MACQUARIE UNIVERSITY SCHOOL OF LAW

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21 SEPTEMBER 1978, 9 a.m.

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The Hon. Mr. Justice M.D. Kirby
Chairman of the Law Reform Commission

CLASS ACTIONS IN CONTEXT

We are living through an age of great legal reform. Every so often society, and its legal system, are convulsed by major movements for legal change. The causes of the present movement need not be specified. They include, at least, the remarkable increases in the levels of education in our community, the massive increase in information which daily bombards each and every one of us, and the exponential developments of science and technology which potentiate the mass economy and the information society. These are the causes which render a languid pace of law reform unacceptable, even to lawyers and politicians. Developments in the laws governing consumer protection and consumer transactions must be seen against this backdrop. Though they affect the daily life of every citizen, and are therefore more visible than many other reforms, they represent nothing more than a species of a genus which is now well identified.

It is not my purpose to identify and catalogue the major developments in consumer laws in Australia. The major themeswill be picked up by the papers to be presented at this seminar. Some of the important developments that are occurring now will be outlined by those who have had a leading part in

their design. The Commonwealth has taken important initiatives, not all of which are well known. Many have been directed at minimising the confusion and uncertainty caused by disparity in differing legal regulations throughout the country. A National Consumer Affairs Advisory Council has been established.[1] A Standing Committee of Commonwealth, State and Territory Ministers for Consumer Affairs is now meeting regularly. A Commonwealth-State Consumer Products Advisory Committee was established last year. The long-awaited uniform credit laws have at last appeared in Bills introduced into the Victorian Parliament.[2] Important reforms recommended by the Swanson Committee's review of the *Trade Practices Act* have passed into law, including the liberalisation of provisions concerning the grant of interim injunctions in consumer protection cases,[3] the establishment of corrective advertising and strengthening of consumer product standards provisions.[4] The Commonwealth Government has also announced its acceptance "in principle" of another recommendation of the Swanson Committee involving protection of the consumer in manufacturers' warranties.[5] Professor Peden's important report on harsh and unconscionable contracts foreshadowed critical changes in the law of contracts, designed to adjust it, somewhat belatedly, to the realities of contractual relationships in the modern world.

Despite hard economic times, when the bargaining position of the consumer has indubitably weakened, and the professed desire of governments to minimise the amount of regulatory legislation and interference in the market place,[6] consumer protection laws and proposals for laws show no signs of abating.

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1. W.A. Fife, Speech to Consumer Organisations (1977) 2 *Commonwealth Record* 1180.
2. Credit Bill, 1978; Chattel Securities Bill 1978; and Goods (Sales and Leases) Bill 1978 (Vic).
3. K.P. O'Connor, "Consumer Law : Recent Reform Measures and Current Proposals for Further Reform", Paper for Canberra Law Workshop II, Oct. 1977, *mimeo*, 2.
4. *Id*, 4.
5. Fife, 1182.
6. *Id*, 1184. More recently, the Minister has announced the appointment of a further *Trade Practices Act* Review Committee under the chairmanship of Mr. Russell Scott, former Commissioner of the Law Reform Commission.

Nor is this a matter upon which our political parties divide. Although there may be differences of emphasis, there is a common recognition of the need to modernise the law and adjust it to suit modern conditions, including the expectations of consumers and the needs of the business community.

One writer has suggested that it is possible to perceive three distinct phases in the reform of Australian consumer protection laws over the past decade or so.[7]

* First, the introduction of penal legislation to outlaw the most outrageous selling techniques, which disadvantaged consumers subjected to them. The laws forbidding or controlling inertia selling, pyramid selling schemes, mock auctions and referral selling were instanced. Regulations of particularly troublesome sectors, such as used car dealers, home builders and travel agents also occurred in this phase.

* Secondly, reform of the substantive law governing consumer transactions and their financing received a great deal of attention as the unsuitability of the common law and original sale of goods legislation was increasing perceived. The major vehicles for reform have been comprehensive new consumer credit laws, new laws governing misrepresentation, implied terms and unconscionable provisions and laws dealing with manufacturers' warranties.

* Thirdly, a phase of reform was identified in which attention was focused on procedural changes necessary to enforce consumer claims and provide access to consumer remedies.[8]

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7. K.P. O'Connor.
8. *Id.*, 1.

If this "overview" is accepted, each of the nine jurisdictions in Australia has reached the end of the first phase. Some have progressed well into the second. A few, notabl the Commonwealth and South Australia, are entering the third phase.[9]

At least four of the current references before the Australian Law Reform Commission are of specific interest to consumers and the business community. The reference on privacy requires us to consider the rules that should govern the establishment, maintenance and security of information systems, including those kept on credit and associated topics. The reference on insurance contracts requires the Commission to consider afresh the way in which consumers and others should be protected by fair laws in respect of insurance contracts. It is plain that such contracts are sometimes not even supplied to the insured. If supplied, they are rarely read. If read, they are often not understood. The Commission will shortly be proposing, in a discussion paper, major reforms and an indigenous law of insurance contracts, uniform throughout Australia. There is also an important project on the reform of debt recovery laws. Already the Commission has delivered a report suggesting changes in the law of debt recovery as it affects small but honest consumer debtors.[10] A discussion paper is circulating suggesting further changes in the laws and procedures of debt recovery.[11] A paper is to be delivered on this topic by an officer of the Commission, Mr. Tearle.

It is, however, about the fourth relevant reference that I wish to speak. This reference, received in February 1977, requires the Law Reform Commission to review and report upon the laws of the Commonwealth relating to standing in federal jurisdiction and class actions in federal and Territory courts

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9. *Ibid.*
10. The Law Reform Commission (Aust.), *Insolvency : The Regular Payment of Deb* 1977 (A.L.R.C.6).
11. *Id.*, Discussion Paper #6 *Debt Recovery and Insolvency*, 1978.

and courts of the States whilst exercising federal jurisdiction. The Commission has issued a discussion paper on one aspect of the reference, namely that dealing with standing in public interest matters.[12] That discussion paper proposes the liberalisation of current rules which limit access to the court and under which the plaintiff is required to show a special interest or involvement, usually proprietary, in the subject matter of the litigation. Clearly that discussion paper will be of importance and interest to those concerned with the effectiveness of the third phase : procedures which permit interested consumers and their representatives to work the machinery of justice. But it is to the second part of the reference that the balance of these observations are directed. Should we introduce class actions into federal jurisdiction in Australia? If so, what rules should govern class actions and what protections should be provided to prevent abuse? The Commission will shortly publish a consultative document discussing class actions in some detail and outlining the arguments for and against their introduction in Australia. Production of that paper has been delayed whilst we await the introduction of major legislative reforms into the Congress of the United States of America. It is in the United States that modern class actions have been developed, especially since the War. There is little doubt that class actions have been abused in the United States, producing reactions from the courts and the Executive to remove the sources of abuse. The Commissioners have had the advantage of a recent discussion with the Attorney-General of the United States, Judge Griffin Bell, and it is plain that important reforms will be suggested in the United States, from which we can learn in Australia. These proposals for reform are expected shortly. The Law Reform Commission's paper will follow soon after. One of the new federal Commissioners of law reform, Mr. Bruce Debelle, a barrister and solicitor of the Supreme Court of South Australia, will take charge of this project and see it to completion. No

12. *Id.*, Discussion Paper #4 *Access to the Courts - I, Standing : Public Interest Suits*, 1978.

final or even tentative views have yet been reached by the Commission on the subject. Any views expressed here will be my own only. This is, as I hope to show, a complex and sensitive issue with economic, social and professional implications all of which will have to be carefully weighed, after they have been thoroughly debated in the Australian community. The most that can be done at this juncture is to describe the modern class action, to explain how it has developed and how it is used, and to consider the arguments that are typically advanced for and against its introduction into Australian federal jurisdiction. The supporters of class actions sometimes see it as the panacea by which consumers, environmentalists, civil libertarians and other concerned people will work the legal system to provide relief against wrong and a modern administration of justice. Opponents, fearful of a repetition of American experience, see it as an unrelieved disaster, "consumerism and consumer protection gone to the extreme",[13] "the final nightmare for the business community",[14] the introduction of which "could spell doom for many companies", one successful case being enough to "send a company to the wall".[15]

A mere legal procedure which occasions language and opinions of this extravagance plainly warrants the closest scrutiny. What is a class action? What is in it for consumers? Should we have it in Australia?

CLASS ACTIONS DEFINED

The class action is a form of legal procedure by which one or more members of a group of people having a cause of action maintainable in the courts sues as a representative on behalf of all such people. The preconditions for class actions are usually three at least :

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13. "Expel Class Actions", Victorian Employers' Federation, *Employers' Report* (1978) Vol. 8, No. 19, 1.
14. *Ibid,*
15. *Ibid*

* *Numerosity* : the numbers of people involved in the litigation are so many that to require all of them to be joined in the case would be impracticable or undesirable.

* *Common Issues* : there are common issues of law or fact involved in the various claims or defences of the members of the "class"

* *Convenience* : somebody, usually the court, or one of its officers, forms a view that combining all the claims or defences of multiple parties in the one case is the best and fairest means of securing an adjudication of the issues that is both efficient and just.

A class action is, then, "essentially a procedural device for adjudicating in a single proceeding the claims or defences of numerous persons having the same interest in the controversy in question".[16] It is a species of multi-party litigation. Other forms of combining litigation are well known in the courts of this country. For example, proceedings may be consolidated where a number of cases have been started in the court and it is convenient to deal with the same issues at the one time.[17] The purpose of consolidation is to save costs and time, including the hard pressed time of judicial officers. The facility of joinder of parties and of intervention in proceedings is another example of the effort of courts to ensure that a number of matters in dispute can be effectually and completely determined in the one case. Court rules also, typically, provide for the appointment of special representatives on behalf of others who are absent from the litigation but have

16. N.J. Williams, *Ontario Class Action Study* (W.P. for Civil Procedure Revisi Committee, Ontario), 1977, 3.
17. e.g. Supreme Court Rules, 1970 (N.S.W.) Pt. 31, R.7; *Cf. Defamation Act* 1912 (N.S.W.) s.11 (repealed).

an interest in it.[18] In all of these cases the parties before the court are fully identified and, even where not specifically named in the litigation, are on notice of it. It is the development of the general representative action in the United States that gave birth to the modern class action. From an identical historical root in the procedures of the Court of Chancery in England, a specific development occurred which was not paralleled in British Commonwealth countries. Inquiries in Canada, South Australia and now at a federal level in this country pose the question whether the special American development should be copied, with or without modifications. The Courts of Chancery developed relief, normally an injunction or declaration determining rights and duties not only of the actual parties to a litigation but also of all persons represented and, indeed, others. Orders made on the application of a particular plaintiff enured to the benefit of a great number of other persons, including those whom the plaintiff represented. This remains the case and remedies of injunction and declaration have actually expanded in scope in recent years. The common law courts of England, however, typically prefer the remedy of money damages, as the sanction to enforce their orders. They preferred the "carrot" of avoiding the obligation to pay money compensation to the "stick" of orders enforceable against the person.[19] Because of the difficulty of involving a court in the obligation to administer large sums of money damages, disposable to multiple parties, the common law courts shied away from representative proceedings. The Courts of Chancery, unembarrassed by such machinery problems, exhibited less reluctance to make orders at the behest of representative litigants. These were enforceable against the per including against persons who were not parties to the actual litigation. Even after the fusion of the Chancery Courts and the common law jurisdiction which began in the late 19th century, jud dealing with causes which were formerly categorised as common

18. e.g. High Court Rules, O.16, R.11.
19. J.G. Fleming, Retraction and Reply : Alternative Remedies for Defamation, (1978) 12 *Uni.Brit.Col.L.R.*, 15, 30.

law actions, seeking the common law remedy of damages, declined to permit the expansion of representative actions. Unless identifiable parties, with a precisely common legal interest and fully informed of the litigation were before the court, representative proceedings were not generally permitted in damages actions. This approach originated in England.[20] Its influence spread to other British Commonwealth countries notably Canada,[21] New Zealand,[22] and Australia. Whilst representative actions for equitable relief were and are a commonplace, representative actions for damages are virtually unknown.

In the United States, legal history took a different course.[23] Starting with modest beginnings in court rules early in the 19th century, representative proceedings were permitted, even in actions where the relief sought was an award of damages. Subject to court scrutiny and supervision, particular litigants were permitted to sue or defend on behalf of a class, many of whose members were strangers to the proceedings and some of whom might be entirely ignorant of them. Class actions are sometimes mounted in the United States for relief by way of injunction or declaration. Typically, however, the claim made is one for money damages. There is no pressing need in Australia for class actions in federal jurisdiction to secure relief by way of injunction or declaratory orders. Such relief is presently widely available. Its scope continues to expand. The remedy of injunction and declaration, secured by an individual litigant in his own case undoubtedly extends, quite often, to the benefit of all coming within the scope of the order made. One plaintiff can obtain an order which, in effect, disadvantages or advantages large groups of persons who have a common interest in the subject matter, some of whom may have been quite ignorant of the case. The real controversy about class actions in Australia is not about class actions for injunctions

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20. *Markt v. Knight Steamship Co.* [1910] 2 *K.B.* 1021 (C.A.)
21. e.g. Federal Court Rules (Can.), R.1711; Ontario Rules of Practice, R.75
22. *Elliott v. Hansen* [1936] *N.Z.L.R.* 826.
23. Yeazell, Group Litigation and Social Context : Toward a History of the C Action, 77 *Columbia L.R.* 866 (1977)

and declarations. It is about representative proceedings where a representative seeks to recover damages on behalf of a group of persons, in a like interest, who are not parties to the proceedings.

It is impossible to identify a typical United States class action. The variety of issues litigated defies typicality. An example often cited is the case of *Daar v. Yellow Cab Co.*[24] In violation of a city ordinance, the Yellow Cab Co. of California raised its fares by simply changing the meters. In the result, many thousands of passengers were unlawfully overcharged. Some never realised the offence. Some doubtless would not have cared much, if they had known. Most certainly would not care sufficiently to sue to recover the unlawful surcharge. It would be too much trouble to do so and in any case the damage done to the individual passenger was small. The rules of the Supreme Court of California, however, provided that the court could, under certain circumstances, permit a representative class action to proceed. One member of the class adversely affected by the unlawful action of the Yellow Cab Co. sought to avail himself of those rules. He applied to the Supreme Court to be permitted to bring a class action on behalf of all who had been unlawfully overcharged. The Supreme Court permitted the action to proceed as a class action. It rejected a defence argument that the class should have a precise community of legal interests in the relief sought. The court furthermore distinguished between the difficulty of ascertaining "a class" with common legal and factual interests and the difficulty of identifying the members of that class, once the class was defined. The "class" specified was ascertainab It was the taxi passengers of the Yellow Cab Co. within a certain period. The individual members of the class were not now identifiable. The court took the view that if a class action were denied, recovery by any member of the class would be

24. 67 *Cal.* 2d. 695 (1967)

unlikely. The individual claim would amount, at most, to no more than a few dollars. The defendant would, if no action were allowed, "retain the benefits from its own wrongs".[25] The court held frankly and deliberately that the representative procedure should be developed to serve the consumer society.[26] The amount of recovery from the defendant was simply calculated. It was the unjust enrichment of the defendant over the period of overcharge, contrary to law. The disbursement of this fund posed a more difficult question. If all of the consumers who had been overcharged could not be ascertained, how could they be reimbursed? This question was answered by ordering the payment into court of the unjust enrichment. After disbursement to those who could prove an actual loss and for legal costs, the balance was to be disbursed by the taxicab company undercharging until the fund was extinguished.

Probably the most spectacular of class action verdicts were those obtained in the *Pfizer* litigation.[27] In these cases, the defendant settled with the plaintiffs at two separate stages of the litigation, on terms requiring it to pay out a total amount of $161.5m. Of this sum $74m was to be devoted to general expenditure for public health.[28] The size of the verdict and its attendant publicity attracted a great deal of attention. The effect of an amendment to the Federal Rules of Civil Procedure in 1966 was, at first, to increase greatly the numbers of class actions in federal jurisdiction in the United States. The same strong opinions which we have lately heard voiced in Australia, were advanced in the United States for and against the facilitation of federal class actions :

> "[T]he public at large, and in particular the attorneys became instruments for the enforcement of important national legislation policy and for the vindication of the rights of, and

25. *Id.*, 715
26. The proceedings were settled upon terms set out above, included in the Court order.
27. *West Virginia v. Charles Pfizer & Co.* 440 F. 2d., 1079 (1971); *Hartford Hospital v. Charles Pfizer & Co.*, 448 F. 2d., 790 (1971).
28. The litigation is reviewed by Lebedoff, "Operation Money Back", 4 *Class Action Reports*, 147 (1975).

> recompense for the wrongs done to, large segments of the population. At last every person seemed to have access to federal courts".[29]

> "A look at the record ... reveals that industry generally did not share the euphoric conviction that consumers could litigate themselves into a Utopian state by means of either private or governmental class action suits".[30]

Although the numbers of class actions in federal jurisdiction in the United States grew at first, a series of decisions of the Supreme Court circumscribed that growth and gave rise to the current debate about reform of federal class actions. The Supreme Court decisions undoubtedly reflected concern that the procedure was susceptible to abuse. In *Zahn v. International Paper Co.*[31] the Supreme Court held that each and every member of a class must have the necessary $10,000 stake in order to be able to invoke federal diversity jurisdiction. The effect of this decision has been, of necessity, to reduce significantly the numbers of class actions claiming damages in federal courts in the United States. The $10,000 threshold requirement does not, however, apply to all federal cases. It does not apply where there is a federal cause of action, most notably in antitrust cases. However, a further impediment to class action development arose out of a decision in *Eisen v. Carlisle and Jacquelin.*[32] In that case, the Supreme Court tightened up considerably the requirements of notice in class actions. Eisen had purchased odd lot shares in the New York Stock Exchange. There were only two odd lot traders in the Exchange. Eisen alleged that, in violation of the Sherman Act, they had monopolised trading and exacted excessive fees. On behalf of himself and all others who had traded in odd lots on the Exchange during the previous four years, he sought treble money

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29. Meyer, "The Social Utility of Class Actions", 42 *Brooklyn L.R.* 189, 192 (1975
30. Pickett, "Consumer Class Actions From Industry's Viewpoint", 26 *Business Lawyer*, 417 (1970-71).
31. 414 *U.S.* 291 (1973).
32. 122 *U.S.* 156 (1974).

damages. His personal stake was $70. The defendants' possible liability, on the basis of treble damages, was $90m. The total number of class members was estimated to be six million persons. The defendants volunteered the identification of two million and contended that the plaintiff would have to give individual notice to all members of the class. For the plaintiff to do so, it was estimated he would have to outlay $200,000. The Supreme Court held that the current rule required the giving of notice to parties affected. In the result Eisen, not surprisingly, dropped the suit.

The Eisen litigation has brought forward a great deal of commentary and federal and state moves for reform of class action procedures in the United States. Undoubtedly, a number of extravagent alleged classes had been proposed. They included "all consumers of gasoline" in a State, "all home owners in the United States", "all residents of the United States", "all purchasers during six years of General Motors products" and so on. Critics stepped up their attack on the profits which some lawyers made out of substantial class action verdicts, by reason of the contingency fee cost rules which generally apply in the United States. The most severe criticism was directed at the manner of the disbursement of class action verdicts. It involved courts in complex handling of large funds and windfall gains to persons and organisations that had suffered no real loss. This controversy has led to State moves to involve public officers in the bringing of class actions according to the so-called *parens patriae* principle of the government acting on behalf of all citizens. Thus the New York City *Consumer Protection Law* provides for a type of class action brought by the Commissioner for Consumer Affairs on behalf of all injured consumers. At a federal level, Attorney-General Bell initiated a study which produced suggestions for significant reforms of federal class actions.[33] Whilst

33. Department of Justice (U.S.), Office for Improvements in the Administration of Justice, *Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury*, No. 842, *mimeo*, 1977.

preserving class relief, the general purpose of the reform measures proposed is to improve the class action mechanism and to remove and control areas of abuse. Legislation designed to effect reform is expected to be introduced later this year. Five examples of abuse of class action procedures are identified :

* The monetary incentives flow chiefly to the lawyer rather than to the person injured
* The vast scale of many class actions causes difficulties if counsel bring them unfairly. Private compensatory procedures do not afford the defendant adequate protection against such huge claims.
* Where the principal purpose of a class action is deterrence against unlawful conduct, the extent of the individual injury to a member of a class may be properly measured by statistical and other means not appropriate in the "compensation orientation" of damages actions.
* The machinery provided for handling the distribution of awards based on widespread small injuries is inefficient.
* Compensatory procedures lack a formal mechanism for involving the Executive in its routine work of protecting the community generally.[34]

Parallel with moves to reform United States class action procedures are developments in Canada, designed to introduce and extend class actions in that country. In 1975 a report was prepared by Professor N.J. Williams suggesting a form of class action relief for consumers and consumer groups in the federal courts of Canada. The government introduced legislation to permit class actions to recover damages under the *Combines*

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34. *Id.*, E.7.

Investigations Act. A number of amendments to the Bill have made the bringing of class actions more difficult. In Canada, as in Australia, costs usually follow the event. In four of the Canadian Provinces, contingent fees are prohibited. Whereas in the United States the cost rules operate in favour of actions being brought, in Canada, as in Britain and Australia, they tend to operate in the reverse direction. In the United States, a plaintiff is at present in a "no loss" situation in a class action. If the action succeeds, the costs will be paid out of the class recovery. If it fails, costs would generally be borne by the attorney himself. In Canada, as in Australia, the plaintiff is, in a sense, in a "no win" situation so far as the personal fruits of a class-type action are concerned, if conducted according to present cost rules. If the action succeeds, he will probably have to bear some solicitor and client costs, which would soon exhaust his generally tiny personal stake. If it fails, he would usually be required to pay the costs of both sides.

The developments in Canada are therefore of special interest to us in Australia. In two Provinces, there is an active study of whether, and if so how, class actions should be introduced. In British Columbia the Law Reform Commission of that Province is working on a project on class actions. In Ontario, the Civil Procedure Revision Committee is in the midst of a like project. A Bill to provide for class actions was introduced into the Ontario legislature in 1977.[35] Quebec, alone, has enacted a law respecting the class action. It amends the *Code of Civil Procedure* by adding a facility of class actions in the Superior Court. A number of preconditions are laid down including the requirement to secure the authorisation of the court before commencing proceedings. Such authorisation can only be given if certain conditions are met. These include that the applicant must establish that the

35. Bill 12, 1977, for An Act to provide for Class Actions (Private Member's Bill, Mr. Lawlor, 1st Reading, 31 March 1977).

persons on whose behalf he acts have identical, similar or related questions of law or fact in common. The court must ascertain that the person appointed a representative, is in a position to represent the members of the group adequately and has given notice to members of the group. Provision is also made for exclusions from the group and other protective measures to prevent abuse of the procedure.[36]

There are no moves to develop class action procedures in the United Kingdom or New Zealand.[37] Recent decisions of the English courts show them struggling for reforms of procedure to cope with issues in which many persons, including some who are not parties to the litigation, have an interest.[38] Possible introduction "subject to proper safeguards" of contingency fees in certain civil litigation was raised in 1975 by the Court of Appeal.[39] The issue was not resolved and has now been turned over to the Royal Commission on Legal Services. *Justice*, the British section of the International Commission of Jurists, has recently proposed to the Royal Commission the introduction of a form of contingency fees for lawyers in England.[40] The provision of contingent fees has undoubtedly facilitated class litigation in the United States. In British countries it is generally regarded as anathema and unethical, if not unlawful. A leading English barrister recently declared to a Canadian audience, discussing the matter of class actions, that he did not see "any need in Britain" for class actions.[41] Debate in Australia is somewhat more active.

PRESENT POSITION IN AUSTRALIA

The Australian legal system has not developed modern class actions after the American model. There are a number of reasons for this. They include principles and attitudes inherited

36. Bill 39, 1977, for An Act Respecting the class action. M. P. Marois, Minister for Social Development.
37. But see *Trustee Companies Managements Act* 1975 (N.Z.) 18.
38. For example *R v. Thompson Holidays Limited* [1974] 1 *All E.R.* 823. *Cf. Beswick v. Beswick* [1966] 3 *All E.R.* 1, 9.
39. *Wallersteiner v. Moir (No. 2)* [1975] 2 *W.L.R.* 389.
40. Submission to the Royal Commission on Legal Services recorded and commen on in *Economist*, 11 Feb. 1978, 20-1.
41. P. Webster Q.C., C.B.A. Annual Meeting, 1977, *Role of the Class Action.*

from England both as to the role of the legal system and the courts and as to the view which the legal profession holds of its proper role in that system and in society. The general disinclination of Australian courts to permit representative proceedings is plain in common law actions where damages are sought, and particularly in actions of tort.[42] The cost rules and laws against maintenance and champerty have discouraged the bringing of representative proceedings.

In 1976 the S.A. Attorney-General asked the Law Reform Committee of South Australia whether class actions should be introduced into that State "as a means by which ordinary citizens could vindicate legal rights for themselves and for all others who had suffered loss from the like cause."[43] The Committee's report was made public in March 1978. It recommends legislation to facilitate class actions in South Australia. The report specifically acknowledges the influence of the writings of Professor Williams in Canada. However, unlike the federal Canadian proposals, it does not suggest that the class procedure should be limited to consumer actions.

> "We are of the opinion that class actions should not be so restricted but that they should be available also in environmental and ecological litigation and indeed generally in all cases in which members of the class would have locus standi if they sued individually".[44]

Leaving aside the historical background, the inadequacy of current rules, the developments in North America and the legislative innovations of South Australia which a class procedur might be used to enforce, the Committee stated its reasons for recommending class actions in these terms:

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42. *Fearnley v. Berm* (1924) *Q.S.R.* 280, 295. *Cf. Cameron v. Hogan* (1934) 51 *C.L.R.* 358, 371-2.
43. Law Reform Committee of South Australia, 36th Report, *Relating to Class Actions*, 1978, 1.
44. *Id.*, 7.

"The class action assumes importance in any search for more effective means by which the ordinary citizen can assert and enforce his legal rights particularly with regard to his transactions as a consumer and to the protection of the environment in which he lives. The same wrongful act, or default, may affect the rights of many people. Each person may suffer loss or detriment which is important to him but which would not justify, on economic ground, individual resort to the Courts. If action can be taken by one or more persons representing the class there may be an effective method by which the remedies for the wrong can be enforced. This representative procedure is not available under the present rule in most consumer and environmental cases. [That rule] requires that members of the class "have the same interest in the subject matter of a cause or matter". The rule therefore does not cover cases in which the claims of members of the class are based upon a separate contract or in which they have individual claims for damages. The present cost rules moreover present an insurmountable problem to the maintenance of a class action in the typical consumer or environmental case. No individual member of the class is likely to have a sufficient financial interest in the outcome to justify either the expenditure of the substantial costs likely to be involved in an action of that kind, or the incurring of the liability to pay the other party's costs in the event of failure. If the representative or class action is to be effective as a weapon in the hands of citizens whose rights have been infringed, a reformulation of the rules of law governing such actions is necessary".[45]

45. *Id.*, 26.

In the result, the Committee recommended draft legislation for the bringing of class actions but only in the Supreme Court of South Australia. Preconditions were laid down including :

(a) that there are numerous people each having a cause of action maintainable in the State;

(b) that there are questions of law or fact common to the class;

(c) that the representative party or parties will fairly and adequately protect the interests of the class;

(d) that the action is brought in good faith and appears to have merit; and

(e) that to proceed by way of class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

Detailed provisions permit the court to ensure adequate legal representation, the giving of notice to members of the class on whose behalf the action is brought and the making of orders for costs having regard to the policy of the Act "to facilitate class actions".[46] Provision is made for a member of a class to exclude himself from the class and from any judgment in the class action. Control over premature or unfair compromise or discontinuance of litigation, the basis of much alleged abuse in the United States, is provided to the court. The fund constituted by damages recovered is to be paid into court and disbursed as the court orders. Where class beneficiaries cannot be traced, after due notice, the plaintiff is required to notify the Attorney-General who may intervene and propose a scheme for the benefit of some or all members of the group who were injured. A statutory indemnity fund is set up with purposes to provide a legal aid scheme for future class actions, the payment of costs to defendants and the alleviation of hardship caused to class members. Although costs are within the full

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46. Draft Bill, cl.5(3).

discretion of the court, no costs are to be ordered in favour of a defendant, except on an initial application or in the event of proof of fraud or perjury on the part of the plaintiff or his representatives and certain other limited circumstances. The report specifically recognises that unless special provision is made to fix costs at an "excess" figure, the provision of a class action facility will be an empty gesture in Australia. In the United States, it has been the contingency fee that has oiled the machinery of class actions and encouraged their organisation by the legal profession. The South Australian Committee suggests that, subject to the approval of the judge, the plaintiff's solicitor should be paid, if the action is successful, on a basis "in excess of the ordinary scale of costs".

The more disquieting features of "fluid recovery" by which courts have disbursed large class action funds in the United States is avoided. The Committee proposes that after disbursement to those proving a loss and to those suffering a hardship, the balance of any unclaimed monies, if undistributed, should be paid in Consolidated Revenue.[47] Response to the proposal has been varied. The Executive Director of the Australian Finance Conference in March 1977 condemned the "blackmail effect" of unprecedented aggregated damages claims.[48] The retiring Federal Chairman of the Finance Conference delivering his report for 1976-7 referred to the "possibility of annihiliation' facing companies because of enormous damages that can stem from class actions with "crippling costs" incurred in defending cases and in out-of-court settlements :

> "The system has been seriously abused by lawyers and others and there are unresolved problems relating to undistributed damages. [The rights of consumers] can be achieved by legislation already in force in some areas in Australia providing for Commissioners for Consumer Affairs

47. S.A. Report, 10.
48. J. Llewellyn, The Coming Revolution in Credit Laws, Address to Australian Institute of Credit Management Convention, 18 March 1977, *mimeo*, 13-4.

> to take actions on behalf of individual consumers and by an extension of the Small Claims Court which have already proved so successful".[49]

In Tasmania a narrower reference relating to environmental matters is reported to be under study by officers of the State Attorney-General's Department. In New South Wales an informal investigation is understood to have been commenced. The *Anti Discrimination Act* 1977 provides for the bringing of a "representative complaint" by a person on behalf of himself "and other persons or two or more persons on behalf of themselves and other persons" before the Anti Discrimination Board. Such a proceeding"must be brought bona fide and in good faith as a representative complainant".[50]

Class actions nowhere exist to enforce general fairness. They merely permit the organisation of parties to enforce the current law. In the United States they have been used typically in a number of identifiable areas of litigation. These include the enforcement of civil rights entitlements, the enforcement of environmental laws, welfare laws, antitrust and securities legislation and, above all, consumer protection laws. In Australia, no civil rights legislation at a federal level lends itself to the organisation of class litigation. The *Racial Discrimination Act* 1975 does provide for court orders by way of injunctions and the award of damages.[51] However, no such proceeding by way of civil action may be instituted unless the person aggrieved has received a certificate from the Commissioner for Community Relations stating that endeavours at conciliation have been exhausted.[52] The Act gives no remedy by way of civil action, as of right. A certificate under the Act has never been granted. No provision is made in present

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49. K.E. Hill, Chairman's Annual Report, Australian Finance Conference, June 1977.
50. *Anti Discrimination Act*, 1977 (N.S.W.) s.103(2)(a).
51. *Racial Discrimination Act* 1975 (Cth), s.24(1)(d).
52. *Id.*, s.24(3). There is another limitation in s.24(2).

Commonwealth environmental laws for the recovery of damages.[53] Nor is there any legislation relevant in the companies and securities field. The one area in which there is legislation that may be susceptible of class action procedure is consumer protection and restrictive trade practices. Insofar as the debate about class actions in federal jurisdiction in Australia is the debate about proceedings for the recovery of damages (and not injunctive or declaratory relief which are already generously available) the *Trade Practices Act* 1974 provides for the recovery of damages to the extent of the loss or damage suffered. Section 87 of that Act already provides substantial machinery of the kind that would be necessary to do the adjustments to the rights of parties that need to be done in the resolution of class actions.

There are, of course, wider issues before the Law Reform Commission, including the general question of class actions in Territory Courts and class actions in State Courts exercising federal jurisdiction, including in diversity cases. Enough has been said to show that legislation in Australia, Commonwealth and State, has rarely been designed to lend itself to class action procedures, as these have been developed in the United States. In particular, legislation is rarely designed to enforce matters of public concern such as civil rights, environment protection, consumer protection and restrictive trade practices, by the use of civil actions for damages. Instead, the normal sanctions provided have been criminal sanctions, sometimes supplemented by administrative controls. A damages remedy, exerciseable by the individual, is rarely provided at all in legislation. Where it is provided, it is usually not a right, susceptible of class action enforcement but a privilege, secured only after negotiating numerous intermediate impediments. In the one case where specific representative complainants are provided for, the remedy of damages is, in terms, withdrawn.[54]

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53. P. Alston, Representative Class Actions in Environmental Litigation, (1973) 9 *M.U.L.R.* 307, 314.
54. *Anti Discrimination Act* 1977 (N.S.W.), s.113(b)(i).

The *Trade Practices Act* of the Commonwealth apart, most Australian legislation has been drawn without any notion at all of concerted litigation to use the civil courts, and particularly the damages remedy, as a means of enforcing public law. This fact must be thoroughly understood if the debate about class actions in Commonwealth courts and under Commonwealth laws is to be put into perspective. In the United States numerous federal laws do provide for individually exerciseable damages actions. For nearly a century this has been an orthodox method of law enforcement. It has not been so in Australia and a realisation of this is necessary if the immediate potential of the Law Reform Commission's exercise is to be fully understood.

ARGUMENTS, ALTERNATIVES AND CONCLUSIONS

Enough has now been said to recapitulate and list the main arguments for and against the modern class action representative procedure. Proponents argue that the current strict rule that all persons materially interested in the subject matter of a suit, however numerous, ought to be parties, was only a rule of general practice. It was established for the convenience of the administration of justice. It is not an end in itself. It is a means to the end of justice. If rigid adherence to such a rule is to deny some people justice, it must bend. Although this was well understood and applied in Chancery, even after the *Judicature Act* it did not receive the same treatment at common law.

Class actions also represent a means for upholding the legal interests of groups in society enjoying common concerns. In law reform it is asserted that "the first and most urgent priority is procedural reform".[55] The move from individual disputes to group disputes reflects a significant change in the role of litigation. It pits an organised class into a more equal battle against the State or the corporation. It forces

55. Trebilcock, Private Law Remedies for False and Misleading Advertising (1972) *U.Toronto L.J.* 1, 3.

the courts to consider explicitly the concerns of large numbers in the community which are not simply selfish individual concerns.

Perhaps the most compelling argument advanced for class actions is that it provides effective relief where otherwise there would be no "coming of justice".[56] It is, so it is said, the means of organising small claimants whose claims, standing alone, would not justify the cost (economic and emotional) of litigation. Costs become trivial when shared across large groups. At the moment, the rule of law may, effectively, not be observed where the damage done to a person is small or where the person himself is poor, timid or has no ready access to lawyers and the courts. Class actions may provide machinery for overcoming this problem and organising small litigants. They may help to overcome the impediments of apathy, indifference to rights, ignorance of entitlement and cynicism about the machinery of justice. It may provide people with relief which the law affords them in theory but which, at present, it does not deliver in practice.

The other arguments advanced depend upon the effect of class actions on the defendant. Aggregate damages awards certainly amount to a more effective deterrent because of the potential they have to strike the polluter, the manufacturer or the retailer in the "hip pocket". Because the sanction may be significant, proponents argue class actions help to "internalise" control.[57] Why should a defendant secure benefits by unlawful conduct, relying on the inadequacy of the legal system and the timidity and lack of organisation of those wronged? Complaints of windfall benefits to third parties not damaged fall on deaf ears amongst supporters of the class action. It does not make the relief improper that third parties benefit from it. The extent of the benefit is limited to the measure of the defendant'

56. *Chancey v. May* (1722) *Prec.Ch.* 592; 24 *E.R.* 265 (Ch.)
57. The Cost Internalization Case for Class Actions, 21 *Stanford L.R.* 383 (1969).

wrongdoing or unjust enrichment. The very publicity which may surround a large class action verdict ensures compliance with the law and supports the substantive relief which the law in theory provides. American writers urge the value of class actions as a means of asserting the "old-fashioned notion" that "the best person to look after consumers' interests may be the consumer himself".[58] Upon this view, it is important to allow citizens themselves to indicate, by initiating litigation, just what their concerns in society are. It also prevents the danger, identified in American legal literature, of regulatory agencies becoming fixed in their ways and even captives of the industries they are supposed to regulate. The difficulties of staff ceilings, lack of funds and other impediments in the way of institutional enforcement of the *Trade Practices Act* 1974 are collected in successive Annual Reports of the Trade Practices Commission.[59] The 1977 Annual Report of the Director-General of Fair Trading in Britain records nearly six hundred thousand consumer complaints received in 1977, a twenty six percent increase over 1976. The number of complaints is likely to increase, with the expectation of utility in complaining. Making every allowance for the inhibitions mentioned above, the fact remains that the number of prosecutions commenced by the Trade Practices Commission or the Attorney-General under the *Trade Practices Act* 1974 of the Commonwealth is small compared to the total area covered by the Act. In the two years before April 1977, there were some thirty nine actions commenced by the Commission. In the same period there were forty five actions brought by private parties. Although these figures must be read with caution, the numbers are plainly small in comparison to the total volume of consumer complaints in Australia. Would class actions provide consumers and others (or their representative associations) with attractive new procedures that would encourage the active enforcement of the law?

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58. Trebilcock, 3.
59. Trade Practices Commission (Aust.) *Annual Report* 1977, 2, 94.

Critics of class actions are equally vocal. They too advance persuasive arguments. I leave aside the issue of the constitutional inhibitions that may exist on the development of federal class actions.[60] Although the Australian Constitution does not contain, in terms, a "due process" requirement, it does commit the judicial power of the Commonwealth to the High Court and other "courts". Jurisdiction is conferred, relevantly, only in respect of "matters". A question may arise as to whether a class action is a "matter". More significantly, it may be said that the procedure, as developed in the United States, is fundamentally inconsistent with courts resolving the rights of parties. According to this view these rights should not be determined in litigation, in which persons affected are not parties and of which they may be perfectly ignorant, indeed, possibly, thoroughly disapproving. Constitutional realists say that the potential of "huge" federal class action verdicts might induce courts to diminish rather than expand the scope of Commonwealth constitutional power. It certainly appears that, in the United States, the Supreme Court has reacted vigorously, in part upon constitutional grounds, to diminish the scope for class actions in federal jurisdiction.

Even if constitutional considerations are set aside, there remain arguments of principle and practicality. Critics assert that the class action is yet another example of the "courtroom syndrome", forcing litigation upon people who do not themselves feel compelled to commence it : organising wrath and litigious discontent, where it may not actually exist. The self-election of a plaintiff "representative" is offensive to some, as is the notion that large social questions are apt to be determined in courtrooms. They ask whether it is desirable that the judiciary should be involved in the disbursement of large sums of money, without clear legal guidance. The class

60. *Trade Practices Commission v. Milreis* (1977) 14 *A.L.R.* 623 (F.C.). The issue was not determined. See Discussion Paper #4, *Access to the Courts,*

action, so it is said, turns courtrooms into legislative fora and involves judges in adjustments that are not susceptible to precise legal decision making. Furthermore, our judicial procedure assumes the adversary process i.e. the presence in court of parties committed personally to conflicting points of view and fighting vigorously for the acceptance of their arguments. Because the rights of some parties at least will be determined in their absence (indeed in ignorance of the trial) class actions may not ensure the same vigour. Self appointed representatives who initiate proceedings may not have the same motivation to work the adversary mechanism.

Whilst supporters of class actions frankly acknowledge the penal or preventive element in the large-scale recoupment of unjust enrichment, critics suggest that this is a misuse of the civil law. It turns a civil action into a punitive proceeding. Penalties of the order of class verdicts should only be imposed after criminal prosecution with the attendant protection of the presumption of innocence, the criminal onus of proof and other rules and procedures developed over many centuries to protect the criminal accused. Class actions will increase the demands upon courts, which are already heavily burdened. Whatever the position in a large market such as the United States, the Australian economy cannot, so it is said, support this luxury. In any case it only "works" in the United States because of a different litigious tradition which sees courtrooms as the means of resolving many social tensions. It is unlikely, on this view, that class actions would succeed even if provided for in Australia, because they are dependent upon cost rules that do not exist, legal traditions that are the opposite of ours and enthusiasm for litigation which is unlikely to develop amongst our people. The existence of a right in "any person" to initiate proceedings under the *Trade Practices Act* has scarcely led to a flood of litigation. In addition to the above, there is a catalogue of problems which any scheme for class actions must confront. These include the obligations of notice, the management of a class action, rules as to discovery, the settling of the jurisdiction of courts in a federal system, rules governing limitation of action, the

means of securing exemption from a class action, the certification of proceedings suitable for class actions, the supervision of legal representation and settlement, the management of class action verdicts and the modification of cost rules that are necessary if class actions are to succeed. Class actions have tended to involve preliminary certification but once certification is granted, the defendant may be in a grossly disadvantageous and perilous position that virtually forces him into settlement out of court. Far from increasing resolution of legal claims in court, class actions may, by litigious blackmail, remit matters to be resolved in lawyers' offices because neither side wishes to run the risk of losing so large a claim.

Finally, the critics of class actions urge the development of alternatives more in line with our tradition. The provision of small claims tribunals, the permission of group interest litigation by identifiable associations, increased activity by administrative and like agencies and a provision of "standing" to individuals are all put forward as a safer course. A further possibility is the expansion of representative actions, but only to permit claims to be brought on behalf of named and consenting members of the representative group. The provision of class actions brought by a community representative, such as the Attorney-General, is another possibility.

These and other arguments are currently under consideration in the Law Reform Commission. It is not possible in a short paper of this kind, to list all the arguments or to deal with all the fears which the class action debate has engendered. Enough has been said to show that the debate transcends consumer protection and raises for determination questions about the proper future role of the legal profession, legal procedures and the courts. The Law Reform Commission is not insensitive to the economic, legal and social effects of the introduction of class actions. Procedural facilities which organise and consolidate many claims may inhibit the development of substantive rights. But they may also encourage access to the substantive rights that already exist but are little used

because of the inhibitions which I have described. In this, as in all of its tasks, the Commission invites the views of the community. There is surely sufficient in the class actions controversy to guarantee a major community debate at the end of which, let us hope, we get it right.