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AUSTRALIAN SOCIETY OF SENIOR EXECUTIVES

LAW REFORM AND CLASS ACTIONS

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

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Chairman of the Australian Law Reform Commission

AN END TO HUFFING & PUFFING

I come before you today, senior executives of many branches of Australian business, to talk to you about class actions. I realise that this is a subject about which you will be rightly concerned. There has been a lot of ill-informed talk in the press about class actions. I want to get straight in the beginning that the Law Reform Commission has received a directive from the present Commonwealth Government to inquire into and report on this subject. Like many other references to the Commission by successive Governments, this is a controversial one. But we in the Commission are not entitled for that reason to return the task to the Government as "too hard" or as "too upsetting to business". Our duty is plain. Having been given the task, we will proceed to reach tentative views, to canvass these widely in the community and then to present a report with final recommendations for the improvement of the legal system of our country.

Most of you will have read a vigorous and somewhat ill-tempered editorial on this subject in the Australian Financial Review (5 July). Instead of dealing with the issues raised in the Commission's discussion paper on Class Actions, the editorialist indulged in an attack on the legal profession:

> "... of all the self-promoting associations of the [illegible] ... good with each other, ... other's ... amusement and reward. A ... [illegible]
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> ...
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> So the legal profession has now issued, under the mask of a contribution to national enlightenment, a set of proposals that would vastly expand litigation – that is its express intent – in order to achieve a goal it never in detail specifies.
>
> This litigation would enrich lawyers at the expense of business and if not enough money were forthcoming from that quarter, the taxpayer. The lawyers want class actions."

This attack was as unfair as it was ill-targeted. The discussion paper cannot be blamed on all lawyers. Nor do all lawyers want class actions. In all probability most are utterly indifferent and not a few are opposed. But the wishes of the legal profession or the wishes of business (and even the wishes of editors) cannot be the guiding star of law reform in Australia. The fact is that the mass production of goods and services in a modern economy is bound to mass produce legal problems and legal claims. The great impediments to access to justice in Australia are the lions of cost and delay that guard every court house door. If the administration of justice, alone of the services of the community, does not provide an answer to mass produced legal problems, cynicism and contempt for the rule of law may be the price we as a society pay.

I hope in this forum I can discuss with you in a calm way the pros and cons of Australian class actions – properly secured against the abuses that have been identified in the United States and relevant to the needs of our society. If we cannot do this we will simply confirm the critics who condemn the immature and anti-intellectual strain in our national make-up. Let there be an end to knee-jerks in the debate about class actions. I do assure you that all the huffing and puffing of editors will not make the Attorney-General's

THE LAW REFORM COMMISSION

In 1973 the Commonwealth Parliament, with the support of all Parties, established a Federal Law Commission for Australia. The tasks of this Commission are to review, modernise and simplify the laws of this country. It works upon references received from the Commonwealth Attorney-General, Senator Durack. It cannot initiate its own programme, although it can suggest matters appropriate for reference.

The Commission is set up in Sydney. It has four full-time Commissioners and seven part-time Commissioners. Sir Zelman Cowen, our Governor-General was, until his appointment to that post, a part-time Member of the Commission.

The Commission staff numbers 19, a figure set years ago and before many major projects of reform were given to the Commission. To supplement this number, the Commission looks beyond its own ranks and indeed beyond the ranks of the legal profession, to honorary consultants who are appointed with the approval of the Attorney-General. Officers have also been seconded from other Commonwealth Departments and authorities and co-operative arrangements have been worked out with universities and other law reform bodies to increase our output and supplement our meagre resources.

WHAT HAS THE COMMISSION DONE?

The Commission has produced a number of reports upon controversial and difficult references received from successive Governments. Our reports on Complaints Against Police and Criminal Investigation were produced for the Labor Government. The reports on Alcohol, Drugs and Driving, Insolvency: The Regular Payment of Debts and Human Tissue Transplants were produced for the present Administration.

[illegible] quarterly [illegible] distribution of the discussion papers [illegible] a wide variety of [illegible] which are still [illegible] to the Commission. These include [illegible] project [illegible] standing [illegible] to [illegible]. They also include projects on Insurance contracts, Privacy and the Census and Debt Recovery. The Commission has recently received a number of important references from Senator Durack. The first is one designed to reform the law of sentencing of Commonwealth offenders throughout Australia. The second is one, most recently received, relevant to the reform of child welfare laws. This has particular importance in the International Year of the Child. A third, received last week, relates to the reform of the law of evidence in Federal and Territory Courts.

HOW DOES THE COMMISSION WORK?

The unique feature of law reform bodies is their procedure of drafting new, reformed laws. Unlike the preparation of most government legislation, the preparation of law reform commission reports goes on in the open. The whole point of committing a project to the Law Reform Commission is to procure public, expert and lobby comment so that the proposed law is thoroughly refined before it is put to the Parliament.

With this in mind, the Commission has designed several procedures for the purpose of securing such participation. Public sittings are held in all parts of the country. Seminars are attended, arranged by various industry and community groups. Public lectures and speeches are delivered. The printed and electronic media are engaged to carry news and details of the Commission's projects and of tentative thinking in them. Discussion papers are produced which are in a less formal and more understandable form than most government documents. Pamphlet summaries of the discussion papers are widely distributed to the legal profession and to other interested groups. Lately, we have begun to use the procedures of public opinion polls and surveys. As well, a team of honorary consultants appointed from interested view points sit down with the Commissioners and discuss with them the various issues that have to be resolved.

[illegible] recommendations [illegible] when [illegible] are, as is often the case [illegible] opinion of the [illegible]. That is not so. [illegible] major changes are [illegible] result [illegible] processes of public consultation. So it has been in the past. So it will be in the case of the reference on Class Actions.

DOES THIS HAVE A PRACTICAL RESULT?

Law reform, which was simply the production of splendid reports and attractive discussion papers would be a waste of public funds and the energies of busy people. It is recognised on both sides of Parliament that our legislative processes need assistance from expert groups and community opinion in the development of complex areas of the law.

The Law Reform Commission Act is silent on what is to happen after a Commission report is produced. It must be tabled by the Attorney-General in Parliament and therefore it becomes a public document. But after that, there is no guarantee that the Government will act upon it.

Australia has a fairly poor record in the implementation of the reports of government bodies and committees such as law reform commissions. A figure taken out in 1976 showed that of 647 reports received from law reform bodies in Australia and New Zealand between 1916 and that date, only 311 had been followed by legislation, i.e., about 48 per cent. Of course this is a poor indication. Some reports recommended no change. Others were annual reports. Others were overtaken by events. The general point made is that not all reports lead to action.

In terms of legislative follow-up, the Australian Law Reform Commission has, so far, a fairly good record. Not only have its reports been adopted by the Federal Government to

Police has been implemented in New South Wales [illegible] important suggestions in the [illegible] adopted in Queensland and, more recently, in South Australia and Victoria. The Federal Government is establishing the Report in conjunction with the proposed establishment of the Federal Police of Australia.

The report on Criminal Investigation led to the introduction of the Criminal Investigation Bill 1977 by Attorney-General Ellicott. He described the Bill, based on the Commission's report, as "a major measure of reform". The major thrust of it is to update and modernise the laws of criminal investigation in this country. Senator Durack has recently announced his hope to re-introduce the Bill in the next sitting of Federal Parliament.

The report on Alcohol, Drugs and Driving has been implemented in the Australian Capital Territory, as has the report on Human Tissue Transplants. The latter is also to be implemented in Queensland, according to an announcement by the Deputy Premier of that State, Dr. Edwards.

In advance of Federal legislation, the South Australian Parliament picked up and enacted legislation based on the proposals contained in our report on Insolvency. Even in advance of our final report, the Northern Territory Government adopted most of the proposals put forward in our discussion paper on Lands Acquisition Reform.

Nor is the adoption of good law reform ideas restricted to the home market. Interest has been shown in our proposals for insurance reform in Thailand. The report on Human Tissue Transplantation is to be translated into Spanish for distribution thoughout South America. The Governments of that continent are grappling with the same need to modernise the law. More recently we heard that our proposals on defamation reform are to be substantially adopted in Barbados in the West Indies.

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[illegible] more relevant to the problems of today. The Law tends to speak to [illegible] The role of the Law Reform Commission is to [illegible] Parliament to review the law in a systematic way, modernising it where necessary and changing it where the change will lead to improvement. Law reform is not change for its own sake. It is change for the better.

HOW DID THE CLASS ACTIONS REFERENCE ARISE?

In 1977, Attorney-General Ellicott gave the Law Reform Commission a reference on Standing to Sue and Class Actions. We have called it, for ease of convenience, the reference on "Access to the Courts".

The Attorney-General's terms of reference called attention to the specific functions of the Commission under the Act to review Commonwealth laws with a view to the "systematic development and reform of the law". Particular attention was drawn to our duty to modernise the law "by bringing it into accord with current conditions", to simplify it and to adopt

> "new or more effective methods for the administration of the law and the dispensation of justice".

The terms of reference recite criticism that has been made "of the restrictions in the present law upon the capacity and right of persons to be heard in courts and proposals which have been made relating to class actions". The Commission is therefore required to review Federal laws on the standing of persons to sue in Federal courts and courts exercising Federal jurisdiction and Territory courts. It is also instructed to review the laws relating to class actions in such courts. We are required to report upon the adequacy of present laws and the desirability of changes in existing law but bearing in mind any constitutional limitations on Commonwealth power. We are also instructed to keep in mind our functions to consider proposals for uniformity of laws in this country.

[illegible] paper will not be available [illegible] available, free of charge, [illegible] who are prepared to [illegible] comment on it. It is still [illegible] the Commission.

The present purpose is not to review in detail the class action controversy. This is done in a discussion paper that has been issued and publicly discussed by my colleague, Mr. Commissioner Bruce Debelle. He is the Commissioner in charge of the reference. Before the issue of the discussion paper, meetings had been held with our consultants. These number a Federal Judge, a member of the Australian Consumers' Association and other persons appointed because of their background in business and industry. The latter include officers of the Confederation of Australian Industry, the Australian Finance Conference and the Australian Industries' Development Association. We also have consultants from the Commonwealth Department of Business and Consumer Affairs, the Trade Practices Commission and the Office of Commissioners for Consumer Affairs in the Australian Capital Territory and New South Wales. It will be seen that we have an excellent team of consultants voicing differing opinions on class actions from differing, indeed competing, points of view. There is no doubt that the Commission will have at its table the best possible advice. It will hear every competing argument and will be left under no misapprehension as to the alleged advantages and disadvantages of the class action procedure.

WHAT ARE CLASS ACTIONS?

We start from a disadvantage in that most people in Australia have no idea at all as to what class actions are. Lawyers are not familiar with the procedure for the simple reason that it did not develop in our country or in Britain, Canada and New Zealand. At least so far as class actions for damages are concerned, (the matter of controversy facing the Law Reform Commission) the species of litigation is quite unknown in this country.

[illegible] purpose is to allow the Australian debate to take place [illegible] if class actions are to be introduced in Australia, they must be put into the context of the Australian legal system and the ethos and rules of the practice of the legal profession of this country.

Put shortly, a class action is a kind of representative action in which one person or a small group of people are permitted to bring legal proceedings on behalf of a large number of other persons and to secure court ordered relief affecting not only the actual named parties to the case but all other parties in a similar position, who are included in the class.

The requirements of a class action are three. First, there must be a large number of persons affected in a similar way to the class litigants. Secondly, they must have a common interest, although not necessarily an identical legal interest. Thirdly, it must be convenient to deal with the matter as a form of group litigation rather than to require the individual parties to bring their own cases to the court in order to litigate them separately. Most class action procedures invoke a requirement that it should not only be convenient to proceed by way of group litigation in this way. Class action rules generally require that the person who wants to organise a class action should show, in a preliminary hearing, either that he has a prima facie cause of action and/or that the claim he is bringing on his own behalf and on the behalf of many others, has "merit".

A type of class action did develop in England in the Chancery courts, when proceedings could be brought by one person for relief that was available to many other people in a like position. They did not develop in the Common Law courts in England. The reason for this disparity arises largely from the fact that the form of remedy granted in the Common Law courts was the award of money damages. The form of remedy

[illegible] Law Courts was the [illegible] form of remedy. It was [illegible] on to benefit many other people. It was also easy for plaintiffs to institute large suits of money [illegible] and available to many other people affected in a way similar to the successful litigant.

In the United States, the same inhibition did not prevent the development of class actions for damages. Starting from modern beginnings in New York State in the 1830s, the class action procedure for damages developed slowly at first. It was introduced into the rules of the Federal courts early in this Century. The mounting of class action procedures did not become a common place until the 1960s. Even today, it is not a big part of the litigation in the United States. However, it has attracted attention because, in a number of cases, very large verdicts indeed have been recovered. These and the alleged abuses on the way have led to calls for major reforms of class action procedures in the United States. It must be emphasised, that few of the calls for reform in United States assert that class actions should be abolished entirely. Mr. Griffin Bell Attorney-General of the United States visited the Law Reform Commission last year. Whilst acknowledging defects in class action procedures which had to be cured (a matter to which he has given his personal attention), the Attorney- General said that a reformed class action procedure was undoubtedly necessary and should be preserved as a valuable means of bringing many people to the courts of justice.

GIVE AN EXAMPLE OF A CLASS ACTION?

Class actions have been brought for many claims and deviding a typical example is not easy. A most frequently cited case is Daar v. Yellow Cab Company 67 Cal 2d 695 (1967). Contrary to a city ordinance, the cab company raised its fares by simply changing the meters. As a consequence,

[illegible] sufficiently to sue to recover the unlawful surcharge. It would be just too much trouble and the damage to each individual passenger would be too small to warrant taking the matter to court, even to a Consumer Claims Tribunal. Mr. Daar, however, was permitted to bring a representative class action allowed for by the Rules of the Supreme Court of California. Even though each individual passenger had a separate contract and a separate claim against the cab company, Daar was permitted to proceed on his own behalf and on behalf of all taxi-cab passengers who had been overcharged in this way. The court rejected the cab company's argument that there should be a precise "community of legal interests" before such an action could be allowed. Of course, it was not possible to identify each and every individual passenger. Advertisements for them to come forward produced a small trickle. But the court took the view that if a class action were denied, recovery by members of the class, or even by the significant portion of them, would be most unlikely. An individual claim would amount to a few dollars only. The defendant, if no class action were allowed, would "retain the benefits from its own wrongs".

In the end, the case was settled. The amount of recovery was simply calculated. It was the "unjust enrichment" which the cab company's books disclosed had been procured as as result of the surcharge. This amount was paid into court. Mr. Daar secured his overpayment. So did those who, by simple procedure, could prove their individual claims. The lawyers in accordance with the legal system of the United States, secured their contingent fee i.e., a proportion of the verdict sum. But there was still a fund in court to be disoursed. The court found a solution to this problem. It ordered that for so long as was necessary to exhaust the fund paid into court, the cab company should undercharge its passengers until the amount in court was extinguished.

criticised as providing a windfall benefit to [illegible] On the other hand, without the intervention of the class action, almost surely the taxi-cab company would have taken the benefit of its own wrongdoing. The risk of an individual claim by a unaffected passenger or even of a criminal prosecution for a relatively smaller fine would be no deterrence from the conduct contrary to law which the class action certainly effectively attacked.

WHAT ARE THE LEGAL ARGUMENTS AGAINST CLASS ACTIONS?

Constitutional Problems There are at least three "legal" arguments against class actions which can be mentioned. In the first place, there may be constitutional difficulties in the way of introducing class actions of the kind I have described in this country, at least in Federal jurisdiction. Our High Court has made it plain that only certain matters can be litigated in Federal courts in Australia. The reason for this arises from the doctrine of the separation of powers and the language of Chapter III of the Australian Constitution. A court only has jurisdiction in "matters". Does a "matter" imply specific litigation of an identifiable issue between parties actually before the court? Are the remedies proposed in class actions for damages the kind of remedies which are appropriate for judges and within the judicial power of the Commonwealth? These threshhold questions must receive the most careful attention. They are not only nice lawyers' controversies. They raise, in an indirect way, the issue of principle, namely the proper function and role of the judiciary and the courts in our type of society.

Impact on Substantive Law It is also pointed out that the class action introduces a means of enforcing the law which was not under contemplation at least so far as Australia is concerned, at the time when the substantive law was

[illegible] procedural [illegible] which was [illegible] change in the substantive law as well as the procedural laws. In other words, class actions are not simply a procedural device. They potentiate with the substantive law to create a legal system which is quite different to that contemplated when the original substantive law was established.

Punishment by Civil Process Furthermore, critics of the class actions say that the multiplication of individual claims to one very large single claim by way of class actions amounts to a misuse of the civil law. It is said that the class action for damages recoups a fund which is in truth to be used not for compensation of persons individually wronged (for many of them cannot be identified or will not come forward), but for the purpose of punishing the class defendant and depriving him of his unjust enrichment. In these circumstances, having regard to the size of the "punishment", it is not apt to deal with the matter by a procedural device of the civil law. It is the business of the criminal law and procedure to punish, not that of the civil law. Recognition of this fact has led to the introduction of special protections in the criminal law, e.g., the rules as to the onus of proof, the entitlement to jury trial, the requirement that the case be proved by the Crown beyond reasonable doubt and so on. These rules would not be available to defendants facing the risk of punishment by a class action.

HOW DO CLASS ACTIONS AFFECT THE PURPOSE OF COURTS?

Lawyer Entrepeneurs Other arguments against class actions point to their effect upon litigation, the role of courts, the judiciary and the legal profession. It has been hitherto thought, in our system, that litigation is a "large resort". Class actions may have the effect of positively organising and encouraging litigation. Furthermore, they amount in this view

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[illegible] Many of them would not themselves be bothered to bring such a suit. Many may support the widely held view of the inevitable price of living in a busy consumer society. Many may even oppose the notion of a class action but may not hear about it at all or until it was too late. Critics of class actions say that it allows the "lawyer entrepreneur" and the busy minority to take charge of mass litigation, often for their personal interests rather than for the real interests of the disaffected or disadvantaged. It is also argued that the common law procedure of advocacy trial depends for its effectiveness upon motivated litigants. The fear of the class action is that symbolic litigation will lead not to the personal motivation that arises from actual direct involvement in "last resort" litigation. The very size of the claim will make the potential of costs an important factor in determining whether the claim proceeds.

Judes as Social Legislators Finally, critics of the class action say that it reposes in judges obligations to perform tasks of social manipulation for which their training and background have not always suited them. The disbursement of fluid funds of class action damages according to broad principles of social justice is the kind of thing which politicians may be better able to perform than judges used to the syllogistic function of the judiciary under our system. The very size of some class action funds and the mutiple choices that are available for their disbursement raise doubts as to the adequacy of the forensic medium to permit a hearing to all of the competing clients that may exist for disbursement to do broad justice. It is one thing to compensate an individual or a group of identified individuals. It is another to disburse large sums according to much less clearly identified rules.

Someone Pays A number of more practical objections have been identified by critics of the class action procedure. In the first place, it is pointed out that "someone pays". In the end, class action verdicts, however large or small, must be picked up by someone. Either the class defendant fails and is ruined or some machinery is devised to pass on to future consumers the cost of the verdict ordered in favour of the class litigant. Of course, it would not always be possible for the class defendant to pass on his verdict. The market may be too competitive to permit this. But the class defendant will normally be a corporation and the sanctions that may be appropriate against an individual may not always work against the corporate defendant, particularly so far as punishment is concerned. One consultant has pointed out that in the case of the Yellow Cab Company, the undercharging of fares for a period necessary to reduce the "unjust enrichment" fund might, in fact, damage competitors of the Yellow Cab Company. Consumers knowing that for a certain period yellow cabs are cheaper than others may be tempted to patronise that service. Other, quite innocent cab companies, may lose their custom temporarily or permanently. Yet they may never have breached the law but may be affected by the "heavy-handed" remedy devised by the court to do broad justice.

Windfall benefits Many critics of class actions point to the ruinous size of some class action verdicts. Furthermore, the windfall nature of some of the orders made to disburse large damages offends many observers. Why should future passengers secure the benefit of overpayment by earlier yellow cab passengers? As soon as judges stray from the narrow path of awarding actual compensation to particular persons affected or from imposing criminal penalties in accordance with law, the broad functions they are asked to perform are more suitably those of the executive or the legislature who are more sensitive to the many interested lobby groups in the community and who, unlike the judiciary, are answerable periodically for their mistakes.

[illegible] disputes do not typically end up in court. Most of the [illegible] are settled. In cases of the class action, there is an even greater pressure to settle this form of litigation than most. Once a class action has passed through the gateway of the preliminary screening procedure provided, enormous pressure will be upon the defendant to settle the case. Far from getting more people to the courts of justice, the net result will be more settlements in lawyers' offices, generally to the great advantage of lawyers rather than access to justice by the community.

ARE THERE EFFECTIVE ALTERNATIVES TO CLASS ACTIONS?

The critics of class actions say that we are already developing and already have effective alternatives to the class action. Small claims tribunals, the Consumer Credit Tribunals, the Trade Practices Commission, the consumer protection machinery, the accredited consumer and other bodies, television publicity and the free press, the ombudsman in the public sector and the growing availability of legal aid all provide effective mains for redress against injustice. Critics of class actions say that the heavy-handed machinery of the United States should not be imported into our very different social and legal environment. Australians are more accustomed, so it is said, to looking to a bureaucratic, informal, conciliatory machinery to solve their disputes and claims rather than the litigious resolution the Americans suggest for every social controversy. Instead of encouraging more people to go to courts, we should, so it is argued, encourage more people to conciliate their differences. The class action would, in this view, introduce an unneeded, uncalled for sledgehammer to solve problems for which we have already developed finely tuned machinery of individual grievance redress. There are many other arguments mounted against the class action but I think the catalogue already mentioned illustrates the kinds of case that is presented by the critics. Clearly close attention must be carefully given that case.

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[illegible]

Fewer Formal Safeguards In the first place, proponents of class action procedures argue that a number of "specious" arguments must be put to one side before the debate can be truly joined. First, it is pointed out that the class action does not exist to enforce "palm tree justice". The plaintiff and his class must have a legal cause of action, i.e., some claim known to law which, individually on a one-for- one basis would be enforceable in the courts of law. It is pointed out that in the United States there are many more causes of action in Federal jurisdiction than there are in Australia. Causes of action for damages, specifically, are granted under United States Federal legislation dealing with the environment, with civil rights, with securities and exchange, with work environment, as well as with consumer protection and anti-monopoly laws. In Australia, there is not yet the same panoply of Federal causes of action susceptible to collection in Federal class action procedures.

No Treble or Minimum Damages As well, it is often pointed out that there are features of the United States scene which would simply never be translated into Australia. Many of the Federal causes of action, for example, provide for treble damages. There is no current similar provision in Australian Federal law. The large verdicts that are often secured in the United States arise so it is said from the fact that the plaintiff can multiply multiple actions for treble damages or minimum damages which thereby create a fund of very significant proportions. In Australia, the damages that can be secured are limited to the actual damages suffered by an individual person. Therefore, the base to be multiplied is not exaggerated, as can occur in the United States where multiple and minimum damages provisions exist in many statutes. Furthermore, the Australian population is much smaller than that of the United States. The consumer market is much smaller. Accordingly, even with multiple claims, the amount of the verdicts are likely to be of much more modest proportion in this country than in America.

[illegible] contingency fees. Most [illegible] the [illegible] as [illegible] [illegible]. It is unethical for lawyers in this country to [illegible] and [illegible] upon a condition that they will secure a valuable proportion of the verdict. It is this phenomenon that has created much of the motivation for multi-party litigation in the United States. It simply does not exist in Australia and it is unlikely to exist in the foreseeable future. Accordingly, the source of much of the United States abuse is simply not present. These arguments are put forward to ensure that we get the class action debate into its proper context and talk about it in the environment of Australia and in the light of what would be likely to happen in this country, in circumstances very different to those that obtain in North America.

WHAT ARE THE POSITIVE ARGUMENTS FOR CLASS ACTIONS?

Getting to Justice The proponents of class actions list a number of positive arguments which they say justify the introduction of class action in this country. In the first place, they refer to the great need for procedural reform actually to deliver the legal remedies which look so good "on paper" but which are rarely available in practice to the ordinary citizen. This is an argument that has much attraction to the Law Reform Commission because we have set out face against merely developing attractive statutes which do not in practice secure effective reform. The search for new remedies that will be more effective is one worthy of law reform and is a common theme of a number of our projects. At a time when we have better educated citizens demanding an increasing part in the running of their society and the decisions of government, there will be an increasing impatience with procedural niceties and a concern that we subject the administration of justice to the very practical tests to which other activities in society are constantly submitted. How far is the administration of justice truly available to ordinary people? How far is it simply the plaything of the wealthy or those who are supported by rich and powerful groups? Is it desirable that in the age of mass consumer production and organisation we should adapt court procedures to society as it exists?

[illegible] whereas an individual claim by a disaffected taxi passenger, a criminal prosecution by a [illegible] ensure compliance with the law, they may not. The very significant risk of class proceedings to recoup the entire unjust enrichment would be more likely to affect the "pocketbook" of the potential defendant (what we would call the "big-pocket nerve"). On this view it would be more likely to ensure compliance with the law in the first place.

Free enterprise legal aid Furthermore, proponents of class actions say that they represent the "free enterprise answer to legal aid". They permit one person or a group of persons and a willing lawyer to take on a proceeding to establish breach of the law and thereby to deliver remedies to a large number of other persons who have not been able or knowledgable enought to bring their claims. It is said that this encourages self-help rather than bureaucratic help. The so-called alternatives of "bureaucratic" assistance through bodies such as the Trade Practices Commission, the Consumer Bureau, the Ombudsman and so on are assailed by proponents of class actions as inadequate. Such bodies labour under staff ceilings and always suffer the risk of "client capture", i.e., so frequently having to deal with those they have to regulate that they end by being problems more sympathetically to them than to those who complain. The number of proceedings brought under the Trade Practices Act by the Trade Practices Commission is, for example, quite small (39 cases in one year). Although a large number of cases are dealt with satisfactorily by conciliation and negotiation, staff ceilings and budgetary limitations restrain the amount of attention which the bureaucratic model can provide. The availability of the individual effective case, brought directly to the courts of law may be a useful check against governmental indifference, interference or restraint.

[illegible] will not complain, do not know their rights, may not be entitled to legal aid, would almost certainly be denied legal aid for small claims and yet who go away with the feeling of cynicism about the system of justice which permits them to be deprived of their legal rights but provides them with no effective means of having those rights enforced.

WHAT ARE THE NEGATIVE ARGUMENTS FOR CLASS ACTIONS?

Unjust enrichment Proponents of class actions also point to the need to provide some form of requiring an account or unjust enrichment. Talk of criminal penalty is often scoffed at. The small fine may have little impact and in any case will do nothing for the individual citizen who has been taken down. The payment of the fine into Consolidated Revenue merely reinforces cynicism about the effectiveness of the law in delivering legal rights which on paper look splendid but which are in practice unenforceable.

Limited legal aid In default of some form of organising little claims into a sizeable and effective large claim, the net result is all too often that there is no claim at all. The individual is denied legal aid for his separate litigation whereas consolidated proceedings in the nature of a test case may be entirely appropriate for legal assistance inuring to the benefit of many.

CONCLUSIONS: THE NEED FOR CARE

The introduction of class actions into Australia has been recommended by the Law Reform Committee of South Australia and now, on a tentative basis and subject to strict controls, by the Australian Law Reform Commission. The reform of class action procedures is being considered in the United States by a number of administration and congressional committees. Class actions have been proposed in Canada, in the Federal sphere, in

[illegible] requires consideration of the issue of class actions in Federal jurisdictions in Australia. The reference has been given to the Commission by the Government. It will not go away. The Commission's duty under its Act is to present a report on the subject. That it will do.

It is abundantly clear that if class actions are to be introduced, adequate protections will be necessary to ensure that we do not fall victims to the same abuses as have been identified in the United States. The rules governing the legal profession in this country already provide some protections against such abuses. However, additional protections may be needed against such risks as liability for technical breaches of the law, litigation by incompetent or ill-motivated lawyers, premature settlement adversely affecting the rights of persons who may not have heard of the litigation and adequate means to disperse fairly residual funds which are recouped from class defendants.

On the other hand, if class actions were to be introduced and were not to be simply another legal "paper tiger", it would be necessary to give thought to the effects such a procedural change would have upon the development of substantive law and the rewards that would be necessary to induce hard-pressed lawyers to bring class actions, given the procedural impediments and devotion of time that would be necessary, under any class procedure devised.

The publication of the Commission's discussion paper provides a focus for informed discussion and debate. Lord Hailsham in his first Menzies Oration, asserted that the banner of the West was the Rule of Law. It is the right of our citizens to go to courts and to have rigorously enforced by independent, fair-minded people the law of the land that distinguishes our form of society from most others. Lawyers, and business executives, have a special concern in the class action debate. Clearly, the resolution of the debate will

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[illegible] then we cannot be content [illegible] itself on fair substantive laws but which are not, in reality, available for enforcement by the ordinary citizen. If he does not know the law, is not informed of it, has no realistic access to legal advice, is too timid, apathetic or ignorant to enforce his rights, then Rule of Law may become a cliche or a shibboleth.

We must be concerned against abuse of legal process. But we must equally be concerned to reform the administration of justice to bring it more into line with modern conditions and to consider new and effective ways of providing ordinary people with access to its procedures and rules. The task is a difficult one, requiring sensitivity and balance. We must avoid the judicialisation of every problem. But we must equally avoid the cynicism that is bred by paper rights which everyone knows will not be enforced and may be abused. If class actions are not acceptable as a means of securing access to justice by those presently denied it, to suggest effective alternatives that will truly bring people to justice.

I invite all those concerned about this important subject to assist the Law Reform Commission with views and suggestions so that, in the end, when we deliver our report to the Attorney-General, we get it right.

FURTHER INFORMATION

Copy of the Law Reform Commission's discussion paper on Class Actions (D.P.11, 1979) is available free of charge by writing to the Secretary, Australian Law Reform Commission, Box 3708, G.P.O., Sydney N.S.W. 2001. The Commissioner in charge of the reference is Mr. Bruce Debelle (02) 231 1733.

AUSTRALIAN SOCIETY OF SENIOR EXECUTIVES

LAW REFORM AND CLASS ACTIONS

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

July 1979