Response to Aotearoa New Zealand's Law Commission / Te Aka Matua o te Ture Project on Class Actions and Litigation Funding

1. Woodsford welcomes the opportunity to make submissions to the Law Commission / Te Aka Matua o te Ture in relation to the Terms of Reference of the Project and in response to the concerns outlined in Issues Paper 45 (IP45). Woodsford's submissions in relation to some of the Terms of Reference and response to concerns outlined in IP45, together with some background information about Woodsford, are set out below.

2. In the course of preparing these submissions, Woodsford has sought to canvas the opinions of a number of lawyers within Aotearoa New Zealand law firms.

Woodsford

3. Since its foundation in London in 2010, Woodsford has developed a reputation as a leading global litigation and arbitration funder.

4. Woodsford is a founder member of the International Legal Finance Association (ILFA), which is the only global association of commercial legal finance companies and is an independent, non-profit trade association promoting the highest standards of operation and service for the commercial legal finance sector. It also serves as a clearinghouse of relevant information, research and data about the uses and applications of commercial legal finance. Woodsford's Chief Operating Officer, Jonathan Barnes, sits on the Management Committee of ILFA.

5. Woodsford is also a founder member of the Association of Litigation Funders of England & Wales (ALF) which is an independent body that has been charged by the UK Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. Woodsford was actively involved in drafting ALF's Code of Conduct (the Code), which sets out the standards by which all Funder Members of ALF must abide, including in relation to their capital adequacy. In particular, the Code requires its members to maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. The Code also sets out circumstances in which funders may be permitted to withdraw from a case and outlines the way in which the roles of funders, litigants and their

lawyers should be kept separate. ALF also maintains complaints handling procedures. Since ALF introduced its complaints procedure, Woodsford has never been the subject of an ALF complaint. Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of ALF.

6. Woodsford has staff in the UK, the United States, Australia, Israel and Singapore. Woodsford has funded and continues to fund class actions in the United Kingdom, Australia and the Netherlands as well as numerous other types of disputes globally, including litigation in New Zealand. Woodsford also supports the Public Interest Advocacy Centre in Australia as part of its worldwide commitment to promoting access to justice for those that lack the means to achieve it.

7. Woodsford's executive team blends extensive business experience with legal expertise, and includes lawyers admitted to practise in England & Wales, Australia, the United States, Canada, Ireland, Israel and Singapore, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales.

8. Woodsford's Chief Executive Officer, Steven Friel, is a solicitor and formerly partner at two major international law firms. Steven has been recognised by every annual edition of the *Legal 500* published in the last eight years. For commercial litigation work, he is praised as having *"the sort of knowledge that one only gets with years of accumulated experience in heavy or complex litigation"* and a *"strong commercial grip on the relevant legal provisions and financial aspects of cases."* For his work in international arbitration, the *Legal 500* ranked Steven as *"outstanding"*. Steven has also been recognised as one of the top 100 leaders in legal finance of 2020. Woodsford's Chief Investment Officer for the EMEA and APAC regions, which covers Woodsford's operations in Australia, Charlie Morris, is a senior lawyer formerly of leading UK disputes boutique law firm Enyo Law and international law firm Addleshaw Goddard. Charlie is a ranked individual in Chambers & Partners directory for litigation funding and praised as "*extremely knowledgeable in financial services matters, possibly more so than the lawyers who run the cases*".

9. Woodsford has an Investment Advisory Panel (IAP) that brings together senior figures from the world of both litigation and international arbitration, with direct experience spanning many areas of law. Our IAP includes John Beechey, a past President of the International Court of Arbitration of the ICC, Fidelma Macken, the first female judge to be appointed to the Court of Justice of the European Union and Shira A. Scheindlin, a former United States District Court Judge.

10. Our in-house team of legal specialists reviews many hundreds of cases every year coming from all parts of the globe, including Australia and New Zealand.

Woodsford's submissions in respect of the Law Commission / Te Aka Matua o te Ture Terms of Reference and Issues Paper 45 insofar as they relate to litigation funding.

11. Woodsford agrees with the preliminary view of the Law Commission / Te Aka Matua o te Ture that litigation funding is desirable in principle and should be permitted in Aotearoa New Zealand.

12. Woodsford hereafter makes submissions to address concerns outlined in IP45 as follows:

    a. Funder control over litigation

    b. The potential for conflicts of interest

    c. Funder profits

    d. Capital adequacy of litigation funders

    e. Regulation and oversight of litigation funding

Funder control over litigation

13. Under the ALF Code of Conduct, funders are prevented from taking control of litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their professional duties. This is in line with the practice and public policy, in England & Wales, of keeping the roles of funders, litigants and their lawyers separate. Because of their interest in the litigation, funders may however ask to be kept informed of the progress of the case. Some funders, like Woodsford, may have considerable in-house litigation experience that can benefit the litigant and its legal team.

14. Similarly, the ILFA Best Practices stipulate that ILFA members should not interfere with the performance of lawyers' duties to the courts and to their clients, and that members should respect the proper administration of justice.

15. In our experience, the role of the litigation funder is not to control, but rather actively monitor the litigation to ensure that it is being effectively run in such a way as to benefit all claimant-side stakeholders. In addition, Woodsford is staffed by a number of sophisticated lawyers with extensive experience in class action litigation. As such, Woodsford is well-equipped to provide a 'sounding board' for lawyers and claimants in relation to the strategic decisions proposed to be made in the litigation.

The potential for conflicts of interest

16. ILFA Best Practices require ILFA members to maintain effective systems to detect and manage potential conflicts of interest, including conflicts that could impact the enforcement of an award or judgment.

17. Further, our standard litigation funding agreements provide that where the claimants' interests and/or instructions diverge from the funder's interests and/or instructions, the lawyers are to give preference to the clients' interests.

18. A conflict might arise if solicitors and law firms have financial and/or other interests in a third party litigation funder that is funding the same matters in which the solicitor or law firm is acting. This can be simply addressed by amending the New Zealand Rules of Conduct and Client Care for Lawyers to prohibit such conduct. When advising their clients on funding arrangements (in particular when advising on different offers received from different funders), we consider that lawyers would be better placed to protect the best interests of their clients if the lawyers' own financial interests were not impacted by the clients' decision.

19. In Australia, prior to recently introduced regulations requiring litigation funders to hold an Australian Financial Services Licence (AFSL), funders were exempt from certain statutory requirements that would otherwise apply under the *Corporations Act 2001* (Cth), provided that they maintained adequate practices for managing any conflicts of interest that may arise. The Australian Securities and Investment Commission (ASIC) published Regulatory Guide 248 (RG 248) which sets out the steps a funder could take in order to comply with its obligations to maintain and manage conflicts of interest. These steps included a funder maintaining documents that showed the funder had written procedures for managing conflicts of interest, which were reviewed every 12 months and were being implemented effectively by the funder.

Funder profits

20. We do not consider that the Court should have an express statutory power to reject, vary or set the commission rate in third party funding agreements. That is ultimately a commercial matter between the funder and the funded party. We consider that market forces, coupled with Court supervision, are sufficient to ensure that litigation funders' commission rates remain competitive and not excessive.

21. Statutory limits on funders' commission rates are not necessary. In our experience, funder's commissions in jurisdictions that we operate in have been on a downwards trend as a result of increased market competition between funders.

22. Competition between funders generally leads to better, more remunerative outcomes for claimants. If significant barriers to entry to the litigation funding market are introduced, such as overly complex regulation and/or licensing regimes (discussed in more detail below), this

healthy competition will likely diminish and result in funding commissions increasing to higher levels, which in turn will lead to worse outcomes for claimants.

23. The appropriateness of funding commissions has recently garnered some commentary in claims being heard in the Competition Appeals Tribunal (CAT) in England. In *Walter Hugh Merricks v MasterCard Incorporated & Others* an argument was put forward by the proposed defendants that the CAT was not in a position to determine whether the price for litigation funding obtained by the proposed class representative in that case was appropriate. Citing the case of *Essar v Norscot*, an English case funded by Woodsford, the Tribunal disagreed, finding "*as for the supposed difficulty of the lack of expertise of the Tribunal in deciding what is an appropriate price for litigation funding, on which Mr Williams sought to rely, that is no less novel a task than the process of approving a collective settlement under sects 49A or 49B Competition Act. There is now a developing market in litigation funding, and the Tribunal can if necessary hear evidence as to what would represent an appropriate return. We note that this appears to be what Sir Philip Otton did as the arbitrator faced with such a question in the Essar Oilfields case.*" Similarly, we submit that the Aotearoa New Zealand Court is both well-able and well-placed to assess the reasonableness of litigation funding commissions and the net returns due to group members in class actions.

24. Further, in Australia, a body of jurisprudence has developed, which the Aotearoa New Zealand Court can look to, in relation to the appropriateness of funding commissions in class actions. Pursuant to s33V of the *Federal Court of Australia Act 1976* (Cth) a representative proceeding may not be settled or discontinued without the approval of the court. The body of law in Australia in relation to class action settlement approvals shows that the assessment of whether a funder's commission is reasonable is a complex exercise, and there is no "one-size-fits-all" approach. Courts in Australia assess whether a funder's commission is reasonable in light of a number of factors including the size of the settlement, complexity of a matter, the significant risk the claim will be unsuccessful resulting in loss of investment, the risk the claim will not result in recovery (in the event the defendant's solvency is questionable), the length of the proceedings, and how many group members are impacted by the decision. An assessment of these different factors on a case-by-case basis has resulted in Australian courts approving a wide range of funding commissions on the basis that those commissions are reasonable. As such, the commissions a funder is entitled to receive are not something that should be (or are suitable to be) the subject of express statutory powers.

25. Often, in the absence of litigation funding, claimants and group members in class actions would not have the means to pursue their claim and would receive nothing, with the defendant wrongdoer suffering no financial consequences. Litigation funding is required to ensure that victims have access to justice and equality of arms against far better resourced opponents and to provide an effective form of private regulation of large corporations and other defendants. Accordingly, it should be kept in mind, when considering the net return that group members

receive from a class action, that absent the litigation funding required to bring the class action, group members would have received nothing. It is preferable for a class action to be advanced and for class members to receive something than for a class action not to be advanced and for class members to receive nothing.

26. In our submission, Aotearoa New Zealand already has the two most important tools required to keep a check on the price of litigation funding and to ensure that claimants in class actions get a fair share of the proceeds of litigation. First, a continued "light touch" approach to the regulation of the litigation funding market will encourage local and international litigation funders to enter the market. The more funders there are in a market, the more competitive the market and therefore the pricing will be, which will ultimately benefit claimants. Second, Aotearoa New Zealand has one of the most sophisticated judiciaries in the world, well able to exercise oversight of class actions, settlements and litigation funding returns.

Capital adequacy of litigation funders

27. As a member of ALF, Woodsford is required, under the ALF Code of Conduct for litigation funders in England & Wales, to maintain access to a minimum of £5 million of capital or such other amount as stipulated by ALF. We think this is a sensible provision to have in place to prevent entities without sufficient capital from becoming involved in the industry. Failing to ensure a funder has adequate capital could cause detriment to funded parties in the event that a funder runs out of money before a funded party's case is complete. However, this is ordinarily a significant part of a funded party's (and/or their advisers') due diligence before entering into a litigation funding agreement and should not in our view, in and of itself, cause the introduction of a licensing regime for funders.

Regulation and oversight of litigation funding

28. We do not consider that any kind of government-led regulation of litigation funders, whether through a licensing system or otherwise, is warranted or necessary. As mentioned above, Woodsford is a founder member of ALF, an independent body charged by the UK Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. It is important to note that Woodsford, other members of ALF and other peers in the professional litigation funding community, are often staffed by lawyers and accountants, who themselves are the subject of professional obligations. Such funders are in the business of funding commercial, high-value disputes which take place in a highly scrutinised environment (i.e. before judges or arbitral tribunals). The parties involved are often sophisticated users of legal services and employ expert legal counsel (who have their own professional obligations). The public policy considerations (including whether there is a need for regulation) that might apply to low value dispute resolution for claimants, who may not have access to expert legal advice, should not apply to the sophisticated commercial market.

29. Further, despite third party litigation funding now being a well-established industry, there have been remarkably few disputes between funders and their funded counterparts or reported problems when compared to other financial industries. We would therefore urge caution when deciding whether or not to regulate an industry which has demonstrated no need for regulation.

30. Various jurisdictions that have actively considered the question of how much (if any) state-controlled regulation of third party litigation funding is necessary have often concluded not to implement such regulation. By way of example, in January 2017, Lord Keen of Elie, speaking on behalf of the UK government, stated that "*the market for third party litigation funding remains at a relatively early stage in its development in this jurisdiction and we are not aware of specific concerns about the activities of litigation funders*" and "*the last Government gave Parliament an assurance that it will keep third party litigation funding under review and this Government is ready to investigate matters further should the need arise.*" Since then, the UK government has not proposed or introduced any government-led regulatory regime in relation to third party litigation funding, which implies that the UK government considers, quite rightly in our view, that the "need" has not arisen. Similarly, Singapore and Hong Kong recently introduced new legislation, following considerable consultation, to permit litigation funding in respect of arbitration proceedings. As part of that process, the need (or otherwise) for government-led regulation was considered, but not adopted.

31. Rather than introducing a licensing regime for litigation funding, the focus should be on ensuring that the professionals who advise the users of third party litigation funding comply with the duties they owe to their clients. For example, we consider that lawyers should be professionally obliged to advise their clients on the various funding options available (including third party funding, but also other options such as after the event insurance) and assist clients by engaging with only the most reputable funders in the market. In England and Wales, inadequate advice by a party's solicitors about litigation funding will not only be a breach of the SRA Code of Professional Conduct, but may also be grounds for a claim in professional negligence. We believe that similar professional obligations, if introduced in Aotearoa New Zealand, would serve to ensure that only reputable funders could operate effectively in the jurisdiction. Clients must be provided with the information they need to make informed decisions about financing their litigation and lawyers should be under a duty to properly advise their clients in respect of the options available to them.

32. Notwithstanding the cogent arguments against government-led regulation of the third party funding industry outlined above, if the Commission is minded to recommend introducing a licensing regime for third party funders (or similar), we would suggest that such a regime should be very 'light-touch' to ensure that any steps taken do not have a 'chilling effect' on litigation funders' desire to fund cases in Aotearoa New Zealand. Overly-onerous regulatory requirements may have the unintended consequence of fettering access to justice in Aotearoa New Zealand and/or Aotearoa New Zealand becoming a less attractive venue for disputes than it is currently. There is already evidence in Australia, following the recent introduction of a licensing regime, that increased regulation leads to a decrease in competition and an increase in the price of funding, which is ultimately to the detriment of litigants.

33. A further option open to the Commission would be to recommend the establishment of an independent complaints mechanism such as the complaints procedure established and maintained by ALF. Such a complaints mechanism would allow funded parties to invoke the procedure if they feel sufficiently aggrieved by a funder's conduct.

Woodsford's submissions in respect of the Law Commission / Te Aka Matua o te Ture Terms of Reference and Issues Paper 45 insofar as they relate to class actions

34. Woodsford agrees with the preliminary view of the Law Commission / Te Aka Matua o te Ture that a statutory class action regime is desirable in principle and should be permitted in Aotearoa New Zealand.

35. Woodsford hereafter makes submissions to address concerns outlined in IP45 as follows:

    a. Which courts and areas of the law a class actions regime should apply to.

    b. Principles for a class actions regime.

    c. Whether preliminary court approval should be required to bring a class action and what the legal tests should be.

    d. Who should be allowed to be a representative plaintiff in a class action.

    e. How class membership should be determined.

    f. Whether an unsuccessful litigant in a class action should have to pay costs to the other party.

Which courts and area of law a class action should apply to

36. We do not think that a statutory regime should be limited to any particular area of law or any particular courts (save for the fact that the courts hearing class actions should be of sufficient superiority to hear complex, high-value disputes). The ultimate aim of any regime should be to provide access to justice to individuals or entities who, individually, might not be able to pursue meritorious claims for lack of financial means. The statutory class action regime should enable individuals or entities to collectively pursue Defendants who have committed wrongs.

Principles for a class actions regime

37. Any statutory class action regime should be premised on an opt-out framework whereby the underlying proceedings define the class and affected group members who are deemed to be covered by the proceedings, unless they choose to opt-out. Indeed it would appear that the Supreme Court of Aotearoa New Zealand has expressed a preference for an opt-out framework in the recent *Southern Response Concealment* class action. An opt-out regime has the advantage of ensuring all affected parties are entitled to the remedies sought, not just those with the

resources and knowledge to initiate a claim. An opt-out claim also provides finality for a Defendant in respect of the defined class, as opposed to an opt-in regime where there is a significant risk of numerous concurrent or consecutive actions being commenced.

38. Any opt-out framework should set out the procedure to be followed in the event competing "open" class actions are issued and a carriage dispute ensues. The process to resolve such a dispute should be clear, efficient, fast, cost effective and outline the principles/factors that the court will have reference to in the process of resolving the issue of carriage. Such a framework should also seek to outline where costs will fall upon resolution of the carriage dispute, not only as between the competing potential claimants themselves but also as between the defendant and the potential claimants. If appropriate, more than one class action should be allowed to proceed if there are good reasons for them to do so. It is important that claimants are afforded the ability to choose their legal representation and funding arrangements. As such, "open" class actions and "closed" class actions (whereby the class is defined by reference to whether the group members have entered into a specific legal retainer or funding agreement) should both be allowed to continue, where claimants in the open class action have opted out of the open proceedings and opted in to a "closed" class action instead.

39. The Law Commission / Te Aka Matua o te Ture should consider adopting a similar class action regime to that currently established in Australia. In our view, Australia has one of the most sophisticated class action regimes in the world and provides an effective mechanism for the resolution of collective disputes. There are, however, some improvements on Australia's system that could be made, as to which see further below.

Whether preliminary court approval should be required to bring a class action and what the legal tests should be

40. A preliminary court approval process should not be required in order to bring a class action and we suggest that a similar approach should be adopted as that in Australia (where no preliminary court approval or certification process is required), subject to what is said below in relation to the making of Common Fund Orders (CFOs).

41. The Law Commission / Te Aka Matua o te Ture should consider expressly providing the courts hearing class actions with the power to make CFOs at the beginning of class action. A CFO is an order made in Australian class actions which requires group members (who have not opted out of the proceeding) to contribute a percentage of any award or settlement to the litigation funder irrespective of whether the group member has signed a litigation funding agreement. The High Court of Australia, in *BMW Australia Ltd v Brewster* [2019] HCA 45, recently determined that Australian courts did not have power to make CFOs at interlocutory stages of proceedings. The High Court's decision brings into question the efficacy of a class action regime in which a litigation funder can provide funding which benefits group members throughout a proceeding and not know whether it will be entitled to a return from those group members until after a resolution has been reached. In our view, it would be beneficial to confer onto courts an express statutory power to make CFOs upon an interlocutory application by a party at an early stage of a proceeding. Leaving this question uncertain risks stifling access to justice, as litigation funders

may feel less inclined to fund opt-out class actions, particularly where there are a large number of group members with relatively small individual claims and it would be impractical for the litigation funder to sign up all group members (or at least a large portion of group members) to litigation funding agreements. Indeed, such an approach undermines the very purpose of an opt-out regime, which is to allow class members to participate in an action passively, not to compel them to actively sign up to funding agreements or otherwise 'opt-in'.

42. The UK Competition Appeal Tribunal (CAT), where Woodsford is funding two actions on behalf of consumers (train passengers on the one hand and vehicles purchasers on the other), provides for a certification process in respect of opt-out collective actions.

43. The certification process has for the first time come under particular scrutiny by the UK Supreme Court in the recent matter of Mastercard Incorporated & Others v Walter Hugh Merricks CBE. In order to grant certification by way of a Collective Proceedings Order (CPO), the Tribunal must be satisfied that it is just and reasonable for the person seeking to act as representative to be authorised to do so and, secondly, the claims must be eligible for inclusion in collective proceedings. Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

44. The framework sets out further factors to be taken into account when considering whether a claim is suitable for collective proceedings including:

    a. whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

    b. the costs and the benefits of continuing the collective proceedings;

    c. whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

    d. the size and the nature of the class;

    e. whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

    f. whether the claims are suitable for an aggregate award of damages; and

    g. the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes.

45. The tribunal is also required to consider whether opt-out or opt-in proceedings would be appropriate. In doing so, the court is required to take account of all the matters it thinks fit, including the strength of the claims and whether it is practicable for the proceedings to be

brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.

46. The tribunal also has a continuing power to revoke or amend a CPO at any time during the life of the proceedings.

47. If Aotearoa New Zealand was to adopt a similar framework to the UK CAT, Woodsford submits that it is important, in any legislation establishing the framework, that the standard to be applied to determine whether a proceeding should be certified should not be overly onerous. Making the standard for certification overly onerous risks restricting access to justice.

Who should be allowed to be a representative plaintiff in a class action

48. In Australia, Pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) a representative plaintiff can institute a class action proceeding if (a) there are seven or more people who have a claim; (b) the claims are in respect of, or arise out of, the same, similar or related circumstances; and (c) the claims give rise to a substantial common issue of law or fact. Section 33D of the *Federal Court Act* deals with the standing of a representative and provides that a person who has a sufficient interest to commence (and continue) a proceeding on his or her own behalf against a defendant has a sufficient interest to commence a representative proceeding against that defendant on behalf of group members. Under Part IVA, a representative plaintiff does not need the consent of the group members in order to commence proceedings.

49. The UK Competition Appeal Tribunal Rules provide that a person can be authorised to be a class representative irrespective of whether the applicant is a class member and only if the Tribunal considers that it is just and reasonable for the applicant to act as a class representative in the collective proceedings.

50. In considering whether it is just and reasonable for an application to be appointed as class representative the tribunal considers whether the person:

    h. would fairly and adequately act in the interests of the class members;

    i. does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;

    j. if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;

    k. will be able to pay the defendant's recoverable costs if ordered to do so; and

    l. where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal.

51. When determining whether the applicant would act fairly and adequately in the interests of the class members, the tribunal is required to take account of all the circumstances including:

    m. whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings;

    n. if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;

    o. whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—
        i. a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and
        ii. a procedure for governance and consultation which takes into account the size and nature of the class; and
        iii. any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.

52. In Woodsford's experience the class representative is often an individual familiar with the industry / sector to which the claim relates or has experience of the issues faced by the class members.

53. For example on the train boundary fares case funded by Woodsford, the class representative is a Mr. Justin Gutmann. Mr. Gutmann has spent a large part of his professional life dedicated to public policy, market research and, specifically, to consumer welfare. His final post prior to retirement was as a Head of Research and Insight at Consumer Focus, the UK's statutory consumer champion, and later Citizens Advice. Mr. Gutmann also spent eight years working for London Underground as Market Planning Manager.

54. In the RoRo Cartel claim where Woodsford is funding vehicle purchasers in respect of car delivery charges, the class representative is Mark McLaren Class Representative Limited, an SPV of which Mark McLaren is the sole Director. Mark is a consumer champion who has dedicated a large part of his career to fighting for consumers, across a wide range of sectors. He spent nine years working for The Consumers' Association, more commonly known as Which?. He currently sits on the Consumer Panel of the Legal Services Board and is a director of The Property Ombudsman.

How class membership should be determined.

55. The burden rests with the class representative to adequately define the class. The court / tribunal can then exercise its supervisory powers in the form of the power to grant or withhold certification by ensuring that the class is sufficiently clear and that its members can be easily determined.

56. Membership of the class should be determined on an opt-out basis, the benefits of which have already been outlined above.

Whether an unsuccessful litigant in a class action should have to pay costs to the other party.

57. Woodsford has extensive experience of funding parties in jurisdictions where costs follow the event and unsuccessful litigants are required to pay costs to the other party (for example in the UK, Australia, New Zealand).

58. In the course of its due diligence of any matter, Woodsford assumes a risk not only that the funded party may be required to pay the opponent's costs (whether pursuant to an interlocutory application or pursuant to a final determination of the claim) but that it also might be made subject to a costs order. Accordingly it ensures that it has sufficient capital and/or insurance to satisfy any such order.

59. Similarly, Woodsford also accepts that orders for security for costs in class actions are commonplace and ensures that it can provide for the same. Such applications can be satisfied in a number of ways, whether by ATE insurance, cash paid into court, bank guarantees or irrevocable deeds of undertaking.

We hope the above assists the Commission in formulating its recommendations and would be happy to assist further as the Commission requires.