

Submission by NZ Shareholders Association TO THE Law Commission

Class Action and Litigation Funding – Issues Paper

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Attn: Nick Gillard

About NZSA

The NZ Shareholders Association ('NZSA') represents retail investors and champions their rights in New Zealand financial markets. As well as advocating on their behalf, we also promote and encourage the development of active, efficient, fair and transparent markets for the trading of equities and other investment products.

Submission

The NZSA thanks the Law Commission for the opportunity to submit on Class Actions and Litigation Funding Issues Paper.

NZSA Key Submission Points

Class Actions

1. NZSA supports the introduction of a regulated class action regime for the reasons set out in Chapter 7 of the Class Actions and Litigation Funding Issues Paper ('the Issues Paper') prepared by the Law Commission, as a replacement for the existing "representative action" model.
2. Specifically, NZSA believes that a class action regime will provide clarity and improves access to justice compared with the existing 'representative action' regime. Class actions are a key mechanism for shareholder redress used in other jurisdictions not currently available in New Zealand.

3. NZSA notes the Commissions comments in relation to the adverse costs in Chapter 13 of the Issues Paper. NZSA believes that the 'no costs' approach, as adopted in the US, ensure effective access to justice for shareholders. The imposition of costs on shareholders in the event of an unsuccessful case does little to encourage or improve standards of corporate governance while placing undue risk on retail investors.
4. We would also support a 'cost scale' approach, that recognised the more limited financial resources of retail investors or shareholders and set costs at a level that would not hinder their access to justice.
5. NZSA does not believe there is enough evidence to suggest that a 'no costs' regime would result in an increase in frivolous litigation being brought before the Courts. We also feel that the legal profession is not incentivised to invest time in investor or shareholder claims that offer limited chances of success.

Litigation Funding

6. NZSA supports the introduction of a regulatory regime for litigation funding in New Zealand, to provide clarity for investors, shareholders and litigation funders. Litigation funding has the potential to improve access to civil justice for retail investors.
7. NZSA notes and agree with the Law Commission's comments in clause 34 of the Issues Paper Executive Summary that "*we have not yet seen robust evidence that the increase in funded litigation across Australasia has caused a hardening of the D&O insurance market*".
8. NZSA believes that issues associated with providing for improved options for shareholders and investors in seeking redress through the introduction of class action or litigation funding regimes **should not be conflated** with:
 - a. D&O insurance and associated premiums paid by directors;
 - b. changes to New Zealand's continuous disclosure liability regime.
9. Both D&O Insurance and the Continuous Disclosure liability regime are much more broadly impacted by capital markets activities in New Zealand than solely by the introduction of regimes aimed at improving access to justice for shareholders.
10. NZSA notes and agrees with the Law Commission's preliminary view "*that litigation funding is desirable in principle and should be expressly permitted*" as expressed in clause 35 of the Issues Paper Executive Summary, subject to management of concerns related to funder control of litigation, conflicts of interest, funder profits and funder capital adequacy.
11. As per NZSA's view on Class Actions, we believe that a 'no costs' approach ensures equal access to justice for shareholders. Regulation should include mechanisms to examine the costs and profitability of litigation funders, including Court reviews of litigation funding arrangements.

NZSA's view on specific questions in the Issues Paper

NZSA has chosen to answer a selection of questions posed within the Issues Paper where it feels it can offer relevant experience and/or expertise.

Question 3: What do you see as the advantages of class actions? In particular, to what extent do you think class actions are likely to improve access to justice, improve efficiency and economy of litigation and strengthen incentives to comply with the law. (Is this an appropriate role for a class actions regime?)

NZSA View: NZSA agrees with the advantages listed within the Issues Paper including improved access to justice, improved efficiency and economy of litigation and strengthened incentives to comply with the law. We believe an additional advantage of a Class Action regulatory regime is the provision of opportunity for shareholder redress.

Question 5: Should Aotearoa New Zealand have a statutory class actions regime? Why or why not?

NZSA View: Yes, for the reasons set out in point (2) above.

Question 6: Should a class actions regime be general in scope or should it be limited to particular areas of the law?

NZSA View: While our interests are aligned with those of shareholders and investors, we believe a class action regime should be 'general' in nature.

Question 9: Should the representative actions rule be retained alongside a class actions regime? For which kinds of case?

NZSA View: No – we believe that regulatory frameworks for both class actions and litigation funding will offer clarity for all stakeholders and provide sufficient scope for redress to allow the replacement of the current “representative action” regime.

Question 16: Do you have any concerns about how a class actions regime could impact on other kinds of group litigation or on regulatory activities? How could such concerns be managed?

NZSA View: We believe that regulatory clarity and access to justice should underpin any future regime. To this end, NZSA believes that a co-ordinated approach in replacing existing mechanisms for shareholder justice (such as representative actions) with both a class action and litigation funding regulatory regime will benefit all stakeholders.

Question 35: Should the current adverse costs rule be retained for class actions or is reform desirable?

NZSA View: NZSA believes that reform is required to the adverse costs rule in relation to class actions and litigation funding, to ensure equal access to justice for investors and small shareholders

Question 43: Are you satisfied that existing mechanisms can adequately manage the concerns about funder control of litigation?

NZSA View: Yes, notwithstanding our support for the concerns expressed by the Law Commission in clause 35 of the issues paper.

Question 52/53: Are you satisfied that existing mechanisms can adequately manage the concerns about funder profits? If not, which option for managing the concerns about funder profits do you prefer, and why?

NZSA View: If the regulatory regime related to litigation funding were to change, it is unlikely that existing mechanisms will be appropriate. While NZSA believes that some regulatory oversight is required, we favour a case-by-case approach that allows the unique complexities of costs relating to each case to be reviewed by the Court. We would be unlikely to support a fixed 'regulatory commission' applicable to litigation funders, as this may dissuade access to justice for more complex cases.

Thank you for the opportunity provided for NZSA to make this submission. We are happy to discuss or clarify any aspect of this submission with you or your team.



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