

AUSTRALIAN CONSUMERS' ASSOCIATION

VISIT BY MR RALPH NADER

SYDNEY TOWN HALL, 20 JULY 1980

INTRODUCTION : CLASS ACTIONS & RALPH NADER

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

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CLASS ACTIONS IN AUSTRALIA?

My task is simple but taxing. I must introduce class-actions and Mr Nader. The only requirement is that I must deal with each in a few minutes. Brevity is not the long suit of the legal profession, least of all the judiciary. Class actions, like Mr Nader himself, have engendered bitter controversy, strong passions and a lot of words.

I am here because the Australian Law Reform Commission was given the task by Attorney-General Ellicott to report on whether class actions should be introduced in Federal courts in Australia. Such procedures do not presently exist. In our courts, it is not possible for an individual claiming damages to sue on his own behalf and on behalf of others similarly affected. Broadly speaking, everybody who wants damages must bring his own individual claim. It is not so in the United States. Individuals (or representative groups) are entitled under legal procedures to sue for the similar wrongs which have been done to other people. If they win a fund of damages is recovered, to be paid out to those who have suffered.

The issue posed by Attorney-General Ellicott's reference to the Law Reform Commission is whether the time has come for us in Australia to follow the American lead or to develop some other procedure suitable for Australia. Never has such a mere matter of legal procedure aroused such a furious debate:

* The Victorian Employers' Federation has described class actions as 'business' final nightmare'.

- * The Director of the Victorian Chamber of Manufactures has described class actions as 'leeches' which would 'sap away the strength and vitality of the manufacturing industry in Australia'
- * The Financial Review, in a series of editorials, has condemned the device as a lawyer's 'makework' and indeed as part of a 'concerted legal thrust to alter significantly the legal framework within which business in Australia operates'. 'Class actions', thundered the editor, would 'enrich lawyers at the expense of business [or] taxpayers.'

The Law Reform Commission is getting on with the job of preparing its report for the Attorney-General and Parliament in its usual way. Our procedures are relevant to the concern tonight with the rights of ordinary Australians to take part in decisions which may ultimately affect them. They are different from the usual secrecy that surrounds lawmaking in our country. We have issued a discussion paper setting out tentative proposals for a form of class actions in Australia. We have held public hearings in all parts of the country. We have attended industry seminars. We have engaged in a great deal of private consultation with business, consumer groups and ordinary citizens. The Commissioner in charge of the project, Mr Bruce DeBelle, has recently returned from North America, where he conducted an intensive examination of class actions in operation.

We are yet to produce our final report. I attend this function organised by the Australian Consumers' Association as I have attended many functions organised by business. We are here to listen and learn.

Advocates of class actions contend that the procedure is basically a means of equalising litigation which is otherwise unfairly weighted against the little individual, including the individual consumer. Where goods and services are mass produced, as they are so often today, mass produced problems and legal rights are bound to occur. The law, so it is said, should adjust its procedures and remedies so that it can ensure true access to justice. We should not be content with conferring paper rights which everyone knows the ordinary citizen has no real chance of enforcing in the courts. It has also been argued that class actions have the effect of internalising proper corporate conduct and lessening the need for bureaucratic controls.

On the other hand, ours is a different society and a different legal environment than the United States. We do not have the same number of constitutional and statutory rights as exist there. There are no treble nor punitive nor minimum damages which so inflate U.S. class verdicts. We have different rules governing legal costs. Basically, in the United States, each party bears his own costs, whatever the outcome of a case. In our country, the unsuccessful party is responsible for most of the winner's costs including the lawyer's fees. In an era of escalating lawyers' fees, the operation of this rule tends to discourage court action, perhaps unjustifiedly. Nor do we have contingent fees in Australia. U.S. costs rules have put a class plaintiff in virtually a 'no risk situation'. In Australia, the reverse would be the case, under present legal costs rules.

Situations which may be suitable for recovery of compensation as a class action include:

- * Cases where the same defect exists in a particular motor car. Individually, it may not be worth the car owner suing. Collectively, the amount involved may be very great indeed.
- * A package tour of overseas travel may be cancelled or suspended mid term. Again, individually, it may not be worth the passenger suing for breach of contract. Collectively, in a class action, it might be very much worthwhile.
- * An illegal overcharge by a finance company on all like contracts, too small to warrant individual action but in total a large sum sufficient to justify a claim.

There are many other suggested cases particularly in the consumer protection field. There is no doubt that abuses have been identified in United States class action procedures. The enormous verdicts frighten Australian business, with its smaller resources and other current difficulties. As we are constantly told, somebody pays for effective legal remedies. Yet conferring legal rights and doing little about ensuring access to those rights is to indulge in a dangerous hypocrisy. The problem of the Australian justice system is not so much in its substantive rights as in the machinery it provides ordinary people to get practical enforcement to those rights.

The Law Reform Commission is looking for effective means, fair to claimant and defendant alike. It is a difficult task. On the one hand, we must avoid the dangers of blackmail litigation and open-ended damages cases brought by self-styled representatives who in truth represent only themselves. On the other, we must seek to turn paper rights into real remedies. The answer may not necessarily be the class action. It may be possible to develop the existing representative action to provide compensation for those people who come forward with claims. The nature of the remedy may in part depend on the objective sought to be achieved. In the United States recovery and distribution of amounts as small as \$4.50 have been made and may be regarded as a deterrent to unlawful conduct rather than the provision for compensation. Should we choose between these alternatives or seek to achieve both? These are matters on which Mr Nader can inform us tonight.

MR RALPH NADER

Mr Nader had a fairly orthodox lawyer's background until 1965. He was educated at Princeton and Harvard Universities. He was a University lecturer and then he was launched upon the national stage in America by his book 'Unsafe at Any Speed'. The book criticised the Corvair motor car. The manufacturers, General Motors, hired a private detective, apparently in an attempt to discredit Mr Nader. Not only did the attempt fail. It drew attention to Mr Nader, his views and his single-minded dedication to the interests of the consumer, whether of cars or other services of business and government.

He has been described as a kind of 'National Ombudsman' in the United States. Since 1965 he has, more consistently than most other national figures, attracted a continuous stream of calumny and adulation.

Consider a few of the things said about him:

- * In 1971 he was listed as the sixth most admired man in the world close on the heels of the Pope in the Gallup Poll's list.¹
- * More recently he has been described by one of his critics 'as the Upton Sinclair of his era and one of the most powerful men in America'²
- * The same critic describes him as a 'calvinist with ambition and a mission'³
- * One of his former employees, Jim Turner, says 'On strategic questions about the way society is operating and what's wrong with it, Ralph is just fantastically perceptive.'⁴

- * Archbishop Fulton Sheen once called him a man 'who lives simply and is committed to social justice while practising individual justice'.⁵
- * David Potter, Vice President of General Motors has said 'He is a force wherever he choses to be a force'. A College of Potter's acknowledges 'There is still an intensity of issue raising'.⁶
- * Business Week records one business lobbyist in Washington saying with relief 'A lot of members of Congress are finding out that the walls don't fall in when they stand up against Ralph'.⁷
- * A state governor is reported to have said 'He has caused more disruption and changed attitudes - some for good and some for worse - than any other individual. It has affected our way of life, standard of living, price of utilities, price of automobiles ... accentuated desire for clean air and water but at the same time played havoc with industry and employment'.⁸
- * Comedienne Joan Rivers put it straight: 'He's the only honest man in the whole country'.⁹
- * A person usually critical of him said: 'A lot of what Nader says sounds like sheer utopianism. But it has to be remembered that Nader has always had an unerring eye for the right political issue at the right time'.¹⁰
- * Lately he has moved into concern for freedom of information. He has written that 'Information is the currency of democracy'.¹¹ He has come out in favour of compulsory voting in the United States where presidential polls sometimes attract only 55% of the electorate.¹²

All in all, his critics and his admirers acknowledge that he is a significant American and we will all listen with attention to what he has to say. The great challenges facing Australian society today are the same as those facing American society. They are the growth and importance of government in all of our lives, the growth and changing face of business, including transnational. The changing moral and social perceptions and the dynamics of science and technology impact our society and its laws as never before. In times like this free societies look about them for people with a clear sense of direction. Not everyone agrees that Mr Nader has the compass. Even if he has the compass, some dispute that it works with accuracy in the Southern Hemisphere where the magnetic field is often quite disturbed. But none dispute that he is a significant American with a passionate concern for consumers and with things to say, relevant to our times.

FOOTNOTES

1. D. Sanford, Me & Ralph Is Nader Unsafe for America? New Republic, Washington 1976, 7.
2. Sanford, 16.
3. *ibid*, 61.
4. *id*, 65.
5. Quoted U.S. News and World Report, April 19, 1971, 30 ('Who Runs America?').
6. Quoted Business Week, april 9, 1979, 72 (A Fading Ralph Nader rewrites his strategy').
7. *ibid*.
8. U.S. News and World Report, n.5, 30.
9. Sanford, 105.
10. *ibid*, 128 (James Ridgeway quoted).
11. Sanford 21, (R. Nader quoted).
12. *ibid*, 125.