

EEC. This extension of strict liability beyond those who actually produce goods is intended to enable consumers to find someone in the country where injury occurs who will be amenable to a claim for compensation. (The pursuit of compensation claims is facilitated by the 1968 EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.) Australian exporters who maintain offices in the UK, or in other EEC countries, are thus made strictly liable to pay compensation for injuries caused by defects in their products. Those exporters who do not have such offices may nevertheless feel the effects of the UK Act through claims made against them by their trading partners in the EEC who have had to pay compensation to persons injured by defective products.

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class actions — opt in or opt out?

Nothing is more destructive to a sense of justice than the widespread belief that it is much more risky for an ordinary citizen to take \$5 from one person at the point of a gun than it is for a corporation to take \$5 each from a million customers at the point of a pen.

Vice President Mondale,
Address to the Second
Judicial Circuit Conference
(10 Sept 1977)

introduction. Debate surrounding the merits of class actions has been long and heated. There are many contentious legal, social and economic issues involved. This article focuses on one of those issues, the opt in/opt out debate. Should citizens have to give

their written consent before they can be bound by any judgment or is it acceptable that claims be made on behalf of a group of people, described, but not named in the proceedings?

traditional representative procedure. There are many kinds of representative or class actions. The traditional representative procedure which originated in the English Chancery Courts and which operates in most Australian jurisdictions, allows a representative plaintiff to bring an action on behalf of numerous unnamed persons who have the same interest in the proceedings. The consent of group members is not required but they will be bound by the result of the proceedings regardless of whether they wish to pursue the claim or not. The only option open to a group member who does not wish to be a member of the group is to apply to the court to become a defendant and to oppose the representative plaintiff's claim. The representative procedure has not been used a great deal mainly because the courts have interpreted the 'same interest' requirement to mean that actions claiming damages cannot be brought in representative form if each individual's entitlement to damages would have to be independently assessed.

class actions. The traditional representative procedure differs from class actions in the United States in two important respects. Firstly a class action can be brought even though group members may ultimately have to prove the extent of their own damages and secondly where damages are claimed, group members can opt out of the proceedings and either have nothing further to do with the litigation or commence their own individual proceedings against the defendant. The rule allowing group members to opt out

was introduced in 1966. Prior to that time group members had to opt in and be named as parties to the proceedings before they were bound by any judgment. The policy rationale for the amendment adopted by the Federal Rules Advisory Committee has been summarised in the following terms:

Requiring the individuals affirmatively to request inclusion in the lawsuit, would result in freezing out the claims of people — especially small claims held by small people — who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable.

opt in — two examples. The Trade Practices Act 1975 (Cth) and the Supreme Court Act 1986 (Vic) both have forms of representative procedure whereby group members have to opt in and be named as parties at the commencement of the action to receive the benefit of any judgment.

trade practices act. Under section 87 where a contravention of certain consumer protection provisions of the Trade Practices Act has been found, the Trade Practices Commission can apply to the court, on behalf of those people who have suffered or who are likely to suffer loss or damage as a result of the breach, for an order for compensation to be paid. The Commission can only bring an application on behalf of those people who have given their written consent. This amounts to a requirement to opt in to the proceedings.

criticisms. While this procedure is welcomed as providing redress for consumers without the need to bring their own proceedings, it has also been criticised as being too narrow in its ap-

plication. C W Butcher, a lecturer in the Department of Legal Studies and Taxation at the University of New South Wales, concluded in a recent article in *Australian Business Law Review* (Vol 15 No 3) that 'now, more than ever, there is a need for some means whereby a multitude of consumers, similarly affected by the same misconduct can unite to enforce their rights, free of any dependence on the TPC or any other government agency. Certainly section 87(1B) does little to answer the need of the Australian consumer for such a mass remedy. It is no substitute for the most obvious solution: the class action for damages'.

supreme court act 1986 (vic). New sections introduced into the Supreme Court Act 1986 (Vic) allow a representative proceeding where more than three people have the same right to relief against the same defendant. Actions for damages can be brought but, like the Trade Practices provisions, persons must consent in writing and be named as parties before they can receive the benefit of any judgment.

criticisms. These provisions have been sharply criticised by Denis Nelthorpe, solicitor at the Victorian Consumer Credit Legal Service, in a recent article appearing in the *Legal Services Bulletin* (Vol 13 No 1). Mr Nelthorpe uses the case of *Anderson v HFC Financial Services* to illustrate the deficiencies of the opt in model. In that case a Mr Anderson brought a test case alleging that HFC Financial Services had incorrectly calculated the rebate on a credit contract regulated by the Credit Act 1984 (Vic). Mr Anderson's alleged loss was \$57, however the Victorian Consumer Credit Legal Service, the Director of Consumer Affairs and the Australian Finance Conference agreed to finance Mr Anderson's ac-

tion against HFC because the total refunds payable to consumers by HFC and other financial institutions could have totalled \$22 million. The full court of the Supreme Court of Victoria found that HFC had miscalculated the rebate of interest. However this decision, which was not brought under the opt-in provisions, did not oblige the defendant to repay any other consumers whose rebate had been miscalculated because Mr Anderson was the only party to the proceedings. Representative proceedings could have been instituted, however the Legal Service would have had to identify all consumers and obtain their consent in writing before the commencement of the actions. Mr Nelthorpe points out that this is a classic case of the identity of consumers being within the knowledge of the defendant. The defendant, using its own records, could have identified each person who suffered loss, calculated the extent of the loss and made the appropriate adjustments. However because the Act obliges the plaintiff to identify and bring together all potential consumers affected by the breach of law, the defendant is protected. Mr Nelthorpe points out that the advantage of a system where consumers may be described as a group rather than named as parties to the proceeding means that defendants cannot retain ill gotten gains merely because the cost to each individual of litigating for the return of \$57 is not economic.

alrc. The alrc has a reference on class actions which is nearing completion. Draft proposals are currently being circulated to consultants for comment. The essence of the proposals is that a person can commence proceedings for him or herself as well as for all members of a group and conduct the proceedings on their behalf. The

proposals are subject to two overriding principles. The management of the case by the court, especially in relation to any settlement, which will have to be scrutinised by the court to ensure that it is fair to all group members, and the entitlement of any group member to give notice opting out of the proceedings. The effect of opting out is that the group member will neither be entitled to share in the benefits of any success of the proceeding nor be bound by its dismissal. For constitutional as well as practical reasons it is proposed that proceedings of this kind only be brought in the Federal Court. Advantage can then be taken of the active role that the Federal Court plays in managing cases before trial.

conclusion. The concept of describing rather than naming plaintiffs in court proceedings is not novel. It is currently provided for in the traditional representative procedure. However this procedure does not extend to claims for damages in cases such as mass disasters, injuries from defective products or errors in financial transactions. If citizens suffering loss, however small, in situations such as these are to be compensated through the court system then one practical solution is a representative or group procedure incorporating an opt out scheme.

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the commonwealth prisoners act

I know not whether Laws be right,
Or whether Laws be wrong;
All that we know who lie in gaol
Is that the wall is strong;