AUSTRALIAN AUTOMOBILE DEALERS' ASSOCIATION

SEMINAR, SURFERS PARADISE, QUEENSLAND

THURSDAY 20 MARCH 1980

LAW REFORM INTO THE EIGHTIES, CLASS ACTIONS AND THE AUTOMOBILE

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

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I have been asked to address this seminar on law reform in the 80s, with special emphasis on areas that could have an impact on the motor industry. My qualification to speak on such themes is limited to my position as Chairman of the Australian Law Reform Commission. I propose to tell you something about the Commission, to seek to identify some of the chief legal questions which we will have to face in the 80s and then to call to your attention certain of the special issues which may bring the Law Reform Commission and the motor industry into contact, for the improvement of our society and its laws.

The Commission itself is a permanent authority established by the Federal Parliament for the review, modernisation and simplification of Commonwealth laws. Our obligation to modernise the law and to promote new and more effective methods for the administration of justice, requires us, to some extent, to indulge ourselves in cautious futurology. It is as important that lawmakers and those who advise them should look forward to the society and laws of the future as it is for people in your industry to contemplate new designs, new styles and the solution of new problems, such as those which the energy crisis has presented. The law is not, and will probably never be, a stylish, modish thing, reacting to this or that trend or reformer's whim. The law is, on the contrary, a rather conservative instrument. But in a time of radical social change, it is important that the law, its procedures and its practitioners, should adjust. The Law Reform Commission is a body established to help Parliament to ensure that this will happen.

The Commission is set up in Sydney. There are ten Commissioners. Two of our former Commissioners were appointed, when resident in this State, namely Sir Zelman Cowen and Mr Justice Brennan. They were part-time Members. The Commission has four full-time Commissioners and a research staff of eight. At any given time it has eight or nine major projects of law reform before it. It is therefore a busy institution. It represents a small national investment in the improvement of the laws by which we are governed.

The Commission does not act on its own initiative. As a guarantee that it will not proceed to examine matters which are of no interest to the lawmakers, it is a prerequisite of any project that terms of reference should be received from the Federal Attorney-General. Each of the inquiries in which the Commission has been involved has started with a reference of the subject matter of the inquiry by the Attorney-General of the day. The end product of our labours is a report which must be tabled in Federal Parliament and thus becomes a public document. To the report we have always attached draft legislation to implement the suggestions for reform. This not only helps to focus our own attention upon the proposals we are advancing. It also tends to make the debate on our proposals more specific and it facilitates Parliamentary consideration of them. As successive Attorneys-General, of different political persuasions, have said, it is important that law reform should not be mere 'windowdressing' but should represent a practical attempt by the best talent available in Australia, to improve the law and its institutions. There are law reform commissions or committees in all of the States, to supplement the work of the federal commission. Law reform has been described as a 'growth industry'. The advent of so many law reform bodies at about the same time reflects the growing complexity of the law and the need constantly to update and review it.

The Australian Law Reform Commission has had a series of controversial references which have taken it out of the so-called area of 'lawyers' law' into contentious questions which affect every sector of our society, powerful interests and ordinary citizens. From the start, the projects given to us were not confined to such uncontroversial lawyers' matters as the Statute of Mortmain, the Rule against Perpetuities and Accumulations, or the Statute of Limitations. Instead, we have received references on such controversial matters as :

* how to handle complaints against the police;
* how to modernise the procedures of criminal investigation;
* whether random breath testing should be permitted;
* how to reform the laws of debt recovery in the modern credit economy;

* how to provide impartial laws to deal with the transplantation of tissues and organs from one person to another;
* how to reform and unify Australia's laws of defamation;
* how to protect privacy in the computer age;
* whether we should recognise Aboriginal customary laws in the criminal justice system of Australia;
* how to make the sentencing of federal offenders throughout Australia more uniform and consistent;
* whether we should introduce class actions into federal courts throughout Australia, permitting a single litigant to bring a claim on behalf of others who have legal complaints similar to his own.

There are other projects upon which we have reported or which are currently under the study of the Commission.[1] All of our tasks have involved us in the obligation to consult the interested trade and professional bodies, the academic and other experts, government officials, Federal and State, the lobby groups and ordinary citizens. It is for this reason that we have spared no effort in reaching out to the Australian community to secure its ideas on the future of the legal system. We have held public seminars. We have distributed discussion papers with tentative proposals for reform. We have held public hearings in all parts of Australia. We have used the media, and talk-back radio, public opinion polls and surveys to elicit community response to our proposals. The aim of all this is to ensure that when our reports are ultimately handed to the Attorney-General and placed before Parliament, they have exhausted all of the relevant points of views and considered the pros and cons of ideas of reform. If law reform is to be more than the process of providing the latest band-aid to a community grown cynical about its legal machinery, if it is to provide laws and procedures that will be in operation well into the next century, it is vital that we should submit the controversial matters committed to us, to a thorough-going and open-minded debate. This we have done. One of the reasons for my being here today is to continue that debate, in a matter which specifically brings together the Law Reform Commission and the motor industry. I refer to the reference we received from Attorney-General Ellicott on the subject of class actions. I propose to return to this topic. But before I do, I will seek to identify a number of the chief themes for the law and its practitioners in the 80s.

AN EXCURSUS IN FUTUROLOGY

Futurology. I venture upon an excursus on futurology with diffidence. We are now well into the 80s. Futurologists of the 80s are a little passe. To be accepted today, a futurologist must peer more boldly into the 90s and indeed into the new century.

If we stand back from the law and Australian society and ask : what are the chief forces at work which will affect our country and its laws into the 80s, I would suggest that three developments stand out. They are the moves to big government, big technology and big business.

Big Government. So far as big government is concerned, we can all see the growth of the public sector and the increasing responsibility it has to make decisions affecting every individual in society at various stages in his life. There will be no going back to the so-called 'good old days' of small government. Border skirmishes will be fought to rein in the public purse, to reduce taxation, to introduce 'sunset clauses' in legislation (by which a particular Act of Parliament will lapse after a given time),[2] and to limit and control the rapacious quango,[3] But I cannot foresee a return to the laissez-faire society of the 19th century. On the contrary, I believe that the growing integration of society and its recognition of responsibility for the poor, inarticulate, underprivileged members, will, if anything, gradually increase the role of the public sector and its influence in our lives.

It is recognition of this trend that has led governments of all political persuasions to urge the development of protective machinery to stand up for the individual against the seemingly overwhelmingly and all-powerful bureaucratic state. In some of the projects of the Law Reform Commission we have addressed this very problem. Our latest report on Lands Acquisition and Compensation, which will be tabled shortly in the Federal Parliament, will deal with the predicament faced by the individual when, under compulsory process, his property is taken by the Commonwealth for public purposes.[4] The Constitution guarantees 'just terms' to such persons.[5] But how do we translate this pious and abbreviated constitutional guarantee into actual fair procedures for the handling of the human problems which arise when a person's home is suddenly resumed for an airport or a quiet suburban street is suddenly turned into a busy inter-urban highway?

I am happy to say that successive governments in the Commonwealth's sphere have reacted positively to the need to defend the individual against unreasonable administration. A national Administrative Appeals Tribunal has been established to hear appeals against administrative decisions made by Commonwealth officers. The tribunal is empowered to hear such appeals 'on the merits' and to substitute for the bureaucratic decision what it feels to be the 'right or preferable' decision in the circumstances. The tribunal, headed by judges, sits in all parts of the country and has already built up a notable reputation for the independent and dispassionate scrutiny of administrative decisions.

In addition, an Administrative Review Council has been established to oversee the development of protective laws. A Commonwealth Ombudsman (Professor Jack Richardson) has been appointed and his business expands daily. He now receives large numbers of complaints by telephone : an innovation which has promoted speed of attention to citizen complaints and an admirable cutting of red tape that secures prompt correction of bad administration. It is expected that the Commonwealth Attorney-General (Senator Durack) will shortly announce the proclamation of the Administrative Decisions (Judicial Review) Act 1976. That Act, which has already been passed by the Commonwealth Parliament, contains a most important provision[6] to the effect that a person affected by a discretionary decision by a Commonwealth officer under a Commonwealth law will in future be entitled to demand from him the reasons for his decision, his findings and a reference to the evidence on which he has relied. No more will the citizen be faced with a bland refusal. In future, he will be entitled to know why a decision has been made. Access to information is also a theme of other legislation. The Freedom of Information Bill which is before Parliament in Canberra establishes the rule that in the future people in Australia will generally be entitled to access to government information. Privacy legislation will be proposed in due course by the Law Reform Commission to ensure that individuals have access to information about themselves. A Human Rights Commission is proposed in a Bill before Parliament, precisely to test our laws against internationally agreed human rights. Similar developments are beginning to happen in the States. They reflect the reaction of the legal order to the growth of the public sector. Thirty years after Lord Hewart, the Lord Chief Justice of England, wrote 'The New Despotism', lawmakers and law reformers are putting forward effective, practical and accessible machinery to assert and uphold the rights of the individual as against the bureaucrat.

Big Business. So far as big business is concerned, I will say less of this. But it is scarcely likely that the same disciplines which are now being developed and enforced as against big government, will not, in time, come to the rescue of the individual as against large corporations which can be equally unthinking, oppressive and (dare I say it?) equally bureaucratic. The problems of big business are somewhat different to the problems of big government, for at least with government, we share an ultimate national or sub-national identity. Business can operate insensitively for its own purposes, without regard to the needs of the country within which it operates. The ever-diminishing significance of distance, and the ever-increasing speed and economy of international communications, makes the development of international business both inevitable and desirable. But there are by-products, of which we will see more in the last decades of this century. For example, the efficiences which persuade electronic companies, motor manufacturers and others to centralise research or other facilities in overseas countries, may not benefit a small market economy, such as Australia's is. Furthermore, a marriage of computers and data bases through satellite and other communications systems presents the very real possibility that vital data on Australian individuals and businesses will be stored outside our country. This is a concern which is at the forefront of much European thinking just now. With memories of invasions still fresh in mind, European leaders are sensitive to the external storage of personal data, sensitive or vulnerable data, data relevant to national security and defence and data vital to the culture and national identity of a country. Although these concerns are not yet in the forefront of Australian thinking, I believe that they will, in time, become matters upon which we will have to reflect. They may require new laws to protect our Australian national interests, for the interests of international and trans-national corporations do not always coincide with our own.

Big Technology. The third great force for change is what I have called big technology. Many of the tasks before the Law Reform Commission reflect the impact of science and technology on our society. The invention of the tape recorder and of videotape devices presents the possibility of solving some of the disputes concerning confessional evidence to police. The invention of the Breathalyser puts at rest many of the old battles about intoxication which took up so much time of courts in my youth. The triumph over the body's immune reaction has rendered human tissue transplantation a daily reality in all parts of Australia. The development of the hospital ventilator has required us to look for a new definition of 'death'. When the heart can be kept artificially beating, the difference between life and death is seen to exist in brain function, not blood circulation.

The development of broadcasting and television makes our old laws of defamation and the nine different systems we have in the States and Territories of Australia, outmoded and on occasion positively obstructive. Above all, the development of the computer promotes problems which the law must address. We must not be blinded by the efficiencies and potential of computerisation, so that we ignore the problems. Some of the problems I have already referred to. They include :

* The threat to individual liberties and particularly the privacy of the individual, which is posed by unregulated and unrestrained computerisation of personal data

* The additional vulnerability of society, which exists where vital information may be stored in a few tapes in the one place, susceptible to destruction. Terrorists last year destroyed the tapes containing the Italian motor registry. There was a certain safety in the inefficiency of the Manilla folder and paper files, which disappears with the vulnerable computer tape.

* The threat to cultural identity and independence is felt acutely by countries which do not speak the English language. In a world of Anglophone data banks they fear that their history and culture will, in the future, be written from data bases stored, probably, in English. Although we in Australia do not have the language problem, it is important that we should uphold the virtues of our own national way of life and not surrender them to the mere economies of computerised scale.

* Finally, there is the often identified problem of unemployment and the suggestion that the society of the future will have to adjust to a significant number of persons permanently out of work. This prospect raises difficulties and promotes the potential for tension, discontent and alienation, unless our lawmakers face up to it and prepare succeeding generations for a new work ethos, relevant to the automated age.

Education, Information and Change. To the forces of big government, big business and big technology must be added the force of cumulating change. No-one should be surprised at the change of moral and social values in Australia. The education figures make such changes inevitable. In the last quarter century we have multiplied by eight-fold the annual output of our universities. We have enourmously increased the range and availability of advanced education.

The numbers of girls continuing at school after the age of 16 years has doubled in the past ten years. Though we lag behind the United States and Japan in school retention, we are, in comparison to the past, a community with much more education and much more information. Such a community will not tolerate unfair laws, as its forebears might have done. It will increasingly demand that the legal system be more open, more rational, more accessible, less traditional: more relevant to the problems of today. The Law Reform Commission exists as a means of helping legislators to make the law fulfil these community expectations.

THE MOTOR INDUSTRY AND CLASS ACTIONS

Law Reform and the Motor Car: It would be inappropriate for me to speak at large on the legal issues which will face your industry in the next decade and beyond. One does not have to be particularly prescient to see that the long-term prognosis for the industry depends very much upon the resolution of today's energy problems. Industrial relations issues, tariff issues, changes in consumer protection and company law will all occupy your industry and your Association in the years ahead. I will confine my remarks to the possible implications for you of the work of the Law Reform Commission, leaving it to others to deal with broader themes.

A number of projects of the Commission affect your industry indirectly. Our report on Alcohol, Drugs & Driving contemplated the possibility of combatting the road toll by better vehicle design and the introduction of mechanical checks against ignition by intoxicated drivers.[7] Our project on debt recovery is concerned to tackle the underlying "disease" of credit incompetence, often evidenced by the failure of individuals to pay their debts. The enormous expansion of consumer credit since the Second World War is in part the product of the citizen's desire to own a motor car and other durable consumer goods. Yet the law has scarcely caught up with this revolution in the extension of credit. The work of the Law Reform Commission is designed to use instances when people fail to pay their debts as a "symptom" of the need for credit counselling, so that we treat the "disease" (inability to handle credit) and not simply the latest symptom (failure to pay on time). Our project on Insurance Contracts is also relevant. The expansion of consumer credit is paralleled by the expansion of consumer insurance. It is doubtful that the rules which were designed for an insurance market of experienced participants of equal bargaining power, is appropriate to the mass consumer insurance market of today. The law governing such contracts should be brought into line with the reality of the market.

Mass Produced Legal Problems. Rather than speak of such issues, I want to spend the time remaining to me dealing with one matter that is before us, which may be specifically relevant to your industry. I refer to our project on class actions. The Federal Attorney-General has asked us to advise whether this United States legal procedure should be introduced into Australia. It is a long time since a mere matter of legal procedure has caused so much controversy and heartburning. Why should this be so?

A class action is a legal procedure. Strictly speaking, it creates no new legal rights, beyond those which exist at present. It provides a means for the 'mass delivery' of existing legal rights. We live in a society of mass production of goods and services. Your industry is the prime, indeed the first great example of mass produced products. If you mass produce a product or a service, it is inevitable that when something goes wrong, you will mass produce the error. A fault in the pipe, connector or gauge supplying LPG gas to power a motor car will be replicated hundreds and possibly thousands of times.[8] The failure during assembly to close clips retaining a fuel tank pressure balance hose will result in the hoses in hundreds and possibly thousands of cars becoming disloged. If this occurs, fuel may escape and create danger and certainly loss of efficiency for the car and its occupants[9].

Whilst the rest of society has moved on to the mass produced economy, the law still lingers lovingly with the individual case. Mass delivery of legal remedies has not kept pace with mass production of legal problems. The courts, which have existed for eight centuries in our tradition, to solve disputes and to redress wrongs, will become increasingly irrelevant to the issues of society, unless they can modify their procedures to respond to the world of today. Under its statute, the Law Reform Commission is specifically charged to :

* review laws ... with a view to the systematic development and reform of the law, including in particular :
  (i) the modernisation of the law by bringing it into accord with modern conditions; and
  (ii) the adoption of new or more effective methods for the administration of the law and the dispensation of justice[10].

This, then, is the position we have reached. The Law Reform Commission's duty, within tasks assigned to it by the Attorney-General, is to modernise the law and, specifically, the delivery of justice.

A reference has been given to us to examine access to the courts and, specifically, class actions. In the United States, proponents of class actions say that they exist, precisely to modernise the administration of justice. They are said to be the 'free enterprise answer to legal aid'. They are said to be the means by which a determined, resourceful litigant can organise a 'class' and bring before a court not only his own little claim, but the aggregate claim of all people similarly affected in a mass wrong. Where is the hardy litigant who will sue for a defective fuel pipe clipping in his car? Should a court be required to spend its time on such a little case? Where is the bold plaintiff who will bring a case when he discovers his LPG fitting is defective? Individually, such cases would simply not come to the courts. Collectively, and in aggregate, the amount at stake may be very significant. The risks to a number of motorists may be large. Collectively, and in aggregate, such litigation would undoubtedly be worth the time of a court. In aggregate, the combined plaintiff would be in a much more equal bargaining position as against the reluctant manufacturer or the disinterested retailers. This is why American supporters of class actions are so enthusiastic for them. They say that the very existence of such a procedure ensures good conduct and law-abiding behaviour. They cause law-abiding conduct to be 'internalised' whereas the risk of an individual, little case by one or two disaffected purchasers can be dismissed as no more than a 'flea bite'. I do not say that this is the view of the Law Reform Commission. I simply want to point out that just as there are vigorous opponents of the class action, in this country and in the United States, there are also champions of its cause.

Proof of Need: Motor Vehicle Complaints: In the public hearings conducted by the Law Reform Commission, the Executive Director of the Australian Automobile Dealers Association made a thoughtful oral submission and tendered a most helpful written submission prepared by the Association. Both are under careful study by us and will be thoroughly reviewed before we report on this subject. An important point made in these submissions is that, before class action procedures should be adopted in Australia, it is obligatory to prove a need for class actions which is not being met effectively by current laws and procedures.[11]

Proponents of class actions point out that consumer claims in respect of motor vehicles represent the highest volume of complaints received by consumer affairs bureaux in each State. In 1978, the Annual Report of the Trade Practices Commission states :

> [T]he automotive industry, covering manufacturers, importers and dealers (in new and used vehicles) has been (as it is for State and Territory consumer agencies) the most significant industry in terms of commission consumer protection enforcement work. This is to be expected - it is a very large industry; its products are essential to almost every family and business; as single items motor vehicles are expensive and significant items of purchase.[12]

The more recent report of the New South Wales Department of Consumer Affairs indicates that it receives six times the numbers of complaints about used motor vehicles than any other type of goods or services. During the year 1978/79 the department received 3,164 complaints about used motor vehicles and launched a number of prosecutions. According to the report there are many practices being adopted by traders in the motor vehicle industry, which the New South Wales department would regard as 'pernicious and clearly inimical to the interests of consumers'.[13] Many of these practices in the motor vehicle market were illegal and the subject of prosecutions. Others, however, were 'not illegal in the technical sense but were clearly not in the interests of consumers'.[14]

The report of the Director of Consumer Affairs in Victoria for the year ended 30 June 1978 disclosed :

> the sad note that the percentage number of motor car complaints was still on the increase. This theme continued during the year under review where motor vehicle complaints occupied a higher percentage (and absolute number) of overall complaints than in any previous year.[15]

According to the Commissioner, many of the complaints on new cars arise because of the condition in which the car is delivered to the consumer; others through ineffective action by the dealer to rectify a problem. Others arise, particularly in relation to second-hand cars, because of the unethical conduct of some salesmen.[16]

This same theme is reflected throughout our country.[17] Of course, a mass produced article cannot be completely fault-free or its price would be prohibitive. The likelihood of a percentage of faulty vehicles being produced and distributed is high. A question before us is whether what happens now to enforce the consumers' legal rights is enough and, if it is not, whether class actions would remedy the defect.

The sanctions available to consumers differ as between the States. In every State there is an official consumer protection body. But such bodies complain of lack of resources, sometimes lack of power to enforce their advice and determinations and lack of a means to protect consumers who may be unaware of a product defect or, so ignorant of their rights, that they do nothing to enforce them.

Recalls of Vehicles: Is it enough? The last year has seen a remarkable spate of motor vehicle recalls. Since the motor industry adopted a voluntary recall code in 1972, motor cars have been recalled for safety-related faults nearly 90 times. In the last few weeks, Ford Australia ordered a national recall of 40,000 current model vehicles, following reports of fuel vapours igniting during refuelling.[18] General Motors-Holden Limited recalled all Commodore Station Wagons for inspection (and rectification where necessary) of the fuel tank pressure balance hose installation.[19] At Chrysler, the top-selling four-cylinder Sigma underwent 2 recalls in 1979.[20] Even before the latest spate of recalls, the Australian Federation of Consumer Organisations called for the appointment of an independent national arbitrator with statutory powers over the recall of defective motor vehicles.[21] According to the Federation, more than half a million vehicles had been recalled in Australia over the past five years because of defects. The figures have increased significantly since that estimate.

The Federation claims that the current industry voluntary code does not adequately protect the consumer. Critics say that manufacturers seek to avoid the bad publicity which attends recall, and resist recall, even when it may be needed for safety reasons.[22] They say that decisions relating to the recall of cars on safety grounds should not be in the discretion of manufacturers alone and that current procedures do not adequately ensure that consumers get to hear about the recall. It is pointed out that relatively few consumers take up the recall offer. There is no available research as to why this should be so. Commenting on the proposal for an independent arbitrator, the Age newspaper in Melbourne expressed this view :

> There is a curious inconsistency in the Federal Government's approach to the car industry. It imposes stiff safety and design standards on manufacturers but seems to shun any responsibility once the cars are on the road. The argument that the industry is capable of regulating itself is a risky one. Certainly the manufacturers know more about the cars they build than anyone else. They know when a fault has a potential to cause tragedy. If they know of a fault and do not correct it, they run the commercial risk of losing sales if, and when, an accident occurs and they are held responsible.

They also risk losing millions of dollars in litigation if the victims of such accidents sue them successfully for negligence - especially if class actions, in which a group of people pool their resources to take a company to court, are introduced in Australia.[23]

Class Actions and Defective Vehicles. Class actions in respect of multiple motor vehicle defects have been brought in the United State and Canada :

* The unexpected Chevrolet engine. In 1977 Oldsmobile, Buick and Pontiac cars were not equipped with their respective engines but with a Chevrolet engine. The 'interchange' was undertaken by General Motors because it had a surplus stock of Chevrolet engines. It was not announced either in advertising, nor in material sent to car dealers nor in documentation required by the U.S. Government. When discovered, these practices led to a number of class actions being filed on behalf of 67,000 purchasers of 1977 Oldsmobiles. Other actions were filed on behalf of buyers of Buicks and Pontiacs. The actions were consolidated. General Motors agreed to a settlement in which it was proposed that it would provide each customer with $200 plus a 36-month or 6,000 extended warranty. The terms of settlement are at present the subject of litigation in the United States Courts.[24]

* The Firenza which never made it. General Motors Canada produced a vehicle which it advertised as being 'tough, durable and reliable'. The advertisements appeared in newspapers on various dates and in other advertising material through distributors. The vehicle, the 1971/2 Firenza, was considered by many consumers a bad car. A number of purchasers commenced actions through consumer tribunals and also sought compensation from General Motors. The cases were fought and voluntary rectification or compensation was refused. Clubs were formed for disappointed 1971 and 1972 owners of Firenza cars. They formed a sad contrast with the usual kind of motor car club, such as the Friends of the M.G. The Ontario club tried direct action. A group intended to drive along the freeway from Ottawa to the General Motors plant, in the hope of securing publicity for their plight. Only half of the number that set out made the journey. The others broke down on the freeway. Of those Firenzas that made it, many did not get back. In the end, an action was commenced in the Supreme Court on behalf of 4,602 purchasers of 1971 and 1972 Firenza motor vehicles.

The claim was for damages for breach of warranty. Compensation of $1,000 for each plaintiff was sought, being calculated on the difference in resale value between the Firenza and another motor vehicle of comparable age, size and purchase price. The Supreme Court allowed the action as a class action and it is now proceeding through the Ontario courts.

* The Mazda that leaked. Recently, we have been informed of a California consumer class action which has just succeeded against the manufacturers of the Mazda car. The claim was permitted to proceed in respect of alleged defects in the rotary engine Mazda that caused water to get into the engine, resulting in damage. We are not aware of the precise details of the case. We are informed that a substantial recovery has been made by the class plaintiff on behalf of himself and all purchasers of the defective Mazda.

* The Pinto calculus. Perhaps the most famous case of private litigatian which forced manufacturers to undertake important safety modifications which they would not adopt voluntarily was a case involving the 1972 Ford Pinto car. In Grimshaw v. Ford Motor Company[25] a claim was made that Ford had 'knowingly misdesigned' the gas tank in the rear end of the Pinto. A 52-year-old woman was killed and a 13-year-old boy severely disfigured by burns over 90% of his body. A jury awarded punitive damages which is still the subject of appeal. In the heels of the Grimshaw award, Ford announced a recall of 1.5 million Pinto and Bobcat cars in June 1978. The purpose of the recall was to instal an $11 fire safety device. Initially Ford did not inform the owners that the recall was for safety modifications. It simply advertised that it was 'strongly recommended that [an] improvement be made'. It was the U.S. National Health Transportation of Safety Association which ordered Ford to alert owners that this was an 'important safety modification'.[26] In January 1980 criminal proceedings were commenced against Ford in one of the States on a charge of reckless homicide, the first such action ever brought against an automobile manufacturer. Ford was liable to be fined a maximum of $30,000, if convicted. As was disclosed in last week's newspapers Ford was acquitted by the jury. But it has been claimed that documents show that a calculation was made by Ford executives of the relative costs of recall and refitting as against the potential cost of a number of damages verdicts for the dead and injured. It is this kind of calculus which proponents of class actions say consumer agencies and even the criminal law will not prevent so effectively as the potential of a swingeing class action verdict.

Class Actions by Vehicle Distributors: One development of interest to your Association is that in the United States class actions have now been brought by motor dealers themselves who are the victims of anti-competitive conduct or other conduct in breach of fair trade practices legislation.

* The exclusive Toyota. In 1972 a class action was allowed against the Toyota Motor Company in the United States where the plaintiff brought proceedings as a representative on behalf of 87 authorised Toyota dealers in the New York region. The plaintiff alleged that the defendant had a nation-wide policy of forcing dealers to become exclusively Toyota dealers. It was claimed that Toyota did this by allocating to dealers who did not agree to be single line an unfairly low number of vehicles. Toyota was said to have attempted to monopolise part of the small car market. The action ultimately led to a result which benefitted the 87 dealers[27].

* The discriminating Chrysler. In the same year an action was brought by automobile dealer franchisees against the Chrysler corporation in the United States. A class action was conditionally allowed on behalf of 5,800 holders of a Chrysler franchise[28]. Complaints were made about the terms of the franchise agreements, alleging that they were too onerous and had provisions in breach of antitrust law. A single holder of the franchise, so it was said, could never take on the Chrysler corporation. 5,800 of them made a much more equal law suit. Each had his own individual franchise. Under Australian court rules each would have to bring his own separate and individual case. Is this desirable? Is it fair?

All of these cases show that there is a real issue to be decided here. It is scarcely surprising that your industry has provided much of the class action litigation of the United States. It is an industry geared to mass production. It is therefore one prone to the mass production of common legal problems. At the moment we soldier along in the law, with few exceptions dealing with each case individually. The question for the Law Reform Commission is whether our current procedures are adequate or whether some modification of legal procedures are needed to cope with mass produced problems.

The current procedures are basically four :

* Consumer protection authorities. The disaffected can proceed to consumer agencies. But these are frequently limited to powers of persuasion and conciliation. They must deal with cases individually. They cannot take the initiative to protect those who do not come along or perhaps do not know and are not organised to assert their rights. They are heavily overworked with large numbers of cases, fixed staff ceilings and limited budgets. In any case, bureacrats are not always the best people to protect the consumer.

* Criminal courts and fines. We also rely on criminal proceedings and fines under the Trade Practices Act. Last year Nissan Motor Company (Australia) Pty. Limited was fined $26,000 in the Federal Court in respect of the failure to provide a rear stabiliser bar to the Datsun Patrol. Nissan issued a service bulletin stating that claims could not be accepted in respect of vehicles for which the bar had not been fitted, despite advertisements stating that the Patrol was fitted with rear stabiliser bars[29]. The fine increased consolidated revenue. But did it effectively protect all purchasers of vehicles without the stabilising bar?

* Voluntary recalls. The spate of voluntary recalls affecting more than half a million cars undoubtedly shows responsibility on the part of the motor industry. But are there more effective ways of identifying affected purchasers? Is it satisfactory to leave it to the manufacturer to determine the terms of, need for and timing of a recall, when there are many reasons of convenience, publicity and cost which discourage recalls?

* The civil courts. Of course, an individual car owner, franchise holder, hardy citizen can bring his own case in the courts. He can sue for breach of warranty. He can claim a breach of contract. But he must do so for what is, individually, a relatively very small amount. And he must take on a powerful opponent, with great resources, able to command the best litigious skills and to press on with costly appeals.

Problems of Class Actions. I am well aware of the problems of class actions : the blackmail suit, the claim without moral merit, the potential for windfall benefits to unexpected plaintiffs and a litigious industry to the benefit of lawyers rather than their clients.

I am also aware that we must design legal machinery that is apt for Australia and that is not simply a palid imitation of a legal process developed in the very different social and professional atmosphere of the United States courts. My colleague, Mr. Commissioner Bruce Debelle (the Commissioner in charge of the class actions project) is shortly proceeding to the United States and Canada to study class actions on the spot and to seek solutions, if they exist, to the problems that have been identified, including those raised by your Association. Only after we have resolved these problems will we report to the government and Parliament.

Making the law and Courts Relevant. I hope that what I have said, however, is enough to show that the debate is not a one-sided affair. Those of us who believe in upholding the Rule of Law in Australian society (and I am one) look for effective machinery that will give people with disputes access to effective dispute resolution machinery. A system of law that contents itself with paper rights, that everyone knows will never be enforced because of the costs, delays and other inhibitions of the courts, is not one deserving of respect. If ordinary people feel that they have been taken down (at least in a sum important to them) and that there is no effective way to remedy their wrongs (or if they do not get to know of the wrong, until it is too late) a force for cynicism in society will exist that will ultimately be destructive of respect for our institutions, including the law. It used to be said that every Englishman's home was his castle. I would adapt this saying to our country with the assertion that 'every Australian's home is his castle and the garage attached'. In a country of great distances, the motor vehicle is the liberator. You are engaged in an industry that brings many problems for society but also great pleasure and release. It is important that as we embark on a new decade, you should reflect upon the great forces that are at work for change in the law and the way in which these forces will affect you and your industry.

No-one can be expected to welcome effective legal controls where none presently exist or where those that exist can be handled with ease because of their limited availability or effectiveness. But every case of legal wrong which is not effectively redressed stains the society that shrugs it off. The cynicism it engenders will endure. Making the law relevant to the problems of to-day's society is the business at the Law Reform Commission. Today's society is the mass consumer society. If the law, the courts and the judges cling to dispensing justice in individual cases we run to risk that institutions that have served as well for centuries, will wither on the vine. Class actions may not be the answer. But I am sure we must find an answer that facilitates actions for the multiple delivery of justice to redress multiple wrongs.[30]

FOOTNOTES

1. For a review of the projects of the Law Reform Commission (Cwlth) see, Annual Report 1979 (ALRC 13) 1979.

2. The Human Rights Commission Bill 1979 (Cwlth) as amended in the Senate, It will lapse after 5 years in default of Parliamentary continuance.

3. Quasi autonomous non-governmental organisations.

4. The Law Reform Commission (Cwlth), Lands Acquisition and Compensation (ALRC 14) 1980 (forthcoming).

5. Australian Constitution, s.51(xxi).

6. Administrative Decisions (Judicial Review) Act 1977 (Cwlth), s.13 (not yet proclaimed).

7. The Law Reform Commission (Cwlth), Alcohol, Drugs and Driving (ALRC 4), 1976, 154 (para.360).

8. For details of the article on LPG gas tanks see The Australian 18 January 1980, 47 and Sydney Morning Herald 24 January 1980.

9. G.M.H. Commodore recall advertisement. See below footnote 19.

10. Law Reform Commission (Cwlth) s.6(1).

11. A.G. Brown, Submission, Public Hearing, Transcript (15 November 1979,) mimeo, 265,266.

12. Trade Practices Commission, Annual Report 1978, para.4.24.

13. N.S.W. Department of Consumer Affairs, Annual Report 1978-79, as reported Canberra Times, 8 November 1979.

14. ibid.

15. The Director of Consumer Affairs, (Victoria) Report for the Year Ended 30 June 1978, 1979, 40 (para.2.1.2).

16. ibid.

17. See, for example, the Bureau of Consumer Affairs (W.A.) Annual Report 1979 reported in the West Australian, 14 November 1979, 10.

18. Reported in The Australian, 7 December 1979, 1.

19. Recall advertised in the Sydney Morning Herald, 25 January 1980.

20. D. Elias, 'Car Recall Law Urged', The Age, 27 November 1979, 7.

21. As reported in the Sydney Morning Herald, 17 September 1979, 3.

22. Elias, op cit.

23. The Age, editorial 'Arbitrating on Car Defects', 27 November 1979, 11.

24. In re General Motors Corporation Engine Interchange Litigation, Oswald v. General Motors Corporation, No.78-2036, unreported decision of United States Court of Appeals, 7th Circuit (26 February 1979), cited in The Law Reform Commission (Cwlth), Access to the Courts - II Class Actions (ALRC DP 11, 1979) 6.

25. California Superior Court Nos. 197761,199397 (6 February 1978). For a note on other pinto litigation, see "Who Pays for the Damage?" in Time 21 January 1980, 39, and Ford breathes easier as Pinto verdict comes in, Australian 15 March 1980 12.

26. P.H. Corboy, 'Contingency Fees: The Individual's Key to the Courthouse Door', paper prepared for A.B.A., mimeo 2.

27. Sunrise Toyota Limited v. Toyota Motor Co., 55 F.R.D. 519 (1972).

28. Merit Motors Inc. v. Chrysler Corporation, 16 F.R.Serv. 2d 543 (1972).

29. Dueret v Nissan Motor Co (Australia) Pty Ltd (1979) A.T.P.R. 40-111

30. Already the courts themselves are beginning to expand to representative action See Prudential Assurance Co Ltd v. Newman Industries Ltd [1979] 3 All E.R. 507.