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ARTICLE

The Regulation of Third-Party Litigation Funders in New Zealand: A Proposed Solution

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Third-party litigation funding of class actions is a globally proven method of enhancing access to justice for plaintiffs. Litigation funding has grown exponentially overseas in both common and civil law jurisdictions. Currently, the statutory position and associated regulation of third-party litigation funders is muddied in New Zealand due to a lack of tailored legislation and judicial confusion. Following the New Zealand Law Commission Report, released in May 2022, both class actions and the usage of third-party litigation funders will likely be formally legalised in New Zealand. However, with the potential growth of the third-party litigation funding market in New Zealand, there must be appropriate regulation. Regulation must ensure that the problem that litigation funding aims to solve, access to justice, is strengthened and maintained through appropriately clear and coherent regulation. This article seeks to propose a regulatory solution to New Zealand's third-party litigation funding market. As part of this, the article explores the role of third-party funders in New Zealand's legal industry; it examines the regulation of litigation funding from the perspective of various common law jurisdictions, as well as analysing the New Zealand Law Commission recommendations, before proposing a recommendation for New Zealand's regulation of third-party litigation funding.

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I Introduction

New Zealand's legal system generates some of the highest litigation costs in the world, especially for high-value civil disputes and large-scale consumer negligence claims.[1] Third-party litigation funding of class actions is a proven method of improving plaintiffs' access to justice. This funding provides a litigation "war chest" equivalent to that of a well-resourced defendant and finances high-quality lawyers to fight for the plaintiff's cause.[2] Litigation funding has grown exponentially overseas in both common and civil law jurisdictions.[3] Proponents herald it as improving plaintiffs' access to justice and creating a new market within the legal industry. New Zealand's lack of tailored legislation and judicial confusion on the issue of litigation funding is muddying the country's regulatory approach to third-party litigation funders.[4] Following the New Zealand Law Commission (NZLC) Report, released in May 2022, it is likely that Parliament will formally legalise both class actions and the usage of third-party litigation funders in New Zealand—potentially triggering growth in their use.[5]

However, with the potential growth of the third-party litigation funding market in New Zealand, there must be appropriate regulation. Regulation must be plaintiff-centric yet also encourage the development of this industry in New Zealand. Regulators must ensure that litigation funding improves access to justice. New Zealand's legal sector is at a crossroads whereby regulators can choose to support the growth of this industry through appropriately crafted regulation or inhibit access to justice through a convoluted approach. The rules that regulators decide on will heavily impact the path third-party litigation will take in New Zealand. This article explores regulatory proposals that, if enacted, would protect plaintiffs, grow class actions as a viable means of vindicating rights, and promote a new sustainable business within New Zealand's legal industry. In short, this article discusses how New Zealand should regulate third-party litigation.

New Zealand should regulate litigation funding through existing procedural and judicial mechanisms. First, there should be a baseline legislative framework of what constitutes an acceptable litigation funding agreement. Parliament should enact this legislation alongside legislation formally approving and regulating class actions in New Zealand. Additionally, the legal community should guide the New Zealand Law Society in formulating a litigation funding strategy favourable to existing and potential plaintiffs and class action litigation funders. Such guidance would ensure that the third-party litigation industry can grow and adapt to societal changes while achieving a statutory baseline standard. Finally, the courts should approve litigation funding agreements on a case-by-case basis when litigants register a class action. I have formulated this article's approach by looking at the NZLC's proposals and through extensive analysis of comparable jurisdictions worldwide.

This article has four Parts. Part II will briefly explore the current role of third-party litigation funders in New Zealand's legal industry before considering the history of litigation funding worldwide, beginning with the torts of maintenance and champerty and

1 Justice Helen Winkelmann "The New Zealand Law Foundation Ethel Benjamin Commemorative Address 2014: Access to Justice – Who Needs Lawyers?" (2014) 13 Otago L Rev 229 at 232.

2 Andrew A Stulce and Jonathan D Parente "Demystifying the Litigation Funding Process" (16 June 2021) Bloomberg Law <https://news.bloomberglaw.com>.

3 BC Bailey "Litigation Funding: Some Modest Proposals" (LLB (Hons) Dissertation, University of Otago, 2018) at 5.

4 Law Commission *Class Actions and Litigation Funding* (NZLC R147, 2022) at [14.3].

5 At [2.75] and [14.23].

ending with the rise of third-party litigation funders. It will also briefly analyse current New Zealand litigation funders, the types of cases they have historically funded and the present muddied regulatory approach. Part III will examine litigation funding regulation in various common law jurisdictions, including Australia, the United Kingdom, Canada, and Singapore. Each of these countries has taken a different approach to regulating the industry—which aids my analysis in determining the best course for New Zealand's regulation of third-party funding. In Part IV, I will discuss the NZLC's recommendations and preferred approach to regulating litigation funding in New Zealand. In Part V, I will make a comprehensive proposal for New Zealand's regulation of third-party litigation funding, drawing on comparable jurisdictions and the NZLC's report. Throughout Part V, I will discuss what implementing my approach would involve and its advantages and disadvantages.

II An Overview of Third-Party Litigation Funding

A *Defining litigation funding*

Third-party litigation funding has been defined as "funding, by an outside party, of all or part of a plaintiff's litigation in exchange for a portion of the recovered proceeds".[6] Funders provide money on a non-recourse basis. Successful plaintiffs give a pre-agreed share of their damages to the third-party funder. However, if the claim is unsuccessful, the funders receive nothing.

Plaintiffs and funders agree to calculate the latter's share of proceeds according to several factors. These can include the sum of the money the court awards, the time until recovery, the expected value of the plaintiff's claim and the strength of the plaintiff's litigation strategy.[7] The funding is essentially a non-recourse loan with no interest and no guarantee of a return, but with higher potential profits if the venture is successful compared with conventional financial products.[8]

B *The role of litigation funders*

Proponents of litigation funding argue that its crucial role is improving access to justice and promoting market efficiency.[9] Providing a source of funding allows plaintiffs to bring claims they may not have otherwise brought, benefitting the underdog plaintiff against potentially well-resourced defendants. Litigation funding improves market efficiency by providing greater demand for lawyers and a different form of capital allocation for investors outside of the traditional market for legal services.[10] More practically, litigation funding allows for an extra set of experienced eyes to assess the merits and risks of a potential collective action.

6 Jacqueline Sheridan "Champerty and Maintenance in the Modern Era" (22 January 2016) Dinsmore <www.dinsmore.com>.
7 Lawrence S Schaner and Thomas G Appelman "The Rise of 3rd-Party Litigation Funding" (21 January 2011) Law360 <www.law360.com>.
8 Bailey, above n 3, at 5.
9 At 5.
10 At 6.

Critics of litigation funding argue that the interaction between the financial and justice systems commodifies justice.[11] These critics contend that this interaction cuts against a central pillar of our legal system: that the system should be above collateral considerations like commodification.[12] Additionally, litigation funding agreements may have the unintended effect of imposing restrictive lending conditions and passing control of the litigation over to a third party.[13] This third party may not share the same interests as the plaintiff—whose interests through the eyes of the justice system should be central. The regulation aims to address these criticisms.

Regardless of one's viewpoint, the emergence of litigation funding is a fast-moving development in the legal industry. Countries must appropriately regulate litigation funding to ensure it remains plaintiff-centric, sustainable and risk-constrained. Regulation must enhance litigation funding's advantages and work to moderate its disadvantages. By appropriately regulating the industry, New Zealand can sustainably increase the role of litigation funders in the legal sector. Their expanded role ultimately benefits potential plaintiffs and the rule of law through increased access to justice and vindication of rights.

C *History of litigation funding*

To understand litigation funding, one must first look towards the doctrines of champerty and maintenance. Historically, common law courts used these torts to prohibit unconnected parties from financing or aiding litigation.[14] Maintenance is the broader tort. It prohibits an unconnected third party from assisting litigation.[15] Champerty, a form of maintenance, prohibits a third party from paying some or all of "the litigation costs in exchange for a share of the proceeds".[16] English courts introduced these torts in medieval times to prevent abuses of justice by corrupt nobles and royal officials.[17] At the time, credible individuals associated their names with dubious cases to add credibility to the proceedings in exchange for a share of the proceeds.[18] The public policy reasoning was that justice should be a pure system without outside interference from the nobility.[19] Many common law jurisdictions enforced these doctrines as torts and criminal offences until recently.[20]

Several countries have relaxed or abolished these torts to promote access to justice in modern times.[21] Fundamentally, the public policy that underpinned these torts has shifted.[22] Ironically, torts introduced by the courts to dissuade vexatious claims prevented all but the wealthiest plaintiffs from bringing meritorious claims due to a personal lack of funds, as deep-pocketed plaintiffs do not generally need third-party financing.[23]

11 W Bradley Wendel "Alternative Litigation Finance and Anti-commodification Norms" (2014) 63 DePaul L Rev 655.
12 At 665.
13 Bailey, above n 3, at 6.
14 Norton Rose Fulbright *International arbitration report* (Issue 7, September 2016) at 9.
15 At 9.
16 At 9.
17 At 9.
18 At 9.
19 Bailey, above n 3, at 8.
20 Norton Rose Fulbright, above n 14, at 9.
21 At 9.
22 David Neuberger "From Barretry, Maintenance and Champerty to Litigation Funding" (Harbour Litigation Funding First Annual Lecture, 8 May 2013).
23 At [33].

Legal systems worldwide increasingly recognise the value of accessibility in an expensive legal system, prompting legislatures and courts to relax torts that historically impeded access to justice.

There is a positive correlation between the relaxation of champerty and maintenance and the rise in litigation funders, seen most prominently in the United Kingdom and Australia—leaders in the litigation funding industry.[24] As lawmakers and judges have relaxed the torts, various jurisdictions have gradually allowed litigation financing, ranging from New Zealand's incoherent position to the plaintiff-friendly regulatory approaches of Australia and the United Kingdom. I will compare jurisdictional positions in Part III.

D *The current status of litigation funding in New Zealand*

Currently, at least seven companies offer litigation funding services in New Zealand.[25] Of those seven, at least four are New Zealand companies, with one British company and two Australian companies operating in the country. By 2021, there had been 37 litigation-funded civil actions in New Zealand over a decade, including eight ongoing suits.[26] Of the concluded cases, court-awarded damages and settlement payouts totalled around $183 million.[27] Of that figure, plaintiffs received $89 million (48.6 per cent), legal fees and project costs totalled $82 million (44.8 per cent), and litigation funders received a profit of $12 million (6.6 per cent).[28] The average length of cases worth $5 million or more is roughly 4.5 years, with five proceedings lasting over seven years.[29] Approximately 28 per cent of suits have resulted in losses to litigation funders totalling $39 million, borne solely by the funders.[30] Most recently, the High Court approved a funded class action against ASB and ANZ for alleged breaches of the Credit Contracts and Consumer Finance Act 2003, now in the Court of Appeal,[31] and against Dilworth School for historic sexual abuses.[32]

New Zealand law does not explicitly regulate litigation funding.[33] An oblique series of judicial decisions permit it, and self-regulatory goodwill is the primary constraint on New Zealand funders' freedom of action.[34] Courts have adopted a cautiously permissive approach to litigation funding, yet New Zealand still employs the torts of maintenance and champerty.[35] This approach has created policy friction between the growth of litigation funding and the two existing torts. The courts have suggested that access to justice considerations in an increasingly expensive legal industry may necessitate the relaxation

24 Christopher Niesche "Litigation Funders Expect More Class Actions as Australia's Government Relaxes Rules" (8 September 2022) ALM | LAW.COM <www.law.com>.

25 New Zealand Law Society "Seven litigation funding services in NZ" (5 May 2016) <www.lawsociety.org.nz>.

26 Nikki Mandow "Access to justice or protecting the big end of town?" (15 September 2021) Newsroom <www.newsroom.co.nz>.

27 Mandow, above n 26.

28 Mandow, above n 26.

29 Mandow, above n 26.

30 Mandow, above n 26.

31 Tamsyn Parker "Multi-million dollar class action lawsuit against ANZ and ASB to include all affected customers unless they opt-out" *The New Zealand Herald* (online ed, Auckland, 2 August 2022).

32 Business Desk staff "LPF, top barrister to fund Dilworth class action" (25 June 2021) Business Desk <https://businessdesk.co.nz>.

33 Law Commission, above n 4, at [13.5].

34 Jonathan Woodhams "Access to Justice: The Role of Litigation Funding in Complex Litigation" (lecture at Auckland Law School, Auckland, 24 May 2022).

35 Law Commission, above n 4, at [13.5].

or removal of the torts, at least for representative and class actions, to encourage litigation funding.[36] However, critics like Elias CJ cautioned that litigation funding still carries a "risk of oppression".[37] The lack of regulation impacts plaintiffs, funders, and the overall efficiency of the legal system. A litigation funder must account for the investment risk of a New Zealand court rendering its funding agreement unenforceable. This risk effect potentially decreases access to justice and increases the time and financial cost of litigation and third-party funding.[38]

III A Comparative Analysis of Third-Party Litigation Funding Regulations Across Various Jurisdictions

A *Introduction*

The experience of New Zealand's close international partners can serve as a valuable guide for how we should direct our country's social, economic, and legal development. As my discussion of other jurisdictions will demonstrate, New Zealand's third-party litigation funding market is underdeveloped compared with our partners.[39]

In this Part, I analyse how the common law jurisdictions of Australia, the United Kingdom, Canada and Singapore each treat third-party litigation funding to inform my proposed reforms to New Zealand's third-party litigation law. I chose these jurisdictions for several reasons.

First, some of them, such as Singapore and Australia, have similar population sizes and legal industries, making their experience informative when designing a regulatory model appropriate for New Zealand's relatively small legal sector.

Secondly, I chose these countries as they have all taken different approaches to regulating third-party litigation funders. By comparing the advantages and disadvantages of each country's position, trends and lessons emerge that can help to instruct New Zealand's approach to regulating the sector.

Finally, third-party litigation funding has taken different growth trajectories within these countries due to their varying market sizes, policy priorities and regulatory approaches. The policy priorities and regulatory positions New Zealand chooses to adopt will significantly impact this country's legal development.

Do we want New Zealand to become a litigation-friendly market, or do we want to ensure that our somewhat less adversarial society and legal system continue functioning as per the historical status quo? This Part briefly explores the history of each jurisdiction's approach to third-party litigation funding before focusing on each country's regulatory strategy and implementation.

36 At [13.9].

37 *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [121] as cited in Law Commission, above n 4, at [13.9].

38 Law Commission, above n 4, at [13.10].

39 Milford Asset Management "Picking up the tab in bid for justice" (22 July 2009) <https://milfordasset.com>.

B *Australia*

Australia has been an industry leader in third-party litigation funding since 1996. Its funding market emerged from statutory exceptions to the torts of champerty and maintenance that permitted litigation funders to work solely with insolvency practitioners.[40] Insolvency practitioners would chase any outstanding debts that could repair an insolvent company's balance sheet.[41] Australian statutory exceptions allowed insolvent companies to sign a third-party litigation financing agreement with a litigation funder to finance the insolvent company's debt chasing in exchange for a share of the proceeds received.

Third-party litigation financing expanded over the following decade.[42] *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* in 2006 allowed third-party litigation funding to expand beyond insolvency practises to general civil claims.[43] The Court reasoned that if several sub-national jurisdictions, including New South Wales, Victoria, South Australia and the Australian Capital Territory, had abolished maintenance and champerty as crimes and torts, there was no policy or legal reason to exclude funding arrangements with third parties.[44] Since this case, there has been considerable growth in the number of funded civil actions, with class actions representing just under half of the funded suits in Australia.[45]

Litigation funding regulation in Australia prompted national debate and controversy following *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd*.[46] The case determined that litigation funding agreements constituted managed investment schemes within s 9 of the Corporations Act 2001 (Cth). *Brookfield* meant that litigation funders had to be registered and operated by a public company holding an Australian financial services licence (AFSL).[47] Failure to comply is an offence under the Act.[48] Secondly, *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* determined that while litigation funding was not a financial product, it did constitute a credit facility and thus would require an Australian credit licence.[49] In 2010, the Federal Government intervened by granting interim class orders that it extended seven times.[50] In 2012, the Australian Securities and Investments Commission (ASIC) formally exempted litigation funders involved in funded class actions from managed

40 See *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380 (FCA).

41 The Practice "A Brief History of Litigation Finance" (September/October 2019) Harvard Law School Center on the Legal Profession <clp.law.harvard.edu>.

42 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134, December 2018) at [3.19]–[3.21].

43 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

44 At [85]–[86] and [89].

45 Australian Law Reform Commission, above n 42, at [2.66].

46 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, (2009) 180 FCR 11 at [103].

47 At [82]: the Federal Court held that the litigation funder was a "managed investment scheme" for the purposes of ss 601ED and 601FA of the Corporations Act 2001 (Cth).

48 Section 911A(1).

49 *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45, (2012) 246 CLR 455 at [33].

50 ASIC Class Order [CO 10/333].

investment regulatory obligations and financial product regulatory requirements of the Corporations Act (Cth).[51]

The Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) rolled back these exemptions related specifically to class action litigation funding. These regulations removed the Australian Securities and Investments Commission Act 2001 (Cth) exemptions for class action litigation funders. The new rules have had two main effects. First, they require third-party litigation funders to hold an AFSL. Secondly, funders must comply with a specialised litigation funding managed investment scheme regime under ch 5 of the Corporations Act (Cth).[52] These regulation amendments aimed to ensure greater regulatory oversight and accountability, with specific legislation to account for class action litigation funders. To be granted an AFSL, funders must "act honestly, efficiently and fairly"; "maintain an appropriate level of competence"; and "have adequate organisational resources to provide the financial services covered by the licence".[53]

The 2022 elected Australian Government is planning to relax these 2020 regulations.[54] The proposed changes include not requiring funders to maintain an AFSL, exempting class action funding schemes from meeting the requirements of managed investment schemes, and exempting class action funding schemes from product disclosure regimes. However, funders will still need to maintain bespoke conflict of interest practices, as they had to before the 2020 regulations. Removing these requirements means unlicensed funders with uncertain financial backing may re-enter the Australian market. Removing these pro-consumer, anti-business rules seems to contradict the Australian Labor Party's social-democratic political ideology. While these changes will likely lead to increased competition, benefitting consumers and access to justice, removing requirements to comply with AFSL obligations means there will be fewer legislative requirements dictating funders to act efficiently, honestly, and fairly. The Australian Government consulted on the draft regulations until 30 September 2022, with the Government expected to act quickly to implement the regulatory rollback.[55]

Australia has flip-flopped between regulatory approaches—as shown by its different requirements and legislative schemes over time. These approaches have ranged from classing litigation funders as managed investment schemes and thus requiring them to hold AFSLs to having virtually no proposed statutory regulation. Therefore, the Australian Government's position on litigation funders appears confused. Does Australia regard litigation funders as consumer financial product providers that require appropriate ringfencing to protect uneducated plaintiffs, or does Australia presume plaintiffs to have enough knowledge to enter a contract without significant regulatory guardrails? I believe New Zealand's main takeaway from Australia's experience should be the importance of capital adequacy requirements. Plaintiffs should be confident that when they engage litigation funders to fund their suits, they will not be responsible for court fees or adverse cost awards due to an insolvent funder.

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51 Corporations Amendment Regulation 2012 (No 6) Amendment Regulation 2012 (No 1) (Cth).

52 Corporations Act (Cth), ch 5C.

53 Josh Frydenberg "Litigation funders to be regulated under the Corporations Act" (press release, 22 May 2020).

54 Belinda Thompson, Andrew Burns and Lachlan Prider "AFSL requirement short-lived for class action funders: Expect swift action from early October" (12 September 2022) Allens <www.allens.com.au>.

55 Australian Department of the Treasury "Exemptions for litigation funding schemes" (September 2022) <https://treasury.gov.au>.

C *United Kingdom*

The origin of third-party litigation funding in the United Kingdom has similar roots to Australia. Like its Commonwealth cousin, the United Kingdom first used third-party litigation funding in insolvency cases before expanding to other civil and commercial lawsuits. However, the United Kingdom has gone further than Australia, expanding litigation funding beyond the scope of commercial lawsuits into non-commercial litigation funding. Additionally, conditional fee arrangements are legal in the United Kingdom, allowing smaller funders to engage in the small-scale financing of cases more significant funders deem not valuable enough to be worth their time. As I explore below, the light-handed British regulatory scheme for third-party litigation funding has created one of the largest litigation funding markets in the world.

Third-party litigation funding emerged in the United Kingdom from budget constraints that necessitated the removal of legal aid for all civil claims.[56] It rapidly grew in usage from the funding gap, removing public legal assistance that was left behind. The Criminal Law Act 1967 (UK) abolished champerty and maintenance as torts and crimes in the United Kingdom.[57] However, it also provided that such abolition "shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal", creating uncertainty about the legality of contractual third-party financing.[58]

In 1993, the House of Lords clarified the lawfulness of third-party funding in *Giles v Thompson*.[59] The case permitted a rental car provider (acting as a funder) to provide financial assistance to a motorist who had been involved in a car accident and needed to hire a replacement car. In return for the financial aid, the hiring fees were to be paid directly from the defendant to the rental car provider. The House of Lords ruled that the funder did not engage in "wanton and officious intermeddling", thus ruling that the funding arrangement was lawful.[60]

The United Kingdom has a unique regulatory regime for third-party litigation funding. In 2007, the Civil Justice Council recommended to the Lord Chancellor that:[61]

> Properly regulated Third Party Funding should be recognised as an acceptable option for mainstream litigation. Rules of Court should also be developed to ensure effective controls over the conduct of litigation where third parties provide the funding.

In response, the Association of Litigation Funders (ALF), alongside a Code of Conduct, was established in 2011 as a self-regulatory model for third-party funders in the United Kingdom.[62] The role of this regulation is to ensure practical and ethical behaviour amongst

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56 Access to Justice Act 1999 (UK), sch 2 cl 1; and Christopher Hodges, John Peysner and Angus Nurse *Litigation Funding: Status and Issues* (University of Oxford, Legal Research Paper Series Paper No 49, July 2012).

57 Criminal Law Act 1967 (UK), ss 13–14.

58 Section 14(2).

59 *Giles v Thompson* [1994] 1 AC 142 (HL) at 153.

60 At 164.

61 Michael Napier and others *Improved Access to Justice – Funding Options & Proportionate Costs: The Future Funding of Litigation - Alternative Funding Structures* (Civil Justice Council, June 2007) at 53.

62 Association of Litigation Funders of England and Wales "Our Founding" <https://associationoflitigationfunders.com>.

litigation funders, ensure greater access to justice, and protect claimants through clear stipulation and enforcement of rules of engagement.[63]

The obligations imposed on ALF members include confidentiality requirements, capital adequacy to respond to adverse costs, litigation control restrictions, and termination of funding agreement restrictions.[64] A potential downside of this approach is the lack of binding effect on members of the ALF. Given that it is a voluntary code, it operates on a goodwill basis with no effective penalties for malpractice other than removal from the ALF.[65] Whilst expulsion from the ALF represents a significant sanction for the funder, it does not provide an aggrieved party with compensation for any losses they suffered as a consequence of the funder's unprofessionalism.

Critics of this model suggest that, when the third-party litigation funding industry was in its infancy, this was a practical model, but that it was outdated and insufficient to regulate the fast-growing market without proper regulatory intervention.[66] Respondents to an Oxford Research Paper on litigation funding indicated that funders and consumer groups favour regulation.[67] Opponents of the model have argued that the goodwill approach of the current regulatory regime fails to account for a rapidly expanding industry where new entrants are creating products that fall outside the Association's control.[68] Current funders are concerned that these new entrants may have bad business practices that bring the funding industry into disrepute. To fix these issues, the Research Paper explored either expanding the self-regulatory model with an Ombudsmen review system for poor practice or creating a separate regulatory body oversight model.[69] The United Kingdom has yet to implement either of these proposed modifications.

Proponents of the United Kingdom's approach argue that the 20 members of the ALF are unlikely to break the voluntary Code of Conduct, as that will bring the entire industry and self-regulation model into disrepute.[70] In general, advocates for self-regulation believe that private regulators can regulate their industries more efficiently and effectively than costly public regulators, given that internal regulators generally have higher levels of sectoral knowledge, expertise, and experience.[71] I argue it is advantageous for proponents and members of a self-sustaining regulatory model to advocate for the current light-handed regulatory model to continue. Whilst they may be correct that the ALF's current members are unlikely to bring the industry into disrepute, critics are concerned that entrepreneurial entrants may be less willing to fulfil their responsibilities under a participatory regulatory model.

Given the growth of third-party litigation funding in the United Kingdom over the past few decades, the current British regulatory regime for funding is outdated. An appropriate regulatory system for third-party litigation funding in the United Kingdom needs to

63 Association of Litigation Funders of England and Wales "Our Mission" <https://associationoflitigationfunders.com>.

64 Association of Litigation Funders of England and Wales *Code of Conduct for Litigation Funders* (January 2018).

65 Rachael Mulheron "England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments" (2014) 73 CLJ 570 at 577.

66 Tets Ishikawa "Is this the end of the road for ALF?" (4 March 2020) Thomson Reuters Dispute Resolution Blog <http://disputeresolutionblog.practicallaw.com>.

67 Hodges, Peysner and Nurse, above n 56, at 141.

68 At 142.

69 At 148.

70 Diane Chisomu and others "At a glance: regulation of litigation funding in United Kingdom (England & Wales)" (30 November 2021) Lexology <www.lexology.com>.

71 See Mulheron, above n 65, at 580.

promote good practice within the industry, provide for an effective and independent complaints procedure, set minimum information and disclosure requirements to funded plaintiffs, provide for effective scrutiny of funding arrangements, and maintain the integrity of the lawyer-client relationship.[72] Notwithstanding this criticism, third-party litigation funding has grown exponentially in the United Kingdom primarily due to that country's light-touch regulations on the industry. Hence, many claimants litigate their claims in the United Kingdom instead of Europe to utilise the liberal funding rules and abundance of third-party litigation funders.[73] Maintaining light restrictions to attract business can suit a growing industry. However, the rapid expansion of the market has led to new entrants whose actions and new products may begin to affect the United Kingdom's consumer-centric reputation, which has been built gradually over the years through the self-regulatory goodwill of existing market participants.

D *Canada*

Canada takes a different stance on recognising and regulating third-party litigation funders to Australia and the United Kingdom. Whilst Canada is a comparable common law jurisdiction (except for the Quebec Province, the only civil law jurisdiction in Canada), it has mostly chosen to use a case-specific, common-law approach to assess the legal validity of a third-party litigation funding agreement. Canada's method thus contrasts with comparable jurisdictions' statutory, regulatory bodies or self-governing systems. This approach allows courts to interpret the relevant legislation flexibly in light of the contemporary legal, economic, and societal background.

Like many jurisdictions, champerty and maintenance were both torts and crimes in Canada until the mid-20th century. The 1907 Supreme Court of Canada case, *Newswander v Giegerich,* emphasised that Canadian law confined maintenance and champerty to cases where the third party was "stirring up strife" with an improper motive.[74] Three decades later, the Supreme Court of Canada explored champerty again in *R v Goodman.*[75] In this case, prosecutors charged Goodman with champerty after agreeing to assist a poor man injured by a streetcar in exchange for a share of any proceeds. The Court held that his conduct did not amount to "officious intermeddling" as he did not stir up any strife, and Goodman's motive was proper.[76] Following these cases, Parliament removed the crimes of maintenance and champerty from the Canadian Criminal Code in 1953.[77]

Contingency fee agreements between a lawyer and plaintiff were rendered legal in 2002 through *McIntyre Estate v Ontario (Attorney General),* heard in the Ontario Court of Appeal.[78] The Court determined that allowing third parties to fund litigation could serve the interests of justice.[79] It identified the funder's motivation as the primary determinant of a funding agreement's validity.[80] It noted that courts should assess the funder's

72 Hodges, Peysner and Nurse, above n 56, at 144.
73 Louis Goss "Legal sector hits back at EU calls for regulation of third-party litigation funders" (14 September 2022) City AM <www.cityam.com>.
74 *Newswander v Giegerich* (1907) 39 SCR 354.
75 *Goodman v R* [1939] SCR 446.
76 At 453–454.
77 Omni Bridgeway "Maintenance and Champerty in Canada" <https://omnibridgeway.com>.
78 *McIntyre Estate v Ontario (Attorney General)* [2001] OJ No 3206 (ONCA).
79 At [16].
80 At [17]–[18].

motivation on a case-by-case basis.[81] The Court initially allowed funding agreements due to concerns around access to justice in Canada and the potentially beneficial role of contingency fee arrangements, necessitating a more flexible understanding and application of champerty.[82] At this stage, the only regulatory framework for contingency fee arrangements was discrete approval by the Court before a hearing.

In 2009, *Metzler Investments GMBH v Gildan Activewear Inc* applied the existing law and regulatory framework on third-party funding to a class action.[83] The Court stated that two crucial elements determined whether a funding agreement was champertous.[84] First, an improper motive cannot spur the funder's involvement. Secondly, involvement cannot enable the third party to acquire unfair gains following the litigation. It is important to note that, given that a funder will want to obtain a financial benefit or gain from funding the litigation, the Court places less emphasis on the gain derived but on the motive for financing the litigation under the first element. The case also confirmed the general principle that a Canadian court will only approve a funding agreement if it is fair, reasonable and guided by a proper motive from the funder.[85] Improper motives include deliberately stirring up strife through third-party intervention, charging unreasonable fees on vulnerable plaintiffs, or generally unfair agreements.[86]

Over time, various decisions have modified and extended the case law on third-party litigation funding for class action proceedings. *Fehr v Sun Life Assurance Company of Canada* stated that funding agreements are not categorically illegal on the grounds of champerty and maintenance but reaffirmed that a court's approval is required to enter into a funding agreement.[87] *Musician's Pension Fund of Canada (Trustees of) v Kinross Gold Corp* reiterated this approach when it commented that:[88]

> ... courts have been left to develop the approval criteria for third party funding largely on their own initiative, relying on common sense, knowledge of the problems of access to justice and of the administration of justice and academic commentary.

In Quebec, Canada's only civil law jurisdiction, the Superior Court of Quebec applied the same logic in *Bank of Montreal v Marcotte.*[89]

Ontario has introduced amendments to its Class Proceedings Act SO 1992 regarding requirements for approving funding agreements to codify case law jurisprudence.[90] These amendments came into force in October 2020. A third-party funding agreement is subject to the approval of a court. A court's decision will determine whether or not the agreement is fair and reasonable. The parties must file a copy with the relevant court and provide a copy to the defendant.[91] The case law discussed above provides an explanation of how to assess fairness. Fairness depends on the funding terms, clauses governing

81 At [16].
82 Gavin H Finlayson and Monica Faheim "Canada: Levelling the Playing Field – The Rise of Litigation Funding in Canada" (1 November 2021) Mondaq <www.mondaq.com>.
83 *Metzler Investments GMBH v Gildan Activewear Inc* [2009] OJ No 3315 (ONSC).
84 At [44].
85 At [70].
86 See at [69].
87 *Fehr v Sun Life Assurance Co of Canada* 2018 ONCA 718, [2018] OJ No 4513.
88 *Musicians' Pension Fund of Canada (Trustees of) v Kinross Gold Corp* 2013 ONSC 4974, 117 OR (3d) 150 at [37].
89 *Bank of Montreal v Marcotte* 2012 QCCA 1396, [2012] RJQ 1541.
90 Class Proceedings Act SO 1992 c 6, s 33.1.
91 Sections 33.1(9)(a)(i), 33.1(4) and 33.1(6).

information flow surrounding proceedings, the portion of funds granted to the funder if successful, instruction requirements for counsel, representations made by the funder, and termination provisions within the agreement. Courts assess whether a funding agreement is fair by comparing it against previous funding agreements, making it difficult for the market to expand beyond historically approved contracts into new product areas.

The law regarding third-party litigation funding agreements continues to develop in Canada. Case law and legislative interference have outlined that third-party funding is legal and approved for class action proceedings in all Canadian provinces on a case-by-case basis. However, whilst adhoc, common-law-derived principles have suitably allowed for the regulation and growth of the industry so far. There is greater interest in third-party funding agreements from Canadian legislatures who may take on a more active role in regulation.[92] Ontario has already taken on a more active role. Other provinces and the federal Parliament have indicated that they are working towards codifying principles and rules that currently exist on a jurisprudential level and potentially introducing additional considerations in response to the growing funding industry.[93] Yet, the approval and enforcement of funding arrangements would still be through a judicial mechanism for each agreement. Thus, the Canadian approach allows the judiciary to adapt common law and statutory principles to respond to the demands and excesses of a growing and shifting funding market.

E *Singapore*

Singapore has a small class action market compared to other analogous jurisdictions. Known in Singapore as representative actions, only two have gone to trial since 2002, one concerning misrepresentation and the other breach of contract.[94] Whilst class action proceedings are unusual in Singapore, parties in Singapore commonly use third-party litigation funding in domestic and international arbitration. Singapore is considered the Asia-Pacific leader and second only to the United Kingdom for international arbitration.[95] As a comparable common law jurisdiction with a similarly small population, it is worth exploring Singapore's approach to regulating third-party arbitration funding to guide New Zealand's approach to regulating third-party litigation funding.

Before 2017, the torts of champerty and maintenance prohibited litigation funding in Singapore. In 2017, the Singaporean Parliament amended the Civil Law Act 1909 (SG) to abolish the torts and thus legalise third-party funding of international arbitration and related proceedings.[96] The Civil Law (Third-Party Funding) (Amendment) Regulations 2021 (SG) expanded the permissible fields for third-party funding in Singapore to domestic arbitration, proceedings from the Singapore International Commercial Court and some court proceedings.[97]

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92 See Hugh Meighen "In Review: Third Party Litigation Funding in Canada" (online ed, Borden Ladner Gervais LLP).

93 Meighen, above n 92.

94 Danial Chia and Jeanette Wong "Class/collective actions in Singapore: overview" (1 July 2019) Thomson Reuters Practical Law <https://uk.practicallaw.thomsonreuters.com>.

95 Jane Croft "Singapore is becoming a world leader in arbitration" *Financial Times* (online ed, London, 3 June 2016).

96 Roger Milburn "Singapore: Litigation Funding Comparative Guide" (20 November 2023) Mondaq <www.mondaq.com>.

97 Ministry of Law Singapore "Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore" (21 June 2021) <www.mlaw.gov.sg>.

Since the Civil Law (Amendment) Act 2017 (SG) allowed for third-party funding, the Civil Law Act (SG) allows the Minister to establish a qualification test for funders to act as a legislative regulatory barrier.[98] First, a plaintiff must enter the funding agreement with a qualifying third-party funder. To qualify as a funder in Singapore, funding arbitration and litigation must be the business's primary activity.[99] There must be at least SGD 5 million of share capital and managed assets to act as a capital buffer for adverse cost awards.[100] Only funders with enough funding capacity will meet the legal requirements to enter a funding agreement. Secondly, the funding agreement must relate to one of the prescribed dispute resolution proceedings allowed by the 2017 and 2021 amendments.[101]

Alongside the codified requirements, the Singaporean arbitration and legal industries have released additional guidance and practice notes to supplement the law. First, the *Guidance Note 10.1.1: Third Party Funding* provides the best practices for lawyers who refer, advise or act for clients who obtain third-party funding.[102] The *Guidance Note* provides guidance on confidentiality, the scope of funding, managing conflicts of interest, a funder's level of involvement in proceedings, and termination of the proceedings. It advises against lawyers receiving a financial benefit from referring funders to individual clients or having a financial interest in the funder.[103] It also discourages lawyers from acting on the client's and funder's behalf when drafting and reviewing the funding agreement, which would conflict with the lawyer's paramount duty to their client.[104]

The Singapore Institute of Arbitrators (SIARB) provides the most extensive guidance to promote the best practice amongst almost 1,000 funders and parties for Singapore-seated international arbitration.[105] SIARB Guidelines set out the basic principles of a funding agreement to be followed by the relevant parties and include similar conflict of interest guidelines as the *Guidance Note*. The Institute encourages proper dispute resolution mechanisms built into funding agreements and discourages funders from funding several parties if a conflict of interest arises. The Singapore International Chamber of Commerce has released similar guidelines and practice notes.[106]

Whilst the Civil Law Act (SG) is legislation that must be complied with, any supplementary guidance is guidance only, and non-compliance does not impact a funding agreement's validity under Singaporean law. However, non-compliance with supplementary guidance threatens a funder or lawyer's membership to the SIARB and Singapore International Chamber of Commerce. The Singaporean regulatory model allows for minimal interference from the judiciary and legislature, provided that funders and lawyers have met the test established under the Civil Law Act (SG).[107] The legislation sets a baseline qualification standard for eligible proceedings in Singapore, and the supplementary guidance provides a higher regulation standard. The influential industry-based regulatory body can ensure funders and lawyers meet its higher standards of practice through widespread membership. Due to their relationships and expertise within

98 Civil Law Act 1909 (SG), s 5B(8).
99 Civil Law (Third-Party Funding) Regulations (SG), s 4(1)(a).
100 Section 4(1)(b).
101 Section 3.
102 Law Society of Singapore *Guidance Note 10.1.1: Third Party Funding* (25 April 2017) at [2].
103 At [13].
104 At [13].
105 Singapore Institute of Arbitrators "Institutional Arbitration Rules - SIARB Arbitration Rules" <www.siarb.org.sg>.
106 *Singapore International Commercial Court Practice Directions* (1 July 2023).
107 Civil Law (Third-Party) Funding Regulations 2017 (SG), reg 4.

the industry, it is advantageous to have industry groups providing the regulation on top of a legislative scaffold, an especially relevant consideration for smaller markets like Singapore and New Zealand. In such markets, the legal and financial industry is heavily relationship-based, and non-membership to these groups would thus be an effective penalty.

F *Commentary*

My jurisdictional analysis shows that common law jurisdictions have taken various approaches toward recognising, approving and regulating third-party litigation funding. From Australia and the United Kingdom's largely self-regulation approaches to Canada's court-centred approach to Singapore's legislative and guidance scaffolding approach—jurisdictions have considered various legal and policy considerations to frame their approach to third-party litigation funding.

A central reason for the different regulatory approaches to third-party litigation funding is whether that jurisdiction wants to establish itself as a global litigation powerhouse, a policy decision for individual countries. Looking at Australia and the United Kingdom, loose regulations have enabled these countries to become world leaders in international litigation for class actions due to their light-touch rules and consumer-friendly provisions. The United Kingdom and Australian funding industries are worth £2.2 billion and AUD $173.5 million, respectively, with high growth rates of approximately 20 per cent per annum over the last few years.[108] Since third-party litigation has been allowed and regulated in these countries, the industry and the number of class actions generally have grown substantially. A key policy consideration for New Zealand is whether we want to position ourselves similarly as an economy that supports international litigation and class actions as a means of adversarial legal action or achieve vindication of rights through public regulatory bodies such as the Commerce Commission. Given New Zealand's generally non-litigious culture, as demonstrated through institutions such as ACC, that deliberately exclude litigation in some areas, it is unlikely that New Zealand will want to encourage a society that thrives on adversarial litigation and the use of class actions.

Moving funding agreement approval decisions into the hands of the courts, such as in Canada, develops precedent regarding the considerations that courts will weigh when assessing whether to approve or reject funding agreements. These cases indicate to funders and plaintiffs what levels of funding commission and other contractual terms the courts will accept. Thus, the Canadian approach effectively guides funders while allowing courts the flexibility to tweak parameters in light of new circumstances.

The Canadian approach of empowering the courts to define what is fair and reasonable when considering funding agreements allows the definition to evolve and potentially expand over time. However, it may not always provide clarity to funders and plaintiffs. As a result, plaintiffs may be less likely to engage class action funders, and funders may charge an additional premium to account for the risk that a court rejects the funding agreement. Allowing time for judicial interpretation of binding legislation and input from industry groups may provide greater clarity to funders and plaintiffs regarding the policy direction courts are pursuing.

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108 Katharine Gemmell "Litigation Funders Are Betting on a Rise in UK Class Actions" (9 August 2022) Bloomberg <www.bloomberg.com>.

The Singaporean arbitration regulation approach can guide New Zealand's course on third-party litigation funding. A minimum regulatory standard enshrined in legislation requires lawyers and funders to adhere to baseline standards of conduct. On top of this, extensive guidance on best practices, alongside industry membership incentives (similar to the United Kingdom's ALF group), motivates industry participants to strive to meet standards that are more rigorous than the baseline regulation. The legislative aspect of this approach provides certainty and allows industry bodies to continually update guidelines and best practice notes in line with changing societal needs. In New Zealand, this would be consistent with current regulations for the legal industry, with the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 providing baseline requirements.[109] Alongside this Act, the New Zealand Law Society and other industry groups provide additional guidance that members must comply with.

IV The New Zealand Law Commission Report

The NZLC Report, released in May 2022, has catalysed my research discussion on the appropriate regulatory framework for third-party litigation funding in New Zealand.[110] This Part explores the NZLC's recommendations for the future of class actions and litigation funding before I make my regulatory proposals in Part V.

First, the NZLC acknowledges uncertainty on whether litigation funding is prohibited, believing that the judiciary in New Zealand has taken a "cautiously permissive" approach to financing to date.[111] The fundamental reasoning behind the uncertainty is the unclear status of champerty and maintenance.[112] The NZLC noted that these uncertainties are problematic as they potentially impact the availability and affordability of litigation funding in New Zealand, inhibiting access to justice.[113] Additionally, uncertainty surrounding the legality of litigation funding and interaction with maintenance and champerty does not provide predictability, an essential requirement under the rule of law.[114] In response, the NZLC recommended that Parliament enact provisions that abolish the torts due to their modern redundancy and hindrance to litigation funding's growth. Doing so would send a clear message of encouragement to plaintiffs and funders, reducing the investment risk of funding agreements for funders.[115]

In principle, the NZLC believes that litigation funding is desirable for New Zealand, with access to justice advantages outweighing the potential disadvantages.[116] Establishing a statutory regime for class actions, as the NZLC recommended, would have little practical effect if not reinforced by mechanisms such as litigation funding that help facilitate access to class actions.[117] The NZLC believes that allowing litigation funding will not substantially affect either Directors & Officers' Insurance or increase meritless cases due to the types of cases and due diligence funders undertake.[118]

109 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
110 Law Commission, above n 4.
111 At [13.5].
112 At [13.9].
113 At [13.10].
114 At [13.10].
115 At [13.54].
116 At [13.59].
117 At [13.61].
118 At [13.62]–[13.63].

When polling respondents to the Issues Paper requesting input on potential regulatory solutions, there was a broad range of responses. The recommendations proposed ranged from heavy- to light-handed regulation.[119] The Issues Paper and subsequent responses discussed various proposals, including requiring court approval, statutory criteria for approval of funding agreements, clarity on the lawyer-client relationship in a funded action, and whether a licensing requirement was appropriate.[120] The NZLC ultimately recommended that the courts be responsible for approving agreements, as they can best consider the fairness and reasonableness of funding agreements in class actions.[121] In the NZLC's view, this approach is most likely to promote fair, consumer-centric access to justice for New Zealanders whilst promoting a sustainable and competitive market with room to grow.

When deliberating the best regulatory mechanism to oversee litigation funding agreements, the NZLC discussed the courts' role in overseeing and approving third-party funding agreements. Through the relatively sparse case law in New Zealand, questions have been raised on the institutional capacity of the courts to judge a funding agreement on the concepts of fairness and reasonableness.[122] The Court of Appeal in *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* and the Supreme Court in *Waterhouse v Contractors Bonding Ltd* both commented on the courts' difficulty in assessing the fairness and reasonableness of funding agreements.[123] In response, the NZLC looked at other jurisdictions where courts can look at, amend and approve the entire funding agreement to ensure the deal is fair and reasonable. I believe satisfactory guidance from the legislature and industry could solve this problem. However, neither Parliament nor industry will likely provide this guidance while the legality of funding agreements is uncertain.

The NZLC provided commentary on other options they assessed when making their decision.[124] It rejected industry self-regulation due to its impracticalities associated with New Zealand's small market of largely overseas-based funders and the lack of scrutiny of funding agreements that would occur.[125] Furthermore, it opposed licensing requirements under existing legislation through the Financial Markets Conduct Act 2013 (FMC) because Parliament did not tailor the FMC to regulate litigation funding arrangements. The Financial Markets Authority, the regulator responsible for the FMC licensing scheme, also opposed shoehorning litigation funding agreements into the FMC framework.[126] The NZLC also rejected the creation of a licensing regime specifically for funding agreements due to the high establishment costs that would be involved relative to the proportionate size of the litigation funding market in New Zealand.[127] The NZLC believed that funders would inevitably pass on to consumers any levies such a scheme would impose on funders. They additionally stated that there is no obvious regulator to oversee the system,

119 At [14.8].
120 At [14.14] and [14.16]–[14.18].
121 At [14.57].
122 At [14.59].
123 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [79]; and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [48].
124 Law Commission, above n 4, at [14.65].
125 At [14.65(a)].
126 At [14.65(b)].
127 At [14.65(c)].

and creating a new statutory body would be disproportionately expensive to the small size of the litigation funding market.[128]

V Proposed Recommendation For Regulating Third-Party Litigation Funders In New Zealand

A *Proposed solution*

New Zealand should adopt a hybrid regulatory regime utilising various existing governance mechanisms to regulate third-party litigation funding. First, statutory guidance through the soon-to-be enacted class action legislation should establish a minimum framework on acceptable third-party litigation financing agreements and baseline financial adequacy requirements for funders. On top of this, industry groups (such as the existing legal societies and a new litigation funders industry group) should work in tandem to provide supplementary practice notes to market participants. These guidelines would establish a higher code of conduct of best practice for members but are not binding. The additional guidance notes have the advantage of being able to be adjusted to change with the industry. I agree with the NZLC that the courts are the best practical avenue to regulate third-party litigation financing due to their ability to adapt their interpretation of legislation with industry and societal shifts over time. I have established my position by analysing jurisdictional approaches and the NZLC's recommendations. It is essentially a hybrid of the Singaporean arbitration funding approach, the Canadian court-driven enforcement approach and the existing recommendations made under the NZLC Report. The following Part will discuss the various procedural roles in detail.

B *The role of the legislature*

My approach begins with the legislature's role in establishing minimum statutory guidelines. I look towards Ontario to provide an example of legislation establishing a statutory base. In Ontario's recently updated Class Proceedings Act, the legislature has clearly defined a framework for a court to approve a third-party litigation funding agreement.[129] The legislation provides several factors that funders must satisfy before a court will deem a funding agreement valid. Mandatory factors include that the terms of the agreement are "fair and reasonable", that "the agreement will not diminish the rights of the … plaintiff to instruct the solicitor or control the litigation or otherwise impair the solicitor-client relationship," and that "the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement".[130] In addition, several procedural requirements exist, including an obligation on the funded party to provide copies of the agreement to the court and the opposing party.[131] The Ontario statutory framework provides a legislative baseline that must be complied with for a funding agreement to be approved. It also imports a requirement that a funder must be financially solvent to provide certainty to both parties that the litigation funder can cover legal costs and any adverse costs.[132]

128 At [14.65(d)].
129 Class Proceedings Act SO 1992 c 6, s 33.1.
130 Section 33.1(9)(a).
131 Sections 33.1(4) and (6).
132 Section 33.1(9)(a)(iii).

New Zealand's class action legislation should provide minimum compliance standards similar to those of Ontario. Using the words "fair and reasonable" in the Act allows courts the flexibility to adjust the terms of an agreement to suit different circumstances, types of actions and changing times. Alongside the qualification requirements, mandatory financial solvency and procedural requirements provide financial security and procedural clarity to industry participants, including the opposing defendant. The fundamental advantage of this approach is that it inspires greater confidence in all parties that litigation agreements will meet minimum acceptable standards, providing funders and plaintiffs with certainty and reducing the risk of the courts arbitrarily rejecting contracts. A disadvantage may be the inability of legislation to adapt to the industry as it grows and changes in New Zealand and globally. The legislature should address this concern about ossification by utilising the courts' ability to interpret statutes to adjust and expand the parameters of acceptable conduct, allowing the industry to grow sustainably on top of a secure legislative backdrop.

C *The role of the industry*

New Zealand's legal industry should play a prominent role, alongside Parliament, in establishing a code of best practice for funders and lawyers. Sectoral groups should provide supplemental industry guidance notes on managing conflicts of interest between plaintiff classes, funders and lawyers; managing the registration of plaintiffs in the class—and their expected involvement; guidance on efficient forms of class distributions to ensure that agreements compensate plaintiffs and funders fairly and efficiently; and any notes of industry developments and extended regulatory requirements that must be complied with.

The United Kingdom and Australia are the strongest examples of industry-led groups that encourage best-practice behaviour through self-regulation. Additionally, Singapore utilises industry groups to provide additional guidance on top of a statutory backdrop. New Zealand should adopt aspects of these jurisdictions' approach. Whilst I recommend that New Zealand should not implement a pure model of self-regulation, allowing a degree of sector-led regulation can encourage industry buy-in. The United Kingdom's ALF provides a Code of Conduct (the Code) that enables three critical aspects of litigation funding.[133] First, on top of the requirement to fund all present disputes that funders have financed, the Code requires funders to be able to cover all potential funding liabilities for a minimum period of 36 months,[134] thus extending beyond any statutory requirement to cover all adverse costs of presently funded disputes. Secondly, the Code provides best practice for withdrawing from funding and requires that the funder behave reasonably and only exit from funding in specific circumstances.[135] Finally, the Code prevents funders from taking control of litigation and ousting the plaintiff from directing the proceedings.[136]

Utilising either existing industry groups or establishing new industry groups would encourage industry buy-in and position New Zealand's legal industry firmly in favour of promoting litigation funding. Industry involvement allows the funding industry to develop with global changes, creating a competitive product for New Zealand plaintiff classes. However, New Zealand's approach should differ from that of the United Kingdom and Australia in that it should provide a more consumer-centric system that gives less

133 Association of Litigation Funders of England and Wales, above n 64.
134 At [9.4.1.2].
135 At [11.2].
136 At [9.3].

centralised power to the industry. Enacting statutory underpinnings for procedural, financial, and disclosure requirements provides security to the plaintiff and ensures that their funding is secure. An industry self-regulation model cannot offer plaintiffs the same level of financial security. Any regulation of third-party funders should encourage competition within the industry to provide the best product for New Zealand plaintiff classes, challenging to achieve in a pure, self- or industry-regulated model where there is the risk that parties may collude—especially in a smaller legal industry like New Zealand's. Providing a statutory baseline with minimum standards and supplementary industry involvement addresses the disadvantage of increased collusion risk in a purely self-regulatory model.

D *The role of the courts*

The courts should be responsible for enforcing individual litigation funding agreements due to their ability to interpret and develop the focus of legislation over time. Court enforcement is the most common approach for practical enforcement utilised in Canada and, soon, Australia, following the proposed rollback of Australian litigation funding regulations. Underpinned by a statutory requirement that a funding agreement must be "fair and reasonable", New Zealand courts would have the discretion to approve funding agreements on a case-by-case basis. The advantage of this approach is that it allows courts to tailor their understanding of what is "fair and reasonable" to the individual cases and the overall policy direction sought by the courts. Funders and potential plaintiff classes can utilise precedent to clarify what courts will likely deem an acceptable funding agreement.

However, I believe the courts need to be cautious in allowing the precedential ambit of what is "fair and reasonable" to change in light of sustainable industry and societal development without too much reliance on historical cases. Too much judicial conservatism has the effect of narrowly applying principles historically relevant to litigation funding agreements without allowing the market to develop sustainably—this has been a disadvantage of the Canadian courts' approach.[137] New Zealand can avoid this problem by setting clear policy expectations statutorily or through regulation for the industry's future growth, which the rules would require the judiciary to promote.

E *The incorporation of NZLC recommendations*

The recommendations posed above partially align with the recommendations made by the NZLC. Instead of a High Court rule requiring disclosure of the funding agreement to the court and defendant, I have proposed a more comprehensive statutory regime that provides financial adequacy, procedural and disclosure requirements. This regime would be more plaintiff- and consumer-centric, aligning with my belief that third-party funding is a form of consumer finance with informational asymmetry.

In addition, I have recommended using supplementary industry groups to stipulate a higher duty on industry participants, with guidance provided for best practice procedures and relationship management. Like the NZLC, I propose utilising the courts as a mechanism for approving third-party litigation funding agreements, as they are in the best position to assess funding agreements practically on a case-by-case basis.

137 See, for example, *Musicians' Pension Fund of Canada*, above n 88, that reiterated the Canadian Judiciary's position that funding agreements must be individually approved by the Court.

F *Critiquing this article's proposal*

The hybrid approach this article proposes strikes a balance between providing clarity and security to plaintiffs and funders whilst allowing for incremental development through the courts and industry groups. If you were to have a purely statutory approach with a strict licensing system, like Australia previously did, the system would become too rigid and inflexible to encourage access to justice and innovation. Suppose you were to have a strictly court-based system. In that case, there is a risk that courts reject funding agreements because they do not neatly fit within precedent. A court-based system can thus fail to allow for the development of funding agreements. If New Zealand adopts a self-regulation model, like the United Kingdom's, there is an increased risk of price collusion, unethical participants and anti-competitive behaviour—especially in New Zealand's comparatively smaller legal industry. My approach accounts for these shortfalls and would create a robust regulatory regime attractive to plaintiffs and funders if implemented.

A potential disadvantage of my approach may be its complexity, given that it is multi-faceted. In response, I would argue that my proposal utilises existing mechanisms. The proposed class action legislation would incorporate soon-to-be-established statutory guidelines and would not require any additional work setting up an independent licensing or regulatory body. Courts already play a role in interpreting today's funding agreements. With the addition of legislation, the legislature will better guide its decisions with a clearly defined role in approving funding agreements according to pre-determined statutory criteria. Courts can also sustainably drive the law forward with industry changes. Finally, New Zealand's legal industry has a robust culture, which the sector should and can leverage to provide the best solution for all industry participants. An example of the sector leveraging its culture is the broad and deep engagement of a spectrum of law firms, academics, funders and other interested parties in the NZLC Report, many of whom made detailed submissions. My approach leverages existing players to implement a market-driven system with statutory foundations, providing clarity and security to plaintiff classes and opportunities to funders.

VI Conclusion

This article aimed to address the issue of regulating New Zealand's soon-to-be-legalised third-party litigation funding industry. As stated in my introduction, New Zealand is at a crossroads in defining the policy direction of the litigation funding industry, and the form of regulation imposed heavily influences this path. The question is not whether New Zealand should regulate the industry but what regime would best balance the need to protect plaintiffs with the interest of encouraging the New Zealand funding industry to grow sustainably.

After an industry overview, a survey of analogous jurisdictions and an analysis of the NZLC's recommendations, I have proposed a hybrid solution to maximise the advantages and minimise the disadvantages of each jurisdiction's approach. As part of this, I suggest introducing a statutory framework to provide baseline certainty, promoting cooperation and best practice through guidance from industry groups, and empowering courts to execute and apply the law pragmatically. This approach aims to provide certainty yet allows for flexibility and utilises existing mechanisms to ensure easy implementation and simplicity for participants.

I believe academics should undertake further research to assess the viability and practicalities of a public class-action fund and how this could further promote access to justice for plaintiffs who may not be seeking monetary damages. Determining how to implement a public class action effectively warrants a separate research article. Additionally, retrospective research on any New Zealand third-party funder regulatory implementation should occur to ensure that the chosen regulation functions effectively in practice.

Reflecting on my proposal, we have the advantage in New Zealand of studying other jurisdiction's approaches to formulate the best way forward for us in our circumstances. New Zealand should capitalise on its opportunity to develop third-party funding mechanisms that most effectively promote access to justice and entrepreneurial funding projects. The Government and Parliament must make accessibility, market competition and flexible regulation central to its reforms to ensure New Zealand provides a solid and attractive legal mechanism for plaintiffs and funders.