"Understanding Shareholder Class Actions from an Agency Theory Perspective: A Comparative Analysis of Shareholder Class Actions and Class Action Regimes in Australia, the United Kingdom and Aotearoa New Zealand"

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The class action is a procedural mechanism that enables multiple claimants to pursue a single defendant for the same wrong that arises out of substantively the same question or questions of law or fact. It has been long-identified as an important mechanism for improving access to justice. In common-law jurisdictions such as New Zealand, the class-action procedure emanates from England's Court of Chancery in the late 17th and early 18th centuries. In modern times, class-action regimes now vary considerably in form from jurisdiction to jurisdiction. For instance, in Australia class actions are governed by statute at both a Federal and State level. In New Zealand, class-action litigants currently pursue class actions under procedural rules that are becoming increasingly ill-fitting, particularly with the increasing prominence of the litigation-funding industry and high-profile shareholder class-action litigation such as "Feltex", which only concluded in 2019, after 11 years in court. In December 2020, the New Zealand Law Commission initiated an investigation into the class-action and litigation funding regimes in New Zealand. In June 2022, the Commission released the outcome of that investigation, recommending that New Zealand adopt a statutory class-action regime akin to Australia's. This paper examines and compares the class-action regimes in three jurisdictions, Australia, the United Kingdom, and New Zealand to determine what procedural settings will best ensure class actions are an accessible and cost-effective mechanism for shareholders to enforce their rights. It will explore the theoretical justification for shareholder class actions from an "Agency Theory" perspective. The class-action regimes presently in place in each jurisdiction will then be assessed and following this, shareholder class-action experiences in each jurisdiction will be analysed. Finally, the Law Commission's recommendations regarding a statutory class-action regime will be assessed against the findings of this analysis. It concludes that the Law Commission's recommendations will go a long way in improving access to justice for litigant in New Zealand's, particularly shareholders; however, more could be done to break down barriers to justice through the class-action procedure. This paper recommends further changes to the Companies Act 1993 to enable shareholders to pursue class actions specifically for breaches of that Act. Further, enabling "bespoke" class-action proceedings which allow determination of preliminary legal or factual issues could result in savings in time and financial costs to the betterment of claimants. The conclusions in this paper emphasise the need for further discussion for continued and wider class-action reform in New Zealand.

Attestation of Authorship

"I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning."

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Ryan Mathew Neil Marsich

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Introduction

Improving access to justice has been a long-standing issue globally for the past several decades. In 2014, the United Nations General Assembly adopted the Declaration of the High-level Meeting of the General Assembly on the Rule of the National and International Levels Cost,[1] which recorded the importance of "equal access to justice for all" and the need to take steps to "provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice".[2]

Access-to-justice problems vary considerably between jurisdictions, including the specific barriers to justice. In many countries, including New Zealand, "cost" has been identified as a prominent barrier to justice, particularly the cost of "accessing legal advice, representation and forums for resolving disputes".[3] Even if a party succeeds in say a civil dispute, the costs involved in enforcing that party's rights could be prohibitive to the extent that it may be more economic not to seek to enforce their rights at all.[4]

The class action is a procedural mechanism which putatively works to improve access to justice. The class action does this by enabling more than one claimant take collective action against a single defendant where the defendant has "wronged" the claimants in the same (or in a substantially similar) way. Situations where a class-action proceeding would be appropriate include where a company sells a batch of defective goods to consumers. That company will be liable to all purchasers of those goods under the Consumer Guarantees Act 1993 for a breach of the company's guarantee as to acceptable quality.[5] Another instance where a class-action proceeding would be appropriate is where a company induces shareholders to purchase through a false representation made as to the company's financial performance in the previous financial

[1] *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels* GA Res 67/1 (2012).
[2] Paragraph 14.
[3] *Access to Justice: Stock of initiatives* (New Zealand Law Society, Research Report, 2020) at 12.
[4] Deborah Rhode "Access to Justice: Connecting Principles to Practice" (2004) 17(3) Geo J LE 369 at 372.
[5] Consumer Guarantees Act 1993, s 6.

year. The company will be liable under the Fair Trading Act 1986 to each shareholder who purchased shares in reliance on that false representation.[6]

In both scenarios, each individual wronged party is entitled to pursue a claim against the company in their own right. However, the parties could in the alternative pursue a claim against the defendant company collectively in a class-action. The would-be claimants in both scenarios would benefit from initiating class-action proceedings against each defendant as opposed to running individual claims. The benefits for the claimants under a class-action proceeding include reduced costs, including the actual costs involved in relation to the enforcement of the claimants' rights through litigation as well as the "hidden" costs on the individual claimant such as time preparing for the proceeding. In addition, class-action proceedings often ensure claimants receive some economic return from the proceedings if they are successful as the overall costs of the proceeding will likely not exceed the total compensation that is received from the defendant, whereas in many single-party cases the costs involved in running litigation are prohibitive and outweigh any potential compensation a claimant may receive.

Furthermore, claimants pursuing a proceeding by way of class action as opposed to an individual claim may also be more likely to obtain funding assistance from a third party litigation-funder, an individual (or more commonly) an entity that assists with the payment of legal fees and other costs associated with litigation in return for (generally) a share of the settlement of judgment proceeds received by the class. Access to litigation-funding reduces a significant barrier to justice, as it enables claimants to pursue a claim without having to front up with legal fees and other expenses at the outset, costs that would otherwise preclude claimants from pursuing proceedings in the first place, or outweigh any benefit obtained through the proceedings through compensation.

Class actions originated (at least in common-law jurisdictions) in England's Court of Chancery in the late 17th and early 18th century.[7] Modern class-action regimes exist in both civil law and common-law jurisdictions, and while there are similarities between these regimes, they also

[6] Fair Trading Act 1986, ss 9 and 13.
[7] See Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132 at 135.

fundamentally differ in several ways. In Australia, statutory class-action regimes have operated at a Federal level since 1992,[8] while in England and Wales and in New Zealand class actions are regulated either primarily or entirely through civil-procedural rules.[9] In Australia class actions can be pursued "as of right", namely where claimants satisfy a number of conditions set out in statute,[10] while in New Zealand a class action claimant must obtain court approval to advance a class action claim,[11] unless consent is obtained from all class members.[12]

In December 2020, the New Zealand Law Commission sought submissions on whether New Zealand should adopt a class-action and commercial-litigation funding regime and, if so, how those regimes should be regulated. In September 2021, the Law Commission indicated it would recommend that New Zealand adopt a statutory class actions regime, and in June 2022 the Law Commission released its final recommendations on class-action reform, including the recommendation New Zealand adopt a statutory class-action regime.[13]

The Scope of this Research

I. Research Rationale

The class-action is an important procedural mechanism for delivering accessible and cost-effective justice for shareholders globally. However at present there are accessibility and cost-effectiveness problems when enforcing rights through a class action. This was clearly highlighted in *Houghton v Saunders*,[14] otherwise known as the Feltex litigation.[15] The Feltex proceedings were commenced in February 2008, but by the time a substantive decision was finally delivered some six and a half years later in September 2014, there had been eight separate pre-trial judgments (including appeals). Chris Patterson has observed that given the extensive pre-trial litigation in those proceedings and the numerous judgments and appeals in relation to

[8] See Federal Courts Act 1992 (Cth), Part IVA.
[9] As will be discussed later in this paper, in New Zealand "class-actions" are commonly pursued in New Zealand through the representative action rule at High Court Rules 2016, r 4.24. In England and Wales, the Civil Procedure Rules 1998 provide for multi-party litigation by way of the representative action rule at 19.6 and the "Group Litigation Order" process: see Civil Procedure Rules 1998, rr 19.10–19.15.
[10] Federal Courts Act 1992 (Cth), s 33C.
[11] High Court Rules 2016, r 4.24(b).
[12] Rule 4.24(a).
[13] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding* (NZLC R147, 2022).
[14] See *Houghton v Saunders* [2015] 2 NZLR 74 (HC).
[15] The Feltex litigation is discussed further in Chapter II.

the same, "on any measure, the Feltex litigation was a spectacular failure in terms of meeting the objectives and goals of group (aggregate) litigation".[16]

The importance of shareholder class actions in New Zealand is exemplified by recent changes in shareholder demographics and share trading in general. In particular, there has been significant growth in "retail investors", namely individuals who trade in shares as opposed to "institutional investors", which are entities that invest on behalf of others. Research by New Zealand's Financial Markets Authority ("FMA") suggests this growth has been driven partly by improved share market accessibility through online share trading platforms such as "Sharesies" and "Hatch".[17]

It has been noted that in addition to making it easier to invest, such platforms have had a positive impact on investors, including helping investors better understand markets.[18] Nevertheless, retail investors tend to make poorer investment decisions than other investors,[19] and new retail investors in particular are more likely to be influenced by factors such as information contained in "online forums" [20] and an emotional connection with a company's brand rather than financial reports or company disclosures when investing.[21] Further, in terms of the demographic of retail investors on online investment platforms, research into New Zealand's "Retail investor platforms" commissioned by the FMA in 2021 shows over half of retail investors on online platforms are aged between 16-34 years (59%),[22] with almost half of those investors identifying their personal income from all sources (before tax) as being either "less than $20,000" or "$20,000 to $49,999" (48%).

[16] Chris Patterson "Class actions in New Zealand: The necessity for introducing a class action regime" (2016) 5(1) JCivLP 20 at 24.
[17] Financial Markets Authority "Online investing platforms transform attitudes to investing" (press release, 5 August 2021) and *Retail investor platforms research* (Financial Markets Authority, 27 July 2021) at 53.
[18] *Retail investor platforms research,* above n 17, at 53.
[19] See Andrea Frazzini and Owen A Lamont "Dumb money: Mutual fund flows and the cross-section of stock returns" (2008) 88 Journal of Financial Economics 299 at 319 and Jill E Fisch and Tess Wilkinson-Ryan "Why Do Retail Investors Make Costly Mistakes? An Experiment on Mutual Fund Choice" (2014) 162 University of Pennsylvania L Rev 605 at 606.
[20] *Retail investor platforms research*, above n 17, at 8.
[21] At 49.
[22] At 10.

Now, with the release of the New Zealand Law Commission's Recommendations on a Statutory Class Action Regime and Litigation Funding, it is evident that it must be clarified what the best procedural framework is for shareholders to take collective legal action against companies and/or their directors for unlawful conduct in a way that is easily accessible and cost-effective. That urgency is made clear not only by the current procedural framework's failure to deliver accessible and cost-effective justice for shareholders, but also by the potential vulnerability, in particular, of online retail investors, who, as shown in the recent findings from the FMA research,[23] are generally younger and in a relatively modest financial position and also have a tendency to make poorer investment decisions than other types of investors.

In addition, in light of the emergence of group litigation in New Zealand and the relatively new litigation-funding industry (which remains largely unregulated), there is a need for greater oversight over, and established rules around, litigation-funding arrangements. This is so as to protect the interests of class members and to minimise the risk of exploitation by litigation-funders of class action litigants.

Accordingly, this paper will examine New Zealand's shareholder class-action experiences and its pre-existing class-action regime against the recommendations contained in the Law Commission's Report. By way of comparison, this paper will also examine the shareholder class-action experiences and class-action regimes in Australia and in the United Kingdom. Both jurisdictions operate substantially different class-action regimes from New Zealand's. For instance, Australia has since 1992 operated a federal statutory class action regime under which claimants can pursue class actions "as of right" without need for a certification process. Given the New Zealand Law Commission's recommendation for New Zealand to implement a statutory class-action regime, Australia's shareholder class action experience is particularly pertinent when we consider the Law Commission's recommendation.

II. The Theoretical Justification for the Research

The need for cost-effective shareholder litigation is supported by corporate legal theory. Shareholder primacy, which is the prevailing corporate-governance model in Australia, the

[23] At 10.

United Kingdom, and New Zealand,[24] has it that directors must act primarily to maximise shareholder wealth. The director-shareholder relationship is further defined under "agency theory" as a quasi-agency relationship, where directors act as "agents" of shareholders who as the ultimate owners of a company, are the "principals" in that agency relationship.[25] "Agency costs" arise as a consequence of this relationship. These include costs associated with monitoring director performance to ensure directors are acting in the best interests of shareholders and in a way that maximises shareholder returns,[26] as well as the costs associated with disciplining directors for poor behaviour.

Shareholder litigation is an essential tool for disciplining directors and controlling agency costs.[27] As a result, it is imperative that the litigation process is accessible and cost-effective for shareholders. It is argued the class-action procedure is one such mechanism which enables shareholders to enforce their rights through legal action collectively and in a way that minimises costs to each individual shareholder.

III. Research Question and Approach

This paper will answer the following question:

> *"What procedural settings will best ensure class actions are an accessible and cost-effective mechanism for shareholders seeking to enforce their rights against directors?"*

This paper will be divided into three Chapters. The first Chapter will assess shareholder class-actions from the perspective of agency theory. In order to do this, the features of the corporation will be discussed, as will the basis of agency theory. Following this, the respective class-action

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[24] See M Anderson, M Jones, S Marshall, R Mitchell and I Ramsay "Shareholder Primacy and Directors' Duties: An Australian Perspective" (2008) 8(2) Journal of Corporate Law Studies 161 at 162; D Collinson, S Cross, J Ferguson, D Power and L Stevenson *Shareholder Primacy in UK Corporate Law: An Exploration of the Rationale and Evidence* (Association of Chartered Certified Accountants, 2011) at 8; and Stephen M Bainbridge *Director versus Shareholder Primacy in New Zealand Company Law as Compared to U.S.A Corporate Law* (UCLA School of Law, Law Econ Research Paper No 14-05, 27 March 2014) at 26.

[25] See Michael C Jensen and William H Meckling "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305 at 308. "Agency theory" together with "agency costs" will be discussed further in Chapter I of this paper.

[26] See Jensen and Meckling "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure", above n 25, at 308.

[27] See Jessica Erickson "The Gatekeepers of Shareholder Litigation" (2017) 70 Oklahoma L Rev 237 at 237–238.

regimes in each of the three jurisdictions will be outlined, together with the general advantages and disadvantages of class-actions. The findings of this analysis will be reconciled with agency theory in order to determine whether class-actions support in minimising agency costs and ensuring directors act in the best interests of shareholders to maximise shareholder wealth.

The second Chapter will assess the shareholder class actions known to have progressed to trial in each of the three jurisdictions, to determine whether shareholder class-actions even when pursued to trial have the effect of materially reducing agency costs for the shareholders involved.

Finally, the third Chapter will discuss the recommendations of the New Zealand Law Commission with respect to a new statutory class-action regime in light of the findings of this paper and provide suggestions on how the final statutory class action should be structured to ensure New Zealand's class-action regime is consistent with the objectives of agency theory.

IV. Research Methodology

This research utilises a research methodology consisting of two main research methods: doctrinal and evaluative. The research questions will be answered through a theoretical framework based on agency theory. The research therefore relies on the following key assumptions:

(a) Directors manage companies primarily to serve the interests of shareholders and maximise shareholder wealth, consistent with the shareholder-primacy corporate-governance model.

(b) The relationship between directors and shareholders is defined as an "agency relationship", where directors (the "agents") act on behalf of the shareholders (the "principals").

(c) Agency costs arise as a result of the relationship between directors and shareholders. These include costs in relation to monitoring director performance through, among other things, litigation.

(d) It is desirable that agency costs be minimised to the greatest extent possible. This is because agency theory assumes the underlying objective of directors is to maximise shareholder wealth.

A comparative analysis will be conducted on the three jurisdictions selected for examination, namely Australia, the United Kingdom and New Zealand. This analysis will involve a comparison of the three jurisdictions' respective corporate legislative frameworks and class-action regimes, including any soft or hard law in place for the regulation of litigation funding, in order to understand the key features and differences for the same within each jurisdiction.

This comparative analysis will also involve an examination of shareholder class actions that have been pursued through to trial as well as of the impact shareholder class actions have had generally on companies, boards, shareholders and other corporate stakeholders. This comparative analysis will assess the class-action process as reflected in each shareholder class action examined and the impact shareholder class actions have had within each jurisdiction in light of the objectives underlying agency theory.

The purpose of this research is both descriptive and normative. The research seeks to describe the current position of the law in the three jurisdictions selected for examination, namely each jurisdiction's corporate-legislation structure and class-action regime. The research is normative in that it will also consider the recommendations of the New Zealand Law Commission for class-action and litigation-funding reform and provide commentary and suggestions on the class-action and litigation-funding regime that ought to be put in place in New Zealand.

Chapter One: Shareholder Class Actions from the perspective of Agency Theory

I. Understanding Agency Theory and the Corporate Structure

A. The Director-Shareholder "Agency" Relationship

To understand the utility (if any) of shareholder class actions in protecting shareholder interests, we must explore the theoretical basis and fundamental structure of the company, including the role or function of shareholders, the interests of shareholders, and how shareholders interact with directors. Companies are independent legal entities that are created ("incorporated") under statute, legally separate and distinct from the "natural persons" and any other juristic persons who are "insiders" in them.[28] It is customary to recognize two main types of insider: first, the shareholders, who own the shares of the company; and second, the directors, who make up the board and are charged with the management of the company.

One important way this relationship has been defined is through "agency theory". Agency theory, which is rooted in economic and finance theoretical discourse, has been a significant influence on corporate governance thought, policy, and practice for decades.[29] In essence, agency theory is derived from the idea the structure of the company, in particular the division between the ownership of the company (shareholders) and the management of the company (directors), gives rise to an "agency relationship", where shareholders (the "principals") delegate decision-making and managerial authority to directors (the "agents").[30] While a company is, by virtue of incorporation, a legal entity in its own right, agency theory assumes directors must act in such a way which promotes the interests of their agents, the shareholders.[31]

Agency theory is predicated on the shareholder-primacy corporate-governance model. According to this model, the overall objective of a company is to serve the interests of the shareholders.[32]

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[28] This principle was first established at common law in the United Kingdom in *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) and confirmed in New Zealand in *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 (PC). That principle is now expressly stated in statute in New Zealand in the Companies Act 1993, s 15.
[29] Luh Luh Lan "Rethinking Agency Theory: The View From Law" (2010) 35(2) Academy of Management Review 294 at 294.
[30] Jensen and Meckling "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure", above n 25, at 308.
[31] Beka Khitiri "Theories of Corporate Governance: A Legal Analysis" (2017) 2 Journal of Law 117 at 123.
[32] Andrew Keay *The Corporate Objective* (Edward Elgar Publishing, Northampton (Mass)), 2011 at 44.

Therefore directors, in the course of discharging their corporate duties, must further the interests of shareholders and maximise shareholder wealth. Directors may do anything in pursuit of this objective provided it is lawful.[33] Failure to act lawfully could generate risks which could ultimately prejudice the financial position of the shareholders.[34] The failure to act lawfully is also inconsistent with directors' fiduciary obligation to manage a company in the best interests of shareholders, to maximise shareholders' investments and to avoid putting those investments at unreasonable risk.[35]

Shareholder primacy is the prevailing corporate-governance model in Anglo-American legal systems, such as the United States, common-law Canada, New Zealand, Australia and the United Kingdom.[36] The shareholder-primacy objective is reflected in varying degrees in the statutes governing companies and corporate relationships of the three jurisdictions analysed here.[37] For instance, the United Kingdom Companies Act 2006 states that the director's fundamental duty is to "promote the success of the company" and that a director "must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole".[38] The fundamental duties contained in the relevant Australian and New Zealand statutes are far less explicit in their focus on shareholder interests and impose the fundamental duty on the company itself rather than on any constituent part.[39] However, it is evident from the provisions of the Australian Corporations Act 2001 and New Zealand Companies Act 1993 that shareholders maintain significant power and authority over the operation of the company,[40] and are a key, if not the most important, corporate stakeholder.[41]

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[33] Milton Friedman *Capitalism and Freedom* (University of Chicago Press, Chicago, 1962) at 133.
[34] Andrew Keay *The Corporate* Objective, above n 32, at 44.
[35] For more discussion on the fiduciary obligation that exists because of a director's obligation to maximise shareholder wealth under the shareholder primacy model, see Wesley Cragg "Business Ethics and Stakeholder Theory" (2002) 12(2) Business Ethics Quarterly 113 at 125: "Managers hold the investment of investors in trust. The capital put at their disposal is not theirs to do with as they please. It is the property of their investors who invest with the expectation that their investment will grow in value. By virtue of their function, managers have a fiduciary obligation to their shareholders to manage profitably".
[36] See Andrew Keay *The Corporate* Objective, above n 32, at 40 and Lan "Rethinking Agency Theory: The View From Law", above n 29, at 297.
[37] Corporations Act 2001 (Cth), Companies Act 2006 (UK), Companies Act 1993 (NZ).
[38] Companies Act 2006 (UK), s 172(1).
[39] Corporations Act 2001 (Cth), s 181.
[40] See, for example, the extensive rights and remedies available at Companies Act 1993 (NZ), Part 9 "Enforcement", and Corporations Act 2001 (Cth), Chapter 2F "Members' rights and remedies", against companies and directors.
[41] See generally Peter Watts "Shareholder supremacy in classical company law – with particular reference to the making of business decisions by shareholders on behalf of their company" (University of Auckland, 2016); Stephen

It is relevant to note that while the traditional formulation of the shareholder-primacy model views shareholder-wealth maximisation as the paramount corporate objective, over the past two decades this has been tempered by shifting attitudes, corporate-governance practices and legislative changes, which have seen a greater focus on the relationship between the company and a wider range of corporate stakeholders, such as customers, employees, suppliers and the community, and on ensuring directors take into account the interests of those stakeholder groups when making decisions. [42] This is known as "stakeholder theory" or "stakeholderism". Despite these changes in approach and attitude, shareholder primacy remains the prevailing corporate governance model in many Anglo-American legal systems including Australia, the United Kingdom, and New Zealand as noted above, and on that basis this paper assumes the paramount objective of the company is to serve the interests of its shareholders and maximise shareholder wealth.

The shareholder-director agency relationship gives rise to what is referred to as the "agency problem". The agency problem can be summarised in the following way:[43]

> *The principal is the person who owns the firm, while agents manage the business of the firm on behalf of the principal. These two parties reside under one firm but have different and opposite goals and interests, so there exists a conflict and this conflict is termed as the agency problem.*

The agency problem manifests as a direct consequence of the division of ownership and management and the inherent conflict between the interests of the shareholder and the director as principal and agent respectively. In particular, the separation of ownership and management provides directors (and other corporate managers who have been delegated managerial authority) with "opportunities and powers to engage in forms of behaviour which may not be in the

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M Bainbridge *Director versus Shareholder Primacy in New Zealand Company Law as Compared to U.S.A Corporate Law*, above n 24; and M Anderson et al "Shareholder Primacy and Directors' Duties: An Australian Perspective", above n 24.

[42] See, for example, Business Roundtable (United States) "Statement on the Purpose of a Corporation" 19 August 2019 <www.businessroundtable.org>. This stakeholder-oriented view is reflected in legislation and corporate governance codes and guidelines. See the Companies Act (UK), s 172(1) which instructs directors to take into account the interests of a specific group of shareholders when acting in the best interests of the company for the benefit of its shareholders.

[43] Brahmadev Panda and NM Leepsa "Agency theory: Review of Theory and Evidence on Problems and Perspectives" (2017) 10(1) Indian J Corp Gov 74 at 80.

shareholders' best interests".[44] This is because, among other things, the separation of ownership and management place directors in a position where they are better informed as to a company's commercial prospects and are therefore able to pursue their own interests without incurring significant risk, to the detriment of shareholders. On the other hand, shareholders find it difficult —particularly because of their more limited access to information—to prompt directors to pursue the interests of a company's shareholders, as well as to effectively monitor managerial performance.[45]

"Agency costs" come about as a result of this agency problem. The traditional economic definition of agency costs includes expenditure in relation to "monitoring" directors, "bonding" expenditures by shareholders and any "residual loss".[46] Agency costs also include the costs associated with "disciplining [corporate] managers in order to prevent them abusing their positions".[47]

Agency costs – and, in particular, how to minimise them – have been a longstanding concern in corporate law and policy.[48] In the past two decades there has been a focus on creating corporate governance mechanisms intended to "curtail the agency problem between self-interested management and dispersed shareholders".[49] This includes soft-law mechanisms imposed by way of statutory mechanisms as well as corporate-governance codes, [50] including board reporting and disclosure obligations.[51]

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[44] Blanaid Clarke "Corporate Responsibility in Light of the Separation of Ownership and Control" (1997) 19 Dublin University Law Journal 50 at 51.
[45] See JA McCahery and EPM Vermuelen *Corporate Governance of Non-Listed Companies* (Oxford University Press, New York, 2008) at 7.
[46] Jensen and Meckling "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure", above n 25, at 308.
[47] Andrew Keay *The Corporate* Objective, above n 32, at 30, n 150.
[48] See John Armour "Shareholder rights" (2020) 36(2) Oxford Rev Econ Policy 314 at 314
[49] McCahery and Vermuelen *Corporate Governance of Non-Listed Companies*, above n 45, at 6.
[50] See, for example, *NZX Corporate Governance Code* (NZX Listing Rules Appendix 1, 10 December 2020) and *Code of Practice for Directors* (Institute of Directors New Zealand, 2022); *Corporate Governance Principles and Recommendations* (ASX Corporate Governance Council, February 2019) in Australia; *The UK Corporate Governance Code* (Financial Reporting Council, July 2018) in the United Kingdom.
[51] See, for example, the "continuous disclosure obligation" in Australia at *ASX Listing Rules* (ASX) at 3.1 which requires a company listed on the ASX to immediately advise the ASX when that company is or becomes aware of any information concerning it that a reasonable person would expect to have a "material effect on the price or value" of that company's securities.

B. Controlling Agency Costs through Shareholder Litigation

Shareholder litigation has been identified as a vital tool in holding directors to account for their actions, controlling agency costs, and ensuring directors act in a company's best interests, not their own.[52] The utility of shareholder litigation, including the threat of shareholder litigation, has been identified in some studies as having a positive effect in combating agency costs. This includes, in particular, combating the costs associated with "monitoring" and "disciplining" directors and protecting the overall interests of shareholders.[53]

In addition to actions available at common law, shareholders generally have access to a range of statutory actions to hold directors to account for breaches of legal duties and for conduct that is otherwise detrimental to the interests of shareholders. Shareholder actions are provided for in each of the main corporate statutes in New Zealand, the United Kingdom and Australia. In addition to remedies available for breaches of duties specifically owed to shareholders,[54] a shareholder may pursue a personal action against a director for conduct that has been, or likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to shareholders.[55]

What is deemed "oppressive", "unfairly discriminatory" or "unfairly prejudicial" conduct is largely similar across the three jurisdictions, with some key differences. In New Zealand, the Companies Act 1993 explicitly identifies certain types of conduct that is deemed "prejudicial", including non-compliance with Companies Act provisions that relate to the distribution of dividends, the alteration of shareholder rights, and major transactions.[56] Case authorities have

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[52] See Jessica Erickson "The Gatekeepers of Shareholder Litigation", above n 27, at 237–238 and Renee M. Jones "Law Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance" (2006) 92 Iowa L Re. 105 at 118.
[53] See, for example, Dain C Donelson and Christopher G Yust "Litigation Risk and Agency Costs: Evidence from Nevada Corporate Law" (2014) 57 J Law Econ 747 at 751–752.
[54] Companies Act 1993, s 169.
[55] Companies Act 1993, s 171, Companies Act 2006 (UK), s 994, Corporations Act 2001 (Cth), s 232.
[56] Companies Act 1993, s 175.

determined that the remedy under s 171 is directed at "conduct of the company which is unjustly detrimental to any member of the company, whatever form it takes".[57]

In the United Kingdom, the courts have determined that a narrow or technical approach should not be taken in determining what interests to take into account in applying the prejudice remedy and prejudice need not be financial in character.[58] For instance, unlawful conduct that does not strictly have any financial consequences may amount to financial prejudice as it may cause shareholders to have a loss of confidence in management or infringe shareholders' rights.[59] Nevertheless, damage to the financial position of a shareholder, including both direct and indirect financial damage, remains an important consideration in determining prejudice.[60]

In Australia, the case authorities have determined "oppressive", "unfairly prejudicial" or "unfairly discriminatory" conduct concerns conduct that, when assessed objectively,[61] involves "commercial unfairness", a "departure from the standards of fair dealing" or where "a decision has been made out so as to impose a disadvantage, disability or burden on the plaintiff that, according to ordinary standards of reasonableness and fair dealing, is unfair".[62]

In addition to the personal remedies above, shareholders can seek remedies under the "derivative action" procedure. In essence, a derivative action is an action by which a right that belongs to the company is enforced by an individual (shareholder or director) for, and on behalf, of that

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[57] *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 (CA) at 693. This decision considered s 174's predecessor provision, s 209 of the Companies Act 1955; however, it remains applicable to the current s 174 and is good law.
[58] *O'Neill v Phillips* [1999] 1 WLR 1092 at 1105G (HL).
[59] Simon Mortimore (ed) *Company Directors: Duties, Liabilities, and Remedies* (3rd ed, Oxford University Press, Oxford, 2017) at [23.27].
[60] *Re Coroin Ltd (No 2)* [2013] 2 BCLC 583 at [630].
[61] See *Wayde v New South Wales Rugby League* (1985) 180 CLR 459 (HCA) at 472–473. The relevant test for oppressive, unfairly prejudicial or unfairly discriminatory conduct is "whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision", or whether "objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair": *Catalano v Managing Australia Destinations Pty Ltd* (2014) 314 ALR 62 (FCA) at [9].
[62] *Re Ledir Enterprises Pty Ltd* [2013] NSWSC 1332 and *Hylepin Pty Ltd v Doshay Pty Ltd* [2020] FCA 1370 at [24].

company.[63] Accordingly, under the derivative action procedure, shareholders are able to bring proceedings on behalf of the company against third parties—including against directors for having breached duties owed by them as directors to the company. To that end, the derivative action has been identified as an important mechanism in mitigating and addressing agency conflict. The reason is that it enables shareholders to stand in the shoes of the company and take legal action against a director where shareholders generally would not otherwise have ability or standing to bring such an action individually—where, for instance, it is alleged a director has breached their obligations to a company, such as the fundamental obligation of good faith and loyalty.[64]

In Australia and New Zealand, leave must be sought by an applicant seeking to bring a derivative proceeding in the name and on behalf of a company.[65] In the United Kingdom, a derivative claim can be brought on behalf of a company in England and Wales [66] but that shareholder claimant must apply for permission from the court to continue it.[67] When considering whether to grant permission, the court must determine whether the applicant has demonstrated a "prima facie case" for the proceedings to continue.[68] In Scotland[69] and Northern Ireland,[70] leave must be sought to bring or to continue derivative proceedings respectively.

II. The Class-Action procedure

A. General Overview

The class action is a civil proceeding that allows for a single claimant (the "representative claimant") to pursue a legal claim on behalf of other persons (the "class") against a defendant for a wrong that is the same, or similar to, a wrong alleged by the representative claimant against the same defendant. The criteria and process for the initiation of a class action differ across the

[63] Dan W Puchniak, Harald Baum, Michael Ewing-Chow *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, Cambridge, 2012) at 7,
[64] At 12–14.
[65] Corporations Act 2001 (Cth), s 237 and Companies Act 1993 (NZ), s 165(1).
[66] Companies Act 2006 (UK), s 260.
[67] Section 261.
[68] Section 261(2).
[69] Section 266.
[70] Section 261.

jurisdictions that provide for a class-action procedure, including the three jurisdictions examined in this paper. However, class actions tend to consist of the following features:[71]

(a) The claims of class members must share questions of law or fact that are common with those of the representative claimant.

(b) The representative claimant is the only party to the action.

(c) Class members do not actively participate in the class action claim.

(d) Class members are bound by the outcome of the class action claim.

Other key aspects of class-action regimes vary from jurisdiction to jurisdiction. For instance, many jurisdictions in which class actions operate require judicial "certification" of a proposed action before the action proceeds to trial, while a small minority (namely Australia and Sweden) do not.[72] Certification involves a preliminary hearing where a court must determine the validity of a proposed class action for the action to continue to a hearing on the substantive issues. The certification process has been justified as helping protect the interests of class members as well as the defendant by ensuring the requirements for a class action have been met by the representative claimant.[73]

Further, in some jurisdictions the certification process involves some form of inquiry on the merits of the proposed class action. The U.S. Supreme Court in its 1974 decision *Eisen v Carlisle & Jacqueline* [74] when considering the application of Rule 23 of the Federal Rules of Civil Procedure – the relevant procedural rule that governs class actions at the Federal-level – held:[75]

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[71] See the definitions of class actions in Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 3 and Michael Molavi *Collective Access to Justice: Assessing the Potential of Class Actions in England and Wales* (Bristol University Press, Bristol, 2021) at 10-12.
[72] See Vince Morabito and Jane Caruana "Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia" (2013) 61 Am J Comp L 579 at 582.
[73] See Rachel Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective*, above n 71, at 24, and Vince Morabito and Jane Caruana "Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia", above n 72, at 585.
[74] *Eisen v Carlisle & Jacquelin,* 417 US 156 (1974).
[75] At 177.

> *We find nothing in either the language of history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.*

However, the U.S. Supreme Court's more recent decisions in *Wal-Mart Stores, Inc v Dukes* [76] and *Comcast v Behrend* [77] indicated some form of merits assessment may be appropriate at the certification stage.[78]

Another key aspect of the class-action regime which varies between jurisdictions is the method of determining class membership. Jurisdictions either operate with an "opt in" or "opt out" approach.[79] Under an opt-in regime, potential class members must "affirmatively opt into the class proceeding by taking some prescribed step" to become a member of a class. Under an opt-out regime a representative claimant may commence a class action without the express consent of class members and those class members are bound as members of the class "unless they take an affirmative step to indicate that they wish to be excluded from the action and from the effect of judgment".[80]

B. Comparing the class-action procedures in Australia, the United Kingdom and New Zealand

Class-action procedures in Australia, the United Kingdom and New Zealand share a number of similarities. They each bear the common features and requirements of a class action as identified earlier in this section. Namely, there must be a common issue between the class members and the representative plaintiff against the defendant in order for the class action to be pursued. Further, the representative plaintiff is the only party to the action (other than the defendant), class members do not actively participate in the class action and class members are bound by the outcome of the claim.

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[76] *Wal-Mart v Dukes* 564 US 338 (2011).
[77] *Comcast v Behrend* 569 US 27 (2013).
[78] See Joao Paulo Lordelo "The Centrality of Class Certification Decisions in the American Class Actions System and its application as a model to other jurisdictions" (University of Oxford, 2021) at 11: "Therefore, an incursion into the facts of the case is inevitable, as long as it is held in an abstract way, not carrying any judgment on the probability of success of the claim, otherwise may allow the risk of impairing access to justice and the impartiality of the judge".
[79] Rachel Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective*, above 71, at 29.
[80] At 29 and 34.

In the following sections, the class-action procedures for each of the three jurisdictions will be examined to determine their key elements, including:

(a) Whether there is a certification requirement.

(b) Whether class actions operate on an "opt-in" or "opt-out" basis, or both.

(c) Whether a pre-trial merits assessment is required.

Following the examination of the above key elements, further differences and characteristics of group litigation mechanisms and procedures in each jurisdiction will be discussed and contrasted.

C. Overview of the class-action procedural mechanisms in each of the three jurisdictions

In Australia, class actions at the federal level were introduced in 1992 by way of an amendment to the Federal Court of Australia Act 1976.[81] The Act provides a class action may be commenced where:[82]

> (a) 7 [*sic*] or more persons have claims against the same person; and
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
> (c) the claims of all those persons give rise to a substantial common issue of law or fact.

Separate class-action regimes also exist at a state-level [83] which are available to a representative claimant alleging breaches of state law as opposed to Commonwealth law. Apart from some subtle differences (which will be discussed later in this section), the state class-action regimes largely mirror the Federal class-action regime.

In the United Kingdom, collective proceedings may be initiated via a number of different procedural mechanisms. The introduction of a "generic collective action" had previously been

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[81] Federal Court of Australia Amendment Act 1991, s 3.
[82] Federal Court of Australia Act 1976, s 33C. See Part IVA, ss 33A−"Representative Proceedings" are covered by Part IVA.
[83] Supreme Court Act 1986 (Vic), s 33C; Civil Procedure Act 2005 (NSW), s 157; Civil Proceedings Act 2011 (Qld), s 103B; Civil Procedure (Representative Proceedings) Act 2022 (WA), s 6; Uniform Civil Rules 2020 (SA), 24.1−24.11.

recommended by the Civil Justice Council in a report to the United Kingdom Government,[84] that is a universal mechanism and approach for collective proceedings. However, this was rejected by the Government, which preferred the current "sector-based approach",[85] namely an approach where the rules and approaches adopted for collective proceedings vary according to specific facts and circumstances. For example, the New Zealand Parliament could theoretically model such a class action on the so-called "representative action" that the FMA may bring under s 39 of the Financial Markets Authority Act 2011, which—in the words of s 34 of the same Act—is an action "against a person who is or has been a financial market participant".

Otherwise, representative proceedings under the general law can be commenced under rule 19.6 of the Civil Procedural Rules. Rule 19.6 provides where "more than one person has the same interest in a claim":[86]

> (a) the claim may be begun; or
> (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

In the alternative, a class action can be commenced by way of the Group Litigation Order ("GLO") procedural mechanism in the Civil Procedure Rules 1998. GLOs are defined as follows:[87]

> A Group Litigation Order ('GLO') means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues').

A separate class-action procedure also exists in the Competition Appeals Tribunal, a specialist tribunal dealing with proceedings in relation to matters under the United Kingdom's Competition Act 1998, which governs competition law.[88] Claims can be pursued as a "collective proceeding"

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[84] *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* (Civil Justice Council, November 2008) at 5 and 507–508.
[85] See *Lloyd v Google LLC* [2021] UKSC 50 at [3].
[86] Civil Procedure Rules 1998 (UK), r 19.6.
[87] Rule 19.10.
[88] In contrast, in Australia and New Zealand class actions are typically permitted only in the courts, with some limited exceptions. For example, in New Zealand the Director of Human Rights Proceedings may bring proceedings

in the Tribunal when it considers the representative plaintiff who brought the proceedings "is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings" and the claims "are eligible for inclusion in collective proceedings".[89] Eligible claims include those where the Tribunal considers "they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings".[90]

In New Zealand, class actions have historically been pursued under the "representative action" at Rule 4.24 of the High Court Rules 2016. Rule 4.24 provides one or more claimants may bring a representative proceeding:[91]

> (a) with the consent of the other persons who have the same interest; or
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

At present there are no clear class-action or group procedural rules in New Zealand to the extent as in Australia or the United Kingdom. For instance, there are no rules that provide for whether class actions can proceed on either an "opt in" or "opt out" basis,[92] or which enable the Court to modify the extent to which a judgment or order is binding on individual parties in a collective claim.[93] Rather, rulemaking as to the conduct of proceedings under rule 4.24 have, to date, largely been left to the Courts. As indicated earlier in this paper (and as will be discussed later) that position will likely change, as the Law Commission has recommended the introduction of legislation providing for a comprehensive set of rules for class actions and litigation funding generally.

In addition to rule 4.24, section 173 of the Companies Act 1993 provides a court may make a representative order where a company shareholder seeks to bring proceedings against a company

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in the Human Rights Review Tribunal on behalf of a class of persons in some circumstances. See Privacy Act 2020, s 97(6); Human Rights Act 1993, s 92B(2); and Health and Disability Commissioner Act 1994, s 50(3).

[89] Competition Act 1998, s 47B(5).

[90] Section 47B(6).

[91] High Court Rules 2016, r 4.24. Proceedings under HCR r. 4.24 were historically referred to as "representative actions" however the judiciary and other stakeholders now tend to refer to proceedings under HCR r. 4.24 as "class actions". The historical term "representative action" is now largely irrelevant. See Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study", above n 7, at 135–138.

[92] See, in comparison, Federal Courts of Australia Act 1976 (Cth), s 33J.

[93] See, in comparison, Civil Procedure Rules 1998 (UK), r 19.12(1)(b).

or a director in certain circumstances. Those circumstances are substantially similar to the circumstances defined under r 4.24, namely:[94]

> Where a shareholder of a company brings proceedings against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject matter of the proceedings, the court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest, and may, for that purpose, make such order as it thinks fit including, without limiting the generality of this section, an order –
>
> (a) as to the control and conduct of the proceedings:
> (b) as to the cost of the proceedings:
> (c) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

While this statutory representative procedure has been in place since 1993, it has been rarely utilised. Section 173 was considered by the High Court in *Hedley v Kiwi Co-Operative Dairies Ltd*.[95] The Court ultimately issued a representative order on the basis of rule 78 (the predecessor to rule 4.24 of the current High Court Rules), not s 173, as the proceedings were not "restricted to issues between shareholders and a company and its directors".[96] It is unclear how s 173 is to be applied as aside from the language of s 173 itself, there are no other statutory provisions or procedural rules which explain how s 173 is to be applied.[97] To date, all shareholder class actions in the New Zealand courts have been pursued on the basis of the representative-proceedings procedure in the High Court Rules, not s 173 of the Companies Act 1993.[98]

D. Is there a certification requirement in each jurisdiction?

[94] Companies Act 1993, s 173.
[95] *Hedley v Kiwi Co-Operative Dairies Ltd* HC Palmerston North CP24/99 18 December 2000.
[96] At [21].
[97] See Lang Thai and Matt Berkahn "Statutory Derivative Actions in Australia and New Zealand: What Can We Learn From Each Other?" 25 NZULR 370 at 399−400. Thai and Berkahn suggest the lack of clear legislative rules and procedure could be one of the reasons why New Zealand shareholders historically have been reluctant to bring shareholder representative actions.
[98] *Hedley*, above n 95, at [21] and *Houghton v Saunders*, above n 14, at [14].

Federal class actions can be commenced without any form or approval or certification by the court.[99] All that is required is the class action meet the requirements for commencement under the Act.[100]

In the United Kingdom, proceedings pursued under the representative action procedure at Rule 19.6 or under a Group Litigation Order must be done with approval by the court. In addition, proposed collective proceedings in the Competition Appeal Tribunal must be approved through a specific certification process. The relevant Tribunal Rules provide that when considering certification, the Tribunal "must take into account all matters it thinks fit" including:[101]

> (a) whether the collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
> (b) the costs and the benefits of continuing the collective proceedings;
> (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
> (d) the size and the nature of the class;
> (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
> (f) whether the claims are suitable for an aggregate award of damages; and
> (g) the availability of alternative dispute resolution and other means of resolving the dispute, including the availability of redress through voluntary schemes …

In New Zealand, rule 4.24(b) effectively operates as a form of *de facto* "certification" procedure. Under rule 4.24(b), proposed class action claimants must seek an order from the court to proceed with class-action proceeding where it is intended the action be commenced without the consent of all class members. In making an order under r. 4.24, a court must have regard to the principles informing the use of rule 4.24, defined by the Supreme Court in the following way:[102]

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[99] *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061 at [18].
[100] Federal Courts of Australia Act 1976, s 33C.
[101] Competition Appeal Tribunal Rules 2015, r 79(2).
[102] *Houghton v Saunders*, above n 14, at [53].

(a) the order cannot confer a right of action on a member of the represented class who would not otherwise have been able to assert a claim in separate proceedings and cannot bar a defence otherwise available in a separate action;
(b) there must be a common issue of fact or law of significance for each member of the class represented; and
(c) it must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.

In contrast, in the case of class actions which commence pursuant to rule 4.24(a), namely where consent has been given by all class members, the class action can commence without approval or by the court.[103]

E. Do class actions operate on an "opt in" or "opt out" basis?

In New Zealand, for some time there was uncertainty as to whether rule 4.24 enabled a court to order a class action proceeding on an 'opt out' basis, that is, on the basis that all members of a class are included in the class action claim unless "they positively choose to opt out" of that claim;[104] or whether the court was limited to bringing class action proceedings on an 'opt in' basis, where members of a class can join the proceeding "not by default, but by actively consenting to join the [claimant] group".[105] This uncertainty persisted until at least 2014, when the Supreme Court suggested that a court may be able to order proceedings under r. 4.24(b) on an 'opt in' or 'opt out' basis.[106] The matter was finally put to rest in the Supreme Court's decision in *Southern Response Earthquake Services Ltd v Ross*, where the Court affirmed the lower courts' decision to allow proceedings under rule 4.24 on an 'opt out' basis.[107]

In Australia, the Federal Court of Australia Act 1976 provides all class actions proceed on an "opt out" basis,[108] except in a few limited circumstances where written consent is required from the proposed class member.[109] As to the position at state-level, all state regimes operate on an

[103] At [1].
[104] *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431 at [55].
[105] *Houghton v Saunders* [2009] NZCCLR 13 (HC) at [24].
[106] *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37 at [163]–[168]. See also Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study", above n 7, at 139.
[107] *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [25] and [108]–[109].
[108] Federal Court of Australia Act 1976 (Cth), s 33E(1).
[109] Section 33E(2).

'opt out' basis except South Australia, which requires the court to determine whether an opt in or opt out process should apply to the proceedings.[110]

In the United Kingdom, representative actions under Rule 19.6 proceed on an "opt out" basis while Group Litigation Orders proceed on an "opt in" basis.[111] Collective proceedings in the Competition Appeal Tribunal may proceed on either an "opt-in" or "opt-out" basis. When considering whether to order proceedings on an opt-in or opt-out basis the Tribunal must take into account (in addition to all matters it thinks fit) the following:[112]

> (a) the strength of the claims; and
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.

F. Do any of the three jurisdictions require a merits assessment?

In Australia and New Zealand no merits assessment is required for any class action initiated. *In the United Kingdom*, no merits assessment is required when a class action is pursued by way of representative order under Rule 19.6 of the Civil Procedure Rules 1998 or a Group Litigation Order under Rule 19.11.

However, in the Competition Appeals Tribunal a representative claimant is required to disclose, among other things, that they "believe" the claim has "a real prospect of success".[113] The Tribunal may only make a collective proceedings order after hearing the parties.[114] The Tribunal has a wide discretion in certifying a claim under the Competition Act 1998, specifically having regard to all the circumstances in order to determine whether the claims "are suitable enough to be brought in collective proceedings".[115] Given the Tribunal's broad discretion and the specific

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[110] Uniform Civil Rules 2020 (SA), r 24.5(2).
[111] See Camilla Sanger, Peter Wickham and James Lawrence "The Class Actions Law Review: United Kingdom – England & Wales" *The Law Reviews* (21 April 2022) at "Introduction to the Class Actions Framework".
[112] Competition Appeal Tribunal Rules 2015, above n 101, r 79(3).
[113] The Competition Appeals Tribunal Rules 2015 (UK), Rule 75(2)(h).
[114] Rule 77(1).
[115] Rule 79(1).

requirement for a representative claimant to state their belief as to whether the claim has a "real prospect of success", it is possible (if not likely) the merits of a proposed collective proceedings are weighed and taken into account by the Tribunal when making a collective proceedings order.

G. Summary

In summary, the position of New Zealand, Australia, and the United Kingdom with respect to the three key elements of the class-action mechanism analysed in this section are as follows:

Element	**New Zealand**	**Australia**	**United Kingdom**
Is there a certification requirement?	Yes, unless all class members give consent	No	Yes
Class actions proceed on an "opt in" or "opt out" basis?	Both	Opt out	Either opt in or opt out depending on procedural mechanism used
Merits assessment required?	No	No	Not in general proceedings under Civil Procedure Rules, but likely in the context of proceedings in Competition Appeal Tribunal

III. The Role of Litigation Funding in Class Actions

A. Overview of Litigation Funding

From a practical point of view, class actions are often significant in the quantum of damages sought and the size of the class bringing the action. They also usually involve complex legal issues. While reducing the overall costs of litigation for individual class members most, if not all, class actions that are pursued are very expensive to litigate; as Murphy and Cameron observe, "class actions are very expensive to run. No applicant, applicant lawyer or litigation funder would spend the millions of dollars necessary to conduct a large class action unless there is reasonable certainty of recovery. There is little if any incentive to pursue an unmeritorious claim".[116] As a result, class-action claimants have come to rely on financial support from third parties to fund class action, namely litigation funders.

Litigation funders are third-party commercial funders that agree to pay some or all of a claimant's legal costs and disbursements in consideration for a share of any damages or settlement proceeds recovered by the claimant.[117] Traditionally, third-party litigation funding was not permitted in New Zealand, Australia or the United Kingdom due to the torts of champerty and maintenance, which prohibited a third party providing financial assistance in a legal action by way of lending money or bearing all or part of the cost of the action without

[116] Bernard Murphy and Camille Cameron "Access to Justice and the Evolution of Class Action Litigation in Australia" (2006) 30 Melbourne University L Rev 400 at 410. Indeed, it is for this reason "[c]ourt actions by individual persons on behalf of themselves are often rendered impracticable because the potential costs far outweigh the returns. By combining many ofthese individually untenable complaints the cost of litigation is dramatically decreased for the plaintiffs, and a realistic access to the courts is created": Justin Scott Emerson "Class Actions" (1989) 19 VUWLR 183 at 187.
[117] Wayne Attrill "Funding Justice: The role of litigation funders in class actions" (2015) 129 Precedent 38 at 39.

lawful justification.[118] However, these torts have either been abolished or limited in some form to allow litigation funding to take place.[119]

Litigation funders have become an important part of the class-action litigation landscape in many jurisdictions, including in Australia and the United Kingdom. As was noted by the Law Council of Australia and the Federal Court of Australia:[120]

> In many senses, litigation funding has proven to be the lifeblood of much of Australia's representative proceeding litigation at federal and state level … Representative proceedings funded by group members are rarely heard of, and actions funded by law firms on a conditional fee basis are the exception rather than the rule.

Commentators have acknowledged litigation funders as making a positive contribution to the aims of the federal class-action procedure and enhancing access to justice, as well as accommodating the commercial realities of class-action litigation and making a positive impact on the responsible conduct and management of class actions.[121]

B. The Advantages and Disadvantages of Pursuing Litigation through a Class Action

The advantages and disadvantages of the class action procedure have been well-traversed in case law and legal academia, as well as in governmental reports and legislative inquiries, across numerous jurisdictions over the past several decades. In relation to one of the many proceedings connected to the *Feltex* saga, Baragwanath J for the New Zealand Court of Appeal, drawing

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[118] Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1063.
[119] See, for example, Criminal Law Act 1967 (UK), ss 13–14; Maintenance, Champerty and Barratry Abolition Act 1993, ss 3–4 (NSW); Wrongs Act 1958 (Vic), s 32; and *Saunders v Houghton* [2010] 3 NZLR 331 (CA). Whilst litigation funding in New Zealand is permitted, the torts of champerty and maintenance remain intact: see *Waterhouse v Contractors Bonding Ltd* [2014] 1 NZLR 91 (SC) at [26].
[120] Law Council of Australia and Federal Court of Australia *Case Management Handbook* (July 2014) at 13.12.
[121] Bernard Murphy and Camille Cameron "Access to Justice and the Evolution of Class Action Litigation in Australia", above n 116, at 435 and 437. See also Christopher Hodges, John Peysner and Angus Nurse "Litigation Funding: Status and Issues" (January 2019) Faculty of Law, Oxford University <www.law.ox.ac.uk>: "Policy changes and cuts in the legal aid budget have also caused problems both for those relying on legal aid as a funding mechanism" (at 16), and "[w]hile the current litigation funding industry in the U.K. is primarily focused on funding commercial litigation … the acceptability and regulation of litigation funding owes a debt to social or community legal aid and its development as a result of changes in policy, and initiatives aimed at solving practical problems in the distribution of litigation funding" (at 14)

upon extensive international academic discourse, succinctly summarised the perceived advantages of class actions in the following way:[122]

> (a) enabling access to justice which would otherwise be unaffordable;
> (b) economy of scale;
> (c) efficient resolution of large number of claims;
> (d) deterrence of misconduct that would otherwise persist;
> (e) promotion of beneficial change in [industry] practices;
> (f) adding to public sector mechanisms for identifying and responding to unlawful conduct; and
> (g) suspending limitation statutes while the litigation proceeds.

Subsequently, the Court of Appeal in *Ross v Southern Response Earthquake Services Ltd* described the "three important advantages" that representative actions offer as being:[123]

> (a) improving access to justice;
> (b) facilitating efficient use of judicial resources; and
> (c) strengthening incentives for compliance with the law.

Similar sentiments have been espoused in North American jurisprudence. In Canada, the Canadian Supreme Court considered the merits of the class action procedure in *Western Canadian Shopping Centres v Dutton*.[124] The Court distilled the benefits of the class-action procedure into three distinct advantages. The first advantage identified was "judicial economy", whereby "unnecessary duplication in fact-finding and legal analysis" was avoided through the consolidation of separate claims into a single class action.[125] The efficiencies generated from channelling claims through a class action include the reduction of litigation costs for plaintiffs as well as defendants.[126] The second advantage is that class actions "improve access to justice" by making the pursuit of claims that would otherwise be too costly to pursue individually

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[122] *Saunders v Houghton*, above n 119, at [16]. His Honour specifically referred to the following academic works as sources for his summary: Peter K Cashman *Class Action Law and Practice* (Federation Press, Alexandria, 2007), Christopher Hodges *Multi-Party Actions* (Oxford University Press, Oxford, 2000), Deborah R Hensler *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand, Santa Monica, 2000), and Rachael Mulheron The Class Action in Common Law Legal Systems: A Comparative Perspective (Hart Publishing, Oxford, 2004).
[123] *Ross v Southern Response Earthquake Services Ltd*, above n 104, at [52].
[124] *Western Canadian Shopping Centres v Dutton* [2001] 2 SCR 534.
[125] At 549.
[126] At 549.

"economical". Further, the Court stated that "the doors of justice remain closed to some plaintiffs, however strong their legal claims".[127] The third stated advantage is that class actions act as a deterrent for wrongful behaviour as they ensure "actual and potential wrongdoers do not ignore their obligations".[128] This is because the ability for litigants to share costs decreases "the expense of pursuing legal recourse" and therefore "deters potential defendants who might otherwise assume that minor wrongs would not result in litigation".[129]

In his inquiry into the competing goals of class actions in the United States, [130] Faisman describes what he perceives as the "two broad justifications" for class actions:[131] the "efficiency" justification and the "representative" justification. Under the "efficiency" view, key advantages of the class action procedure which align with the goal of litigants include the ability to "share the transactional costs of litigation, resulting in greater net competition,"[132] as well as "deterring misbehaviour" by increasing monetary penalties. [133] In respect of the "representation" view, Faisman identified the key advantages of the class action procedure which align with the goals of litigants include allowing "more claimants and more grievances be represented in the legal system"[134] as well as having a "significant impact over legal precedent and societal norms".[135]

In the author's view, the advantages as identified by Faisman are accurate and appear to be largely consistent with the experiences of the jurisdictions which permit class actions and other group litigation procedural mechanisms, notwithstanding there are aspects of such mechanisms which may be improved (particularly with respect to the position in New Zealand, as will be discussed later in this paper).

Baragwanath J stated the disadvantages of class actions can include:[136]

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[127] At 549.
[128] At 550.
[129] At 550.
[130] Andrew Faisman "The Goals of Class Actions" (2021) 121(7) Columbia L Rev 2157.
[131] At 2169.
[132] At 2177.
[133] At 2177.
[134] At 2177.
[135] At 2177.
[136] *Saunders v Houghton*, above n 119, at [16].

(a) class actions provide a mechanism for advancing claims without legal merit;

(b) exposure to massive damages claims may compel a defendant to settle regardless of merit;

(c) where a litigation funder is involved decision-making effectively shifts from the injured party to others, notably the funder; and

(d) there can be opportunity for unethical practices.

As to the issue of meritless litigation as identified by Baragwanath J at (a) and (b) above, commentators in the United States have noted a problem with class actions is that they give a platform for parties to advance meritless litigation. As argued by one commentator, William P Barnette, "the merits of any individual claim – and frequently even the merits of the class's claims in the aggregate – are often an afterthought".[137] The problem with meritless class actions is perhaps aggravated by another form of behaviour that has been observed by commentators and judges alike: class action defendants, particularly when faced with significant potential damages exposure or substantial litigation costs, are often compelled into settlement, even when they have strong defences.[138] Accordingly, there is a risk the class action procedure may be used by claimants who advance a claim they know is lacking in merit, with the intention of not proceeding to trial but simply securing a pre-trial settlement from the defendant.[139] This particular kind of class action has been referred to by several commentators and judges as a "strike suit".[140]

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[137] William P Barnette "There Is No Conservative Case for Class Actions" 22 The Federalist Society Review 192 at 194. Note that the Federalist Society is, in its own words, "a group of conservatives and libertarians": The Federalist Society "About Us" *The Federalist Society* <https://fedsoc.org/>. Still, there is a member of the Federalist Society who argues in favour of class actions: The Federalist Society "Brian T. Fitzpatrick" *The Federalist Society* <https://fedsoc.org/>; Brian T Fitzpatrick *The Conservative Case for Class Actions* (University of Chicago Press, Chicago, 2019). Also, note that in the United States, the defendant risks having to pay (reasonable) costs *even* in the event of an unmeritorious claim. The reason is that under United States law, there is no principle of the costs following the event in the United States: *Fleischmann Distilling Corp v Maier Brewing Co*, 386 US 714, 87 S Ct 1404 (1967) at 717–718. If there were such a principle, it would have the effect that "I pay my costs and your reasonable costs if I lose" and "[y]ou pay your costs and my reasonable costs if I win": Australian Law Reform Commission *Costs Shifting – Who Pays for Litigation* (ALRC Report 75, 1995) at [4.1]. Importantly, there is such a principle under the law of other common-law jurisdictions, including New Zealand: *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [3].

[138] William P Barnette "There Is No Conservative Case for Class Actions", above n 137, at 194–195. See also Linda S Mullenix "Ending Class Actions as We Know Them: Rethinking the American Class Action" (2014) 64(2) Emory Law Journal 399 at 416: "Thus, corporate defendants may capitulate to meritless or unsubstantiated claims rather than incur substantial ongoing litigation expenses with the risk of an adverse jury decision".

[139] Michael J Legg "Shareholder Class Actions in Australia – The Perfect Storm?" (2008) 31(3) UNSW LJ 669 at 710.

[140] *P Dawson Nominees Pty Ltd v Multiplex Ltd*, above n 99, at [26].

While not specifically recorded by Baragwanath J in his summary of the disadvantages of class actions, another oft-cited concern associated with class actions is the low return to class-action claimants where the class action is supported by a litigation funder.[141] These low returns come about as a result of, among other things, fees being received by litigation funders that are disproportionate to the risk that they are taking in funding actions. Excessive fee-taking negatively impacts the return to claimants, as fees are typically taken from any compensation that is received by claimants. Unreasonable influence by litigation funders on the management and conduct of class-action proceedings has also been identified as a problem by commentators and judges in a number of jurisdictions. In Australia, the adverse effect of litigation funders on the conduct and outcome of class action litigation was recorded as a key concern by the Australian Parliamentary Joint Committee on Corporations and Financial Services ("the Joint Committee").[142] In the Joint Committee's report released in December 2020, it was observed that "in many cases, litigation funders have the ability to control or influence key decisions in class actions in a way that prioritises their interests over those of class members".[143]

In Australia, the problem of low return among claimants in class actions supported by a litigation funder is evidenced in the Australian Law Reform Commission's report into class action proceedings and litigation funders in 2018.[144] In particular, the Commission observed that the median percentage return of all finalised shareholder claims in the Federal Court of Australia from 2013 to 2018 was only 51 percent,[145] compared to a median of 85 percent for settlement returned on all finalised claims that were unfunded in the same period.[146] Further, the Australian Parliamentary Joint Committee noted that in many cases "litigation funders are obtaining

[141] See, for example, *P Dawson Nominees Pty Ltd v Multiplex Ltd*, above n 99, at [26].
[142] Parliamentary Joint Committee on Corporations and Financial Services (Australia) *Litigation funding and the regulation of the class action industry* (December 2020).
[143] At 5.26.
[144] Australian Law Reform Commission *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018).
[145] At 3.53
[146] At 3.49. This includes data on class actions that do not involve shareholder litigants.

windfall profits well in excess of the risks they are taking", which is "coming at the expense of the class members' share of the proceeds from a successful outcome".[147]

IV. Reconciling Shareholder Class Actions with Agency Theory

A. Shareholder Class Actions help minimise Agency Costs

When the recognised benefits of class actions are considered together with the practical implications of recent shareholder class action activity, legislative changes, and commentary within Australia, the United Kingdom and New Zealand, it is clear that shareholder class actions assist in the minimisation of agency costs. Class actions can do this in two primary ways:

(a) First, class actions assist shareholders (pursuing litigation in relation to wrongs that have been committed against them by companies) by reducing the overall costs of litigation ("the cost-efficiency benefit" of shareholder class actions); and

(b) Second, class actions assist in the moderation of company conduct to ensure boards make decisions and adopt governance practices which reduce the risk of companies engaging in behaviour that is detrimental to the interests of shareholders and exposes companies to the risk of being subject to litigation from aggrieved shareholders or other parties. The need for shareholders to take corrective action through litigation is therefore reduced, as there will be fewer instances where shareholders' rights will be infringed ("the regulatory effect" of shareholder class actions).

The key features of the class-action procedure which contribute to the reduction in agency costs include the opportunity the class action provides to shareholders to have all issues common to shareholders determined through a single set of proceedings, rather than each shareholder taking an individual action against a company for the same issue. By joining together and pursuing litigation through a class action, shareholders may be in a better position to access funding from

[147] At 5.23. The problem of litigation funders as well as class action claimant lawyers receiving too high a portion of class action awards or settlement proceeds has been highlighted in a number of Australian academic journals and professional publications. See, for example, John Emmerig and Michael Legg "The problem of competing class actions" *Governance Directions* (Australia, July 2018) at 359.

third party litigation funders, further reducing the cost barrier to litigation for litigant shareholders. Pursuing litigation through a class action may also provide shareholders with a better opportunity to reach a settlement with a defendant company, given that a class action typically exposes a defendant to potential damages of a significant sum. Early settlement ensures shareholders obtain compensation without the expense of a trial.

In addition, exposure to shareholder class actions or even the availability, threat or risk of shareholder class actions assists in the prevention of corporate behaviour that could amount to unlawful conduct or the infringement of the rights and interests of shareholders. This is because the response by company boards to shareholder class actions can moderate board behaviour and corporate governance practices to ensure decisions are made in such a way that do not adversely affect or infringe on shareholders' rights or interests, particularly to the extent such behaviour is unlawful or could trigger legal action by shareholders and therefore expose the company or individual directors to liability.

As discussed in the sections above, a shift toward conservative, more risk-averse governance practices as a result of the proliferation of shareholder class actions has been seen in Australia.[148] There may be a similar effect on governance decision-making in New Zealand, particularly in light of Directors and Officers ("D&O") Insurance premium increases and uncertainty as a result of potential changes to New Zealand's class-action regime.[149]

The regulatory effect of shareholder class actions has been evidenced in other jurisdictions, particularly in jurisdictions which typically experience a large volume of class actions such as the United States. In particular, commentators in the United States have observed that shareholder class actions often result in extensive changes to board behaviour and corporate-

[148] See, for example, Australian Institute of Company Directors "The growing impact of rising shareholder class actions" (27 September 2018) <www.companydirectors.com.au> and Parliamentary Joint Committee on Corporations and Financial Services (Australia) *Litigation funding and the regulation of the class action industry*, above n 142, at [17.119].

[149] See the discussion on the effects of proposed changes to New Zealand's class-action regime in Gabriel Olano "Rising trend for D&O premiums likely to continue" (12 February 2022) Insurance Business NZ <www.insurancebusinessmag.com> and Minter Ellison Rudd Watts "The present and future of class actions in New Zealand" (4 November 2022) <www.minterellison.co.nz>.

governance practice that is favourable to shareholders.[150] Such changes may have the effect of reducing agency costs, as they assist in preventing situations where shareholder rights and interests are infringed and therefore minimise the need for shareholders to take disciplinary or corrective action through litigation.

B. Shareholder Class Actions and the Shareholder-Primacy "Objective"

Agency theory is predicated on the concept of shareholder primacy. Under shareholder primacy, the primary objective of the company is to maximise the wealth of shareholders and advance the interests of shareholders. As explained in the previous sections, a concern commonly expressed about shareholder class actions is that they have the effect of negatively impacting companies' economic growth by, among other things, fostering a "risk-averse" culture among boards. The propensity to take less "risks" in turn reduces shareholder return and undermines the corporate objective under shareholder primacy, namely, to maximise shareholder wealth.

To the contrary, the fostering of "risk-averse" boards does not necessarily undermine the ability for directors to maximise shareholder wealth. Greater risk-aversion in boards may even be consistent with shareholder primacy's objective of wealth maximisation and advancing the interests of shareholders; while shareholder primacy instructs directors to do all they can to maximise shareholder wealth, any actions in pursuit of this objective must be *lawful*.[151] This is because directors who engage in unlawful actions risk the financial security and sustainability of a company and, accordingly, the shareholders' equity in that company. Risk generated by unlawful behaviour exposes directors to the risk not only of litigation initiated by shareholders, but also of other legal action, such as by public entities charged with regulatory

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[150] See, for example, discussion on the impact the threat of shareholder litigation has on corporate governance practice from a United States context in Ian Appel "Governance by Litigation" (unpublished Working Paper, 2019) at 17, as well as Luke Green "Governance Reforms Through Securities Class Actions" (2012) 20(1) *The Corporate Governance Advisor* at 13, which examines corporate governance reforms that have arisen from shareholder actions led by institutional shareholders.

[151] See, for example, Milton Friedman *Capitalism and Freedom*, above n 33. Note that it may be unlawful for directors to over-focus on the risk of being held personally liable; if doing so prevents them from acting, it may be that they are (unlawfully) failing to "exercise their discretion bona fide in what they consider … is in the interests of the *company*": *In re Smith and Fawcett Ltd* [1942] Ch 304 (CA) at 306 (my emphasis). See also Companies Act 1993, s 131(1).

responsibilities.[152] Unlawful behaviour also entails many consequences other than litigation which may have negative effects on shareholder value.[153] These include a reduction in a company's market share value as a result of any negative perception on the part of the public and potential investors, of disciplinary action by stock-exchange operators, and of long-term damage to a company's brand and reputation. All these factors are detrimental to "shareholder wealth" for shareholders (in companies subject to a shareholder class action) in the short term as well as the long term.[154]

The regulatory effect of shareholder class actions which some commentators (as well as the Australian Parliamentary Inquiry into Class Actions) [155] discount as having a negative effect on shareholder returns in fact operates to protect shareholder wealth by helping maintain an environment where boards are less inclined to engage in risky commercial behaviour which may be unlawful. Accordingly, if the objective of a company is to maximise the wealth of shareholders, then it is desirable that the option to pursue legal action against companies or directors through a class action or other form of collective redress be easily available to shareholders.

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[152] This includes, for example, the Financial Markets Authority (in New Zealand).

[153] See, for example, Jeff Frooman "Socially Irresponsible and Illegal Behavior and Shareholder Wealth: A Meta-Analysis of Event Studies" (1997) 36(3) Business & Society 221 at 241, where it is concluded through an empirical analysis of a number of case studies that unlawful behaviour has negative implications on shareholder wealth. In addition, see generally Alan K Reichert, Michael Lockett and Ramesh P Rao "The Impact of Illegal Business Practice on Shareholder Returns" (1996) 31(1) The Financial Review 67 (which discusses criminally unlawful behaviour).

[154] See generally Angelo Aspris and Luke McAplin "A Cause for Alarm? The Long-Term Performance of Shareholder Class Action Defendants" (2020) 56(2) A Journal of Accounting, Finance and Business Studies 213 at 215, which explores the impact shareholder class actions has on shareholder wealth in the United States and determines that, in the main, companies subject to a shareholder class action will "underperform over the long run".

[155] Parliamentary Joint Committee on Corporations and Financial Services (Australia) *Litigation funding and the regulation of the class action industry*, above n 142, at [17.119].

Chapter Two: Shareholder Class Actions in "Action" – Assessing the "Cost-Efficiency" Benefit of Shareholder Class Actions in Australia, New Zealand and the United Kingdom

This Chapter will analyse the extent to which the class action procedural frameworks in Australia, New Zealand and the United Kingdom have worked to minimise costs to shareholder plaintiffs. First, case law will be analysed to determine the "Cost-Efficiency" benefits that have occurred as a result of the procedural frameworks in place in each jurisdiction. Second, the "Regulatory Effect" of shareholder class actions in the three jurisdictions will be examined. This "Regulatory Effect" lies in the extent to which class actions are altering, have altered, or may in the future alter board behaviour so as to reduce the risk of companies (1) engaging in conduct detrimental to the interests of shareholders or (2) being subject to litigation from aggrieved shareholders and other parties (as well as regulatory action).

The "Cost-Efficiency" benefits of shareholder class actions in Australia, New Zealand and the United Kingdom will be assessed, jurisdiction by jurisdiction and class action by class action, against five measures which contribute to costs (or the reduction of costs). These are as follows:

Measure	Rationale for using the measure
The proceeding's length of time	While proceedings remain active, shareholder plaintiffs are likely to continue to incur costs, such as lawyers' costs in relation to the preparation of a trial.
The number of hearings that occur during the proceeding	The number of hearings that occur during the proceedings (for example, hearings in relation to interlocutory applications) is a contributor to costs given the time involved in preparing for each specific hearing, lawyers attending hearings and overall proceedings being delayed as a result of the additional hearings.
The use of a Litigation Funder	A Litigation Funder assists in reducing costs for shareholders, as in most circumstances the Litigation Funder "funds" the action and takes on the litigation

	risk. In return, the Litigation Funder receives a portion of the compensation received by the plaintiffs.
Whether the plaintiffs were successful in their action	An unsuccessful action results in the plaintiffs failing to obtain compensation for the losses claimed. The plaintiffs will not receive any contribution toward their costs from the defendant and will more than likely be subject to a cost award in favour of the defendant. An unsuccessful outcome may also suggest the claim was unmeritorious.
Total number of shareholder class actions pursued and that have reached trial	A high number of shareholder class actions being pursued and reaching trial suggests class actions are perceived as an effective way for shareholders to take action against directors.

The shareholder class actions that will be examined in this paper are restricted to reported class action judgments in Australia, [156] New Zealand and the United Kingdom that have proceeded to trial. Shareholder class actions that have been pursued and later settled or abandoned have not been considered. This is because a key focus of this paper is on examining, from an Agency Theory perspective, the cost-effectiveness of the complete shareholder class-action process to shareholders, including judicial determination at trial.

I. Shareholder Class Actions in Australia

A. Case Analysis – Overview

In Australia shareholder class actions have been pursued on a regular basis since 2004.[157] The shareholder class action has been the most popular form of class action since at least 2014.[158] In

[156] Federal class actions have been examined for the purposes of this paper only, not state class actions.
[157] Michael J Legg "Shareholder Class Actions in Australia – The Perfect Storm?", above n 139, at 669.
[158] John Emmerig and Michael Legg "No Myth: Securities class actions escalate in Australia" *Governance Directions* (Australia, July 2014) at 364.

a recent study by Professor Vince Morabito, it was determined that the number of shareholder class actions pursued in Australia (at both state and Federal level) in the period from 1992 to 2019 totalled 122, 19.2% of all class actions pursued in that period.[159] Most shareholder class actions pursued in recent times have related to (1) alleged misleading or deceptive conduct in respect of statements or a failure to disclose information or (2) breach of a (listed) company's continuous disclosure obligations.[160]

Whilst many class actions have been pursued in Australia since the introduction of the Federal class action regime in 1992, practitioners have noted that only three class actions have resulted in a judgment (at least at the federal level),[161] namely *TPT Patrol Pty Ltd v Myer Holdings Ltd*,[162] *Crowley v Worley Ltd*,[163] *Bonham v Iluka Resources Ltd*.[164] These cases' respective performance against the "Cost Efficiency" measures identified above are as follows:[165]

Case	**Time until Judgment**	**Number of hearings before Judgment**	**Litigation Funder**	**Plaintiffs Successful?**
TPT Patrol Pty Ltd v Myer Holdings Ltd	2 years, 10 months[166]	Unknown	Unknown	No

[159] Vince Morabito "Shareholder class actions in Australia – myths v facts" (Empirical Report, Monash University, 2019) at 15.
[160] See Allens Linklaters "Shareholder class actions in Australia" (February 2017) <www.allens.com.au>.
[161] See Allens Linklaters "Australia's third shareholder class action judgment" (17 February 2022) <www.allens.com.au>; Malcolm Wood "Australia: Latest shareholder class action judgment yet another win for the defendant company" (March 2022) Gillchrist Connell <www.gclegal.com.au>.
[162] *TPT Patrol Pty Ltd v Myer Holdings Ltd* [2019] FCA 1747.
[163] *Crowley v Worley Ltd* [2020] FCA 1522.
[164] *Bonham v Iluka Resources Ltd* [2022] FCA 71.
[165] Only Federal Class Action Judgments will be assessed for the purpose of this research.
[166] The class action was filed on 29 December 2016. The date of Judgment was 24 October 2019. See Commonwealth Courts "File details – TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited" <www.comcourts.gov.au>.

Crowley v Worley Ltd	5 years[167]	Approximately 2 [168]	Yes [169]	No
Bonham v Iluka Resources Ltd	3 years, 10 months[170]	Approximately 3 [171]	Yes [172]	No
Total Number of Cases				**3**

B. TPT Patrol Pty Ltd v Myer Holdings Ltd

The *TPT* case related to the conduct and statements made by Myer Holdings Ltd (the defendant) and its officers, namely its chief executive Mr Bernie Brookes, in and around 2014 and 2015. On 11 September 2014 Mr Brookes made public statements that in his opinion the defendant's net profit after tax ("NPAT") for the 2015 financial year would be in excess of the defendant's NPAT in the previous year, which was $98.5 million.[173] Subsequently on 19 March 2015 the defendant announced that it expected its NPAT for the 2015 financial year to be between $75 to $80 million.[174] In that same announcement the defendant advised (among other things) that its sales were up by only 1.5% in the first half of the 2015 financial year, its operating gross profit margin had declined, its cash cost of business had increased and its NPAT for the first half of the 2015 financial year was 23.1% below what it had achieved in the same period in the 2014 financial year.

[167] The class action was filed on 27 October 2015. The date of Judgment was 22 October 2020. See Commonwealth Courts "File details – Larry Crowley v Worley Limited ACN 096 090 158" <www.comcourts.gov.au>.
[168] *Crowley v Worley Parsons Ltd* [2017] FCA 3; *Crowley v Worley Parsons Ltd (No 2)* [2019] FCA 1535.
[169] See *Crowley v Worley Parsons Ltd* [2017], above n 168, at [3]–[5]: JustKapital Litigation Pty Ltd were the litigation funders for the plaintiff.
[170] The class action was filed on 11 April 2018. The date of Judgment was 7 February 2022. See Commonwealth Courts "File details – James Bonham as Trustee for Aucham Super Fund & Anor v Iluka Resources Ltd ABN 34 008 675 018" <www.comcourts.gov.au>.
[171] *Bonham v Iluka Resources Ltd* (2015) 107 ACSR 75 (FC); *Bonham v Iluka Resources Ltd* (2017) 350 ALR 63 (FCAFC); *Bonham v Iluka Resources Ltd (Security for Costs)* [2019] FCA 1693.
[172] See *Bonham v Iluka Resources Ltd (Security for Costs)*, above n 171, at [2]: several funders had been involved in the litigation.
[173] *TPT Patrol Pty Ltd v Myer Holdings* Ltd, above 162, at [3].
[174] At [4].

From 11 September 2014 to 19 March 2015 the defendant was subject to continuous disclosure obligations pursuant to s 674 of the Corporations Act and rule 3.1 of the ASX listing rules, which required the defendant to immediately notify the ASX once it became aware of any information concerning it "that a reasonable person would expect to have a material effect on the price or value" of the defendant's securities, of that information.[175]

In essence, the representative plaintiff TPT Patrol Pty Ltd ("the applicant") made two claims. The first was that Mr Brookes and the defendant did not have reasonable grounds to make the representation on 11 September 2014 that the defendant's NPAT for the 2015 financial year would exceed its NPAT for the 2014 financial year. The second claim was that statement was misleading and deceptive conduct in contravention of s 1041H of the Corporations Act.[176] In addition, the applicant claimed the defendant was aware by no later than 11 November 2014 that the defendant's NPAT for the 2015 financial year would be materially lower than the 2014 financial year and by failing to disclose that specific information the defendant breached its continuous disclosure obligations under s 674(2) of the Corporations Act.[177]

Further, the applicant claimed that by failing to disclose anything about its earnings forecast for the 2015 financial year subsequently on 21 October, 11 November and 21 November 2014, and 2 and 3 March 2015, the defendant engaged in misleading or deceptive conduct, or conduct that was likely to mislead or deceive, namely conduct in breach of s 1041H of the Corporations Act.[178]

Ultimately, the applicant established there had been contraventions of ss 674 and 1041H of the Corporations Act.[179] However, the claim failed, as the applicant failed to show those contraventions had caused any of the claimed loss or damage to the applicant or to any of the class members.

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[175] At [7]. See *ASX Listing Rules*, above n 51, at 3.1.
[176] At [11].
[177] At [36].
[178] At [13] and [36].
[179] At [1719].

C. Crowley v Worley

The *Crowley* case related to a number of statements made by Worley Limited (the defendant) in late 2013 and the consequential drop in the defendant's share price.

On 14 August 2013 the defendant issued an "earnings guidance statement" which included statements to the effect that it had a solid foundation for expecting earnings growth on its NPAT for the 2013 financial year, namely $322 million: despite "*uncertainties in world markets*", it expected its "*geographic and sector diversification to provide a solid foundation to deliver increased earnings in* [the 2014 financial year]".[180]

On 9 October 2013 the defendant made a further announcement to the market, stating that its first-half results would be lower than in the previous financial year, but it reaffirmed the 14 August 2013 earnings guidance statement.[181] The 14 August 2013 earnings guidance statement was restated on 10 October 2013 and again on 15 October 2013.[182]

However, the defendant revised its earnings guidance on 20 November 2013 to state it expected its NPAT for the 2014 Financial Year to be between $260 million to $300 million,[183] below the defendant's NPAT of $322 million for the 2013 Financial Year.[184] The price of ordinary shares in the defendant dropped approximately 26% following the announcement of that revised earnings guidance.[185]

Mr Crowley subsequently brought proceedings on his own behalf and as representative plaintiff on behalf of other persons who purchased shares in the defendant company in the period between 14 August 2013 and 20 November 2013.[186] Mr Crowley alleged he and the other class members suffered a loss as a result of the defendant's wrongful conduct, this conduct including:[187]

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[180] *Crowley v Worley*, above n 163, at [1] and [2].
[181] At [3].
[182] At [4].
[183] At [5].
[184] At [1].
[185] At [1].
[186] At [17].
[187] At [19].

(a) Breaches of the defendant's "continuous disclosure obligations" under s 674 of the Corporations Act 2001 and rule 3.1 of the ASX Listing Rules as a result (among other things) of the defendant's failure to disclose to the ASX that it did not have a reasonable basis for making the August 2013 earnings guidance statement.

(b) Engaging in misleading or deceptive conduct in contravention of s 1041H of the Corporations Act, s 12DA of the Australian Securities and Investments Commission Act 2001 and/or s 18 of the "Australian Consumer Law" (at Schedule 2 of the Competition and Consumer Act 2010), as (among other things) the defendant did not have any reasonable grounds to make the representations in the earning guidance statements regarding the defendant's NPAT for the 2014 Financial Year.

Ultimately, the Court found the defendant's conduct did not amount to a breach of its continuous disclosure obligations under the Corporations Act.[188] With respect to Mr Crowley's allegations of misleading or deceptive conduct, the Court found the defendant did not contravene any statutory provision prohibiting misleading or deceptive conduct.[189]

D. Bonham v Iluka Resources Ltd

The *Bonham* case related to statements made by the defendant in a sales guidance issued on 12 April 2012 regarding the future sale of minerals for the period 12 April 2012 to 9 July 2012 and in a subsequent update issued on 8 May 2012. On 9 July 2012 the defendant revised its sales guidance. As a result its share price fell around 25%.

The representative plaintiff, Mr Bonham, claimed the defendant made false or misleading statements and/or engaged in false or misleading conduct in relation to the sales guidance.[190] The plaintiff claimed the false and misleading statements and conduct involved representations as to the future sales of certain minerals (namely zircon, rutile and synthetic rutile) and implied

[188] At [620].
[189] At [646]–[651].
[190] *Bonham v Iluka Resources Ltd*, above n 164, at [1].

representations that the defendant had reasonable grounds to make such representations as to future sales, despite the defendant having no grounds for doing so, during the period between 12 April 2012 to 9 July 2012.[191] These implied representations were contained in two Australian Securities Exchange Notices dated 12 April 2012 [192] and 8 May 2012.[193]

In addition, Mr Bonham claimed the defendant breached its "continuous disclosure obligations" under s 674 of the Corporations Act by failing to disclose (1) a "reasonably-based" forecast would be less than the forecasts stated in the sales guidance and (2) the defendant knew at the time of the April 2012 forecast representation and the subsequent representation in May 2012 that it (among other things) had no reasonable grounds to make either representation and was no longer able to provide reliable forecasts of future revenue.[194] Mr Bonham claimed that as a result of those contraventions, he and the other class members suffered a loss.

Ultimately, the Court found the defendant did not contravene any statutory provision prohibiting misleading or deceptive conduct. The Court reasoned (among other things) that the defendant did not make either the alleged 12 April 2012 representation or the 8 May 2012 representation,[195] and further that if the defendant did make those representations, the defendant had reasonable grounds for making the representations.[196]

The Court also found the defendant did not contravene its statutory continuous disclosure obligations, as the Court did not accept that the "reasonably-based" forecast of the defendant's expected sales for zircon, rutile and synthetic rutile in the 2012 financial year would be less than that stated in the April 2012 sales guidance. Nor did the Court accept there were any reasonable grounds for the defendant to make the forecast representations in April 2012 and May 2012.[197]

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[191] At [6].
[192] At [21].
[193] At [22].
[194] At [9].
[195] At [663].
[196] At [698].
[197] At [700].

II. Shareholder Class Actions in the United Kingdom

A. Case Analysis – Overview

Whilst a number of class actions have been pursued in the United Kingdom, one law firm notes that there is only one reported class action against a company and/or its directors:[198] *Sharp v Blank* ("the *Lloyds/HBOS* Litigation"). The proceedings were initiated by 5803 shareholders under the "group litigation" procedural mechanism,[199] with a group-litigation order being issued on 6 August 2014[200] and the proceedings reaching trial in October 2017.[201] The case's performance against the "Cost Efficiency" measures are as follows:

Case	**Time until Judgment**	**Number of hearings before Judgment**	**Litigation Funder**	**Plaintiffs Successful?**
Sharp v Blank	5 years, 4 months[202]	Approximately 5[203]	Yes [204]	No
Total Number of Cases				**1**

B. Sharp v Blank – the "Lloyds/HBOS Litigation"

The *Lloyds/HBOS* Litigation related to the acquisition by Lloyds TSB Group plc ("Lloyds") of HBOS plc ("HBOS") in 2008. On 18 September 2008 the boards of Lloyds and HBOS notified the market the two companies had reached an agreement on the terms of an acquisition of HBOS

[198] Herbert Smith Freehills "The Lloyds/HBOS litigation: The first shareholder class action judgment in England & Wales" (15 November 2019) <www.herbertsmithfreehills.com>.
[199] Civil Procedure Rules 1998 (UK), r 19.10.
[200] *Sharp v Blank* EWHC HC14CO3000 6 August 2014.
[201] *Sharp v Blank* [2019] EWHC 3096 (Ch).
[202] The plaintiff's application for a GLO was filed on 7 July 2014 whilst the judgment for the trial was issued on 15 November 2019: see *Sharp v Blank*, above n 200, and *Sharp v Blank* above n 201, respectively.
[203] *Sharp v Blank* EWHC HC14CO3000 6 August 2014; [2015] EWHC 2685 (Ch); [2015] All ER (D) 171 (Nov); [2016] EWHC 776 (Ch); [2017] EWHC 141 (Ch).
[204] See *Sharp v Blank* [2020] EWHC 1870 (Ch) at [33]. The Litigation Funder, Therium, funded the Claimants' costs up to some £21.45 million.

by Lloyds, which each board intended to recommend to the shareholders.[205] At this time there was significant disruption in the funding markets due to the "credit crunch" which had resulted from the collapse of Lehman Brothers on 15 September 2008 and which had generated "unprecedented turbulence in the global financial markets".[206]

This growing "turbulence" prompted the three entities responsible for maintaining the integrity and health of the financial markets—the Bank of England, HM Treasury and the Financial Services Authority ("FSA") (as it was)—to take measures to restore confidence in the banking sector through a package of financial support announced on 8 October 2008.[207] The package included measures to provide short-term liquidity to support banks in lending and required banks to raise more capital in order to strength their balance sheets. The government, through the Treasury, would participate in these measures. As a result of this announcement, Lloyds would have to raise £7 billion in additional capital and if the proposed acquisition of HBOS proceeded, then the Lloyds/HBOS group would be required to raise £17 billion in additional capital.[208] Through September and October 2008, Lloyds made additional credit facilities of almost £10 billion available to HBOS to "help it with its immediate funding requirements" (the "Lloyd's Repo").[209] Further, in October 2008 the Bank of England made a collateralised emergency facility available to HBOS, referred to as "emergency liquidity assistance" ("ELA").[210]

Following a due-diligence process, the Lloyds board unanimously decided, on 29 October 2008, to recommend the acquisition to Lloyds shareholders on revised terms.[211] A shareholder circular was issued on 3 November 2008 giving notice of a general meeting.[212] A letter from the Lloyds Chairman strongly encouraged the shareholders to vote in favour of the resolutions to give effect to the acquisition.[213] Further, the circular described Lloyds' capital ratios as being "robust" and its liquidity position as being "strong"[214] and in relation to HBOS noted that there had "been no

[205] *Sharp v Blank*, above n 201, at [9].
[206] At [16].
[207] At [16].
[208] At [17].
[209] At [14].
[210] At [15].
[211] At [20].
[212] At [21].
[213] At [21]–[22].
[214] At [23].

significant change in the financial or trading position of the HOBS Group since 30 June 2008".[215] Neither the Lloyds Repo nor the ELA were mentioned in the circular.[216] On 19 November 2008 the Lloyds shareholders approved the acquisition of HOBS,[217] and subsequently, on 12 December 2008, HBOS shareholders approved, in extraordinary general meeting, HBOS being taken over by Lloyds.[218] On 16 January 2009 Lloyds acquired 100% of HBOS, and 7.76 billion new shares were issued in Lloyds.[219]

The claimants in *Lloyds/HBOS* commenced litigation in 2014, against Lloyd's Board Chairman, Group Chief Executive, Acting Group Finance Director, Group Executive Director of the Lloyd's UK Retail Banking Division and Group Executive Director of the Lloyd's Wholesale and International Banking Division,[220] together with Lloyds Banking Group PLC itself.[221] The shareholders' two primary claims were in essence that the Lloyds directors should not have recommended the acquisition of HBOS as it "represented a dangerous and value-destroying strategy which involved unacceptably risky decisions" (this claim was referred to as "the recommendation case"). Further, the shareholders claimed the Lloyds directors ought to have provided additional information regarding Lloyds and HBOS, including in relation to the funding crisis faced by HBOS and the vulnerability of HBOS's assets as a result (this claim was referred to as "the disclosure case"). Accordingly, the shareholders claimed that if the directors had either refrained from recommending the acquisition or made additional disclosures about Lloyds and HBOS, then (1) the shareholders and the market in general would not have been "misled" regarding the financial position of HBOS or the proposed acquisition, and (2) the shareholders would have "avoided the recapitalisation of the merged entity and the consequential loss in value by dilution of their shareholding".[222] Ultimately, both claims were dismissed.

In relation to the "recommendation case", the Court found the Lloyds board of directors were faced with two clear choices, (1) to proceed with the acquisition of HBOS on revised terms,

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[215] At [25].
[216] At [25].
[217] At [27].
[218] At [28].
[219] At [28].
[220] At [12].
[221] At [29].
[222] At [29].

accept the capital package of £17.5 billion and have the group raise £5.5 billion itself, or (2) abandon the acquisition, proceed as a standalone bank and raise £7 billion.[223] The advice available to the defendants at the time was that raising £5.5 billion was less dilutive than raising £7 billion.[224] Whilst in retrospect (given what happened in the months and years following the acquisition) an over-capitalised Lloyds individually might have weathered the Global Financial Crisis better than the expanded Lloyds/HBOS Group, the choice made by the directors nonetheless "lay within a range of reasonable choices".[225]

In relation to "the disclosure case", the Court found that there was no loss caused by the failure of the board to provide information regarding (1) the funding crisis faced by HBOS and (2) the resulting vulnerability of HBOS' assets.[226] In particular, the Court determined that if there had been a disclosure to the shareholders of the information that the plaintiffs claimed there ought to have been (including information regarding the grant of the ELA to HBOS as well as the Lloyd's Repo), a majority of the shareholders "would not have reached a conclusion other than that which they did in fact reach".[227]

III. Shareholder Class Actions in New Zealand

A. Case Analysis – Overview

Fewer class actions have been pursued in New Zealand than in, say, Australia—although more than twice as many on a per capita basis. An empirical study by Nikki Chamberlain and Susan Watson stated that as at 1 July 2019, only 40 class actions had been reported in New Zealand.[228] Of those 40 reported class actions, only two were exclusively shareholder class actions.[229] While

[223] At [763].
[224] At [763].
[225] At [764].
[226] At [964].
[227] At [964].
[228] Nikki Chamberlain and Susan Watson "The Emergence and Reform of the New Zealand Class Action" in Brian Fitzpatrick and others (eds) *The Cambridge Handbook of Class Actions An International Survey* (Cambridge University Press, Cambridge, 2021) 305 at 319.
[229] At 321. It is noted *LDC Finance (in rec and in liq) v Miller* [2013] NZHC 2993 was an investor *and* shareholder class action. That proceeding has been excluded from this paper as this paper examines shareholder class actions only, not proceedings involving multiple types of plaintiffs.

this study noted that very few class actions had been pursued in New Zealand historically, it confirmed there had been a gradual increase in the number of class actions being pursued, with over half of the recorded class actions taking place within the past two decades (including 12 class actions in the period 2010-2019).[230]

As noted above, there have been only two reported class action judgments in New Zealand, namely *Hedley v Kiwi Co-Operatives Dairies Ltd* [231] and *Houghton v Saunders* (the "Feltex Litigation"). The performance of these two cases against the identified "Cost Efficiency" measures are as follows:

Case	**Time until Judgment**	**Number of hearings before substantive Judgment**	**Litigation Funder**	**Plaintiffs Successful?**
Hedley v Kiwi Co-Operative Dairies Ltd	2 years, 3 months	1	No [232]	No
Houghton v Saunders	6 years, 6 months	Approximately 20	Yes [233]	No [234]
Total Number of Cases				**2**

[230] At 319.
[231] *Hedley v Kiwi Co-Operative Dairies Ltd* (2000) 15 PRNZ 210 (HC).
[232] Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study", above n 7, at 158.
[233] "Feltex court sage: Insurance, costs issues arise" *New Zealand Herald* (online ed, Auckland, 30 September 2019).
[234] The substantive Judgment was successfully appealed (in part) by the plaintiffs. See *Houghton v Saunders* [2019] 1 NZLR 1 (SC).

B. Hedley v Kiwi Co-Operative Dairies Ltd

Hedley involved representative proceedings by shareholders in a co-operative dairy company, Tui Milk Products Ltd ("Tui").[235] In 1996 Tui and Kiwi Co-Operative Dairies Ltd ("Kiwi") agreed to merge on terms that included, among others, Tui acquiring all of Kiwi's assets and Tui being liquidated.[236] The respective companies' shareholders were required to approve the merger through a combination of ordinary and extraordinary resolutions, with the final approval of the merger being made by the shareholders of Tui by way of extraordinary resolution.[237] The shareholders of Tui declined to pass the extraordinary resolution required for the merger to proceed.[238] A further meeting of the shareholders was subsequently arranged to attempt to have the shareholders pass the extraordinary resolution approving the merger agreement. The plaintiff shareholders alleged that prior to the further meeting, a group including Tui's chief executive, its chairman and another member of its board of directors had agreed to promote the merger and obtain a positive review of the merger proposal. The report for the review was eventually obtained from the business advisory firm Ernst & Young and another consultant. The shareholders passed the extraordinary resolution at the second meeting, and the merger proceeded.

The shareholders initiated proceedings on 24 September 1999 alleging (among other things) that as a result of the merger, they had suffered a loss in the value of their shares and loss of income. They claimed the actions taken by the named defendants (which included Kiwi; the former chief executives and directors of Tui; Ernst & Young; and the consultant who assisted in the preparation of the report) in relation to the merger (and following the initial extraordinary meeting of Tui on 20 August 1996) were illegal. The shareholders claimed the report produced in advance of the second meeting was not truly independent and was wrong and false in a number of respects.

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[235] *Hedley v Kiwi Co-operative Dairies Ltd*, above n 231, at [5].
[236] At [6].
[237] At [6]–[7].
[238] At [7].

The plaintiffs successfully obtained a representative order on 18 December 2000,[239] and the matter proceeded to trial held on various dates in June, July and August 2001. The plaintiffs pleaded breaches of statutory duty, deceit, breaches of duty of care and breaches of the Fair Trading Act 1986.[240]

Ultimately, the plaintiffs' claim failed on all causes of action. In her concluding remarks at trial, Goddard J was particularly critical of the claims advanced by the plaintiffs. In respect of the allegations of deceit, she noted the allegations made were serious, "the more so, in my view, because they have no foundation".[241] She summarised her overall view on the deceit allegations as follows:[242]

> *"[I]n essence the plaintiffs' case was never founded on anything more than mere suspicion. Illustrative of this was their inability to point to any motive for the alleged "plan" of deception they pleaded against the Tui directors".*

Further, Goddard J noted the plaintiffs *"*were unable to pinpoint any evidence of actual deceit on the part of the Tui directors".[243] The plaintiffs challenged some of Goddard J's findings on deceit as well as negligence, however these were upheld on appeal to the Court of Appeal.[244]

C. Houghton v Saunders [245]

The *Houghton* class action involved a claim by the shareholders of the Feltex Carpets Ltd ("Feltex"), a well- known New Zealand manufacturer of carpets. The plaintiffs' claim centred around representations that were made in a share prospectus for an Initial Public Offering ("IPO") for Feltex shares in 2004. That prospectus recorded a positive financial outlook for

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[239] *Hedley v Kiwi Co-Operative Dairies Ltd*, above n 95, at [26].
[240] *Hedley v Kiwi Co-Operative Dairies Ltd*, above n 231, at [69]–[90].
[241] At [312].
[242] At [314].
[243] At [328].
[244] *Hedley v Kiwi Co-Operative Dairies Ltd* [2003] BCL 235 (CA) at [44].
[245] *Houghton v Saunders*, above n 14.

Feltex, including (among other things) a prediction of a gross yield of 9.6 per cent per annum.[246] The share price was ultimately settled at $1.70 per share.[247] The IPO closed on 2 June 2004, and the shares were subsequently listed on the New Zealand Stock Exchange, where trading commenced on 4 June 2004.[248] While the company initially performed as predicted,[249] by 1 April 2005 the directors indicated the company would not achieve the level of profitability projected in the prospectus. By the end of June 2005 the Feltex share price had dropped to $0.63 per share.[250] In September 2006 Feltex's bank appointed receivers, and in October 2006 the receivers sold the assets of Feltex to a competitor, rendering the company's shares worthless.[251] Feltex was placed in liquidation in December 2006. An inquiry was subsequently conducted by the Securities Commission (as it was) into the adequacy of the disclosures made in the share prospectus. The Commission concluded in October 2007 that the prospectus was not misleading in any material respect.[252]

Unsatisfied with the findings of the Commission, the plaintiffs initiated proceedings against five defendants, claiming breaches of the Fair Trading Act 1986,[253] the Securities Act 1978,[254] and a duty of care in tort.[255] The defendants included former directors of Feltex; former Feltex shareholder Credit Suisse First Boston Asian Merchant Partners LP; equity manager Credit Suisse Private Equity Inc; and First New Zealand Capital and ForBar, who both participated as joint lead managers of the IPO.[256]

The proceedings were initially filed in 2008 and were subject to a significant number of pre-trial considerations and determinations, including approximately 20 interlocutory applications.[257] Among the pre-trial matters considered was the manner in which any hearing would proceed. It was eventually determined that the matter would proceed by way of two separate hearings

[246] At [6].
[247] At [6].
[248] At [7].
[249] At [8].
[250] At [9].
[251] At [10].
[252] At [11].
[253] At [29] and [32].
[254] At [34].
[255] At [38].
[256] At [17].
[257] Nikki Chamberlain "Class Actions in New Zealand: An Empirical Study", above n 7, at 160.

(named "stage 1" and "stage 2" respectively). The stage 1 hearing was to involve the resolution of all issues that were common to Mr Houghton and the other claimants (as well as issues unique to Mr Houghton),[258] while the stage 2 hearing would involve the consideration of the individual aspects of all the other qualifying shareholders.[259]

The stage 1 hearing finally occurred in 2014, beginning in March 2014, some 6 years after the proceedings were initially filed. Ultimately the plaintiffs failed on all causes of action, with the High Court finding that while some criticisms of the prospectus had "some justification", none of the criticisms "made out material misleading content or omissions that would trigger liability [under the Securities Act 1978]".[260] Further, the Court found that given the relevant conduct was regulated by the Securities Act 1978, liability could not arise under the Fair Trading Act. Nor did a duty of care in tort arise between the Feltex directors and the investors in the IPO.[261]

The plaintiffs appealed the substantive judgment with some success. In particular, the Court of Appeal found that the prospectus did contain an untrue statement in respect of the revenue forecast for the 2004 financial year.[262] However, the Court found the plaintiffs could not prove the untrue statement was of sufficient "materiality" to trigger liability.[263] Further, the Court of Appeal found the High Court was wrong in finding that liability could not arise under the Fair Trading Act 1986 by virtue of the relevant conduct being regulated by the Securities Act 1978;[264] however, given the Court's conclusion that the 2004 financial year revenue forecast was "immaterial", it was found "the contention that the forecast caused loss is untenable".[265]

In a subsequent appeal to the Supreme Court, the Court upheld the Court of Appeal's findings and held the share prospectus did in fact contain a misleading and untrue statement.[266] However, the Court found that "materiality" was irrelevant when determining whether or not a statement

[258] *Houghton v Saunders* [2012] NZCCLR 31 (HC) at [9].
[259] At [11].
[260] *Houghton v Saunders*, above n 14, at [50].
[261] At [50].
[262] At [204].
[263] At [204]. Also see [69] for the Court's "materiality" test.
[264] *Houghton v Saunders* [2017] 2 NZLR 189 (CA) at [295].
[265] At [298].
[266] *Houghton v Saunders*, above n 234, at [231].

was untrue.[267] Accordingly, the Court found that the untrue statement in respect of the 2004 financial year revenue forecast was capable of causing loss, and the issue of whether the untrue statement did in fact cause loss was an issue to be dealt with at the "stage 2 hearing".[268] However, the proceedings did not ultimately progress to the "stage 2 hearing", as the plaintiff failed to provide security for costs for the hearing ($1.65 million) within the time period required.[269]

V. Findings from Case Analysis

The case analysis undertaken in this Chapter identifies some differences (and similarities) in the shareholder class-action experience in Australia, the United Kingdom, and New Zealand.

There are differences in the length of time it takes to obtain a judgment after the filing of proceedings. However, because the sample size (of proceedings) is small, it is difficult to draw any meaningful conclusions.

For what it is worth, the length of time is, on average, shorter in class proceedings in Australia than in United Kingdom. In Australia, judgment is obtained within about 4.5 years after filing.[270] In the United Kingdom, the Lloyds/HOBS litigation concluded 5 years and 4 months after filing.

New Zealand's two shareholder class-action proceedings involved experiences different from those in Australia and the United Kingdom. In *Hedley*, proceedings were completed in a relatively short time frame for a class action (a little over two years). However, the *Hedley* proceedings differed significantly from the other class actions examined in this paper (including in terms of breadth of issues and class size). Therefore, on some "Cost Efficiency" measures (such as the length of time proceedings took to obtain a Judgment), the shareholder experience in *Hedley* was probably skewed. The other proceedings examined involved a greater number of participants and were more complicated.

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[267] At [267].
[268] At [275].
[269] *Houghton v Saunders* [2019] NZHC 1362 at [90].
[270] It is noted one of the three class actions proceedings in Australia, *Crowley*, was concluded in about 5 years, a similar length to *Lloyds/HBOS* in the United Kingdom.

The *Feltex* High Court judgment was delivered six and a half years after the proceedings were originally filed. The proceedings also involved a number of interlocutory applications, dealing with procedural matters (among others). The length of the *Feltex* proceedings compared to the Australian and United Kingdom proceedings tends to suggest that class-action or group-litigation mechanism with clear rules and procedures, such as in Australia and United Kingdom, would improve the cost-efficiency of class-action proceedings in New Zealand.

The plaintiffs in the Australian and United Kingdom proceedings examined in this Chapter were funded by Litigation Funders. In New Zealand, only the plaintiffs in *Feltex* were funded by a Litigation Funder, not those in *Hedley*.

One similarity among all six class actions examined is that no representative plaintiff succeeded at trial. While the success (or lack thereof) is not strictly relevant to the cost-effectiveness of litigation proceedings themselves, the lack of successful class-action proceedings may cause shareholders to perceive class actions as ineffective for enforcing shareholder rights. It may also affect the attitude of companies and directors toward shareholders, as will be discussed further in this Chapter.

The lack of success on the part of representative plaintiffs arguably gives credence to the oft-cited criticism that class actions encourage meritless litigation. However, it is significant that while none of the representative plaintiffs in the proceedings examined was successful at trial, at least two of the representative plaintiffs had some success on appeal.

In particular, in *Feltex*, the Supreme Court held the share prospectus in that case *did* contain an untrue statement in relation to the forecast revenue for the 2004 financial year, unlike the High Court. Further, the Supreme Court found the "materiality" of the statement was irrelevant when determining whether it was "untrue". The Court remitted the proceedings back to the High Court, to determine causation and loss at the previously agreed "stage 2" of hearings.

However, despite the Court remitting the proceedings, the "stage 2" hearing did not go ahead, and as a result, the proceedings did not yield any financial return for the aggrieved shareholders.

Rather, the proceedings were struck out in 2019, some 11 years after the proceedings were initiated, due to the plaintiff being unable to provide security for costs.[271]

VI. Assessing the "Regulatory Effect" of Shareholder Class Actions in Australia, the United Kingdom and New Zealand

The "Regulatory Effect" of shareholder class actions will be examined through an analysis of secondary sources available on the topic of shareholder class actions in each jurisdiction, focusing on the following factors:

(a) Evidence that changes in board behaviour have occurred, or are occurring, that have the effect of promoting the interests of shareholders and lowering the risk of litigation and regulator action; and

(b) Evidence of any factors that may drive such general change in board behaviour as in (a) in the future, including the development of a litigation-funding industry, prospective class actions (or threatened class actions) and any action taken by directors and officers ("D&O") insurance providers in response to shareholder class actions.

A. The "Regulatory Effect" of Shareholder Class Actions in Australia

The proliferation in class actions against companies has contributed to an increase in attention and scrutiny on class actions and litigation funding. Indeed, the Australian class-action statutory regime and litigation-funding industry have recently been subject to various government inquiries.[272] These inquiries precipitated submissions by a wide range of individuals and groups—including law firms, litigation funders, industry groups and professional associations—on the operation of the class-action regime and litigation-funding industry. It has also been

[271] *Houghton v Saunders* [2021] NZSC 38 at [14] and [16].
[272] Parliamentary Joint Committee on Corporations and Financial Services (Australia) *Litigation funding and the regulation of the class action industry*, above n 142. See also David Crowe "New rules for litigation funders after jump in class actions" *The Sydney Morning Herald* (online ed, Sydney, 22 May 2020), which records that there was a "325 per cent rise in class actions in the Federal Court over the past decade".

observed that shareholder class actions, including the threat of a class action, had the overall effect of decreasing returns for shareholders, reducing share prices, and otherwise adversely impacting shareholder interests.[273]

This adverse impact on shareholder interests is a result of a number of factors. One factor is the "risk averse" nature of Australian boards. It has been suggested the rise in shareholder class actions has resulted in boards becoming more risk averse [in their decision-making]".[274] Directors now have a "heightened sense of personal risk [of being named in a class action]".[275] This risk-averse behaviour on the part of boards is a concern noted by the Australian Parliamentary Joint Committee on Corporations and Financial Services, which recorded in its 2020 report that:[276]

> "A culture of risk-averse decision-making across Australian boards is a further adverse outcome of shareholder class actions, with harmful long-term impacts on economic growth, job creation and investors' returns on equity".

Further, it has been observed that the increased risk of personal liability may dissuade individuals from becoming directors of larger companies, these individuals including senior industry leaders such as former chief executives.[277] In addition to the increasing boards' "risk aversion", shareholder class actions have been blamed for driving up the cost of D&O insurance in recent years, to such an extent that premiums are now unaffordable for some directors.[278] These increases in D&O costs also create a barrier to individuals either joining boards of large companies or continuing to serve as directors in such companies.

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[273] See Parliamentary Joint Committee on Corporations and Financial Services, above n 142, at [17.23]–[17.24] and Peter Cashman and Amelia Simpson "Class Actions and Litigation Funding Reform: The view of Class Action Practitioners" (Research Paper 3, University of New South Wales, 2020) at [1.13].
[274] Australian Institute of Company Directors "The growing impact of rising shareholder class actions" (27 September 2018) <www.companydirectors.com.au>.
[275] Michaela Healey "The dark side of class actions" *Australian Financial Review* (online ed, Sydney, 27 July 2020).
[276] Parliamentary Joint Committee on Corporations and Financial Services (Australia) *Litigation funding and the regulation of the class action industry*, above n 142, at [17.119].
[277] Michaela Healey "The dark side of class actions", above n 275.
[278] Ronald Mizen "Class actions making directors' insurance unaffordable" *Australian Financial Review* (online ed, Sydney, 27 July 2020) and Michaela Healey "The dark side of class actions", above n 275.

Australia operates a sophisticated third party litigation funding market.[279] It is estimated the litigation funding market earned approximately A$173.5 million in the 2020–2021 financial year, with projected growth of 4.1 per annum over the next five years from 2022.[280] Australian Litigation Funders are subject to consumer protection laws which prohibit unfair contract terms, unconscionable conduct and misleading and deceptive conduct, as well as other general regulatory requirements under legislation such as the Corporations Act 2001.[281]

B. The "Regulatory Effect" of Shareholder Class Actions in the United Kingdom

In recent years, there has been an increase in the number of class-action proceedings pursued in the United Kingdom. Since the introduction of group litigation orders in 2000,[282] 109 group litigation orders have been issued in the United Kingdom; however, only one such order has related to a claim made by shareholders against directors and/or a company [283] (*Lloyds/HBOS* litigation). It is unclear how many claims have been pursued through the representative-action procedure under Rule 19.6 of the Civil Procedure Rules 1998.

While *Lloyds/HBOS* was the only shareholder class action to reach trial in the United Kingdom, the United Kingdom has experienced a gradual increase in the number of class actions being initiated in the past several years. This included a shareholder class action against Tesco. This action was brought by shareholder groups under financial-markets legislation for losses suffered in reliance on an untrue or misleading statement and/or a dishonest omission from public disclosures.[284] However, that dispute was settled out of court prior to proceeding to trial.

The increase in availability of litigation funding has been identified as having directly contributed to the proliferation of class actions in recent years.[285] The growth of the litigation-

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[279] Jason Geisker and Dirk Luff "The Third Party Litigation Funding Law Review: Australia" *The Law Reviews* (8 December 2022) at "Market Overview".
[280] IBISWorld *Litigation Funding in Australia* (June 2022) at 9.
[281] Jason Geisker and Dirk Luff "The Third Party Litigation Funding Law Review: Australia", above n 279, at "Legal and Regulatory Framework".
[282] Rule 9, The Civil Procedure Amendment Rules 2000.
[283] GOV.UK "Group litigation orders" <www.gov.uk>.
[284] DAC Beachcroft "Tesco Shareholder Litigation settles: a sign of the complexities of bringing securities class actions under s 90A FSMA?" <www.dacbeachcroft.com>.
[285] CMS *European Class Action Report 2021* (2021) at 9.

funding industry in the United Kingdom is demonstrated by the rapid growth in assets managed by litigation funders: in 2009, these assets were valued at approximately 180 million; however, by 2021, this total had increased to 2 billion.[286]

In 2011, the Code of Conduct for Litigation Funders (the "Code") was introduced by the Association of Litigation Funders of England and Wales ("ALF"),[287] an independent body charged by the United Kingdom Ministry of Justice to provide self-regulation of litigation funding in England and Wales.[288] The Code was introduced in response to the growth in the litigation-funding industry, particularly to alleviate concerns around the ability of litigation funders to influence and control litigation.[289] The Code has been updated a number of times since its inception, with the latest version being adopted in January 2018.

The Code provides a number of protections for class-action litigants. This includes (among other things) a provision requiring a funder to "not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties".[290] In addition, the Code requires funders to not "seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder".[291] The Code does not, however, completely protect class-action litigants who access litigation funding. Membership of ALF and, accordingly, submission to the terms of the Code is voluntary, so its protection does not extend to those litigants who obtain funding from non-ALF members. As was noted by Shoult and Latham, most (if not all) instances of courts taking issue with the approach of litigation funders have involved litigation funders not belonging to ALF.[292]

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[286] Ben Edwards "UK litigation funding market doubles in three years as pipeline of cases builds up" *The Global Legal Post* (28 April 2021).

[287] Association of Litigation Funders of England and Wales "Code of Conduct for Litigation Funders" (January 2018) <associationoflitigationfunders.com>.

[288] Association of Litigation Funders of England and Wales "Who We Are" <www.associationoflitigationfunders.com>.

[289] See Jackson LJ "Third Party Funding or Litigation Funding" (Sixth Lecture in the Civil Litigation Costs Review Implementation Programme, The Royal Courts of Justice, London, 23 November 2011) at 3.3, where Jackson LJ noted his concern for a "funder's ability to influence the litigation and any settlement negotiations" and that the Code meets this concern, among others, "to a reasonable extent".

[290] Association of Litigation Funders of England and Wales "Code of Conduct for Litigation Funders", above n 287, at Clause 9.2.

[291] At Clause 9.3.

[292] Natasha Shoult and Simon Latham "The Third Party Litigation Funding Law Review: United Kingdom – England & Wales" (10 January 2021) The Law Reviews <www.thelawreviews.co.uk>.

C. The "Regulatory Effect" of Shareholder Class Actions in New Zealand

At the time of writing, a number of shareholder class actions have been publicly initiated, planned, or mooted. These include the proposed class action against the failed company CBL Corporation Ltd, relating to false or misleading statements made in the company's initial public offering ("IPO") documents and ongoing breaches of continuous disclosure obligations;[293] as well as the threatened class action against Fonterra for a collapse in the value of its shares as a result of a proposed capital restructuring by the company.[294]

Although the volume of class actions (and shareholder class actions in particular) remains very low in New Zealand, directors in New Zealand are, according to recent studies, becoming increasingly wary about their risk and liability. For example, in a survey by the Institute of Directors in 2020, 40% of directors surveyed stated that the scope of director responsibilities in 2020 would be more likely to deter them from taking on governance roles than 12 months before, and 47% stated that they were more cautious in decision-making due to increased personal liability.[295]

D. Findings from assessment of the "Regulatory Effect" of shareholder class actions

It is clear that class actions have, and will likely continue to have, some effect on board behaviour. Most significantly, in Australia class actions appear to have influenced a shift to more risk-averse decision-making among boards. Some commentators have attributed this shift in behaviour to being as a result of the heightened personal risk in a director being involved in being identified in a class action and liability exposure.

It appears behaviour in the United Kingdom and New Zealand has not been affected by shareholder class-actions to the same extent as in Australia. This may well be due to the comparatively limited exposure companies and directors in those jurisdictions have had to

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[293] CBL Class Action "About" <www.cblclassaction.co.nz>.
[294] Andrea Fox "Dive in Fonterra share value sparks action from dismayed large shareholder" *The New Zealand Herald* (online ed, Auckland, 24 June 2021).
[295] Institute of Directors New Zealand *Director Sentiment Survey 2020* at 23.

shareholder class-action litigation, although it is noted there has not been a significant investigation into the impact of shareholder class actions in United Kingdom or New Zealand as has occurred in Australia.

Chapter Three: The Future of Group Litigation for Shareholders in New Zealand

I. A New Class Action Statutory Regime

On 27 June 2022 the Law Commission published its final report on Class Actions and Litigation Funding law reform ("the Law Commission Report").[296] The Law Commission recommended the introduction of a Class Actions Act "as the principal source of class actions law".[297] In particular, the Commission recommended the courts provide oversight over litigation funding arrangements. Further, the Commission recommended the High Court Rules and the Rules of Conduct and Client Care for Lawyers be amended to ensure greater transparency of litigation funding arrangements, and to clarify how conflicts of interest situations should be avoided and managed in funded proceedings.[298]

The Law Commission crystallised its recommendations in the "Draft Class Actions Legislation" at Appendix 1 of its Report,[299] a proposed bill which sets out a number of substantive provisions recommended for inclusion in the final Class Actions Act. The Law Commission's proposed Class Actions legislation has the following key features:

(a) Class actions are to be commenced in the High Court.[300]

The draft legislation provides a person (or more than one person) may commence a class-action proceeding on behalf of a class if all the claims made by the members of the class raise a common issue.[301] A State entity may also commence a class-action proceeding.[302]

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[296] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding*, above n 13.
[297] At iv ("Foreword").
[298] At 389–390.
[299] At 466 ("Appendix 1 – Draft Class Actions Legislation").
[300] At 466 ("Section 1 – Commencement of class action in High Court").
[301] At 466 ("Section 1(1)").
[302] At 466 ("Section 1(3)").

(b) Class-action proceedings must be certified.[303]

When a class-action proceeding is commenced, it must be accompanied with an application for an order certifying the proceeding. The Commission suggested the certification requirement was appropriate given the "significant burden" class actions place on defendants and the court system, as well as the fact class actions are "usually expensive and lengthy".[304] The Commission considered the overall benefits of the certification process outweighed its disadvantages, these disadvantages including increased cost and delay for parties and increased difficulty in initiating a class action.[305] Further, the Commission noted the certification requirement "may deter meritless or vexatious class actions"; however, its view was that the risk of such class actions was "relatively low" given the cost of class actions and the risk of being ordered to pay costs.[306]

(c) The court is to certify class actions in accordance with an established set of statutory criteria.[307]

The draft legislation provides for a number of factors which the court must be satisfied with before certifying a class-action proceeding. For example, the proceeding must disclose "[one] or more reasonably arguable causes of action", and the "opt-in or opt-out mechanism" that is proposed for a proceeding must be appropriate for determining class membership in the circumstances of that proceeding.

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[303] At 467 ("Section 3 – Application for certification of class action").
[304] At 151 – [6.10].
[305] At 151 – [6.12]. The Commission noted that if there was no certification process then the proposed elements of the certification process may need to be decided in multiple interlocutory applications instead. The Commission pointed to the comments of one consultation workshop participant who stated in Australia (which as discussed earlier in this paper does not have a certification requirement in its class action regime) plaintiffs could be "tortured in a drip feed fashion", with issues "being dragged out over a long period rather than being resolved at one certification hearing".
[306] At 151 – [6.10].
[307] At 467 ("Section 4 – Certification of class action").

(d) Class action proceedings can be commenced concurrently.[308]

The draft legislation provides that a concurrent class-action proceeding – that is a class-action proceeding that (1) involves the same or substantially similar issues as contained in another class-action proceeding before the Court and (2) has at least one defendant in common [309] – can be commenced. However, it must be filed within 90 days of the date notice is given of the first of the concurrent class-action proceedings on the "Class Actions Register"; or at later time if leave is given by the Court.[310]

Certification of concurrent class-action proceedings must be considered by the court at the same time.[311] The court has discretion as to whether all concurrent proceedings should be certified or whether some or only one concurrent proceeding should be certified.[312] Where more than one concurrent proceeding is certified, the court has a wide discretion as to further orders in relation to the management of those proceedings.[313]

(e) A representative plaintiff must apply to the court for approval of the plaintiff's litigation-funding agreement.[314]

The draft legislation provides that a representative plaintiff must apply to the court for approval of a litigation-funding agreement and that the agreement is enforceable by a litigation funder if the agreement is approved by the court.[315] The court must not approve a litigation-funding agreement unless the court is satisfied the representative plaintiff "received independent legal advice" on the agreement and the agreement is "fair and reasonable".[316] The legislation provides for a number of factors the court may consider in determining whether a litigation-funding agreement is "fair and reasonable", including

[308] At 468 ("Section 5 – Commencement of concurrent class actions").
[309] At 468–469 ("Section 5(2)").
[310] At 468 ("Section 5(1)").
[311] At 469 ("Section 6(1)").
[312] At 469 ("Section 6(2)").
[313] At 469 ("Section 6(4)").
[314] At 469 ("Section 7 – Litigation funding agreements").
[315] At 469–470 ("Section 7(2)").
[316] At 470 ("Section 8(1)").

(1) the circumstances in which the litigation funder can terminate the agreement, (2) the dispute resolution process under the agreement, and (3) "any other matters the court considers are relevant".[317]

(f) The court has a wide discretion as to the assessment and award of any aggregate monetary relief.[318]

The draft legislation provides a court may make an assessment as to any aggregate monetary relief to which a class is entitled provided it is satisfied it can make a "reasonably accurate assessment of that amount".[319] The court may also make "any orders" for the distribution of any award for aggregate monetary relief, including approving the process for class members to establish their entitlement to a share in the award [320]

(g) Class action settlements are not binding unless approved by the Court.[321]

The draft legislation provides a class-action proceeding settlement is not binding until it is approved by the court. The court must approve a class-action settlement if it is satisfied the settlement is "fair, reasonable, and in the interests of the class".[322] In determining whether a settlement is "fair, reasonable, and in the interests of the class", the Court must take into account a number of factors including (1) the "terms and conditions of the proposed settlement",[323] (2) "the legal fees and funding commission that may be deducted from the relief payable to class members", [324] (3) any information available to the court about "the potential risks costs, and benefits of continuing with the

[317] At 470 ("Section 8(2)").
[318] At 471 ("Section 10 – Aggregate assessment and distribution of monetary relief").
[319] At 471 ("Section 10(1)").
[320] At 471 ("Section 10(4)(c)").
[321] At 472 ("Section 12 – Settlement").
[322] At 472 ("Section 14 – Approval of settlement").
[323] At 472 ("Section 14(a)").
[324] At 473 ("Section 14(b)").

proceeding",[325] (4) the "views of class members" and "any steps taken to manage potential conflicts of interest",[326] and (5) "any other factors it considers relevant".[327]

(h) The Court has jurisdiction to oversee the administration and implementation of a class action settlement it approves.[328]

The draft legislation provides the court with a wide range of powers to ensure the implementation of any settlement it approves, including the appointment of an administrator to implement the settlement [329] and "any other order it considers appropriate for the administration and implementation of the settlement".[330]

II. Will the proposed Class Actions Act ensure class actions are an accessible and cost-effective mechanism for shareholders seeking to enforce their rights?

On its face, the Law Commission's proposed Class Actions Act will improve accessibility for shareholder litigants seeking to enforce their rights against directors or a company through class-action proceedings. It does this primarily by providing clarity in the class-action proceeding process. As discussed earlier in this paper, there were few rules regarding the application of Rule 4.24 of the High Court Rules, which has to date been utilised by litigants to pursue class-action-type litigation in New Zealand. The Class Actions Act, if enacted as proposed, should give greater procedural certainty to parties engaging in class-action litigation.

The provisions for court oversight of litigation-funding arrangements provide some protection to shareholder litigants in terms of ensuring the litigation funding arrangements are fair and reasonable. In particular, the requirement for court approval of litigation-funding agreements addresses concerns identified in other jurisdictions (and discussed earlier in this paper) around ensuring litigants maintain control over the instruction of lawyers as well as the direction of the

[325] At 473 ("Section 14(c)).
[326] At 473 ("Sections 14(d)-(e)).
[327] At 473 ("Section 14(f)").
[328] At 474 ("Section 16").
[329] At 474 ("Section 16(2)").
[330] At 474 ("Section 16(3)").

class-action proceeding. The requirement for court approval also addresses concerns held around ensuring shareholder litigants receive a reasonable return from any proceeds awarded as part of a successful claim.

In addition, the enactment of a statutory Class Action regime may in itself have positive effects on shareholders. For instance, the introduction of the Class Action regime which outlines a clear process to initiate group litigation may have a "chilling" effect on directors' conduct and ensure directors are more cognizant of shareholders' rights and properly executing their legal duties and avoiding any situations where shareholders may have grounds to take legal action against directors for any infringement of their rights. As discussed in Chapter One, the existence of shareholder class actions directly affected board behaviour and board decision-making.[331]

A key feature of the proposed Class Actions Act is the requirement for class-action proceedings to be certified. This is consistent with the law in the majority of other jurisdictions where class-action regimes are in place (with the notable exception of Australia). The proposed Class Actions Act provides "a court must certify a proceeding as a class action proceeding if it is satisfied that":[332]

(a) the proceeding discloses [one] or more reasonably arguable causes of action; and
(b) there is a common issue of fact or law in the claim of each member of the proposed class; and
(c) there is at least [one] representative plaintiff that is suitable and will fairly and adequately represent the class; and
(d) a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members; and
(e) the opt-in or opt-out mechanism proposed for the proceeding is an appropriate means of determining class membership in the circumstances of the proceeding.

There will inevitably be additional costs to shareholders as a result of the certification procedure, including in terms of making an application for certification as well as the holding of a certification hearing. The risk of certification causing additional cost and delay to litigants is

[331] See, for example, Australian Institute of Company Directors, at 274.
[332] Section 4, Class Actions Act (Draft), Appendix 1.

specifically acknowledged by the Commission.[333] However the Commission's position is that such concerns are outweighed by the benefit of the certification. The Commission also noted the risk in not having a certification procedure, including the prospect of issues considered at certification being dealt with by way of multiple interlocutory applications instead.[334]

The Australian class-action regime, which does not have a certification procedure but rather allows representative plaintiffs to initiate class action proceedings "as of right", has been criticised in this respect. For instance, Mulheron suggested many of the interlocutory applications filed in Australian class action proceedings would not occur if there were a preliminary hearing dealing with "certification" issues.[335] Given the Australian experience, it is arguable that even without a certification procedure, there will likely be delays caused by procedural challenges to (among other things) the reasonableness of the causes of action argued and the definition of the class.

III. Representative actions under the Companies Act – a viable alternative group litigation procedure for shareholders?

As mentioned earlier in this paper, the Companies Act 1993 specifically provides for a group litigation mechanism for shareholders under a "representative actions" provision. That provision states:[336]

> Where a shareholder of a company brings proceedings against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject matter of the proceedings, the court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest, and may, for that purpose, make such order as it thinks fit including, without limiting the generality of this section, an order –

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[333] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding*, above n 13, at 151 – [6.12].
[334] At 151 – [6.12].
[335] Rachael Mulheron "Justice Enhanced: Framing an Opt-Out Class Action for England" (2007) 70(4) MLR 550 at 568.
[336] Companies Act 1993, s 173.

(a) as to the control and conduct of the proceedings:
(b) as to the costs of the proceedings:
(c) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

The "representative actions" provision at s 173 has been rarely utilised, if at all, since its enactment. It was briefly referred to in the Law Commission Report in summary of other existing statutory group-litigation mechanisms, including under the Health and Disability Commissioner Act 1994, Human Rights Act 1993, and Privacy Act 2020.[337] The Commission considered these alternative mechanisms were "insufficient for contemporary Aotearoa New Zealand" and "some are more suitable where there is a small number of claims (such as a joinder of plaintiffs)".[338] However, the Commission did not make any further comment on the provision, nor did it make any recommendation as to its amendment or repeal. To date the government has provided no advice or indication as to whether it intends to amend the Companies Act 1993 in light of the Law Commission Report. Therefore, s 173 will presumably remain in force if the Law Commission's recommendations are adopted by Parliament and the proposed Class Actions legislation enacted.

If the Commission's proposed Class Actions Act is enacted, the issue of proceedings pursuant to a "representative action" under s 173 (as opposed to a class action) may be perceived to be advantageous to shareholders in some circumstances. The circumstances may include when the proceedings involve a relatively small group of shareholders or when there is an appetite among shareholder litigants to circumvent the prescriptive rules under the Class Actions Act, such as the requirement to obtain certification, which may be viewed as being cost prohibitive. The main disadvantage in pursuing a representative action under s 173 (as opposed to a class action) is that the claimants will lose the protections the Class Actions legislation will provide. This includes the provisions in relation to the oversight of litigation funding arrangements designed to ensure such arrangements are fair and reasonable, as well as ensuring the enforcement of any settlements.

[337] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding*, above n 13, at 52 – [2.21].
[338] At 63 – [2.78].

With class-action and litigation-funding reform now more or less inevitable, it is the opinion of the author that Parliament should also take the opportunity to review other group-litigation procedures in place and determine whether any amendments need to be made to those procedures to ensure they are appropriate and fit for purpose. In respect of the "representative action" at s 173 of the Companies Act, it is the author's view that this section should be amended to provide for an effective alternative group litigation mechanism for shareholders. This amended s 173 representative action procedure will complement the new class-action regime. In addition, the amended s 173 procedure will enable shareholders to more easily, and more cost-effectively, pursue Companies Act breaches against directors and companies, reducing agency costs and ensuring directors act in the best interests of shareholders.

IV. Section 173 of the Companies Act 1993 should be amended

A. The case for reform

While the proposed class-action legislation improves shareholders' access to justice and the ability for shareholders to take collective action against directors, the need for shareholders to have accessible and cost-effective remedies available to them to monitor the performance of directors and companies is underlined by the nature of the relationships that exist within the corporate model, namely the relationship between shareholders and directors. As discussed in Chapter One, that relationship has been described as being akin to an "agency relationship" where directors act as the "agent" of shareholders. That agency relationship arises as a direct consequence of the separation of ownership and management of the company between shareholders and directors respectively and the inherent tension between the interests of those two corporate participants. Shareholders are interested in maximising their wealth and return from the company, while directors– who are charged with managing the company to advance the interests of shareholders and maximise their returns– are in a position where they are better informed as to the company's commercial position and prospects and therefore able to pursue their own interests without incurring significant risk.

In Chapter One, shareholder litigation was identified as a useful method of monitoring director performance and ensuring directors are properly exercising their duties lawfully and in the best interests of the shareholders – in terms of both disciplining directors for wrongful behaviour actually committed and acting as a deterrent against wrongful behaviour. The Commission's proposed class-action law reform will benefit shareholders by making initiating group litigation via class action proceedings easier and improving access to justice. However, as will be outlined in the sections below, it is the author's view that further changes could be made to the existing representative-action procedure under the Companies Act 1993 that would ensure shareholders are in a better position to protect their rights. Such changes would not undermine the class-action regime proposed by the Law Commission but, rather, complement it.

In addition to enacting the class-action legislation recommended by the Law Commission – a measure which the author would support – Parliament should also make changes to s 173 of the Companies Act 1993 to provide an effective "bespoke" group litigation procedure specifically for shareholders. This would be an alternative to group litigation under the class-action regime or the representative action procedure at Rule 4.24 of the High Court Rules 2016. The changes to s 173 would not only improve shareholders' access to justice, but reduce agency costs with respect to monitoring and disciplining directors. However, at present s 173 is not a viable alternative group litigation mechanism, as there are no specific rules (statutory, procedural, or otherwise) which detail how s 173 is to be applied, or how claims under s 173 are to be pursued or managed. In order for s 173 to be a viable alternative to the new class-action or representative action procedure, it is suggested the following amendments be made to s 173.

It is proposed that s 173 of the Companies Act 1993 be amended to allow a shareholder (or former shareholder) to initiate group ligation without the need to obtain approval from the High Court or certify that claim through a certification procedure with respect to any claim initiated pursuant to the statutory "personal" action available to shareholders against a director or a company under ss 169 to 176 of the Companies Act 1993. Those statutory "personal" actions reserved for shareholders include the ability for shareholders or former shareholders to bring an action against a director or a company for a breach of a duty owed by him or her as a

shareholder,[339] an action requiring directors or a company to take an action "that is required to be taken" under the constitution of the company or the Companies Act 1993,[340] and an action for the "prejudiced shareholder" remedy.[341]

The duties that the Act specifically enables shareholders to pursue "personally" against directors are important and directly relate to the ability of a director to discharge their duties in the best interests of the company (and accordingly shareholders). The duties directors owe specifically to shareholders are expressly defined in s 169 of the Companies Act 1993:[342]

(a) Section 90 (which relates to the duty to supervise the share register); and
(b) Section 140 (which relates to the duty to disclose interests); and
(c) Section 148 (which relates to the duty to disclose share dealings).

There are also a number of duties that are not specifically provided for under the Companies Act 1993 that could arguably be enforced by shareholders through a "personal action" under s 169(1). These include the following:[343]

- The obligation to respect the pre-emption rights of existing shareholders by offering newly issued, equal-ranking shares to such shareholders;
- The obligation not to take action that affects the rights attached to shares without first obtaining a special resolution of the relevant interest group;
- The obligation not to discriminate against particular shareholders and to treat shareholders equally and fairly when the company is offering to acquire its own shares or redeem its shares;
- The obligation to call a special shareholders' meeting when requested by a shareholder; and
- The obligation to comply with the minority buy-out procedures in the event that these are triggered.

Section 174 is wider in scope and allows a shareholder claimant (or former shareholder) to take an action against a director or company where the affairs or acts of a company "have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial" to the claimant. As mentioned earlier in this paper, the behaviour the remedy is directed at is any "conduct of the company which is unjustly detrimental [to any shareholder] whatever form it

[339] Companies Act 1993, ss 169(1) and 171 being "personal actions by shareholders against directors" and "personal actions by shareholders against company" respectively.
[340] Sections 170 and 172 being "actions by shareholders to require directors to act" and "actions by shareholders to require company to act" respectively.
[341] Section 174.
[342] Section 169(3).
[343] See Peter Watts *Directors' Powers and Duties* (3rd ed, LexisNexis, Wellington, 2022) at 410 for further discussion on which duties could arguably be enforced by shareholders.

takes".[344] In addition, the statute provides failure to comply with specific sections of the Act is deemed to be unfairly prejudicial for the purposes of the oppression remedy at s 174, in particular:

(a) Section 45 (which relates to pre-emptive rights to the issue of shares):
(b) Section 47 (which relates to the consideration for which shares are issued):
(c) Section 53 (which relates to dividends):
(d) Section 60 (which relates to offers by a company to acquire its own shares):
(e) Section 61 (which relates to special offers to acquire shares):
(f) Section 63 (which relates to stock exchange acquisitions subject to prior notice to shareholders):
(g) Section 65 (which relates to stock exchange acquisitions not subject to prior notice of shareholders):
(h) Section 76 (which relates to the provision of financial assistance by a company to acquire its own shares):
(i) Section 78 (which relates to special financial assistance):
(j) Section 80 (which relates to financial assistance not exceeding 5% of shareholders' funds):
(k) Section 117 (which relates to the alteration of shareholder rights):
(l) Section 129 (which relates to major transactions).

The amended "representative action" procedure should provide a claimant may initiate group litigation as of right and on an opt-out basis. Allowing shareholder claimants to initiate litigation "as of right" under s 173, on an opt-out basis, rather than seeking approval under Rule 4.24 or having a claim certified under the new class-actions regime, is appropriate for shareholder claims under the Companies Act proceedings. This is because the "personal" actions specifically provided for shareholders under the Act relate to wrongs committed by directors and/or the company that, by and large, affect the interests of a group, if not all, shareholders. For example, a breach of, say, s 140 by a director (as a result of failing to disclose their interest in a transaction or proposed transaction in the company) is a matter that affects all shareholders in the company, as such conduct relates to the ability of a director to discharge their fundamental duty of loyalty and good faith to the company as well as their ability to act in the best interests of the company (and, accordingly, the shareholders). Similarly, a breach of, say, s 129 by the company by failing to obtain approval of a major transaction by way of a special resolution, is a matter that affects all shareholders. This is because a major transaction involves more than half a company's assets and will likely have significant implications on the company's ability to generate wealth and provide a return to shareholders.

[344] *Thomas v H W Thomas Ltd*, n 57, at 693.

The proposed changes to the "representative action" procedure in s 173 of the Companies Act 1993 allows shareholders to take collective action more easily under the Act at a lower cost, thus reducing agency costs. This is because class actions allow litigations to pool financial resources or access litigation funding, which eases the financial burden of litigation on all claimants involved. In addition, collective shareholder litigation may be more persuasive in inducing settlement than litigation brought by an individual, given the greater potential for exposing a director or company defendant to liability. Further, the mere existence of the amended "representative action" procedure would provide an additional deterrent against directors (and companies) engaging in behaviour that might infringe on shareholders' rights.

B. The proposed changes to s 173 of the Companies Act

Section 173 should be amended to distinguish the Companies Act "representative action" procedure from the class-action procedure. To that end s 173 ought to state that the mechanism under the relevant section should not be used where a proceeding could be more appropriately brought as a class action. The Law Commission has recommended Rule 4.24 of the High Court Rules and District Court Rules be amended similarly.[345]

Rather than what is effectively a replication of Rule 4.24 of the High Court Rules, s 173 should provide for an alternative procedure for shareholders to conduct group litigation under the Companies Act 1993. Accordingly, s 173 should be amended to provide a shareholder or other person entitled to bring a "personal action" under ss 169 to 176 of the Companies Act may bring that "personal action" as a "representative action" pursuant to s 173 on behalf of one or more shareholder or other entitled person ("the group"). The conditions for bringing a representative action under s 173 should be similar to the conditions set out in Australia's federal representative-proceedings provisions,[346] namely:

[345] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding*, above n 13, at 77 – [2.140].
[346] See Federal Courts of Australia Act 1976 (Cth), s 33C.

(a) [one] or more other shareholder, former shareholder or entitled person has the same claim against the company.
(b) The other shareholder's and/or entitled person's claim relate to or arise out of the same circumstances; and
(c) The claim of that shareholder and/or entitled person give rise to a common issue of law or fact.

Further, an amendment should be made to make clear the court has the discretion to make "any order as it thinks fit" regarding the management of the representative proceedings (which any shareholder or entitled person may initiate *"as of right"* provided they meet the qualifications under s 173). The orders would include any order:

(a) as to the control and conduct of the proceedings:
(b) as to the costs of the proceedings:
(c) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

As discussed, shareholders should be entitled to pursue "representative actions" under s 173 (on an opt-out basis) without the need to obtain approval from the Court to do so. To that end, s 173 should be amended to state the consent of a group member is not required for a representative plaintiff to initiate proceedings under s 173 on the member's behalf.

However, s 173 should contain a specific provision obligating a representative plaintiff to notify group members proceedings have been issued (through, for example, the service of proceedings on group members or, if individual service is not possible, other reasonable means), together with a provision stating group members may "opt-out" of the proceedings by a certain date (either a fixed date, such as 40 working days from the date of the proceedings were filed, or a date determined by the Court).

In addition, s 173 should provide for the same protections with respect to the settlement of class action proceedings, including the approval of any settlement, and in the event of litigation funding, the approval of litigation-funding agreements proposed under the draft class-actions legislation should apply to proceedings initiated under s 173. A shareholder group pursing litigation under s 173 has the same vulnerabilities as litigants pursuing a class action, such as being involved in a litigation funding arrangement that gives an excessive level of control to litigation funders or which does not provide an adequate return to class members. It is

appropriate that those same mechanisms should be imported into the s 173 procedure to ensure the interests of shareholders pursuing a claim under s 173 are protected.

C. The proposed amendment to s 173 will not undermine the new class-action regime

A key criticism of the proposed amendment to the "representative action" procedure in s 173 could be that the amendment will result in a second class-action procedure which will undermine the regime proposed by the Law Commission. In the author's view the proposed amendment will not do this.

First, the amendments to the "representative action" procedure will apply only to a very narrow group of litigants, namely shareholders, former shareholders, and other "entitled persons".[347] There will be no wholesale access to the procedure by litigants other than those specifically entitled to pursue remedies under the Companies Act 1993.

Second, the proposed Class Action Act is intended to be the "principal source of class actions law"[348] only, and the class action procedure is not expressly intended to be the exclusive procedural mechanism for all group litigation or collective action. This is evident given the Law Commission has recommended the "representative action" procedures under the High Court Rules and District Court Rules be retained, albeit with amendments, to ensure courts do not make representative orders where a class action would be more appropriate. Further, while the Law Commission criticised the s 173 "representative action" procedure and other class action-type mechanisms provided in other enactments,[349] the Law Commission made no specific recommendation to repeal those mechanisms. Accordingly it appears the Law Commission intends the new Class Action Act will sit alongside other existing procedural mechanisms for group litigation, not supplant them.

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[347] "Entitled person" is defined as being "a shareholder" and "a person upon whom the constitution confers any of the rights and powers of a shareholder". See Companies Act 1993, s 2.
[348] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding*, above n 13, at 63 – [2.74].
[349] See Privacy Act 2020, s 97(6); Human Rights Act 1993, s 92B(2); and Health and Disability Commissioner Act 1994, s 50(3).

Third, there are a number of circumstances where pursuing litigation as a class action, as opposed to a "representative action" under the proposed amended s 173, would be appropriate. Those circumstances include where, for example, shareholders allege a company or its directors breached the Fair Trading Act 1986 by making false or misleading representations in its annual report and thereby induced the shareholders into purchasing shares in that company, causing the shareholders loss as a result. In that case, it would be more appropriate for shareholders to initiate group litigation as a class-action proceeding than a "representative action" under s 173. This is because there may be difficulties in showing there is a common issue among all class members. For example, the representative plaintiff could propose the class be defined as purchasers of shares from "Date X to Date Y" being after the issue of the Annual Report which contained the alleged false or misleading representation. But a potential issue with the proposed class is that it is not clear whether all members of the class relied upon the alleged false or misleading representation in purchasing the shares. Given those potential difficulties, it may be beneficial for the claim to be subject to the certification process to assist in determining the common issues and defining class members. Otherwise if the claim was advanced under s 173, it may be subject to a strike-out application by the defendants, which would prolong the proceedings and increase costs to shareholders.

In contrast, a shareholder who seeks to pursue a collective action on behalf of all shareholders for the failure of directors to properly obtain approval from at least 75% of shareholders pursuant to s 129 of the Companies Act 1993 before, for example, concluding a contract to sell over half the companies' assets can clearly show there is a common issue of fact or law – the directors' failure to comply with s 129 potentially affects all shareholders as it involves a breach of the Companies Act 1993, but also is an interference with all shareholders' legal and economic interests in the company.

D. Alternatives to the proposed amendments to s 173 of the Companies Act

Given the inevitable reform of the law of class actions and group litigation in New Zealand, it is appropriate to evaluate the representative-action mechanism in s 173 and mechanism's position within the emerging range of options available to litigants to pursue collective litigation. Accordingly, in the author's view, to simply leave the s 173 mechanism as it is (which the Law

Commission, given its silence on the issue, appears to favour) will not be adequate, particularly if Parliament ultimately implements the Law Commission's recommendations in full and introduces the Class Actions Act as drafted.

At the very least, s 173 should be amended along the same lines as the Law Commission has recommended for Rule 4.24 in the High Court Rules and District Court Rules, to ensure s 173 is not utilised by shareholders as an "alternative" mechanism for initiating a collective proceeding when a class-action proceeding would be more appropriate.[350]

Whilst it appears the representative mechanism at s 173 is rarely used by shareholders (if at all) as there is no reported case where s 173 has been used, the mechanism may become an attractive option for shareholders if Parliament were to introduce the Class Actions Act. This is because a representative claimant under s 173 will not be required to have their claim "certified" and, therefore, avoid the time and costs involved with that preliminary process. However, shareholders who choose to pursue a representative claim under s 173 would also lose the protection the class-action legislation provides, including the requirement for litigation funding arrangements to be approved by the court before they can be enforced.[351] Accordingly, there is a risk the protections under the class-action regime would be circumvented and undermined by keeping s 173 as it is presently drafted.

Another option would be to simply repeal s 173. On the face of it, there does not appear to be any substantial difference between the s 173 representative-action mechanism and the current Rule 4.24 of the High Court Rules. The main exception is that Rule 4.24 provides a representative plaintiff may sue on behalf of all persons with the same interest in the subject-matter of a proceeding "with the consent" of the other persons with the same interest, while a shareholder representative litigant seeking an order under s 173 can rely only on the discretion of the Court in issuing an order for that litigant to act as representative plaintiff for "the same or substantially the same interest in relation to the subject matter of the proceedings".

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[350] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding*, above n 13, at 79 – [2.147].
[351] At 740 ("Section 7(2)").

Accordingly, it could be argued that for practical purposes, s 173 is unnecessary, particularly when Rule 4.24 already provides shareholder litigants with the ability (1) to obtain a representative order from the court to pursue a representative claim and (2) to pursue a representative claim with the "consent" of other shareholders (which is not available under the current s 173). The author's view is that simply to repeal s 173 would represent a wasted opportunity for improving access to justice for shareholders as well as empowering shareholders by enhancing their ability to take collective action to protect their rights. For reasons traversed earlier in this paper, the representative-action mechanism ought to be amended to make it easier for shareholders to take collective action for breaches of the Companies Act 1993 and breaches of duties specifically owed to them by directors or companies.

Such an amendment is justified by agency theory. This is because the amendment would establish a clear and cost-effective mechanism for shareholders to pursue group litigation. Reducing cost barriers for shareholder group litigation increases the risk of shareholders commencing group litigation against directors. In the author's view, the increased risk of shareholder group litigation may result in a chilling effect on director conduct, which in turn may contribute to a reduction in agency costs (by, for example, deterring poor director conduct, which would otherwise require litigation by shareholders and/or the company to be addressed).

In addition, such an amendment is also consistent with the general desire to minimise barriers for litigants and improve access to the courts. As was acknowledged by the Law Commission in its Class Action and Litigation Funding Report:[352]

> Improving access to civil justice requires a coordinated effort across many areas. While class actions and litigation funding do not offer a panacea, they can both make important contributions.

Sector-specific group litigation procedures can co-exist together with a broad, generalised group litigation process. For instance, as discussed earlier in this paper, the Competition Appeals Tribunal in the United Kingdom enables litigants to pursue collective proceedings within the Tribunal's limited jurisdiction through a collective proceedings order, while general civil claims can be pursued as collective proceedings in the courts by way of group-litigation order under the

[352] At iv ("Foreword").

Civil Procedure Rules. Each type of procedure is different. There are specific considerations that must be taken into account before a collective proceeding or group-litigation order is made, as well as specific circumstances in which litigants can pursue collective proceedings or group litigation.[353]

V. Comments on the proposed class action and litigation-funding reforms generally

The proposed class-action and litigation-funding regime will improve access to justice not only for shareholders, but also for all other potential litigants. This reform was overdue for the reasons outlined in earlier Chapters. In particular, there was uncertainty as to the application of the "representative action" procedure at Rule 4.24 of the High Court Rules, and the mechanics of the group litigation process. The regime proposed by the Law Commission provides a coherent process which is largely consistent with other jurisdictions, including Australia, and which, if enacted, will provide certainty to litigants.

Nevertheless, even if there is a wholesale implementation of the Law Commission's recommendations, nothing will change the fact that class actions remain lengthy and costly processes not only for the parties involved, but also for the courts. Therefore, Parliament should consider what other procedural mechanisms, in addition to those recommended by the Law Commission, can be employed to further improve access to justice and, in particular, reduce costs on class action litigants, increase the speed in which class action proceedings are resolved, and reduce procedural burdens on the courts.

One such mechanism may include enabling the courts, either through a provision in the Class Action Act or through an amendment to the High Court Rules, to allow the courts to make preliminary determinations of certain "essential" issues in class proceedings prior to trial. Such determinations should not involve an assessment of the "merits" of the proceedings (although such an assessment was suggested by some submitters on the Law Commission's Report,[354] the

[353] For example, proceedings in the Competition Appeal Tribunal only relate to proceedings under the Competition Act 1998.
[354] Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa – Class Actions and Litigation Funding*, above n 13, at 71 – [2.111].

suggestion was subsequently rejected by the Law Commission);[355] rather, they should be early determinations on specific, important issues of law or fact in the proceedings.

The ability for the courts to make such preliminary determination has some support from legal practitioners in Australia. In research undertaken by Cashman and Simpson at the University of New South Wales Law School,[356] members of the Federal Court Class Action Users' Committee [357] and the Australian Law Council Class Actions Sub-Committee were interviewed regarding how the current class-action regime in Australia was working and how it could be improved. Research participants suggested the courts "need to do more to facilitate early determination of separate issues" [358] in order to help reduce transaction costs (namely lawyers' and funders' costs).

The author agrees. The ability for the courts to determine a preliminary legal or factual issue could be advantageous in a class-action proceeding, particularly when the preliminary determination of such an issue will have wide implications on the proceedings and potentially (1) reduce the size, length, and scope of any trial and/or (2) increase the likelihood that a settlement would result from the determination of that issue and, therefore, reduce the overall costs of the proceedings to shareholders.

In the Cashman and Simpson's paper, it is suggested that the early determination of a legal issue would be useful where, for example, a defendant pleads a limitation period defence which may apply to a section of the class.[359] In that case, the early determination of the application of the limitation period to the class would "assist the parties to ensure that costs remain in proportion".[360]

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[355] At 313 – [11.141].
[356] Peter Cashman and Amelia Simpson *Research Paper #3: Class Actions and Litigation Funding Reform: The Views of Class Action Practitioners* (Law Research Series, University of New South Wale, 2020).
[357] Research participants from the Federal Court Class Action Users' Group included former judges of the Federal Court. See Footnote 3, at 3.
[358] At [5.4.1].
[359] At [5.4.1].
[360] At [5.4.1].

In the author's view, the early determination of legal issues could have assisted in the *Feltex* litigation. In *Feltex*, one of the legal issues at trial (and on appeal) was the interpretation and application of sections 55 and 56 of the Securities Act 1978. With respect to s 55(a)(i) of the Act (which stated that a statement in an advertisement or registered prospectus is "*deemed to be untrue if … it is misleading in the form and context in which it was included …"*), the question arose as to whether in order to be an "*untrue statement*", a statement had to be misleading to a material extent or simply had to be misleading in the form and context in which it was included in the prospectus.[361]

In the High Court, it was found (1) that the defendant's failure to achieve the 2004 financial-year revenue forecast was not material and therefore (2) that the prospectus did not contain an untrue statement.[362] However, when the specific issue was considered on appeal, the Supreme Court finally determined s 55(a)(i) did not specifically require a statement to be "misleading to a material" extent for the statement to attract liability under s 56 of the Securities Act 1978.[363] Accordingly, the Supreme Court found (1) the prospectus contained an untrue statement in relation to the 2004 financial-year revenue forecast and, as a result, (2) the defendant could be liable for losses in relation to that forecast.[364]

In addition, whilst the High Court had found the directors of neither Feltex nor Credit Suisse could be liable under the Fair Trading Act,[365] the Supreme Court found both companies were in breach of s 9 of the Fair Trading Act 1986 for having engaged in misleading and deceptive conduct with respect to the untrue statements made about the 2004 financial-year revenue forecast.[366] The plaintiff could therefore pursue both for breaches of the Fair Trading Act 1986.

If, in the *Feltex* litigation, the legal issue of "materiality" or that of the ability for the representative plaintiff to sue the directors of Feltex or Credit Suisse under the Fair Trading Act

[361] *Houghton v Saunders*, above n 234, at [267].
[362] *Houghton v Saunders*, above n 14, at [187]-[192].
[363] *Houghton v Saunders*, above n 234, at [81]-[82].
[364] At [231].
[365] *Houghton v Saunders*, above n 14, at [50].
[366] *Houghton v Saunders,* above n 234, at [318].

1986 had been dealt with in, say, a preliminary High Court hearing (on those specific legal issues), that fact could have both (1) changed the nature of the *Feltex* litigation, to the advantage of the shareholder claimants and (2) reduced overall costs to the parties and provided finality to the proceedings sooner, even if such a hearing was subsequently subject to appeals. For example, an adverse finding against the defendant companies, and the increased potential liability resulting from that finding, could have stimulated settlement discussions and a reasonable settlement between the parties. In the alternative, an adverse finding against the plaintiff could have prompted decisions to either cut causes of action (a decision which would have had the effect, among others, of reducing the size and scope of any trial and minimising the overall costs of the proceedings) or to abandon the proceedings altogether.

Instead, what occurred was a lengthy High Court trial which resulted in a decision that continued to be appealed for some five years, with the plaintiff finally achieving some "success" in the Supreme Court on the "materiality" and Fair Trading Act issues. The proceedings were remitted to the High Court for the previously agreed "stage 2 hearing", which was to determine causation and loss; however, ultimately, the proceedings lost their "steam" and were dismissed due, effectively, to a lack of funding (the plaintiff was unable to meet the security for costs ordered by the court).

Given the specific circumstances between the parties in the litigation as largely unknown, it is difficult to know whether there would have been a different outcome for the shareholders in Feltex if the "materiality" and Fair Trading Act issues had been finally determined in, say, 2011 (three years after proceedings were filed) rather than in 2019. The author suspects that the outcome would have been different. In any case, it is submitted that in the main, the ability for the courts to determine a narrow preliminary legal or factual issue will reduce agency costs. This is because the determination of a key issue in proceedings will inform shareholders as to whether to (1) continue the proceedings (where a favourable result is obtained and success at the substantive hearing is likely) or (2) negotiate settlement. In addition, the early determination of a key issue could induce a favourable settlement for shareholders where an adverse result is obtained by the defendant.

Conclusion

Access to justice is an issue globally and in particular in New Zealand. The cost of litigation has time and time again been identified as a significant barrier to potential litigants. Even claimants who have a good chance of success often choose not to litigate as the cost of litigation outweighs any compensation that might be obtained.

The class-action procedure – which enables more than one claimant to take collective action against a defendant where the defendant has wronged all the claimants in the same way – is a procedural tool available in a number of jurisdictions which works to improve access to justice. Class-action proceedings do this in a number of ways, including by spreading litigation costs as well as by enabling claimants to access funding for litigation from litigation funders. Class-action proceedings can also have the effect of "deterring" misconduct, given class actions have the potential to expose defendants to much greater liability than they would otherwise be exposed to, in turn reducing (1) the potential benefits of wrongful conduct and therefore (2) the need for litigation.

A formalised "class action" procedure has been in place in Australia at the federal level since 1992. The United Kingdom has a number of civil procedures in place to enable "group" litigation, comparable to the classic "class action" procedure. At present, New Zealand does not have a formal class-action procedure. However, following a lengthy period of research and consultation, the Law Commission has recommended the introduction of a statutory class-action and litigation-funding regime.

That regime, if implemented by Parliament, will go a long way to improving access to justice for litigants. The regime would provide greater procedural certainty for class-action litigants. To date, class actions have primarily been pursued in New Zealand via the "representative action" procedure at Rule 4.24 of the High Court Rules, with no specific rules or guidance as to how to manage them. The proposed regime would also provide protection for class-action litigants by providing litigation-funding arrangements, on the one hand, and settlements, on the other, must be approved by the court. Such a procedure could help ensure litigation like in *Feltex* – where it

took over six and half years, from the date the proceedings were filed, to obtain a judgment – will never happen again.

Nevertheless, even under the Law Commission's proposed regime, class actions would continue to require considerable time and money from litigants. This fact is evidenced by the shareholder class-action experience in Australia and the United Kingdom. Despite the maturity of the group-litigation procedures in both those jurisdictions, it takes some four or five years from the filing of the relevant proceedings to obtain judgment – about three or four times longer than from the filing of non-group proceedings.

Therefore, it is recommended Parliament implement the Law Commission's proposed statutory class-action and litigation-funding regime. It is also recommended Parliament, when considering the implementation of the Law Commission's proposed regime, also consider further changes to group-litigation procedures to improve access to justice. Parliament should also amend the statutory "representative action" procedure in s 173 of the Companies Act 1993, to create a special group-litigation procedure for shareholders, enabling them to pursue group litigation against companies and directors for breaches of duties owed to them under the Companies Act 1993 without the need for "certification". Such an amendment is justified because shareholders need to protect their legal and financial interests in companies and because the duties owed specifically to them under the Companies Act 1993 help them do so. Given that the breach of a duty to the shareholder tends to "interest" or "affect" every single shareholder in its capacity as shareholder, certifying group litigation that seeks to enforce any such duty is not necessary.

Further discussion is recommended in relation to other ways access to justice can be improved. One could be to enable "bespoke" class-action proceedings where preliminary legal or factual issues can be determined prior to the determination of substantive issues. Enabling such proceedings would be particularly beneficial where the early determination of the relevant issues could meaningfully reduce the time and money required by the litigation.

It is clear the proposed statutory class-action and litigation-funding regime, while helpful, would not in any way, shape, or form be a "silver bullet" in terms of improving access to justice.

Further changes would be required in order to continue to break down barriers to New Zealand's justice system. Doing that could be facilitated by innovative procedural ingenuity grounded in the practical real-world experience gained by implementing the regime.