Report of the Commonwealth Legal Aid Commission stresses the need for further funds for legal aid in Australia but also the need to explore, by proper research and statistics, the best way of delivering the greatest number of people in need to justice:

> "While the Report makes a plea for adequate government funding of legal aid, there is an urgent need for research into new methods of funding and providing legal aid — particularly to the forgotten middle class of Australians. We need to tap other sources of funding".

The report details the development of a new comprehensive legal aid scheme throughout Australia and the establishment of the Commonwealth Commission to provide liaison, co-operation and co-ordination.

The very low threshold to qualify for legal assistance (about $60 p.w. disposable income) is roundly criticised, as is the alleged "run down" in Federal legal aid and the miniscule expenditure in Australia (in comparison to Canada and the United States) on research into differential means of providing legal aid.

Amongst other things, the report outlines the success of the community legal aid seminar held in 1979 and calls for a follow-up seminar, open to the public, to develop further ideas on the direction for legal assistance in Australia. On the money side, it urges that for the purposes of funding, legal aid should be regarded as part of the Federal Welfare Budget instead of as part of the administration of the Attorney- General's Department. Commenting on the report, Attorney- General Durack expressed disappointment about the lack of "any positive proposals for alternative sources of legal aid funding". He pointed out that appropriation for such aid had risen from $12 million in 1975 to an estimated $25 million in 1979/80.

Class actions public hearings

> "It must be a long time since mere matters of legal procedure aroused such fury".
>
> Michael Jacobs

The above comment published in the Adelaide *Advertiser* on 24 November points to an unfortunate trend which has developed in the national debate about class actions following the ALRC Discussion Paper No.11. The pleas for a rational and calm debate have not always been heard, prompting the Australian Industries Development Association in a report published on 7 November 1979 to declare:

> "It is unfortunate that the class action debate in Australia has already taken on some of the characteristics of the ongoing debate in the United States".

Opponents of class actions seem anxious to surpass one another in devising new epithets to condemn class actions.

- In a report published on 2 November 1979 the Victorian Employers Federation described them as "business's final nightmare".
- Opening a seminar on class actions in Melbourne on 14 November the acting director of the Victorian Chamber of Manufactures described class actions as "leeches" which would "sap away the strength and vitality of the manufacturing industry in Australia". He then went on to point out how the Commission had called for an end to the emotional debate.
- The *Financial Review* on 6 December, 1979 discussed class actions as part of "a concerted legal thrust to alter significantly the legal framework within which business in Australia operates".

The danger in such an emotional debate is that it clouds the issues and hinders the proper consideration of effective alternatives. Let's say it again: class actions in federal jurisdiction in Australia are neither panacea nor nightmare.

Commissioner Bruce Debelle has just returned from conducting the Commission's public hearings during November in all parts of Australia. Arguments for and against the introduction of class actions were also advanced at a series of seminars. Commissioner Debelle presented a number of procedures alternative to the U.S. class action. The U.S. procedures he said, were based on a machinery which included members of the

class similarly affected unless they expressed a desire to be excluded from the action. This was commonly known as the *opt-out* procedure. It sometimes resulted in defendants having to pay a large sum of damages. As every member of the class was not identified, a large surplus sometimes resulted. The procedure best suited for Australia might be different. What was appropriate might depend on the primary objective of the remedy. If compensation is to be the rationale, an *opt-in* procedure might be more suitable. Only those who told the court that they wanted to be involved in the action would be included in the class. The defendants would only be paying damages to those who sought compensation. Such a procedure could overcome the open ended nature of the U.S. class actions which sometimes resulted in awards of damages to people who had never heard of the dispute or even did not wish to be involved. Another alternative, he said, was simply to remedy the decision in *Markt v Knight Steamship Co.*, [1910] 2 K.B. 1021 so that a mechanism would be available to enable a group of named and identified people to band together to claim damages when they had suffered financial loss as a result of unlawful conduct. Put broadly the *Markt* decision requires identical, not just similar, legal interests to sustain a group action. The difference between the opt-in procedure and remedying *Markt* was essentially a question of degree.

At a number of hearings and seminars concern was voiced that there ought to be a group action procedure in Australia. There was a substantial degree of support for at least remedying the rigidities of the *Markt* precedent. Some participants expressed the view that compensation ought to be the primary objective of the remedy and therefore, favoured the opt-in procedure.

Although at the public hearings most representatives of industry and commerce opposed any improvement in group action procedures, there was nevertheless support from some business interests for remedying *Markt.* At least one group went so far as to support an opt-in class action. However, the opt-out class action procedure was universally opposed by business. On the other hand a number of private individuals, consumer groups and community legal services supported opt-out class actions. The Fitzroy Legal Service typified this view. Pointing out that in its experience the law did not always operate equally and that many people were effectively denied access to justice, the Fitzroy Legal Service supported an opt-out class action. It would provide improved access to justice for cases of multiple legal wrongs. The Council for Civil Liberties in Western Australia supported the concept of revised group action procedures. But it expressed concern about opt-out class actions. The interests of both plaintiffs and defendants alike had to be considered. No procedure should be introduced which would unfairly tip the scales against defendants. A similar submission was made by the Council for Civil Liberties in South Australia.

In addition to unjustified concerns about treble damages some of the opposition to class actions was also based on misunderstandings of the possible use of class actions. At the Canberra hearings the Australian Mining Industry Council acknowledged that at least part of its submission was based on a misunderstanding of the procedure.

The attitude of trade unions to class actions was mixed. Speaking at a seminar in Sydney on 17 November, Mr Alan Boulton, a legal officer with the ACTU, stated that generally speaking trade unions supported class actions. However, he did have some concerns about the manner in which they could be used against trade unions. One area in which he saw class actions as assisting trade unionists was in the context of workers who suffered injury as a result of working in a particular environment. He instanced workers in Western Australia who had suffered asbestosis.

The Australian Industries Development Association report referred to above says that two of the reforms suggestions in the Commission's Discussion paper are in areas "where consideration of new procedures may be productive".

- The provision of a *parens patriae* procedure which would be brought by an officer such as a Commissioner of Consumer Affairs on behalf of aggrieved consumers. This essentially represents the public interest action noted in DP 11.
- A procedure along the lines of the former s.87(1) of the *Trade Practices Act*, 1974. This procedure enabled the Federal Court, on finding a breach of certain provisions of that Act "to make such other orders as it thinks fit to redress injury to persons caused by any conduct to which the proceedings relate or any like conduct engaged in by the defendant". This provision was repealed, without explanation, in 1978.

The Association's report represents a positive contribution to the debate. However, should consideration not be given to the provision of a private mechanism to enable the law to be enforced in case of multiple grievance? Should compensation for damages to groups of affected individuals be limited to purely governmental procedures? At a time when there is active consideration of de-regulation of Australian industry, the AIDA's report gives strangely brief consideration to a private enterprise mechanism in the law and shows a surprising confidence in bureaucratic paternalism. The debate goes on.

Odds and Ends

■ *Our Covers*: The last cover of "Reform" upset some cognoscenti by describing H.E. Starke as a "K.C.". Starke is one of the few Justices of the High Court elevated from the Junior Bar. He never took silk. The artist Low obviously did not know this. *Reform* faithfully reproduced Low's cartoon, including the error for which Low can be forgiven. This month's cover shows the trial of Charles Stewart Parnell M.P. and 13 other leaders of the Irish National Land League. It was the activities of this League that added the word "boycott" to the English language, after Captain Boycott, the agent of an English landlord, who was subjected to ostracism. Parnell, accused of conspiracy to prevent the payment of rent, was discharged when the Dublin jury predictably failed to agree. A year later he was imprisoned under new coercion legislation and was finally released after negotiating reforms to the land laws.

■ The Law Council of Australia and the Maritime Law Association have established a Joint Committee to examine reform of Admiralty jurisdiction in Australia. New Zealand Admiralty Law was completely revised in 1973. The principal need for reform identified when the Joint Committee was established:

> "arises from the fact that the current jurisdiction of the Australian Courts is restricted to that which was granted to the High Court in England by the Admiralty Courts Acts of 1840 and 1861. Thus the Admiralty jurisdiction of the Australian Courts has remained unaltered for almost 120 years; in consequence the Australian commercial communities are deprived of the advantages of more modern jurisdiction available in most other parts of the world".

Mr. Justice Zelling (Chairman, S.A.L.R.C.) has agreed to serve on the committee whose report, when made public, will be forwarded to Commonwealth authorities.

■ *New Books*: The publication of *Lawyers Law Books* was noted in [1978] *Reform* 1933. Now a first supplement has been prepared by Donald Raistrick, Librarian to the Law Commission. The supplement brings up to date the organisation of law reform and monograph literature on legal subject matters which are organised under wellknown headings. Address for inquiries: Professional Books, Abingdon, Oxon, OX14 4SY, England. On the local scene, Mr. Reg Bartley S.M., an experienced magistrate in New South Wales, has launched a new book, *The Court is Open*. It is written specifically for the public of New South Wales and deals in a straightforward way, principally with the kinds of problems that tend to come before Magistrates Courts. It is part of the growing body of literature seeking to explain the law to ordinary members of the community in Australia. Address for Inquiries: DX 1238 Sydney, Cost $1.50.