

15 March 2021

Review of Class Actions and Litigation Funding
Law Commission
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Submitted via email: cal@lawcom.govt.nz

Submission on Class Actions and Litigation Funding Issues Paper

1. Introduction

Thank you for the opportunity to make a submission on the "Class Actions and Litigation Funding Issues Paper". This submission is from Consumer NZ, an independent, non-profit organisation dedicated to advocating on behalf of New Zealand consumers. Consumer NZ has a reputation for being fair, impartial, and providing comprehensive consumer information and advice.

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2. General comments

In general, we support the idea of New Zealand having a statutory class actions regime as a way of expanding access to justice. Class actions will play a valuable role in respect of statutes where there is no regulator in charge of their enforcement.

We also support the idea of allowing an ideological plaintiff to take a class action. This would enable an organisation to make a claim on behalf of its members. In addition, we agree with the ability for plaintiffs to rely on litigation funding, as it will enable those who have suffered harm to receive redress, even though they may not have the ability to pay for the necessary litigation.

3. Answers to questions

This submission is limited in scope and focuses largely on the impact and benefits to consumers. Our answers to specific questions in the issues paper are set out below.

Q5. Should Aotearoa New Zealand have a statutory class actions regime? Why or why not?

In principle, yes it should. The right to a fair and public hearing in the determination of legal rights and obligations is recognised internationally as a fundamental human right. We see a statutory class actions regime extending the group of people able to access this human right and are supportive of a regime that extends the ability for a greater number of people being able to access justice in the courts.

We support the idea of New Zealand having a statutory class actions regime for the following key reasons, while also recognising there may be additional reasons:

- It's an efficient means for a large number of people who have suffered a similar detriment and have the same interest to have their judicial concerns addressed.
- A greater number of people will have access to justice – providing access for those in a lower socio-economic group or those with a lack of means (whether financially, psychologically, intellectually or otherwise) to legally address an issue, with the ability to do so.

We recognise there are other means for joining parties together with the same or similar claims. However, in the event there are gaps in those processes, we support the implementation of a class actions regime to ensure efficiency and access to justice.

One of our roles is ensuring laws and regulations are sufficient for all consumers. Therefore, we have consumers and consumer legislation front of mind when we look at the ability to take a class action. Under the Fair Trading Act (section 43), the Commerce Commission is able to apply for a compensation order on behalf of consumers when there has been a breach of that Act, which has caused (or is likely to cause) consumers loss or damage. However, the current precedent in relation to section 43 is that it does not permit a claim to be brought on behalf of an indeterminate group of people identified only by class. The fact that a class of people can be identified in proceedings is a benefit of the ability to take a class action and would bolster the Commerce Commission's ability to act on behalf of consumers.

In addition to the Fair Trading Act, consumer grievances may arise under the Consumer Guarantees Act. The Consumer Guarantees Act has no enforcement agency. Where there has been a breach of the Act, it is up to the consumer to take their own action to address it. Individual amounts pursued by a consumer under the Consumer Guarantees Act may be relatively small. In addition, some groups of consumers (including those aged 18 to 26 and those with household income up to \$25,000 a year) are more likely to have a low level of awareness of their consumer rights. Therefore, having the ability for a class of people to group together and take a claim may provide a substantive benefit for these groups of consumers, particularly those who may not otherwise have enforced their rights.

We support the Commission's view that class actions may play a particularly valuable enforcement role in respect of statutes that have no regulator in charge of their enforcement, such as the Consumer Guarantees Act, or where the legislation is premised on the principle of private enforcement.

We've recently completed a review of the various retirement village agreements between residents and six major retirement village operators. We found that there were clauses in those agreements that are inconsistent with consumers' rights under the Consumer Guarantees Act. For example, under some arrangements, residents are liable to pay for the cost of repairs to appliances and other items in their unit, after a very short period of use, and even though they don't own the items. We consider that village operators' obligations to provide services with reasonable care and skill extends to ensuring chattels provided in residents' units are of an acceptable quality. While some of the issues we identified in our review fell under the Fair Trading Act, others were under the Consumer Guarantees Act. If a sufficient number of residents suffered loss, this would be an appropriate situation for a class action where all consumer-related issues could be heard in the same claim.

Even where there is a regulator in charge of enforcement under an Act, such as the Fair Trading Act, there are possible grounds for class action to be taken by a willing group. For example, we recently found that some "green" claims in relation to baby products were misleading. Consumers are willing to pay a premium for a product that has a lower

environmental impact (such as 100% biodegradable baby wipes). While each consumer would only suffer a small amount of loss in relation to each product, the cumulative amount of each consumer paying more for this product would be a substantial amount when calculated across the nation. If the Commerce Commission didn't have the capacity to take a claim, as is regularly the case, it may be a case that would be suited to a class action.

We recognise that some consumer issues can be dealt with via other avenues, such as an individual taking a complaint to the Disputes Tribunal, where the value is under the \$30,000 threshold. However, this approach doesn't lead to an equitable outcome for all those who suffer loss from the same action(s).

An example of a situation where there would have been good grounds for consumers to take a class action complaint was in relation to the February 2020 Elton John concert that was cut short due to the artist's illness. The ticket seller, Chugg Entertainment, insisted that it would not partially refund ticket holders. When pursued by a small number of individual ticket holders through the Disputes Tribunal, Chugg Entertainment offered those applicants settlements for their loss (being a partial refund of the ticket price). Those ticket holders who didn't take a claim through the Disputes Tribunal missed out on getting recourse. A class action may have been appropriate, and a justiciable way for ticket holders who wanted to pursue a refund for their tickets to the abandoned concert. Having the ability to take a class action claim would have meant a consistent outcome for all of those ticket holders, as well as creating a precedent for future concert-goers in a similar situation.

We understand the concern that class actions may lead to an increase in litigation, which will have an impact on the court system. However, if there is a meritorious claim, it should be heard, regardless of the increase in workload. To ensure meritless claims are not regularly brought (which may have an impact on the court system) we'd suggest this could be addressed through other avenues, such as an order to strike out proceedings, to ensure meritless claims are not progressed.

Q10. What should the objectives of a statutory class actions regime be? Should there be a primary objective?

Class actions provide for the ability for a greater number of people to access justice, than in the current system, and can help protect the interests of vulnerable individuals and groups. Therefore, we think the key objective of a statutory class actions regime is to improve access to justice. Any additional "benefits" resulting from class actions, such as a deterrence of wrongdoing or a greater incentive to comply with the law, while important, are secondary to the key objective.

Q29. Should a representative plaintiff be a class member or should ideological plaintiffs be allowed?

There are valid arguments for allowing an ideological plaintiff to take a class action. The ability for a representative plaintiff to take a class action would be valuable for a group of plaintiffs for the claim to be actioned, where none in the group may have the capacity (whether because of the emotional or intellectual burden of having to take the action or otherwise not being capable of the responsibility) to take the claim. Allowing an ideological plaintiff to take a claim would enable those in the most vulnerable groups to have access to legal recourse.

Consumer NZ regularly receives complaints from consumers and is often in a position to assess whether numerous people may be subject to similar harm. Hence, we'd be well placed to take a class action on behalf of a group of claimants suffering the same or similar issues, particularly where the group of members were unable to take action themselves.

Litigation Funding:

Q37. Which of the potential advantages and disadvantages of permitting litigation funding do you think are most important, and why?

In principle, we believe that litigation funding is desirable for New Zealand.

While it's not a panacea to all access to justice issues, in our view the potential advantage of improving access to justice is the most important advantage of litigation funding. Litigation is inherently expensive, and cost is a significant factor in whether a party may pursue a valid and meritorious claim. We agree with the sentiment of Jackson LJ in his Review of Civil Litigation Costs that it is better for claimants to "forfeit a percentage of their damages than to recover nothing at all".

In consumer-related class action cases, where the overall claim by each individual consumer may be relatively low, these parties may not have the means to contribute to litigation costs. Having access to litigation funding would also enable not-for-profit organisations to take a claim on behalf of their members. Therefore, in the event that litigation funding enables a party to access justice, where they wouldn't otherwise have been able to, we support the ability of claimants to access such funding.

We realise that any litigation funder can choose whether to fund a case and is most likely only going to take a case where they can foresee they will be able to recoup costs. Any risk of litigation funding encouraging meritless litigation could be controlled either through commercial incentives of the litigation funders or through court proceedings to stay or strike out meritless claims.

Q42. What concerns, if any, do you have about funder control of litigation?

We recognise that there are some concerns around funder control, or even significant influence, of litigation. However, our key concern is that there should always be the ability for the claimant, or members of the class action, to agree to settle out of court. This may be contrary to the financial interests of the funder but may ultimately be the best outcome for the claimant(s).

Thank you for the opportunity to make a submission. If you require any further information, please do not hesitate to contact me.

Yours sincerely



Jon Duffy
Chief executive