



12 November 2021

Review of Class Actions and Litigation Funding  
Te Aka Matua o te Ture I Law Commission  
Wellington  
New Zealand

Email: [cal@lawcom.govt.nz](mailto:cal@lawcom.govt.nz)

## **Submission on the Law Commission's Class Actions and Litigation Funding Issues: Supplementary Paper**

The Institute of Directors (IoD) appreciates the opportunity to submit on the [Supplementary Paper](#) on Class Actions and Litigation Funding in New Zealand (September 2021) (the Supplementary Paper). This Supplementary Paper is part of the Law Commission's first principles review and seeks feedback on some additional class actions issues.

As we have previously submitted, the IoD, in principle, supports the development of a statutory class actions regime and a regulatory framework for litigation funding.

Given the Supplementary Paper primarily focuses on litigation process, we have refrained from providing in-depth comment. However, we wish to reiterate the comments made in our previous submission and make a few additional comments on issues that relate to governance and director-related matters.

### **About the Institute of Directors**

The IoD has over 10,000 members and is New Zealand's pre-eminent organisation for directors and is at the heart of the governance community. We believe in the power of governance to create a strong, fair and sustainable future powered by best practice governance.

Our role is to drive excellence and high standards in governance. We support and equip our members who lead a range of organisations from listed companies, large private organisations, state and public sector entities, small and medium enterprises, not-for-profit organisations and charities.

Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development requirements.

The IoD's Code of Practice for Directors provides guidance to directors to assist them in carrying out their duties and responsibilities with high professional standards. All IoD members sign up to the Code.

## IoD commentary

### *General*

The Institute of Directors continues to support the review of class actions and litigation funding in New Zealand. This is a key opportunity to put in place a regime that is fit for purpose and for the long-term.

We support the Commission's confirmed view expressed in the Supplementary Paper that a statutory class actions regime is desirable for New Zealand in order to improve access to justice and manage multiple claims in an efficient way.

We note the Supplementary Paper provides a high-level summary of submitters' feedback on the first issues paper and the Commission's preliminary views. We are particularly pleased the Commission proposes to include a certification process at the beginning of proceedings to strike out unmeritorious claims.

It also good to see a number of recent developments have been taken into account since the first Issues paper was published in December 2020 such as the Australian review of their class actions regime and recent court decisions.

We support the Commission's revised eight principles that will guide the development of a class actions regime which are:

- Consider the interests of both plaintiffs and defendants
- Safeguard the interests of class members
- Consider the principles of proportionality, meaning that the time and cost of litigation should be proportionate to what is at stake
- Strike an appropriate balance between flexibility and certainty
- Be appropriate for contemporary Aotearoa New Zealand
- Recognise and reflect tikanga Māori
- Not adversely impact on other methods of group litigation
- Provide clarity on issues arising in funded litigation.

We strongly agree that the design of the class actions regime is critical to ensure these principles are put into practice. We would like to reiterate the importance of getting the settings right to prevent unmeritorious proceedings and ensure injustices are not created elsewhere in the overall system.

We continue to urge the Law Commission to review New Zealand's continuous disclosure director liability settings well before the class actions regime comes into effect to prevent a significant upsurge in shareholder class actions. While we strongly support a corporate governance regime that holds corporate entities to account, we believe New Zealand will benefit most from regulatory settings that encourage boards to focus on long term strategy rather than becoming overly risk adverse and compliance oriented.

A balance needs to be struck between supporting access to justice while ensuring skilled, experienced responsible directors are attracted to take up challenging roles. We remain concerned about the impact that an increase in class actions could have on D&O insurance and consequently directors' ability to assume risk.

#### *Certification process*

We are pleased the Commission has acknowledged the significant burden that can be placed on defendants and the court system and is proposing a certification process. We encourage a robust approach to ensure unmeritorious actions do not proceed. This will enable the proceedings to be set up well from the beginning, leading to fewer complications and consequential cost.

We note the Commission's comment that a defendant faces significant uncertainty about the claim against them due to the unknown size of the class. We support the principle of providing as much certainty for the defendant as possible and ensuring the defendant can obtain adequate discovery from at least one named party.

#### *Cost obligations*

Previously we submitted on the desire for certainty that plaintiffs could pay costs if the class action is not successful. We note the Commission's view that it does not think it is necessary for a plaintiff to establish that they have the financial resources to meet an adverse costs award or have been provided with a costs indemnity because the situation is sufficiently covered by the current security for costs mechanism.

In order to ensure the plaintiff understands their costs obligations, we would like to see the

certification process require explicit acknowledgement from the plaintiff that they are aware and understand their obligations before substantive proceedings commence.

### *Court approval of settlement*

We support the proposal for the Court to approve settlement. We believe this will result in fairer outcomes in terms of the split of proceeds they may receive between class members and the litigation funder. In addition, it could be advantageous for the courts to maintain a level of oversight and influence of the settlement arrangements over time to ensure fairer outcomes.

We have previously referred to the high level of settled claims in Australia and United States that insurers can be driving based on financial considerations. This can result in unjust situations where defendants are not given the opportunity to defend the merits of the claim despite having to endure public scrutiny. We submit that in considering a settlement proposal, the Court should also give consideration to whether the defendant has been given a fair opportunity to access justice and defend the claim.

Thank you for this opportunity to comment on behalf of our members.



**Susan Cuthbert**

Principal Advisor, Governance Leadership Centre