APPENDIX A

Private Enforcement Project - Questionnaire Responses

I. GENERAL HISTORICAL AND CONTEMPORARY INFLUENCES

To set the context for our inquiry, we are asking you to provide some basic information concerning the structural, social, political, economic and cultural circumstances that are generally thought to have contributed to the enforcement environment for statutory and administrative law in your country. Our aim is to identify aspects of the nation's make-up that facilitate or hinder privately-initiated enforcement.

A. Are there any structural characteristics of your country that might be thought to militate for or against privately-initiated enforcement in the way that the origins and nature of the federal system in the United States are thought to influence choices (at the federal level) there?

England and Wales

Martin Partington

I am not quite sure what it means, but my sense is that there are no specific structural characteristics which inhibit individual enforcement. Indeed the lack of a written constitution with a rigid divide between the executive and the judiciary arguably makes it easier in the UK to create dispute resolution models outside of the formal court structure.

It is also the case that there is great flexibility in the UK about who can offer legal/advisory services; very few areas are now the exclusive preserve of professionally qualified lawyers (the so-called 'reserved activities' mentioned in the Legal Services Act 2007); non-legally qualified people do much of the work in this area and, in some cases, receive public funding for so doing.

Australia (*Peta Spender*)

The federal system in Australia complicates enforcement generally. There are 6 states, 2 territories and the federal system to take into account when considering enforcement strategies. Increasingly there are co-operative regimes which create uniform regimes but there are still the exception rather than the rule. In the federal system, a rigid interpretation of the separation of powers has created a strange bifurcation between court and tribunals which has complicated the choice of forum. There tribunals deal with public law remedies and courts do most other claims, especially private law claims. At the state and territory level there are fewer constitutional constraints and there many tribunals deal with a wider range of remedies both in public and private law.

Canada (Jasminka Kalajdzic)[1]

Canada's constitutional framework gives the provinces jurisdiction over property and civil rights (including education, employment, language and human rights) while the federal government has jurisdiction in matters of criminal law, banking, currency, patents and copyrights and the postal service. Jurisdiction over taxation, agriculture, immigration, *Competition Act*, interprovincial transportation and telecommunications, among others, is shared with the provinces. Significant overlap between the federal and provincial powers to regulate trade and commerce exists, and questions about the division of powers under the Constitution have been the subject of much litigation (Stevenson, 20-33).

It is difficult to gauge the impact of this federalist structure on choices between public and private enforcement mechanisms. More than anything else, the enactment of the *Charter of Rights and Freedoms* in 1982 (Canada's bill of rights) contributed significantly to a "rights consciousness" among Canadians. The *Charter* also substantially enlarged the powers of courts, critically at a time when trust in representative politics was low and continued to decline over the next few decades (Bogart, ch. 2). There continues to be widespread general faith in the court system to resolve private disputes and enforce individual rights, and an increasing gap between private citizen and elected government (*Back on the Map*, 2010).

B. Are there generally recognized (and perhaps even empirically confirmed?) attitudes about the proper role of government in your country that might be thought to influence decisions about the locus of responsibility for the enforcement of statutory and administrative law?

England and Wales

Martin Partington

I don't think there are 'generally recognised' attitudes – most people don't think about these things. But I do think that the changing approach to regulation by government is an interesting issue. (See for example, Richard Macrory *Regulatory Justice : Making Sanctions Effective Final Report*, (2006 Cabinet Office, London; see also the work of the Better Regulation Executive: http://www.bis.gov.uk/policies/better-regulation/better-regulation-executive.)

Australia (*Peta Spender*)

The general Australian view about government probably sits somewhere between the approach of US and the UK societies. Australians are not as individualistic as the US but they are more suspicious of central government than the British. This is reflected in the arrangements about private enforcement, so that there is a mixture of public and private enforcement of laws with a current tendency to expand private rather than

[1] References cited in the responses for Canada are at the end of this Appendix.

public enforcement due to resources. I'm not aware of any empirical studies that have looked into this.

Canada (Jasminka Kalajdzic)

A dated source of information is *An Analysis of Public Attitudes Toward Justice Related Issues, 1986-87* (Ottawa: Canada, Dept. of Justice, Research Section, 1988). As mentioned in answer to question A, above, Canadians generally trust courts to enforce and protect citizens' rights more than they do elected government officials (Bricker, ch. 1). It is unclear whether this extends to a greater trust in private enforcement mechanisms.

C. Are there generally recognized (and perhaps even empirically confirmed?) national attitudes about the desirability of social change (as opposed to maintaining the status quo) and/or the pace at which social change should occur?

England and Wales

Martin Partington

Not that I'm aware of!

Australia *(Peta Spender)*

Overall Australians are probably conservative, however they have been willing to embrace social change at various times and this has been reflected in their choice of government, particularly at the federal level.

Canada (Jasminka Kalajdzic)

Since the entrenchment of the *Charter*, our courts have dealt with a multitude of issues that could broadly be categorized as harbingers of social change. Everything from abortion, euthanasia and same-sex marriage rights, to social host liability for alcohol-induced torts, recognition of battered-wife syndrome and parental rights to use physical discipline have been decided upon by our appellate and Supreme courts.

The Canadian judiciary has not escaped the charge of inappropriate judicial activism. The SCC has been sensitive to adjudicating questions of social policy. In *R. v. Salituro*, [1991] 3 SCR 654, Justice Iacobucci confirmed that the Court can change the law where there are "compelling" reasons to do so, but that the change must be incremental to keep legal rules in step with changing society. He wrote that the Legislature, not courts, have major responsibility for law reform; if change would lead to complex and uncertain ramifications, then such questions should be left to the Legislature.

D. Do the public's attitudes towards the legal profession affect preferences regarding enforcement of statutory and administrative law through private rather than government initiation? If so, how?

England and Wales

Martin Partington

> This is hard to know; there is evidence in Causes of Action that fear of the expense of lawyers is a deterrent to taking cases to court; there is also evidence that lawyers (solicitors) are generally held in high regard, certainly by their clients.

Richard Moorhead

> I know of no evidence to support this, although you'll be familiar with Kagan's work on adversarial legalism. There is some empirical evidence of a social ambivalence to claiming (the public express some distaste) though I believe this is collected in the sphere of torts.

Australia (*Peta Spender*)

> There is some reservation about giving the legal profession too much control of enforcement e.g. there is a significant reticence to allow lawyers to use contingency fees for litigation, but in other respects lawyers play a critical role in comparatively large range of private enforcement activity.

Canada (Jasminka Kalajdzic)

> No known reliable data is available to answer this question.

E. To the extent that privately-initiated enforcement plays a role in your country, can you identify a particular period when it became more acceptable/common, and if so, are there identifiable political, social or economic circumstances that might have causal significance?

England and Wales

Martin Partington

> I think awareness of the possibility of taking individual actions became greater in the later 1960's when there was a new focus on 'rights' – that was the era of the creation of law centres, and socially motivated law firms, the Legal Action Group and the like – much of the inspiration being taken from similar developments in the US. The last 40 years has in my view tested the capacity of law to deliver individualized justice – too often the individual case takes away resources that might be better spent for the

collective good (for example several houses might be repaired for the cost of one court case.)

Richard Moorhead

There has been a general growth in employment claims, and discrimination/equal pay claims in particular. This is associated with a number of legal changes (including the introduction of the Human Rights Act and specific equality legislation) as well as changes in the work place and (interestingly) de-Unionisation:

As Hammersley and Johnson have pointed out, the 1990s and early 2000s saw much new employment legislation, including the Employment Rights Act 1996, the Employment Relations Act 1999 and the Employment Act 2002**.** Further, the introduction of the Human Rights Act 1998 has led to increased awareness of rights. Equal pay disputes have grown against major public sector job evaluation initiatives. Importantly, Burgess et al demonstrated the importance of underlying socio-economic drivers of employment tribunal cases with factors such as the rise in numbers of women in the workforce; increases in the numbers of people employed in small enterprises; a decline in manufacturing and trade union membership accounting for significant levels of growth in employment tribunal applications.
Damage-Based Contingency Fees in Employment Cases: A Survey of Practitioners,,Moorhead R and Cumming R, (2008), p. 75.

Australia (*Peta Spender*)

Australia had a comparable "Civil Rights period" to the US in the 1970s - 1980s and this led to the conferral of new rights and causes of action, but it didn't necessarily lead to higher rates of private enforcement and by the 1990s it led to broader control of enforcement by the courts through strategies such as case management.

Canada (Jasminka Kalajdzic)

See discussion of about the impact of the *Charter*, above.

F. Are there some areas or issues where privately-initiated enforcement seems particularly prominent? What accounts for the prominence of these areas?

England and Wales

Martin Partington

The areas on which legal action has focused have changed over time. Housing/homelessness, employment and family are the principal areas; consumer has less attention in the courts at any rate than might be anticipated.

Richard Moorhead

Equal Pay and discrimination cases– the causes are the matter of some debate but are probably largely to do with structural change in the public sector (re: regarding pay scales) and the actions of one firm of Solicitors bringing cases on contingency fees and then prompting (or shaming) the trade union movement into action. See **Damage-Based Contingency Fees in Employment Cases: A Survey of Practitioners**,
Moorhead R and Cumming R, (2008), see p. 90-95.

Australia (*Peta Spender*)

Privately-initiated enforcement seems particularly prominent in areas which were the subject of co-operative federal legislative reform in the 1970s to 1990s e.g. securities and consumer claims. The passage of federal legislation which effected structural reform of the markets, together with the introduction of procedural devices such as class actions, facilitated private enforcement to a significant extent.

Canada (Jasminka Kalajdzic)

Human rights have long been enforced by way of privately-initiated litigation and/or administrative tribunal. Employment standards are supposed to be enforced by provincial government agencies, but have been, on the whole, inadequately enforced, leading to a call for private prosecutions (Elson 2008).
The Ministry of Consumer Services, a provincial body, has jurisdiction over the *Consumer Protection Act*, 2002, Ont. Reg. 17/05; this legislation protects consumers in a over a dozen sectors, including retail contracts, leased goods, payday loans, and travel. A consumer may file a complaint with the Consumer Protection Branch of the Ministry, which attempts to mediate complaints between consumers and businesses. For further information see:
http://www.sse.gov.on.ca/mcs/en/Pages/About_the_Ministry.aspx.
The provincial Ombudsman exercises a more robust jurisdiction over consumer complaints involving government agencies in all sectors except municipalities, universities, schools and hospitals; see http://www.ombudsman.on.ca/en.aspx. The Ombudsman's office attempts to mediate informal complaints lodged by consumers. It also has its own investigation powers, which it exercises in situations involving systemic bad practices.

Additional Comments

England and Wales

Chris Hodges

In talking about private enforcement, one needs to ask 'enforcement *of what*?' The question that you ask is odd to a European. We have essentially always distinguished the following different types of enforcement:

- In private law, ie where private rights exist, they are essentially enforced by the owners of such rights through private litigation in the civil courts.

- In criminal law, the state has always enforced crimes through prosecutions in the criminal courts.

- As public law has developed during the 20th century, and public regulatory agencies have developed, those agencies have enforced infringements through their statutory powers, which stretch across quite a wide range from prosecutions to administrative orders (eg to stop an activity, or to recall a product, or issue information to consumers).

...There are admittedly some situations in which private individuals can take action following breach of public or criminal law provisions, but they are very rare in Europe. Basically, we keep the two sides basically separate. We do not regard private actions (whether for damages or for injunctive relief etc) as performing a public enforcement function. *Pace* some tort law theorists, the essential function of tort law (*in Europe* but not in USA) is strictly compensatory, and although a theoretical deterrence element can be identified, it does not have much policy or functional significance in a private damages claim over here.

By contrast, as I understand it, a private action in the US can cover both public and private enforcement aspects for several reasons. First, breach of the same legal provision triggers a right for a public agency to take action but also (transferability) the right for a private person to institute a private damages action. We don't think that way. Secondly, the same action has an integrated outcome (ie a damage award covers both public and private vindication). Thirdly, the enforcement policy is also the same/transferable, namely that of deterrence through the award of financial penalties (ie because a money penalty is involved it can function as both damages and a fine). We keep the two functions separate: private compensation is 'full compensation' for loss, whereas a fine is a (separate) fine. The former is traditionally imposed by a civil court, and the latter by a criminal court or administrative process.

Indeed, in civil law jurisdictions, the position is reversed to the extent that compensation for breach of private rights can be delivered through the action of the public authorities. The first consideration if you have a product liability claim in Germany, for example, and in many Continental states, is whether you can interest the state prosecutor's office in investigating the case (which would produce evidence at no cost to you) and prosecuting any breach found, in which case you can apply to join the public enforcement action as a private party (*partie civile* in France and Italy). This means you don't think first of a private product liability suit in those countries, you try to see if there is a simpler and cheaper way.

This private-on-public compensation piggy-back has existed in England for some years under general criminal law, and some specific instances (eg for claims against financial services companies under s 404 of the Financial Services and Markets Act 2000 and precursors) but it has not been used much. The reason is that the criminal courts and regulatory agencies have not regarded it as part of their function to deal with civil (ie private) damages issues. But that

policy has changed, at least at government level, in relation to consumer protection issues. The change has emerged as part of the debate during the past decade on two different issues. Firstly, there is the 'Better Regulation' policy, which is an attempt to reduce regulatory and economic burdens on business, and also to reduce costs and increase effectiveness for the activities of public agencies. Secondly, there has been the ongoing debate on 'collective redress' for consumers. That debate aims at delivering increased damages to consumers in mass situations where claims are usually low, whilst positively avoiding what is seen as the potential for abuse and high unnecessary transactional costs that would flow from the privatised solution of a 'class action-type' mechanism.

The outcome of these two streams of thought has been a governmental decision that is the converse of privatisation of the compensation function. It was heavily influenced by looking at the Nordic (especially Danish, but the other Nordics have similar systems) Consumer Ombudsman (who is not a neutral intermediary-style ombudsman, but a governmental enforcement officer for consumer and competition law). The new UK policy has been called 'regulation plus'. It is still developing, and being trialled, so as to persuade the main local consumer officers (called Trading Standards Officers, employed by local Councils) that they can deliver re-balanced markets and effective enforcement not just by using their traditional quasi-criminal and administrative enforcement powers but also new powers aimed at delivering private compensation. ...

So, the basic answer to the question 'Does England have 'private enforcement'?' is 'We do for private rights' but 'We don't for public norms in the way USA does'. There are some exceptions, but they are pretty rare. For example, punitive damages are theoretically available in addition to compensatory damages, but only allowed very rarely, essentially as recognition that criminal enforcement is not strong enough as a deterrent or vindication in those exceptional situations.

Martin Partington

Background

Before turning to the detailed questions, I want to start by setting my comments in a bit of context. As I indicated in an earlier email to the researchers, the language they have used in their paper does not exactly resonate with the language I would use in the UK.

The development of the welfare state; different models for the delivery of social policy

Over (roughly) the last 150 years, countries – particularly those in the industrialized world – have seen the development of the welfare state. Politicians have adopted policies designed to address a wide range of social and economic policies. These include, for example: health care; education; public health; protection of health and safety in the work place; employment protection; anti-discrimination measures; measures to protect consumers, tenants and other vulnerable groups.

The ways in which different countries have addressed these issues have varied widely and have been very dependent on the political and ideological cultures within which each country operates. But it may be said that there have been two broad mechanisms by

which the social policies of welfare states have been, or have been attempted to be, delivered:

- Direct provision by government agencies: an obvious example is social security provision, but there are many others.

- Indirect provision by a variety of agencies and bodies (including the private sector), where the provision of services is subject to protective regulation prescribed by government. There are numerous examples: health care for the elderly; the provision of rented housing

Enforcement of the law that arises in the context of the first group is often through specially created decision-taking mechanisms including, in particular in the UK, tribunals.

Enforcement of regulatory standards which are relevant to those providing services in the latter group may be though special agencies established and charged with enforcement responsibilities: these include (in the UK context) regulatory agencies such as the Health and Safety Executive, the Civil Aviation Authority; the Food Standards Agency, Trading Standards Officers. All these agencies have powers to regulate and enforce rules contained in regulations designed to regulate relevant target groups and to protect the individual – e.g. factory/office owners, the airlines, food manufacturers and retailers.

But there are many contexts in which enforcement of statutorily prescribed legislative standards, found in the protective legislation of the Welfare State, is left to the individual. Obvious examples include housing and other consumer protection measures, and employment.

The decision as to which method of enforcement should be adopted is the result – conscious or otherwise – of the policy-makers' approach to regulation. Historically law makers tended to rely on a 'command and control' model of regulation. They thought that if they enacted legislation, they could reasonably assume that those people affected by the regulation would obey. If they did not, those who sought the benefit of the protective legislation could let the courts deal with it. Statute usually prescribed detailed routes and grounds for appeals against decisions taken by service providers.

More recent writing on the theory and principles of regulation has shown that this 'command and control' model is largely ineffective. There are now many more regulatory approaches that can be adopted (the regulation literature is extensive – one of the leading writers in the field is the Australian scholar Braithwaite; in the UK see the writings of Keith Hawkins, Robert Baldwin; in Ireland, Colin Scott.)

From this analysis, at least *three models of regulation* and enforcement have emerged:

1. *Agency enforcement* – specific agencies are established to regulate specific industries (e.g. civil aviation) or specific issues (e.g. health and safety at work). The agencies work with the industries concerned to enforce standards – but enforcement is usually based on co-operation between the regulators and regulated; enforcement in the courts is rare. (This leads to the criticisms of regulatory capture.)

2. *Individual enforcement* –individual citizens who seek to take advantage of protective legislation have to take action themselves – e.g. tenants, consumers.

3. *Hybrid* – where agencies are established while the individual also has scope for individual action. In the UK a main example is in the context of anti-discrimination

legislation – where the Equality and Human Rights Commission (which is scheduled to take over from other anti-discrimination agencies in October 2010) has power to take cases to court where it thinks this would be appropriate (see further www.equalityhumanrights.com)
It is group 2 that is the main focus of the present study.

Individual enforcement – research findings

In fact, as regards the issue of the enforcement of protective legislation in courts and tribunals by individuals there is already a [not] inconsiderable literature, including important empirical studies, many of which focus on the issue of 'unmet legal need'. This note does not offer a comprehensive review of the literature, but highlights some of the principal contributions to that literature.

In the UK a number of studies of unmet legal need were undertaken in the late 1960s and early 1970s into the issue of 'unmet legal need'. The most well-known is the study *Legal problems and the citizen; a study in three London Boroughs* by Brian Abel-Smith, Michael Zander and Rosalind Brooke published in 1973. But there were other empirical studies published at around the same time. (These academic studies were reflected in developments in the practice of law in the UK – through the creation of the first Law Centres; and the establishment of the Legal Action Group). These studies focused on the fact that people did not go to court to enforce, for example, their housing or employment rights.

….

By 2006 in *Causes of Action* – the research study that was undertaken by the Legal Services Research Centre, which in turn developed from Professor Hazel Genn's study *Paths to Justice*, Professor Pascoe Pleasance and his colleagues had identified 18 areas of civil law as areas in which people might be able to go to court for assistance – i.e. the issues were 'justiciable'. The areas were: children, clinical negligence, consumer, divorce, discrimination, domestic violence, employment, homelessness, immigration, mental health, money/debt, neighbours, owned housing, personal injury, relationship breakdown, rented housing, unfair police treatment and welfare benefits. The researchers found, of course, that actual use of law – in terms of people going to court – was far less than might have been anticipated, given the nature and extent of the problems that people had.
What is common to the empirical studies is the assumption that there are protective rules set out in legislation; individuals must enforce them through the courts if they are to benefit as fully from them as parliamentarians/lawmakers may be assumed to have intended; and that because of the failure of many people to take advantage of these opportunities to enforce 'their rights' this demonstrates that there is 'unmet legal need' that needs to be met through the provision of legal aid, the creation of law centres, or other enforcement mechanisms which utilize the courts.
From a practical, political point of view, all the options for progress identified by researchers are currently seen by governments as expensive and often benefitting lawyers and other advisers as much as (sometimes more than) the people whom the legislation is designed to help. These concerns – always present – are even more acutely felt in an age of austerity and cut-backs in government expenditure.

There is now also an extensive body of empirical research into regulation and the work of the specially created regulatory agencies. These include, again in the UK context, the Civil Aviation Authority (see *Regulating the airlines*, Robert Baldwin 1985); or the Health and Safety Executive (see writings by Keith Hawkins and others) has tended to occur on an industry wide basis or where there are general issues of public safety (e.g. regulation of nuclear power). The research has analysed how each agency has developed its regulatory strategy designed to protect the public. It has noted that enforcement rarely involves the taking of individual cases through the court, though this is reserved for the really hard/serious case; rather enforcement is achieved in rather different ways, in particular by collaboration and partnership. (This obviously raised the question, discussed in the literature, of 'regulatory capture'.)

In 2008 the Law Commission of England and Wales undertook an interesting analysis of the legislation designed to protect tenants. This argued that a legislative strategy that relied on tenants using the courts to get landlords to behave as Parliament wanted them to behave was, in effect, a waste of time. The Commission argued that what was needed in this context was a new regulatory approach – with the emphasis being on industry self-regulation. (See Law Commission *Housing: Encouraging Responsible Lettin*g. 2008) Although the UK Government did not adopt the ideas discussed in the paper, I think the paper shows that the use of what are here described as hybrid models of regulatory enforcement may have greater potential for effective utilization of protective legislation than simple reliance on court process – which will only ever be a partial and an individualized response to a problem.

Test case strategies

This comment leads to another point – the use of 'test-case litigation' ('cause-lawyering') to try to achieve court rulings that will benefit more than just the individual case but be of wider social benefit. Some years ago there was a research report into the use of test cases by the Citizens Rights Office – the legal 'arm' of the Child Poverty Action Group, the primary group lobbying for reform of the social security system (I regret I cannot lay my hands on the reference for the moment; but for current information go to http://www.cpag.org.uk/cro/CROHome.htm.) Other social action groups have adopted similar strategies, for example the housing rights group in SHELTER (the housing campaign group) (see http://england.shelter.org.uk/)

The UK organization that now leads the field in 'action research' in both taking and analyzing the effects of test cases is the Public Law Project.: see http://www.publiclawproject.org.uk/. This is an organization that will repay further investigation as a possible model for development in other countries.

Canada

Marina Pavlovic

Canada is a federal state composed of thirteen federal units—ten provinces and three territories and is a bijural jurisdiction. Nine provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince

Edward Island, and Saskatchewan) and three territories (Northwest Territories, Nunavut, and Yukon) are common law jurisdictions, while one province, Québec, is a civil law jurisdiction. Sections 91 and 92 of the Constitution Act, 1867 set out the respective powers of the federal and provincial governments. Matters not assigned exclusively to the provinces fall within federal jurisdiction.

The Canadian court system is a result of its constitutional arrangements. The Supreme Court of Canada is the country's top appellate court, hearing appeals from both the Federal Court of Appeal and the provincial appellate courts. Federal courts, consisting of the Federal Court and the Federal Court of Appeal, have jurisdiction over matters within federal legislative jurisdiction. Provincial courts, consisting typically of a three-level court structure—Provincial court, Superior court, and provincial Court of Appeal, have jurisdiction over civil matters within the provincial jurisdiction. Criminal procedure and substantive criminal law matters (including criminal offences under the Competition Act), are within federal regulatory jurisdiction, but criminal matters are decided by provincial courts. Civil procedure, on the other hand, is within the provincial regulatory jurisdiction.

II. GENERAL INFORMATION ABOUT ACCESS, BARRIERS TO ACCESS, LITIGATION INCENTIVES AND DISINCENTIVES

A. Costs and Funding

1. To what extent are users expected to pay the costs of maintaining the courts and/or other tribunals? What mechanism(s) are employed for that purpose (e.g., filing fees)? How are the amounts calculated, and are data available concerning the amounts involved and their relationship, if any, to the amounts involved in the underlying disputes (i.e., are the costs scaled in some way to the amount in dispute)?

England and Wales

Richard Moorhead

There is a policy of full costs recovery in the civil courts, with schemes of remission of fees for those who cannot pay. The process of, and underlying data for calculating these fees is regularly subject to criticism. Anecdotally, it is rumoured that civil fees subsidise the costs of other elements of the system. Some useful links:
http://www.justice.gov.uk/consultations/docs/civil-court-fees-2008-consultation-paper-cp31-08.pdf; and
http://www.civiljusticecouncil.gov.uk/files/nov05_civil_family_fees.pdf
I have not been able to trace documentation in support but it would be logical if there was a similar policy in the tribunal system (where most discrimination and equal pay cases are brought).

Martin Partington

> In the British context, there is a critical distinction between courts and tribunals (and other forms of dispute resolution).
> In England and Wales, it is government policy (heavily criticized by the judiciary – see for example reports from the Civil Justice Council: available, with difficulty, from http://www.civiljusticecouncil.gov.uk/) that – save for the cost of judicial salaries – the courts should pay for themselves, the income being derived from fees charged for taking cases to court. The details of the current fees are set out in http://www.hmcourts-service.gov.uk/courtfinder/forms/ex50_e.pdf.
> They include a variety of elements: fees for starting a claim (issue fees); fees for the allocation of a case to a 'track' (small claims track cases do not pay this fee); and pre-trial checklist and hearing fees. Reduced issue fees are payable where cases can be launched on-line – Money On Line and Possession on Line
> It will be seen that the fees for money claims do differ a bit depending on the sum of money claimed. There is a good deal of criticism that the actual hearing fees are relatively speaking too low.
> There is a scheme for exempting those on low incomes from payment of the fees. (See http://www.hmcourts-service.gov.uk/courtfinder/forms/ex160a_web_0709.pdf.)
> Research commissioned by the Ministry of Justice suggests that, by themselves, the fees charged by the courts do not act as a significant deterrent to individuals taking cases to court. See http://www.justice.gov.uk/publications/docs/changing-court-fees.pdf (2007) And it is probably the case that, when considering the overall costs of going to court, the court fees on their own are a relatively minor component.
> ….
> By contrast with the courts, taking cases in other fora, such as tribunals or ombudsmen, typically involve the individual incurring no initial costs or only modest initial fees. Furthermore, many of these alternative dispute resolvers have been specifically designed to operate in ways which enable parties to take cases without the expense of hiring lawyers to prepare cases and to represent them.

Australia (*Peta Spender*)

> Users are not expected to pay the cost of maintaining the courts or tribunals. A filing fee is payable for most proceedings courts and tribunals, however the filing fee bears no relationship to the cost of litigating the case. There can be significant differences in the filing fee charged for particular claims e.g. compare the general cost of an initiating application in the Federal Court ($2000 for a corporation) with the cost of filing a discrimination claim in the same jurisdiction ($54). Waivers of filing fees may also be granted where litigants are impoverished. Fees are generally decided by the executive and are scaled to the extent that higher value jurisdictions have higher filing fees (eg compare the Supreme Court (ACT) fee of $725.00 for claims higher than $50,000 with the ACT Civil and Administrative Tribunal fee of $284 for claims under $10,000) but there is little differentiation in the cost of filing fees for higher and lower value claims within the same civil jurisdiction.

Canada (Jasminka Kalajdzic)

Litigants must pay a fee to initiate an action or application, and to file court documents. By way of example, currently Ontario legislation requires that litigants in the Superior Court of Justice (where civil claims not within the purview of Small Claims Court are adjudicated) pay the following fees: $181 to issue a statement of claim or file a defence; $235 to obtain a court order the fee; $259 to file a notice of appeal. See *Administration of Justice Act*, O. Reg. 293/92, available online: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_920293_e.htm.

Small Claims Court has jurisdiction of claims under $25,000. Fees in this court are lower than those charged in Superior Court but are set by regulation and therefore do not fluctuate with the amount at issue in the proceeding.

Impecunious parties can seek a fee waiver but the financial threshold is quite low and therefore only a small minority of litigants is eligible for relief. See http://www.attorneygeneral.jus.gov.on.ca/english/courts/default.asp#fees for a description of all fees and the fee waiver option.

Administrative agencies like the Human Rights Tribunal of Ontario and Employment Standards Program of the Ministry of Labour do not charge a fee for the filing of claims.

2. **To what extent in theory, and to what extent in fact (if data exist), are the parties' costs of civil litigation shifted from the winner to the loser? Does this vary depending on type of case, type of party, or other factors (e.g., nature of the parties' funding)? If so, how?**

England and Wales

Neil Andrews [here as elsewhere extracted from his monograph, Contracts and English Dispute Resolution, with most footnotes omitted][2]

[2] In the message transmitting the relevant chapter of his book, Andrews noted: "As for costs, the Jackson Report on Costs is being considered: Sir Rupert Jackson, Review of Civil Litigation Costs (December, 2009: London, 2010). It is not clear yet what changes will occur. This 2010 publication was written before his report. Adrian Zuckerman has criticised the Jackson report: AAS Zuckerman, `The Jackson Final Report on Costs-Plastering the Cracks to Shore up a Dysfunctional System' (2010) 29 CJQ 263."

The main rule in England is that a victorious party ('the receiving party') should recover his 'standard basis' costs from the opponent ('the paying party').

Richard Moorhead

In employment tribunal cases, costs rules are broadly that each party bears their own costs.

…..

It is very rare for costs to be shifted in employment tribunal cases. 367 cases had costs awards in the last set of statistics (http://www.employmenttribunals.gov.uk/Documents/Publications/ET_EAT_Stats_0809_FINAL.pdf) out of (in broad terms) about 250,000 cases!

Australia *(Peta Spender)*

The English rule as to costs generally applies in Australia i.e. the loser pays the winner's costs. However, in some claims (e.g. workers compensation claims) and in a significant group of tribunals (e.g. the State and Territory civil and administrative tribunals) the US rule applies so that each party bears their own costs. In areas where the US rule applies there will be specific statutory provisions that state when cost shifting will occur (e.g. unreasonable delay or obstruction by a party) but these examples are rare.

Canada (Jasminka Kalajdzic)

The basic rule in Canada is a two-way costs rule (loser pays costs to winner of litigation). The amount varies in different jurisdictions and depending on the scale of costs awarded. The usual scale, known as "partial indemnity", roughly provides 50-60% of the successful party's actual legal costs. The higher "substantial indemnity" scale, which provides closer to 80% indemnification of true legal fees and disbursements, is awarded as a matter of judicial discretion and only in specific circumstances contemplated by Rule 57 of the Rules of Civil Procedure, O.Reg. 194, including unsuccessful allegations of fraud; rejected formal offers to settle that proved to be better than the judgment ultimately obtained; or improper or vexatious conduct. No data is available on the frequency of cost awards, but anecdotally, the practice follows the doctrine, and courts generally fix costs on a partial indemnity scale and award them to the successful party on a motion or after trial.

Courts have discretion to depart from the usual two-way costs rule in certain circumstances, including where the case raises novel legal issues or is in the nature of test case litigation. In rare and exceptional circumstances, courts will award advance costs to an impecunious plaintiff litigating a matter of general

public importance (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Excise)*, 2007 SCC 2 (CanLii)).

3. In what circumstances, if any, is a plaintiff likely to be required to post security for costs?

Australia *(Peta Spender)*

This is dealt with in the rules of the superior courts (i.e. the State and Territory Supreme Courts, the Federal Court and the High Court), which generally state that the security for costs will be awarded where some or all of the following criteria apply - the plaintiff is impecunious, is acting in a representative or corporate capacity and is ordinarily resident outside of the jurisdiction.

Canada (Jasminka Kalajdzic)

The Rules of Civil Procedure [56.01] provide the legal test for security for costs orders … Although the rule contemplates either the defendant or plaintiff moving for security for costs, typically it is the defendant who seeks such an order.

4. What are the components of "costs" for this purpose?

England and Wales

Neil Andrews

The normal award is for payment to the victorious party of his costs assessed on the 'standard costs' basis. However, sometimes, especially where the paying party's procedural conduct has been reprehensible, costs are assessed in a manner more generous to the 'receiving party', namely on the 'indemnity' basis. 'Indemnity costs' expose the paying party to liability for nearly all costs incurred by the other in the relevant litigation. 'Standard costs' are calculated less generously towards the receiving party, because the costs claimed by that party must be proportionate overall.

Australia *(Peta Spender)*

Costs are generally awarded on a "party - party" basis which is assessed on a scale involving costs that are "fair and reasonable for the attainment of justice and for enforcing/defending the rights of the party". Party-party costs are distinguishable from solicitor-client costs or indemnity costs and generally only amount to about two thirds of the winner's total cost of the litigation.

Canada (Jasminka Kalajdzic)

> The moving party submits a draft Bill of Costs for fees and disbursements (on a partial indemnity scale) that it estimates will be spent to take the case to trial. Costs include legal fees, experts' fees, disbursements (photocopies, faxes, imaging, long distance telephone, and the like) and court filing fees.

5. **To what extent can and do individuals and firms insure against liability for costs before any particular dispute? After the event? Are there third-party funders that effectively serve an insurance function for costs (e.g., labor unions as a benefit to their members)?**

England and Wales

Richard Moorhead

> Recent research suggests this is significant (it's before the even insurance):
> "The proportion of claimants who were insured against legal expenses or who were members of any organisation that would cover these costs had increased since 2003 (24 versus 18 per cent). Similarly, the proportion of employers who were insured rose from 27 to 32 per cent." (See here: http://www.berr.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008.pdf, page 58)

Neil Andrews

> If a claimant wins under a CFA funded action, the defendant will be liable for each of the following three items: first, the claimant's ordinary costs; secondly, the claimant's lawyer's 'success fee'; thirdly, the claimant's 'after-the-event' ('ATE') insurance premiums for legal services. ATE cover is important to cover the claimant's risk that—in accordance with the loser must pay principle—he will normally become liable to pay the defendant's costs if he loses the action.

…..

> There has been extensive litigation (indeed a 'costs war') concerning appropriate levels of both success fees and ATE insurance premiums, although this `costs war' was not anticipated when the relevant legislation rendered the defeated defendant liable for these sums. Furthermore, in the core areas of tort litigation, specific rules govern reasonable success fees in claims concerning road traffic accidents and employers' liability. The Court of Appeal has held that the rules governing success fees in the road traffic and employment liability contexts are mandatory, that is, the courts have no discretion to reduce the 100 *per cent* bonus prescribed in the CPR.

….

Rachael Mulheron in her 2008 report[3] had noted that there have been relatively few (only 63) Group Litigation Orders since their introduction in 2000. She suggests that this figure is low, when comparison is made with common law jurisdictions (notably Ontario and Australia) offering `opt-out' systems. The English GLO figures (an `opt in' system) are perhaps disconcerting if one takes an absolutist approach to `access to justice'. But the figures are not surprising, because large-scale litigation will not be brought unless there is substantial private funding or public support. As for the private source, it would appear that the conditional fee system has not worked in this context. This seems to be attributable to the absence (in this especially risky context) of ATE (`After-the-Event') legal expenses insurance to cover the claimants' risk of liability for the defendant's costs. As for the public source, Mulheron notes the sharp decline in public funding of such litigation since the pre-2000 peak.

Australia *(Peta Spender)*

Before the event insurance is routinely taken out for certain claims such as motor vehicle accident and public liability claims. After the event insurance for costs is rarer in Australia although some financiers provide it. More commonly these firms lend money for disbursements. Third-party litigation funders have become more active in Australia over the last 10 years but tend to be involved in the large claims e.g. class actions and corporate insolvencies. Labour unions have arrangements with various plaintiff firms whereby they refer members for legal advice, but they don't indemnify their members for the cost of the litigation.

Canada (Jasminka Kalajdzic)

European-style legal expense insurance (LEI) is still rare in Canada. Commercial LEI is available but is narrow in its coverage and does not have a wide market among non-professionals. For example, one prominent website (http://www.legalexpenseinsurance.ca) offers insurance products to dentists, physicians, school officials and commercial enterprises only. Where individual consumers do have coverage, it is typically through a group employee plan or as an add-on to other insurance policies. According one source, about 5.5 million Canadians have some kind of coverage, but it is usually limited to legal advice by phone (Lunau). The most comprehensive coverage has been enjoyed for over twenty years by Canadian Auto Workers, unionized employees with access to the CAW Legal Services Plan. The CAW plan covers property, marital and other legal disputes, with set numbers of hours of free legal representation by participating lawyers, and discounted rates thereafter.

Consumers who wish to obtain LEI privately have a limited market to choose from, although the provincial Law Societies appear to be welcoming new providers in recent months (McKiernan). Such plans typically do not cover marital disputes but will

[3] See also Mulheron Report (2008) (`Reform of Collective Redress in England and Wales' www.civiljusticecouncil.gov.uk/files/collective_redress.pdf , pp 9 ff; 144 ff).

insure against contract, employment and property disputes, as well as personal injury claims. The insured will select her own lawyer, and the insurer will pay legal fees and disbursements in modest amounts: according to one insurer's website, lawyers' fees and costs of only $7,500/dispute and $15,000/year are covered at an annual premium of almost $400. See http://www.insurance-canada.ca/profproducts/legal-insurance/legal-insurance-services-P.php. Another prominent insurer offers higher indemnity limits, but the cost of coverage is not known. See www.das.ca.

The issue of third party funding and indemnity agreements in class actions is receiving increasing judicial attention. In 2009, the Ontario Superior Court of Justice considered the propriety of such an arrangement with an Irish funder in *Metzler Investment GMBH v. Gildan Activewear Inc.*, 2009 CanLii 41540. The agreement was not approved in that case, but without foreclosing the third party funding option in principle. In an unreported decision of the Supreme Court of Nova Scotia, however, the same plaintiff's law firm involved in the *Metzler* case was successful in obtaining court approval of a third party indemnity agreement against adverse costs between the representative plaintiff and a private funder. See *MacQueen v. Sydney Steel Corporation*, Hfx. No. 218010 (Order dated Oct. 19, 2010) (on file with author).

6. To what extent, and for what types of matters, is Legal Aid available for those involved in civil litigation, and are the rules regulating court funding and party costs the same as in privately-funded litigation?

England and Wales

Neil Andrews

> *The English Conditional Fee Agreement (`CFA') System*: this system has enabled Government to reduce reliance upon legal aid. The decision to develop the conditional fee system was manifestly a response to the rise in the amount of expenditure upon civil legal aid. During the 1980s and early 1990s, this had increased at a rate exceeding general inflation.[4] The Treasury (a Government Department) noted the fiscal anomaly that expenditure on the legal aid system was not capped. This led to the political decision to replace civil legal aid with the Community Legal Service Fund. This provides public financial support for civil litigation, but only in specially deserving cases. Many categories of civil actions are excluded (for example, ordinary personal injury claims).[5]

….

[4] 'Access to Justice with Conditional Fees' (Consultation Paper, Lord Chancellor's Department, London, 1998), para 3.3; for further comment, *Modernising Justice* (Lord Chancellor's Department: Cm 4255, 1998), ch 2, especially at paras 2.42 ff, and ch 3; in *Callery v Gray* [2001] EWCA Civ 1117; [2001] 1 WLR 2112, at [7], Lord Woolf CJ noted the interrelated motivation behind the expansion of conditional fee arrangements: to increase effective access to justice and to reduce public expenditure on civil legal aid; there are similar comments in *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28; [2002] 1 WLR 2000, at [2] *per* Lord Bingham, [47] and [48] *per* Lord Hope.

[5] Neil Andrews, *English Civil Procedure* (Oxford University Press, 2003), 35.65 ff; *Cook on Costs* (London, 2006), ch 41; for an Italian scholar's study of the English system, Alessandra De Luca, *L'Accesso alla Giustizia in Inghilterra: fra Stato e Mercato* (Torino, 2007).

'Funding' is a fundamental problem in the field of multi-party litigation. In civil litigation in general, 'economic access to justice' in England is no longer significantly supported by public expenditure on legal aid. Instead there has been a major shift towards the 'privatised' conditional fee system ('CFA'). This 'privatised' system of CFA-funding has also affected multi-party litigation. Formally, the rules and guidance permit public financial support of unusually deserving group litigation. In fact public funding for group litigation is seldom granted.

Richard Moorhead

Legal aid is not generally available for employment tribunal cases. There is provision for applications to be granted in exceptional circumstances, but these would be rare to non-existent.

Australia *(Peta Spender)*

Legal aid in civil matters is very restricted both on merits and income bases. The criteria are as follows:
1. the person needs legal assistance but can't afford a private lawyer (Means test); and
2. it is a type of case in which legal assistance may be granted (Guidelines); and
3. it is reasonable in all circumstances to provide the assistance (Reasonableness test).
See for example the ACT Legal Aid Guidelines at
http://www.legalaidact.org.au/pdf/la_act_guidelines_july_2010.pdf
The general types of matters that are legally aided are dealt with on pp5-10 of this publication but in the area of civil litigation, it is often family law, domestic violence applications, social security and housing disputes that are legally aided. The guidelines list actions for compensation for death and personal injury as qualifying for legal aid but these cases are frequently conducted by the private profession on a 'no win, no fee' basis.
The same costs rules apply to legal aid matters as to general matters.

Canada (Jasminka Kalajdzic)

Legal Aid is generally provided in two ways: a certificate system which enables litigants to retain a private lawyer who is guaranteed payment of legal fees according to the legal aid tariff; and a legal clinic system that provides general legal advice or subject matter-specific legal representation. Legal aid certificates are rarely approved for civil litigation matters in Ontario and the rest of Canada. Out of a total of 107,299 certificates approved by Legal Aid Ontario in 2007-2008, for example, less than 6,000 were issued in civil matters ("civil matters" do not include family or immigration/refugee cases, for which 25,599 and 11,401 certificates were issued, respectively) (LAO 2008 Report, 14).

Legal aid-funded community legal clinics, however, do offer legal advice and assistance regarding a number of non-criminal matters… .

The usual two-way cost rule applies to cases involving a clinic lawyer or private practitioner working on a legal aid certificate. By statute, the court is not to take into account the existence of legal aid in ordering costs, including the quantum of costs. Section 46 of the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, specifies this… .

The irrelevance of the existence of legal aid funding to cost awards has been the subject of numerous court decisions. See e.g. *Holt v. Anderson*, 2005 CanLII 44179 (ON Div.Ct.) and cases cited therein. Courts order costs to be paid by unsuccessful litigants on legal aid certificates, but the costs are to be borne by the client personally, and not Legal Aid Ontario, unless the court is satisfied on the evidence that Legal Aid Ontario acted unreasonably in funding a client.

7. To what extent are lawyers permitted to assume the risk of loss as to, or to reflect that risk in, their fees (e.g., through some form of no-win, no-pay fee)?

England and Wales

Neil Andrews

(10) *English Conditional Fee Agreements (`CFAs')*

This is the English 'no win, no fee' system. This type of legal funding agreement gives a lawyer a reward for 'success' in the litigation. The Courts and Legal Services Act 1990 introduced conditional fees. This system was greatly expanded in 1998 by delegated legislation. It now embraces all civil litigation or arbitration, other than

certain family law matters. This legislation overrides the traditional opposition of the English Common Law to litigation lawyers having any form of financial interest in the case's outcome. The legislation legitimises conditional fee agreements only if they comply with the statutory scheme of recognition. An English conditional fee agreement concerns the provision of advocacy or litigation services. It stipulates that the client's 'fees and expenses, or any part of them' shall be 'payable only in specified circumstances'. The agreement usually specifies that the lawyer can receive a 'success fee', as well as his ordinary fee. The success element is a 'percentage increase'. This bonus cannot exceed 100 *per cent* of the normal fee.
[T]he American 'contingency fee' *remains unlawful in English law* as far as remuneration of lawyers is concerned in respect of *contentious* work, that is, court litigation….In 2005 Parliament revoked complicated regulations prescribing formalities for valid CFAs. Now it is enough that the solicitor should explain [to the prospective client]:

> *'the circumstances in which the client may be liable for their own costs and for the other party's costs; the client's right to assessment of costs, wherever the solicitor intends to seek payment of any or all of their costs from the client; and*

any interest the solicitor may have in recommending a particular policy or other funding.

Australia *(Peta Spender)*

Lawyers are not permitted to enter into contingency fee arrangements, however no win no fee arrangements are common, as are uplift fees, which allow lawyers to charge an additional percentage fee if they are successful in the litigation.

Canada (Jasminka Kalajdzic)

Contingency fees are now permitted throughout Canada, in both class actions and most non-representative proceedings. See e.g. *Solicitors Act*, R.S.O. 1990, ch.S-15, sections 15-20.1. Contingency fees are not permitted in criminal and family law matters, for public policy reasons.

Earlier this year, the New Brunswick Court of Appeal considered the novel question of whether a provincial government prosecuting or defending a class action could enter into a contingency fee arrangement with private lawyers retained to represent the government in the litigation. The Court determined that the Province could lawfully enter into a contingent fee agreement without trenching upon the Legislature's exclusive jurisdiction over the appropriation of public funds and offending the statutorily prescribed process for the transfer of provincial property: *Imperial Tobacco Canada Limited et al. v. Her Majesty the Queen in Right of the Province of New Brunswick*, 2010 NBCA 35 (CanLII).

8. To the extent that your country permits class or other aggregate litigation, are there special rules concerning any of the matters referenced in 1-7 above?

England and Wales

Neil Andrews

However, representative proceedings remain distinctly marginal in England, for two reasons. First, there is the claimant's personal 'costs risk'. As mentioned above, represented parties are not fully-fledged 'parties' to the action. Therefore, they are not subject *as parties* to liability for costs (furthermore, proceedings can be commenced without their consent; and the action can be settled without their approval). It follows that a representative must bear the entire cost of the litigation if the case is lost, paying also the defendant's costs. Even if the representative wins the case, there is the risk that he might not succeed in recovering all his costs from the losing opponent. This costs 'short-fall' might ultimately be borne by the representative if he cannot persuade his fellow represented parties to share the burden

equitably. For these reasons, prospective representative claimants will be apprehensive about their personal liability for costs.

However, even if fresh flexibility is exhibited on the interpretation of 'same interest', it is unlikely that a torrent of litigation will ensue. This is because the costs problem (see above) will continue to inhibit recourse to this procedure. Indeed judicial crafting in 1981 of a two-stage procedure—(I) representative action establishing the defendant's liability towards members of the represented class, with (II) individual claims by members of that class to quantify their recoverable loss—did not stimulate significant use of representative proceedings.
……

Such orders (`GLOs') are the mainstay of the English system's treatment of multi-party litigation (an 'opt-in' system). A GLO is a special form of multiple joinder, by listing of claims on a group register. The Senior Master and the Law Society maintain a list of GLOs.

The main components of the GLO system are: First, the court must approve group litigation order. Secondly, group litigation involves 'opting-in' by each individual. Thirdly, a group member enjoys both membership of the group and the general status of a fully-fledged 'party to civil proceedings'. Fourthly, during the progress of the GLO, the court will exercise extensive case management and issue directions. The court's directions can include the following: providing for one or more

claims on the group register to proceed as test claims; appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants; specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met; or specifying a date after which no claim may be added to the group register unless the court gives permission.
…..
Fifthly, if the group loses the case, each group member is liable to the victorious party both for that member's share of the common costs of the proceedings and for any individual costs specifically incurred with respect to his claim; but if the group is victorious, the defeated party is liable to pay costs attributable both to the 'common costs' and the 'individual costs'.

Richard Moorhead

My understanding is that class/aggregate litigation is not permitted/facilitated in employment tribunals. There are calls for this to change (see for example: http://www.lawgazette.co.uk/news/class-actions-employment-tribunals-called-government-research)

Australia *(Peta Spender)*

Re (2) members of the class are not liable for costs, only the lead plaintiff. Re (3), security for costs orders are commonly made in group proceedings but hard to say whether they are more common than in individual proceedings. Re (5) Third-party funders are increasingly involved in class actions. They are one of the most commonly funded procedures. Re (6) legal aid would not be granted for the group proceedings. Re (7) third-party funders are permitted to work on a contingency basis but not the lawyers conducting the class-action, even if those lawyers are retained by the funders.

Canada (Jasminka Kalajdzic)

In provinces where the two-way cost rule applies to class actions (the majority of the Canadian provinces), the normal considerations regarding the awarding of costs are sometimes modified, having regard to the underlying purposes of the *Class Proceedings Act, 1992*, one of which is to secure access to justice: see *Caputo v. Imperial Tobacco Ltd.* 2005 CanLII 63806 (ON S.C.), (2005), 74 O.R. (3d) 728 (S.C.J.); and *DeFazio v. Ontario (Ministry of Labour)* (2008), 53 C.P.C. (6^{th}) 192 (Ont. Div. Ct.). This is not to say that adverse costs awards are not made against representative plaintiffs. Indeed, such awards are made with increasing frequency (Kalajdzic, 18)

In British Columbia, the two-way cost rule is modified by statute; each party bears its own costs of the certification motion unless the court finds that the action was frivolous or vexatious: *Class Proceedings Act*, R.S.B.C. 1996, c.5. A defendant may not seek an order for security of costs in a class proceeding, therefore, either before or after certification: *Secure Networx Corp. v. KPMG*, 2002 BCSC 1001 (CanLII).

The situation is different in Ontario, where the two-way costs rule applies to class actions. Security for costs has been ordered pre-certification (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2007] O.J. No. 1136 (S.C.J) ($10,000), leave to appeal refused [2007] O.J. No. 2404 (Div. Ct.)). Post-certification, a recent ruling confirms that the judge has jurisdiction under the ordinary rules of civil procedure and under s. 12 of the *Class Proceedings Act 1992*, S.O. 1992, ch.6, to order a representative plaintiff to post security for costs, but the judge declined to do so in that case: *Peter v. Medtronic*, Inc., 2008 CanLII 56712 (ON S.C.).

Legal aid is not available in class actions, as the access to justice imperative is perceived to be met with the availability of contingency fee arrangements.

9. To what degree are the matters referenced in 1-8 above treated differently in the other tribunals available for the resolution of civil disputes (e.g., administrative

tribunals or agencies)? (For example, in England solicitors have not been permitted to set fees as a percentage of recovery in cases filed in court, but can charge on that basis for cases heard by Employment [formerly Industrial] Tribunals.)

England and Wales

Richard Moorhead

Contingency fees are permitted in employment tribunal cases.

Australia *(Peta Spender)*

As has been answered in question 2 above, the tribunals generally have different rules as to costs, so that fee shifting does not occur in those tribunals.

Canada (Jasminka Kalajdzic)

No known prohibitions exist with respect to charging contingency fees in administrative tribunal matters, so long as the subject-matter of the retainer does not involve criminal, quasi-criminal or family law issues.

B. **Procedure**

1. **What is the general rule concerning the level of factual particularity required of the plaintiff's pleading initiating a case in court (which in the U.S. is referred to as the "complaint"?) Is there a mechanism for testing the factual sufficiency of a complaint or its equivalent) (e.g., demurrer, motion to dismiss for failure to state a claim upon which relief can be granted)?**

England and Wales

Neil Andrews

Each party to English civil proceedings must produce a sworn `statement of case' (formerly known as 'pleadings'). This must set out the main aspects of the claim or defence. There is no need to include in a `statement of case' any detailed evidence or details of legal argument. The claimant should also specify the relief he is seeking, such as the remedies of a debt claim, damages, injunction, or a declaration.

.....

Disclosure of Documents: Main Framework: Both the system of pre-*action* disclosure and pre-*trial* disclosure are intended to enable each side of the contest to gain access to relevant information which might otherwise be known only to one side. Reciprocal disclosure achieves equality of access to information, facilitates better settlement of disputes, and avoids `trial by ambush' (where a party is unable to respond properly to a surprise revelation at the final hearing).

After proceedings have begun, each party must prepare a list of documents on which he will rely, or which might assist the other party. A party is obliged both to provide a list of documents (`disclosure') and to allow inspection of these by the other side. Such information is not yet evidence: it only becomes evidence if it is `adduced' by one party for the purpose of a trial or other `hearing'. `Standard disclosure' concerns: documents on which party A will rely; or which adversely affect A's own case; or adversely affect party B's case; or support B's case; or any other documents which A is required to disclose by a relevant practice direction. For this purpose, a `document' is `anything in which information of any description is recorded'.

.....

Sometimes the court can strike out a claim or defence, usually at a very early stage of the proceedings. The power to strike out a pleading (now known as a 'statement of case', whether it is a claim, defence, reply, or counterclaim, or any part of one) is exercisable in any of these situations, CPR 3.4(2):
`*the statement of case discloses no reasonable grounds for bringing or defending the claim; or the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or failure to comply with a rule, practice direction or court order.*

Striking out can be exercised whether or not a party makes an application to the court. Striking out can be specified as a `sanction', that is, prescribed as the automatic consequence of failure to comply with an `unless' order. The court can take the initiative and order a summary judgment hearing, under: CPR 24.5(3).

One of the grounds for striking out (because '*the statement of case discloses no reasonable grounds for bringing or defending the claim*') can overlap with the court's jurisdiction to award summary judgment under CPR Part 24 (on which see above). Both pre-trial procedures serve the function of enabling the court to weed out bad or tenuous claims or defences. Both are subject to the evidential constraint that the court can only receive oral evidence at trial. As we shall see, the summary judgment sieve has a slightly finer mesh than the striking out jurisdiction.

Australia *(Peta Spender)*

In relation to courts, the level of factual particularity required of the plaintiff's pleadings is similar to the US. There are mechanisms to require further particulars (called a request for particulars) and procedures similar to demurrer e.g. an application to strike out a claim as not disclosing a cause of action and summary judgment.

Canada (Jasminka Kalajdzic)

The Rules of Civil Procedure in each province dictate what level of factual specificity is required in a statement of claim. For example, Ontario's rule 25.06 states:

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

….

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1… .

Motions for summary judgment may be brought where a party believes there is no genuine issue for trial (Ontario's Rule 20). A party may also bring a motion to strike out a pleading (claim or defence) on the basis it discloses no reasonable cause of action or defence, as the case may be (Ontario's Rule 21).

2. What devices exist for one party to obtain information from another party ("discovery") prior to trial (e.g., interrogatories, oral depositions, written depositions, medical examinations, document requests, requests for admissions – i.e., as to the genuineness of a document or the existence of a fact believed to be indisputable)? What is the standard governing the scope of permissible discovery (e.g, "any matter not privileged that is relevant to any party's claim or defense")? Must the information sought itself be admissible or is it sufficient that it might lead to the discovery of admissible evidence?

England and Wales

Neil Andrews

CPR Part 31 introduced a more restrictive approach to the exchange of documents between the parties in preparation for trial. Before the CPR, the so-called '*Peruvian Guano*' (1882) test of relevant documents was much too broad. It included peripheral documents. The idea was that if an opponent were permitted to inspect these `outer' documents, this might enable him, by a side-ways investigation (a 'train of inquiry'), to uncover centrally important matters. In the 1880s this broad test did little harm. There was little commercial printing. …But in the last part of the twentieth century, the legal process was battered by the documentary tidal-waves of photo-copying and word-processing. During the discovery process, it would be necessary for lawyers to sift through two masses of papers, those held by their clients and those released by

opponents for inspection in accordance with the disclosure obligation. In determining which documents should be released for the opponent to inspect, each side had to apply the broad *Peruvian Guano* case's test to identify 'relevant' documents. The recipient party then had to absorb the material disclosed according to that broad test. This process of release and inspection could result in large legal fees. The discovery process also caused delay. Finally, the same process could be used to intimidate, because one side could cynically bury the other in an avalanche of paper.

Lord Woolf's new 'standard disclosure' test (effective since 1999) is an attempt to render the process proportionate to the nature of the claim. Each party must now disclose and allow inspection of: documents on which he wishes to rely; or which adversely affect his case or his opponent's case, or which support the latter's case. An order for 'standard disclosure' is the usual provision, except for 'small claims' litigation.

However, technological change continues to challenge the discovery system. Under the CPR, the word 'document' refers to 'anything in which information of any description is recorded': whether paper or electronic; literary, pictorial, visual or 'audio'. It thus encompasses 'e-mail', 'e-commerce', information held on answer-phones, and details recorded in mobile phones. Most people possess large `e-foot-prints'. This deluge of recorded information has intensified the need for a focused and disciplined approach to disclosure. Since 1998 the rules have been amended to deal with the question of disclosure of electronic data.

Apart from the CPR's redefinition of 'relevance' and the challenge presented by electronic documentation, the main issues in this field are, first, fixing the legitimate scope of obligations to disclose information *before commencement of proceedings* (normally associated with the so-called 'no fishing rule'); the second issue (overlapping with the question of pre-action disclosure) is the appropriate extent of the jurisdiction to *require non-parties, in anticipation of trial, to provide information* for use in pending or contemplated litigation, a topic normally referred to as 'exceptions to the "mere witness rule"'.

Australia *(Peta Spender)*

Generally speaking documentary discovery is available in most jurisdictions though it is controlled in some. Third-party production and requests for admission are also commonly used in the interlocutory phase. Interrogatories similarly exist though they are not commonly used. The general discovery standard applies to documents that relate directly or indirectly to a matter in issue in the proceedings that is not privileged (see eg r 605 ACT Court Procedures Rules). In relation to the last question, the *Peruvian Guano* test applies generally in Australia so that documents are discoverable even though they not directly relevant but may lead to relevant evidence. However, some court rules have restricted this test. There are no oral depositions in Australia, though there have been some proposals for reform that have recommended their introduction.

Canada (Jasminka Kalajdzic)

In recent years, there has been a concerted effort to reduce the time and expense of litigation by emphasizing the concept of proportionality. One of the manifestations of this new paradigm is the amendment of discovery rules that were previously very broad in scope. In Ontario, those amendments took force in January 2010.

Civil cases involving less than $100,000 exclusive of costs and interest are subject to the Simplified Procedure rules, pursuant to which affidavits of documents are exchanged but no oral discovery takes place (Ontario's Rule 76). In other civil litigation, the parties are entitled to both oral and documentary discovery, but absent leave of the court, a party is limited to examining an adverse party once, and for up to 7 hours only (Ontario's Rule 31).

In terms of documentary discovery, every document *relevant* to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed, whether or not privilege is claimed in respect of the document. The privilege claim is then negotiated between the parties or a motion is brought for the judge to determine if the privilege claim is valid. Up until January 2010, the scope of documentary discovery was much broader, in that every document *related to* any matter in issue was produceable. The amendments raised the threshold to "relevance", and also imported a series of proportionality considerations, namely:

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source. (Ontario's Rule 29.2.03)

3. With respect to documents, is any discovery permitted without court order, and how specific must a request for production be (i.e., must documents be separately described and/or must the party seeking discovery satisfy the judge that the documents sought actually exist or did exist)?

England and Wales

Neil Andrews

Traditionally, the starting point under English Law has been that non-parties are compellable to supply evidence only as 'witnesses', that is, by court order in connection with trial. This restriction on litigants' (and prospective litigants') access to information held by non-parties is known as the 'mere witness rule'.

....

However, in the nineteenth century, Equity had recognised an exception to the 'mere witness' rule. That exception is now known as a '*Norwich Pharmacal* order'. This is a *non-statutory* jurisdiction to compel a person (not necessarily a prospective defendant) to disclose documents or non-documentary information if that person was 'involved', whether culpably or innocently, in an alleged civil wrong. This judge-made jurisdiction can be exercised, therefore, against non-parties (for a related, but more narrow, statutory power, see the next paragraph). A *Norwich Pharmacal* order is *normally made before* the main proceedings have begun. The order can be used to provide information concerning any of the following matters: the main wrongdoer's identity; or, secondly, the location, nature and value of the prospective defendant's assets; or, thirdly, whether the applicant has fallen victim of a civil wrong, such as defamation, committed behind his back; or, finally, to identify and discipline a dishonest or defaulting employee within the applicant's organisation.

Furthermore, *after commencement* of proceedings, the court has a *statutory* power to order disclosure of *documents* against a non-party in any type of case (the words underlined bring out the points of contrast between this and the broader judge-made jurisdiction, '*Norwich Pharmacal* orders', discussed in the preceding paragraph). This statutory power, in rule CPR 31.17, requires the applicant to satisfy the court that the required document (or class of documents) is 'likely' to be supportive in those proceedings. The word 'likely' has been held to require only something weightier than a mere 'fanciful chance' that the document might assist the applicant.

Australia *(Peta Spender)*

In some jurisdictions discovery is permitted without a court order and all that is required is a notice is served upon the other party to disclose discoverable documents. This is frequently done by letter.

Canada (Jasminka Kalajdzic)

Documentary discovery is available to all litigants without court order. Documents relevant to the issues in the proceeding must be listed in an affidavit of documents, sworn by the party producing it (either the individual litigant or a representative of the corporate litigant). Documents over which solicitor-client, litigation or other privilege is claimed must be listed in a schedule to the affidavit (these are usually described in general terms, like "correspondence between Joe Client and Jane Attorney"). The non-privileged documents must then be produced for inspection to the opposing party or, more typically, copies of these documents are provided electronically or in paper form.
Where it is believed that documents exist that are not listed in the affidavit of documents, questions are asked of the opposing party during examinations for

discovery, in the hope that a "further and better affidavit of documents" is voluntarily produced. Alternatively, a party may bring a motion to the court seeking an order to compel the opposing party to produce a "further and better affidavit of documents". The moving party must support her request with an affidavit or other evidence suggesting that relevant documents have not been produced. Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may, among other things, order cross-examination on the affidavit of documents, order service of a further and better affidavit of documents, or inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

4. In what circumstances, if any, does your country permit group litigation such as class actions or other representative litigation? What types of relief are obtainable through such actions?

England and Wales

Neil Andrews

Summary of the Three Forms of Multi-Party Litigation: English 'multi-party' litigation can take one of three forms: (I) representative proceedings; (II) mass claims under a 'group litigation order'; or (III) consolidated litigation. The ensuing discussion will focus on the first two of these, and conclude with reflections on the suggestion that England might consider adopting an `opt out' system of `collective redress'.

Representative proceedings in England differ from II and III (see above) because the representative claimant brings an action on behalf of himself and others (the represented class). He is the only claimant. Members of that represented class are not parties to the action. Nevertheless, those class members will receive the benefits of a *res judicata* decision (or be subject to that decision), for example the benefit of a favourable declaration of legal entitlement. This form of proceeding is, therefore, characterised as an opt-out system. Modern English cases show this device's utility as a means of obtaining declaratory relief: a declaration in favour of a large class of represented person can be a powerful and often decisive element in securing individual redress. Furthermore, recent decisions emphasise that the representative proceeding mechanism should be used in a more flexible way to facilitate multi-party claims for monetary redress.

Group Litigation Order actions have quickly become the main, but not the exclusive, means of handling claims for compensation involving large groups of similarly affected persons or entities. Group Litigation Orders are characterised by high levels of case management at all stages of the proceedings. Such judicial control, well prescribed in the rules governing this specific type of procedure, will be exercised in the interests of focus, expedition, and fairness to both sides, and fairness to all

members and segments of the interested group of claimants. Furthermore, the judges involved in this procedure are experienced in this type of litigation. The GLO procedure is an opt-in system. *There is no limit to the number of parties who might register their names in a Group Litigation Order action.*

The Government in July 2009 rejected the suggestion that there should be a generic opt-out reform: *Ministry of Justice July 2009: the Government's Response to the Civil Justice Council's Report Improving Access to Justice Through Collective Actions.* Earlier, Rachael Mulheron's paper on `Reform of Collective Redress in England and Wales', presented to the Civil Justice Council in February 2008 (Professor Mulheron, an Australian, is a professor at the University of London, who continues to write prolifically on this topic), had been endorsed by the CJC: `Improving Access to Justice Through Collective Actions' (`CJC's 2008 Final Report'-- November 2008).[6]

Consolidation or joinder of co-claimants is an established means of accommodating multi-party actions. *There is no limit on the number of co-claimants who can use this form of procedure*.

Chris Hodges

Thus, we don't set out to have civil procedure rules and costs rules that encourage private action. Our imminently-published comparative study of Litigation Costs has showed that the US is unique in its approach to many aspects here, precisely because of the 'private enforcement' policy that everywhere else does not have. For example, our rules are:

a. Loser pays, in general, although usually not 100% for reasons of avoiding (a) the winner and his lawyer loading their costs and (b) to encourage settlement by both sides.
b. Pleading that communicates a clear view of the facts and the legal right alleged to be infringed – i.e. more than US 'notice pleading'.
c. No juries.
d. Very rare punitive damages.
e. Until recently, no success fees for lawyers. Since the 1950s, private citizens' litigation was funded by Legal Aid. Governments found that increasingly economically unsustainable, and replaced it with a privatised but regulated mechanism, the CFA, introduced in 1995 and expanded in 1999 (through increased transferability of costs to defendants). The 2010 Jackson Costs review is likely to lead to reversal of the 1999 increased transferability rule, and might also lead to the introduction of contingency fees and an extension of (now extant) third party litigation funding – but in both cases the arrangements would be regulated, and hence constrained.

[6] http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf

Martin Partington

….

And it is probably the case that, when considering the overall costs of going to court, the court fees on their own are a relatively minor component.

However, this should not lead one to assume that people rush to litigate in the UK. The nature of the court process, which is generally more formal than that found in other dispute resolution contexts, encourages parties to use professional lawyers to represent them. Unless legal aid is available to pay for professional legal representation (and the availability of legal aid is currently under severe pressure) or unless there are other ways of funding litigation (such a conditional fee agreements or the use of legal expenses insurance), the nature and consequent expense of the process in the civil courts can act as a deterrent to people taking legal proceedings. It is well known, from the research of Professor Hazel Genn (Paths to Justice, 1999) and subsequent research by the Legal Services Research Centre (see http://www.lsrc.org.uk/) that a large majority of those with justiciable problems (matters that have the potential for being taken to court) do not in fact pursue those problems through the courts (or indeed other dispute resolution procedures.) It is unlikely that expense (whether payment of court fees or payment of lawyers' fees) is the sole cause for failure to pursue matters through the courts; but it is clear from this research that fear of cost is a very important factor for many people.

By contrast with the courts, taking cases in other fora, such as tribunals or ombudsmen, typically involve the individual incurring no initial costs or only modest initial fees. Furthermore, many of these alternative dispute resolvers have been specifically designed to operate in ways which enable parties to take cases without the expense of hiring lawyers to prepare cases and to represent them.

The major exception in this context is disputes relating to individual employment matters. Although the majority of employment law issues are determined in specialist Employment Tribunals, rather than the ordinary courts, the complexity of the law has grown to such as extent as to make use of legal representation if not essential at least a very important consideration for those taking cases against their employers – whether for unfair dismissal from a job, for redundancy or for allegations of unlawful discrimination. Interestingly, employment protection legislation requires employers to fund at least some basic legal to employees who are being made redundant – designed to encourage employees to sign up to 'compromise agreements' thereby avoiding the expense of a tribunal hearing.

Australia *(Peta Spender)*

Opt out group proceedings are available in Federal Court in the Victoria Supreme Court. Representative litigation is available in most state and territory jurisdictions and the Federal Court. There is no limit on the type of relief that can be claimed in group proceedings, however where damages are being claimed this can undermine the commonality requirements of the group procedure and frequently leads to special arrangements for individual assessment of damages. These arrangements are frequently overseen by lawyers acting for the applicants.

Canada (Jasminka Kalajdzic)

All provinces except Prince Edward Island now have class action legislation. There are separate federal court class action rules exclusively for matters within the Federal Court's narrow subject matter jurisdiction as prescribed by statute and confined, for example, to actions against the federal government, those involving admiralty issues, and certain matters of intellectual property. Although defendants' classes are available, 99% of the country's class actions are brought by plaintiff classes. In Quebec, consumer associations can act as plaintiff, whereas in Ontario and other provinces, only individual persons and corporations with a direct *lis* can stand as representative plaintiffs.

Monetary damages are always sought in class proceedings. Courts have shown a reluctance to certify class proceedings seeking declarations of constitutional invalidity or of other legal rights, which can typically be resolved through a test case or an individual action for declaratory or injunctive relief, which would then be binding and achieve the same result as a class action or application. Last year, the Supreme Court of Canada decided in a 5-4 decision that a class action was not an appropriate vehicle by which to quash an allegedly unlawful municipal by-law (*Marcotte v. Longueuil (City),* 2009 SCC 43).

For more details about Canada's class action regimes, see Kalajdzic 2009.

In addition to class proceedings, the provincial rules of civil procedure permit joinder of individual claims.

III. EXCEPTIONS TO THE GENERAL RULES DESCRIBED ABOVE OF WHICH YOU ARE AWARE

A. Are there categories of cases in which the loser need not pay the winner's costs?

England and Wales

Neil Andrews

The same costs-shifting rule applies to applications for judicial review, normally against public bodies, although the rule is adjusted to reflect the special features of that procedure and its various contexts.

In special cases, so far confined to 'public interest' litigation, the courts have discretion to protect a claimant or a defendant against potential liability for costs.

….

The courts can impose an *ex ante* 'cap' on one party's capacity to recover costs from the opponent, at least in the context of defamation actions brought under conditional fee agreements without 'after-the-event' legal expenses insurance.

Australia *(Peta Spender)*

Yes, this is discussed above in relation to tribunals. In courts, there are some rules applicant who brought proceedings in the public interest will not be liable for the winner's costs, however, this argument is rarely successful.

Canada (Jasminka Kalajdzic)

See answer to II.A.2., above.

B. Are there categories of parties who are excused from having to pay the costs of a successful opposing party?

Australia *(Peta Spender)*

See above.

Canada (Jasminka Kalajdzic)

No.

C. Are there categories of cases in which the pleading rules require less factual specificity?

Australia *(Peta Spender)*

Yes, in tribunals which deal with small civil claims there is more flexibility about pleadings.

Canada (Jasminka Kalajdzic)

The Small Claims Court rules, which govern actions involving less than $25,000, have more limited pleading requirements. In Ontario, these rules require that the claim contain the following information, in concise and non-technical language:

i. The full names of the parties to the proceeding and, if relevant, the capacity in which they sue or are sued.

ii. The nature of the claim, with reasonable certainty and detail, including the date, place and nature of the occurrences on which the claim is based.

iii. The amount of the claim and the relief requested. (Rules of the Small Claims Court, Ont. Reg. 258/98, section 7.01).

D. Are there categories of cases in which the discovery rules afford greater freedom to seek information?

Australia *(Peta Spender)*

Not that I am aware of.

Canada (Jasminka Kalajdzic)

No. The proportionality principle, however, may require less or more detailed discovery. See answer to II.B.2., above.

E. In what circumstances, if any, can a plaintiff recover punitive ("exemplary") damages (i.e., damages that are not intended to compensate that party for harm but to punish the defendant)?

England and Wales

Neil Andrews

English law does not award damages without proof of actual loss suffered by individual claimants. Exemplary damages are not awarded for breach of contract. The categories of exemplary damages for tort claims are restricted to oppressive, arbitrary or unconstitutional conduct by public servants, or private persons' (or corporate) wrongdoing cynically calculated to achieve a gain, or to statutory instances of punitive damages.

Chris Hodges

So, the basic answer to the question 'Does England have 'private enforcement'?' is 'We do for private rights' but 'We don't for public norms in the way USA does'. There are some exceptions, but they are pretty rare. For example, punitive damages are theoretically available in addition to compensatory damages, but only allowed very rarely, essentially as recognition that criminal enforcement is not strong enough as a deterrent or vindication in those exceptional situations.

Australia *(Peta Spender)*

Plaintiffs can recover punitive or exemplary damages in tort in Australia where the court considers that the defendant has acted in complete disregard of the plaintiff's rights or to acknowledge the special suffering endured by the plaintiff (though the latter would more commonly be referred to as aggravated damages). However the award of punitive or exemplary damages in Australia is very rare and even where it is awarded the quantum is much lower than in the US.

Canada (Jasminka Kalajdzic)

Courts have a common law jurisdiction to award punitive damages. In addition, some consumer protection and other statutes expressly confirm the availability of punitive damages.

The Supreme Court of Canada has held that punitive damages are recoverable provided the defendant's conduct said to give rise to the claim is itself "an actionable wrong". An "actionable wrong" does not require an independent tort; a breach of the contractual duty of good faith, for example, can qualify as an independent wrong, or it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation. In addition, punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. See *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362. The Court has also cautioned that punitive damages are to be awarded in only exceptional cases.

F. In what circumstances, if any, can a plaintiff recover multiple (e.g., treble) damages?

Australia *(Peta Spender)*

Treble damages are not available in Australia.

Canada (Jasminka Kalajdzic)

Treble damages are not recoverable in Canada.

****

Martin Partington

Again I will leave others to answer these questions. From my perspective, I am more interested in court-substitute fora for the adjudication of disputes. My hunch is that the courts are not well equipped to deal with mass litigation (the reason that employment tribunals were established was fear of swamping of the county court by employment disputes)

IV. GENERAL INFORMATION ABOUT THE JUDICIARY

A. Does the judiciary (as opposed to the Parliament) make prospective, legislation-like rules to govern practice and procedure in civil cases? If so, are there limitations on its power to make such rules, and what is the source of those limitations?

Australia *(Peta Spender)*

Yes, the rule-making committees of courts make civil procedural rules to govern practice and procedure in civil cases. The power of the courts to make rules is derived from the inherent power of the Supreme Courts and therefore the limit on the court's powers to make the rules is based on an understanding of the proper ambit and operation of judicial power.

Canada (Jasminka Kalajdzic)

No. Rules of civil procedure are drafted by rules committees, on which judges and lawyers sit, but they are passed by the legislature. It is worth remembering that Quebec is a civil law jurisdiction.

B. About which of the matters in Question II.A, if any, does the judiciary bear primary lawmaking responsibility (i.e., the responsibility to *initiate* consequential reform), whether by decision or rulemaking?

Australia *(Peta Spender)*

Most of the case law and court rules which deal with the matters in Question II.A concern the details or the interpretation of rules and legislation. There have been some decisions by the courts regarding third-party funding and security for costs. However, overall the courts would consider that it is the responsibility of the legislature to initiate consequential reform in these areas.

Canada (Jasminka Kalajdzic)

The judiciary interprets the legislated rules, and may issue practice directions to supplement the rules, but has no formal rulemaking power.

C. About which of the matters in Question II.B, if any, does the judiciary bear primary lawmaking responsibility (i.e., the responsibility to *initiate* consequential reform), whether by decision or rulemaking?

Australia *(Peta Spender)*

The courts play a major role in initiating consequential reform in this area, however if a reform was radical they may prefer that it be effected by legislation.

Canada (Jasminka Kalajdzic)

Same answer as B., above.

D. Do courts infer private rights of action to enforce statutes that do not expressly so provide? If so, please state whether this is a common phenomenon and provide a few examples.

Australia *(Peta Spender)*

Judges would argue that it is a question of statutory interpretation whether a statute is enforceable by a private right of action. Therefore judges would say that they don't necessarily "imply private rights of action". However the courts do not assume that private rights of action are not contemplated by legislation and where the legislation is silent as to who may enforce the rights conferred by a statutory provision, there has been little hesitation in allowing private rights of action to develop. See for example, the use of private rights of action under the Corporations Act (Cth) and the Trade Practices Act (Cth).

Canada (Jasminka Kalajdzic)

Breach of a statutory obligation cannot by itself give rise to a civil cause of action unless so provided in the statute which establishes the obligation: *Canada v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (S.C.C.). Breach of statute, where it has an effect upon civil liability, is considered in the context of the general law of negligence.

E. Is there judge-made law concerning standing to sue? If so, what are the general requirements, and have they changed noticeably over time?

Australia *(Peta Spender)*

Yes, there is a lot of judge-made law concerning standing to sue. The requirements are too disparate to set out here, but I'd be happy to provide you with details of the specific area if you get back in touch with me.

Canada (Jasminka Kalajdzic)

It is a fundamental precept of the Canadian justice system that the validity of government intervention (including regulation) must be reviewed by courts. Even before the passage of the *Charter* the Supreme Court of Canada considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases: *Thorson v. Attorney General of Canada*, 1974 CanLII 6, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, 1975 CanLII 14 (S.C.C.), [1976] 2 S.C.R. 265, and *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (S.C.C.), [1981] 2 S.C.R. 575. Writing for the majority in *Borowski*, Martland J. set forth the conditions which a plaintiff must satisfy in order to be granted standing, at p. 598:

. . . to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a

serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

The question of standing was first reviewed in the post-*Charter* era in *Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (S.C.C.). In that case the Court extended the scope of the trilogy and held that, where a private litigant with a direct private interest in the matter is not expected to initiate an action, courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation.

***

Martin Partington

The judiciary does have powers to make procedural rules, in both courts and tribunals. (In this context it is important to remember there are two distinct branches of the judiciary, with somewhat different approaches to judging.) They are also very importantly (and not mentioned in the questionnaire) responsible for their training ….Richard Moorhead has published an excellent report on the challenges litigants in person give to the judiciary; the tribunals judiciary however has a lot of experience in dealing with litigants in person and the ways in which parties may be assisted to present their case without the tribunal itself losing its impartiality.

V. SPECIFIC INFORMATION: SECTORAL COMPARISONS

A. Employment Discrimination: Hiring and Wages[7]

1. Are there laws (statutory or administrative prohibitions) against discrimination in hiring or wages in your country? (If not, proceed to Question 13 below) If so:

Australia *(Peta Spender)*

Yes, these laws exist at both the federal and state and territory levels.

Canada (Jasminka Kalajdzic)

There are a number of statutes governing the employment relationship. Employment standards legislation in each province as well as the federal government sets out minimum standards for working conditions (wages, hours of work, overtime, parental leave, termination pay, etc.). These statutes do not specifically address discrimination.

[7] We have deliberately avoided discriminatory terminations because of concern about possible conflation/confusion resulting from common law doctrine.

Human rights legislation in each province and federally provides protection against discriminatory treatment in a number of sectors, including employment. Such legislation prohibits employers from discriminating against job applicants or employees on the basis of race, nationality, ethnicity or place of origin, colour, religion or creed, marital status, mental or physical disability, sex and sexual orientation. Most, but not all, provinces also protect against discrimination on the basis of family status or due to a criminal conviction for which a pardon has been granted. All jurisdictions prohibit discrimination based on age, but the definition of age varies. In Ontario, protection against discrimination in employment only extends to persons over 18 years of age. Mandatory retirement at age 65 is no longer permitted under human rights codes.

Human rights protection in employment has been interpreted very broadly, to include all aspects of the employer-employee relationship – from advertising a job posting and interviewing candidates, to wages, promotion, workplace culture and termination.

Section 15 of the *Charter of Rights and Freedoms* also guarantees equality of treatment in the same protected spheres, but the *Charter* applies to unlawful conduct of government agencies and officials (and therefore applies only to employees of government bodies).

2. What bases of discrimination are covered by the primary law, whether national or sub-national[8] (e.g., race, sex, religion, national origin, sexual orientation, disability, age, etc.)?

Australia *(Peta Spender)*

By way of example, the following bases of discrimination are covered in the ACT legislation in section 7 of the Discrimination Act (ACT)

(a) sex;
(b) sexuality;
(c) gender identity;
(d) relationship status;
(e) status as a parent or carer;
(f) pregnancy;
(g) breastfeeding;
(h) race;
(i) religious or political conviction;
(j) disability;
(k) industrial activity;

[8] If the primary laws are sub-national, please choose the law for which the greatest amount of information is available to you and specify your choice.

(l) age;
(m) profession, trade, occupation or calling;
(o) spent conviction

Canada (Jasminka Kalajdzic)

See answer to 1, above.

3. What role, if any, does government-initiated enforcement play, what is the enforcement process, what tribunal(s) have jurisdiction, and what remedies are available if discrimination is proved (e.g., declaratory relief, injunctive relief, back pay, compensatory damages, punitive damages)?

Australia *(Peta Spender)*

Government initiated enforcement plays almost no role in this area.

Canada (Jasminka Kalajdzic)

Human rights commissions in some provinces have the authority to conduct self-initiated investigations and prosecutions of suspected violations, usually those of a systemic nature. Most human rights complaints, however, are initiated by the affected individual. However initiated, such complaints are either settled through mediation or adjudicated by the human rights tribunal, which has the jurisdiction to make the complainant whole, by way of an order for compensatory and aggravated damages, reinstatement, back-pay and workplace education or other anti-discrimination measures.

4. What role, if any, does privately-initiated enforcement play, what is the enforcement process, who has standing to commence a proceeding, what tribunal(s) have jurisdiction, and what remedies are available if discrimination is proved (e.g., declaratory relief, injunctive relief, back pay, compensatory damages, punitive damages)?

England and Wales

Richard Moorhead

Private enforcement is significant although there is also a measure of enforcement activity via the Equality and Human Rights Commission (http://www.equalityhumanrights.com/)

Australia *(Peta Spender)*

In most cases, the complaint is privately initiated by an individual with the relevant State, Territory or Federal agency that deals with discrimination matters. The complaint is subject to conciliation and if conciliation fails to resolve the dispute, the complaint is either referred by the agency to a tribunal or the complainant brings separate proceedings in the tribunal. At the federal level, the Federal Court and Federal Magistrates Court perform the functions that are otherwise performed by the tribunal at the State and Territory level.

The relief that may be claimed includes injunctions (both mandatory and prohibitory) and damages. Although damages are payable, the quantum is low relative to comparable tort claims. A recent average amount is about $24,000.

If a party wishes to enforce an award of the tribunal, the award must be registered in a court in order to bring further enforcement proceedings.

Standing is expressly dealt with under the relevant discrimination legislation, though representative proceedings are generally allowed.

Canada (Jasminka Kalajdzic)

Privately-initiated enforcement plays a huge role. Employees have a number of options available to them: file a complaint with the Employment Standards branch of the provincial Ministry of Labour; file a complaint with the Human Rights Tribunal; grieve (if a unionized work setting); or launch a civil action.

Employment Standards. Generally, the enforcement process begins with an aggrieved employee filing a complaint of breach of the act with the provincial department of labour. An official of the employment standards branch will then investigate the complaint and attempt to settle the dispute through conciliation. Failing a settlement, the director of the branch may order the employer to comply with the Act, reinstate the employee, and/or compensate the employee for his losses. The director will collect the monies owed on behalf of the employee, thereby obviating the need to pursue traditional methods of debt collection (England, 116).

Most provincial employment standards statutes expressly preserve the civil remedies of employees covered by the acts though employees must choose one route or the other; an employee who has filed a complaint under the statutory procedure is precluded from subsequently litigating a wrongful dismissal action. In many cases, civil litigation to enforce the employment contract is beyond the financial means of most workers. Numerous studies have shown that securing compliance with employment standards acts has proven to be very difficult, especially for part-time workers, casual workers and homeworkers, as well as members of visible minorities (England, 115).

Human Rights. A complaint of breach of the act is normally filed by the victim personally, although some provincial codes (like Ontario's *Human Rights Code*, R.S.O. 1990, c.H-19) permit a person or organization to file a complaint on behalf of the victim, with the latter's consent. Although the majority of complaints are settled via mediation, the Tribunal adjudicates many cases and has very broad remedial authority. The legislation adopts a "make whole" approach, which results in the employer being liable for all reasonably foreseeable losses, including loss of future earnings and benefits, reinstatement and damages for mental distress (England, 254-259). The Tribunal also has the power to order any number of anti-discrimination initiatives in furtherance of its mandate to eliminate discrimination from the workplace for the benefit of all workers.

Although the Supreme Court of Canada once held, out of deference to the expertise of the human rights tribunals, that a human rights breach could not be litigated in civil courts, courts now do permit a common law action in tort on a contract involving behaviour by the employer that potentially runs afoul of human rights codes, so long as the cause of action can stand on its own, and does not depend exclusively on the breach of the code (MacTavish & Lenz). Recent amendments to Ontario's Code create a new substantive jurisdiction in the Superior Court for breaches of the Code, so long as the claim does not rest solely on the statutory breach (section 46.1 of the *Human Rights Code*, which came into force on June 30, 2008).

5. If a non-government actor can initiate but not prosecute enforcement proceedings, is that actor eligible for any form of award (e.g., back pay, compensatory damages) if discrimination is proved?

Australia *(Peta Spender)*

Not applicable.

Canada (Jasminka Kalajdzic)

Yes – see remedies described above. These are available to the victim of the discriminatory behaviour.

6. If both governmental and non-governmental actors can prosecute enforcement proceedings, what if anything distinguishes the situations in which government officials prosecute enforcement proceedings and when nongovernmental actors do so?

Australia *(Peta Spender)*

Not applicable.

Canada (Jasminka Kalajdzic)

n/a

7. Whoever is entitled to initiate or prosecute enforcement proceedings, are those proceedings governed by any special rules (i.e., different from the normal rules inquired about in Question II) with respect to any of the following:

a. Court costs (amount)
b. Party costs (including attorney fees) (responsibility for)
c. Punitive and/or multiple damages
d. Attorney fee contracts (i.e., contingency or conditional fee)
e. Pleading
f. Discovery
g. Class or other representative litigation

Australia *(Peta Spender)*

No.

Canada (Jasminka Kalajdzic)

a., b. Costs There are no filing fees at the human rights tribunals. Administrative tribunals do not possess an inherent jurisdiction to award costs to a successful party; any such jurisdiction must be found in the constating statute. Some human rights acts, like Saskatchewan's and B.C.'s, include costs provisions. Ontario had such a provision up to 2008 (but even then costs would only be awarded if the complaint was found to be frivolous or vexatious, or had caused undue hardship). The 2009 overhaul of the Ontario human rights regime did not maintain a jurisdiction to award costs. Tribunals have ruled that they have no jurisdiction to award costs as a result: see *Facciolo v. 1383078 Ontario*, 2010 HRTO 1686 (CanLII).

f. Discovery Ontario's Code authorizes the Tribunal to order the production and examination of records; require a party to a proceeding or another person to produce any document, information or thing, provide a statement or oral or affidavit evidence, or adduce evidence or produce witnesses who are reasonably within the party's control. In addition, the Tribunal may appoint someone to conduct an inquiry; such person has subpoena power and the right to enter onto the employer's premises and inspect documents, etc.

g. Class Proceedings Few human rights class actions have been litigated in Canada. In a very recent decision dismissing a proposed class action on behalf of public housing tenants suffering from mental disabilities, the Superior Court of Justice held that "if a claim for discrimination is founded upon a breach of the *Ontario Human Rights Code* or invokes the public policy expressed in the *Code*, the claim is to brought to the Ontario Human Rights Commission and not the courts." (*Mackie v. Toronto (City) and Toronto Community Housing Corporation*, 2010 ONSC3801 at para. 62.)

Overtime class actions have fared somewhat better. In *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, the Ontario Superior Court of Justice certified a class of bank employees who claimed that they were not paid for overtime, in contravention of their contracts of employment and the *Canada Labour Code* (the federal equivalent to provincial employment standards acts). While the court agreed with the defendant that the proposed class had no cause of action based on breaches of the Labour Code (for reasons identical to those offered in *Mackie*, above), Strathy J. did not foreclose the possibility that the protections under the statute could found implied duties of the employer in its contracts with employees.

In *Kumar v. Sharp Business Forms Inc.*, [2001] O.J. No. 1729 (S.C.J.), Cumming J. certified a class action for overtime pay and vacation pay under the *Employment Standards Act.* The issue of jurisdiction is more straightforward given that the legislation in question expressly allows civil court enforcement of the Act, so long as the employees had not previously elected to pursue the administrative tribunal regime.

8. Please provide a citation to the primary law(s), whether national or sub-national.

England and Wales

Richard Moorhead

The Equality Act 2010

http://195.99.1.70/acts/acts2010/pdf/ukpga_20100015_en.pdf

Australia *(Peta Spender)*

Federal -- Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992, Age Discrimination Act 2004.

ACT -- Discrimination Act 1991, Human Rights Commission Act 2005

Canada (Jasminka Kalajdzic)

(Citing Ontario only; provincial or federal equivalents are also available on www.CanLii.org.)

Human Rights Code, R.S.O. 1990, c.H.19

Employment Standards Act, R.S.O., 1990, c. E.14

9. Are there any "landmark" court decisions that have affected the enforcement of law in this area within the past decade? If so, please provide a citation.

Australia *(Peta Spender)*

Most of the landmark decisions about enforceability occurred prior to the last 10 years.

Canada (Jasminka Kalajdzic)

Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 (CanLii) [determining when the decision of an administrative official, such as an employment standards officer, gives rise to issue estoppel].

Jeffer v. York University, [2009] O.J. No. 4606 (S.C.J.) [human rights tribunals have exclusive jurisdiction]

Rasanen v. Rosemount Instruments Ltd. (1994), 1 CCEL (2d) 161 (Ont.C.A.) [decision by employment standards referee that worker unreasonably refused employer's offer of alternal employment precluded worker from subsequently bringing civil action for constructive dismissal].

10. Have there been any empirical studies of enforcement of the law(s) in this area, whether privately- or publicly-initiated? If so, please provide a citation (or a copy if unpublished).

Australia *(Peta Spender)*

See for example R Hunter and A Leonard "The Outcomes of Conciliation in Sex Discrimination Cases", *Working Paper No. 8,* Centre for Employment and Labour Relations Law, University of Melbourne; L Thornwaite, "The Operation of Age Discrimination Legislation in New South Wales in Relation to Employment Complaints" (1993) 6 *Australian Journal of Labour Law* 31; A Devereux, "Human Rights by Agreement? A Care Study of the Human Rights and Equal Opportunity Commission's View of Conciliation" (1996) 7 *Australasian Dispute Resolution Journal* 280, A Chapman and G Mason, " Women, Sexual Preference and Discrimination Law: a Case Study of the New South Wales Jurisdiction" (1999) 21 *Sydney Law Review* 525.

Canada (Jasminka Kalajdzic)

See sources cited in England, 105-110 (regarding employment standards) and 246 ("a plethora of studies have shown that human rights commissions, nationwide, have performed poorly over many years in enforcing the legislation, especially in the following areas [listing employment, among others]").

11. Are regular statistics published (or posted electronically) that document experience under the primary law(s) as to such matters as the number of

proceedings commenced, dispositions and appeal rates? If so, please provide a citation or web link.

England and Wales

Richard Moorhead

You have the link to the Employment Tribunal data above. There may also be data on the EHRC website above.

Australia *(Peta Spender)*

Yes, information is often provided in the annual reports of the relevant agencies e.g. the Australian Human Rights Commission (Cth), http://www.hreoc.gov.au/ the Anti-Discrimination Board (NSW) http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_aboutus , and the ACT Human Rights Commission http://www.hrc.act.gov.au/

Canada (Jasminka Kalajdzic)

For statistics re: employment standards complaints, see Ministry of Labour sites of each jurisdiction. For example, Ontario's enforcement statistics are available online at http://www.labour.gov.on.ca/english/es/pubs/enforcement/index.php.

For statistics re: human rights complaints up to 2008, see Human Rights Commission Annual Reports, online at http://www.ohrc.on.ca/en/resources/annualreports/ar0809/pdf. Effective 2008, Ontario adopted a direct access model, whereby complaints do not need to be investigated by the Commission then referred to the Tribunal for adjudication. As a result, enforcement statistics will be maintained by the Tribunal and posted on its website, www.hrto.ca, once tabled in the Legislature.

12. Have there been any recent serious proposals, whether official or not, to change the law and/or the enforcement regime in this area? What are the major elements of the proposal(s)? Have those making them stated their reasons (e.g., perception that existing level of enforcement is inadequate, concern about budgetary implications of greater public enforcement, concern about over-deterrence under current regime)?

Australia *(Peta Spender)*

There is an ongoing concern about whether the relevant agencies are sufficiently resourced and the consequences of this for the conciliation phase of the proceedings. There are also arguments about the formalisation of the conciliation phase. However the author is not aware of other recent serious proposals for changes to the enforcement regime.

Canada (Jasminka Kalajdzic)

No official proposals are known. A thorough literature review would need to be conducted to determine if unofficial calls for reform have achieved any consensus.

14. Are there any specialized organizations or sections of general organizations of lawyers that focus on these kinds of cases?[9]

Australia *(Peta Spender)*

Certain firms of lawyers and community legal centres specialise in this area of law but I am not aware of specialised organisations that deal with it.

Canada (Jasminka Kalajdzic)

The Ontario Human Rights Legal Support Centre is staffed by lawyers who assist complainants in filling out forms, answering general legal and procedural questions, and in some cases providing legal representation before the Tribunal. As damage awards are not usually very high in human rights matters, it is difficult to retain the services of a lawyer in private practice.

Some community legal clinics specialize in employment claims, while others will provide advice if the client meets strict income requirements.

15. Are advocates other than fully qualified legal professionals (lawyers, solicitors, etc.) permitted to represent individuals or organizations bringing cases alleging hiring or wage discrimination?

Australia *(Peta Spender)*

Individuals or organisations may be represented by lay advocates though such lay advocates frequently need to seek leave and prove the consent of the right-bearer to represent them e.g. through a power of attorney.

Canada (Jasminka Kalajdzic)

Paralegals may represent claimants before the Human Rights Tribunal and before the Employment Standards Branch.

[9] Question 13 did not apply given responses to other questions.

16. Are there any administrative tribunals where such cases can be prosecuted? If so, how do the rules governing those tribunals differ from court rules (e.g., simpler pleading/complaint rules, different discovery rules, less restrictive rights of audience, different rules vis-à-vis costs, etc.)

Australia *(Peta Spender)*

Yes, at the State and Territory level, after conciliation in the agencies, the complaint proceeds to tribunals. These tribunals are empowered under legislation to decide their own procedures and therefore their rules are less prescriptive than courts and their procedures (including their procedures regarding disclosure) are more informal. The general rule is to costs in tribunals is discussed above.

Canada (Jasminka Kalajdzic)

The Human Rights Tribunal, like other administrative tribunals, is governed by its own statute and more generally the *Statutory Powers Procedures Act,* R.S.O. 1990, c. S.22 ("SPPA"). The *Human Rights Code* contains numerous provisions conferring broad inquisitorial powers on the Tribunal members (see answer to V.A.7, above). The Tribunal has the power to order alternatives to traditional adjudicative or adversarial procedures. The rules of evidence are relaxed (so, for example, the Tribunal may admit evidence that is not given under oath), but the ordinary rules regarding privilege are maintained (s. 15, SPPA).

17. If there are administrative tribunals for such cases, what is the relationship between such tribunals and the courts (i.e., what controls where cases go, and how they move from one venue to another)?

Australia *(Peta Spender)*

The discrimination legislation states where cases will go and most of the legislation of the State and Territory level adopts a more informal model of dispute resolution, which points to tribunals rather than courts. However, as stated above, orders of the tribunal must be enforced through courts. At the federal level, where the Constitution requires that judicial power made only be vested in courts, the courts are the nominated venue for discrimination cases and enforcement of orders can remain within the court system, although the procedures are often more formal.

Canada (Jasminka Kalajdzic)

See discussion under V.A.4 and 7, above.

18. Are employers permitted to require employees to consent to private dispute resolution mechanisms (e.g., arbitration) as a condition of employment? If so, is

there any research on how such contract restrictions have affected private enforcement?

Australia *(Peta Spender)*

No, contracts of employment are subject to industrial instruments which do not allow clauses to operate which they oust the jurisdiction of courts and tribunals. It is now the case in 2010 that employees cannot contract out of industrial instruments. Even if an executive employee purported to do so, the courts would still have oversight of the arbitration under the state and territory legislation which regulates arbitration. See for example the Commercial Arbitration Act (ACT) 1986.

Canada (Jasminka Kalajdzic)

Employers cannot contract out of their obligations under human rights and employment standards legislation, nor can they prevent an employee from seeking relief as permitted in the statutory regime.

****

Chris Hodges

Hence, I am concerned about whether you are making valid comparisons in your two examples. Employment rights are essentially personal in UK, and so enforced in private civil actions. [I do not know whether there are *extra* regulatory provisions as well, I think not, but they would be enforced by the public authorities. I cannot think of a relevant public authority for general employment law, but might be wrong. There are some agencies for Equality and Racial Discrimination. But I leave that area to experts.]

Employment law claims are interesting. First, private claims are brought in Employment tribunals, not in courts. The reasons lie in deployment of expertise and some informality, although there has been much criticism of the current Tribunal rules and procedure for being too complex. Secondly, by a historical accident, the ban on contingency fees that applies to claims brought in 'contentious litigation', i.e. to court claims, has not applied to claims in tribunals. Accordingly, contingency fees have been allowed in employment claims. ...

Employment law essentially concerns individual rights, and an individual relationship between an employer and employee, so it should not be surprising that this is an area that is dealt with by private law and by a dispute resolution mechanism that deals with the resolution of private issues, namely Employment Tribunals. There are not many public policy issues here. But there are some. One is equal pay. Various aggregate individual claims have been brought by an enterprising solicitor on behalf of groups of women. There has been debate recently about how to make women's pay catch up with men's. ... The outcome was that a private law remedy (to enforce a private law obligation to pay equally, which probably already exists) was rejected and instead a public law obligation was imposed on local authorities to produce a plan to achieve

equal pay. The absence of a plan, or an ineffective plan, could be pursued as a judicial review in the courts (i.e. a public remedy) or a political matter. The choice was expressly influenced by (a) the need to avoid swamping local authorities in costly litigation, (b) the serious financial difficulties in which all public authorities now find themselves, but (c) a pragmatic move toward the equality policy when this can be prudently achieved. Litigation now just would not solve anything, and would cost ratepayers.

B. Consumer Protection: Deceptive Consumer Sales

1. Please provide a citation to the most prominent law or laws (statutory or administrative prohibitions, national or sub-national) dealing with unfair or deceptive consumer practices in your country. (If there are none, proceed to Question 13 below)

England and Wales

Iain Ramsay

The Consumer Protection from Unfair Trading (CPUT) Regulations 2008 http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1 is the primary law addressing unfair and deceptive consumer practices in the UK. This regulation implements in UK law the 2005 EU Unfair Commercial Practices Directive and involved the repeal of over 20 existing consumer protection statutes, including the previous "workhorse" statute in this area, The Trade Descriptions Act 1968. There are other specialized laws on misleading and unfair practices (e.g. the Consumer Protection (Distance Selling) Regulations 2000 and credit and financial services legislation (see e.g. Consumer Credit Act 1974 enforced by the Office of Fair Trading and overlapping role of the Financial Service Authority under the Financial Services and Markets Act 2000). These agencies can police misleading credit practices through licensing and conduct of business rules and the Financial Services Authority may require firms to make restitution. In addition the Financial Ombudsman Service plays an important role in consumer redress in relation to financial services. But I will focus on the CPUT regs.

Australia *(Peta Spender)*

Trade Practices Act 1974 (Cth) ("TPA"), Fair Trading Act (ACT) and other state and territory equivalents.

Canada (*Marina Pavlovic*)

A large part of the private aspects of consumer protection (and private enforcement) are within provincial regulatory jurisdiction. Public aspects are shared between the federal and provincial governments. The core of the current Canadian legislative

structure for consumer protection online arguably rests on four main legislative constructs:

- Provincial consumer protection legislation (e.g., the Ontario Consumer Protection Act 2002)
- Competition Act
- Personal Information Protection and Electronic Documents Act (PIPEDA)
- Criminal Code

In addition, and depending on the issue, other issue- or industry-specific legislation may also be involved. However, at present, these four main instruments address most issues in consumer protection. Table 1 (in the appendix) presents a broad legislative framework for consumer protection. Each act is prefaced with either [F] or [P] to denote the jurisdiction (federal or provincial, respectively).

2. What forms of practices are covered by that law?

England and Wales

Iain Ramsay

The CPUT regs. cover "unfair commercial practices" (defined in reg. 2(1)) by a trader to a consumer before, during and after a transaction. They extend to commercial practices in relation to "any goods and services" including immovable property. The regs. include a "grand general clause" prohibiting commercial practices contrary to "professional diligence" (reg. 2(1) "contrary to honest market practice or the general principle of good faith in the trader's field of activity"), general prohibitions on misleading actions and omissions and aggressive commercial practices, and 31 practices which are prohibited per se (see Schedule 1 for list). Apart from the per se prohibitions it is necessary to show that a practice is likely to lead an average consumer (defined in reg.2(2)-2(6)) to take a transactional decision (defined in reg.2(1) he would not have taken otherwise.

Australia *(Peta Spender)*

TPA - Misleading and deceptive conduct, unconscionable conduct, false representations, bait advertising, pyramid selling, breach of implied warranties such as unmerchantable quality etc. The State and Territory Fair Trading Acts have similar provisions which are enforceable in the state and territory courts and tribunals.

Canada (*Marina Pavlovic*)[10]

Competition Act

The Competition Act is a federal statute governing business conduct in Canada and it focuses "at preventing anti-competitive practices in the marketplace." One of the Competition Act's objectives is to "provide consumers with competitive prices and product choices." The Act provides both criminal and civil enforcement regimes. The Competition Bureau, an independent law enforcement agency is responsible for administering the Competition Act and several other federal statutes. Provisions under the criminal regime of the Competition Act prohibits materially false or misleading representations made knowingly or recklessly, deceptive telemarketing, deceptive notices of winning a prize, double ticketing, pyramid selling schemes, and multi-level marketing. Under the civil regime, the Competition Act prohibits materially false or misleading representations, performance representations not based on adequate and proper tests, misleading warranties and guarantees, false or misleading ordinary selling price representations, untrue, misleading or unauthorized use of tests and testimonials, bait and switch selling, and the sale of a product above its advertised price. The promotional contest provisions prohibit contests that do not disclose required information."

Ontario Consumer Protection Act

The Ontario Consumer Protection Act 2002 (Ontario CPA) came into force on 30 July 2005 and has been enacted largely to update the consumer protection legislation dating back to 1970s. The guiding principles of the Ontario CPA are: encouraging fairness in the marketplace, ensuring proper disclosure rules, ensuring that the consumers receive fair, ensuring that the legislation is responsive to both businesses and consumers, and ensuring flexible that would allow the Act to respond to future needs and changes.

The Ontario CPA applies to all consumer transactions taking place in Ontario (a business or a consumer must be resident in Ontario at the time of transaction), including internet agreements, over CAN$50. Consumer transactions are defined as transactions involving individuals who purchase goods or services for personal, family or household purposes.

The Act regulates the following agreements: future performance agreements, time share agreements, personal development services, direct agreements, remote agreements, repairs to motor vehicles and other goods, credit agreements, assignment of security for credit, and leasing. Sections 37–40 of the Ontario CPA contain specific provisions regarding internet (text-based communication) agreements, and sections 44–47 provide rules for remote agreements. Part III of the Ontario CPA incorporates consumer protection provisions relating to unfair business practices. Making a false, misleading or deceptive representation about goods or services is considered unfair practice, and the Ontario CPA includes a non-exhaustive list of false, misleading or

[10] Professor Pavlovic provided information on provincial statutes from Ontario and Quebec as examples of the provincial statutes across Canada.

deceptive representations, and a list of unconscionable representations. Failure to comply with the Act, regulations under the Act, or an "order, direction or other requirement", is an offence (provincial offence). Any person who attempts to commit such an offence is also guilty of an offence. Directors or officers of a corporation are guilty if they do not take reasonable care to prevent the corporation from committing any of the above.

Quebec Consumer Protection Act

The Quebec Office de la protection consummateur (Consumer Protection Office—CPO) has been operating since 1971. The CPO administers the Consumer Protection Act (Quebec CPA), as well as several other related statutes. The Quebec CPA applies to every contract for goods and services entered into between a consumer and a merchant, with the exception of some regulated industries. A consumer is defined as a natural person, other than a merchant, who obtains goods or services for the purposes of his business. The Quebec CPA does not contain explicit references to internet agreements.

The Quebec CPA regulates the following agreements: contracts regarding goods and services, warranties, distance contracts, contracts by itinerant merchants, credit contracts, insurance, installment sales, long term lease of goods, contracts relating to automobiles and motorcycles, repair of household appliances, contract of service involving sequential performance. Sections 54.1–54.16 deal with distance contracts but there are not other provisions regulating internet contracts. Title II of the Quebec CPA incorporates consumer protection provisions relating to unfair business practices. Making a false or misleading representation to a consumer is considered and unfair practice, and the Quebec CPA contains detailed provisions describing such practices.

Recent amendments to the Quebec CPA have introduced important changes to significantly strengthen consumers' redress. Consumer protection organizations are now able to apply for injunctions against prohibited stipulations (unfair business practices). The amendments have also introduced the creation of funds to indemnify consumers, which require further implementation.

3. What role, if any, does government-initiated enforcement play, what is the enforcement process, what tribunal(s) have jurisdiction, and what remedies are available if a violation is proved (e.g., declaratory relief, injunctive relief, back pay, compensatory damages, punitive damages)?

England and Wales

Iain Ramsay

Government enforcement combines decentralized enforcement by Trading Standards Officers throughout the UK (about 200 local authority trading standards departments throughout the UK) and the Office of Fair trading. Both have a duty to enforce the Act. Local enforcement involves some proactive monitoring. The regulations may be

enforced by quasi-criminal sanctions (liability arising from fact of offence with defences of due diligence: mens rea is required in relation to offences under grand general clause). Sanctions are fine or imprisonment.
Civil enforcement orders and interim enforcement orders (injunctions), and undertakings may be sought where a contravention of regs. harms the "collective interests of consumers" (see Part 8 Enterprise Act 2002). In an application for an enforcement order the court may require the defendant to provide evidentiary substantiation of the accuracy of any factual claim (s218A Enterprise Act 2002). Enforcers may also have regard to the desirability of encouraging compliance through "established means" (reg.19(4)). In the UK this recognizes the role of advertising self-regulation through the Advertising Standards Authority which plays a significant role in advertising regulation. A pilot programme to test the use of fixed monetary penalties under the CPUT regulations was proposed in March 2010 but I am not aware of whether it has proceeded in the light of the change in government. See http://www.bis.gov.uk/assets/biscore/corporate/docs/c/10-706-civil-sanctions-pilot.pdf
Since the Hampton Report in 2005 there has been increased effort to co-ordinate enforcement as part of "better regulation". A Local Better Regulation Office was established on a statutory footing under the Regulatory Enforcement and Sanctions Act 2008. The OFT plays a co-ordinating role in relation to civil enforcement under Part 8 of the Enterprise Act and is required to provide guidance. This can be consulted on the OFT website at http://www.oft.gov.uk/about-the-oft/legal-powers/legal/enterprise-act/part8/publications as can the 2010 OFT Statement of Enforcement Principles
http://www.oft.gov.uk/shared_oft/reports/consumer_protection/OFT1221
Criminal actions may be prosecuted in the Magistrate's court or the Crown Court, but would generally be prosecuted in Magistrate's court. Enforcement orders would be sought in the County Court or High Court.
There is the possibility in a criminal prosecution to request a compensation order for victims of a practice under ss130-131 of the Powers of Criminal Courts (Sentencing) Act 2000. A study indicated that in 2004-05 (under the Trade Descriptions Act 1968) an aggregate of £53,088 was awarded (OECD, Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes (2006) paras. 148-151).
http://www.oecd.org/document/45/0,3343,en_2649_34267_35935597_1_1_1_1,00.html . The Regulatory Enforcement and Sanctions Act 2008 envisages the possibility of regulators applying for wider enforcement powers than currently exist including the ability to include compensation orders to consumers in undertakings by firms . The OFT has not requested additional powers under RESA. It is possible that the OFT persuades businesses to provide compensation to consumers under their various regulatory powers (e.g credit licensing) but they have no explicit power currently under Part 8 to require that compensation be provided.

Australia *(Peta Spender)*

Government-initiated enforcement plays a significant role here because the regulator (the Australian Competition and Consumer Commission– "ACCC") can bring

proceedings for breach of the Trade Practices Act. Similarly, the regulatory agencies operating at the State and Territory level can also initiate actions for breach of the Fair Trading Acts. The relevant venues are as follows. At the federal level, the Federal Court and Federal Magistrates Court have jurisdiction and at the State and Territory level, actions can be brought in tribunals for claims up to a certain value (e.g. $10,000) and over that threshold in Local/Magistrates Courts up to a certain value (e.g. $50,000) and over that threshold in the Supreme Courts. Most remedies are available in the courts e.g. declaratory relief, injunctive relief and compensatory damages though, as stated above, punitive damages are rarely awarded. These remedies are generally available in courts and tribunals up to the monetary threshold, however because the powers of the statutory courts (i.e. the courts that are not superior courts with an inherent jurisdiction) are conferred by legislation, there may occasionally be disputes about the ambit of the power of the statutory court and tribunals to make certain orders.

Canada (*Marina Pavlovic*)

Provincial Consumer Protection Ministries

Ontario: Minister of Consumer and Business Services
The Ontario CPA grants the Minister of Consumer and Business Services the right to enforce the act and other legislation for the protection of consumers. The Minister may also delegate her powers, and may also enter into agreements with law enforcement agencies from Ontario and other jurisdictions for the purpose of consumer protection. These agreements allow the Minister to exchange information concerning breaches or possible breaches of the Ontario CPA or related consumer protection legislation. The Director of the Ministry of Consumer and Business Services must maintain a public record of compliance orders issued under the Ontario CPA as well as other documentation ("Consumer Beware List"). The Director of the Ministry of Consumer and Business services (directly or through delegated authority to others) has both investigative and enforcement powers regarding consumer protection.
The Director may appoint investigators to investigate complaints under the Ontario CPA. Investigators are designated Provincial Offences Officers and Special Constables and these designations give them powers to lay charges and execute search warrants under the consumer protection legislation. Investigators can apply to a justice of the peace for a search warrant if there are reasonable grounds to believe that a person has contravened or is contravening the Ontario CPA, or if there is evidence of such a contravention in any building, dwelling, receptacle or place. They can also seek the assistance of the police or other experts, and can use force that is reasonably necessary to execute the warrant. The Ontario CPA specifies other details surrounding the search warrants, including the time of execution, expiry dates, admissibility of evidence and incidental search powers. Investigators can also conduct warrantless searches in extreme circumstances where obtaining a warrant would be impracticable, though that power does not extend to searches of dwellings.

When a consumer makes a complaint to the Ministry, attempts are made by the Consumer Services Bureau to resolve the matter. If the attempt fails and if the matter falls under the contraventions identified in the Act, the Ministry will conduct an investigation. The purpose of the investigation is to obtain documentary and physical evidence to determine if charges can be laid against an individual or a Corporation and its Directors. Investigators with the Ministry are designated Provincial Offences Officers and Special Constables and can lay charges and execute search warrants under the Ontario CPA. Investigations of a criminal nature are not investigated and are forwarded to the Police. Once charges are laid against an offender in-house legal counsel carries the matter through the courts. Cases brought to court under the Ontario CPA are heard in Provincial Offences Court. Individuals convicted of an offence under the Ontario CPA are liable to a maximum fine of CAN$50,000, a maximum imprisonment for a term of two years less a day or both. A corporation is liable to a maximum fine of CAN$250,000. A court may order the offender to pay compensation or make restitution in addition to the above penalties.

If the matter proceeds to trial and there is a successful penalty decision, in-house crown counsel can apply to court to have the defendant pay restitution to the consumer. The defendant can pay the full amount at once or pay in instalments as part of the conditions of a probation order imposed by the court. The investigator will monitor the probation period to ensure that the defendant complies with the conditions of probation. If the defendant fails to comply with the probation order, the Ministry investigator has the authority to charge the defendant with breaching the conditions of their probation order and the defendant has to return to court.

The Director may also order a person to stop making false, misleading or deceptive representations in respect of any consumer transactions, if there are reasonable grounds to believe that person is doing so. The Director can also issue other types of orders, such as:

- Compliance Order: if the Director believes on reasonable grounds that a person has contravened or is contravening the Ontario CPA, that person will be directed to comply with the act. The Director must give notice of the proposed order with written reasons.
- Order for Immediate Compliance: the Director may make an order for immediate compliance if in the Director's opinion it is in the public interest to do so. If the named person requests a hearing, the order expires 15 days after the written request for a hearing, though the Tribunal can extend that deadline in certain circumstances.
- Freeze Order: if the Director has issued a search warrant and made one of the above orders, or where a person has undertaken voluntary compliance, the Director can order a freeze of a person's funds or assets, with some exceptions.
- Restraining Order: if a person is not complying with the Ontario CPA, the Regulations or an order, the Director may apply to the Superior Court of Justice for an order directing that person to comply. The named person can apply to the Divisional Court to review the order.

A person named in an order may enter into a written undertaking of voluntary compliance at any time before all rights of appeal have been exhausted. The

undertaking may be to cease engaging in a specified act, to compensate a consumer, publicize the undertaking, pay legal costs related to the undertaking, or to take any other action the Director considers appropriate. The undertaking has the force and effect of an order, and the Director may require the person giving an undertaking to provide security.

"From January 2008 to November 2009, the Ministry of Consumer Services conducted 597 compliance inspections and field visits and laid 2,777 charges."

In addition, the Ministry of Consumer Services (Consumer Services Bureau) is responsible for mediating/handling consumer complaints. In 2009, the Ministry received 55,000 complaints. "From January 2008 to November 2009, the Ministry of Consumer Services obtained over $740,000 in mediated refunds for consumers." The Ministry maintains the list of List of top 10 complaints by year, and based on the available information, none of the top 10 complaints seem to be related to the consumer protection on the internet.

Quebec: Office de la protection consommateur

The Quebec CPA established the Office de la protection consummateur ("Office") and defines the scope of its duties. The Office is responsible for protecting consumers by supervising the application of the Quebec CPA, receiving complaints from consumers, educating the public and merchants about consumer protection, conducting research, co-operating with other departments in Quebec on matters of consumer protection and promoting the interests of consumers generally. The office maintains a public record of merchants who have not complied with the Quebec CPA, and the merchant's profile includes the number and the nature of complaints received by the Office, as well as the number of complaints that were resolved.

The appointed President of the Office may investigate any matter related to any of the acts administered by the Office. Under the Quebec CPA, the President has the powers and immunity given to commissioners appointed under the Act respecting public inquiry commissions except the power to order imprisonment. These powers include conducting inquiries, holding hearings, and "with respect to the proceedings upon the hearing, all the powers of a judge of the Superior Court." The President may also appoint investigators for the same purpose.

The president (and, by delegation, the investigators) may enter an establishment of a merchant, manufacturer or advertiser at any reasonable time and conduct a search or seize materials. The President may compel the production of copies of registers, documents or reports. The President may also require merchants/manufacturers/advertisers to communicate various information about advertisement or credit contracts, and may make that information public. The President may also require a merchant/manufacturer/advertiser to demonstrate the truthfulness of an advertisement.

A person who contravenes the Quebec CPA or the Regulations under the Act, obstructs an investigation under the Act (i.e. by misrepresentation), does not comply with a voluntary undertaking, disobeys a decision of the President or refuses to comply with a court order is guilty of an offence (provincial offence). Penalties upon conviction for every one of the above acts, except a contravention of the Quebec CPA or the Regulations per section 277(a), include a fine between CAN$600 and

CAN$15,000 for natural persons and a fine of CAN$2,000 to CAN$100,000 for corporations. Subsequent convictions result in minimum and maximum limits twice that size. Directors or representatives of corporations may be vicariously liable for any offences if they had knowledge of them. Similarly, individuals who aid in the commission of any of the above offences are liable to the same penalty.
The President may require security from a merchant, or may apply for an injunction if there is reason to believe that consumer payment funds may be misappropriated by the merchant. A court may, on the application of a prosecutor, order that a convicted merchant communicates to consumers the judgment rendered against him and provide adequate explanations and warnings relating to the goods or services in question.
A Superior Court judge on application by the Attorney General of Quebec may issue interlocutory injunction against repeated violators. The application can only be brought if the Director of Criminal and Penal Prosecutions has instituted penal proceedings against the alleged violator.
Merchants may enter into a written undertaking of voluntary compliance. The President sets the conditions for undertakings, which may include: publication or distribution of the content of the undertaking, compensation of consumers, reimbursement of costs of investigation, and security or guarantee to indemnify consumers
The President may apply to the Superior Court for an injunction ordering a person to cease a prohibited practice under the Quebec CPA. The court may grant additional orders to that person, for example, to reimburse the costs of investigation or publish and distribute communication to the consumers.
In 2008–2009, the Office conducted 646 investigations, 183 legal interventions, and charged nearly CAN$600.000 $ in penalties.

In addition, the Office is responsible for handling (and informally mediating) consumer complaints. In 2008–2009, the Office received 198,382 inquires, of which 5,752 were filed as complaints, and the Office obtained CAN$800,000 in compensation to consumers.

Federal

Competition Bureau
The Competition Bureau, headed by the Commissioner of Competition, is an independent law enforcement agency responsible for the administration and enforcement of the federal Competition Act, as well as several other statutes. The Act provides for a dual enforcement regime—criminal and civil (administrative) and these two regimes can not be pursued concurrently. "The Commissioner can launch inquiries, challenge civil and merger matters before the Competition Tribunal, make recommendations on criminal matters to the Director of Public Prosecutions of Canada (DPP), and intervene as a competition advocate before federal and provincial bodies." The Commissioner can also use "public education, written opinions, information contacts, voluntary codes of conduct, written undertakings and prohibition orders."

After the Bureau receives a complaint, a preliminary inquiry is conducted to assess whether there is sufficient evidence for a formal inquiry. If there is sufficient evidence after this initial stage, the Commissioner will conduct a formal investigation. During this investigation, the Bureau staff has various tools at their disposal to assist them in collecting evidence, including application to a court for a search warrant, authorization to examine records, or to question witnesses under oath. The Competition Bureau's approach to securing compliance with the Act, as well as its powers and are outlined in detail in the document entitled "Conformity Continuum" [see http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01750.html]. With respect to the civil regime under the Competition Act, which is pursued most often, and depending on the matter, the Commissioner may apply to the Competition Tribunal for a review of certain practices, or to the Federal Court of Canada or the superior court of a province. With respect to criminal matters, if the investigation establishes that there is a basis for criminal prosecution, the matter will be referred to the Attorney General of Canada. "The Director of Public Prosecution, acting for and on behalf of the Attorney General, determines whether a prosecution should be undertaken."

In addition to criminal prosecution and civil remedies outlined above, the Commissioner can use other tools to ensure compliance with the Act, which are described in detail in the "Conformity Continuum." Most notably, the Bureau may seek a temporary or permanent injunction prohibiting future offences or engaging in reviewable conduct, and the Commissioner may enter into a written undertaking of voluntary compliance with the wrongdoer.

4. What role, if any, does privately-initiated enforcement play, what is the enforcement process, who has standing to commence a proceeding, what forum(s) have jurisdiction, and what remedies are available if a violation is proved (e.g., declaratory relief, injunctive relief, back pay, compensatory damages, punitive damages)?

England and Wales

Iain Ramsay

Under Part 8 of the Enterprise Act 2002 the government may name as a "designated enforcer" (s213(2)) any person who has "as one of its purposes the protection of the collective interests of consumers" provided they meet certain criteria….such as independence, etc -- see The Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003. Under The Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order 2005 the Consumers Association, (now known as Which?) the best known and most influential privately financed consumer association in the UK, is given power to bring actions. I am not aware of it bringing any actions and I suspect that it would be reluctant to do so given the resources required and its fairly unsuccessful group damage action under s47B of the Competition Act 1998 <http://www.catribunal.org.uk/237-640/1078-7-9-07-The-Consumers-Association.html.>

[I]n relation to deceptive and unfair advertising [there is also] the Advertising Standards Authority to which consumers can complain. The ASA is an industry financed body but it would be misleading to describe it purely as self-regulation since the government has delegated the day to day administration of broadcast advertising to it under a co-regulation contract. In relation to print ads the ASA investigates complaints and also monitors advertising. It can ask advertisers to withdraw ads, require them to have ads vetted, with the ultimate sanction of requesting media not to carry an ad (rarely used). It gives adverse publicity to ads which contravene its code. It is well financed and although originally established in 1960s as a method of preventing further legal regulation, governments view it as an integral part of regulation of UK advertising. In relation to the CPUT, the OFT regards it as perhaps the "first port of call" in relation to misleading ads, reducing calls on its resources. The ASA may refer cases to the OFT as it did in relation to e.g. Ryanair advertising <http://www.oft.gov.uk/news-and-updates/press/2009/79-09> . It is often used as a model for European wide regulation. Consumers do not receive any compensation for a successful complaint so one might speculate whether it is sometimes a method for "letting off steam" (Hirschman). Its website is at http://asa.org.uk/.

Australia *(Peta Spender)*

In most cases, the statutory provisions which create the cause of action do not differentiate between regulator- initiated and privately-initiated claims. Therefore privately-initiated claims are quite common because the regulator generally only brings proceedings where there is a systemic issue that needs to be resolved. A hybrid of this approach is where a prosecution or a civil penalty proceeding is initiated by the regulator followed by private enforcement action, by example through class-action proceedings. Most of the remedies available to the regulator are also available to the private individual other than the power to bring a prosecution or a civil penalty proceeding. However, the ACCC has greater power to compel information than is available to private litigants under a private enforcement action (see s 155 TPA)

Canada (*Marina Pavlovic*)

Private enforcement of consumer rights in individual disputes revolves around three principal methods, which, in most instances, can also be considered as successive phases of dispute resolution—negotiation with the business, failing which the consumer should engage the appropriate complaint handler, failing which the consumer should resort to the formal court system (small claims court, individual litigation, or class action). This section presents a brief overview of the private enforcement mechanisms, including alternative dispute resolution framework (negotiation, mediation, and arbitration); collective redress through class proceedings; and small claims courts.

Alternative dispute resolution

Negotiation / Settlement

All stakeholders encourage direct interaction (negotiation) between an affected consumer and a business as the principal dispute resolution mechanism for the settlement of individual disputes. In fact, in order to engage a more formal complaint mechanism, the consumer has to have contacted the business first and attempted to resolve the problem with the business directly. For example, the Complaint Courier, an Industry Canada-operated clearing house for consumer complaints, requires that the consumer contacts the business first, before funneling the consumer's complaint to the appropriate complaint handler. Other organizations, whether governmental (such as Ontario Ministry of Consumer Services), merchant (such as the Canadian Council of Better Business Bureaus), or consumer organizations (such as Consumers' Council of Canada) all suggest direct negotiation and settlement as the first, if not the principal, dispute resolution mechanisms for individual consumer complaints. Direct negation with the other side, whether encouraged or not, has emerged as the most dominant method for the resolution of justiciable consumer problems in Canada. A recent survey on the handling of justiciable problems found that in 58.7% of consumer problems consumers attempted to resolve the problem on their own (presumably by talking to the other side).

In addition to private negotiation between the disputing parties, several public agencies use negotiation as the first step in both their complaint handling process as well as for securing compliance (for example, Competition Bureau of Canada, Office of the Privacy Commissioner, etc.).

Mediation

Both voluntary and mandatory mediation are used in Canada. Mandatory mediation is governed by the rules of court and the most notable example is the mandatory mediation that has been in use in several counties in Ontario for the past 15 years. Under the Ontario mandatory mediation model, all civil cases filed with the court of general jurisdiction (excluding the small claims court) must go through a three-hour mandatory mediation before proceeding further.

In addition to court-connected mediation, several public agencies, such as Quebec's Office de la protection du consommateurs or the Privacy Commissioner of Canada, use a mediation-type process (where the agency acts as a facilitator between a consumer and a business) for the resolution of individual consumer complaints.

Arbitration

The Canadian Motor Vehicle Arbitration Plan (CAMVAP), used for the resolution of disputes between purchasers and vehicle manufacturers is the only consumer-specific institutional arbitration regime in Canada.

The use of private arbitration in consumer contracts has dramatically increased over the past decade. Domestic and inter-provincial consumer disputes, as well as international consumer disputes are generally arbitrable, even in the three provinces which have prohibited (with varying degrees) the use of pre-dispute arbitration clauses. The Ontario CPA prohibits pre-dispute arbitration clauses in consumer contracts governed by the Act only insofar as arbitration prevents consumers from commencing an action before the Superior Court of Justice (arguably, a pre-dispute arbitration clause for a dispute that falls under the jurisdiction of a small claims court would be valid). Post-dispute arbitration is permitted by the Ontario CPA. The Quebec CPA includes a broad prohibition of all pre-dispute arbitration in all consumer contracts. Like Ontario, Quebec allows post-dispute arbitration. Alberta's Fair Trading Act prohibits arbitration under very narrow circumstances, and it effectively permits pre-dispute arbitration in that province.

In Dell Computer Corp. v. Union des consommateurs, the Supreme Court of Canada enforced an arbitration clause included in the terms and conditions on a website (browse-wrap contract) and referred the parties to arbitration rather than class proceedings. Dell has significantly altered the landscape of consumer arbitration in common law Canada. The prohibition of pre-dispute arbitration in Quebec and Ontario Consumer protection statutes overrides the effect of Dell in these provinces. However, post-Dell, consumer disputes can be resolved by arbitration in other provinces, and, furthermore, in those provinces, arbitration will prevail over class action.

Class proceedings

A class proceeding is a procedural mechanism that allows one person—a representative plaintiff, to commence an action on their own behalf as well as on behalf of all others similarly situated (the defined class). The Supreme Court of Canada has defined three principal objectives of class proceedings—judicial economy, access to justice, and behaviour modification. In addition, class proceedings provide compensation to the class members. Class proceedings have become available in most provincial jurisdictions in the past twenty years, as well as before the Federal Court. Quebec is the first Canadian jurisdiction to have introduced the class proceedings regime in 1978.

In order for the matter to proceed as a class action, it must first be certified as such by a competent court. The certification criteria generally include an identifiable class (of two or more persons); commonality of issues of fact and law between the class members; preferability of class proceedings for the fair and efficient resolution of common matters (rather than for the resolution the whole controversy); and the existence of an adequate class representative.

Settlement can be reached before certification (in which case the court will certify the action for the purpose of approving the settlement) or after certification, which requires the approval of the court. In approving the settlement, the courts should "determine whether the settlement is fair, reasonable and in the best interests of the class as a whole." Courts cannot modify the terms of the settlement, but can "indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement." The class proceedings (and a resulting settlement) are binding on all resident class members who have not opted-out. Different opting regimes apply for non-resident members, in so called-national class actions, depending on the jurisdiction, The Canadian Bar Association has recently formed a group to work on the legal reform of national (cross-Canadian) class actions.

The role of public authorities and consumer organizations in class proceedings

There are no legislative provisions that specifically regulate the role of public authorities or consumer organizations as class plaintiffs. The practical limitation to their involvement, however, is posed by the "adequate class representative" requirement. The representative plaintiff 1) has to be a member of the class (i.e. the plaintiff has to have been affected), who 2) would fairly and adequately represent the interests of the class, 3) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and 4)does not have, on the common issues for the class, an interest in conflict with the interests of other class members."

Any organization wishing to commence class proceedings would have to satisfy all four criteria. Similar provisions exist in the Quebec Code of Civil Procedure. While similar to the requirements in common law provinces, they are less restrictive and have permitted consumer protection groups to commence class proceedings when at least one of their members has been affected (i.e. was a class member). It is estimated that consumer protection organizations have commenced between 10%–20% of all class actions in Quebec.

The membership of the representative class member in the public interest organization has been a significant impediment for public interest organizations in commencing class proceedings. A statutory change giving standing to public authorities and public interest organizations would be required to enable them to commence class proceedings on behalf of an affected class of consumers.
Public bodies and consumer organizations can use two additional procedural tools to ensure that consumers' rights and their views are appropriately represented in class proceedings. These consist of intervener status in the proceedings (similar to Amicus Curiae in the United States) or "intervener objectors" in the settlement approval hearings ("fairness hearings"). Both statuses are not as of right and are obtained by the leave of court (unless the objector in the settlement hearings is also a class member).
While the intervener status does not allow the organizations to commence actions, it has proven to be an invaluable tool for the representation of underrepresented groups (including consumers) or for presenting views of related/potentially affected stakeholders. Intervener status is available in both class actions and individual litigation. For example, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) has intervened in two landmark consumer cases—BMG Canada Inc. v John Doe on file-sharing and disclosure of subscriber data by the ISPs; and Dell Computer Corp. v Union des consommateurs, on the relationship between class proceedings and contractual arbitration in consumer internet contracts. The latter case originated in Quebec, where it originally commenced as a class action by L'Union des consommateurs, a consumer group, and Oliver Demoulin (a member of the group). Public organizations/bodies have also intervened in numerous consumer cases, both class actions and individual litigation. For example, L'Office de la protection du consommateurs, Quebec's public body in charge of consumer protection in the province, has intervened in a class proceeding to ensure that the Office's interpretation of a specific legislative provision was "heard and confirmed by the court." Other public bodies, such as the Privacy Commissioner of Canada or the Competition Bureau, have appeared as interveners in cases of concern. CIPPIC has also appeared as an intervener objector in the settlement approval hearings in Sony's Canadian rootkit class action in Ontario.

Financing of class proceedings
For the most part, class proceedings are financed through contingency fee arrangements between the class members/representative plaintiff and the representative lawyers. Limited public funding is available from Class Proceedings Fund (Ontario) and Le Fonds d'aide aux recours collectifs (Quebec). Class proceedings are not eligible for provincial legal aid.

Small claims courts
A small claims procedure is available in provincial jurisdictions. The jurisdiction of small claim courts is defined ratione materiae to claims for debt or damages, recovery of personal property, specific performance of an agreement relating to personal property or services, or relief from opposing claims to personal property and with respect to the quantum —typically ranging from CAN$10,000–CAN$25,000.

5. If a non-government actor can initiate but not prosecute enforcement proceedings, is that actor eligible for any form of award (e.g., compensatory damages) if a violation is proved?

England and Wales

Iain Ramsay

N/A

Australia *(Peta Spender)*

Not applicable.

Canada (*Marina Pavlovic*)

Non-governmental actors can only initiate class proceedings, however, with considerable limitations (see above). No special forms of award are available for such actors.

6. If both governmental and non-governmental actors can prosecute enforcement proceedings, what if anything distinguishes the situations in which government officials prosecute enforcement proceedings and when nongovernmental actors do so?

England and Wales

Iain Ramsay

N/A

Australia *(Peta Spender)*

The ACCC will bring proceedings when a systemic issue has arisen but in other respects relies upon private litigants to bring claims for breach of the consumer provisions of the TPA. The misleading and deceptive conduct proceedings (see for example section 52 TPA) are very common in all Australian jurisdictions.

Canada (*Marina Pavlovic*)

[T]wo examples—Canadian Public Interest and Internet Policy Clinic (CIPPIC) as a non-government actor and Quebec Ministry of Consumer Affairs regarding certain

consumer protection issues. Competition Bureau has a different status regarding maters within its jurisdiction.

7. Whoever is entitled to initiate enforcement proceedings or prosecute such proceedings, are those proceedings governed by any special rules (i.e., different from the normal rules inquired about in Question II) with respect to any of the following:

a. Court costs (amount)
b. Party costs (including attorney fees) (responsibility for)
c. Punitive and/or multiple damages
d. Attorney fee contracts (i.e., contingency or conditional fee)
e. Pleading
f. Discovery
g. Class or other representative litigation

England and Wales

Iain Ramsay

No

Australia *(Peta Spender)*

No as to (a)-(e).

f. Discovery - see above in relation to section 155 TPA – the ACCC has much greater powers than the private litigant to compel the disclosure of information, documents and evidence.

g. Class or other representative litigation -From time to time the ACCC has acted as the lead plaintiff in a class action in Federal Court.

In relation to a -- g above, where proceedings brought by the ACCC, it must act as a model litigant. See Appendix B Legal Services Directions 2005, made under section 55ZF of the Judiciary Act 1903. The Commonwealth's obligation to act as a model litigant includes

2 The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

… (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid

(c) acting consistently in the handling of claims and litigation

(d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate

(e) where it is not possible to avoid litigation, keeping the costs of

litigation to a minimum, including by:

(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true

(ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum

(iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and

(iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations

(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

(g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement

(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and

(i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Canada (*Marina Pavlovic*)

See above under Class proceedings.

8. Please provide citation(s) to the primary law(s), whether national or sub-national.

England and Wales

Iain Ramsay

See response to 1.

Australia *(Peta Spender)*

See answer to question B 1

9. Are there any "landmark" court decisions that have affected the enforcement of law in this area within the past decade? If so, please provide citations.

England and Wales

Iain Ramsay

No landmark decisions because very recent law.

Australia *(Peta Spender)*

The cases which have been decided within the past decade would not be described as "landmark" court decisions. Most of the significant decisions concerned the assessment of damages and these cases were reversed by legislation. I can provide you with citations of those cases if you consider them to be helpful.

10. Have there been any empirical studies of enforcement of the law(s) in this area, whether privately- or publicly-initiated? If so, please provide citations (or copies, if possible, of any unpublished studies).

England and Wales

Iain Ramsay

There is no recent systematic empirical study of enforcement of consumer law in this area. The classic study remains Ross Cranston, Regulating Business: Law and Consumer Agencies (1979). Although much has changed since this study, it is still a valuable source. The Hampton Report, Reducing Administrative Burdens: Effective Inspection and Enforcement (2005) provides data on enforcement as does the Macrory Report, Regulatory Justice (2006). The OECD study (see question 3) provides a useful overview of enforcement. I provide an outline of these and other studies in Ramsay, Consumer Law and Policy: Text and Materials on Regulating Consumer Markets (2d. ed, Oxford, Hart,2007), Chapter 7 and discuss empirical studies at 373-378.

Australia *(Peta Spender)*

The Productivity Commission did a review of Australian Consumer Policy Framework in 2008. Its report can be accessed at http://www.pc.gov.au/projects/inquiry/consumer .
The report considers that the enforcement framework for consumer contracts in Australia at chapter 10 at Volume 2 of the commission's report and summarises the framework in Volume 1 of the report. The report does some quantitative analysis of the proposed policy changes in chapter 14 of volume 2 (see Page 344onwards).
The major consumer organisation in Australia, Choice, did a survey of regulator performance in enforcement of consumer rights. There is a reference to the survey at http://www.choice.com.au/Consumer-Action/Past-campaigns/Consumer-protection/Consumer-protection-enforcement/Page/Performance%20bands.aspx, however unfortunately is password protected. I would need to conduct further research to ascertain what other work had been done. If you would like me to do that could you please let me know?

Canada (*Marina Pavlovic*)

Not available.

11. Are regular statistics published (or posted electronically) that document experience under the primary law(s) as to such matters as the number of proceedings commenced, dispositions and appeal rates? If so, please provide a citation or web link.

England and Wales

Iain Ramsay

The Annual Reports of the Office of Fair Trading contain statistical annexes on proceedings commenced. http://www.oft.gov.uk/OFTwork/publications/publication-categories/corporate/annual-report/

Australia *(Peta Spender)*

No, because these claims are very common in court and tribunal proceedings they would not be separately monitored from other types of enforcement proceedings e.g. breach of contract. Although ACCC provides details of its enforcement proceedings in its annual report (see http://www.accc.gov.au/content/item.phtml?itemId=898144&nodeId=764b4c4f4cc990f5d79e1ee222ac429e&fn=ACCC_Annual_Report_2008-09.pdf at pages 24-26), this is only a very small percentage of the total number of claims made.

Canada (*Marina Pavlovic*)

Both the Ontario and Quebec Consumer Protection Ministries provide basic annual statistics on their respective websites. For example, for Ontario, see http://www.sse.gov.on.ca/mcs/en/Pages/News_29Jan2010.aspx. Competition Bureau provides some of its statistics in its Annual report to the Parliament. See www.competitionbaureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00169.html.S ome (but not all) administrative agencies and tribunals provide their own annual statistics.

12. Have there been any recent serious proposals, whether official or not, to change the law and/or the enforcement regime in this area? What are the major elements of the proposal(s)? Have those making them stated their reasons (e.g., perception that existing level of enforcement is inadequate, concern about budgetary implications of greater public enforcement, concern about over-deterrence under current regime)?

England and Wales

Iain Ramsay

There are two developments. First, the "better regulation" agenda influences the search for a wider "toolkit" of remedies for public enforcement beyond the use of strict criminal liability which was viewed as too "blunt" an enforcement tool. This includes e.g. possibility of more administrative sanctions such as monetary penalties, undertakings, naming and shaming, harnessing private actors through self-regulation etc. For recent discussion of enforcement by the OFT see OFT Statement of Consumer Enforcement Principles http://www.oft.gov.uk/shared_oft/reports/consumer_protection/OFT1221. It should be noted that agencies such as the OFT do now have a relatively wide array of public remedies (e.g. revoking credit licence---the credit licensing net in the UK is very wide including many suppliers such as automobile dealers). But OFT does not have explicit powers to obtain compensation for consumers similar to US FTC powers. Second, there is the issue of whether there should be private enforcement of the regulations which is connected to current discussions on the development of collective redress mechanisms in Europe and the role of class actions. The EU UCPD Directive permits member states to include private enforcement by consumers and competitors. Ireland has done so. The relevant UK department (currently called the DBIS, previously DTI) has not thus far been enthusiastic,
perhaps related to concerns about the possibility of class actions (if US style class actions were permitted in the UK). The Law Commission is currently studying the topic within the context of reform of the law of misrepresentation http://www.lawcom.gov.uk/misrepresentation_commercial.htm. The Financial Services Act 2010 originally contained provisions permitting class actions in consumer credit, but these were dropped when the election was called. I assume that general reporter will discuss further the differing positions on the role of class actions in the UK.

Australia *(Peta Spender)*

Major legislative changes have just been made to the Trade Practices Act, legislated as the Trade Practices Act (Australian Consumer Law) Act 2010 and assented to on 4 April 2010. These changes substantially improve the substantive rights of consumers. Legislation entitled the "Australian Consumer Law" will replace the TPA, introduce a power to declare unfair contracts void and give additional enforcement powers to the ACCC. This regime is due to operate from 1/1/2011.

Canada (*Marina Pavlovic*)

There has been some debate about the use of arbitration in consumer contracts. While Ontario and Quebec has prohibited the use of arbitration in consumer contracts (see above), the matter is under consideration is some (but not all) provinces.
There has also been a considerable debate on consumer protection on the internet, in particular, spam and identity theft, and corresponding legislative changes (Federal Anti-Spam legislation and recent changes to the Competition Act)

14. Are there any specialized organizations or sections of general organizations of lawyers that focus on these kinds of cases?

England and Wales

Iain Ramsay

The general reporter is probably in a better position to answer this question but consumer advice is provided by Citizens Advice Bureaux and Trading Standards Offices. Solicitors have traditionally played a modest role in advising consumers on claims related to economic losses rather than physical injury. Claims management companies operate in area of consumer credit (see below VIA)

Australia *(Peta Spender)*

There are specialised organisations which deal with consumer matters e.g. Choice (as stated above) and provide enforcement support for consumer claims e.g. the Consumer Law Action Centre. These organisations consist of lawyers and non-lawyers.

Canada (*Marina Pavlovic*)

No

15. Are advocates other than fully qualified legal professionals (lawyers, solicitors, etc.) permitted to represent individuals or organizations bringing cases alleging unfair or deceptive consumer practices?

England and Wales

Iain Ramsay

Trading Standards Officers who are not legally qualified can represent local authority in prosecutions in the Magistrate's court.

Australia *(Peta Spender)*

Yes, sometimes a court or tribunal will allow a non-lawyer to represent a person with a consumer claim but they generally require leave and/or proof of representation e.g. through a power of attorney.

Canada (*Marina Pavlovic*)

Consumers may be either self-represented or represented by a qualified lawyer.

16. Are there any administrative tribunals where such cases can be prosecuted? If so, how do the rules governing those tribunals differ from court rules (e.g., simpler pleading/complaint rules, different discovery rules, less restrictive rights of audience, different rules vis-à-vis costs, etc.)

England and Wales

Iain Ramsay

N/A

Australia *(Peta Spender)*

See the answer to A16 above.

Canada *(Marina Pavlovic*)

Subject-matter and/or industry determine where a complaint can be prosecuted. While certain issues will be in the jurisdiction of the provincial ministries or the Competition Bureau (as indicated above), there is close to 100 different tribunals, agencies, or complaint handling institutions that may resolve consumer issues and most of them have their own rules. Complaint courier [http://www.consumerinformation.ca/app/oca/complaintcourier/index.do?lang=e] is administered by the Office of Consumer Affairs (Industry Canada) and is a joint initiative between federal and provincial consumer protection authorities. Complaint Courier acts as a clearing house for consumers' complaints. It will coach consumers on appropriate complaint process to the business, including providing sample complaint letters. If this initial complaint is unsuccessful, consumers can file a formal complaint via the Complaint Courier to the appropriate complaint handling organization. In 2009, consumers filed 13,455 complaints via Complaint Courier. The top 5 complaint handling organizations were the Ontario Ministry of Consumer Services (6,101 complaints), Commissioner for Complaints for Telecommunication Services (1,068 complaints), Quebec Office de la protection du consommateurs (882 complaints), Business Practices and Consumer Protection Authority of British Columbia (774 complaints), and Alberta Government Services (738 complaints).

17. If there are administrative tribunals for such cases, what is the relationship between such tribunals and the courts (i.e., what controls where cases go, and how they move from one venue to another)?

England and Wales

Iain Ramsay

N/A

Australia *(Peta Spender)*

See the answer to A17 above.

Canada (*Marina Pavlovic*)

Some complaint handling organizations are voluntary (for example, the Commissioner for Telecommunication Services or Canadian Transportation Agency's Informal Air Travel Complaints Process) and therefore the decisions and recommendations are non-binding; while other are mandatory (such as Competition Bureau). The jurisdiction of each complaint handler is determined in the appropriate legislation or regulations. Decisions of administrative tribunals can be submitted to appropriate court (provincial or federal, depending on the jurisdiction of the tribunal) for judicial review.

18. Are sellers permitted to require consumers to consent to private dispute resolution mechanisms (e.g., arbitration) as a condition of sale? If so, is there any research on how such contract restrictions have affected private enforcement?

England and Wales

Iain Ramsay

Two sources of regulation here. Consent to arbitration at time of entering consumer contract prohibited for sums under £5000 (ss89-91 Arbitration Act 1996 and Unfair Arbitration Agreements (Specified Amount) Order 1999. Under the Unfair Terms in Consumer Contracts Regulations 1999 such a clause would probably be held to be unfair. It would fall within the grey list in Schedule 2 of clauses "which may be regarded as unfair". Schedule 2 (1) (q) " excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration…".

Australia *(Peta Spender)*\

Under the previous legislation, a seller may have been able to require consumers to consent to private dispute resolution mechanisms as condition of sale. However, this conduct would probably give rise to an unfair contract term under the new provisions of the Australian Consumer Law (discussed above in the answer to question 12) and therefore such a term would be liable to be declared void or varied by the court. The relevant provision applies to standard form contracts and states as follows:

A term in a standard form consumer contract is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Chris Hodges

> The consumer protection area intrinsically contains both private and public issues. It therefore can be divided along the classical lines outlined above into public law and private law, each with its own distinct, separate enforcement system. Some areas of consumer protection contain *both* public law and private law obligations. But breach of one or the other would be pursued through its own *particular* process, namely administrative/criminal or civil. Deceptive consumer sales is such an area. ...

Canada (*Marina Pavlovic*)

> Regarding arbitration, see above under "private enforcement"

VI. CONCLUDING QUESTIONS

A. If you were studying privately-initiated enforcement in your country, which areas or sub-areas would you choose to study (whether or not they are on the list in note 5 above), and why would you choose them?

England and Wales

Iain Ramsey

> Litigation in credit transactions. There appears to be significant numbers of claims facilitated partly by internet sites (e.g. in relation to overdraft fees, resulting in Office of Fair Trading initiating (and losing) a test case, Office of Fair Trading v. Abbey National et al [2009] UKSC 6, [2009] EWCA 116, [2008] EWHC 875) Claims management companies advertised possibility of getting out of credit card contracts by relying on failure by creditors to follow proper formalities. Recent decisions have reduced possibility of success in these cases. Many claims have been taken to Financial Ombudsman Service in relation to credit cards and payment protection insurance which has now been almost prohibited by the Financial Services Authority. The Financial Services Authority has been given powers under Financial Services Act 2010 s14 to require firms to establish "consumer redress schemes" for mass claims ("where there has been widespread or regular failure to comply". Judges refer to the

contemporary "spate" of consumer credit litigation but there have been no systematic empirical studies of this phenomenon.

Australia *(Peta Spender)*

I'm not sure what you mean by "areas or sub-areas". Are you referring to substantive or procedural areas? Taking a punt, securities law and competition law have created some interesting developments, both substantive and procedural, at the federal level in Australia, and private enforcement has been significantly enhanced by the growth and development of class actions.

B. For which areas or sub-areas in your country do studies of privately-initiated enforcement exist?

Australia *(Peta Spender)*

See the last answer.

C. Are there questions we should have asked but did not ask, and if so what are they?

England and Wales

Martin Partington

If I were doing this research, I think I would want to examine two other areas not prioritized in the original research paper.

Consumer disputes in the financial sector

One of the extraordinary developments over the last 15 years or so has been the creation of ombudsmen to deal with consumer disputes relating to the provision of financial service – insurance, banking, mortgages, pensions, savings and investments, credit cards and store cards, loans and credit, hire purchase and pawnbroking, money transfer, financial advice, stocks, shares, unit trusts and bonds. These are now all covered by the Financial Ombudsman Service.(See http://www.financial-ombudsman.org.uk/)
This has effectively taken over dispute resolution in these areas of consumer disputes from the courts. It has the jurisdiction to decide cases up to £100k. It is very user friendly (certainly by comparison with the courts) Staff help customers to fill out claim forms. Cases are dealt with much more efficiently and cost effectively than courts. The service is paid for by the financial services industry, at no cost to the citizen. *I think the service provides a excellent example of what can be achieved if you move away from an assumption that adversarial hearings are the sole/best form of adjudication.* In this context, disputes are primarily decided on the papers, though assistance given about what is relevant. The service also offers feed back to banks and other financial companies to try to get them to operate better and more fairly.

Housing disputes

The other areas I would choose – simply because I know a lot about it – is housing disputes, disputes between landlord and tenant and other disputes relating to residential accommodation.

The law differs in Scotland, so this note is only about the position in England and Wales.

The first thing to note is that the body of regulatory law relating to housing is huge and extremely complex. ….

The present situation is that housing disputes are currently divided between the following bodies:

1. The courts. They primarily make decisions and resolve disputes about whether a tenant/mortgagor can be ordered to give up possession of his/her dwelling. This is an enormous jurisdiction with large numbers of cases annually; the nature of the process is more administrative than adjudicative; the majority of cases are uncontested. (Data on numbers are available in the annual Judicial Statistics: the latest figures currently available are for 2008, published Sept 2009 (Cm 7697); 2009 data should be available soon)

The courts also deal with cases where a homeless person is arguing that he/she should be granted a right to accommodation under the UK's Homelessness legislation (not found in other jurisdictions).

2. Tribunals. The residential property tribunal (RPT) has a wide jurisdiction to deal with housing related disputes. For details see http://www.rpts.gov.uk. This tribunal deals with some disputes relating to rent level, also service charges and other issues under the Housing Act 2004.

Housing benefit appeals are decided by the First-tier Tribunal (Social Security and Child Support) in the Tribunals Service see http://appeals-service.gov.uk. This resolves disputes about financial assistance for housing payable to low income householders.

Disputes about real estate agents (though not letting agents) go to the First-tier Tribunal (Estate Agents) also in the Tribunals Service See: http://www.estateagentappeals.tribunals.gov.uk (RPT is not part of the Tribunal Service)

Where private tenants are required to pay a deposit against damage or failure to pay rent, the deposits have to be held in one of three scheme, each of which has to offer a dispute resolution service: see http://www.thedisputeservice.co.uk/; http://www.mydeposits.co.uk/ and http://www.depositprotection.com/.

Furthermore there are other housing related ombudsmen schemes, including the Property Ombudsman, see http://www.tpos.co.uk/ and the Housing Ombudsman service, see http://www.housing-ombudsman.org.uk/

Each of these performs slightly different functions. Access to all, save the courts, is free. (It was fear of loss of revenue to the Court Service as well as fear of loss of judicial jobs that resulted in fierce opposition to Law Commission proposals to bring some order to this chaos.) What is clear, though, is that policy makers and the housing industry do not perceive the courts as the forum of choice for resolving housing disputes.

It may also be noted that there are no constitutional restrictions on this mix of private and public forms of adjudication – cf other countries where the issue might be more complex.

Chris Hodges

I am sorry to say that I do not think there is much point in comparing 'enforcement' of law by comparing specific areas of law in detail.... if I am right that we don't use private enforcement of public norms in the way US does, the real comparison lies simply at the levels of policy and systemic architecture. The two systems are just different.

This is not to say that the public/private enforcement topic is not interesting and important. Indeed, I think that the policy choices here are of absolutely fundamental policy importance. I also think that the EU, at least, is in effect confronting a major choice in this area, as the architecture of our legal systems evolves.

I have been researching public and private enforcement mechanisms in UK and USA ... we have uncovered to be a huge area of non-court private dispute resolution procedures and pathways. ... they have developed on a sectoral basis and escaped general attention. But there are many of them. The principal types might be categorised as ombudsmen, business codes of conduct that contain complaint mechanisms and dispute resolution schemes (usually cascading, from initial direct negotiation to mediation to arbitration), and sometimes regulators assisting with dispute resolution (see 'regulation plus' referred to above). ... We found over 100 of them in 2009 and are finding more. We are proceeding to investigate leading mechanisms in detail.

.... I think that it is misleading to compare tort or private enforcement costs in USA with anywhere else, because of the 'public enforcement' element of US private litigation. I am interested in looking at comparing (a) the total costs of *both* public and private enforcement in different jurisdictions and (b) the *ratios* of public to private enforcement costs.

Appendix: Current UK Enforcement Policy [11] [Most footnotes omitted]

Two important developments deserve attention. First, UK has developed a rich area of public regulation of corporate activity, overlapping into regulation of consumer protection. Along with this, sophisticated enforcement policies have emerged and are

11 This is largely an updated fusion of two forthcoming book chapters; CJS Hodges, 'Public and Private Enforcement: The Practical Implications for Policy Architecture' in in R Brownsword, H Micklitz, L Niglia and S Weatherill (eds), *The Foundations of European Private Law* (Hart Publishing, forthcoming 2010); and CJS Hodges 'Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress' in J Steele and W van Boom (eds), *Mass Justice* (Hart Publishing, forthcoming 2011).

being developed further. The same phenomena are occurring across European states, although UK is possibly the most advanced and innovative in relation to this diversification of regulatory agencies and innovative enforcement policies.

> Secondly, a diversification has occurred in methods of dispute resolution. …Dissatisfaction with courts has partly come about because of high costs, and partly because of the alienating formality of the procedure and inflexibility of available outcomes. Hence, the diversification has produced not only mediation, other types of ADR and small claims tracks that are appendages to the court system. It has also lead to the creation of tailor-made pathways for many different types of disputes, encompassing ombudsmen (of different types and with differing remits and powers), business codes of conduct with their own complaint and dispute resolution schemes, specific statutory or private compensation schemes, and assistance of regulators in achieving rectification of problems.

The two phenomena mentioned above, regulation and diversification of dispute resolution are closely linked. …

Within the regulatory sphere, the existence of a range of fairly new sectoral regulators has led to a need for each to develop an enforcement policy. Broadly, the enforcement policies that have emerged (and there are several, sometimes with differences) have been aimed at encouraging companies to comply with legal requirements as a matter of 'good citizen' voluntary and preventive policies, whilst enabling the public authorities to take criminal or administrative enforcement action where needed under extensive statutory powers. Such enforcement policies seek to cut costs of compliance for responsible businesses so as to make them more competitive and assist the UK economy, and to cut costs of enforcement for authorities. A particular initiative was to cut the latter by cutting the number of agencies and inspections to which businesses were subjected.[12]

The enforcement policies rarely if ever mention deterrence. Neither do they contemplate 'private enforcement' of the public law requirements. Deterrence may be a familiar and important policy of enforcement of criminal law, but it is of limited relevance in European enforcement of private law and of public regulatory enforcement. Public regulatory techniques and powers have also expanded their boundaries, and are now beginning to spilling over into adopting civil sanctions in addition to administrative or criminal sanctions.

The development of enforcement policies has been strongly influenced by academic analysis. Leading figures have been Anthony Ogus at Manchester, Rob Baldwin and various colleagues at LSE, and Richard Macrory at UCL. They concluded that enforcement plays an essential role in regulation, and the design of enforcement

[12] P Hampton, *Reducing administrative burdens: effective inspection and enforcement* (H M Treasury, 2005).

mechanisms and their policies and practical operation are all crucial for the effectiveness and success of the system.[13]

Against an overriding economic policy of encouraging economic health and competitiveness, specific policies are encouraged of reducing administrative burdens, adopting a risk-based and impact-assessment approach towards regulation and enforcement, aligned to the government's view of a contemporary world in which competition is fierce, consumers are better informed, and resources are scarce, both for enforcers and economic operators. Hence, the philosophy that risk assessment should comprehensively underpin regulatory and enforcement policy seeks ways in which the administrative burden of regulation on business can be reduced, while maintaining or improving regulatory outcomes.

This risk assessment policy is expressly based on 'responsive regulation' theory developed by professors Ayres and Braithwaite.[14] Their 'enforcement pyramid' comprises an ultimate peak sanction of removal from society (removal of liberty or license to operate) and a broad base of simple, low key discussions, up which regulators would progress depending on the seriousness of the regulatory risk and the non-compliance of the regulated business. They argued that regulatory compliance was best secured by persuasion in the first instance, with inspection, enforcement notices and penalties being used for more risky businesses further up the pyramid.

A separate stream of academic theory on 'restorative justice' has also been adopted. In a review of sentencing for regulatory breaches, Professor Richard Macrory stated Six Penalties Principles: [15]

1. Aim to change the behaviour of the offender;
2. Aim to eliminate any financial gain or benefit from non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
6. Aim to deter future non-compliance.

---

[13] R. Baldwin and M. Cave, *Understanding Enforcement* (Oxford, 1999), ch. 8; R. Cranston, *Regulating Business* (London, 1979). See also P. Selznick, in G. Teubner, L. Farmer and D. Murphy (eds.), *Environmental Law and Ecological Responsibility* (London, 1994); and E. Bardach and R. Kagan, *Going by the Book – The Problem of Regulatory Unreasonableness* (Transaction Publishers, 2002), ch. 5.

[14] I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, 1992). J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford, 2002).

[15] R. Macrory, *Regulatory Justice: making sanctions effective* (HM Treasury, 2006).

Principles 2 and 5 have clear links with private compensation law. In adopting a 'restorative justice' approach he focuses on a holistic process that addresses the repercussions and obligations created by harm with a view to putting things right. The emphasis is on a *process* 'whereby those most directly affected by a wrongdoing come together to determine what needs to be done to repair the harm and prevent a reoccurrence.'[16] Even though Macrory's approach was focused on sanctioning from the regulatory and compliance perspective, and not from the perspective of compensation, the approach has led to revolutionary developments in relation to compensation and restoration policy, especially in collective redress, as mentioned below.

The government wishes to "develop an enforcement culture that focuses first on compliance, second on restoring any damage done to consumers by breaches of the law, and only third on punitive prosecution". The government "does not want to see a surge in monetary penalties as the new powers are used more and more. Rather it wants companies who have infringed legal provisions to take the opportunity to put things right before any formal public enforcement takes place. Many good businesses do this already."

The acceptance of these theoretical underpinnings on enforcement by government has led to a revolution in policy on the enforcement of regulation of corporate activity in the United Kingdom. The policy is to adopt new approaches to delivering better outcomes for consumers, whilst at the same time reducing unnecessary burdens for business and promoting fair and competitive markets. The government introduced legislation providing a new enforcement framework and powers, involving a combination of components:

1. a duty on many regulatory bodies to observe principles of good regulation, including transparency, proportionality, consistency, targeting at need (the Hampton principles);
2. a requirement on regulators to aim to eliminate any financial gain or benefit from non-compliance;
3. enabling regulators to exercise a new category of civil sanctions, including imposing discretionary requirements that the offender must take steps specified by the regulator, within a stated period, designed to secure (a) that the offence does not continue to recur (a 'compliance requirement') and (b) that the position is restored, so far as possible, to what it would have been if no offence had been committed (a 'restoration requirement'). If a person refuses to comply with a discretionary requirement or undertaking, the enforcer may decide to bring a prosecution for the original offence.

The government has issued a Code of Practice on Guidance on Regulation[17] and, for civil servants, a Guide to Code of Practice on Guidance, which cover issuing good guidance on regulation. The various regulatory bodies are now being required to revise, or publish for the first time, their enforcement policies in the light of the particular conditions in their sectors.

---

[16] *Restorative Justice and Practices* – presented at 'Restorative Justice in Action … into the Mainstream', The 3rd International Winchester Restorative Justice Group Conference, 29th and 30th March 2006, London: quoted in Macrory, above, para 4.33.

[17] http://bre.berr.gov.uk/regulation 7 July 2008.

In April 2009 the Local Better Regulation Office issued guidance advising local authorities on the operation of the Primary Authority Scheme, offering the opportunity for local authorities to develop a constructive partnership with a business that can deliver reliable advice and coordinated and consistent enforcement for the business.

The Financial Services Authority issued on 6 July 2009 a consultation on its new enforcement policy which is exactly on 'restorative justice' principles: it prioritises disgorgement (restitution), discipline (penalties for offenders) and deterrence, in that order. In 2009 the Office of Fair Trading (OFT) published its Annual Plan in March promising to adopt a responsive approach that includes continuing to focus on high-profile enforcement action, including the first ever criminal convictions against individuals for price-fixing offences. It may be wondered whether such an approach in fact continues a command-and-control or US-style deterrent policy, rather than truly responsive policy, although the top of Ayers' and Braithwaite's enforcement pyramid does provide for effective deprivatory sanctions. The OFT also published a Simplification Plan particularly intended to set out how it proposes to meet its new obligations under the Regulatory Enforcement and Sanctions Act 2008 and giving an indication of how the OFT will continue to address the government's better regulation agenda more generally. Further, the OFT published revised leniency guidance for businesses and individuals that come forward with information about their involvement in a cartel. An additional development has been increased support for the development of private sector positive incentive schemes and for further self-regulation though the OFT's Consumer Codes Approval Scheme. Amongst a number of other agencies, reviews of enforcement practice have recently been issued by Ofcom, Ofwat, and the Office of Rail Regulation (ORR).

The contemporary status of public and private enforcement mechanisms, across different sectors, quickly identifies a range of techniques that is almost bewildering in scope and complexity.[18]

The availability of not just one technique (a judicial action) but of several options enables *diverse* situations to be addressed, and offers a choice of techniques and an opportunity to consider how to evolve existing techniques or combinations of techniques.[19] An important

[18] See for example J. Stuyck and others, *Commission Study on alternative means of consumer redress other than redress through ordinary judicial proceedings* (Catholic University of Leuven, January 17, 2007, issued April 2007); Civic Consulting, *Study on the use of Alternative Dispute Resolution in the European Union*, 16 October 2009 at http://ec.europa.eu/consumers/redress_cons/adr_study.pdf . The latter study found that the highest numbers of ADR mechanisms were: Germany 247 (many decentralised schemes), Italy 129 and UK 43, France 35. Civic said that ADR is clearly more relevant in Belgium, UK, Spain, Sweden, Austria, Ireland, Netherlands, Denmark and Malta than elsewhere. UK seems to have the highest number of cases for any individual scheme, with the FOS often handling over 100,000 a year – most large schemes in other Member States handle 5,000 to 20,000 annually. They identified 530,000 ADR cases in the EU in 2008, an increase from 410,000 in 2006.

[19] The EU 2008 Consumer Green Paper tellingly cited the recommendation of the OECD on consumer dispute resolution and redress that countries should provide *different* means of redress, including collective redress mechanisms: *Green Paper on Consumer Collective Redress*, COM(2008) 794, 27.11.2008, at

opportunity opened up when it was realised that public enforcement of regulatory norms can also be used to deliver compensation.

Thus, the requirement on regulators to aim to eliminate any financial gain or benefit from non-compliance, referred to above, has profound implications for the balance between public enforcement of regulatory requirements and private enforcement of private compensation rights.

Two examples can be given of how public enforcement of compensation (i.e. the converse of the private enforcement policy in USA) is being implemented in different sectors in the UK.

The fist is financial services disputes. Primary emphasis is placed on self-regulation and ADR by banks, supported by the Financial Ombudsman Service and the Financial Services Compensation Scheme, supported by an extended regulatory oversight power for the Financial Services Authority (FSA). [The FSA is currently being reorganized itself, to be placed under the control of the Bank of England, alongside a new Consumer Protection Agency.] A judicial representative claim (i.e. ca class action) was mooted as a last resort[20] but although the Financial Services Act that emerged from Parliament did extend the voluntary and regulatory mechanisms, the collective action was not introduced.

The second example is the consumer sector. Many business complaint mechanisms exist here. Government policy is to develop regulatory techniques, to be supported as a last resort by a judicial compensation technique, which would be controlled by a new quasi-ombudsman (the Consumer Advocate), who would be empowered to bring a collective action, but not to introduce a private class action technique in addition to the existing Group Litigation Order.[21] The Consumer Advocate is modeled on Nordic Consumer Ombudsmen, who are regarded as being particularly effective and efficient in delivering mass compensation as well as behaviour control of corporations. In other words, a private class action has not been made available to private actors, and instead enforcement of public/regulatory law lies in the hands of public authorities, and although enforcement of private rights can be undertaken by private citizens, the primary responsibility for overseeing and encouraging mass private compensation will lie in the hands of business, regulators and a quasi-regulator (the Consumer Advocate), in that order of priority. Mass private enforcement is positively not being facilitated.

---

http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm; *OECD Recommendation on Consumer Dispute Resolution and Redress* (OECD, 2007) at http://www.oecd.org/dataoecd/43/50/38960101.pdf.

[20] Financial Service Bill, cl 18 – 25, which proposed that an individual may bring representative proceedings on behalf of others who are entitled to bring proceedings of the same, similar or related issues of fact or law, subject to the court approval of a collective proceedings order. The court would decide on whether an opt-in or opt-out model would apply. Extensive subsidiary regulations and rules are envisaged: see Draft court rules for collective proceedings by the Civil Justice Council at http://www.civiljusticecouncil.gov.uk/files/CJC_Draft_Rules_for_Collective_Actions_Feb_2010.pdf.

[21] Civil Procedure Rules, Part 19.III.

REFERENCES CITED IN JASMINKA KALAJDZIC'S RESPONSES FOR CANADA

Back on the Map, Report of Canada's World National Citizens' Dialogue (2010), available online: http://www.canadasworld.ca/reports/backonthem.

Bogart, W.A., *Good Government? Good Citizens?: Courts, Politics and Markets in a Changing Canada* (Vancouver: UBC Press, 2005).

Bricker, Darrell Jay, *We Know What You're Thinking: From Dollars to Donuts –Canada's Premier Pollsters Reveal What Canadians Think and Why* (Toronto: HarperCollins, 2009).

Elson, Kent, "Taking Workers' Rights Seriously: Private Prosecutions of Employment Standards Violations" (2008) 26 Windsor YB Access to Justice 329.

England, Geoffrey, *Individual Employment Law*, 2nd ed. (Toronto: Irwin Law, 2008).

Kalajdzic, Jasminka, "Class Actions in Canada: Country Report Prepared for the Globalization of Class Actions Conference" (2009) 622 Annals of the American Academy of Political and Social Sciences 41-52 ["Kalajdzic 2009"].

Kalajdzic, Jasminka, "Consumer (In)Justice: Reflections On Canadian Consumer Class Actions" (2011) 50 Can. Business L.J. [forthcoming].

Legal Aid Ontario, *2008 Annual Report*, online: http://www.legalaid.on.ca/en/publications/downloads/annualreport_2008.pdf.

Lunau, Kate, "How to pay for some justice. Special Report: Legal insurance could be just what Canadians need." *Maclean's* (March 5, 2009), online: http://www2.macleans.ca/2009/03/05/how-to-pay-for-some-justice/.

MacTavish, A.L. and Lenz, A.J.F., "Civil Actions for Conduct Addressed by Human Rights Legislation: Some Recent Substantive and Procedural Developments" (1996) C.L.E.L.J. 375.

Michael McKiernan, "Legal-costs insurance needs official boost, says longtime provider" *Law Times* (July 19, 2010), online: http://www.lawtimesnews.com/201007197223/Headline-News/Legal-costs-insurance-needs-official-boost-says-longtime-provider

Stevenson, G. *Unfulfilled Union*, 3rd ed. (Toronto: Gage Publishing, 1989)

All cases and statutes available online at www.canlii.org.