



**REPRESENTATIVE ACTIONS IN
CONSUMER PROTECTION
LEGISLATION**

Consultation

12 JULY 2006

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Respond by 4 October 2006

**Responses &
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Foreword

In this country consumers generally experience a sense of fair play when they seek redress over poor products or shoddy services. However, going to court is sometimes the only way a customer can find real justice.

We know many consumers feel unable to bring a court case on their own, while those who do may consider the size of their losses are outweighed by the potentially high legal costs. But when a number of consumers have been harmed in the same way, by the same trader, there are good reasons to allow a representative body to bring a case on their behalf.

Of course, good businesses must not be exposed to inappropriate or spurious cases, resulting in huge legal bills to defend their good name. We therefore propose to introduce a number of safeguards to protect decent firms from unwarranted actions.

We initially consulted on this proposal in the DTI consumer strategy and it is intended as a final measure for groups of consumers who are unable to obtain redress through any other means. Where possible we encourage consumers and businesses to resolve problems without resorting to court action, either face to face or through the use of Alternative Dispute Resolution (ADR) forums. We are keen to ensure that this proposal is proportionate and fair for both consumers seeking redress and for businesses. Your views are valuable in shaping this policy.



Ian McCartney

Minister of State for Trade, Investment and Foreign Affairs

July 2006

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Executive Summary

Research has shown that consumers in this country have reasonably good experiences when seeking redress for faulty goods or services that have not lived up to expectations. However, court action is sometimes the only way for consumers to seek out justice.

In 2004 we consulted on the possibility of introducing representative actions as part of a raft of proposals set out in our consumer strategy. Consumers are reluctant to bring court cases on their own; either because they perceive the process is too difficult or the potential costs outweigh their losses. We proposed to allow appropriate interested bodies to represent groups of consumers in court to help them recover damages for similar detriment caused by the same company.

The proposal to introduce representative actions was well supported by consumer groups and enforcement officers. However, the consultation acknowledged there was a danger of unwittingly creating a compensation culture, putting good business at risk of inappropriate or spurious cases. It was noted that suitable safeguards would have to be introduced.

When we published the consumer strategy in 2005 we committed to introducing representative actions for consumer cases as long as the detail could be made to work. We proposed a number of safeguards to prevent inappropriate or spurious cases including requirements that cases would only be allowed from a body designated by the Secretary of State, be it on behalf of named consumers and possibly subject to pre-trial approval from a court.

This document fulfils our commitment to consult again on the detail of the policy.

Devolution

Consumer protection is a matter for Westminster in respect of England, Scotland and Wales. Consumer protection (other than safety in relation to goods) is a transferred matter in relation to Northern Ireland. This policy will therefore be GB-wide, although implementation in Scotland is likely to differ due to the Scottish civil justice regime.

How to respond

The Department of Trade and Industry welcomes comments, including supporting evidence, by 4 October 2006.

Where possible please send responses by email only to the following address: paul.bland@dti.qsi.gov.uk making clear that your email is in response to this consultation.

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

A list of those organisations and individuals consulted is in Annex C. We would welcome suggestions of others who may wish to be involved in this consultation process.

An electronic version is available at:

<http://www.dti.gov.uk/consultations/Open/index.html>

If you are not able to reply by email, a response can be submitted by letter, or fax to:

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Confidentiality of responses

Your response may be made public by the DTI. If you do not want all or part of your response or name made public, please state this clearly in the response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Help with queries

Questions about the policy issues raised in the document should be addressed in the first instance to:

paul.bland@dti.gsi.gov.uk

If you are not able to make contact in this way, you can also contact:

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Fax: (020) 7215 6414

Complaints

If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Mary Smeeth
DTI Consultation Co-ordinator
Bay 4110
Department of Trade and Industry
Better Regulation Team
1 Victoria Street
London
SW1H 0ET

E-mail: mary.smeeth@dti.gsi.gov.uk
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A copy of the Code of Practice on Consultation is in Annex A.

List of Questions

Should representative action cases be for consumers at large, or named consumers?

Q1. Do you agree that representative action cases should be confined to *named* consumers? If not, why not?

Sub-options

Measures to avoid inappropriate or spurious cases:

Should representative actions only be brought by designated bodies?

Q2. Are the criteria of reputation, ability to handle the case and consumer focus sensible factors when considering whether a body should be designated to bring a representative action?

Q3. Should we consider any other factors? If so what are they and why should they be considered?

Q4. Is designation necessary at all? Should any body, or firm, be able to bring a case on behalf of a group of consumers?

Should permission be obtained from a court before bringing a case?

Q5. Is a permission stage necessary to avoid inappropriate cases?

Q6. If anyone, not just designated bodies, can bring a claim should a permission stage be used?

Q7. If necessary, are there any other factors that should be considered at the permission stage? If so what are they?

Q8. If necessary, how should the permission stage be implemented in Scotland?

Q9. Even if the permission stage were considered unnecessary to prevent spurious cases, would it have value from a case management point of view?

Types of cases that should be open to representative action:

Defining the scope of 'consumer cases'

Q10. How should the scope of representative actions cases for breaches of consumer protection legislation be defined?

- According to the definition of ‘consumer’? If so, is the definition set out above appropriate? If not, what would be more appropriate?
- According to legislation listed in secondary legislation – subject to revision by Order? If so, which legislation should be included?
- According to broad areas defined in secondary legislation – subject to revision by Order? If so, which areas should be included?

Should small cases have to follow small claims procedures, rather than forming part of a representative action?

Q11. Should cases below the small claims limits have to be dealt with individually as a small claim?

Q12. Do you think that a minimum limit should be set for each case in a representative action?

Handling representative actions cases

Q13. Would it be adequate to amend the primary legislation to allow a representative body to bring a case in England and Wales?

Q14. Would it be more appropriate to amend primary legislation to allow consumers to assign their rights or action to a designated body? The resulting court case could then be handled using existing court procedures in England and Wales or in Scotland.

Funding representative actions cases and payment of damages

Q15. Do you think that a written agreement of how damages will be distributed in the event of winning a case should be signed at the outset? Should consumers also be able to agree an amount, proportion or percentage of any such award to cover the legal and administrative costs of the representative body?

Background

1. In the Consumer Strategy 'A fair deal for all', published in June 2005, we set out our plans for delivering a consumer protection regime that is fit for a 21st century Britain. A regime that is as good as any in the world, and one which is as fair to business as it is to consumers.
2. One of our core commitments was to make it easier for consumers to resolve problems. We recently consulted on one aspect of this, whether to provide individuals with a right of action for breaches of the Unfair Commercial Practices Directive. This consultation focuses on another aspect, the introduction of representative actions for consumers.
3. Where possible we are keen to avoid the use of the court system to resolve consumer complaints. However, sometimes court action is the only remaining recourse for a consumer seeking damages. There are instances where a breach of consumer protection legislation affects a number of consumers in a similar way, such as a widespread consumer scam. These consumers are unlikely to pursue damages individually due to the perceived complexities of the legal system and, in cases that are not dealt with as a small claim, their relatively low individual losses compared to potentially high legal fees. We believe that there may be a role for a consumer body, or similarly interested organisation, to bring a case on behalf of such a group in an attempt to win damages on their behalf.
4. We believe representative actions should be brought on behalf of domestic consumers rather than businesses, or individuals purchasing goods for use in a business context. We consider that businesses or traders should be sufficiently competent to act on their own behalf.
5. Good traders have nothing to fear from this proposal. We support a broad range of complaint resolution methods to deal with disputes, without resorting to court action. We encourage companies to put systems in place to deal efficiently with consumer complaints in-house. If complaints cannot be resolved internally, we would support the introduction of third party Alternative Dispute Resolution (ADR) schemes, for instance, through the National Mediation Helpline. We see representative actions as a further important measure in consumer protection although we propose to encourage consumers to make use of alternative methods of redress before seeking damages through the courts.
6. While we are keen to increase consumer access to justice we want to avoid exposing business to spurious or vexatious claims or unwittingly creating a compensation culture. Traders should not be burdened with time consuming processes and legal costs unless it is clear that there is a case for them to answer. We therefore propose that the following safeguards would have to be satisfied before a representative action could be brought to court:

- Representative actions could only be brought by a body designated by the Secretary of State.
- Actions would only be brought on behalf of named consumers who could demonstrate loss and who wished to pursue a claim for damages, repair, or replacement of faulty goods.
- Permission would have to be sought from the court prior to bringing a case

7. Bringing a case to court is a right, not an obligation. Consumers would still be free to bring individual cases themselves or not to take part in legal action at all, even if a representative action is ongoing. This policy is not designed to change these rights but to provide additional access to justice for groups of consumers who feel unable to bring cases on their own.

8. This proposal builds on the Competition Act 1998 which has a provision for the Secretary of State to designate a body to bring a representative action on behalf of a group of consumers who have suffered loss or damage as a result of an infringement of a competition prohibition. These powers are triggered once the Office of Fair Trading (OFT) or Competition Commission (CC) has made a decision that an infringement has taken place. The designated body may then bring a representative action on behalf of *named* consumers who have suffered detriment to the Competition Appeals Tribunal (CAT) who may then make an award in their favour to compensate them for their losses.

Previous work on representative actions in England and Wales

9. In February 2001 the Lord Chancellor's Department (now the Department for Constitutional Affairs) issued a consultation paper titled 'Representative Claims: Proposed New Procedures'. This paper sought views on the feasibility of allowing a representative body to bring an action on behalf of a group of individuals when the body itself did not have a legal interest in the case.

10. The paper also set out existing provisions for group actions in England and Wales:

There are already some circumstances [in England and Wales] where an individual may act in a representative capacity; existing rules¹ allow, in certain cases, for one or more persons to bring proceedings on behalf of numerous other persons who have the same interest.

[In England and Wales] There is also provision for the case management of a group of claims which give rise to common issues of fact or law. Often these group litigation orders are complex and involve a large number of individual claims. Procedures are already in place

¹ CPR Part 19.6 Representative Parties With Same Interest

which achieve a balance between the rights of claimants and defendants to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner².

11. The LCD consultation received a range of responses and there was general support for the greater access to justice that provisions of this kind would provide. It was decided that provisions of this sort should be introduced only where there is a clear need for them and through primary legislation. This was partly because this would allow greater flexibility and fuller consultation than simply making amendments to the court rules by secondary legislation. In light of these findings we are now setting out proposals to introduce representative actions for consumer protection legislation.

Scotland

12. Representative party and group litigation proceedings do not exist in Scotland and any proposals for representative actions will have to take this into account. In the case of England and Wales representative actions could take existing provisions a step further by allowing a representative body to bring proceedings on behalf of a group of consumers where the body itself does not have a direct legal interest. In Scotland consumers are able under current law to assign their rights of action, and ensuring that the designated body had legal power to take on such assignments and to pursue cases in court may be sufficient to allow such cases to proceed within current civil procedures.

² CPR part 19 Parties And Group Litigation

Options

13. In considering this policy we identified two main options:

1. Representative actions brought by designated bodies on behalf of domestic consumers at large.
2. Representative actions brought by designated bodies on behalf of *named* domestic consumers.

Option 1. Representative actions brought by designated bodies on behalf of consumers at large.

14. In some jurisdictions designated consumer bodies can bring a claim for damages on behalf of consumers named and as yet unnamed as part of a representative action. If successful, damages can be awarded for named consumers who have suffered detriment AND consumers who have yet to be identified. Damages for unnamed consumers are kept in a reserve and can be paid once consumers are identified.

15. This system also allows designated bodies to bring actions on behalf of consumers at large on the basis that many people may have lost a small amount of money due to a breach of consumer law. In these cases the damages awarded are retained in a central fund, often used to promote consumer welfare in some way. This approach is designed to be punitive rather than returning what are often small amounts of money to many consumers, although sometimes vouchers are given, requiring consumers to spend more money before seeing any true financial benefit. A 'consumer as yet unnamed' may have already brought a private action against the company and hence the business may be doubly penalised.

16. We are keen to provide access to justice for consumers but are concerned that this method represents a scatter-gun approach, may be administratively cumbersome, and may leave businesses open to inappropriate claims. It would be unlikely to reflect actual loss, leading to unfairness, and could introduce punitive damages which would not reflect the Government's policy intentions. We therefore favour representative actions on behalf of *named* consumers.

Option 2. Representative Actions on behalf of *named* consumers

17. This is our preferred option.

18. Requiring representative actions to be brought on behalf of *named* consumers avoids the potential problem of companies paying damages to consumers at large as well as individual consumers who have pursued private cases.

19. Cases brought on behalf of named consumers give the companies involved the opportunity of offering replacement or repair of faulty products rather than just paying financial compensation. In some cases this may be a more satisfactory outcome for both the company and the consumer.

Q1. Do you agree that representative action cases should be confined to *named* consumers? If not, why not?

Sub-Options

20. There are a number of sub-options to consider:

Measures to avoid inappropriate or spurious cases:

- Should representative actions only be brought by designated bodies?
- Should permission be obtained from a court before bringing a case?

Types of cases that should be open to representative action:

- Defining the scope of 'consumer cases'
- Should small cases have to follow small claims procedures, rather than forming part of a representative action?

Handling representative actions cases

Funding representative actions cases and payment of damages

Measures to avoid inappropriate or spurious cases

Should representative actions only be brought by designated bodies?

21. We believe that only bodies designated by the Secretary of State should be able to bring representative actions. It would be possible to allow representative claims to be brought generally. But we do not believe this is the best option because evidence from other countries shows this can lead to spurious claims or claims which provide little, if any, redress for the consumer. We believe that reputable consumer organisations with suitable resources and skills to handle such cases are best suited to bring representative actions. Bodies wishing to be designated should be able to demonstrate that they have the welfare of the consumer at the heart of their ethos.

22. We therefore wish to specify criteria that bodies must meet before being designated to bring representative actions. We believe that designated bodies should:

- be of good reputation;
- have the ability to handle the case; and,
- have the wellbeing of consumers, rather than profit, at the centre of their ethos.

23. We believe that designating bodies who fulfil these criteria will reduce the possibility of inappropriate claims. It will also eliminate cases being brought which fail to provide suitable remedies for the consumers.

Q2. Are the criteria of reputation, ability to handle the case and consumer focus sensible factors when considering whether a body should be designated to bring a representative action?

Q3. Should we consider any other factors? If so what are they and why should they be considered?

Q4. Is designation necessary at all? Should any body, or firm, be able to bring a case on behalf of a group of consumers?

Should permission be obtained from a court before bringing a case?

24. The designated body could be required to seek approval from the court before formally bringing a representative action on behalf of a group of consumers. This would provide a filter to prevent weak or spurious claims proceeding. The court could also check that the body had permission to represent the consumers in the group.

25. The designated body could have a right of appeal in the event of a court refusing permission to bring a case.

26. It is possible that there might be publicity associated with the permission stage of a representative action and this may encourage other consumers who have suffered detriment to come forward. We anticipate that additional consumers with a valid claim could be added to the action with the permission of the court.

27. Scottish civil court procedures do not include a 'case to answer' stage. There are procedures that allow one party to seek to have a case dismissed at an early stage because of basic defects, such as lack of title to sue, or that the court has no jurisdiction, but current procedures do not involve the court making a preliminary assessment of the merits of a case before allowing it to proceed. Introducing a permission stage for this type of case in Scotland would therefore involve clearly setting out the requirement for such a stage in legislation, including specifying the tests that the court would need to apply.

28. If a permission stage were included, we would expect the court to consider the following:

- Whether there appeared to be a case to answer
- Whether the consumers in the group had given their permission to be represented in the action
- Whether the case was within the scope of the legislation
- Whether the separate claims in the group could be practically dealt with in one representative action

A question of need?

29. The permission stage was initially considered to avoid inappropriate cases and to reduce the chance of a business running up legal costs without a good case to answer. It may however be thought that in England and Wales the overriding objective and duty of the court to manage cases in Civil Procedure Rule 1 is sufficient to achieve this. In addition if a case were not well founded and proceeded to court the representative body would lose and would have costs awarded against it. This risk of financial loss, together with our proposal that claims should only be brought by designated bodies, may be sufficient to prevent the possibility of inappropriate cases, rendering the permission stage unnecessary.

30. In Scotland there is normally no permission stage in civil proceedings, and there may be no reason to introduce one, if representative actions are to otherwise follow existing procedures.

Q5. Is a permission stage necessary to avoid inappropriate cases?

Q6. If anyone, not just designated bodies, can bring a claim should a permission stage be used?

Q7. If necessary, are there any other factors that should be considered at the permission stage? If so what are they?

Q8. If necessary, how should the permission stage be implemented in Scotland?

Q9. Even if the permission stage were considered unnecessary to prevent spurious cases, would it have value from a case management point of view?

Types of cases that should be open to representative action

Defining the scope of 'consumer cases'

31. We intend that representative actions should be brought on behalf of consumers rather than businesses or individuals purchasing goods for use in a business context. As a minimum we would expect to limit actions to individuals suffering detriment following the purchase of goods or services for their own consumption from a person supplying those goods and services in the course of a business.

32. There are three options for the scope of representative actions.

Option one: The scope of representative actions will cover all 'business' to 'consumer' infringements.

33. The proposal would allow cases to proceed that satisfied the definition of business to consumer transaction. It is possible that some products or services should be excluded from this definition. For instance, some products or services are already highly regulated and already offer high levels of consumer protection.

34. Is this an appropriate scope for a definition for representative actions to resolve breaches of consumer protection legislation?

Option two: The scope of representative actions will cover all 'business' to 'consumer' infringements of Acts or regulations which are specifically listed

35. We could specifically list consumer protection legislation and regulations under which claims could be pursued by representative action. This is a similar approach to the injunctive provisions adopted by the Enterprise Act 2002. The list could be amended by order of the Secretary of State if additional legislation needed to be included at a later stage. The court would not permit a representative claim unless the detriment suffered resulted as a breach of specifically listed legislation.

36. This proposition could result in a lengthy schedule which might need to be frequently amended and it may be difficult to identify all the legislation that should be listed. It would also exclude breaches arising other than from the specified legislation. However, this option does have the advantage of clarity as only breaches of specified legislation could result in a representative claim.

Option three: The scope of representative actions will be all 'business' to 'consumer' infringements within broadly defined areas. The court will be allowed to determine whether a case is in scope at the permission stage.

37. Under this proposal broad areas of consumer protection legislation or contract law would be specified in secondary legislation. It would then be a matter for the court to consider whether a case was within scope.

Analysis

38. Our preferred option is option 1, which may require specific areas to be excluded to ensure that the scope is effectively limited to business to consumer transactions. This definition of scope appears to offer clarity without being unduly unwieldy. For instance, new legislation within the definition would automatically fall within scope, unless specifically excluded.

39. Option 2 offers great clarity at the price of bureaucracy and a limitation in scope. There is a great deal of consumer legislation and producing an exhaustive list may be very difficult. Keeping the list up to date via secondary legislation may also prove an undue burden on Parliamentary time.

40. Option 3 has the advantage of flexibility; any breach of new legislation within already specified areas would automatically be open to a representative action. However, there is a potential lack of clarity in this approach as a court would decide on a case by case basis whether areas of consumer protection legislation should fall within scope.

Q10. How should the scope of representative actions cases for breaches of consumer protection legislation be defined?

- **According to the definition of ‘consumer’? If so, is the definition set out above appropriate? If not, what would be more appropriate?**
- **According to legislation listed in secondary legislation – subject to revision by Order? If so, which legislation should be included?**
- **According to broad areas defined in secondary legislation – subject to revision by Order? If so, which areas should be included?**

Should small cases have to follow small claims procedures, rather than forming part of a representative action?

41. Consumers have access to the small claims procedure to pursue damages below £5,000 in England and Wales and £750 in Scotland. The small claims procedure is intended to make it easier for people to represent themselves and is suitable for considering a wide range of consumer cases. However, we know that consumers are reluctant to bring cases on their own because they perceive the process as difficult to manage. Is it therefore unreasonable to expect consumers to seek redress through a small claim individually, rather

than taking part in a representative action where the level of their claim falls within the small claims limit?

42. It would be legally possible to set a minimum level of detriment for each case in a representative action. However, it may be more appropriate for the court to consider this matter at the permission stage or for the representative body to factor into its decision-making process when deciding whether to bring a case. There is no set minimum level of detriment in the Competition Act provisions.

Q11. Should cases below the small claims limits have to be dealt with individually as a small claim?

Q12. Do you think that a minimum limit should be set for each case in a representative action?

Handling representative actions cases

43. There are a number of factors to consider when judging whether a case is suitable to form part of a representative action.

- Whether the cases are sufficiently similar to make them manageable
- Whether the scale of damages expected to be awarded is large enough to justify the resources required to process the case by the designated body, or the court.

Sufficiently similar cases

44. Claims by groups of consumers with very similar cases are more likely to be manageable as a representative action. The key is determining how similar the cases would need to be to make it legally sensible to deal with the group together. This matter is something that may be better left for the designated body to consider, but would ultimately be for the court to decide. We raise the issue in consultation to get views from stakeholders of the sorts of cases that they believe may be suitable for this procedure and whether overly complex cases should be prevented from forming representative actions.

45. Cases with identical details, such as lottery scams, are intuitively the most simple to deal with from a legal standpoint. It would be more difficult to process a claim where the cause of detriment is similar but the individual consumers have suffered different losses, as their damages would have to be assessed separately by the designated body and the court.

Possible examples

46. **Example 1:** A certain brand of washing machine suffers from a common fault and many consumers find that the product fails after 6-8 months. The manufacturer refuses to replace or repair the product or refund the money. In this example there may be a common breach of legislation and each consumer in the prospective representative action has suffered the same, or very similar, detriment. A representative action could be brought to prove liability and pursue damages. This case would be straightforward as the same failure had been experienced by each consumer and similar damages would be awarded, either replacement of the machine or a refund.

47. **Example 2:** A large group of consumers who have lost money to a lottery scam. The facts of each case are identical and the scale of damages being pursued is likely to be the same for each individual. Legally the case would have to demonstrate a breach of consumer protection legislation (which would be the same in each case). If proven, the damages awarded are likely to be the same in each case.

48. **Example 3:** Five consumers who have all had problems with the same kitchen fitting company. Their problems may be quite complex and slightly

different. For some it might concern no supply or fitting of the kitchen at all. For others it might have been supplied but not fitted. A third possibility is that the kitchen was supplied and fitted but either the units were faulty or the workmanship was. Each case in this example could be a similar breach of consumer protection legislation but the facts of each case are slightly different meaning that the legal case may have to explore each one individually to assess the liability and the damages. Intuitively this seems likely to be as difficult legally as bringing five separate cases.

49. Each of these examples could be legally viable but cases such as the kitchen example could be very difficult for the representative body and the court to manage, and is likely that they would be more costly to process. This may be an argument for confining representative actions cases to more straight forward examples such as the washing machine or wide-spread lottery scam cases.

Representative Parties

50. If consumers were permitted by primary legislation to transfer their right to bring a case to a suitably designated representative body, these cases could be managed under new representative action rules in England and Wales.

51. Existing representative parties procedures allow individuals with similar cases to form up behind one lead case which is used to determine liability. The risk for the lead individual is that if he loses the case then costs will be awarded against him. If he wins the case, liability will be proven and he and the rest of the group can then go on to pursue a damages award from the defendant.

52. Individuals are generally unwilling to take the risk of large costs being awarded against them, particularly if their individual detriment is relatively low.

53. However, a consumer organisation might be willing to undertake a case on behalf of a group of consumers if the law were changed to allow them to bring an action on behalf of those consumers. The case could reasonably be managed using suitably amended court procedures.

Group Litigation procedures

54. Group Litigation Orders, in England and Wales are used by the courts to manage cases where there are a number of claims giving rise to common or related issues of fact or law. It is an efficient way of dealing with parallel and substantially overlapping cases, which may be more complex than representative party cases. In England and Wales, group litigation orders can be used by the courts to group similar claims that raise the same issues together. The resulting court case is structured to establish liability for the main part of the case which affects the whole group. The group is then split into different classes which share similar damages claims and the court considers the claims of each class and assesses individual damages.

55. If a representative body brings a claim the existing procedures would enable the claim to be 'grouped' with those brought independently by individual consumers.

Scotland

56. There are no procedures to formally manage group claims in Scotland. However, we consider that amending primary legislation to allow individuals to assign their rights of action to a suitably designated body, and to give such a body the power to take it on and pursue the case, would be sufficient to implement representative actions using existing procedures.

57. Implementation of representative actions in this way may mean that the resulting cases are relatively simple, as set out in examples 1 and 2 on page 17.

58. We are keen to avoid unexpected consequences and are particularly interested to hear views on the impact of this proposal in Scotland.

Q13. Would it be adequate to amend the primary legislation to allow a representative body to bring a case in England and Wales?

Q14. Would it be more appropriate to amend primary legislation to allow consumers to assign their rights or action to a designated body? The resulting court case could then be handled using existing court procedures in England and Wales or in Scotland.

Funding representative actions cases and payment of damages

59. Representative actions are intended to help groups of consumers seek compensation for losses resulting from breaches in consumer law. We do not intend to fund such cases directly from the public purse but see a role for consumer bodies or other similarly interested groups leading this activity.

60. It should be clear how damages will be distributed in the event of the representative body winning the case. We propose that a clear agreement should be drawn up between the representative body and each consumer at the outset, explaining what proportion will be returned to each consumer in the event of a successful case. The representative body may wish to retain a proportion of winnings to cover administration or other costs. If so, this should be clear at the time of signing the agreement. These terms could be included in the formal agreement transferring the consumers right of action to the representative body.

Q15. Do you think that a written agreement of how damages will be distributed in the event of winning a case should be signed at the outset? Should consumers also be able to agree an amount, proportion or percentage of any such award to cover the legal and administrative costs of the representative body?

ANNEX A – Code of Practice on Consultations

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.
7. The complete code is available on the Cabinet Office's web site address: <http://www.cabinetoffice.gov.uk/regulation/consultation/code/>

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mary Smeeth
Consultation Co-ordinator
DTI Better Regulation Team, Bay 4113
1 Victoria Street
London SW1H 0ET

ANNEX B – Partial Regulatory Impact Assessment

Partial Regulatory Impact Assessment Representative Actions for Consumer Protection Legislation

Purpose and intended effect

Objective

1. This proposal is intended to provide better access to redress for groups of consumers who have suffered losses through breaches of consumer protection legislation.
2. Sometimes court action is the only way for consumers who have suffered detriment to recover damages. Consumers are generally reluctant to bring civil cases on their own, either because they perceive the system to be complex or because the level of detriment is small compared with the potential costs. Sometimes a number of consumers suffer similar detriment from the same trader. In this scenario there may be a case for enabling a representative body to bring a civil case for damages on their behalf. We are not proposing a new right of action but the ability of a representative body to bring a case on behalf of a group.

Background

3. This policy was first proposed as part of the DTI consumer strategy published in June 2005 which was consulted on in detail in 2004. The strategy also set out a number of proposals to improve consumer's access to redress including the quality marking of third party Alternative Dispute Resolution (ADR) schemes and improving access to information held about companies or faulty products for consumers seeking redress in court. Representative actions was seen as the final step for groups of consumers who had been unable to obtain redress by any other means.
4. The best method of redress is for the consumer and trader to resolve the issue themselves. This presents the least burden to either party and allows the trader to maintain a positive reputation with the consumer. If the parties cannot resolve their difficulties themselves there is the possibility of a third party ADR scheme, either provided by a trade association or other body independent of either party.
5. If ADR is unsuccessful then the only remaining option to seek damages is to bring a civil case. Consumers are reluctant to bring cases themselves, either because they find the system too complex to manage or they expect the costs to outweigh their detriment. Sometimes a group of consumers suffer similar detriment from the same trader. In these cases there is an argument to that a representative body should be able

to bring a collective case on their behalf and navigate the legal difficulties for them.

6. In England and Wales where several people have the same interest in a dispute one person can bring a case and act as a representative for the other people (this is known as a representative party). In addition there are provisions to manage several claims which give rise to common issues of fact of law together. However, the individuals participating have to bring the case in their own names and do not have the benefit of a representative body to manage the case for them. There is no provision for group litigation in Scotland.

Rationale for government intervention

7. In 2000, the Office of Fair Trading estimated consumer detriment, in the form of problems that the consumer becomes aware of at £8.3 billion per annum¹. If this figure is adjusted to more accurately reflect lost welfare (i.e. that consumer problems affect lower income groups proportionately more than higher income groups) then the figure is nearer £10 billion. Whilst the work is subject to considerable margins of error, it represents an order of magnitude of the harm caused by consumer problems.

8. Generally, consumers seem to have good experience in seeking redress. A 2004 survey commissioned by DTI² suggested that 70% of those that have pursued claims for redress are satisfied with the outcome. There were a minority whose claims were still ongoing (17% of those seeking redress) and closed but unresolved (11% of those seeking redress). 5% of those responding to the survey chose not to pursue claims for redress. The most common reasons for this are (a) that it is too much hassle (37%) and (b) that the claim is too small to worry about (31%). The Paths to Justice Study by Hazel Genn also suggests that a large number of complaints are not resolved.³

9. Enforcement action is often successfully taken against traders who are breaching the law. This action prevents the trader from continuing the harmful activity. However, the consumer who may have lost out as a result of the activity, for example by paying over the odds for a kitchen, which is not properly installed, does not get compensated for their loss.

10. Whilst there is provision in existing legislation for consumers to bring court action to seek redress, many consumers, particularly vulnerable consumers, are unable to bring cases to court on their own behalf due to

¹ "Consumer Detriment", February 2000, OFT 296

² "DTI Redress Research", prepared by YouGov, May 2005
<http://www.dti.gov.uk/ccp/topics1/pdf1/redressreportfull.pdf>

³ Hazel Genn, Paths to Justice (Hart Publishing, 1999)

fear of the costs or difficulties understanding the system.

11. This suggests that there may be a role for representative actions where groups of consumers are affected in the same way. The perceived difficulty of recovering losses through civil actions and the potential exposure to high costs compared to the losses does suggest merit in allowing a representative body to bring a case collectively.

Consultation

- Within government

12. This consultation has been drafted following considerable consultation between the Department for Constitutional Affairs (DCA) and officials at the Scottish Executive.

- Public consultation

13. This policy was initially consulted on during the DTI consumer strategy consultation exercise.

14. Trading standards unanimously supported representative actions. Birmingham estimated there could be 10 – 20 cases per year in Birmingham, one of the largest of the authorities, which would be suitable for representative action.

15. Among the consumer groups there was widespread support for representative actions. They suggested that the policy would help consumers, and particularly vulnerable consumers, obtain redress. Little detail about the powers needed and how they would be used came forward. The Consumer Councils support representative actions for England and Wales, but noted that the Scottish Consumer Council was already lobbying for a class actions procedure in Scotland.

16. The key business representative organisations did not support representative actions (CBI, BRC and IoD). There was some genuine acknowledgment that they might help consumers but worries that they could become crusades for organisations seeking a change in the law. There were fears that claims would surge and overburden the system. CBI and IOE expressed fears that this proposal was a move towards American style class actions and CBI pointed to the Lord Chancellor's 2001 study that concluded there was no general case for representative actions. BRC could not see the case for action, given that the current system allowed group claims and did not prohibit a pro bono body hiring legal support. We are keen to ensure that representative actions do not expose businesses to a compensation culture and a series of safeguards have been proposed to overcome this potential problem.

Options

17. The first option for consideration is the scope of the policy, whether it should be applied to named consumers only, or consumers at large. The implications are discussed in the consultation documents but obviously the coverage of the policy will directly affect its impact.

18. There are also a number of sub-options:

What measures are necessary to avoid inappropriate or spurious cases?

- Should representative actions only be brought by designated bodies?
- Should permission be obtained from a court before bringing a case?

Which types of cases that should be open to representative action?

- How should the scope of 'consumer cases' be defined?
- Should small cases have to follow small claims procedures, rather than forming part of a representative action?

How should representative actions cases be handled?

How should representative actions cases be funded and how should payment of damages be dealt with?

19. These options are discussed in more detail in the main consultation document.

Costs and Benefits

Sectors and Groups Affected

20. Representative actions will apply to all businesses to some extent. Businesses who have failed customers through failing to provide or providing poor or damaged goods or services will now face the potential for a representative action and may instead seek to provide redress, improve their services or goods. This should be good for business as a whole, improving customers' confidence in goods bought or sold in the UK.

21. Other groups affected will include Consumer organisations which have been approved by the Secretary of State to take representative actions. They will need to consider how they will provide, fund and manage such actions, although if they win their case costs will normally be met by the losing party.

22. The legal profession are likely to be appointed by the Consumer organisations and the defendants in the case. This will be a new area of business for the profession.

23. Consumers, particularly vulnerable consumers should benefit because businesses will take into account the availability of representative actions in their dealings with consumers, and because there is now a new means of obtaining redress. Vulnerable consumers should benefit particularly, as they are the least likely to have the means or ability to pursue claims.

24. The courts will be affected because this is likely to involve new court procedures.

1. Do Nothing

25. Not introducing representative actions in any form would represent a missed opportunity for further improving consumers' access to redress. This may particularly disadvantage the most vulnerable consumers who do not have the skills to pursue avenues of redress on their own.

2. Allow designated bodies to bring representative actions on behalf of named individuals

26. This could benefit all consumers but particularly vulnerable consumers who may face more barriers than most in pursuing individual action. Often consumers do not pursue their claim to redress, as the amount they have lost does not justify the costs of pursuing a case. By considering a group of consumers at the same time, the combined consumer detriment makes it worth pursuing the claim.

27. Over time, if representative actions are successfully brought, this could act as a signal to traders at risk of breaching consumer legislation. This could act as an increased deterrent for traders acting unlawfully and benefit legitimate business as the prospect of action raises the chances of a trader facing more severe financial penalties for their actions. As noted above, Birmingham Trading Standards estimated that they could have 10 to 20 cases suitable for representative actions per year. Without further information it is not possible to scale this up across Local Authorities to suggest a number of cases per year.

28. However, there could be considerable public sector costs. The designated body (or bodies) will incur costs in identifying groups of consumers and preparing the case. Taking action on behalf of named individuals would require details of each individual's claim to be assessed. This could involve significant legal costs, however, if the designated body wins the case the costs are likely to be met by the

defendant. It is not possible to gauge how much these cases will cost because of the innovative nature of representative actions. Much will also depend on the number of people involved and the complexity of the case.

29. Introducing this ability to bring representative actions could lead to marginally more court cases, but that cost would be uncertain as the length of the court process may be unclear, cases could be appealed and legal costs are therefore variable. There is a possibility that there would be initial set-up costs such as training and production of guidance to the judiciary when the legislation was commenced. However, as we are essentially suggesting that a representative body should be able to bring cases on behalf of a group of consumers using existing procedures these costs should be negligible.

30. Some cases will be settled before a claim is made. Others will settle before a trial in which case much will depend on the terms of the settlement and, in England and Wales, whether it is made under Part 36 of the Civil Procedure Rules, which provides can provide protection as to costs for parties who make offers to settle. Cases not progressing to court are likely to still attract costs in terms of judicial time to review the case, time taken to prepare and other administrative fees. We would expect these costs to be met by the body seeking to bring as case as they arise.

31. In the Consumer Strategy consultation respondents suggested that representative actions could be applied to various types of cases:

- Defective product or services
- Deceptive advertising or sales practice
- Illegal credit card charges
- Unfair contract terms

32. The exact scope of cases is a matter for this consultation.

Questions for enforcers/consumer groups:

Do you have examples of cases that you think would benefit from the ability to use a representative action?

Can you suggest an order of magnitude for how many cases might occur in a year?

Do you think this would replace some of the existing individual claims or would this increase the overall number of cases?

33. Implementing this option could entail unintended consequences by exposing businesses to inappropriate or spurious claims for damages. If this were to happen, honest businesses could face costs, both in defending the case and more seriously through damage to their reputation. Detailed consideration of how representative actions are established will minimise these risks. Furthermore, the cost incurred by a designated body to bring a representative action would make it more likely that only the strongest cases would be pursued.

34. There is a further risk of moral hazard. In other words, as a result of the ability to bring a representative action, individuals may take more risks in their engagement of traders, believing (sometimes mistakenly) that a public body will come to their aid if things go wrong. This risk is likely to be very small as there will be a number of criteria to meet before an action can be taken. There has to be a coincidence of a number of people having the same problem with the same trader, amongst other conditions.

3. Allow designated bodies to bring representative actions on behalf of consumers at large

35. This option would have similar benefits to option 2. Taking action on behalf of consumers at large will make it easier to prepare and bring the case in the first place. However, this would mean an increased risk relative to option 2 of inappropriate or spurious claims, leading to a higher probability of honest businesses being subjected to claims and incurring costs (both of a direct financial nature and indirect via loss of reputation) in defending the case.

Costs and Benefits of Sub-Options

36. The right to bring a representative action needs careful design to ensure potential benefits are maximised and potential risks to business are removed. Summarised below are some of the key issues in designing this right of action and the likely costs, benefits and risks.

Designation

37. We believe that only bodies designated by the Secretary of State should be able to bring representative actions. The main intention is to limit the possibility of inappropriate or spurious cases and to ensure that those organisations bringing claims have the capacity and ability to manage them properly. If only consumer focussed bodies are designated then representative actions are more likely to be focussed on consumer redress, rather than potential financial benefits.

38. We do not intend to limit the number of bodies permitted to bring actions on behalf of consumers. Any body meeting the criteria will be granted designation. The benefit of designating a number of bodies is that the chances of identifying problems that can be addressed through the use of representative actions are higher. The more the ability is used, the more this could address consumer detriment and even deter traders from breaching legislation to begin with.

39. However, those bodies will incur costs in bringing representative actions, which in some cases will not be recovered, as cases may not be successful. In addition, damages awarded in courts are often not fully recovered due to trader insolvency issues.

Permission Stage

40. A provision could be made such that the designated body would be required to seek approval from the court before formally bringing a representative action. The advantage of this stage is that this could be another factor that reduces the risk of businesses being subjected to inappropriate or spurious claims as the court would need to consider that there was a reasonable case to answer. In addition, this avoids incurring higher legal and court costs for bringing a representative action where the case may not be strong. However, there is a cost in seeking approval from the court. It is not possible to give an indication as to potential costs of such proceedings at this time as it is not clear how much court time will be involved and we will need to consider what fees are to be charged by the courts once we have a clear idea of the option to be adopted.

41. In Scotland there is not normally a permission stage in an action, although preliminary procedures may deal with matters of law such as whether a pursuer (claimant) has title to sue, or whether the court has jurisdiction to hear the case. The court would not however normally make a preliminary assessment of the merits of the case before allowing it to proceed. If we intend to otherwise use existing procedures there may not be good arguments to add one.

Types of case open to representative action

42. The third design question refers to which legislation should be open to representative actions. A list of legislation could be defined, or alternatively broad areas of consumer protection legislation could be defined. The preferred approach is to simply define a consumer transaction and allow cases to be brought by representative actions for any breaches in consumer law.

43. The advantage of listing consumer legislation is that it provides certainty over which pieces of legislation are subject to representative actions. However, it may be difficult to ensure the list is comprehensive and appropriate and amending the list at a later stage would be time consuming.

44. Defining broad areas of legislation removes the problems with making exhaustive lists but introduces issues of legal certainty. This less precise approach may lead to clarification being sought from a court, adding to costs.

45. Opening all types of consumer protection legislation infringements to action under representative actions procedures will not carry the administrative costs of the other options. In addition there is complete clarity – if consumer legislation was breached in a business to consumer transaction then a representative action would be viable.

46. Handling representative actions cases

47. The more complex the case the more costly to administer. There is a question about how similar individual consumers' cases would need to be to enable a representative action to be brought. It would be possible to limit representative actions to groups where there is a single cause of actions e.g. the same scam used on 20 people perpetrated by one trader and this would minimise the court and legal costs of taking the action and maximise the chance of securing an outcome. However, the identification of sufficient consumers with the same problem could be more difficult, hence reducing the number of cases that can be brought and reducing consumers' ability to gain redress.

48. Our preference is to leave this matter to the representative body contemplating a new case and to the court. Representative bodies are only likely to bring cases that they believe they can successfully handle and win. As a back-stop the court could have the option to decline any cases that they believe are unmanageable at the permission stage, if that is implemented.

Small Firms Impact Test

49. In Spring 2005 a questionnaire was sent to a number of small businesses seeking a greater understanding of the impacts on small businesses of a number of proposals relating to the DTI's Consumer Strategy.

50. The questionnaire asked whether there were any issues arising with representative actions for small businesses. A number of respondents were not sure, but the majority felt there were issues for small businesses. These included concerns over the power that might be exerted by “minority pressure groups”, the costs of legal defence for small businesses, the fact this should be a matter for Government rather than NGOs and potential abuse of the system.

51. A key point raised was that representative actions against large companies were understandable, but greater consumer power against small business was not justified.

Competition assessment

52. A competition filter test has been carried out and we do not believe that this will have an adverse impact on competition in markets. There is a small chance that the likelihood of having a representative action brought will act as a further deterrent to dishonest traders. In this instance the measure could be marginally pro-competitive.

53. Introducing a representative action in either form would not change the rules under which firms operate. It would therefore not affect the balance between new and existing firms, both in terms of entry costs or ongoing costs. The proposal will not affect a firms’ ability to choose price, quality, range or location of their products and it will not affect market structure.

Enforcement, sanctions and monitoring

Monitoring

54. We are keen to avoid creating a compensation culture but believe there are real benefits in introducing representative actions for consumer cases. We will keep this procedure under review and if the cases brought appear to be disproportionately inappropriate or spurious we will remove designated status from the offending body and consider a full review of the legislation.

Declaration and publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed

Date

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ANNEX C – List of Consultees

Advice Services Alliance
Advisory Council for Messenger-at-Arms and Sheriff Officers
Age Concern
Mr Justice Aikens
Association of British Insurers
The Association of Chartered Certified Accountants
The Association of Personal Injury Lawyers
The Bar Council
Beachcroft Wansboroughs Solicitors
Sheriff Principal Edward F Bowen QC
The British Chamber of Commerce
British Energy Group Plc
British Retail Consortium
Sir Henry Brooke (Vice-President Civil Division of the Court of Appeal)
BT Scotland
Building Societies Association
Catalyst Mediation Ltd
Centre for Effective Dispute Resolution (CEDR)
Centre for Scottish Public Policy
The Chartered Institute of Arbitrators (Scottish Branch)
Chartered Institute of Bankers in Scotland
Citizens Advice
Citizens Advice Scotland
City of London Solicitors Company
Civil Court Users Association
The Civil Justice Council
Civil Procedures Rules Committee (England and Wales)
Messrs Clifford Chance Solicitors
Clyde & Co, solicitors
Clydesdale Bank
His Hon. Judge Collins CBE
Commission for Racial Equality
Committee of Scottish Clearing Bankers
Community Business Scotland
The Confederation of British Industry
Confederation of British Industry (Scotland)
Consumer Credit Association
Consumer Credit Counselling Services
Convention of Scottish Local Authorities (CoSLA)
Core Solutions Group
Council for Circuit Judges
Council of Mortgage Lenders
Court of Session Rules Council
Credit Services Association Ltd
Dowse & Co Solicitors

Sheriff Principal R Alastair Dunlop QC
Messrs Edwin Coe Solicitors
Energywatch
Equal Opportunity Commission
Etherington Solicitors
Faculty of Advocates
Federation of Small Businesses
The Federation of Small Businesses
Finance and Leasing Associations
Financial Services Authority
Forum of Insurance Lawyers
The Forum of Private Business
Forum of Scottish Claims Managers
Lord Hamilton
HBOS plc
Heads of Trading Standards Services – England, Scotland, Wales
Health and Safety Executive
Messrs Herbert Smith Solicitors
Highlands and Islands Enterprise
Peter Hurst
Lord Justice Igor Judge
In Court Advice Service
Institute of Credit Management
Institute of Credit Management
Institute of Directors Scotland
Institute of Legal Executive
Irwin Mitchell Solicitors
Judicial Studies Board
Judicial Studies Committee
Justice
Kendal Freeman, Solicitors
Sheriff Principal Bruce A Kerr QC
Law Commission
The Law Society of England and Wales
Law Society of Scotland
The Legal Action Group
Legal Services Agency
Linklaters Solicitors
Litigants in Person Society
Lloyds TSB
Local Authorities Coordinators of Regulatory Services
Local Government Association
Sheriff Principal Brian A Lockhart
London Solicitors Litigation Association
Messrs Lovells Solicitors
Lovetts Plc
Maitland Chambers
Sir Anthony Tristram Kenneth May
Michael Walker - Association of District Judges
Money Advice Scotland

Lord Justice Andrew Morritt
National Consumer Council
Ofcom
Office of Fair Trading
Ofgem
Ofwat
Payplan Ltd
Lord Phillips of Worth Matravers
Postcomm
Postwatch
Poverty Alliance
Property Managers Association Scotland Ltd
The Royal Bank of Scotland Group plc
Royal Society of Edinburgh
Sandersons Solicitors
Scottish and Southern Energy plc
Scottish Association of Law Centres
Scottish Bankruptcy Advice
Scottish Chambers of Commerce
Scottish Consumer Council
Scottish Consumer Council
Scottish Consumer Credit Association
Scottish Council of Development and Industry
Scottish Enterprise
Scottish Executive
Scottish Gas
Scottish Law Agents Society
Scottish Law Commission
Scottish Legal Action Group
Scottish Mediation Network
Scottish Power
Scottish Tenants Organisation
Scottish Trade Union Congress
Scottish Water
Shelter Scotland
Sheriff Andrew C Normand
Sheriff Courts Users Group
Society of Chief Officers of Trading Standards in Scotland
Society of Chief Trading Standards Officers
Society of Law Accountants in Scotland
Society of Messengers-At-Arms and Sheriff Officers
Society of Solicitor Advocates
The Society of Solicitors in the Supreme Courts of Scotland
Society of Writers to HM Signet
Stepping Stones for Families
Sheriff Principal James A Taylor
Tenant Information Service
Tenants Participation Advisory Service (TPAS)
The Institute of Chartered Accountants of Scotland
The Judges Council (Barbara Flaxman - secretary)

Lord Justice Thomas
Thompson Solicitors
Trading Standards Institute
The Senior Master Turner
Sheriff Warner
Watervoice
Welfare Rights Service
Welsh Assembly
Welsh Consumer Council
Welsh Local Government Association
Which?
White Dalton Solicitors
Chief Master Winegarten
Women in Unison Scotland
Sheriff Principal Sir Stephen S T Young Bt QC

End