**How would you improve or reform our current system for group litigation and other civil proceedings involving multiple parties?**

# Introduction

This essay will argue that the current system for group litigation and other civil proceedings involving multiple parties in England and Wales would be improved by the introduction of a generic opt-out class action regime based on the collective procedure available for competition law claims in the Competition Appeal Tribunal (“CAT”). The proposed class action mechanism would retain the prevailing system of costs shifting. However, it would also permit the recovery of fees by third party funders from the damages awarded; in this respect, it differs from the CAT procedure.

The structure of this essay is to: (i) identify the aims of multi-party litigation; (ii) explain why the current system employed in England and Wales fails to satisfy those aims; (iii) propose the adoption of a generic opt-out class action regime; (iv) address a flaw in the CAT’s approach to litigation funding.

# Objectives of multi-party litigation

In order to answer the question of how the current system of multi-party litigation can be improved, we must first identify precisely what it is that we want the system to achieve.

## Securing effective and efficient access to justice for individuals

In his “Access to Justice: Final Report” (July 1996), Lord Woolf identified three fundamental objectives for the multi-party litigation regime in England and Wales. His objectives were:

* To provide access to justice in situations involving large numbers of claims which, individually, would be economically unviable to pursue.
* To provide effective and proportionate methods of resolving cases where the number of claimants means that the cases cannot be managed satisfactorily in accordance with normal procedure.
* To achieve a balance between (i) the normal rights of claimants and defendants both to pursue and defend cases individually and (ii) the interests of a group of parties to litigate the action as a whole in an effective manner.

## Deterring unlawful conduct and supporting regulatory regimes

In addition to the primary objective of securing access to justice for affected individuals, there are least two other important secondary goals that may be advanced through a state’s system of collective redress.

The first is the deterrence of unlawful conduct. Allowing victims ready access to the courts increases the cost to defendants of breaching the law: the effect is to deter such conduct. As Lord Neuberger observed:

“If all members of society cannot gain genuine access to the courts, then the possibility exists for society to become exploitative, as some elements take advantage of the fact that they can ignore the law with relative impunity.”[[1]](#footnote-1)

The second is the supplementation of regulatory regimes through private law enforcement. Public and regulatory bodies suffer from a number of limitations that favour the availability of alternative routes to enforcement through civil action, such as: (i) their vulnerability to lobbying and political pressure; and (ii) their dependence on limited resources. In its Submission on (what was) the Consumer Rights Bill 2013, the Office of Fair Trading candidly acknowledged that “public enforcement cannot deal with all breaches”. The Civil Justice Council has similarly commented that “Ombudsmen and Regulatory Systems are not primarily suited to resolve the very wide range of detriment that can give rise to the need for large scale remedial action.” In a wide-ranging review of international approaches, the Australian Law Reform Commission therefore concluded that a combination of private enforcement and public regulation was the most effective regulatory tool.[[2]](#footnote-2)

# The current system does not meet these aims

## The “traditional” means of managing large-scale litigation are acknowledged to be deficient

The flexibility of the English court’s case management powers and considerable judicial creativity have historically been used to great effect to enable the courts to develop practical methods of meeting the challenges posed by large-scale multi-party litigation. Two key approaches are:

* The selection and prosecution of “test cases” involving issues common to a group of cases, backed by the court’s power to stay the remainder of the claims pending the outcome; and
* Ordinary consolidation of separate proceedings or joinder of large numbers of co-claimants.[[3]](#footnote-3)

However, the unsuitability of the traditional means of managing large-scale litigation has been apparent since the 1980s and 1990s, when the courts were required to deal with a sequence of cases arising from transport and product liability disasters. In *Nash v Eli Lilly & Co* [1993] 1 WLR 782, at 810, Purchas LJ specifically called for legislative intervention. In his Final Report, Lord Woolf acknowledged that the overwhelming view among judges, practitioners, and consumer representatives was that the conventional mechanisms were too unwieldy and costly to satisfy the aim of effective and efficient access to justice.

## The Group Litigation Order regime does not meet Lord Woolf’s objectives

The “Group Litigation Order” (“GLO”) regime was introduced into CPR Part 19 following the recommendations of Lord Woolf’s Final Report. Efficiency is advanced by selecting a single “management court” to make binding orders in respect of all claims covered by the GLO. The court is empowered to deal with generic issues by selecting test claims. The central feature of the regime is the need for registration of individual claimants: the effect is to enshrine an “opt-in” approach.

The main problem with the GLO regime is that it suffers from participation problems. In the *Wm Morrison Supermarkets Plc v Various Claimants* litigation (currently being heard by the Supreme Court), for example, only 5% of the 100,000 employees affected by the relevant data breach chose to participate in the claim. This problem is not limited to the formal GLO system: it is true of all opt-in mechanisms. Studies show that ad hoc opt-in actions (by agreement between the parties and the judge, as occurred in several cases prior to the GLO’s introduction) were similarly characterised by low levels of participation.[[4]](#footnote-4)

The reasons for these failures of participation are diverse. Commentators speculate on practical difficulties (associated with identifying and notifying potential class members), economic reasons, physical restrictions, psychology, and simple lack of understanding of the legal process. The effect is substantially to undermine the GLO’s capacity to meet Lord Woolf’s first objective of maximising access to justice. This decreases the secondary value of the GLO as a means of forcing beneficial changes in corporate behaviour and adherence to desirable regulatory standards through collective action.

## Representative proceedings cannot be relied on to fill the gap

The English representative action, originally developed in the Court of Chancery in the 1800s and now contained in CPR 19.6, allows a representative claimant to bring an action on behalf of other persons with the “same interest”. The utility of the procedure as generic form of class action is severely limited by the restrictive approach taken by the courts to the “same interest” requirement. The failure of the litigation in *Emerald Supplies Ltd v British Airways Plc* [2010] EWCA Civ 1284 concerning an international price fixing cartel on this basis stands in contrast to the recovery by the same Anglo-American law firm which was unsuccessful in the English action of damages settlements of approximately half a billion dollars in an American class action involving the same defendant.

Following the Court of Appeal’s recent decision in *Lloyd v Google LLC* [2019] EWCA Civ 1599, it seems that representative proceedings may have a role to play in cases involving the misuse of private data. However, that decision was premised on the uniform nature of the claims with no room for consideration of any individual’s personal circumstances: an approach which “has the effect, of course, of reducing the damages that can be claimed to what may be described as the lowest common denominator.” An appeal to the Supreme Court is awaited; in the meantime, the broader utility of this decision outside the context of misuse of data is not obvious.

# A generic opt-out class action regime will solve this problem

## The participation problem is resolved in an opt-out regime

By contrast to the low registration numbers in opt-in systems, empirical data from the USA and Victoria confirm that the rates of participation under opt-out regimes are very high (at least 87%). Where empirical data does not exist, opt-out rates noted in individual cases indicate that the rates of participation exceeded 60% on the sample of cases selected.[[5]](#footnote-5) The data show that the primary objective of increasing access to justice for large-scale low-value claims will be met by the introduction of a generic opt-out system.

The availability of an opt-out mechanism is consistent with retention of the GLO regime for use in appropriate cases. This reflects the power of the CAT under s. 47B(7)(c) of the Competition Act 1998 to decide whether any collective proceedings will be opt-in or opt-out. Such a dual system is currently being implemented in Scotland in the form of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

The major fears associated with the introduction of a generic opt-out class action appear to be (i) abuse of the system through an increase in unmeritorious claims and unfair pressure on defendants to settle them and (ii) exploitation of victims by the lawyers and those funding them.

## Abuse can be avoided through robust control mechanisms

The fears of abuse are motivated by the perceived undesirability of certain features of the American class action system. However, there are some important basic distinctions between the two legal orders that must be taken into account.

* Unlike the position in the USA, the costs shifting regime in England exposes representative claimants to the risk of adverse costs orders if the litigation fails. This provides an obvious disincentive to the bringing of unmeritorious litigation.
* While punitive damages are available in American class actions, s.47C(1) of the Competition Act 1998 provides that exemplary damages are not permitted in collective proceedings in the CAT. It is submitted that this restriction can be employed more broadly in a generic opt-out regime as a safeguard against abuse.

In any event, the rational response to the fear of abuse is the introduction of measures capable of reducing or preventing it rather than the removal of a procedure that will allow meritorious claims to proceed. In addition to the courts’ normal powers to strike out or to give summary judgment, a key safeguard would be the introduction of a formal certification process before a class action can proceed. This would be analogous to s.47B(6) of the Competition Act 1998, under which the CAT must make a “Collective Proceedings Order” (“CPO”) certifying a group claim before it can proceed. The CAT must consider whether: (i) it is “just and reasonable” for the representative to act on behalf of the class; (ii) the claims concern the “same, similar or related” issues of fact or law and are “suitable” to be brought in collective proceedings.

There is, however, an obvious problem with the way the CAT certification process in particular has been approached to date, which is that it has been applied so narrowly that not a single class has yet been certified. However, a recent decision of the Court of Appeal suggests that the CAT’s approach has been unduly restrictive.[[6]](#footnote-6) Permission has been granted for leave to appeal to the Supreme Court; the Supreme Court’s ruling on this issue will be of central importance to the viability of the CAT’s system of collective redress.

## Exploitation of claimants can be avoided by court management of settlements

In respect of the fears of exploitation, the most common solution in other jurisdictions has been to give the court extensive powers to ensure that group members’ interests are adequately protected. The CAT regime takes the same approach in relation to opt-out proceedings in respect of the management of settlements. Once a CPO has been made and proceedings are authorised to continue on an opt-out basis, claims can only be settled by way of a collective settlement approved by the CAT. By s.49A(5) of the Competition Act 1998, the CAT may only make an order approving the settlement where it deems the terms to be “just and reasonable”. It is submitted that the court can be similarly involved in active management of settlements reached under a generic opt-out regime.

## There is no good reason to restrict the provision of an opt-out mechanism on a sector-by-sector basis

This essay’s suggestion of the adoption of a generic opt-out regime is not new: the CJC recommended it in a major 2008 report entitled “Improving Access to Justice Through Collective Actions”. The recommendation was rejected by the Government, which preferred a system of sector-by-sector reform (ultimately culminating in the CAT’s collective procedure).

The Government gave two reasons for preferring sector-by-sector reform to the introduction of a generic opt-out regime.

* The first was the existence of “potential structural differences between the sectors which will require different consideration.”
* The second reason was that it would not be possible accurately to model the global impact of a generic opt-out mechanism from an economic perspective, meaning that certain sectors could be disproportionately affected.

Neither reason is convincing. The availability in particular sectors of alternative means of resolving disputes, the types of representative entities who may be willing to bring a collective action, and the relative merits of an opt-in or opt-out system are all matters that can be considered and addressed under a generic regime. Even if class actions do threaten serious economic consequences to certain businesses within the community, it is no answer simply to preclude an expanded class action procedure which facilitates meritorious claims. The danger of abuse is properly met not by withholding reform from certain sectors, but by implementing appropriately robust procedures implemented by alert judicial gatekeepers.

There are also dangers associated with reform on a sectoral basis. Inconsistencies in the regimes applied to different sectors risk undermining public confidence in the law in circumstances where one sector has available redress via opt-out mechanisms and other sectors do not. Such inconsistencies also mean that higher court decisions which are authoritative for one sector may not necessarily be so for another. The leads to a system which is more inefficient and less conducive to legal certainty for its stakeholders (namely, judges, funders, lawyers, and litigants).

# Litigation funders should be entitled to recover success fees as a charge on the damages awarded

The Ontario Law Reform Commission explained in 1982 that:

“The question of costs is the single most important issue that this Commission has considered in designing an expanded class action procedure … the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilised at all.”[[7]](#footnote-7)

The experience in Australia demonstrates that the retention of a system of costs shifting in opt-out proceedings represents a workable model. However, an effect of maintaining the costs shifting regime is that representative claimants must have access to the resources to pay adverse costs orders made against them. The importance of this issue is reflected in the fact that it is dealt with by the CAT as part of the certification process.[[8]](#footnote-8)

In these circumstances, the availability of third-party funding is of substantial importance for the success of any generic opt-out class action regime. However, s.47C(6) of the Competition Act 1998 makes it clear that payments to class representatives in respect of the costs they have incurred can only be made from unclaimed damages. If the action succeeds in its primary aim of achieving full compensation for affected victims, then there is no way in which the funder can recover their fee for funding the action. The practical effect is substantially to reduce the attractiveness of the enterprise to litigation funders, who will be faced with a funding model that depends on people not exercising their legal rights.

The rationale of s.47C(6) is to protect class members’ entitlement to full compensation. But this ignores the probability that victims are unlikely to have their actions funded in the first place in circumstances where a prospective funder faces uncertainty as to whether they can recover their investment. This is additional to the inherent uncertainty as to whether the action will succeed or not. The conclusion of this proposal is therefore that the generic opt-out regime will include statutory authorisation for the funder to recover its fee as a charge on the damages awarded.

# Conclusion

The current system of multi-party litigation does not properly meet the primary aim of securing effective and efficient access to justice for claimants in large-scale litigation. The GLO regime suffers from the participation problems inherent in all opt-in systems. This means that the secondary aims of deterrence of undesirable behaviour and supplementation of public regulatory systems are also undermined. This essay has therefore proposed the introduction of a generic opt-out class action regime incorporating safeguards from the CAT’s collective procedure. The practical efficacy of this regime will depend on (i) an approach to class certification which is not unduly restrictive and (ii) increasing the attractiveness of litigation to funders by permitting fees to be recovered from the damages awarded.

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I confirm that I am qualified to take part in the 2019 Jonathan Brock QC Memorial Prize Essay Competition.

1. “From barretry, maintenance and champerty to litigation funding”, Inaugral Harbour Lecture, Gray’s Inn, 8 May 2013, para.47. [↑](#footnote-ref-1)
2. Australian Law Reform Commission, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Report No.134, December 2018). [↑](#footnote-ref-2)
3. For example, *Lubbe v Cape plc* [2000] 1 WLR 1545 (3,000 co-claimants). [↑](#footnote-ref-3)
4. R Mulheron, “Reform of Collective Redress in England and Wales: A Perspective of Need”, Research Paper for submission to the CJC (February 2008). [↑](#footnote-ref-4)
5. R. Mulheron, *supra.* [↑](#footnote-ref-5)
6. *Merricks v MasterCard Inc & Ors* [2019] EWCA Civ 674. [↑](#footnote-ref-6)
7. Ontario Law Reform Commission, Report on Class Actions (1982), vol.3, p.647. [↑](#footnote-ref-7)
8. CATR 78(2)(d). [↑](#footnote-ref-8)