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THE LAW REFORM COMMISSION AND LAWYERS

In recent years the legal profession in Australia has been cajoled, criticised and castigated. No-one has been exempt.

* Judges have been criticised for the obscurity of judgments and for insensitivity to rapidly changing times
* Legislative draftsmen have been criticised for obscure laws and muddled statutes
* Barristers have been taken to task for their infatuation with 17th century periwigs
* The suburban solicitor has been assailed for clinging to his monopoly in land conveyancing
* For everyone life was to be made harder by changing rules and upsetting settled procedures in a vast range of areas including criminal investigation, debt recovery, defamation actions and so on.

Lawyers are, of course, always fair game for public criticism. An angry editorial put it as follows :

> "Take your problem to the architect and he will tell you that you need a new building; an academic will propose more study; a doctor will say there is nothing wrong that an operation won't fix.
>
> But of all the self-promoting assumptions of the professions, none are as 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. ..."

I have said before and I repeat, the bad press "enjoyed" by the legal profession is mostly its own fault. It is sadly tongue-tied, when it comes to putting the case for the modern role of the lawyer. It is about that modern role that I want to speak to you today. The supporters of class actions assert that here at last is a means for lawyers to play an effective and socially useful function in the age of mass production. At a time when goods and services are mass produced, the legal profession remains extremely manpower-intensive. One lawyer for one client for one case before one judge. Mass production of goods and services inevitably tends to mass produce legal claims when things go wrong. Yet basically our system of justice persists with one by one litigation. The germ of the idea behind class actions, which developed fairly spontaneously in the first mass consumer society of them all, the United States of America,

is a simple one. It is that the administration of justice must catch up with the economy as it is. It must find new means to deliver justice, if judges, courtrooms, lawyers and above all the Rule of Law, are not to become mere irrelevant appendices, left overs from an earlier time and economy.

It may be that the class actions from the United States, even with protections and safeguards of the kind which the Law Reform Commission has proposed before any transplant takes place, are not an acceptable means of delivering justice to large numbers. But the Law Reform Commission cannot simply shrug off the case of people denied access to the enforcement of their legal rights. The Act which establishes the Law Reform Commission sets out its Charter. This 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 the performance of its functions the Commission shall review laws with a view to ensuring that laws and proposals do not trespass unduly on personal rights and liberties and "do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions". Therefore, our task is one of modernising the law and its procedures. We are asked to give particular attention to the adoption of new and effective means of dispensing justice. Judicial rather than administrative procedures are to be preferred, at least where the rights and liberties of citizens are involved.

IMPEDIMENTS TO JUSTICE

What is the present position? We all know, from the daily practice of the law, how difficult it is for ordinary people to come at justice. It must be frankly acknowledged that 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. It took us a century in New South Wales (rather shorter in other States) to embrace the same reforms. When the Supreme Court Act 1970 (N.S.W.) was passed it rightly earned Mr. Justice Jacobs' jibe that we were rushing headlong into the 1890s. If we are serious about courts and the protection of legal rights, we must take seriously the instruction to improve the dispensation of justice to ordinary people.

There is no gainsaying the fact that the present situation is defective. Every young lawyer learns within a week of starting in a firm that there are many cases which will just not get to the independent umpire, unless the complainant 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. I do not have the current average but even a young barrister will charge $200 - $300 on his brief and 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.

Trade unions do support their members in litigation, but, naturally enough, this support is generally confined to the area of workers' compensation cases, individual damages actions and industrial or award cases.

Legal aid, which was presented by the editor of the Financial Review as the alternative to class actions, is, as we all know, painfully inadequate for bringing to justice all the claims that should get to the decisionmaker. If anything, as the Commonwealth Legal Aid Commission itself has complained, the funds available for legal aid are declining. In any case, such is the means tests applied that most Australians are excluded from legal assistance. The middle class is largely unprotected by legal aid.

Many lawyers do, quite properly, bring actions before the courts, without first insisting on the payment of their fees and even, sometimes, in the knowledge that if the client fails, no fees will be recovered. But there are limits to the proper demands upon individual practitioners for charity. Furthermore, no lawyer will dig into his own pocket to meet the costs of a successful opponent, in the event that his client loses. The rule of costs that "winner takes all" inhibits and restrains litigation in our country.

Also within a short time of arriving at the office, the young clerk learns of the "magic cut-off point". This is the sum below which it is simply not worth bringing a matter to court. When I began, the sum was about £100. Nowadays it would be much higher. It is notable that in some States the so-called "small claims tribunals" deal with cases up to $3,000. We have come to the point that $3,000 is a "small claim".

The inability to bring a case and recover $200, $500, $1,000, may mean nothing to the critic of class actions. It is a legitimate daily concern of citizens. It is they, who experience the disappointment and frustration of being unable, under the present administration of justice in our country, to get to justice. It is the lawyers who have to turn clients away with the frustrating explanation that though they have an arguable case, the amount at stake simply does not warrant the bringing of a case. Of course, the client can bring his own case. He can argue the matter himself and bring his own witnesses.

ut most people regard going to court as higher on the order of pain than going to the dentist. It takes most people courage to go to the lawyer, let alone to court. The idea of presenting their own case in the mysterious world of the law, is simply unthinkable.

What is the net result of all this? It can be simply stated. Where in Australian society an individual loses a certain sum, let it be $500, give or take a few, 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, he may get at justice. If he is supported by or is a corporation, he may get at justice. If he is sufficiently poor and within the defined classes he may get legal aid and thereby get to the umpire. If he can overcome timidity, fear, a feeling of inadequacy or unequal struggle, he may bring the case himself. In most cases, of course, if he cannot get a lawyer, he simply shrugs it off, puts it down to experience and laments that "life is tough".

There are some who assert that that is as it should be. We must not clutter the courts. Lawyers are too expensive. They are a "plague" whom everybody loves to hate. Above all we must ensure that lawyers do not modernise the procedures for the dispensation of justice because, if they are to do that, they may suddenly and unexpectedly find themselves highly relevant to the problems of today.

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

I am not one of those who will shrug his shoulders when ordinary citizens cannot have their case justly determined. The functions of the Law Reform Commission include finding new ways to dispense justice. That is what the class actions debate is all about. This is one of the reasons why in 1977 the then Attorney-General, the Hon. R.J. Ellicott, referred this question to the Commission. If class actions are not the answer to getting ordinary people's claims to justice, it behoves the critics of class actions to say what the effective alternatives are.

EXAMPLES OF CLASS ACTIONS

A number of examples of the potential use of class actions are given in the discussion paper of the Law Reform Commission. One of them involves the case of 55 tourists who had part of their holiday tour cancelled and were told they had to return on an earlier flight. The editor of the Australian Financial Review dismissed that case as "too puerile for comment". It 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.

There are several other cases in the discussion paper and I want to add to them a few more, without in any way pretending to exhaust the types of cases that could be brought as class actions.

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. S ms borrowed range 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?

THE NEED FOR CLASS ACTIONS

These and many other cases have been supplied to the Commission by consumer protection authorities. It is simply not true to say that consumer protection bodies in the States or the Trade Practices Commission can deal with all of the complaints by individuals against unlawful activity depriving them of their rights. Like all areas of government activity, these 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. Nor is it right that people should have to forfeit their legal entitlement and be content with bureaucratic solutions to problems. Infinitely preferable, as it seems to me, would be finding some means of dispensing justice in the courts in a more effective and economic way.

Proponents of class actions must indicate why class actions are necessary in Australia. This is an entirely fair requirement and the debate over the forthcoming months will be targeted at this question. It is undoubtedly true that unless a need is established, all the talk in the world about the protections against abuse in class actions will not be to the point. Unless there is a need for some kind of mass delivery of justice, we do not have to concern ourselves about class actions and we can get on with other things.

I doubt if there is lawyer in this country who has not had to face the cold reality of telling a client that his individual claim is just not worth bringing on its own. At present, legal procedures for the aggregation of claims are very poor indeed. At the very least, we must improve them. Whether we should go further and provide a form of class action (and if so under what guarantees of fairness) is the issue which the Law Reform Commission raises for the profession and the community.

It is a debate worthy of the attention of law reformers. It addresses the question how, in the modern age, we can put lawyers to a relevant task in the effective dispensation of justice for fellow citizens. Lord Devlin, in a book titled "The Judge" published last year, said that it was the responsibility of a community to provide means of resolving disputes, not just to the rich who could afford court cases under current rules; but to all. I agree with this view. Class actions represent one possible means, by no means yet acceptable to Australia, to bring people to justice in the age of mass production of legal problems.