AUSTRALIAN PRODUCT LIABILITY ASSOCIATION INCORPORATI

SEMINAR, MELBOURNE, 30 JULY 1984

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The Hon Justice MD Kirby CMG
Chairman of the Australian Law Reform Commission

THE CLASS ACTIONS DEBATE IN AUSTRALIA

In 1977 Attorney-General Ellicott announced that a reference on Standing and Class Actions was to be examined by the Australian Law Reform Commission. Two years later, in June 1979 we published a Discussion Paper Access to the Courts: Class Actions (DP 11) which tentatively suggested the introduction of class actions into Federal jurisdiction in Australia. The Discussion Paper caused disquiet in business circles, fearful of a repetition of United States' experience where enormous verdicts have been recovered and 'lawyer entrepreneurs' have made a business out of class actions. One comment was made by the Sydney Morning Herald in an editorial 'A New Way to Sue' (2 July 1979):

> The Australian Law Reform Commission's discussion paper on class actions cuts a swath through present legal practice ... While it advocates the class action procedure, the Commission is not blind to the difficulties connected with its introduction ... The changes it proposes could revolutionise legal practice in Australian courts. A long public debate is now needed to establish whether the proposed sweeping reforms have any merit to them.

Much more definite was the editor of the Australian Financial Review (3 July 1979). Under the banner 'A plague of Lawyers', the Review attacked the proposal as 'the latest offering of the legal profession under the mask of a contribution to national enlightenment'.

> 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 a case; only his client does ... [Class actions] would enrich lawyers at the expense of business and if not enough money were forthcoming from that quarter from taxpayers. The lawyers want class actions.

In a subsequent editorial the Financial Review urged that business was entitled to know why class actions were needed and that the debate should be on that question before the issue of safeguards and protection was canvassed. The president of the New South Wales Bar Association, Mr Trevor Morling QC (now Justice Morling), wrote:

> It is regrettable that your editorial should attribute to the legal profession base motives in respect of a proposal which it has not even considered. For what it is worth, my own opinion is that the Bar Association may well come down on the side of opposition to the introduction of class actions. But that is beside the point. The point is that whatever decision is arrived at by ... legal professional bodies will be taken after careful consideration of the public interest ... and without regard to the profession's pecuniary interests.

The President of the Victorian Chapter of the Company Directors' Association of Australia, Mr Richard Franklin, wrote to the Financial Review calling for a calm debate on class actions.

> While we hold no brief for class actions we hold even less a brief for irrational argument and debate. The Financial Review has been guilty of creating hysteria on the matter of class actions ... No other body in our history has been at such pains to bring debate on matters of law to the people. The Australian Law Reform Commission has made every effort in seeking a rational intelligent debate on this subject. [Without it] we might find ourselves having class actions imposed without any discussion, rational or otherwise.

A newsletter, Inside Canberra, reported that 'within [the Fraser] government' class actions were 'regarded as a hare-brained proposal whose only beneficiary would be the legal profession'. But Federal Minister RJ Ellicott QC who, as Attorney-General, had sent the Reference on Class Actions to the Law Reform Commission, told the NSW Chamber of Manufacturers:

> The Rule of Law is basic to our society. It embraces not only the criminal law but also the civil rights and duties of governments, individuals and corporations. Once you accept this proposition it is difficult not to embrace the further proposition that there should be adequate procedural means of enforcing legal rights and duties before the courts ... [T]he debate should not be clouded by emotional attitudes based on American experiences. There are material differences between the Australian and American position ... We have an opportunity of learning from the American experience. This should not lead us to reject class action procedures out of hand.

Although the Financial Review expected lawyers to welcome the prospect of class actions, submissions to the Commission indicated that generally this was not the case. Many lawyers suggested that a preferable approach was to strengthen existing legal and administrative procedures. A Victorian Queen's Counsel[1] examined the three examples given in the Discussion Paper as cases indicating the need for class actions. He argued that existing remedies were available and that to the extent they were inadequate, reform should be addressed to each particular abuse. He dealt with three of the cases mentioned in the Australian Law Reform Commission's discussion paper:

- Bush Fires. The 168 farmers, who, the discussion paper said, had to bring separate actions, could, as in the Yarraville Sinking Village Case, join as co-plaintiffs in three separate actions, one in respect of each fire. The calculation of damages after liability was established might be referred to assessors or referees under Order 36 of the Supreme Court Rules of the Supreme Court of Victoria.
- Holiday Cut Short. Likewise for the 55 Hawaiian tourists, whose holiday was cut short by one day when they were told to return home. There is an undoubted cause of action for damages both for the cost of the lost day and disappointment: see Jarvis v Swan Tours [1973] QB 233 and Jackson v Horizon Holidays Limited [1975] 1 WLR 1468. The Plaintiffs could join to claim their damages in one action pursuant to O 16 (representative actions). One difficulty might be the existence of exemption clauses in the contract which ordinarily would cover the circumstances. The Trade Practices Act probably would operate to prevent the operation of an exclusion clause, and the consumer protection provisions (which are now actionable in the State courts) probably also would furnish an independent cause of action for relief. In England, legislation in respect of tourists, agents and carriers would also make the responsible party amendable to penalties. Perhaps there is a need for similar legislation here, with a power bestowed in a supervising authority to direct the agent or carrier to make refunds to clients. This would seem to be the preferable course to theoretical availability of a class action. The commentator asked : would any one of the 55 tourists commence a class action if the procedure was available?
- Loans made in Breach of Moneylending Act. The third case involved overcharging by moneylends. Under the Victorian Money Lenders Act 1958 there is a Registrar of Moneylenders. I would have thought that this problem was more amenable to solution by vesting an effective Registrar with power to refuse renewal of licences unless and until the breaches were remedied by repayment to all those persons entitled. This would seem more likely to provide an effective remedy to ensure the disbursement of the moneys to the persons entitled than the theoretical possibility of a class action.

By analogy, the example mentioned in respect of estate agents wrongfully demanding $15 lodging fee for stamp duty seems to be an abuse better cured by an effective Registrar of Estate Agents who could revoke or suspend licences if refunds were not made.

In November and December 1979, following the publication of the Australian Law Reform Commission discussion paper, public hearings were conducted throughout Australia which attracted many submissions, particularly from employer and business associations. The thrust of their proposals was to reject the concept of class actions and to suggest greater reliance on the Trade Practices Commission and Tribunal and Consumer Affairs Bureaux[2] On the other hand, consumer and environmental organisations and workers in welfare fields commended the approach outlined in the Discussion Paper[3] and were generally in favour of some form of class action.

Three basic arguments against class actions emerge from all of this public debate:

- no need has been demonstrated;
- there are adequate responses otherwise specifically the representative action, the joint action, and action by registrars under licensing schemes; and
- class actions will only advantage lawyers.

The Cases

The 'no need' argument has been put on the basis that there is no mob of frustrated litigants out there waiting to beat down the doors of the court, but stymied for want of the class action procedure. It is a somewhat specious objection. The potential level of use of the procedure is not the only test of the justification for it. The demands of justice are less pragmatic than that. It would cost little to provide the procedure and no harm is done if it is not used or rarely used. Indeed, availability of class actions can be expected to produce a deterrent effect in potential defendants. There are lots of examples of unlawful behaviour in Australia — and more by analogy with US experience — which could be suitable for class action resolution which have either gone unresolved or only resolved in some other way. Where they have been resolved in some other way, the further issue must be considered whether that resolution was as satisfactory as class action resolution would be. Recent Australian examples include:

- an unsuccessful approach to the ACT Electricity Authority by a consumer for reduction of account on the basis that rate increases had not been notified in accordance with the Authority's statute;

- cancellation of a rate increase by the NSW Electricity Commission which had involved elements of retrospectivity, following complaint to the Ombudsman, political pressure and intervention by the Government;
- litigation by the victims of bushfires against the alleged perpetrator;
- litigation by the tenants of a suburban shopping centre to test their liability for levies imposed for maintenance of the centre, and to contest notices to quit issued to them;
- complaints by a tour group that their holiday was cut short, or was incompetently managed;
- complaints by customers of door-to-door sellers;
- complaints by ex-servicemen of the effects of being sprayed with herbicide;
- complaints by adjoining residents of the toxic effects of aerial spraying;
- complaints that 4 wheel drive vehicles were not, as advertised, fitted with stabilisers, costing $60;
- complaints by purchasers of land that the land was swamp and unsuitable for building contrary to advertised representations;
- under-payment of statutory rebates for early completion of hire purchases;
- falsely representing the true rate of interest under a money lending agreement;
- people forced out of their homes and businesses by a chemical spill;
- exaggerated weights shown routinely on bulk meat[4];
- used car yards winding back odometers;
- women members of a superannuation scheme discriminated against by the terms of the scheme;
- the meat substitution scandal;
- fishermen and tour operators affected by an oil spill;
- imposition of stamp duty on recipients of an interstate cheque.

The above examples are not a representative selection of mass grievances. They are based on disputes which have mostly received a lot of public attention, or been noted in the reports of Consumer Affairs Bureaux, Ombudsmen and like bodies. In the United States, class actions have been brought for the following, all of which are of a type likely to occur also in Australia:

- Oldsmobile, Buick and Pontiac cars which were fitted without notice to consumers with Chevrolet engines;
- Mazda was sued for defects in its rotary engines;
- action was brought by businesses alleging price fixing by competitors;
- motor car dealers combined to sue manufacturers for discriminatory practices and unfair dealing;
- civil rights actions for discrimination etc.

An unstated assertion of those who say no need has been established could be that there is not an 'across-the-board' need; but that there could be need for improvements in some areas of litigation.

Existing Mechanisms

Existing mechanisms for redressing mass wrongs include:

- Intervention of government consumer protection bodies (e.g. Consumer Affairs Bureau, Trade Practices Commission, Corporate Affairs Commission) either to prosecute offenders or to conciliate on behalf of complainants. Sometimes there is provision for ancillary action by those who have suffered damage to recover their loss.
- Public interest advocacy bodies (eg the Public Interest Advocacy Centre in New South Wales) which exist to pursue various sorts of public interest claims including against organisations which perpetrate mass wrongs.
- Representative consumer bodies (like the Australian Consumers' Association) which might also conciliate on behalf of consumers and which can exercise some consumer muscle through publicity etc as an adjunct to conciliation.
- The straight political process. Notorious consumer frauds etc are likely to lead to demands for political action. This might involve prosecution of the perpetrators. More commonly it involves prospective changes to law and/or administration. Sometimes establishment of a fact-finding enquiry is one of the measures resorted to by governments faced with such political demands.
- The resort to individual private litigation (eg action by individual consumers in contract, or fraud, or deceit), now to be supplemented by the proposed new s 87(1A) of the Trade Practices Act which provides for the making of consequential orders.
- Existing group litigation procedures for damages : consolidation, joint actions etc.
- Self regulation, including voluntary recall by manufacturers of defective products.

Class actions have proved very useful in the United States in tackling claims for damages on behalf of groups of persons with a common legal claim. However it is important in developing Australian class action procedures to avoid the abuses and deficiencies of the United States class action. Specifically, class action procedures would be useful in product liability cases to supplement voluntary product recall and to reinforce consumer protection provisions under the Trade Practices Act.

Recent newspaper reports provide very recent examples of situations where a form of representative action could be useful:

- The case of the recent discovery of defects in the floors of certain GMH Commodore cars. The ACT motor registry has required floor reinforcement to be undergone before registration because of defects disclosed in a number of Canberra taxis. A 'class action' could ensure the prompt repair of all similar vehicles in all jurisdictions of Australia without relying upon administrative discretions in motor registries. It could reinforce manufacturer inclination to recall defective products nationally — irrespective of the initiatives of State or Territory registration bodies.
- The recent case of hundreds of first-class passengers on the British Airways Concorde suffering salmonella poisoning as a result of defects in prawns in aspic. Already proceedings have been commenced in the United States on behalf of all passengers affected by way of a class action which would not be available in Britain or in most parts of Australia.
- Proceedings by a record company for damages against a tape cassette pirate company, on behalf of all members of the industry body for pirate tapes without copyright arrangements. Class actions are not just consumer weaponry. Like the Trade Practices Act itself, the representative action can be a very useful adjunct to the armoury of corporations.
- Electricity consumers suing the electricity supply company for the recovery of security deposits which were demanded without legal authority.

Victorian changes

Following amendments to the Victorian Supreme Court Act which came into force in mid May 1984, representative proceedings for damages can be now brought in Victoria if a judge decides that such an action is appropriate. Newspaper reports have drawn attention to the relevance of the Victorian reform to claims by shareholders against the Trustees, Executors and Agency Company Limited which collapsed in 1983. A meeting of TEA shareholders last year discussed the problem of pursuing claims against the company and its officers on an individual basis. The aim of representative actions is to permit a pooling of resources to bring greater equality into litigation between small people and larger well-resourced litigants. It has to be acknowledged that this Victorian reform is a step forward. It overcomes the legal impediment of a 1910 English precedent which, until now, has been thought to stand in the way of representative actions for damages in Britain

and . .stralia. But whilst it is a step in the right direction, it has a number of defects which Attorney-General Kennan has acknowledged. It leaves a great deal to the discretion of judges, unfamiliar with the burgeoning jurisprudence on this subject in the United States and unguided by legislative rules. Secondly, it fails to provide for the costs of class actions. In the United States class actions are 'fuelled' by the contingency fee system. Under this system the lawyer secures a proportion of the verdict if he is successful and nothing if the claim fails. Without some provision for motivating costs, few lawyers would be willing to take on the significant additional responsibility and work of litigation for damages brought on behalf of many people. Accordingly, with attention to reform of cost principles, the mere provision of a facility for representative actions for damages may be a paper tiger.

Legal procedures in the century of Henry Ford

The Australian Law Reform Commission is presently completing its examination of class action procedures. The Commissioner in charge of the inquiry, Professor Michael Chesterman, expects to complete a report on the subject with draft Federal legislation in 1985. Despite the newspaper editorials, it seems likely to me that some form of representative action would be necessary in Australia. In the age of mass production of goods and services, where mistakes occur, it is inevitable that a problem, possibly a legal problem, will be mass produced. If the law insists upon craftsman-like resolution of claims, case by case, it will fail adequately to meet the legal needs of our time. It will either create a bottleneck in the courts (where similar claims must queue to be held individually). Or, more likely, because no individual claim can be brought separately, no claim may be brought at all, even though, in aggregate, the claims were substantial. The basic idea of the American class action is right. The fundamental problem with our system of justice is in the delivery of legal services not in the substantive rules. Accordingly we should be paying increasing attention to bringing people to the umpire by modern, efficient legal procedures. In the age of mass production of legal problems, this may mean mass production of legal solutions. The law alone cannot hold out against the tide that began with Henry Ford's production line in 1904. As it is nearly a century since the commencement of mass production, we must surely be facing the time when the law and its procedures will catch up. That is not to say that we should embrace American class actions without modification. What we will need is an Australian representative action which is in tune with Australian needs and professional traditions.

Ame .an 'heartburning' unnecessary

The 'worst fears' of Australian business about US-style class actions can be set at rest. A number of considerations make it unlikely that the problems that have emerged in the United States with class actions would cause heartburn in Australia. This is so for a number of reasons:

- the very size of the United States market which makes class actions in consumer protection cases inevitably substantial;
- the more litigious features of American society, with the greater inclination to take conflicts to court;
- the greater number of substantive legislative entitlements under US Federal law which could be aggregated in class actions, when compared to the small number in Australian Federal law;
- the provision in many US Acts for treble damages, minimum damages or punitive damages which tend to increase the size of verdicts; and
- the contingency fee system available in the United States to provide an incentive to class action lawyers. This is not available in Australia and, indeed, is considered unethical conduct, at least in its pure North American form.

Free enterprise legal aid

It is curious that business interests and their supporters oppose the notion of class actions when, at least on one model, the class action would simply facilitate individual initiatives in seeking redress for perceived legal wrongs. The alternative, of reliance on the Trade Practices Commission or other consumer protection agencies, is a bureaucratic system, which depends very much on resources and other considerations. The class action at least permits the claimant and his lawyer to initiate their claim themselves and to bring proceedings to the court for independent resolution. It is a free enterprise form of legal initiative. Nor can I work up much enthusiasm for the self-righteous condemnation of 'contingency fees'. At least this system permits people to get to the umpire. Our more 'gentlemanly' system, with its insistence on prepaid fees for services, may promote decorum and professional restraint. But it may also prevent many people getting to the assertion of their legal rights who, in the United States, would have the aid of a lawyer who has assessed the case as being worth the risk of bringing.

So class actions will come. They will not replace the Trade Practices Commission or voluntary recall. But they will supplement self-regulation and bureaucratic regulation, with a dash of individual initiative. However, class actions will not work, or will not work often, unless we pay careful attention to:

learning from American mistakes; and

- learning from our own impediments to justice which may well include our rules on legal costs.

I congratulate the Australian Product Liability Association for sponsoring this important and useful seminar.