

# New Zealand Law Commission Issues Paper: Class Actions and Litigation Funding

Submission by Omni Bridgeway Limited

March 2021

## 1. INTRODUCTION

Omni Bridgeway Limited welcomes the opportunity to provide a submission to the New Zealand Law Commission's review into Class Actions and Litigation Funding.

Omni Bridgeway has noted that this review is taking place within a wider context of ongoing work to address barriers to accessing civil justice and that it aims to ensure the laws relating to class actions and litigation funding support an efficient economy and a just society, and are understandable, clear and predictable. Omni Bridgeway fully supports these objectives as its business involves facilitating access to justice through the actions it funds.

In this introductory section, we have set out some background information about Omni Bridgeway, briefly addressed the importance of access to justice and included a summary of Omni Bridgeway's submissions. In section 2, we address the specific questions raised by the Law Commission in the Issues Paper.

### 1.1. About Omni Bridgeway

Omni Bridgeway is the largest and most experienced litigation funder in the Asia-Pacific region (APAC) and is a global leader in financing and managing legal risks. It offers dispute finance from case inception through to post-judgment enforcement and recovery. The company was known as IMF Bentham Limited in APAC until it completed the acquisition of Europe-based Omni Bridgeway in November 2019 and adopted a single global name. The company listed on the Australian Securities Exchange in 2001, specifically to promote transparency in what was at that time a new industry.

Omni Bridgeway has recently funded its first case in New Zealand but has been conducting due diligence on potential cases for funding for several years.

Omni Bridgeway has a diversified portfolio of approximately 286 funded claims around the world<sup>1</sup>. While a clear majority of these funded claims are now outside Australia, Omni Bridgeway's funding of class actions is primarily in Australia (where the company is currently funding 15 class actions). We are also currently funding two multi-party actions in New Zealand<sup>2</sup>.

Since listing on the ASX, Omni Bridgeway has been involved with 89 multi-party actions<sup>3</sup> in Australia, generating more than AUD 1.9 billion in recoveries, of which approximately AUD 1.2 billion – approximately 62.7 per cent<sup>4</sup> – has been returned to claimants. Of the balance of the recoveries, AUD 266 million covered the legal and other 'project costs' of preparing and prosecuting the actions paid by

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<sup>1</sup> As at 31/12/20 (see Omni Bridgeway's [ASX Announcement](#) of its Investment Portfolio Quarterly Report).

<sup>2</sup> These are representative actions under rule 4.24 of the New Zealand High Court Rules (HCR 4.24).

<sup>3</sup> These actions included representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth); proceedings under provisions equivalent to Part IVA found in the Rules of state Supreme Courts; and proceedings under the Chancery rules and as multi-plaintiff actions.

<sup>4</sup> This statistic is based on 78 actions won, settled or lost. The balance were withdrawn. This statistic is based on the amount of project costs paid by Omni Bridgeway. In some circumstances the lawyers may have been paid additional amounts out of the settlement monies and the settlement amount may have earned interest before distribution to group members.

Omni Bridgeway. Over this 20 year period, Omni Bridgeway has earned a commission of approximately AUD 454 million – or 23.5 per cent of the recoveries - after covering legal and other project costs (before the company's operating costs).<sup>5</sup>

The participants in these multi party actions comprise both what are described as 'mums and dads' and also sophisticated institutional investors.

Further information on Omni Bridgeway can be found on its website at [www.omnibridgeway.com](http://www.omnibridgeway.com), including its latest financial results and its Annual Reports to shareholders.

## 1.2. How Omni Bridgeway operates

Omni Bridgeway funds a wide range of claims, including:

- single-party disputes, which include general commercial disputes, claims against estates and trustees, building and construction disputes, patents disputes, professional indemnity claims, contract disputes, and claims against insurers;
- insolvency proceedings, including claims for insolvent trading, preferences and breaches of directors' duties, as well as third-party claims;
- class actions and other types of multiparty actions, including securities class actions, cartel claims, claims involving the provision of financial services, defective building products, and claims in connection with land contamination;
- international commercial arbitration and investment treaty claims; and
- enforcement proceedings.

Omni Bridgeway funds claims from its own balance sheet or from one of seven specialist funds it has established with a range of investors.

Omni Bridgeway funds only 3-5 per cent of all applications for funding it receives worldwide, demonstrating its commitment to support only genuine actions with reasonable prospects of a successful outcome for claimants. This also recognises Omni Bridgeway's obligation to the courts and the public not to burden the courts with meritless claims.

Omni Bridgeway's funding for class actions is provided on a limited-recourse basis – that is, Omni Bridgeway pays the claimants' costs as the case proceeds and only receives a recovery if the case is successful and a recovery is made from the defendant.

In the claims that it funds, Omni Bridgeway typically provides funding for the claimants' own legal fees and disbursements, including counsels' fees, witness expenses, court costs, any security for costs and adverse costs and other expenses (together, these are referred to by Omni Bridgeway as the project costs).

Omni Bridgeway does not provide legal services. Instead, in addition to the funding, it provides a broad range of services to assist clients and the lawyers in relation to the conduct of the proceedings.

In funded class actions, Omni Bridgeway plays a key role in informing potential claimants of the opportunity to join the class action to enforce their rights. In some circumstances this can include covering the cost of independent legal advice to group members about the terms of the litigation funding agreement (LFA). Omni Bridgeway has a Client Team that undertakes many of the administrative tasks relating to managing group members' claims at no additional charge to group members. The alternative is for these functions to be performed by the lawyers and form part of the legal costs that the group members are asked to pay. This could amount to millions of dollars in large actions.

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<sup>5</sup> As at 31/12/20.  
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Omni Bridgeway negotiates litigation budgets with the claimants' lawyers and ensures so far as possible that the legal costs and strategies are proportionate to the sums at stake. In jurisdictions where it is permitted, Omni Bridgeway also oversees the litigation and liaises with the lawyers on a day-to-day basis (subject always to the representative claimant's rights to override Omni Bridgeway's views and the lawyers' paramount professional duties to the claimants). Omni Bridgeway also assists the claimants on litigation strategy.

Crucially, Omni Bridgeway also agrees to pay any adverse costs orders, in the event that the claims are unsuccessful, and usually lodges a "Deed Poll" with the court confirming Omni Bridgeway's obligation to meet any adverse costs orders made against the funded claimant. As a listed entity, Omni Bridgeway's financial position is set out in its periodic reports lodged with the Australian Securities Exchange. Omni Bridgeway agrees that, if a case is unsuccessful, costs orders may be made directly against a funder to obviate the time and cost for a defendant to enforce a costs order.

As Omni Bridgeway's funding is limited-recourse, in return for our commitment to fund and assumption of the risks of commencing and prosecuting the class action, claimants agree to assign to Omni Bridgeway a share of any damages or settlement proceeds that are recovered from the opposing parties to their claims. Under the LFA used for class actions, if the action is successful, Omni Bridgeway will usually be entitled to be reimbursed all amounts it has paid and a fee or commission which is usually a percentage of the recoveries. In some cases, the fee is based on a multiple of the costs spent by Omni Bridgeway in the proceedings. This fee is fixed at the commencement of a class action and before the outcome is known.

### 1.3. Importance of access to justice

The high costs of litigation and lack of public legal funding cause significant issues for both individuals and companies in affording access to the civil justice system. The significant costs for a litigant in funding its own legal costs and disbursements, plus the risk of adverse costs orders if the litigation is unsuccessful, deter many individuals and companies from commencing litigation, even where they have a strong case. These costs and risks are serious barriers to access to justice and to the effective civil enforcement of laws.

This is a particular issue in relation to class actions which are particularly expensive and risky. Class actions funded by claimants themselves are rare, and few law firms have the financial capacity to conduct a large and lengthy class action on a 'no win, no fee' basis<sup>6</sup>.

The growth of the litigation funding industry globally, including in New Zealand in recent years, has been a private market response to the demand for increased access to justice in a time of rising legal costs and falling public funding.

Omni Bridgeway has built its business around meeting some of the demand for funding from claimants with strong legal claims who lack the financial resources necessary to pursue their claims through the civil justice system. Omni Bridgeway has made access to justice a practical reality for those claimants. To date, Omni Bridgeway has assisted over 300,000 claimants, from the largest investment funds to small businesses and individuals<sup>7</sup>.

In the Omni Bridgeway funded class actions against the Australian Commonwealth Department of Defence over contamination caused by the use of toxic firefighting chemicals on Defence facilities in Williamstown in New South Wales, Oakey in Queensland and Katherine in the Northern Territory, Justice

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<sup>6</sup> This is a form of conditional fee which is permitted in some jurisdictions, including New Zealand provided that any premium paid to the lawyer in case of success is not calculated as a percentage of a damages award or settlement (see Issues Paper, paragraph 3.25).

<sup>7</sup> Omni Bridgeway's clients include private individuals, small businesses, superannuation funds and other institutional investors, churches, councils and charities and insolvency practitioners.

Lee in the Federal Court of Australia said the case would have been “impossible to bring without a funder”. He made the following observation about the role of litigation funders:

*“There is a live contemporary controversy about litigation funding. I do not propose to enter the arena of this policy debate save to make a few comments. The term “access to justice” is commonly misused, most often by some funders who fasten upon it as an inapt rhetorical device. To those with a long and close involvement with litigation funding, it is evident that there is not only a danger in generalisation (and assuming all funders are the same), but there is also a danger of using well-worn phrases to obscure the reality that litigation funding is about putting in place a joint commercial enterprise aimed at making money. As I said in *Turner v Tesa Mining (NSW) Pty Limited* [2019] FCA 1644; (2019) 290 IR 388 (at 401 [41]): ‘the funder is not so much facilitating access to justice by the funded party as itself gaining access to justice for its own purposes’.*

*But recognition of this reality does not diminish the importance of litigation funding in allowing these class members to vindicate their claims against the Commonwealth. Without litigation funding, the claims of these group members would not have been litigated in an adversarial way but, rather, they would likely have been placed in the position of being supplicants requesting compensation, in circumstances where they would have been the subject of a significant inequality of arms ... But it strains credulity to think that claims of this complexity and attended by such potential expense could have been litigated to a conclusion without third party funding of some sort. It seems to me a testament to the practical benefits of litigation funding, that these complex and costly claims have been able to be litigated in an efficient and effective way and have procured a proposed settlement. It must be recalled that an acceptable settlement was only forthcoming after a vast outlay of resources, and the assumption of risk of a third party funder for potential adverse costs.”<sup>8</sup>*

## 1.4. Summary of Omni Bridgeway’s submissions

### Class actions

- Class actions provide an efficient means for large numbers of people to obtain access to justice and seek compensation for mass wrongs.
- The current representative proceedings regime in New Zealand has worked well to date. However, there would be benefits for class members for New Zealand to adopt a more detailed legislative regime, such as the class actions regimes that exists in Australia.
- The Australian system largely works well. It was first introduced in the Federal Court of Australia almost 30 years ago and, since then, has been substantially adopted in several Supreme Courts of Australian states.
- Under the Australian regimes, the courts retain significant powers throughout proceedings and all class actions settlements must be approved by the court.
- The statutory regime in New Zealand should include some reforms to certain areas that have led to uncertainty and satellite litigation in Australia in recent years, including in relation to competing and multiple class actions and class closure orders.
- The New Zealand statutory regime should permit both opt-in (closed) class actions and opt-out (open) class actions.

### Litigation funding

- Omni Bridgeway recommends that New Zealand abolishes the torts of maintenance and

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<sup>8</sup> *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837 at [83-85].

champerty.

- Omni Bridgeway supports appropriate regulation of funders in New Zealand including licensing of funding and ensuring that commercial funders have capital adequacy.
- The form of regulation must ensure that funders operate fairly but does not prevent them from participating in the process, to ensure the litigation is conducted efficiently for the benefit of all and to enable the funder to protect its investment.

## 2. RESPONSE TO QUESTIONS IN THE ISSUES PAPER

### Chapter 4: Problems with using the Representative Actions Rule for Group Litigation

#### (Q1) What problems have you encountered when relying on HCR 4.24 for group litigation?

1. Omni Bridgeway has not encountered any significant issues in its funding of representative actions in New Zealand under HCR 4.24.
2. Omni Bridgeway is currently funding two representative actions in New Zealand: a shareholder action against CBL Corporation and a combustible cladding action involving product liability claims against the manufacturer and suppliers of Alucobond polyethylene core cladding products.
3. Omni Bridgeway considers that the current representative action regime in New Zealand has worked well to date. The courts have had the flexibility to approach procedural issues on a case by case basis. For example, the Omni Bridgeway-funded CBL action is one of two representative actions proceedings against CBL. Despite this multiplicity, the actions do not overlap in that each action is brought on behalf of a separate group of shareholders. The two groups are represented by different law firms with backing from different funders.
4. Nevertheless, in Omni Bridgeway's submission, there would be benefits for group members and defendants for New Zealand to adopt a clear and more detailed legislative regime, to provide clear policy objectives and rules on the procedural issues that commonly arise and are unique to group actions. Although having a statutory regime doesn't mean that there will never be satellite litigation, a detailed regime is more likely to create certainty for all parties in how the action will proceed.<sup>9</sup>
5. Omni Bridgeway considers that the statutory regime should be based on the Australian regimes but include some reforms to certain areas that have led to uncertainty and satellite litigation in Australia in recent years (see our response to question 5 below).
6. The current procedure in New Zealand under HCR 4.24 includes an initial step that requires court approval to bring a representative proceeding. Omni Bridgeway considers there is a danger that this could be interpreted as a de facto certification procedure and lead to satellite litigation and additional and unnecessary costs (see our response to question 19 below).

#### (Q2) Which kinds of claim are unlikely to be brought under HCR 4.24 and why?

7. Omni Bridgeway has not experienced any barriers to bringing any particular kinds of claim under HCR 4.24. In our view, when a large number of people have suffered wrongdoing but no action

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<sup>9</sup> Issues Paper at paragraph 4.18 and *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [94].  
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has been brought, there can be a number of underlying reasons, including that the cause of action and/or case law make the particular type of claim more difficult to prove, the wrongdoing is remedied without resort to litigation, or consumers lack awareness about their legal rights. However, Omni Bridgeway recognises there may be some cases where a statutory regime that provides for an open class action may provide some benefits.

## Chapter 5: Advantages of Class Actions

(Q3) What do you see as the advantages of class actions? In particular, to what extent to you think class actions are likely to:

- (a) Improve access to justice?
  - (b) Improve efficiency and economy of litigation?
  - (c) Strengthen incentives to comply with the law. Is this an appropriate role for a class actions regime?
8. Omni Bridgeway considers that class actions provide an efficient means for large numbers of people to obtain access to justice and seek compensation for mass wrongs.
  9. Strong access to justice in a society increases the likelihood that losses due to misconduct will be adequately compensated by the wrongdoers, and also that laws will be enforced and wrongdoing deterred. This is particularly important in relation to laws designed to protect the interests of consumers or to promote confidence in the integrity of financial markets, due to the widespread economic and social importance of those laws.
  10. Often, the only practical means of enforcing those laws is through a funded class action because individual losses are too small and the costs too high, to justify them being pursued alone. Class actions funded by Omni Bridgeway have facilitated the enforcement of a range of laws in Australia, including the continuous disclosure regime, trade practices law, financial services and competition laws.
  11. Three recent Australian class actions that we believe demonstrate the advantages of class actions are the Omni Bridgeway-funded actions against the Commonwealth Department of Defence over contamination caused by the use of toxic firefighting chemicals on Defence facilities. In approving the settlement of the “complex and costly claims”, Justice Lee in the Australian Federal Court said the class actions were:

*“conducted in a highly efficient way and [the parties] have constructively sought to conduct the litigation with the aim of bringing it to a speedy conclusion.”*

and

*“...there was a good deal of cynicism expressed about the legal system in general, and class actions in particular. But, to my mind, the present cases are a good example of the system working, and working well.”<sup>10</sup>*
  12. Class actions also improve efficiency and economy of litigation. The main alternatives to class actions<sup>11</sup> are either:
    - No action being brought.

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<sup>10</sup> *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837 at [73] and [85].

<sup>11</sup> Chapter 3 of the Issues Paper also set out other procedural techniques and specific statutory procedures for bringing group claims in New Zealand but states that most of these have never or rarely been used.

- Hundreds or even thousands of individual actions (although the majority of these are unlikely to be viable).
- In some cases, an action by a regulator (although they have limited resources to pursue the range of breaches that occur).<sup>12</sup> In Australia, the Australian Securities and Investments Commission (ASIC) has said in relation to shareholder class actions:

*"Where private action can achieve a similar outcome to that which action by ASIC could achieve, it allows ASIC to allocate its enforcement resources to other priorities. Shareholder class actions provide a number of benefits to consumers and financial markets and play an important role in improving shareholder access to justice."<sup>13</sup>*

## Chapter 6: Disadvantages of Class Actions

(Q4) Do you have any concerns about class actions? In particular, do you have concerns about:

- (a) the impact on the court system?
  - (b) the impact on defendants?
  - (c) the impact on the business and regulatory environment?
  - (d) how class members' interests will be affected?
13. Omni Bridgeway has not seen any evidence of a detrimental impact of class actions on the court system or defendants. Most class actions are extremely expensive, risky and time-consuming to prosecute against well-resourced defendants. This ensures that generally only class actions with good prospects for success proceed and the courts and defendants are not burdened with meritless claims.
  14. Omni Bridgeway does not have any concerns about the impact of class actions on the business and regulatory environment. Despite some commentary to the contrary from business interests, there is no credible, independent evidence that class actions are having a negative impact on the economy in New Zealand or Australia.
  15. In Australia, it has been acknowledged by the regulator, ASIC, that class actions, by complementing action by regulators to enforce Australia's continuous disclosure regime, contribute to the integrity of the nation's financial markets, making them an attractive source of capital for Australian and international companies.<sup>14</sup>
  16. In submissions to the Australian Parliamentary Joint Committee on Corporations and Financial Services' (Australian PJC's) inquiry into class actions and litigation funding in 2020, the Australian Competition and Consumer Commission (ACCC) submitted that *"class actions are an efficient and appropriate mechanism for obtaining compensation that generally and appropriately supplements public enforcement"*.<sup>15</sup>

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<sup>12</sup> The Issues Paper sets out proceedings that may be brought by the Commerce Commission and the Financial Markets Authority (FMA) but that these statutory provisions are not used often or at all (see paragraphs 3.79 to 3.89).

<sup>13</sup> ASIC's submission to the Australian Law Reform Commission's (ALRC's) inquiry into class action proceedings and third-party litigation funders at [47].

<sup>14</sup> ASIC's submission to the ALRC's inquiry at [4].

<sup>15</sup> ACCC's submission to the Australian PJC's inquiry into class actions and litigation funding, June 2020 at page 2. [omnibridgeway.com](https://www.omnibridgeway.com)

17. In its submissions to the Australian PJC, hospitality industry superannuation fund HESTA<sup>16</sup> said it participates in class actions *"to recover losses but also as a means of encouraging better standards of corporate governance and improved accountability by companies, directors and corporate advisors to their shareholders"*.<sup>17</sup>
18. Another superannuation fund, AustralianSuper<sup>18</sup> submitted to the Australian PJC:  
*"From our viewpoint, where the interplay between the legal system, shareholders and companies is effective, class actions can be a meaningful means to hold companies accountable and enhance better corporate governance, resulting in long-term value for our members."*<sup>19</sup>
19. The Issues Paper referred to the claim that the increase in shareholder class actions in Australia has had a significant impact on the pricing and availability of directors and officers liability insurance (D&O insurance).<sup>20</sup> Omni Bridgeway accepts that the number of class actions may have been one contributing factor to the increase. However, in our view, there have been a number of other important factors driving the increase, including the *"chronic under-pricing of ... D&O business by insurers since at least 2011"*<sup>21</sup>, global trends in the commercial insurance market (including in markets where securities class actions cannot be considered the primary driver) and evidence of corporate wrongdoing, which increases the risk of regulatory and legal action against companies and directors and, as a result, increases insurance premiums. For example, in an article in the Australian Financial Review in January 2019, the findings of the Hayne Royal Commission<sup>22</sup> were said to be the cause of *"pushing up already rocketing D&O premiums – doubling the cost on average – and increasing the excess payable by several times."*<sup>23</sup>
20. In Omni Bridgeway's submission, the interests of class members will be protected by the court's supervisory role in a statutory class actions regime, including in relation to the settlement approval process.
21. In funded litigation, class members' interests will be protected if litigation funders in New Zealand are subject to a licensing regime which includes capital adequacy and conflicts management requirements (see our responses to questions 54 and 57 for further details). Third-party funding arrangements for class actions generally include obligations on the funder to pay significant sums. In Omni Bridgeway's view, prudential regulation of funders is required to ensure those commitments can be met.
22. Omni Bridgeway therefore supports the introduction of a licensing regime for all litigation funders operating in New Zealand to ensure that both class members' interests and the interests of defendants are protected, as well as the reputation of the funding industry as a whole.

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<sup>16</sup> HESTA manages AUD 50 billion of assets on behalf of 860,000 members and that regularly participate in class actions.

<sup>17</sup> Hesta's submission to the Australian PJC's inquiry into class actions and litigation funding, June 2020 at page 1.

<sup>18</sup> AustralianSuper manages almost AUD 170 billion on behalf of 2.2 million members representing over one in 10 working Australians.

<sup>19</sup> AustralianSuper's submission to the Australian PJC's inquiry into class actions and litigation funding, June 2020 at page 1.

<sup>20</sup> Issues Paper at paragraph 6.32.

<sup>21</sup> See the joint white paper published by insurer XL Catlin and law firm Wotton + Kearney XL, *"Show me the money"*, September 2017, at page 15.

<sup>22</sup> The Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

<sup>23</sup> <https://www.afr.com/companies/financial-services/royal-commission-fears-spark-mass-insurance-exclusions-20190102-h19mz1>. That article stated: *"The fallout from the (Royal Commission) has increased premiums for professional indemnity insurance up to 400 per cent and prompted some insurers to exit that segment of the market altogether."*



## Chapter 7: A Statutory Class Actions Regime for Aotearoa New Zealand

### (Q5) Should Aotearoa New Zealand have a statutory class actions regime? Why or why not?

23. In Omni Bridgeway's submission, a statutory class actions regime should be implemented in New Zealand. As set out above, the legislative regime should provide clear policy objectives and rules on the procedural issues that commonly arise and are unique to class actions, including opt-in and opt-out, class closure, settlement and multiplicity of actions.
24. Omni Bridgeway considers the statutory regime should be based on the Australian regimes which are largely fit for purpose. A class actions regime was first introduced in 1992 in the Federal Court.<sup>24</sup> Since then, largely the same regime has been introduced in Victoria, New South Wales, Queensland and Tasmania and a Bill is currently before the Western Australia Parliament.
25. However, Omni Bridgeway considers that the statutory regime should include some reforms to certain areas that have led to uncertainty and satellite litigation in Australia in recent years. Some of these issues were included in recommendations made by the Australian PJC in its December 2020 report. These reforms include:
  - An express power for the court to resolve competing and multiple class actions at the earliest possible time in the proceedings and as cheaply as possible (see paragraphs 29-30 below for further details). The power should include a discretion to allow more than one class action with respect to the same dispute to continue. This is likely to be clearer now in Australia following the High Court's decision in the AMP case referred to below.
  - An express power to order class closure orders.<sup>25</sup>
  - Specified criteria for the court to apply in determining whether to close the class or re-open the class. If an order to close the class is made, it should be final unless the court finds that it is in the interests of justice to re-open the class.<sup>26</sup>
26. While Omni Bridgeway considers that closed (opt-in) class actions have several benefits over open (opt-out) class actions (see paragraph 28 below), in our view the New Zealand statutory regime should permit both closed class actions and open class actions. This would give the parties the flexibility to choose the most appropriate type of action (and funding) depending on the circumstances.
27. A closed class action is often restricted to those group members who sign a funding agreement, while an open class action is often supported by a common fund order (CFO)<sup>27</sup> since the Australian Federal Court decision in the *Money Max* case in 2016<sup>28</sup>.
28. In Omni Bridgeway's view, the closed class system has several benefits over open class actions with CFOs, including that a closed class action:

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<sup>24</sup> Part IVA of the *Federal Court of Australia Act 1976* (Cth). This has been supplemented by a Class Action Practice Note (GPN-CA).

<sup>25</sup> There is currently no express power in the Australian Federal Court class action regime. However, this power has been recommended by the Australian PJC. The power could be modelled on, or similar to, section 33ZG of the *Supreme Court Act 1986* (Vic).

<sup>26</sup> The Australian PJC recommended this should be set out in the Federal Court of Australia's Class Actions Practice Note.

<sup>27</sup> An order which requires group members to pay the litigation funder a commission from any proceeds of a settlement or judgment, regardless of whether they have entered into a funding agreement with the funder, in return for the funder financing the action.

<sup>28</sup> *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.

- Demonstrates that a class action is supported by enough engaged claimants and is not merely a speculative endeavour by a litigation funder or entrepreneurial lawyers;
  - Enables the litigation funder to determine whether it is commercially viable to fund the action. If there is insufficient group interest, the action will not proceed, consistent with the overarching purpose of not using the court's time to achieve an outcome that group members are not interested in participating in;
  - Provides the group members with an avenue to express their preference for a particular funder, lawyer or case theory;
  - Enables the funder and lawyers to gather information relevant to the claim, including the individual circumstances of group members;
  - Enables the funder and lawyers to keep all of the group members apprised of progress and to seek relevant information and documentation from the group members, as appropriate;
  - Enables feedback to be received from group members on prices and for individual terms to be negotiated and fashioned to address specific circumstances; and
  - Enables settlements discussions to subsequently occur on the basis that:
    - The represented group represents the bulk of those interested in pursuing the case (opt-outs will be small or non-existent);
    - It is unlikely that there will be significant additional people who have not already signed a funding agreement wishing to participate in any settlement;
    - An estimate can be made of total claim size, both for the funded members and for unfunded members if the class is opened and then closed for settlement purposes. This promotes certainty and efficiency and maximises the prospects of reaching a settlement.
29. In Omni Bridgeway's submission, the statutory regime should include an express power for the court to resolve competing and multiple class actions to avoid the uncertainty and satellite litigation that has occurred in Australia in recent years. This uncertainty culminated in an appeal to the High Court of Australia in the *AMP* case in which a judgment, dismissing the appeal, was handed down on 10 March 2021.<sup>29</sup> Omni Bridgeway agrees with the judgment of the High Court majority in that case that, when considering competing class actions, the court's power should be flexible and enable the court to assess the appropriate factors and circumstances of the particular case. The majority stated:
- "there can be no "one size fits all" approach. There is no rule or presumption that the representative proceeding commenced first in time should prevail. In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case."*
30. In Omni Bridgeway's view, there should be no requirement in the statutory regime for a selection hearing or a list of non-exhaustive factors to be considered. However, the power should include a discretion to allow more than one class action with respect to the same dispute to continue if that is in the best interests of group members.

## Chapter 8: Scope of a Statutory Class Actions Regime

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<sup>29</sup> *Wigmans v AMP Limited* [2021] HCA 7 (*AMP* case).  
[omnibrIDGEWAY.com](http://omnibrIDGEWAY.com)

### (Q6) Should a class actions regime be general in scope or should it be limited to particular areas of the law?

31. Omni Bridgeway considers that the class actions regime should be general in scope and should not exclude any areas of the law. As set out below, in Omni Bridgeway's submission, the statutory regime in New Zealand should include an express power found in the regimes in Australia for the court to order that the proceedings no longer continue as a class action on certain grounds including that it will not lead to an efficient and economic resolution of the common and individual issues (see our response to the questions on certification and threshold legal test for more detail).

### (Q7) Should a class actions regime be available in the District Court, Employment Court, Environment Court or Māori Land Court?

32. Omni Bridgeway considers that the High Court of New Zealand should have exclusive jurisdiction over class actions. Class actions involve unique procedural issues and are invariably large and complex actions which benefit from being heard by an experienced class actions judge.

### (Q8) Should a class actions regime include defendant class actions?

33. Omni Bridgeway has not had any experience with any defendant class actions. If they are to be permitted, then specific rules should be prescribed to avoid arguments and the costs of satellite litigation. Alternatively, if the representative actions rule is retained, then rules could be included for the use of that rule for defendant class actions.<sup>30</sup>

### (Q9) Should the representative actions rule be retained alongside a class actions regime? For which kinds of case?

34. The Issues Paper indicates that the Law Commission may be in favour of retaining the representative actions rule, alongside a new statutory class actions regime, as it provides a flexible regime for smaller actions, for example, where non-monetary remedies are sought or a small number of group members have identical interests. In Omni Bridgeway's submission, retaining the representative actions rule may lead to confusion and a better option is for the new statutory regime to provide that the court retains a discretion to make whatever orders it thinks fit in the circumstances of the case. This would ensure that no claims that would otherwise have been able to be commenced under HCR 4.24 are prevented from being brought under the new regime.
35. However, if the Law Commission nevertheless recommends there is utility in HCR 4.24 being retained, in Omni Bridgeway's view, it should be amended to be clear about the circumstances in which it applies and that it does not apply to claims that are to be commenced under the new regime. This should avoid any confusion over which procedure should be followed.

## Chapter 9: Principles for a Statutory Class Actions Regime

### (Q10) What should the objectives of a statutory class actions regime be? Should there be a primary objective?

36. Omni Bridgeway agrees with the Law Commission's preliminary view in the Issues Paper that there should be a primary objective of the statutory class actions regime, and that it should be access to justice.

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<sup>30</sup> See Issues Paper at paragraph 8.27.  
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37. In Omni Bridgeway's submission, other objectives of the statutory class actions regime should be to deliver efficient collective redress and to strengthen incentives to comply with the law.

(Q11) Which features of a class actions regime are essential to ensure the interests of plaintiffs and defendants are balanced?

(Q12) Which features of a class actions regime are essential to ensure the interests of class members are protected?

38. In Omni Bridgeway's submission, the key feature of a class actions regime that is essential to ensure the interests of plaintiffs and defendants are balanced and the interests of class members are protected is the court's supervisory role, particularly in relation to the settlement approval process. Under a statutory regime, the court must retain the flexibility of the current system and have clear powers to do what is in the interests of justice in each individual case.<sup>31</sup>

(Q13) Is proportionality an appropriate principle for a class actions regime? If so, what features of a class actions regime could help to achieve this?

39. In Omni Bridgeway's submission, proportionality is an important principle for a class actions regime given the considerable expense and risk involved in these actions and the need to protect the interests of the plaintiff, defendant and class members. As set out in the Issues Paper, there is also a public interest in the efficient use of court time.<sup>32</sup>

40. In Omni Bridgeway's submission, the statutory regime should also include a procedure at an early stage of proceedings for the plaintiff to be required to provide an estimate of the quantum of the claims and for the defendant to assist with this by providing any relevant information it has in its possession, and for both sides to be required to provide an estimate of the legal and other costs to be expended to pursue and defend the claims. This would assist the NZ High Court in assessing procedural proportionality.<sup>33</sup> An estimate of defence side costs should be disclosed in order for the adverse cost order risk to be assessed.

(Q14) Are there any unique features of litigation in Aotearoa New Zealand that need to be considered when a class action regime is designed?

41. Omni Bridgeway does not have any substantive submission to make on this question but we agree in principle with the Law Commission's observation that the class actions regime needs to be appropriate for contemporary Aotearoa New Zealand. This will involve considering issues including New Zealand's small population size and accordingly the kinds of cases that are economic to run.

(Q15) To what extent, and in what ways, should tikanga Māori influence the design of a class actions regime?

42. Omni Bridgeway does not have any substantive submission to make on this question but we agree with the Law Commission that the status of tikanga Māori invites consideration in the design of the statutory class actions regime.

(Q16) Do you have any concerns about how a class actions regime could

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<sup>31</sup> For example, in the context of the court's consideration of competing class actions, see paragraph 29 above for the quote from the majority of the High Court of Australia in the recent *AMP* case.

<sup>32</sup> See Issues Paper at paragraph 9.24 and footnote 31.

<sup>33</sup> This is similar to the costs management regime in the UK and a recommendation made by the Australian PJC.  
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impact on other kinds of group litigation or on regulatory activities? How could such concerns be managed?

43. Omni Bridgeway does not have any concerns about the impact of class actions on other kinds of group litigation or on regulatory activities. As set out above in our response to question 4, in Australia it has been acknowledged by the regulators ASIC, that class actions complement action by regulators to enforce laws, and the ACCC, that class actions generally and appropriately supplement public enforcement.<sup>34</sup>

(Q17) Which issues arising in funded class actions need to be addressed in a class actions regime?

44. In Omni Bridgeway's submission, there are certain issues that commonly arise in funded class actions that should be addressed in a statutory regime to try to avoid costly and time-consuming satellite litigation. The regime should have clear rules regarding:
- Disclosure of funding arrangements for both plaintiffs and defendants (see our response to question 27 below).
  - Class membership, that is whether actions should be permitted to be opt-in or opt-out (see our response to questions 32 and 33 below).
  - Preserving freedom of contract. It should be made clear that the court should not have the power to reject, vary or amend the terms of any LFA. Consistent with the principle of freedom of contract such a power would be unjustified and unnecessary.

(Q18) Do you agree with our list of principles to guide development of a class actions regime?

45. Omni Bridgeway agrees with the law Commission's list of principles set out in the Issues Paper to guide development of a class actions regime.

## Chapter 10: Certification and Threshold Legal Test

(Q19) Should a class action regime include a certification requirement? If not, should the court have additional powers to discontinue a class action (as in Australia)?

(Q20) Should a class actions regime contain a numerosity requirement? If so, what should this be?

(Q21) Should the commonality test that applies to representative actions under HCR 4.24 apply to a class actions regime? If not, how should this test be amended?

(Q22) Should a representative plaintiff have to establish that the common issues in a class action are substantial or that they 'predominate' over individual issues?

(Q23) Should a representative plaintiff have to establish that a class action

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<sup>34</sup> See footnotes 13, 14 and 15.  
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is the preferable or superior procedure for resolving the claim?

(Q24) Should a court be required to conduct a preliminary merits assessment of a class action or an assessment of the costs and benefits?

46. Omni Bridgeway considers the issue of certification and the 'predominance' test and 'preliminary merits assessment' as related and strongly opposes all three being included in a statutory regime in New Zealand.
47. In the United States, Federal Rules of Civil Procedure 23(b)(3) provides that a class action may only proceed if "*the court finds that the questions of law or fact common to class members predominate over any question affecting only individual members*". This predominance test is widely regarded as resulting in considerable time and expense, leading to a mini trial at the outset which can take *two or more years* after filing the class complaint to be resolved.<sup>35</sup>
48. In Omni Bridgeway's view, it is artificial to say that a claim with 51% 'common issues' and 49% 'individual issues' can proceed, but a claim with the reverse percentages cannot. In our view, the question is not whether the claims have 1%, 51%, or 91% individual or common issues, the question is whether resolution of the common issues leaves the class action participants in a position where their individual claims can be determined in an efficient way relative to the cost of that exercise.
49. In Omni Bridgeway's submission, assessment of that issue is a matter for the representative plaintiff's lawyers when advising their client on the appropriate litigation strategy. In funded class actions, the funder will have carried out significant due diligence to ensure that it is commercially viable to bring the particular claims as a class action, including assessing the cost of proving individual issues. If the funder decides to fund the action, then it will be assuming considerable costs and risks to do so on a limited recourse basis.
50. In Omni Bridgeway's submission, the statutory regime in New Zealand should include an express power found in the regimes in Australia for the court to order that the proceedings no longer continue as a class action on certain grounds including that it will not lead to an efficient and economic resolution of the common and individual issues.<sup>36</sup>
51. In Omni Bridgeway's view, the costs and delay caused by a preliminary assessment of merits far outweigh any advantages of such a procedure. If a class action is commenced and appears to lack underlying legal merit, the New Zealand court is empowered to strike out the pleadings or summarily dismiss the proceedings. In addition, the lawyers' obligations to the court and the funder's commercial interests make it highly unlikely that meritless class actions will be commenced and if, for some reason such an action was commenced, procedural tools such as strike out and summary dismissal are available to dispose of the action swiftly and efficiently.
52. In Omni Bridgeway's submission, the statutory regime in New Zealand should include a "low" standard of commonality found in the regimes in Australia, Canada and the United States (excluding money damages class actions requiring certification under Rule 12(b)(3) of the US Federal Rule of Civil Procedure), that is, there need only be one common issue of law and fact.
53. In summary, in Omni Bridgeway's submission, the class action regime should not include a

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<sup>35</sup> See "*Getting the Deal Through*" on Class Actions in the United States by Sidley Austin LLP, December 2017 <https://gettingthedealthrough.com/area/82/jurisdiction/23/class-actions-united-states>.

<sup>36</sup> See Issues Paper at paragraph 10.17. For example, section 33N(1)(c) of the *Federal Court of Australia Act 1976* (Cth) provides that a court may, on application by a defendant or on its own motion, order that a proceeding no longer continue as a class action if "*the [class action] will not provide an efficient and effective means of dealing with the claims of group members*".

certification requirement, nor a predominance or merits test, and should include a low standard of commonality and other straight forward requirements for matters such as numerosity.

54. Omni Bridgeway considers that the court should adopt the same or similar threshold requirements required under the Australian statutory regimes, as follows:
- A claim (or potential claim) by seven or more people against the same respondent;
  - The claims must arise out of similar or related circumstances; and
  - The claims give rise to at least one substantial common issue of law or fact between class members. However, there is no requirement for the common issues to dominate over the individual issues.
55. In Omni Bridgeway's submission, the courts should have express powers to discontinue class actions which do not meet the relevant threshold criteria for commencement. In our view, these powers should be broadly in line with the powers under the Australian class actions regimes which have worked well.
56. In 2013, Professor Vince Morabito and Jane Caruana studied the number of Australian class actions (since 1991) that had been subjected to discontinuance applications. They found that only one quarter of the actions had been subject to an application and, of these, 80% had failed.<sup>37</sup> Anecdotally, we believe the number of discontinuance applications has fallen since 2013.
57. Further, in 2019, the Australian Law Reform Commission (ALRC) considered the introduction of a new procedure into Australian class actions for leave to proceed.<sup>38</sup> However, the ALRC ultimately decided that no additional hurdles were to be placed on applicants and a new leave process was not recommended. More recently, the Australian PJC also considered whether a certification process was required in its 2020 inquiry into the Australian class actions regime and concluded that it was not. The Australian PJC report stated that the existing threshold criteria are reasonable, proportionate and fair and an additional step of certification was not necessary. The report stated:

*"Defendants have options to seek an early resolution if they are concerned about a lack of clarity in the case they are required to meet, consider the claims to be baseless or consider that a class action is an ineffective or inefficient way of dealing with the claims.*

*Additionally, the risk of an adverse costs order is a feature of the Australian civil curial system which can act as an effective deterrent to the bringing of speculative claims, or claims with little merit, a feature which is not present in the US class action system."<sup>39</sup>*

## (Q25) Should a representative plaintiff be required to provide a litigation plan?

58. In Omni Bridgeway's submission, a representative plaintiff should not be required to provide a litigation plan. This is not required under the Australian regimes and, in our experience, would not assist with any aspect of the class action regime. As set out in the Issues Paper, in Australia, class actions practice notes set out a detailed list of matters that are considered at case management conferences and this works well.

## (Q26) Should a court consider funding arrangements as part of a threshold legal test for a class action?

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<sup>37</sup> Professor 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 L579 at 601. See Issues Paper at paragraph 10.25. Professor Morabito is in the Department of Business Law and Taxation at Monash University's Monash Business School.

<sup>38</sup> See report of the ALRC following its inquiry into class action proceedings and third-party litigation funders.

<sup>39</sup> Report of the Australian PJC at paragraphs 6.47 to 6.48.

## (Q27) Should a statutory class actions regime have any other threshold legal tests?

59. In Omni Bridgeway's submission, the New Zealand courts should no longer consider funding arrangements as part of a threshold legal test for a class action under a statutory regime. Omni Bridgeway considers that the court should adopt the same or similar threshold requirements required under the Australian statutory regimes (see our response in paragraph 54 above). In our view, funders operating in New Zealand should be required to be licensed under a regime that includes capital adequacy requirements. This will give the court comfort at an early stage of funded proceedings about the capacity of the funder to meet its financial obligations and that its involvement in the proceedings will ensure that the litigation is conducted efficiently for the benefit of all (for further details of our views on licensing, see our response to question 59 below).
60. In Omni Bridgeway's view, although a consideration of funding arrangements is not required as part of a threshold legal test for a class action, disclosure of funding arrangements is appropriate and should be imposed in all funded class actions (subject to the right to redact any terms or information that is privileged or that might confer a tactical or strategic advantage on an opponent)<sup>40</sup>. However, in our submission, equal disclosure obligations should be imposed on both plaintiffs and defendants where any form of external funding is involved for either party. This could include an after the event insurance policy, an employer or union funding the litigation, an insurer under a D&O policy, PI policy or other insurance policy. Disclosure of the identity of the "funder" (in this extended sense) and any relevant funding agreement or insurance policy should also be required. This gives the parties the ability to ensure there are no conflicts of interest by any third-parties involved in funding the claim or the defence of the claim and gives the defendant the opportunity to consider whether and what form of security for costs it may wish to seek in the action.

## Chapter 11: The Representative Plaintiff

### (Q28) Should a court consider the representative plaintiff's suitability for the role as part of the threshold legal test for a class action? If so, what should the criteria be?

61. In Omni Bridgeway's submission, the court should not consider the representative plaintiff's suitability for the role as part of the threshold legal test for a class action. The respondent may object to the plaintiff on the basis of suitability but it should not become part of a routine inquiry which, in our view, would lead in many cases to unnecessary costs and expense.

### (Q29) Should a representative plaintiff be a class member or should ideological plaintiffs be allowed

62. In Omni Bridgeway's submission, a representative plaintiff should have a sufficient interest to commence the action, that is, they must have a valid claim against the defendant or statutory standing (including under other legislation) to bring the claim. However, this is subject to our response to question 31 below in relation to class actions brought on behalf of a Māori collective.

### (Q30) When should a government entity be able to bring a class action as representative plaintiffs

63. In Omni Bridgeway's submission, a government entity should be able to bring a class action as a

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<sup>40</sup> This is required in Federal Court class actions in Australia (Federal Court Practice Note at paragraph 6.4).  
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representative plaintiff, provided it has a valid claim against the defendant or statutory standing (including under other legislation) to bring the claim.

(Q31) When a plaintiff wants to represent the interests of a whānau, hapū or iwi, should the court inquire into their suitability to represent the group in terms of tikanga Maori?

64. Omni Bridgeway does not have any substantive submission to make on this question. However, we agree with the Law Commission's observation in the Issues Paper that it may be appropriate to consider the role of tikanga Māori in evaluating the representativeness of an intended plaintiff pursuing a class action on behalf of a Māori collective.<sup>41</sup>

## Chapter 12: Membership of the Class

(Q32) Should class membership be determined on an opt-in basis or an opt-out basis or should different approaches be available?

(Q33) If the court is required to decide whether class membership should be determined on an opt-in, opt-out or universal basis, what criteria should it apply? Should there be a default approach?

65. In Omni Bridgeway's submission, the statutory regime should permit both opt-in (closed) class actions and opt-out (open) class actions. This would give the parties the flexibility to choose the most appropriate type of action depending on the circumstances of each case. While Omni Bridgeway considers that closed class actions have more benefits (see our response to question 5 above), we recognise there will be some cases where an open class action may be preferable and provide greater access to justice to more group members, for example, this may be the case in some consumer actions.
66. Consequently, Omni Bridgeway considers that the statutory regime should not set out fixed criteria for when class membership should be determined on an opt-in basis or an opt-out basis. This should be up to the parties and the court to determine in a flexible manner on a case by case basis and in the interests of justice.

## Chapter 13: Adverse Costs

(Q34) How has the risk of adverse costs impacted on representative actions?

(Q35) Should the current adverse costs rule be retained for class actions or is reform desirable?

(Q36) Are there any other issues associated with class actions that we have not identified? Is there anything else you would like to tell us about class actions?

67. In Omni Bridgeway's view, the risk of adverse costs makes it difficult for many class actions to be brought and is one of the reasons there has been a recent increase in the number of funded

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<sup>41</sup> Issues Paper at paragraph 11.44.  
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actions.

68. Nevertheless, Omni Bridgeway considers that the risk of adverse costs deters frivolous or meritless actions being brought and should be retained for class action proceedings as it is for single party proceedings.

## Chapter 17: Advantages and Disadvantages of Litigation Funding

(Q37) Which of the potential advantages and disadvantages of permitting litigation funding do you think are most important, and why?

(Q38) Is litigation funding desirable for Aotearoa New Zealand in principle?

69. In Omni Bridgeway's submission, litigation funding is desirable for New Zealand. In our view, the most important feature of litigation funding is that it provides access to justice to large numbers of claimants, many of whom would otherwise individually lack the financial resources necessary to pursue their claims through the civil justice system.
70. One example of this is the Australian class action, funded by Omni Bridgeway, taken by the 6700 victims of the mismanagement of Queensland's Wivenhoe Dam during the 2011 floods. In 2020, lead claimant representative, Vince Rodriguez, said:

*"Without funding from Omni Bridgeway, I would not have been able to successfully pursue my claim and run an action against such powerful entities. They agreed to back the Brisbane flood class action for me and thousands of other people who suffered damage from the flooding in January 2011.*

*I found the funding process fair and reasonable for the claimants, understood the terms of the Funding Agreement and Omni Bridgeway and the lawyers kept me fully informed during the claim and the litigation process.*

*Funders take on a massive risk if they lose (not just the legal and other fees they have paid for, but also potential adverse costs). The case has been hard fought and still in May 2020 has not yet finally resolved. It is fair that funders recover their expenses and a commission for taking on the risk. Without them, claimants would recover nothing at all."<sup>42</sup>*

71. Litigation funding has another important benefit in that it can "level the playing field", particularly in 'David and Goliath' cases. A claimant with limited resources, whether an individual or company, is able to take on a larger defendant with (essentially) unlimited resources. Where the class action is funded, the defendant will appreciate that an experienced, independent and objective commercial entity considers the claim to be of sufficient strength to merit funding and that the claimants cannot be 'outspent' or worn down in a lengthy war of attrition. This increases the prospects of a fair and just outcome in the proceedings.

## Chapter 18: Reforming Maintenance and Champerty

(Q39) To what extent, if any, do the torts of maintenance and champerty impact on the availability and pricing of litigation funding in Aotearoa

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<sup>42</sup> On 26 February 2021, Omni Bridgeway announced a conditional settlement with 2 of the 3 defendants in an aggregate amount of AUD 440 million. The conditional settlement follows a hard fought and extremely expensive case on behalf of the approximately 6,700 class members over many years. It is now 10 years since the Brisbane floods in 2011 and the case is ongoing against the 3<sup>rd</sup> defendant.

New Zealand?

(Q40) Should the courts be left to clarify and develop the law in relation to maintenance and champerty, or should the law in relation to maintenance and champerty be reformed?

(Q41) If reform is required, which option for clarifying the law do you prefer and why? For example, should the torts of maintenance and champerty be:

- (a) retained, subject to a statutory exception for litigation funding?
- (b) abolished?
- (c) abolished, subject to a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality?

- 72. While litigation funding is permitted in New Zealand, Omni Bridgeway considers that the torts of maintenance and champerty have impacted on the availability and therefore pricing of litigation funding.
- 73. In Omni Bridgeway's submission, these torts should now be abolished in New Zealand as they have in many common law jurisdictions around the world, including England & Wales, Singapore and the majority of states in Australia. There has been an increasing acceptance of the benefits of litigation funding, particularly given the high costs of large, complex litigation and concerns about access to justice, and this has led to litigation funding becoming a mainstream financial product.
- 74. In the state of Queensland, the failure to abolish the torts of maintenance and champerty in that State (despite enacting a class action regime) led to confusion as to the status of litigation funding arrangements and the requirement for costly satellite litigation.<sup>43</sup>
- 75. In Omni Bridgeway's submission, it is not necessary to enact a statutory preservation of the courts' ability to find a litigation funding agreement unenforceable on grounds of public policy or illegality. This form of legislative carve out was included in legislation abolishing maintenance and champerty in the UK and Australian states of New South Wales and Victoria long before litigation funding became widely available and accepted. Since then, public policy has decisively shifted in favour of assisting persons wronged by another to bring legal actions seeking compensation.<sup>44</sup>

## Chapter 19: Funder Control of Litigation

(Q42) What concerns, if any, do you have about funder control of litigation?

(Q43) Are you satisfied that existing mechanisms can adequately manage

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<sup>43</sup> At first instance, *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd (No 4)* [2019] QSC 228 and, on appeal, *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Others* [2020] QCA 250.

<sup>44</sup> The Australian State of Tasmania abolished the torts of maintenance and champerty in 2015 and the relevant legislation does not include any statutory carve-out.

the concerns about funder control of litigation?

(Q44) If not, how should the concerns about funder control of litigation be managed? For example, should litigation funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?

76. In Omni Bridgeway's submission, the level of funder control should be set out clearly in the litigation funding agreement. The New Zealand and Australian courts have accepted it is appropriate for a funder to have a degree of control to protect its investment.<sup>45</sup>
77. In Omni Bridgeway's view, there are also benefits in experienced funders being able to have day to day involvement in overseeing the litigation they fund, particularly in class actions where the representative plaintiff has often never litigated before and is representing a large group of class members. Experienced funders are skilled repeat participants whose interests are closely aligned with class members in wanting to ensure the efficient resolution of the action for the maximum recovery.
78. The High Court of Australia has permitted the role that funders assume in class actions since the seminal *Fostif* case in 2006.<sup>46</sup> In that case, the High Court stated:
- "By "organising" persons into a legal action for the vindication of their legal rights, representative proceedings are not creating controversies that did not exist. Controversies pre-existed the proceedings, even if all those involved in them were unaware of, or unwilling earlier to pursue, their rights. A litigation funder, ..., does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law."*
79. In a recent decision<sup>47</sup>, the Supreme Court of Queensland (Court of Appeal) said it was inevitable that the funder would have a great degree of control of the action. This would ensure the litigation was conducted efficiently for the benefit of all, while affording the funder, who was risking millions of dollars, to be able to oversee and protect its investment.

## Chapter 20: Conflicts of Interest

(Q45) What concerns, if any, do you have about funder-plaintiff conflicts of interest?

(Q46) Are you satisfied that existing mechanisms can adequately manage the concerns about funder-plaintiff conflicts of interest?

(Q47) If not, which option for managing the concerns about funder-plaintiff conflicts of interest do you prefer, and why? For example:

- (a) should funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what

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<sup>45</sup> See, for example, *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [46] and *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [66].

<sup>46</sup> *Campbells Cash and Carry Pty Ltd v Fostif* [2006] HCA 41 at [202].

<sup>47</sup> *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Others* [2020] QCA 250.

minimum terms would be appropriate?

(b) should funders be required to have a conflicts management policy?

(c) should funder control of litigation be regulated?

(Q48) What concerns, if any, do you have about lawyer-plaintiff conflicts of interest in funded proceedings?

(Q49) Are you satisfied that existing mechanisms can adequately manage the concerns about lawyer-plaintiff conflicts of interest?

(Q50) If not, which option for managing the concerns about lawyer plaintiff conflicts of interest do you prefer, and why? For example:

(a) should funders be encouraged or required to include minimum terms in their litigation funding agreements? If so, what minimum terms would be appropriate?

(b) should professional rules or guidelines be developed for lawyers acting in funded proceedings? If so, what rules or guidelines would be appropriate?

(c) should activities that are likely to give rise to lawyer-plaintiff conflicts of interest be prohibited? If so, which activities should be prohibited?

80. In Omni Bridgeway's submission, the litigation funding agreement (LFA) should expressly recognise that the lawyer who has the conduct of the claim owes his or her full professional and fiduciary duties to the claimant and the group members. The LFA may also provide that, in the event of a conflict of interest between the plaintiff and the funder, the lawyer may continue to act solely for the plaintiff, even if the funder's interests are adversely affected by him or her doing so. This standard should be observed whether the lawyer is retained by the funder or by the plaintiff.

81. In Omni Bridgeway's case, the LFA meets these obligations. Our LFA also includes that we will pay for the representative plaintiff to be independently advised on the term of the LFA. The current standard terms of our LFAs that relate to managing conflicts of interest are:

*Omni Bridgeway will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings, however the Claimant may, in relation to the Claimant's Claims, override any instruction given by Omni Bridgeway by giving the Claimant's own instructions to the Lawyers.*

*Except in relation to Settlement, which is dealt with below, if the Lawyers notify Omni Bridgeway and the Claimant that the Lawyers believe that circumstances have arisen such that they may be in a position of conflict with respect to any obligations they owe to Omni Bridgeway and those they owe to the Claimant, the Claimant and Omni Bridgeway agree that, in order to resolve that conflict, the Lawyers may:*

*1.1.1 seek instructions from the Claimant, whose instructions will override those that may be given by Omni Bridgeway;*

*1.1.2 give advice to the Claimant and take instructions from the Claimant, even though that advice is, and those instructions are, or may be, contrary to Omni Bridgeway's interests; and*

*1.1.3 refrain from giving Omni Bridgeway advice and from acting on Omni Bridgeway's instructions, where that advice is, or those instructions are, or may be, contrary to the Claimant's interests.*

82. In addition, Omni Bridgeway has a comprehensive Conflicts Management Policy and our conflicts management arrangements are outlined in the Code of Conduct that is available on our website.<sup>48</sup> Omni Bridgeway's Conflicts Management Policy conforms with the requirements in Australia for litigation funders to have "adequate practices for managing a conflicts of interest" that may arise.<sup>49</sup>
83. In Omni Bridgeway's submission, the interests of plaintiffs and funders are usually aligned to reach the earliest possible resolution of the case for the maximum recovery. In the event of a dispute between the representative claimant and the funder over settlement of the class action, Omni Bridgeway's LFA stipulates the appointment of the most senior counsel of those retained by the lawyers to resolve the issue.<sup>50</sup>
84. In Omni Bridgeway's submission, the New Zealand Rules of conduct and client care for lawyers should also be amended to include that, in funded class actions, lawyers owe their full professional and fiduciary duties to the claimant and the group members.

## Chapter 21: Funder Profits

(Q51) What concerns, if any, do you have about funder profits?

(Q52) Are you satisfied that existing mechanisms can adequately manage the concerns about funder profits?

(Q53) If not, which option for managing the concerns about funder profits do you prefer, and why? For example:

- (a) should competition in the litigation funding market be encouraged? If so, how?
  - (b) should the courts be empowered to vary funder commissions? If so, when, and how?
  - (c) should funder commissions be regulated? If so, should there be restrictions on how funder commissions can be calculated (and if so, what) or should funder commissions be capped (and if so, how)?
85. Omni Bridgeway is aware that there is concern in relation to litigation funder profits in some cases, although we note the concerns are often raised by parties other than the group members.

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<sup>48</sup> Available to download from the [Omni Bridgeway website](#).

<sup>49</sup> Corporations Regulations 2001 (Cth), reg 7.6.01AB(2) and ASIC Regulatory Guide 248.

<sup>50</sup> If no counsel has been retained then the lawyers, in consultation with the representative claimant and Omni Bridgeway, will appoint counsel for that purpose.

We have set out on pages 2-3 above some detail about our funding model for class actions in Australia and New Zealand.

86. Omni Bridgeway considers that the appropriateness of the returns to funders can only be properly evaluated on a portfolio basis rather than cherry-picking individual cases with hindsight bias. The litigation funder's fee is fixed at the commencement of a class action, before the outcome is known, and depends on the claim size, estimated recoverable amount, estimated costs, estimated duration to resolution and the risks undertaken. The returns on successful cases must be balanced against losses in other parts of a funder's portfolio, some of which may be costly. For example, Omni Bridgeway spent approximately AUD 30 million in actions on behalf of bank customers over various bank fees that were ultimately lost. The fees charged by funders must also be balanced against the outsized risks that come with pursuing litigation against large, well-funded defendants over long periods.
87. In Omni Bridgeway's submission, assuming a new statutory class action regime is based on the regimes in Australia, the court will have considerable oversight of litigation funding commissions, particularly given the requirement for all class action settlements to be approved by the court. In Australia, the court will only approve a settlement of a class action if it considers the settlement to be fair and reasonable and in the interests of group members. In many cases, this includes an examination of what the group members will receive after costs and the funders' commission. The court will usually be provided with confidential material by the claimant's lawyers concerning the prospects of the success of the case and the risks involved. Because the material is confidential it can sometimes be difficult for third parties to fully appreciate the risks the funder has assumed. Accordingly, the court is best placed to protect the interests of group members and determine what is a fair and reasonable outcome.
88. Court approval is just one of numerous checks and balances that already exist in the legal system to regulate and, in some cases, moderate litigation funders' commissions. These include:
- LFAs which set out the commission to be earned by the funder. The LFA also includes a cooling-off period, support for members to obtain independent legal advice and standard terms regarding the management of conflicts. As set out above, in the event of a dispute between the representative claimant and the funder over settlement of the class action, the LFA stipulates the appointment of the most senior counsel of those retained by the Lawyers to resolve the issue to resolve the issue.
  - The obligations of the lawyers acting for the representative claimant and class members as officers of the court. A lawyer's overriding obligation and fiduciary duty is to their client. As officers of the court, lawyers have a duty to the court and their conduct is supervised by state law societies and Bar associations.
  - Mediations and settlements are typically overseen by current or former judges or practising senior officers of the court, such as an SC or QC. It is routine in settlement approval applications for the appointment of an independent expert to review the reasonableness of legal costs.
  - Group members have the right to opt out of class actions and the right to object to settlements. Group members also have general law protections, covering issues such as unconscionable conduct, misleading and deceptive conduct and unfair contracts.
89. In Omni Bridgeway's submission, these checks and balances provide adequate protection for class members and the courts should not be empowered to vary funder commissions. However, we believe that funders operating in New Zealand should be regulated (see our response to question 59 below).
90. In a 2019 settlement approval decision in the *Sirtex Medical* class action in Australia, for example, Justice Beach in the Australian Federal Court elaborated on funding commission rates and

concluded that the rate sought in the action – a 25 per cent funding commission on the gross settlement sum – was well within the range that he considered to be reasonable and proportionate for the risks undertaken by the funder:

*"I do not subscribe to any 'race to the bottom' philosophy in setting commission rates. As a corollary, I do not accept that rates should be set that do not properly provide a reward for the risk undertaken."<sup>51</sup>*

91. In another 2019 class action settlement, in the *Murray Goulburn* case in Australia, Justice Murphy in the Australian Federal Court discussed the considerations for assessing the "reasonableness of a funding commission":

*"The litigation risks of providing funding in the proceeding ... is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding."<sup>52</sup>*

92. In approving the settlement in the Williamstown, Oakey and Katherine contamination class actions in 2020, Justice Lee in the Australian Federal Court made the following statement:

*"...in assessing 'justice' in this context, it is important that the assessment not be distorted by hindsight bias..."*

*On any view of it, this was complex litigation attended by some risk. Moreover, it is appropriate to focus on the risk when the funding agreements are entered into, not assess the risk after the making of implicit findings (following the reports of referees being adopted) and all the work preparing for hearing had essentially been done. Although I am conscious of the complaints of some group members as to the size of the funding fee deduction, when one compares this to other settlements and the risks involved, the amount of 25 per cent commission across the three proceedings could not be stigmatised as being unreasonable in all the circumstances."<sup>53</sup>*

93. In a number of matters, Omni Bridgeway has voluntarily reduced its entitlement to recoveries to ensure a larger return for group members. For example, the court-approved funding commission payable to Omni Bridgeway across the three Australian contamination class action investments represented 24 per cent of the settlement amount. Omni Bridgeway reduced its contractual entitlements across the three class actions by approximately 30 per cent (an amount of approximately AUD 35 million).
94. In Omni Bridgeway's submission, there should be a legislated minimum return to group members of 50 per cent of gross recoveries in funded class actions.<sup>54</sup> We believe that this will ensure that funders and claimant lawyers only back claims where the recoveries and costs appear likely to enable this metric to be met. It will also ensure that class actions are run for the benefit of the group members. However, it is also important to ensure that if a minimum return is introduced, it does not have the consequence - unintended or otherwise - of pricing funders out of the market. The returns received by funders need to allow for fluctuations in a funder's portfolio – some cases will be lost and others will achieve a lower recovery than anticipated. Therefore, any minimum level of return needs to be set at a level that, in most cases, will allow sufficient proceeds left for funders to cover their costs and to receive a fee for the significant capital investment and risks taken. If not, funders will leave the market and many class actions will not be pursued – leaving

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<sup>51</sup> *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374 (23 August 2019). The claimants and group members were funded by Omni Bridgeway.

<sup>52</sup> *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719 at [27]. The claimant and group members were funded by Omni Bridgeway.

<sup>53</sup> *Smith & Ors v Commonwealth of Australia* (Federal Court, NSD 1908 of 2016/ NSD 1155 of 2017/ NSD 1388 of 2018, Justice Lee, 5 June 2020) at [87].

<sup>54</sup> Omni Bridgeway also made this recommendation to the Australian PJC.



group members with no means to access the legal system.

95. This position is supported by independent research by PwC, which was commissioned by Omni Bridgeway, to review possible regulatory models for the regulation of litigation funders (PwC report).<sup>55</sup> The PwC research analysed data collected by Professor Vince Morabito on past Australian class actions. It found that, based on the data, a guaranteed return of 70%<sup>56</sup> to class members would have resulted in 36% fewer class actions being those where the legal costs alone would have exceeded the 30% cap.
96. The PwC report says:
- “... a 30% cap on gross returns to litigation funders [as proposed by the Australian PJC] will have the effect of reducing the investment by third parties to support class actions. What we see is a trade-off; by providing higher returns to some plaintiffs, there will be fewer supported actions, and hence zero returns to other potential plaintiffs.”*
- And
- “The foreshadowed cap of 30% would have had implications for 91% of publicly available settlements funded under Part IVA Proceedings ... That is, 9% of cases would unambiguously proceed as the gross returns (i.e. legal fees and funder returns) would fall below the 30% caps.”*
97. The PwC report also found that even a 50% minimum return to group members would render a large number of cases commercially unviable to fund, due to the capped amount being inadequate to cover the legal costs of the class action and generate a profit adequate to justify the risks assumed by the funder in often long and protracted litigation. Nevertheless, Omni Bridgeway believes that setting a minimum of 50 per cent return to group members strikes the right balance, beyond which courts are best-placed to assess the reasonableness of returns to a litigation funder.

## Chapter 22: Capital Adequacy

### (Q54) What concerns, if any, do you have about the capital adequacy of litigation funders?

98. Third-party funding arrangements for class actions generally include obligations to pay significant sums. In Omni Bridgeway’s submission, prudential regulation is required to ensure those commitments can be met. Therefore, we support the introduction of a licensing regime for all litigation funders operating in New Zealand which includes a capital adequacy requirement (see our response to question 57).

### (Q55) Are you satisfied that the existing security for costs mechanism can adequately manage the concerns about funders’ capital adequacy?

### (Q56) If not, should the security for costs mechanism be strengthened? In particular:

- (a) should there be a presumption or requirement that a litigation

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<sup>55</sup> The PwC report can be accessed from the [Class Actions page on Omni Bridgeway’s website](#).

<sup>56</sup> Recommendation 20 of the Australian PJC’s report in December 2020 was that the Australian Government consult on, amongst others, the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements) and whether a minimum gross return of 70% to class members is the most appropriate level.

funder will provide security for costs in funded proceedings?

(b) should there be a requirement that security for costs is provided in a form that is enforceable in Aotearoa New Zealand?

99. In Omni Bridgeway's submission, a licensing regime for all litigation funders operating in New Zealand should be introduced which includes a capital adequacy requirement (see response to question 57).
100. In Omni Bridgeway's submission, there should be no presumption or requirement that a litigation funder will provide security for costs in funded proceedings. The court has a discretion to order security and will weigh up the competing interests of the parties and the circumstances of the case including the capacity of the claimant to meet an adverse costs order. This balancing exercise should also apply in funded litigation. If the litigation funder has the capacity to meet an adverse costs order, there is no reason why security for costs should be ordered.
101. As a listed entity, Omni Bridgeway's financial position is set out in its periodic reports to the Australian Securities Exchange. It often provides a Deed Poll lodged with the court confirming its obligation to meet any adverse costs orders made against the funded claimant. This form of security has been accepted by the courts as good security. As we stated above, Omni Bridgeway agrees that, if a case is unsuccessful, costs orders may be made directly against a funder to obviate the time and cost for a defendant to enforce a costs order.

(Q57) Alternatively, or additionally, should litigation funders operating in Aotearoa New Zealand be subject to minimum capital adequacy requirements? If so:

- (a) should any minimum capital requirement be formulated by specifying a particular amount (and if so, what amount) or an amount correlated to a funder's financial commitments (and if so, what correlation), or in some other way?
- (b) should minimum capital adequacy requirements be able to be satisfied if the funder's capital is held in another jurisdiction, or should the capital be held in Aotearoa New Zealand?
- (c) what other requirements, such as audit requirements, would be appropriate?
- (d) who should oversee compliance with any minimum capital adequacy requirements?
- (e) what consequences should follow from a funder's non-compliance with any minimum capital adequacy requirements?
102. Omni Bridgeway supports the introduction of a licensing regime for all litigation funders operating in New Zealand which includes a capital adequacy requirement. The licensing regime should require a commercial funder to have sufficient resources (or access to sufficient resources) to be able to back its litigation funding obligations and deliver its services competently, efficiently,

honestly and fairly. This would provide valuable consumer protections, particularly where the funder is a private company (as opposed to a listed funder which regularly publishes financial information about the funding entity and its portfolio of investments).

## Chapter 23: Regulation and Oversight

(Q58) Which of the concerns with litigation funding, if any, warrant a regulatory response?

(Q59) Which option for the form of any regulation and oversight do you prefer, and why? For example, should regulation and oversight of litigation funding take the form of:

- (a) Industry self-regulation and oversight?
  - (b) Managed investment scheme requirements, overseen by the Financial Markets Authority?
  - (c) Tailored licensing requirements, overseen by the Financial Markets Authority (or another existing regulator)?
  - (d) A tailored statutory regime, overseen by a new oversight body?
  - (e) Court approval of litigation funding arrangements?
  - (f) A combination of the above?
103. In Omni Bridgeway's submission, litigation funders operating in New Zealand should be regulated by a licensing regime which should include:
- Minimum capital adequacy requirements.
  - Disclosure obligations and reporting standards.
  - Conflicts management requirements.
104. In Omni Bridgeway's view, a licensing regime will give the court comfort at an early stage of funded proceedings about the capacity of the funder to meet its financial obligations and that its involvement in the proceedings will ensure that the litigation is conducted efficiently for the benefit of all. This avoids any requirement for the court to carry out its own assessment. A court can rely on the licensing regime to provide protection for plaintiffs and defendants without the need for an additional procedural step or costly and time-consuming satellite litigation if this is challenged by a defendant.
105. Omni Bridgeway considers that the detail of any licensing regime will need to be the subject of a detailed, consultative process likely to be carried out by the Financial Markets Authority (FMA) if licensing is approved. However, we make some general submissions below on key features we submit should be part of the licence's design.
106. First, the licensing regime should apply to all litigation funders operating in New Zealand, that is, funders of multi-party actions as well as funders of single party claims, including insolvency actions and claims of solvent commercial entities. It should apply to all funders, whether they are domestic or foreign entities (provided certain not-for-profit litigation funders who hold charitable status are exempt).
107. Second, the licence needs to be tailored to the litigation funding industry.
108. Third, the FMA should issue the licences, monitor and enforce compliance with them and prosecute any breaches of licence conditions.

109. Fourth, the licensing regime should require a commercial funder to have sufficient resources (or access to sufficient resources) to be able to back its litigation funding obligations and deliver its services competently, efficiently, honestly and fairly. This entails having sufficient financial and organisational resources. A funder's personnel should include people with qualifications and relevant experience in the conduct or management of litigation and in financial management.
110. Fifth, the funder should be subject to an annual audit, which includes an audit to ensure the funder is complying with the terms of its licence.<sup>57</sup> Further, the funder should conduct an impairment test in respect of its funded litigation investments on a half-yearly basis, so as to determine whether any of those investments should be written off or provisioned. The results of the audit and impairment test should be reported to the FMA.
111. The form of regulation must ensure that funders operate competently, efficiently, honestly and fairly.
112. If the Law Commission is considering recommending a regulatory regime for class actions, in line with the managed investment scheme that has been implemented in Australia in 2020, Omni Bridgeway would welcome being involved in any consultation on this issue based on our experience in Australia. This would need to be a fit for purpose regime tailored for litigation funders (that is not a managed investment scheme).

(Q60) Are there any concerns about litigation funding, or options for reform, that we have not identified? Is there anything else you would like to tell us?

113. In Omni Bridgeway's view, there is a balance to be struck in ensuring regulation of the class action industry does not harm the very people it is trying to protect. If there are too many barriers placed in the way of class actions or in the way of litigation funding then the aims of promoting access to justice may be harmed. Omni Bridgeway has sought to achieve an appropriate balance in the submissions it has made above.

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<sup>57</sup> Unless the funder is under an existing audit obligation.  
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