comments to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into litigation

funding and the regulation of the class action industry.[34] These risks are specific to the nature of the court process and the relationship between funder, lawyer and client.

In the UK, the litigation funding industry is self-regulated. A Code of Conduct for litigation funders was published by the UK's Civil Justice Council in 2011. The Association of Litigation Funders (**ALF**) responsible for administering the code.[35] Relevantly, the Code provides that:

- funders are prevented from taking control of litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their professional duties;
- funders must behave reasonably and may only withdraw funding in limited circumstances; and
- funders may be kept informed of the progress of a case.

The ALF has published a complaints procedure for complaints made against funder members by funded litigants.[36] Sanctions for breaches of the Code include a public or private warning, expulsion or suspension from the ALF, the payment of the costs of determining the complaint, or a fine not exceeding 500 pounds.

In our view, self-regulation is not a sufficient safeguard against the risks of litigation funding. A tailored statutory regime with meaningful enforcement powers would be a more effective mechanism.

IV. CONCLUDING REMARKS

The ALWG appreciates the opportunity provided by Law Commission to comment on the Issues Paper. We welcome any further opportunity to provide any additional comments or clarification, or answer any questions, that the Law Commission may have following review of these comments.

[34] ASIC, *Opening statement by ASIC Deputy Chair, Daniel Crennan QC at the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into litigation funding and the regulation of the class action industry, (29 July 2020), available from:* https://asic.gov.au/about-asic/news-centre/speeches/parliamentary-joint-committee-on-corporations-and-financial-services-inquiry-into-litigation-funding-and-the-regulation-of-the-class-action-industry/ *(accessed 2 March 2021).*

[35] Association of Litigation Funders *Code of Conduct* available from: https://associationoflitigationfunders.com/code-of-conduct/ (accessed 2 March 2021).

[36] Association of Litigation Funders of England & Wales, *A procedure to govern complaints made against Funder Members by funded litigants*, available from: https://associationoflitigationfunders.com/wp-content/uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf (accessed 2 March 2021).