

QUEENSLAND LAW SOCIETY

ANNUAL PRACTITIONERS' DINNER, THE BRISBANE CLUB

FRIDAY, 9 NOVEMBER 1979, 7.45 P.M.

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"MAKING LAWYERS RELEVANT"? OR
"BUSINESS' FINAL NIGHTMARE"?

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

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THE LAW REFORM COMMISSION'S INQUIRY INTO CLASS ACTIONS

We live in an age when it is fashionable to criticise lawyers and to suggest that they should be deprived of this or that function. Of course lawyers have always been fair game for public criticism. Because we, as a profession, are not very good in putting the case for the modern role of the lawyer, we tend to attract criticism, some of it justified. Typical is a recent editorial in a leading Australian newspaper commenting on the Australian Law Reform Commission's discussion paper on class actions :

"Of all the self-promoting assumptions of the professions, none are more cavalierly, as blindly or as arrogantly held as those of lawyers. Lawyers more than any other profession live in their own world. They joust with each other, in front of each other, to each other's infinite amusement and reward. A lawyer never loses his case, only his client does ... Like undertakers [lawyers] know they will get you in the end".

In the United States a procedure known as "class actions" has

been developed. It is often championed as a means of rendering the lawyer, and the administration of justice, relevant to the society of today. Put shortly, a class action is a means by which one person, aided by his lawyer, can sue for a legal wrong done not only to himself but to a group of people similarly affected. At a time when the mass production of goods and services tends to mass produce legal problems, we in the law adhere fairly rigidly to an old-fashioned, manpower-intensive, individualistic machinery for delivering the umpire's decision. In the United States class actions are said to be means of adapting the courts and lawyers to the mass consumer society.

Now, there are many thoughtless people who would be only too happy to confine lawyers, the courts and even the Rule of Law to a privileged few : shunting them off to a siding and leaving regulation of the community to administrators, vocal editorialists and others. But we happen to live in a country which inherited the British system of justice, with its ultimate reliance on fearless and independent courts assisted by a vigorous, legal profession.

The Law Reform Commission has been asked by the Federal Government to report whether class actions (with due protections against abuse) or some other alternative can be developed in Australia, in federal jurisdiction, to provide modern means for the delivery of justice. The Act which establishes the Commission sets out its Charter. This Charter includes :

- * the modernisation of the law, by bringing it into accord with current conditions; and
- * the adoption of new or more effective methods for the administration of the law and the dispensation of justice.

When the Bill was going through Parliament, it secured the support of all Parties. The late Senator Ivor Greenwood, twice Commonwealth Attorney-General, insisted on the insertion in the Bill of what is now s.7 of the Law Reform Commission Act. That section requires that, in making its recommendations, the

Commission should ensure that laws and proposals put forward by it do not "unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions".

With this task in mind, we make no apology for the search for new and modern means by which the courts, judges and lawyers can play a relevant part in solving disputes of today's society. Otherwise they will become mere irrelevant appendices in a bureaucratic state : left over from an earlier time and economy.

CLASS ACTIONS : 'BUSINESS' FINAL NIGHTMARE?

Our procedures of consultation involve us in what is surely the most exhaustive effort to secure the opinions and criticisms of interested groups and the public. We have published a discussion paper, necessarily brief, setting out the arguments for and against the introduction of class actions and the various alternatives available. The Commission is at present in the midst of a series of national seminars and public hearings in all parts of the country. It is encouraging to us to see the large numbers of citizens with competing points of view coming to the public hearings and vigorously asserting the case for and against class actions.

For example, in Perth earlier this week, representatives of business urged that there was no demonstrated need for class actions. Perth Chamber of Commerce said that a representative action of this kind would result in litigation by lawyers on behalf of people who would never have contemplated legal action themselves. People who would join in a class action but would not have started an action on their own account, would generally have comparatively small claims. Such people should use the Small Claims Tribunals established in recent years.

On the other hand the Consumer Action Movement urged that class actions would be appropriate where car manufacturers produced the same fault in many cars or a home builder was guilty of negligence affecting several homes. The Citizens'

Advice Bureau told us that 90% of complainants to the Bureau earned less than \$10,000 per year. Such people, it was said, found it very hard to envisage legal action to redress wrongs done to them. They thought that the law and lawyers were beyond their reach. Class actions, it was declared, would help such people to get to justice.

A common theme of the submission of business is that a heavy onus is on the Commission to establish the need, costs and benefits of class actions. The latest bulletin of the Victorian Employers' Federation, Employers' Report, declares that class actions are "business' final nightmare".

"Unless the Australian business community adopts a strong and united stand against class actions this proposed consumer law will be yet another business burden to be borne by all employers and paid for by the community. . . . Australia already has a very well established legal system well able to cater for all the needs of the whole community . . . To add class actions . . . will turn this country into a nation of litigants where businessmen will not be able to move for fear of litigation not just by one person but perhaps by hundreds or even thousands of people. If introduced, class actions will stifle enterprise in this country, for no more will businessmen enter any venture for fear of some unforeseen risk that would wreck the whole organisation in one stroke".

These are, of course, serious arguments. All of them will command our attention. I hope that when the Commission sits in Brisbane next week there will be a good attendance. I want to pay tribute to the help we have had in the past from this Society and notably from your President, Mr. Murphy. I know that, whatever is said in some circles, lawyers will approach the issue of class actions not from a selfish point of view of their own profit and advantage but from the

perspective of public interest and improvements in the administration of justice.

IMPEDIMENTS TO JUSTICE

In the search for the modern rôle of the lawyer of the 21st century, it has to be acknowledged that the present system does not work perfectly. Each of us, who practises the law daily, knows how difficult it is for ordinary people to come at justice. The last major change in legal and courtroom procedures took place in the 1870s in England when the Courts of Common Law and Equity were fused. Even this change took a century to reach New South Wales although you in Queensland adopted it more promptly. If we are serious about protecting legal rights and ensuring that the courts and our profession are available to do so, we must take seriously the need to actually bring people to justice and not to be content with a purely theoretical right to go to court which we know will not be used.

There is no gainsaying the fact that the present situation is defective. Within a week of starting practice every young lawyer learns that there are many cases which will just not get to the independent umpire, unless the client is rich enough or is supported by a trade union, legal aid or other public subsidy.

Few of us are rich enough to afford litigation today from our own pockets. Even a young barrister will charge between \$200 and \$300 on his brief. If the case goes beyond a day (especially with the peril of having to pay the costs of the other party if you lose) the sum at stake has to be very large to outweigh the risk of lawyers' fees.

Legal aid which is often presented as an alternative to class actions is, as we all know, painfully inadequate for bringing to justice all claims that should get to the decisionmaker. The Commonwealth Legal Aid Commission has itself complained that the funds available for legal aid are declining. The means test applied is such that most Australians are excluded from legal assistance. The rich

can get to court. The very poor can get legal aid. Middle class Australia is largely unprotected.

Many lawyers, quite properly, bring actions to court without first insisting on the payment of their fees. There are limits to the extent to which individual practitioners should be a kind of charity. Furthermore, few lawyers would be willing to dig into their pocket to meet the costs of a successful opponent. The rule of costs that "winner takes all" inhibits and restrains litigation in our country.

The inability to bring a case to recover \$200, \$500, \$1,000 may mean nothing to the critics of class actions. It is, however, a legitimate and daily concern of citizens and, I believe, many lawyers. It is the citizen who experiences the disappointment and frustration of being unable, in effect, to get to the umpire. It is lawyers who have to turn clients away with the frustrating argument that though they have an arguable case, the amount at stake simply does not warrant the bringing of the case. Of course, the client can argue the matter himself and call his own witnesses. But most people regard going to court as higher in the order of pain than going to the dentist. It takes most people courage to even go to the lawyer, let alone to court. The idea of presenting their own case in the mysterious world of the law is simply fantastic for most people.

The net result of all this can be easily stated. When in Australian society an individual loses a certain sum, let it be \$500, the plain fact is that our system of dispensing justice does not provide a ready remedy for him. If he is supported by a trade union or is a corporation he may get to court. If he is so poor that he is within the defined class, he may get legal aid. If he can overcome timidity and a fear of inadequacy, he may bring the case himself. In most cases if he cannot get a lawyer he simply shrugs it off and puts his loss down to "experience". He laments that "life is tough" and he is reinforced in his feeling of cynicism about the law and about its practitioners.

CLASS ACTIONS AND ALTERNATIVES

In the United States, class actions were developed to ensure that people with amounts owing to them that were small (but in aggregate, large) could be provided with a facility to bring the claims together and, combined, bring them to courts of law. This is not a matter of seeking palm tree justice. It is not a matter of coming to court with hundreds or thousands of unruly malcontents who seek general fairness at the hands of judges. It is a case of bringing to justice actual causes of action which presently exist in law but which do not get to court simply because the person with a claim cannot afford a lawyer and will not bring the case on his own.

There are some who shrug their shoulders about such cases. But functions of the Law Reform Commission include seeking out and recommending to Parliament new ways to dispense justice. That is what the class actions debate is all about. It is one of the reasons why Attorney-General Ellicott referred this question to the Commission. Whilst I understand the fears of business and recognise that there have been abuses in class actions in the United States which must surely be solved before we embrace them here, it will be important for those who oppose class actions to suggest alternatives. If it is established that people with genuine legal cases are not presently getting effective remedies, our task will be to propose remedies that work.

EXAMPLES OF CLASS ACTIONS

There are many cases that have been put forward to us as instances when, if a class action facility had been available, proceedings would have been brought. It is not appropriate to list all of these but one or two cases can be mentioned.

The Package Tour

In one case 55 tourists had part of their holiday tour cancelled and were told that they had to return on an earlier flight. Commenting on this illustration, the editor of the Australian Financial Review dismissed it as "too puerile

for comment". He asserted that a company that "regularly messed up arrangements like this" would meet its fate in the market place. I am not so convinced about the market place but inherent in the contention is the view that some satisfaction could be procured by the passengers inconvenienced, arising out of the knowledge that in the long run practices of this kind would be dealt with by economic forces. I rather suspect that most of the passengers involved would regard that explanation as "academic". They would be more interested in getting some compensation for themselves rather than waiting until the market caught up with such conduct. Furthermore, they might consider that an effective court action, which the company knew was readily available to passengers in this predicament, would be more likely to prevent such cases occurring than the mysterious forces of the economic market.

Moneylending

Some time ago several moneylenders were specialising in advancing loans to persons who would normally be regarded as bad risks including pensioners and low-income earners. Sums borrowed ranged from \$300 to \$600. In one case, the effective interest rate was alleged to be in the vicinity of 180%. Under current law about 6,000 borrowers would be entitled to apply to reopen these loans on the grounds that the interest rates are harsh and unconscionable. Of course, nothing happens and even if one or two bring a case, the amount at stake in them is not outweighed by the amount of profit procured from the thousands of innocent and needy credit victims.

Sale of Faulty Goods

During 1970 complaints were made by consumers about a plastic material similar in appearance and texture to leather which was developed in Germany and manufactured in Australia under licence. It emerged that the furniture covering was wholly unsuited for Australian conditions. The deterioration did not become evident until more than 12 months after use. A guarantee of recovering free of charge during the first six months after purchase was useless. Nearly 3,000

complaints were received by consumer claims bodies. They could do nothing. Mounting an individual action was just not worthwhile. No compensation was offered. It was just "hard luck". A class action would have provided a means to supplement the consumer authorities and to bring an effective action to a hearing by the independent courts.

An adhesive for tiling purposes which was entirely unsuited for the purpose was developed. Its failing became known and there were widespread complaints. The manufacturer took the goods off the market. But it did not make any provision at all for compensation for those who had purchased the product and for whom the adhesive was worthless. Many of these were young people who had incurred substantial costs in having tiling performed in their homes and had to start again. They were left without remedy. Individually, there was no effective means to enforce redress. A class action might have led to a negotiated settlement to bring some scheme of compensation to the people injured in this way.

Motor Vehicle Hire Purchase

During 1974, a State Motor Vehicle Department investigated a racket involving the sale of poor quality motor vehicles to recently arrived migrants. When negotiating sales, representatives of the motor dealers approached the migrants on their arrival or at Hostels and took advantage of their limited knowledge of English and lack of knowledge of the complexity of Australian hire purchase laws. Records held by the dealers and by the finance companies disclosed large-scale illegalities and irregularities in hire purchase transactions. Mis-statements of the amounts of deposit paid increased the prices over those initially agreed. The vehicles described in the contract were totally misrepresented. Over 700 individuals were interviewed. In some cases redress was provided but in others it was not. A class action to organise and consolidate the delivery of redress might have given the migrants involved a better perception of the advantages of "Australian justice".

Real Estate Transactions

A State Consumer Affairs Department has investigated several real estate frauds where large numbers of persons have been defrauded. Misrepresentation is the common element. Purchasers' deposits are misused by the vendor or developer. Deposits are sometimes financed through personal loans advanced by a finance company. Although in some cases the fraudulent party may be a "fly by night" operator, the link to a credit provider could provide suitable relief if an effective action could be mounted. In one case relating to unsubdivided land in Queensland and Victoria, there were over 200 consumers involved. In another there were over 400 consumers involved. If an effective action could be brought against credit providers, it would require them to make more appropriate arrangements to check out proposals for which they are providing finance.

Entertainment Cases

There is a growing area that affects a large number of consumers. The entertainment industry is nowadays organised differently. Large-scale concerts are mounted and sometimes these can result in consumers being defrauded. Recently one entertainer did not appear for concerts for which he had been promoted as a star attraction. It was just a "rip-off" and individually, of course, the amount at stake was too small to warrant a legal case. Should we just put such matters down to life and experience?

LAWYER' DUTY TO PARTICIPATE

A great many cases have been supplied to the Law Reform Commission by consumer protection authorities. It is simply not true to say that these bodies in the States or the Trade Practices Commission of the Commonwealth can deal with all of the complaints by individuals against unlawful activity depriving them of their legal rights. Like all areas of government activity, consumer protection bodies are subject to staff ceilings and restraint. In any case, class actions in the United States have not been limited to consumer protection cases. It is surprising to me to see

the faith that is put in bureaucratic solutions to social problems. The courts have been there for eight centuries and they command the respect of the community. It is at least necessary for us to examine whether they can be used to solve modern problems in an effective and economic way.

On the other hand, proponents of class actions must establish that a sufficient need is there and that dangers of abuse identified in the United States (including the dangers of entrepreneurial lawyers) can be avoided. One must be careful in looking at needs to avoid the logical error of saying that before wrongs can be remedied by law, we must ensure that much wrong is done, worthy of redress. This is, again, not our way of doing things. Normally we try to design laws that will prevent the accumulation of wrongs or provide effective remedies, no matter how many or few are harmed.

The debate about class actions is one worthy of the attention of a modern legal profession. It addresses the question of how, in the modern world, we can put lawyers, courts and judges to a relevant task in dispensing justice for fellow citizens. I do hope that in this State and in every other part of the Commonwealth, members of the legal profession will closely examine our discussion paper and come forward at the public hearings to assist the Commission to come to a report which at once stills the legitimate fears of business and provides modern legal procedures to bring people's claims to legal resolution. The issue at stake is nothing less than observance of the Rule of Law.