
Class Actions & Litigation Funding in Aotearoa New Zealand

Overview of LPF Group's submission to Issues Paper | He Puka Kaupapa 45

Established in 2009, LPF Group is the largest New Zealand owned and operated litigation funder. This paper is a summary of LPF Group's full submission, which is available on request.

Facilitating an accessible civil justice system

At the centre of the Law Commission's Issues Paper on Class Actions & Litigation Funding in Aotearoa New Zealand, is access to justice and facilitating a more inclusive and accessible civil justice system.

Access to justice is an important right in any democracy and strongly in the public interest. Yet because legal action can be expensive and lengthy, it is often out of reach for most ordinary New Zealanders who have suffered as a result of serious wrongdoing.

The challenges mean without litigation funding, many credible claims simply would not be able to proceed, and defendants who have acted wrongly or negligently, would not be held accountable for their actions.

Facilitating access to justice to achieve meaningful outcomes is the most important advantage of litigation funding. Second to this is levelling the playing field in the courts between deserving plaintiffs and defendants (many of whom are well-funded by third parties – being their insurers). Additionally, having clear guidelines of the standard of professional conduct required of those in governance and advisory roles increases confidence across all areas of the business and investment community and our society.

A regulatory framework for litigation funding and class actions should exist to provide certainty around the rules for third party funding and ensure both funded plaintiffs and funded defendants are treated equally and transparently in the courts of New Zealand.

In the absence of certain regulations, funding becomes riskier and more expensive as funders are required to factor in the additional risks, time, and cost associated with bringing legal actions. These additional costs result in the thresholds for funding meritorious cases being far higher than they ought to be and act as a further significant barrier to accessing justice and results in plaintiffs finding it harder to source funding and therefore harder to access justice.

LPF Group's approach to litigation funding:

Due to our unique legal market and size, litigation funding has evolved cautiously in New Zealand. There are few cases which are both meritorious and large enough to attract funding in comparison to other comparative jurisdictions.

LPF has extensive ties with the New Zealand business and legal environment and takes a cautious approach to evaluating cases to ensure the merits of the case warrant, and justify, funding. LPF only provides funding to claims with a strong legal merit on a 'no success, no fee' basis.

Given the inherent risks with litigation, this approach provides an absolute incentive on the funder to be responsible when making decisions over which cases to fund. As such the presence of LPF acts as an important check on the merits of the action before it is undertaken.

Consistent with most litigation funding models, LPF provides funding to plaintiffs on a limited recourse basis and in return for paying all the costs of the litigation, receives an agreed percentage of the outcome if the legal case is successful.

Levelling the Playing Field

Litigation funding levels the playing field between plaintiffs who wish to access justice yet are discouraged by the expense, time, and complexity and defendants, many of whom are well-funded through their commercial liability insurance. However, due to the lack of regulation there is a level of uncertainty around the legal status of litigation funding, which means deserving plaintiffs are further disadvantaged from the outset.

What's required to level the playing field:

- Replace the current laws of champerty and maintenance. These laws only exist for the benefit of defendants and create significant imbalance between plaintiffs and defendants and should be reformed and replaced with a fit-for purpose statutory framework.
- Introduction of a statutory class actions regime to reduce the reliance on HCR 4.24 to bring a group legal action. There are numerous benefits of having an efficient class action regime that improves corporate behaviour and governance standards is in fact beneficial to everyone and should be supported by effective legislation.
- Establishment of a well-designed, fit for purpose regulatory framework that addresses the following key elements:
 - Minimum capital requirements and a New Zealand presence
 - Requirement that both plaintiffs and defendants should be liable for costs on an indemnity basis in the case they lose, and each side would need to post security for costs
 - Clarification of adverse costs rule where a funder is funding the action, and the defendants and their insurers are defending an action.
 - Funder disclosure of all potential conflicts of interest to ensure the lawyers representing the plaintiff are free to solely advise on the merits of the case
 - Any 'success fees' payable to representative lawyers should be tied to the lawyer's usual hourly rates and not based on the outcome achieved.
 - Greater clarification and enforcement around excluding barristers and solicitors from stepping into the role of funder through conditional fee arrangements.
 - Implementation of common disclosure rules to ensure both sides can make sound decisions about the legal action based on the known presence of litigation funding.