

REBECCA KIMPTON*

**CLASS ACTION LEGISLATION FOR THE
ENFORCEMENT OF CONSUMER LAW**

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2021

* I would like to thank Professor Geoff McLay for his invaluable advice, support, and guidance.

Abstract

The Law Commission is currently undergoing a review of the law relating to class actions and litigation funding in New Zealand. This essay specifically examines whether class action litigation is an appropriate mechanism to rely on in improving access to justice for New Zealand consumers. Despite New Zealand's relatively comprehensive consumer protection regime, some consumers with unresolved low value disputes are likely to encounter barriers in utilising existing enforcement mechanisms to resolve said disputes. This essay identifies class action litigation and public enforcement of consumer law as the most effective enforcement mechanisms for the resolution of low value consumer claims due to their ability to overcome financial and information barriers faced by consumers. The essay determines that both a class action statute clarifying procedural and funding aspects of the class action procedure in New Zealand and an increase in the Commerce Commission's jurisdiction to allow it to enforce claims under the Consumer Guarantees Act 1993 would positively impact consumer access to justice. It argues that commonly cited concerns relating to class action litigation can be relatively easily overcome with a carefully drafted statute, whereas increasing the Commerce Commission's enforcement jurisdiction may come at too great a public cost. Ultimately, consumer law is best enforced through a mixed public-private approach, and enacting a class action statute while retaining the Commerce Commission's current enforcement jurisdiction is likely to result in the best improvement to consumer access to justice.

Key Words

Consumer law, access to justice, class actions, representative actions, Commerce Commission.

Table of Contents

I	Introduction	4
II	Consumer Access to Justice	5
	A Meaning of Access to Justice	5
	B The Consumer Access to Justice Gap	6
III	Consumer Law in New Zealand	7
	A New Zealand’s Consumer Protection Regime.....	7
	B Enforcement of Consumer Law.....	9
	1 The courts	9
	2 Disputes Tribunal.....	10
	3 Industry specific disputes resolution schemes.....	12
	4 The Commerce Commission.....	13
	5 Representative actions	14
	C Proposed Solutions to the Consumer Access to Justice Gap	18
IV	Class Actions	19
	A Class Action Legislation.....	19
	B Consumer Representative Actions in New Zealand	19
	C The Purpose of Class Action Procedures	21
	1 Efficiency.....	21
	2 Access to justice.....	21
	3 Deterrence.....	22
	D Statutory Class Action Framework and Consumer Access to Justice	23
	1 Procedural access to justice.....	23
	2 Substantive access to justice	24
	E Policy Considerations in a Statutory Class Action Framework.....	25
	1 Litigation funding	25
	2 Frivolous litigation.....	26
V	The Commerce Commission	27
	A Increase Commerce Commission’s Enforcement Jurisdiction	27
	B Public Enforcement of Consumer Law	27
	C Increased Role of the Commerce Commission and Consumer Access to Justice	28
	1 Procedural access to justice.....	28
	2 Substantive access to justice	29
	D Policy Considerations in Increasing the Commerce Commission’s Enforcement Role	29
	1 Source of funding.....	29
	2 The Consumer Guarantees Act 1993	30
VI	Recommendation	31
VII	Conclusion	31

I Introduction

Although consumer issues are amongst the most prevalent legal problems experienced by New Zealanders, consumers who have had their rights infringed are less likely to seek redress than they would for other legal issues.¹ Consumer access to justice is inhibited by barriers including the weaker position of customers compared to the traders they transact with, lack of knowledge on the part of consumers as to their legal rights, the financial cost of litigation, and social and cultural factors inhibiting consumers from complaining.²

Where the consumer disputes in question are of relatively low value, these barriers are even more likely to prevent consumers from receiving compensation. It may be tempting to dismiss low value consumer disputes as unimportant, but numerous low value claims considered cumulatively represent considerable interests. As eloquently stated by former Vice President of the United States of America Walter Mondale:³

Nothing is more destructive to a sense of justice than the widespread belief that is it much more risky for an ordinary citizen to take \$5 from one person at the point of a gun than it is for a corporation to take \$5 each from a million customers at the point of a pen.

New Zealand has an array of effective mechanisms for the enforcement of consumer law. However, the available mechanisms are either unsuitable for the resolution of low value consumer claims, or, in their current form, are burdened by access to justice barriers which can, in some cases, prevent the resolution of such claims. The object of this essay is to analyse whether either the enactment of class action legislation or an increase in the Commerce Commission's enforcement jurisdiction would be beneficial in reducing the access to justice gap experienced by New Zealand consumers. The Law Commission is

¹ Law Commission *Class Actions and Litigation Funding* (NZLC IP45, 2020) at 4.33.

² Jessica Palmer "Chapter 11: Access to Justice for Consumers" in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd Ed, LexisNexis, Wellington, 2016) 495 at 496-497.

³ Alexandra Sims "Reforming the Consumer Guarantees Act 1993 and its Enforcement: Time for Action" (2010) 16 NZBLQ 145 at 151, citing Walter Mondale, Vice President of the United States of America "Address to the Second Judicial Circuit Conference" (10 September 1977).

currently undergoing a review of the law relating to class actions in New Zealand, and this essay is a contribution to that process in the specific context of enforcement of consumer law.

Part II of this essay examines consumer access to justice, particularly in relation to low value claims. Part III goes on to provide an overview of New Zealand's consumer protection regime and identifies the gap in available enforcement tools for small consumer claims. Part IV analyses the extent to which class action legislation would improve consumer access to justice and considers concerns pertaining to class action litigation. Part V analyses the likely effect of an increase in the Commerce Commission's enforcement jurisdiction on consumer access to justice and explores relevant policy considerations. Part VI recommends the enactment of legislation governing the class action procedure and no change to the Commerce Commission's current jurisdiction.

II Consumer Access to Justice

A Meaning of Access to Justice

Despite commonly being cited as an important goal of the law, the precise meaning of 'access to justice' is not always clear. Deborah Rhode's definition of 'access to justice', consisting of procedural and substantive access to justice, will be adopted for the purposes of this essay.⁴ Procedural access to justice entails whether, and the extent to which, all people have access to the law.⁵ This includes access to formal courts, but also access to other forms of dispute resolution.

Substantive access to justice involves the ability to translate formal rights into fair legal judgments or outcomes, which may be inhibited by lack of access to (quality) legal representation or post-judgment power imbalances making enforcement of judgments difficult.⁶ Therefore, consumer access to justice includes both procedural access to enforcement of consumer laws, and substantive access to fair resolution of disputes.

⁴ Deborah Rhode "Access to Justice" (2001) 69 Fordham Law Rev 1785 at 1786.

⁵ Rhode, above n 4, at 1787.

⁶ Rhode, above n 4, at 1787.

B The Consumer Access to Justice Gap

As stated in Part I, consumer issues are amongst the most prevalent legal problems experienced by New Zealanders, but people are less likely to seek redress than they would for other legal issues.⁷ This can be at least partially attributed to factors which may prevent access to both procedural and substantive justice, including: the weaker position of customers compared to the traders they transact with; lack of knowledge on the part of consumers as to their legal rights; the financial cost of litigation; and social and cultural factors inhibiting consumers from complaining.⁸ Access to justice issues may be accentuated where the value of the claim is low, because the relatively low compensation which may be available is perceived as less worthwhile.

It may be easy or tempting to dismiss small consumer claims as unimportant because of their relatively minor financial impact on individual parties. In argument against this, Nicole L'Heureux underscores two reasons for the importance of access to justice in low value consumer claims:⁹

Consumer disputes are small only if taken separately one from another; globally considered, they represent considerable interests. The dispersion of those small injuries allows some traders to realize, without great risks, important illegal profits.

Firstly, unresolved consumer disputes represent significant numbers of consumers who have suffered financial loss.¹⁰ Consumer disputes are more likely to go unresolved where the potential claimants lack knowledge of their rights. Many consumers are likely to be unaware of their consumer rights (54% of those surveyed in the *New Zealand Consumer Survey 2020* felt they knew little or nothing about their rights as consumers), but some

⁷ Law Commission, above n 1, at 4.33.

⁸ Palmer, above n 2, at 496-497.

⁹ Nicole L'Heureux "Effective Consumer Access to Justice: Class Actions" (1992) 15 JCP 445 at 445 citing Jean Calais-Auloy *L'interventionnisme Economique de la Puissance Publique* (Universite de Montpellier, Montpellier, 1984).

¹⁰ Palmer, above n 2, at 498.

groups are more likely than others to lack this knowledge.¹¹ These groups include those whose main occupation is looking after family (71%), those whose main language is not English (70%), Asian New Zealanders (64%), those aged 18-36 years (62%), those with a household income of \$50,000-\$75,000 (61%), and women (57%).¹² Ensuring that these consumers are able to receive compensation where their rights have been breached is an important step towards equal access to justice for all consumers.

Secondarily is that, in some cases, manufacturers and suppliers who deliberately or negligently breach consumer protection laws may realize significant profits in doing so. These parties are essentially rewarded for their socially undesirable behaviour and by implication are incentivised to continue it. Ensuring that smaller consumer claims are vindicated will both punish and deter commercial wrongdoing.¹³ The Supreme Court of Canada acknowledged the “rise of mass production” and the “advent of the mega-corporation” as realities which make an effective mechanism for enforcement of consumer rights even more necessary.¹⁴

III Consumer Law in New Zealand

A New Zealand’s Consumer Protection Regime

New Zealand consumer law exists primarily to protect purchasers of goods and services in a personal capacity.¹⁵ Consumer protection laws are necessary because manufacturers and suppliers often have access to more information about the goods and services they provide than the consumers who purchase them, resulting in unequal bargaining power between the parties.¹⁶ Without consumer protection laws, manufacturers and suppliers would be free to supply unsafe, faulty, or low-quality goods and services and to mislead consumers without

¹¹ Consumer Protection *New Zealand Consumer Survey* (May 2020) at 9.

¹² Consumer Protection, above n 11, at 9.

¹³ Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132 at 153.

¹⁴ Jasminka Kalajdzic “Consumer (In)Justice: Reflections on Canadian Consumer Class Actions” (2011) 50 CBLJ 356 at 358, citing *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534, 201 DLR (4th) 385 *sub nom Western Canadian Shopping Centres Inc v Bennett Jones Verchere* at 26.

¹⁵ Consumer Guarantees Act 1993, s 2; Fair Trading Act 1986, s 2; Credit Contracts and Consumer Finance Act 2003, s 5.

¹⁶ Kate Tokeley *Consumer Law in New Zealand* (2nd Ed, LexisNexis, Wellington, 2016) at 21.

consequence. Consumer law allows for consumers who have suffered financial loss to be compensated by the manufacturer or supplier that caused it.

New Zealand's consumer law regime is largely made up of statutes and regulatory frameworks.¹⁷ The primary consumer protection statutes are the Consumer Guarantees Act 1993 and the Fair Trading Act 1986. The purposes of both enactments are to protect the interests of consumers, to ensure businesses compete effectively, and to ensure that consumers and businesses participate confidently.¹⁸ The Consumer Guarantees Act contains guarantees that suppliers must ensure that goods supplied are reasonably safe, are fit for purpose and are of acceptable quality, and that services provided are carried out with reasonable skill and care.¹⁹ The Fair Trading Act prohibits certain unfair conduct and practices in trade, promotes fair conduct and practices in trade, provides for disclosure of consumer information in the supply of goods and services, and promotes safety in respect of goods and services.²⁰

Other enactments making up New Zealand's consumer law regime include the Credit Contracts and Consumer Finance Act 2003, Motor Vehicle Sales Act 2003, Weights and Measures Act 1987, Auctioneers Act 2013, the Commerce Act 1986, and the Contract and Commercial Law Act 2017.²¹ The Ministry of Business, Innovation and Employment is responsible for consumer policy, in particular the Consumer Affairs branch.²² Consumer rights can also be enforced to a limited extent through tort, in particular negligence.

¹⁷ Tokeley, above n 16, at 6-7.

¹⁸ Consumer Guarantees Act, s 1A(1); Fair Trading Act, s 1A(1).

¹⁹ Section 1A(2).

²⁰ Section 1A(2).

²¹ Trish O'Sullivan "Enforcement and Effectiveness of Consumer Law in New Zealand" in Hans Micklitz and Geneviève Saumier (eds) *Enforcement and Effectiveness of Consumer Law Ius Comparatum – Global Studies in Comparative Law* (Springer, Cham, 2018) 415 at 417.

²² O'Sullivan, above n 21, at 415.

B Enforcement of Consumer Law

The effectiveness of consumer protection law “... does not depend only on the creation and recognition of rights, but it equally and especially depends on efficient and appropriate means to assert them.”²³ Consumer protection laws may be enforced in New Zealand through individual action in the courts, Disputes Tribunals, industry specific disputes resolution schemes, the Commerce Commission, and through representative actions. These enforcement mechanisms can be highly effective, but, in their current form, some consumers with low value claims are likely to encounter barriers in accessing justice through them.

1 The courts

Consumers can bring their individual claims against manufacturers or suppliers to the courts to be adjudicated. Claims for up to \$350,000 may be lodged in the District Court, while claims above that must be made in the High Court.²⁴ Legal representation is normally required, which contributes to the high cost of bringing a claim – it is normally not cost-effective to bring claims for less than \$100,000 to the District Court.²⁵ There is also a significant time cost involved, both in the preparation required to bring a claim and due to frequent delays in proceedings.

Micklitz and Saumier found that, of 37 reporting jurisdictions, the vast majority considered private individual enforcement to be the least effective way of enforcing consumer law.²⁶ This is because consumer disputes tend to be for relatively low amounts, so the costs of pursuing individual litigation are likely to outweigh any potential benefit to the claimant.²⁷ For low value consumer claims, individual action in the formal courts will almost certainly be unaffordable.

²³ L’Heureux, above n 9, at 290.

²⁴ District Court Act 2016, s 74.

²⁵ O’Sullivan, above m 21, at 421-422; Courts of New Zealand “Improving Access to Civil Justice” (20 July 2021) <<https://courtsfnz.govt.nz>>.

²⁶ Hans Micklitz and Geneviève Saumier (eds) *Enforcement and Effectiveness of Consumer Law Ius Comparatum – Global Studies in Comparative Law* (Springer, Cham, 2018) at 10.

²⁷ Palmer, above n 2, at 497.

2 *Disputes Tribunal*

Individual consumers may lodge claims for up to \$30,000 in the Disputes Tribunal, a division of the District Court, at a lodgment cost of \$30-\$100.²⁸ The Rules Committee (the statutory body responsible for procedural rules in the courts)²⁹ has recommended that the jurisdiction of the Disputes Tribunal should be increased to include claims of up to \$50,000 to address the justice gap in New Zealand.³⁰ Legal representation is not permitted in Disputes Tribunal hearings, though legal advice may be sought prior to appearing before the Tribunal.³¹

The Disputes Tribunal's relatively low cost of bringing a claim makes it an appropriate channel for low value consumer disputes. Further, the system is designed to remove bias against those unfamiliar with legal procedure, for example by allowing Tribunal Referees to explain the process to parties and to decide cases on their merits, and by preventing legal representation, which is often unaffordable for claimants, during hearings.³²

Despite its benefits, there are some features of the Disputes Tribunal which may reduce the likelihood of consumers using it to have their disputes heard, particularly where their claims are low in value. Those barriers include claimants' lack of knowledge of the Disputes Tribunal or consumer law, the semi-legal nature of the Tribunal, claimants' poor literacy skills, and the cost of lodging a claim.

Consumers may lack knowledge as to the existence of the Disputes Tribunal or how to access it. Although the Consumer Protection *New Zealand Consumer Survey 2020* found that 74% of respondents were aware of the Disputes Tribunal, 42% of consumers who had experienced problems and had not contacted a disputes resolution service said that they did

²⁸ Disputes Tribunal Act 1988, s 10(3); The Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021) at 2 and 16.

²⁹ Senior Courts Act 2016, s 155.

³⁰ The Rules Committee, above n 28, at 2 and 15.

³¹ O'Sullivan, above n 21, at 420; The Rules Committee, above n 28, at 13.

³² Sims, above n 3, at 153.

not do so because they did not know where to go, or were unaware of the appropriate service to resolve their dispute.³³ The groups least likely to be aware of the Disputes Tribunal were those who did not speak English as their main language (54%), Pacific consumers (56%), those aged 18-36 years (60%), and Asian New Zealanders (63%).³⁴ Similarly, while almost all consumers are aware that there are laws which protect their basic consumer rights (94%), less than half of consumers felt they knew a moderate amount about their rights (45%).³⁵ Lack of knowledge as to legal rights may prevent consumers from attempting to have their disputes resolved through the Disputes Tribunal.

Barriers may also be experienced by consumers with poor literacy skills, as claims must be made in writing.³⁶ While s 55 of the Disputes Tribunal Act requires Registrars to provide assistance in filing claims, this may be of minimal assistance in practice.³⁷ Firstly, claimants might not be aware of available assistance, which could prevent them from attempting to file claims. Secondly, there has been anecdotal reference to court staff providing assistance to claimants on an ad hoc basis rather than regularly doing so.³⁸ Thus, consumers with poor literacy skills may not receive the help they need in filing claims.

Another barrier is that the Disputes Tribunal is not entirely non-legal. Although legal representation is not permitted during hearings, legal advice may be obtained beforehand.³⁹ This may contribute to a perceived or real power imbalance between consumers and manufacturers or suppliers and could prevent consumers from attempting to utilize the Disputes Tribunal.

³³ Consumer Protection, above n 11, at 18.

³⁴ Consumer Protection, above n 11, at 18.

³⁵ Consumer Protection, above n 11, at 9.

³⁶ Disputes Tribunal of New Zealand “How to make a claim” (18 June 2021) <<https://disputestribunal.govt.nz>>; Sims, above n 3, at 156.

³⁷ Disputes Tribunal Act, s 55.

³⁸ Sims, above n 3, at 156, citing (1 April 2009) 653 NZPD 2311 (Disputes Tribunal Amendment Bill – First Reading, Hon Rahui Katene).

³⁹ O’Sullivan, above n 21, at 420; The Rules Committee, above n 28, at 13.

Finally, despite being relatively inexpensive, a \$30-\$100 lodgment fee may be too high for some consumers. This may be so particularly where the claimant has a relatively low disposable income, or where the cost of bringing the claim is lower than the potential compensation. Van den Bergh and Visscher describe the latter as ‘rational apathy’: potential claimants are driven by private gain, and where the likely costs seem higher than possible gain it is perfectly rational not to bring a claim at all.⁴⁰

3 Industry specific disputes resolution schemes

There are a variety of industry-specific dispute resolution schemes available, mostly relating to services industries, through which consumers may seek to resolve their disputes.⁴¹ Some schemes are provided for by statute or regulation, and may be established as tribunals, commissions, or services.⁴² Examples include the Weathertight Homes Tribunal, the Motor Vehicle Disputes Tribunal, the New Zealand Law Society, and the Health and Disability Commissioner.⁴³

While industry specific dispute resolution schemes can be highly effective and efficient, they cannot be relied upon to resolve all consumer disputes. Firstly, the schemes are only available for certain industries, meaning consumers with disputes in industries without the schemes cannot rely on them. Additionally, the schemes are first instance dispute resolution options, and the process may not produce results which are satisfactory for all parties involved. Further, consumers may face similar barriers as those existing in the Disputes Tribunal, such as a lack of knowledge of the availability of the schemes or their rights as consumers.⁴⁴

⁴⁰ Roger Van den Bergh and Louis Visscher “The Preventative Function of Collective Actions for Damages in Consumer Law” (2008) 2 ELR 5 at 14.

⁴¹ O’Sullivan, above n 21, at 422.

⁴² Palmer, above n 2, at 509.

⁴³ Palmer, above n 2, at 510.

⁴⁴ Consumer Protection, above n 11, at 18.

4 *The Commerce Commission*

Consumers seeking to have their rights upheld may make a complaint to the Commerce Commission, the independent Crown entity responsible for the implementation of consumer rights. The Commission has the jurisdiction to enforce the Fair Trading Act, the Credit Contracts and Consumer Finance Act, and the Commerce Act, but notably its jurisdiction does not extend to the enforcement of the Consumer Guarantees Act.⁴⁵ The Commerce Commission's lack of jurisdiction to enforce this enactment means that the responsibility of enforcement of guarantees owed by manufacturers and suppliers falls on the consumer.

The Commerce Commission ensures compliance with consumer laws within its jurisdiction through a range of methods, including advocacy and education to ensure traders and consumers are aware of their obligations and rights, and enforcement tools such as compliance advice letters, warnings, and prosecution through the courts.⁴⁶ Between July 2019 and June 2020, prosecution through the courts resulted in consumers receiving \$49.9m in refunds or compensation.⁴⁷

However, the Commission cannot take on all complaints made to it due to funding restrictions.⁴⁸ The Commerce Commission determines which claims it will enforce by reference to factors such as whether the conduct complained of involves vulnerable consumers or public safety, or whether the conduct is relevant to the Commission's strategic priorities (which, for 2017-2022, are that markets work well and that consumers and businesses are confident).⁴⁹ Additionally, the Commission may act on consumer complaints by giving manufacturers or suppliers compliance letters or formal warnings, rather than by taking legal action to seek compensation for consumers. Thus, far from all

⁴⁵ O'Sullivan, above n 21, at 422; Commerce Commission "How the Commission Helps" (2021) <<https://comcom.govt.nz>>.

⁴⁶ Commerce Commission *Briefing for the Incoming Minister* (November 2017) at 12.

⁴⁷ Commerce Commission *Briefing for the Incoming Minister* (November 2020) at 1.

⁴⁸ Commerce Commission, above n 45.

⁴⁹ Commerce Commission *Annual Report 2020* (December 2020) at 3.

the complaints made to the Commerce Commission result in the complainants receiving compensation.

5 *Representative actions*

Large groups of consumers with substantially similar claims in fact or in law against the same manufacturers or suppliers may seek to enforce their rights through a representative action. The procedure is provided for by High Court Rule 4.24:⁵⁰

4.24 Persons having the same interest

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—

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

(a) Procedure

The rule provides minimal guidance as to the procedure to be followed in a representative action claim, other than the fact that the claims are brought by a representative on behalf of others with an interest in the proceedings. As a result, the representative action procedure has been judicially developed. Key features of the procedure, as they relate to enforcement of consumer law, are the same interest requirement, the option to bring claims on an opt-in or opt-out basis, the ability to make claims for damages, and the requirement for court approval of settlements in certain cases.

Historically the threshold for bringing a representative action claim was high – all parties had to establish the same issues in both fact and law in order to have their claims represented by a single party.⁵¹ The threshold is now much lower since the 1987 decision in *RJ Flowers Ltd v Burns*, in which it was held that only a “common interest” was required.⁵² The lower threshold for having a claim brought under High Court Rule 4.24 has

⁵⁰ High Court Rules 2016, r 4.24.

⁵¹ *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 265; Chamberlain, above n 13, at 136.

⁵² Chamberlain, above n 13, at 271.

made the procedure significantly more appropriate for the resolution of consumer claims, which are unlikely to be identical in both fact and law.

The permitted method of defining the class of represented parties under High Court Rule 4.24 has been the subject of judicial contention. The two broad approaches are an opt-in approach (where those who wish to be included must take active steps to join in the proceedings) and an opt-out approach (where those who fall within the definition of the class are automatically included unless they take steps to be removed from the proceedings).⁵³ In 2008 the High Court held that opt-out proceedings were not contemplated by the rule, so for a time all representative actions were brought on an opt-in basis.⁵⁴ The Supreme Court in *Southern Response Ltd v Ross* recently held that opt-out proceedings are consistent with the wording of High Court Rule 4.24 and the purposes of representative actions.⁵⁵

The recent Supreme Court decision will make the representative action procedure more useful for consumer claims, because opt-out litigation can overcome the knowledge barrier faced by consumers in accessing justice.⁵⁶ Where claims are brought on an opt-in basis, lack of knowledge as to the procedure or their rights may prevent consumers taking steps to join the proceedings, and therefore from being compensated for loss. On an opt-out basis, parties are automatically included and must take active steps to be removed from proceedings, so information gaps are less likely to prevent consumers from receiving compensation.

Whether claims for damages may be made in representative actions has also been the subject of debate. In 1920, the Court in *Take Kerekere v Cameron* held that representative action proceedings were inappropriate for the settlement of numerous claims of damages.⁵⁷

⁵³ Law Commission, above n 1, at 2.16.

⁵⁴ Law Commission, above n 1, at 3.46; *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [165].

⁵⁵ *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [40].

⁵⁶ Consumer Protection, above n 11, at 9.

⁵⁷ Law Commission, above n 1, at 3.39; *Take Kerekere v Cameron* [1920] NZLR 302 at 303 following *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA).

Later High Court and Court of Appeal cases held that damages were not precluded in representative action proceedings.⁵⁸ The relaxation of the attitude of the courts towards damages makes the representative action procedure much more appropriate for consumer claims, which normally seek compensation for financial loss.

The Supreme Court in *Southern Response Ltd v Ross* considered that the courts have the power to approve settlements of representative actions, and that this should be a condition of proceedings being brought on an opt-out basis.⁵⁹ The courts take a more supervisory role in representative actions due to the need to protect the interests of represented parties, particularly important in consumer representative actions due to the prevalence of power imbalances between parties.

(b) Problems with the representative action procedure

Despite judicial development making the representative action procedure more useful for consumer claims, there are flaws in the current form of the procedure which reduce its utility for this purpose. Notably, there is a lack of regulation of litigation funders and a lack of clarity as to the procedure. The overriding issue is the minimal protection of consumers bringing claims through representative actions.

The cost of funding representative actions is likely to be too great for the consumer claimants to bear at the outset of litigation, so normally third parties are relied on to fund such litigation. Lawyers in New Zealand are prohibited from charging contingency fees (fees calculated as a proportion of damages awarded or settlement reached charged on a 'no win no fee' basis).⁶⁰ While lawyers are not prohibited from charging conditional fees (fees pre-determined at the outset of litigation charged on a 'no win no fee' basis), they may be reluctant to do so due to the risk of payoff being low in comparison to damages awarded.⁶¹ Plaintiffs may also be reluctant to agree to pay on a conditional basis – because

⁵⁸ *RJ Flowers Ltd v Burns*, above n 51, at 265.

⁵⁹ Law Commission, above n 1, at 3.48; *Southern Response Earthquake Services Ltd v Ross*, above n 55, at [82]-[83].

⁶⁰ Law Commission, above n 1, at 2.23.

⁶¹ Palmer, above n 2, at 512; Lawyers and Conveyancers Act 2006, s 333.

fees are calculated based on risk, there is a chance that the damages awarded will not be sufficient to cover the pre-determined rate.⁶²

This has resulted in litigation funding increasing in popularity as a method of funding representative actions in New Zealand, in particular consumer representative actions, of which five of the six have been funded by third party litigation funders.⁶³ Despite its increasing prevalence, there is no formal regulation of litigation funding in New Zealand. Rather, litigation funders are only partially regulated by tort, judicial developments, and general powers of the courts.⁶⁴

What is clear in the limited regulation of litigation funding is that there is no protection of claimants. There is risk that litigation funders may withdraw funding or force settlement partway through litigation where chances of success appear to be low. Very recently, Harbour Litigation Funding announced it was no longer willing to continue funding the Auckland-based leaky building representative action against James Hardie New Zealand Ltd following the failure of the Wellington-based litigation in the High Court.⁶⁵ This forced a settlement which led to the claimants receiving no compensation for their financial losses.⁶⁶

Similarly, there is risk that litigation funders do not have sufficient financial security to fully fund litigation, which could also result in claims being withdrawn part way through proceedings. Furthermore, consumers are at risk of being taken advantage of by litigation funders through unfair agreements which may lead to an extortionate proportion of damages being paid to litigation funders. The Supreme Court in *Waterhouse v Contractors Bonding* stressed that it is not the court's role to assess the fairness of, or to act as regulators

⁶² Michael Legg, Edmond Park, Nicholas Turner, and Louisa Travers “The Rise and Regulation of Litigation Funding in Australia” (2011) 38 N Ky L Rev 625 at 631.

⁶³ Law Commission, above n 1, at 14.24 and 14.26.

⁶⁴ Law Commission, above n 1, at 15.2.

⁶⁵ *Cridge v Studorp Ltd* [2021] NZHC 2077 at [888].

⁶⁶ Rob Stock “James Hardie leaky homes trial ends early with settlement, but no compensation for owners” *Stuff* (New Zealand, 3 August 2021).

for, litigation funding arrangements, indicating that the courts will not step in to prevent such agreements.⁶⁷

Despite judicial development to the representative action procedure, the lack of guidance provided by the wording of the rule alongside questions yet to be addressed by the courts create uncertainty as to the procedure to be followed. In her 2008 chapter in *The Yearbook of Consumer Law*, Kate Tokeley referred to the “strikingly inadequate” direction given by the wording of High Court Rule 78 (now High Court Rule 4.24) in arguing that it needed to be reformed to maximise the effectiveness of the procedure and to prevent its abuse.⁶⁸

Additionally, some relevant issues (including common funds orders and management of competing representative actions) are yet to be addressed by the courts.⁶⁹ In some cases, claims which raise unresolved issues may result in extensive procedural litigation to resolve them before substantive issues are decided, possibly at significant cost to parties and the judiciary. This may impact the price and availability of litigation funding, as funders will either charge more for or refrain from funding litigation which is perceived to be of high risk. Uncertainty may deter groups of claimants with valid claims from pursuing them to avoid the risk of expensive, drawn-out litigation, or encourage representative claimants to settle prematurely to avoid having to litigate, even though the class may have a strong claim.⁷⁰ The lack of direction provided by the wording of the rule and areas yet to be judicially developed create uncertainty as to the precise process.

C Proposed Solutions to the Consumer Access to Justice Gap

There is an access to justice gap for low value consumer disputes in New Zealand. The most common access to justice barriers for these disputes are the financial or time cost of bringing claims, and consumers’ lack of knowledge as to their rights or the dispute

⁶⁷ *Waterhouse v Contractors Bonding* [2013] NZSC at [28] and [48].

⁶⁸ Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, and Anette Norhausen (eds) *The Yearbook of Consumer Law* (Ashgate Publishing Group, November 2008) 297 at 313.

⁶⁹ Law Commission, above n 1, at 4.3

⁷⁰ Law Commission, above n 1, at 4.22.

resolution options available. Two of the enforcement mechanisms referred to above are less prone to these particular access to justice barriers less than the other mechanisms, but in their current form have flaws which reduce their utility. Those mechanisms are the Commerce Commission, as a public enforcement body, and the representative action procedure, a private action procedure designed to jointly resolve large numbers of claims. Therefore, this essay will consider whether either a statutory class action framework or an increase in the Commerce Commission's enforcement jurisdiction would be beneficial in reducing the access to justice gap for low value consumer claims.

IV Class Actions

A Class Action Legislation

A class action can be defined as "... any procedure that increases access to justice by allowing a single plaintiff (the representative plaintiff) to bring an action on behalf of persons with a common interest in the subject matter of the litigation."⁷¹ As argued by Kate Tokeley in *The Yearbook of Consumer Law*, a statute providing for a class action procedure would provide better protection of consumers than currently provided by the representative action procedure.⁷² The statute would provide clear guidelines as to the procedure to be followed to minimise the need for procedural litigation, and would regulate the funding of class actions. While the precise form of the statute will not be contemplated by this essay, the Law Commission is currently undergoing a review of class actions and litigation funding in New Zealand and is likely to recommend guidelines for legislative reform in this area.

B Consumer Representative Actions in New Zealand

Despite its shortfalls, New Zealand's representative action framework has begun to be used for consumer litigation in the past decade, which Nikki Chamberlain describes as "a new type of class action entering the New Zealand legal landscape".⁷³ This demonstrates that

⁷¹ Tokeley, above n 68, at 297-298.

⁷² Tokeley, above n 68, at 313.

⁷³ Chamberlain, above n 13, at 147.

class action-style litigation is beginning to be perceived as useful for the resolution of consumer claims in New Zealand.

To date, the consumer representative actions in New Zealand have concerned banking,⁷⁴ insurance claims arising out of the Christchurch earthquakes,⁷⁵ and building materials causing damage to buildings.⁷⁶ Broadly, the claims in the consumer representative actions have been for breach of contract or implied term of contract, breach of good faith, misrepresentations, negligence, breaches of the Credit Contracts and Consumer Finance Act, breaches of the Fair Trading Act, and breaches of the Consumer Guarantees Act.⁷⁷ The claims have been for amounts varying between \$15 to over \$100,000 per claimant, though have tended to be toward the higher end of the range.⁷⁸

It is worth noting that the consumer representative actions to date have not been ‘typical’ consumer claims – they have mostly revolved around expensive and complex goods and services, which means the claims have been for larger amounts than in ‘typical’ consumer disputes. Arguably, the flaws in the representative action procedure which make it risky and leave consumers unprotected have contributed to this trend, as the lower payoff for small consumer claims makes the risks of bringing a representative action less worthwhile.

⁷⁴ *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827.

⁷⁵ *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105; *Southern Response Earthquake Services Ltd v Ross*, above n 55.

⁷⁶ *Cridge v Studorp Ltd*, above n 65; *The Minister of Education v James Hardie Ltd* [2018] 1481; *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478.

⁷⁷ *Cooper v ANZ Bank New Zealand*, above n 74, at [34]; *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd*, above n 75, at [9]-[10]; *Southern Response Earthquake Services Ltd v Ross*, above n 55, at [8]; *Cridge v Studorp Ltd*, above n 65, at [11]; *Paine v Carter Holt Harvey Ltd*, above n 76; *The Minister of Education v James Hardie Ltd*, above n 76, at [11].

⁷⁸ Law Commission, above n 1, at 4.31.

C The Purpose of Class Action Procedures

The three purposes of class action procedures are widely recognised to be efficiency, access to justice, and deterrence.⁷⁹ The purposes of class action litigation make it suitable for the resolution of large numbers of small consumer claims for the reasons discussed below.

1 Efficiency

Efficiency relates to both the efficient use of judicial resources and to the general economic use of resources.⁸⁰ Claims brought as a class achieve economies of scale by reducing the cost of litigation to each individual claimant.⁸¹ Represented claimants also do not have to take on the time cost associated with most other forms of dispute resolution, as only the representative claimant is party to the proceedings. Thus, claimants' resources are used more efficiently.

Judicial resources are also used more efficiently under class action-style litigation than individual actions through the courts, as the judiciary does not waste time and resources hearing and deciding substantially similar claims multiple times.⁸² The force of this argument is reduced slightly when considering that many consumer claims likely would not have been brought individually as private actions.

2 Access to justice

Class action litigation reduces the financial and time costs to individual claimants, meaning they are more likely to bring their claims and therefore to receive compensation. Additionally, some class action litigation can overcome the knowledge barrier faced by consumers in enforcing their rights. Consumers who are not aware of their rights are unlikely to seek to enforce them unless made aware of their rights by a third party, which

⁷⁹ Kenneth Dam "Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest" (1975) 4 J Leg Stud 47 at 48; *Southern Response Earthquake Services Ltd v Ross*, above n 55, at [40].

⁸⁰ Dam, above n 79, at 48.

⁸¹ Van den Bergh and Visscher, above n 40, at 18; L'Heureux, above n 9, at 447.

⁸² Tokeley, above n 68, at 301.

may occur when they are added to or invited to join a class action.⁸³ This increases the likelihood of consumers receiving compensation for loss caused by manufactures or suppliers.

3 *Deterrence*

Manufacturers and suppliers may breach consumer protection laws inadvertently through negligence, or deliberately to increase profits.⁸⁴ The threat of class action litigation is said to have a deterrence function, discentivising wrongdoing or incentivising compliance with the law.⁸⁵ Smaller disputes are less likely to be litigated than high value disputes, which means that manufacturers or suppliers causing low value financial loss to large numbers of consumers are less likely to be held to account. Class action litigation increases the likelihood of small claims being brought, and thus increases the likelihood of manufacturers or suppliers being held accountable, theoretically producing a deterrent effect.

Whether deterrence actually plays a role in consumer protection is contested. Some research indicates that liability to compensate for harm has not been shown to produce a deterrent effect. For example, Brown's analysis of motor vehicle accidents before and after the implementation of the Accident Compensation Corporation (ACC) scheme in New Zealand found that, contrary to traditional theory of tort deterrence, the number of motor vehicle accidents did not increase after the implementation of ACC.⁸⁶ Under ACC, all injured persons are entitled to compensation without having to prove fault, accompanied by a statutory bar against suing for personal injury.⁸⁷ According to traditional tort theory,

⁸³ Chamberlain, above n 13, at 153.

⁸⁴ Deborah Hensler "Using Class Actions to Enforce Consumer Protection Law" in Geraint Howells, Iain Ramsay, and Thomas Wilhelmsson (eds) *Handbook of Research on International Consumer Law* (2nd ed, Edward Elgar Publishing, Cheltenham (UK), 2018) 445 at 445.

⁸⁵ Dam, above n 79, at 48.

⁸⁶ Craig Brown "Deterrence in Tort and No-Fault: The New Zealand Experience" (1985) 73 Cal L Rev 976 at 1002.

⁸⁷ Accident Compensation Act 2001, s 317; Trish O'Sullivan and Kate Tokeley "Consumer Product Failure Causing Personal Injury Under the No-Fault Accident Compensation Scheme in New Zealand – a Let Off for Manufacturers?" (2018) 41 JCP 211 at 212.

the number of accidents should have increased because injurers were less likely to face financial consequences for their actions. This research indicated that liability to compensate for personal injury did not product a deterrent effect, so it could be argued that liability to compensate for product or service defects does not deter breaches of consumer law. It could be further argued that the statutory bar on suing for personal injury under ACC should be interpreted as a public policy decision in New Zealand that deterrence is not an important function of the law.

On the other hand, law is considered to be a public good, meaning the enforcement of the rights of one class of consumers may have value beyond what those rights are worth to that class, by preventing harm to other consumers through deterrence.⁸⁸ It could be argued that the statutory bar on suing for personal injury under ACC represented a policy decision that, in the context of personal injury, no-fault compensation was deemed to be *more* important than deterrence. I would further argue that, because of the limited liability created by ACC, there is an even greater role for the deterrence function of class actions in New Zealand than exists in other jurisdictions.

D Statutory Class Action Framework and Consumer Access to Justice

1 Procedural access to justice

A class action statute clearly setting out the requirements for, and the procedure relating to, class actions would create certainty for consumers considering class action litigation. The likelihood of extensive and costly procedural litigation before substantive issues are considered would be decreased, improving the accessibility of class actions to consumers, and thus improving procedural access to justice.

A statute setting out the procedure relating to class actions would also need to address methods of funding and the responsibilities of funders. This could possibly have the dual effect of increasing the availability of class action funding and decreasing its price. The availability may increase due to certainty that the funding activities were legal. The price

⁸⁸ Rhode, above n 4, at 1795.

of funding tends to be calculated with risk as a contributory factor, so where the legality of the funding method is certain less risk is taken on by funders, and the price may therefore be lower.

Whether funding would indeed become cheaper and more accessible is unclear. It could be argued that availability would remain the same, particularly if demand for funding increased with an increase in the number of class actions, and that the price of class action funding would go unchanged due to the need for funders to remain profitable. If class action funding were to become cheaper and more widely available, this would represent a further improvement in procedural access to justice.

2 Substantive access to justice

Substantive access to justice is also likely to improve. A class action statute will make use class action-style litigation by consumers more common, resulting in more consumers having their claims heard and subsequently (in some cases) receiving compensation for their financial loss. On the other hand, a substantial proportion (a third to two thirds) of the total damages awarded or settlement reached goes toward the payment of litigation funders (or alternatively the payment of contingency fees to lawyers).⁸⁹ This is a significant quantity of the compensation allocated, thus reducing substantive access to justice for consumers relying on class actions for the enforcement of their rights. However, consumers currently rely on litigation funders despite the potential for funding to be withdrawn part way through litigation. Reducing the potential for this to occur through regulation of funders is likely to improve the prospects of litigation being funded for the entire process, thus an improvement to substantive access to justice.

⁸⁹ Legg, Park, Turner, and Travers, above n 62, at 631.

E Policy Considerations in a Statutory Class Action Framework

1 Litigation funding

Despite the increasing prevalence of litigation funding, it is not formally regulated in New Zealand. The reality is that, without a way to finance class action litigation, a class action legislative framework would be essentially useless to consumers. While litigation funding is a tool which allows consumers to access the courts, there are features of the practice which may be concerning.

One concern is that litigation funding fees tend to be for a substantial proportion of the total damages awarded or settlement reached (on average one to two thirds), which reduces the redress received by each consumer following litigation.⁹⁰ Relatedly, the Law Commission identified that just over half of litigation funders currently operating in New Zealand are foreign companies.⁹¹ This means that a proportion of the damages or settlement meant for New Zealand claimants as compensation for their financial loss is received by large foreign corporations, which may have adverse impacts on the New Zealand economy.

If litigation funding was deemed to be an undesirable feature of New Zealand's legal landscape, the most likely alternative for the funding of class action litigation would be to allow lawyers to charge contingency fees. Realistically the fees charged to claimants would be similar to those charged by litigation funders, as fees are charged on the same basis (taking into consideration risk and likely reward). Favouring contingency fees would, however, likely have the advantage that most of the fees charged would remain in circulation in New Zealand, as litigation would likely be funded by New Zealand-based law firms.

The relevant question then becomes whether the downfalls of either litigation funding or contingency fees, most notably the substantial price paid by successful claimants, is enough to mean class actions are not a suitable tool for the enforcement of consumer law. One

⁹⁰ Legg, Park, Turner, and Travers, above n 62, at 631.

⁹¹ Law Commission, above n 1, at 255.

factor to consider is that the deterrence function of class actions is still achieved where funders are paid a substantial proportion of the damages, so long as the defendant party pays great enough amount that it deters future misconduct, and the misconduct of other manufacturers and suppliers.⁹² Another factor to consider is substantive access to justice. On the one hand, consumers receiving minimal compensation for their financial losses as a result of high fees could be regarded as unsuccessful and contrary to the purpose of class action litigation.⁹³ The stronger argument is that, although consumers may not receive the full quantity of damages awarded, they may still receive more than they otherwise would have, particularly because many of the claims would not have been brought without class action litigation.

2 *Frivolous litigation*

Another concern associated with class action procedures is the possibility of lawyers or litigation funders encouraging meritless litigation for their own financial benefit, referred to as frivolous litigation or ‘legalised blackmail’.⁹⁴ Despite the fact that meritless claims are likely to fail at trial, frivolous litigation relies on the high likelihood that the defendant party will settle to avoid the costs of defending the claim and the risk of losing, even though they may have a strong defence. Where the defendant settles, lawyers will still be paid for legal fees and litigation funders will receive one-to-two thirds of the payout, while claimants may end up with only minimal compensation.⁹⁵

There are procedural safeguards which could be incorporated into class action legislation which could partially prevent frivolous litigation. One element, already used in proceedings under High Court Rule 4.24, is to require preliminary court approval of class actions before they are brought, meaning the courts could choose to dispose of the claims before full trial.⁹⁶ Alternatively or additionally, litigation funders could be required to provide security

⁹² Hensler, above n 84, at 462.

⁹³ Hensler, above n 84, at 462.

⁹⁴ Tokeley, above n 68, at 301.

⁹⁵ Legg, Park, Turner, and Travers, above n 62, at 631.

⁹⁶ Legg, Park, Turner, and Travers, above n 62, at 630.

for costs (a deposit of the opponent's costs to be paid in the event of the claims failing), which acts as a disincentive to bring meritless claims.⁹⁷

V The Commerce Commission

A Increase Commerce Commission's Enforcement Jurisdiction

Trish O'Sullivan recommended an increase in the Commerce Commission's jurisdiction to allow it to enforce the provisions of the Consumer Guarantees Act in order to improve access to justice for consumers.⁹⁸ This would significantly increase the types of claims the Commission was able to enforce, and would therefore enhance its ability to litigate on behalf of and retrieve compensation for consumers with relatively low value claims. To support the Commission's increased enforcement jurisdiction, the funding allocated to the Commission would have to be increased.

B Public Enforcement of Consumer Law

Micklitz and Saumier's research across 37 jurisdictions found that, in all of those jurisdictions, some form of public enforcement of consumer law is provided for, though the enforcement powers and the extent to which dispute resolution services were provided varied significantly.⁹⁹ Micklitz and Saumier suggested that, because consumer protection law was provided for by statute in all reporting countries, some form of public enforcement was considered to be necessary to give force to the statutes.¹⁰⁰

Public enforcement of consumer law can overcome some of the access to justice barriers experienced by individual consumers attempting to enforce their rights. Specifically, public enforcement bodies do not experience lack of knowledge as to consumer rights or available enforcement mechanisms, or power imbalances vis-à-vis manufacturers or suppliers. Further, public bodies face monetary and time barriers to a significantly lesser degree than

⁹⁷ Legg, Park, Turner, and Travers, above n 62, at 630.

⁹⁸ O'Sullivan, above n 21, at 431.

⁹⁹ Micklitz and Saumier, above n 26, at 9-10.

¹⁰⁰ Micklitz and Saumier, above n 26, at 9.

individual consumers. These factors mean that public enforcement bodies like the Commerce Commission can, in some cases, be better equipped to bring legal action for breaches of consumer law consumers than the consumers themselves.

The degree to which public enforcement of consumer law is used differs between jurisdictions. Deborah Hensler premised her chapter in *Handbook of Research on International Consumer Law* with a statement that public enforcement of consumer law is preferred in most consumer protection regimes, but that resourcing limitations often prevent this ideal from being met.¹⁰¹ This statement brushes over the fact that public bodies may experience unique issues in enforcing consumer laws, including a lack of access to information about potential breaches in consumer law until complaints are made.

Micklitz and Saumier's research does not go so far as to suggest that public enforcement is necessarily the ideal, but rather that a mixed public-private enforcement approach is the best way to ensure adequate consumer protection.¹⁰² This takes into account the fact that both private and public enforcement mechanisms face their own unique issues, which can be mitigated by a combination of the two approaches. This mixed approach is achieved by the Commerce Commission's current jurisdiction, so whether its jurisdiction should be increased will depend on its likely improvement to consumer access to justice and other policy considerations.

C Increased Role of the Commerce Commission and Consumer Access to Justice

1 Procedural access to justice

Increasing the Commerce Commission's jurisdiction to cover the Consumer Guarantees Act and increasing its funding for consumer litigation would mean the Commission could represent increased numbers of consumers in litigation, arguably an improvement in procedural access to justice. However, the Commerce Commission's ability to take on consumer claims will always inevitably be restrained by the availability of funding and the

¹⁰¹ Hensler, above n 84, at 445.

¹⁰² Micklitz and Saumier, above n 26, at 10.

Commission's strategic priorities.¹⁰³ There is also a question of whether procedural access to justice requires claimants to have control over proceedings, which is removed where the Commerce Commission takes on the responsibility of bringing claims. Thus, the extent of the improvement to procedural access to justice for consumers will be constrained.

2 Substantive access to justice

The improvement in substantive access to justice would be correlated to the number of cases the Commerce Commission was able to take on. Where the Commission is able to take on cases, substantive access to justice is likely to improve significantly, because consumers who otherwise may not otherwise have had their claims heard at all would have access to quality legal counsel through the Commerce Commission at no personal cost. On the other hand, the Commission does not always enforce complaints made to it through litigation. Where the Commission decides that the best method of upholding consumer law is through compliance advice letters or formal warnings, consumers who have complained to the Commission will either go without compensation for their financial loss or will have to seek it elsewhere. Thus, substantive access to justice will be significantly improved in some cases, but not in others.

D Policy Considerations in Increasing the Commerce Commission's Enforcement Role

1 Source of funding

For the Commerce Commission's enforcement jurisdiction to be increased to cover claims under the Consumer Guarantees Act, the Commission's funding would have to be increased. Without an increase in funding, the Commerce Commission would not have any increased ability to take numerous low value consumer claims, so increasing its jurisdiction would be ineffective in improving consumer access to justice.

In 2019-2020, the Commerce Commission recorded a total of \$53.7m in funding, which was sourced from general taxation revenue from the Crown (\$32.3m), revenue from

¹⁰³ Commerce Commission, above n 46, at 12.

industry levies (\$19.8m), and other revenue such as interest, fees, and recoveries (\$1.7m).¹⁰⁴ Consumer protection activities, including litigation (for which \$7.8m was allocated), are funded only by Crown funding.¹⁰⁵ An important consideration in the funding of the Commerce Commission going forward is economic recovery from the impact of COVID-19, particularly from periods of ‘lockdown’ where the economy slowed significantly. In the 2020 *Briefing for the Incoming Minister*, the Commerce Commission indicated that its key contributions to economic recovery would be through ensuring competitive behaviour between businesses, new protections in the consumer credit sector, and strong and sustainable infrastructure for the supply of essential services.¹⁰⁶

While representing consumers with low value claims is not necessarily inconsistent with the Commerce Commission’s key contributions to economic recovery post-COVID-19, this does not fully align with the Commission’s current priorities. Allocating more funding to the Commerce Commission so that it could focus on low value consumer disputes in the context of the COVID-19 pandemic would currently be an unwise policy decision.

2 *The Consumer Guarantees Act 1993*

While it is true that allowing the Commerce Commission to enforce the Consumer Guarantees Act would take away some burden of enforcement away from consumers, it is arguable that increasing the Commerce Commission’s jurisdiction to allow it to represent claims made under the Consumer Guarantees Act would undermine the policy behind the enactment. If consumers began to treat the Commerce Commission as the first resort for enforcing the Consumer Guarantees Act, they may actually be less likely to receive compensation than if they attempted to enforce the Act themselves first.

A significant strength of the Consumer Guarantees Act is its simplicity – it sets out clear guarantees that manufacturers or suppliers of goods and services must comply with, and circumstances in which consumers of those goods and services may be entitled to a repair,

¹⁰⁴ Commerce Commission, above n 49 at 8.

¹⁰⁵ Commerce Commission, above n 49 at 8.

¹⁰⁶ Commerce Commission, above n 47, at 14-16.

replacement, or refund. As detailed in Part III, the Commerce Commission uses a range of enforcement mechanisms to ensure compliance with consumer law. As well as prosecution through the courts, the Commission also uses tools such as compliance advice letters and warnings. In cases where the latter two enforcement mechanisms are used, consumers who complain to the Commerce Commission may not receive financial compensation for their losses at all, whereas self-enforcement of the provisions of the Consumer Guarantees Act may have resulted in compensation.

VI Recommendation

To improve access to justice for consumers with low value disputes, class action legislation should be enacted. Class actions are already effectively a part of New Zealand's legal landscape through High Court Rule 4.24, and clear direction as to the procedure to be followed would resolve current flaws in the representative action procedure which leave consumers unprotected. Though the concerns surrounding litigation funding and frivolous litigation are valid, a well drafted piece of legislation would minimise the potential for undesirable conduct.

While some level of public enforcement of consumer law is necessary, the current level of public enforcement provided by the Commerce Commission could be supplemented by the enactment of a statutory class action procedure. Increasing the Commerce Commission's enforcement jurisdiction would require an increase in its level of funding, which, particularly in the context of economic recovery from the effects of COVID-19, is undesirable. Additionally allowing the Commission to enforce the Consumer Guarantees Act may reduce its enforceability by consumers, which would undermine the purpose of the enactment.

VII Conclusion

Despite New Zealand's strong consumer protection regime and array of available enforcement mechanisms, there is currently a gap in consumer access to justice for low value disputes. This gap arises largely due to cost and information barriers which may inhibit consumers' ability to rely on existing dispute resolution options. The representative

action procedure and the Commerce Commission are less susceptible to these access to justice barriers, but in their current form do not adequately address the consumer access to justice gap. Thus, the potential impacts of the enactment of class action legislation and an increase in the Commerce Commission's enforcement jurisdiction on consumer access to justice, and the feasibility of each option, are considered in this essay.

This essay finds that both of the options considered would have the effect of improving consumer access to justice. The enactment of class action legislation is concluded to be the more feasible option, as the public cost of increasing the Commerce Commission's jurisdiction would likely be too high. Therefore, in order to address the consumer access to justice gap in New Zealand, legislation governing the procedure relating to class action litigation should be enacted so as to better allow numerous consumers with substantially similar low value claims to enforce their consumer rights.

VIII Bibliography

A Cases

1 New Zealand

Cooper v ANZ Bank New Zealand Ltd [2013] NZHC 2827.

Credit Suisse Private Equity LLC v Houghton [2014] NZHC 37, [2014] NZLR 541.

Cridge v Studorp Ltd [2021] NZHC 2077.

Houghton v Saunders (2008) 19 PRNZ 173 (HC).

Paine v Carter Holt Harvey Ltd [2019] NZHC 478.

RJ Flowers v Burns [1987] 1 NZLR 260 (HC).

Southern Response Earthquake Services Ltd v Ross [2020] NZSC 126.

Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 3105.

Take Kerekere v Cameron [1920] NZLR 302.

The Minister of Education v James Hardie Ltd [2018] 1481.

Waterhouse v Contractors Bonding [2013] NZSC.

2 Canada

Western Canadian Shopping Centres Inc v Dutton [2001] 2 SCR 534, 201 DLR (4th) 385
sub nom Western Canadian Shopping Centres Inc v Bennett Jones Verchere.

3 England and Wales

Markt & Co Ltd v Knight Steamship Co Ltd [1910] 2 KB 1021 (CA).

B Legislation

Accident Compensation Act 2001.

Auctioneers Act 2013.

Commerce Act 1986.

Consumer Guarantees Act 1993.

Contract and Commercial Law Act 2017.

Credit Contracts and Consumer Finance Act 2003.

Disputes Tribunal Act 1988.

District Court Act 2016.

Fair Trading Act 1986.

Lawyers and Conveyancers Act 2006.

Motor Vehicle Sales Act 2003.

Senior Courts Act 2016.

Weights and Measures Act 1987.

High Court Rules 2016.

C Books and Chapters in Books

Jean Calais-Auloy *L'interventionnisme Economique de la Puissance Publique* (Universite de Montpellier, Montpellier, 1984).

Deborah Hensler “Using Class Actions to Enforce Consumer Protection Law” in Geraint Howells, Iain Ramsay, and Thomas Wilhelmsson (eds) *Handbook of Research on International Consumer Law* (2nd ed, Edward Elgar Publishing, Cheltenham (UK), 2018) 445.

Hans Micklitz and Geneviève Saumier (eds) *Enforcement and Effectiveness of Consumer Law Ius Comparatum – Global Studies in Comparative Law* (Springer, Cham, 2018).

C J Miller and Brian Harvey *Consumer and Trading Law* (Butterworth, London, 1985).

Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004).

Trish O’Sullivan “Enforcement and Effectiveness of Consumer Law in New Zealand” in Hans Micklitz and Geneviève Saumier (eds) *Enforcement and Effectiveness of Consumer Law Ius Comparatum – Global Studies in Comparative Law* (Springer, Cham, 2018) 415.

Jessica Palmer “Chapter 11: Access to Justice for Consumers” in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd Ed, LexisNexis, Wellington, 2016).

Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, and Anette Norhausen (eds) *The Yearbook of Consumer Law* (Ashgate Publishing Group, November 2008) 297.

Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd Ed, LexisNexis, Wellington, 2016).

D Journal Articles

Craig Brown “Deterrence in Tort and No-Fault: The New Zealand Experience” (1985) 73 Cal L Rev 976.

Nikki Chamberlain “Class Actions in New Zealand: An Empirical Study” (2018) 24 NZBLQ 132.

Nikki Chamberlain “Contracting-out of Class Action Litigation: Lessons from the United States” (2018) 1 NZLR 371.

Kenneth Dam “Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest” (1975) 4 J Leg Stud 47.

Nicole L’Heureux “Effective Consumer Access to Justice: Class Actions” (1992) 15 JCP 445.

Jasminka Kalajdzic “Consumer (In)Justice: Reflections on Canadian Consumer Class Actions” (2011) 50 CBLJ 356.

Michael Legg, Edmond Park, Nicholas Turner, and Louisa Travers “The Rise and Regulation of Litigation Funding in Australia” (2011) 38 N Ky L Rev 625.

Trish O’Sullivan and Kate Tokeley “Consumer Product Failure Causing Personal Injury Under the No-Fault Accident Compensation Scheme in New Zealand – a Let Off for Manufacturers?” (2018) 41 JCP 211.

Deborah Rhode “Access to Justice” (2001) 69 Fordham Law Rev 1785.

Alexandra Sims “Reforming the Consumer Guarantees Act 1993 and its Enforcement: Time for Action” (2010) 16 NZBLQ 145.

Maya Steinitz “Whose Claim is this Anyway – Third Party Litigation Funding” (2011) 95 Minn L Rev 1268.

Roger Van den Bergh and Louis Visscher “The Preventative Function of Collective Actions for Damages in Consumer Law” (2008) 2 ELR 5.

E Parliamentary and Government Materials

(1 April 2009) 653 NZPD 2311 (Disputes Tribunal Amendment Bill – First Reading, Hon Rahui Katene).

Law Commission *Class Actions and Litigation Funding* (NZLC IP45, 2020).

F Reports

Commerce Commission *Briefing for the Incoming Minister* (November 2017).

Commerce Commission *Annual Report 2020* (December 2020).

Commerce Commission *Briefing for the Incoming Minister* (November 2020).

Consumer Protection *New Zealand Consumer Survey* (May 2020).

The Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021).

G Internet Resources

Commerce Commission “How the Commission Helps” (2021)
<<https://comcom.govt.nz>>.

Christopher Naudie and Eric Prefontaine “Class/Collective Actions in Canada: Overview” (1 Dec 2016) Thompson Reuters Class Actions Global Guide <<https://content.next.westlaw.com>>.

Courts of New Zealand “Improving Access to Civil Justice” (20 July 2021) <<https://courtsfnz.govt.nz>>.

Disputes Tribunal of New Zealand “How to make a claim” (18 June 2021) <<https://disputestribunal.govt.nz>>.

H Other Resources

1 Newspaper articles

Rob Stock “James Hardie leaky homes trial ends early with settlement, but no compensation for owners” *Stuff* (New Zealand, 3 August 2021).

2 Speeches

Walter Mondale, Vice President of the United States of America “Address to the Second Judicial Circuit Conference” (10 September 1997).

Word Count

The text of this paper (excluding cover page, abstract, table of contents, footnotes, and bibliography) comprises exactly 7,990 words.