REPRESENTATIVE CLASS ACTIONS IN ENVIRONMENTAL LITIGATION

In recent years the development of a comprehensive body of law dealing with problems of pollution of the environment in the United States has been nothing short of spectacular.[1] In part, this has been achieved by broadly based legislative enactments laying down specific limits upon the emission of pollutants and establishing powerful government agencies to enforce and apply substantial penalties against offenders. Equally however, the role played by the courts through the development of an environmental common law has been a vital factor. This has been largely achieved by the successful utilization of the concept of class actions, whereby a group of individuals with a common grievance join together in a single action.[2]

In Australia the two *Reports of the Senate Select Committees on Air and Water Pollution,*[3] the creation of state and federal government environment departments, and the passing of far reaching statutory measures such as Victoria's Environment Protection Act 1970, have all demonstrated a considerable awareness of the problems of pollution. However, despite the potentially significant role that the common law might be expected to play in these developments the class action in Australian courts has languished in the background. The question then is, can the class action be of any use?

THE APPLICATION OF CLASS ACTIONS

The paradigm case in which class actions are potentially significant is where a number of people have been substantially affected by air pollution caused by a single polluter. Thus a class action in *private* nuisance might be available to persons who had suffered ill health and diminution in the enjoyment of their land as a result of the emission of noxious vapours from a nearby factory. Similarly, a group of persons, each of whom could show 'special' damage as a result of the same activity may qualify to bring a class action in *public* nuisance.[4] Various instances of water

[1] See generally, Yannacone & Cohen, *Environmental Rights and Remedies* (1972); and Krier, *Environmental Law and Policy* (1971).

[2] Krier *op. cit.* 221-33.

[3] Commonwealth of Australia, *Report of the Senate Select Committee on Water Pollution* (1970); Commonwealth of Australia, *Report of the Senate Select Committee on Air Pollution* (1969).

[4] In *Walsh v. Ervin* [1952] V.L.R. 361, Sholl J., after reviewing the relevant English authorities, concluded that particular damage may consist of proved general damage . . . provided it is substantial, direct and not consequential, and is appreciably greater in degree than any suffered by the general public . . ."

pollution would also provide obvious examples of where a class action may succeed.

IS A PRIVATE ACTION NECESSARY?[5]

Despite the creation of numerous statutory authorities at all levels of government, the responsibilities of which are constantly increasing, there will inevitably remain a need for the opportunity of effective private legal action. In the United States one writer claims that 'governmental enforcement agencies have not been particularly successful in the past in reducing pollution'.[6] An English barrister has said 'I know of no serious attempts by River Boards to enforce the Act in respect of serious pollutions'.[7]

And in Victoria a recent study concluded that 'the officials responsible for carrying the [clean air] legislation into effect are anxious to maintain good relations with industry. They certainly do not enforce the letter of the law'.[8] There seems no doubt therefore that some form of private action is both useful and not redundant.

BENEFITS OF CLASS ACTIONS

The main factor deterring an individual from taking action against a polluter frequently is cost. The expense involved in environmental litigation, which often involves lengthy scientific investigation and evidence as well as prolonged legal proceedings, would be prohibitive in many cases unless a class action was available. This device provides a solution for a group of persons who individually have not suffered sufficient harm to warrant taking action, yet who collectively are justified in wanting to, and financially able to, take their case to court. It enables the costs involved in matching the resources usually possessed by large industrial polluters to be shared amongst a large number of people. Thus the United States Supreme Court recently observed that class actions 'may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture'.[9]

The significance of the cost factor is well illustrated by the *Pride of Derby* case[10] in which two fishing clubs and a riparian owner, supported by the Angler's Association, sought injunctions to prevent three defendants from altering the quality of river water. The three defendants were: a city

[5] See especially Sax, *Defending the Environment. A Strategy for Citizen Action* (1970). *Cf.* Cramton & Boyer, 'Citizen Suits in the Environmental Field: Peril or Promise?' (1972) 2 *Ecology Law Quarterly* 407.

[6] Comment: 'Equity & the Eco-system: Can Injunctions Clear the Air?' (1970) 68 *Michigan Law Review* 1254, 1259.

[7] Newsom, *River Pollution and the Law* (1972) 2 *Otago Law Review* 383, 388.

[8] Lyons, *An Inquiry into Aspects of Victorian Air Pollution Law and its Administration* (1970) also Lanteri, 'Student Survey of Problems of Pollution Control Over the Yarra River in the City of Melbourne, 1971' (1972) 8 *M.U.L.R.* 685, 693.

[9] *Hawaii v. Standard Oil Co. of California* (1972) 405 U.S. 251, 266.

[10] *Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd.* [1953] Ch. 149.

corporation, whose sewage disposal works was old-fashioned and overloaded; a large chemical factory producing waste organic matter and hot condenser water; and a power station discharging hot cooling water. The court subsequently awarded the injunctions and damages. As a result, the cost of the action to the plaintiffs was $20,000, and the cost of the entire action with its appeal was $100,000.[11] The prosecution of such a case would have been impossible without the financial backing of the Angling Association and its many interested members.

Class actions of this nature also fulfil a valuable role in achieving the principle of cost internalization within polluting industries[12] — a policy which has recently received support from the Australian Treasury.[13] This implies that a manufacturer who causes pollution must pay to clean it up; the costs thereby incurred being passed on to the consumer.

They are also very effective in ensuring large scale publicity of the polluter's activities, thereby mobilizing public opinion and encouraging repentance or compromise. For this reason the class action has been described by one commentator as 'the judicial analogue to the mass demonstrations of the streets'.[14]

In addition, it has been argued that plaintiffs may often reap a considerable 'psychological advantage in coming before the court [and the defendant] not alone, as the representative of one, but on behalf of many'.[15]

Finally, class actions operate so as to avoid a multiplicity of actions which may otherwise occur. By saving a polluter from the problems and costs associated with multiple and continuous litigation, as well as by facilitating the presentation of a more elaborate and detailed claim, class actions can operate to the benefit of all concerned.

DISADVANTAGES

There are certain procedural disadvantages attaching to class actions which will be examined later. In addition they may increase the possibility of vindictive and unjustified claims being brought which could result in considerable harm to the image and perhaps the business of a company, regardless of the merits of the action.[16] But the advantages of a properly used and efficiently controlled class action far outweigh these considerations.

[11] Newsom, *op. cit.* at n. 7, 386.
[12] Note, 'The Cost—Internalization Case for Class Actions' (1969) 21 *Stanford Law Review* 383.
[13] *Economic Growth: Is It Worth Having?* Treasury Economic Paper No. 2.
[14] Starrs 'The Consumer Class Action—Part II' (1969) 49 *Buffalo University Law Review* 407, 408.
[15] *Hawaii v. Standard Oil of California* (1972) 405 U.S. 251, 266 (1972).
[16] *E.g.* see Baroni, 'The Class Action as a Consumer Protection Device' (1971) 9 *American Business Law Journal* 141, 146.

UNITED STATES DEVELOPMENTS

By 1971 as a result of a flood of class action cases concerned with protection of the environment[17] the law in the United States was, in effect, that 'virtually any sincere group of conservationists will be accorded the right to come to court'.[18] More recently, in *Sierra Club v. Morton,* the Supreme Court has affirmed its attitude that 'aesthetic and environmental well being, are important ingredients in the quality of life . . . [and as such are] deserving of legal protection through the judicial process'.[19]

The outstanding success of environmental class actions in the United States led to the farcical situation where the Heart Disease Research Foundation and two individual plaintiffs, on behalf of approximately 125 million residents of city areas of the United States, sought $375 trillion in damages for air pollution from the four major American car manufacturers. Observing *inter alia* that the damages sought were 300 times more than the U.S. gross national product the judge dismissed the action.[20] In another case seven million inhabitants of a city sued 291 corporations (automobile manufacturers, oil companies, *etc.*) for air pollution. There were 14 causes of action, including negligence, trespass, nuisance, strict liability and products liability.[21] It too was dismissed. Such blatant lack of moderation can do nothing to advance the cause of pollution control and it is expected that Australian courts would be even less receptive.

The most useful check on such abuses in the United States is Rule 23 of the Federal Rules of Civil Procedure which governs class actions.[22] However its terms of reference are still fairly wide. But the details of the Rule are not sufficiently relevant to Australian experience to warrant discussion here.

CLASS ACTIONS IN AUSTRALIA

By comparison, class actions in Australia have reached only an embryonic stage of development. Under the Rules of the Supreme Court of each state provision is made for the representation of 'numerous parties' by an individual plaintiff.[23] Yet, few such actions have been brought, and, in the context of environmental issues, precedents are almost non-existent. This phenomenon can be partly explained by the

[17] *E.g. Scenic Hudson Preservation Conference v. F.P.C.* (1966) 384 U.S. 941. This was one of the first really significant decisions in this area and was the basis for many more.

[18] Rheingold, 'A Primer on Environmental Litigation' (1972) 38 *Brooklyn Law Review* 113, 116.

[19] (1972) 405 U.S. 727.

[20] Adler, 'The Viability of Class Actions in Environmental Litigation' (1972) 2 *Ecology Law Quarterly* 533, 537.

[21] *Diamond v. General Motors Corporation* (1971) 20 Cal. App. 3d 374.

[22] Adler, *op. cit.* at n. 20, 544-8.

[23] For example: Rules of the Supreme Court of Victoria. Order 16, rule 9; N.S.W. Supreme Court Rules 1970 Part 8, s. 2. Queesland Rules of the Supreme Court. Order 3 rule 10.

absence, until very recently, of highly organized, financially strong and legally aware environmental groups in Australia.[24] But even those already in existence have preferred to seek redress through non-legal avenues, despite the existence of a potentially successful representative class action. A number of factors are relevant to this preference. They include the cost and amount of time involved in litigation, the technical problems inherent in many complicated pollution problems, and the substantial task of discharging the burden of proof.

The two major obstacles confronting Australian environmental groups which wish to bring a representative action are the relevant procedural rules and the common law rule against maintenance.

(i) RULES OF PROCEDURE[25]

The practice of the English Court of Chancery required the presence of all parties interested in an action so that the matter might be finally settled; but when the parties were so numerous that you could never 'come at justice',[26] the rule was relaxed and a representative procedure was allowed. This flexibility was extended to common law actions by the *Judicature Acts*.

Order 16, rule 9 of the Supreme Court of Victoria states:

> Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a Judge to defend in such cause or matter on behalf or for the benefit of all persons so interested.[27]

The common law has evolved a threefold test whereby it must be shown that all the members of the class represented have a common interest and a common grievance and that the relief claimed is, by its nature, beneficial to them all.[28] The requirement of a common grievance is unlikely to prove an obstacle to a majority of representative actions where the common complaint is the activity of a polluter in a certain area. This was shown in a recent Victorian case where six plaintiffs successfully represented others in their neighbourhood in a private nuisance action against a particularly noisy car wash operation.[29]

[24] This preference was exemplified by the attitude of Mr. A. J. Tye, Director of the Clean Air and Environment Council of Victoria in an interview in 1972. The Council felt quite strongly that 'the first responsibility lies with the local councils'. If their support could not be obtained then the assistance of other local pressure groups was enlisted and the State Government contacted. Whilst the Council did have two honorary legal advisers, legal action was to be used only as a last resort.

[25] Generally, see Jacob, *The Supreme Court Practice* 1973, i, part I, 197. Order 15, rule 12; and Williams, *Practice of the Supreme Court of Victoria* (1964) i 227.

[26] Per Jessel M.R. in *Commissioners of Sewers v. Gellatly* (1876) 3 Ch.D. 610, 615.

[27] County Court Rules 1964. Order 6, rule 12 is almost identical. See *Jacobs' County Court Practice* (5th ed. 1972) 198.

[28] *Markt & Co. Ltd. v. Knight S.S. Co. Ltd.* [1910] 2 K.B. 1021; *Hardie & Lane Ltd. v. Chiltern* [1928] 1 K.B. 663.

[29] *McLeod and Others v. Rub-A-Dub Car Wash (Malvern) Pty. Ltd.*—unreported. Judgment delivered on 29 February, 1972, by Stephen J. in the Victorian Supreme Court.

In contrast, the requirement of a common interest effectively precludes an action for damages because the amount sought by various members of the class would differ depending on several subjective factors.

> Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.[30]

Thus householders complaining of damage to their washing, or car owners whose paintwork has been eroded as a result of the emission of dust particles, would be unable to join together in a representative action to obtain compensation from the owners of the source of pollution. If, however, they were to seek an injunction or a declaration the requirement of a common interest would be satisfied.

Ensuring that the relief sought is beneficial to all may also be difficult. Thus, in *Smith v. Cardiff Corporation*[31] four council tenants, 'on behalf of themselves and all other tenants'[32] sought a declaration that the act of the defendant local authority in increasing rent was *ultra vires*. The nature of the defendant's scheme to increase rents was that the more affluent tenants would, in effect, subsidize the less affluent. There were therefore two classes of tenants whose interests were not identical and, accordingly, the court held that the relief sought was not beneficial to them all. On that basis it is possible that persons who may be members of the class being represented in a pollution case may derive injury to their interests by such an action. Thus a person employed by a polluter would suffer severely if, as a result of the action, the factory at which he worked was effectively closed down. However in such a case a person may apply to be excepted or to be joined as a defendant.[33]

In embarking upon a class action the class representatives must ensure that the parties are sufficiently numerous,[34] and more importantly that the named plaintiff is truly representative.[35] If the representation is

[30] Per Fletcher Moulton L.J. in *Markt & Co. Ltd. v. Knight S.S. Co. Ltd.* [1910] 2 K.B 1021, 1040-1

[31] [1954] 1 Q.B. 210.

[32] *Ibid.*

[33] *Hancock v. Scattergood* [1955] S.A.S.R. 1. Such an application must be made promptly—*Conybeare v. Lewis* (1883) 48 L.T. 527.

[34] '[S]peaking generally a representative order should not be made or a decision given, in the presence of one only of a few parties with similar interests . . . Five parties were not numerous enough, unless the amount in question was very small or unless the court was satisfied that all the other parties wished the question to be determined in the presence of the one'. *Re Braybrook* [1916] W.N. 74 *per* Sargant J.

[35] The class of persons sought to be represented must be clearly and precisely defined in the writ. A claim to represent merely 'some of' the members of a class, without defining which members, would not be maintainable. (*Markt & Co. Ltd. v. Knight S.S. Co. Ltd.* [1910] 2 K.B. 1021, 1033-4). See also *Campbell v. Thompson* [1953] 1 Q.B. 445; *Attorney-General v. City of Brighton* [1964] V.R. 59.

unsatisfactory the court may, in its discretion, prevent the continuation of the proceedings.[36]

In a representative action 'a judicial decision on any question of construction or other matter arising in the action will bind all the members of the class represented by the plaintiffs'.[37] Further, a plaintiff cannot voluntarily give away any of the rights to which the persons he represents are entitled.[38] Each individual must elect which course of action to follow.[39]

The final factor of importance in the context of pollution class actions is that of costs. The burden falls entirely upon the plaintiff — the represented parties being not liable for costs.[40] Thus the possibility of obtaining financial support for an action against a polluter will often be the crucial factor in deciding whether or not to go to court. It is in this context that the danger of committing the tort of maintenance will be considered later.

In conclusion it is apparent that the procedural requirements for a representative action are not, *per se*, too harsh. On the contrary, if the approach recently adopted by Megarry J. in *John v. Rees*[41] and subsequently endorsed in the Queensland Supreme Court[42] is applied by other Australian courts the Rule will be 'treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice . . .'[43] Seen in that light there is no reason why specific classes or groups of persons who are unduly and adversely affected by the activities of a polluter, should not be permitted by Australian courts to bring a class action through one or several representatives. For example, a group of landholders who objected to the spraying on their own land of some noxious substance (such as D.D.T. or dieheldrin) by a local council could call a meeting to ensure that they had the support of other residents whom they would be representing, and then proceed to issue a writ on behalf of themselves and other agreeable parties, seeking an injunction against the council. The courts have in the past permitted representative actions under the Rule in cases where: six persons represented themselves and all other local fruitgrowers,[44] two fishermen brought an action on behalf of all their colleagues,[45] and a single plaintiff sued on behalf of all married women teachers as a class.[46]

[36] Although not stated in the Supreme Court Rules this was made very clear in *Markt's* case [1910] 2 K.B. 1021 and *John v. Rees* [1969] 2 W.L.R. 1294. The power has been specifically incorporated in the English Rules of Supreme Court Order 15, rule 12.

[37] *Re Calgary & Medicine Hat Land Co. Ltd., Pigeon v. Calgary & Medicine Hat Land Co. Ltd.* [1908] 2 Ch. 652, 659 *per* Cozens-Hardy M.R.

[38] *Ibid.*

[39] *Smith v. Law Guarantee & Trust Society* [1904] 1 Ch. 500.

[40] *Markt's* case [1910] 2 K.B. 1021, 1039.

[41] [1969] 2 W.L.R. 1294.

[42] *Re McAndrews Application* [1972] Q.W.N. (Dec. 16) *per* Williams J.

[43] *Ibid.* 1306.

[44] *Bedford (Duke of) v. Ellis* [1901] A.C. 1.

[45] *Mercer v. Denne* [1905] 2 Ch. 538.

[46] *Price v. Rhondda Urban Council* [1923] 2 Ch. 372.

The contribution that the development of Rules of the Supreme Court Order 16 Rule 9 could make in this context towards minimizing the inevitable shortcomings of any statutory scheme for environmental protection is very considerable. Unless full use is made of this provision an incomparable opportunity for the legal profession will otherwise have been lost.[47] In the words of one Law Lord at the turn of the century: 'the principle is as applicable to new cases as to old and ought to be applied to the exigencies of modern life as occasion requires'.[48]

(ii) THE TORT OF MAINTENANCE

If a representative action is held not to be in order it is still permissible for one of the plaintiffs to appear solely on his own behalf in what can be considered a test action.[49] This does not assist in spreading the cost unless financial, technical or legal assistance is forthcoming to aid the test plaintiff. Once again the possibility of committing the tort of maintenance is encountered.

Maintenance is the promotion or support of contentious legal proceedings by a stranger, who has no direct concern in them, and whose assistance is not justified by the circumstances.[50]

Individuals and groups who are concerned with the protection of the environment are often unable to bring an action to court because they do not have sufficient standing in their own right. In some cases therefore conservation groups, or others with similar interests have attempted to avoid the problem entirely by locating an individual who is directly and significantly affected by the pollution in question, and then assisting in an action taken in his name. He is not merely a nominal plaintiff, but rather one who would otherwise be unable to afford the financial demands of such litigation.

In the United States such a practice presents no ethical problems. However in Australia, and until 1967, when it was abolished, in England, the courts have been wary about any circumstances which could be said to constitute maintenance. Specifically in the context of pollution cases the English Court of Appeal has handed down two decisions, both of which are of significance for conservation groups. The first of these is *Martell and Others v. Consett Iron Co. Ltd.*[51]

[47] The present writer's conclusions are in contrast to those expressed by Lanteri, 'Environmental Protection Through The Law', in *Australia as Human Setting* (1973) 277. It is submitted that in fact, procedural rules only block the class action in its widest possible sense. For the purpose with which the writer is concerned the class action has all the potential to be an effective answer. It is to the rules regarding the actual causes of action themselves that we must look to see why class actions have been restricted in the past.

[48] *Per* Lord Lindley in *Taff Vale Railway v. Amalgamated Society of Railway Servants* [1901] A.C. 426, 443.

[49] This procedure was adopted successfully in *Smith v. Cardiff Corporation* [1954] 1 Q.B. 210.

[50] Fleming, *The Law of Torts* (4th ed. 1971) 548-9.

[51] [1955] 1 Ch. 363.

An association for the protection of the rights of owners and occupiers of fisheries, and for the prevention of pollution of rivers in Great Britain and Northern Ireland, supported an action brought against the defendant company by the plaintiffs, who were members of the association and were respectively a riparian owner and the six trustees of an angling club with a fishing tenancy on the River Derwent. The plaintiffs claimed that their fishery was being polluted by effluents from the defendant's ironworks. The support given by the association was in the form of indemnities for their costs in the action given to the plaintiffs by a trustee company controlled by the association. Membership of the association was open to all who supported its objects and the public was invited to contribute to its funds.

The defendants objected, claiming that the association's support amounted to maintenance.

At first instance Danckwerts J. realized fully the far-reaching significance of the case.

> It would be disingenuous to disregard the difficulties which the man of small financial resources (not confined to the legal aid class) faces in present-day conditions in defending such rights as he may have against infringement by powerful commercial corporations or adversaries who may draw their strength from the rates or the National Exchequer. If such a man may not avail himself of the help of sympathisers, his condition may be serious indeed. His relative position is still more unfavourable if his powerful commercial opponents may deduct the costs of such litigation as trade expenses.[52]

Having reviewed all the decisions His Honour came to the conclusion that:

> A doctrine which was evolved to deal with cases of oppression should not be allowed to become an instrument of oppression, which it must be if humble men are not allowed to combine or to receive contributions to meet a powerful adversary. If it is right for members of a trade union to combine to assert the right of a trade unionist to his wages, and it is right for a number of manufacturers to combine to protect the freedom of an individual trader to make his goods, *why is it wrong for persons whose livelihood or recreation will be adversely affected by pollution of waters to combine to defeat an aggression against the rights of one or more of them?*[53]

Danckwerts J. held that the plaintiffs did have a sufficient common interest with the association and that the latter's support was thus not unlawful. On appeal it was held that the association had merely been defending the collective interests of its members, and the decision was affirmed. The test applied by Jenkins L.J. was whether the individual member of the organization possessed 'relevant interests' that is such as 'would justify him individually in lending financial support to the plaintiff in an action brought to restrain the pollution of that river'.[54] To illustrate such an interest His Honour gave the example of 'the proprietor of an

[52] *Ibid.* 375.
[53] *Ibid.* 386. My italics.
[54] *Ibid.* 417-8.

hotel near a good fishing river' who depended for his custom on people coming to fish in the river and might well be ruined if the fishing was spoilt by pollution. Such a person would 'have a legitimate and genuine business interest which would justify him in giving financial support to an action brought by the riparian owner to stop the pollution of the river'.[55] A vendor of fishing tackle was also said to be in a comparable position.

The extent to which funds could be contributed to the association by individuals with no relevant interests was a matter of fact and degree to be liberally applied so long as the interest of the association was relevant.[56]

The second case is the *Pride of Derby* case[57] which has already been discussed. In that case it was held that the plaintiff as riparian owner was entitled to sue and no question of maintenance was raised by the defence.

It is submitted therefore that, in theory, the legal position of Australian and United States environmental organizations is similar. In both *Sierra Club v. Morton*[58] and *Martell's* case[59] the courts insisted that no right of action resided in a plaintiff who could show no particular interest in the area concerned, whether it be an economic or recreational interest. Both the Supreme Court and the Court of Appeal agreed that given that the nominal plaintiff has such a specific interest, it is perfectly legitimate for an organization which has a genuine, *bona fide* and relevant interest in the subject matter of the litigation to tender financial, technical and legal advice.

Certainly there were differences in emphasis. The English court was concerned to ensure the rights of a plaintiff in the position of the man to whom Lord Coleridge C.J. refers in his judgment in *Bradlaugh v. Newdegate* as 'a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them'.[60] The Supreme Court, on the other hand showed itself to be primarily concerned with the protection of the environment.

The implications of this difference in emphasis are substantial. English, and more so Australian, courts have yet to affirm with any conviction that through the legal system, they are prepared to assist where necessary, those who seek to protect the environment. This is understandable in view of the paucity of environmental cases that have been litigated in the past.

[55] *Ibid.* 418.
[56] *Ibid.* 420.
[57] [1953] Ch. 149.
[58] (1972) 405 U.S. 727.
[59] [1955] 1 Ch. 363.
[60] Cited by Vaisey J. in *Martell's* case, *ibid.* 430.

THE FUTURE

It has been shown that neither procedural requirements nor the rules governing the tort of maintenance will necessarily preclude the success of a carefully formulated class action financed by an environmental group. Perhaps a lesson can be learnt from the activities of the Anglers' Co-operative Association in England whose aim was to protect fisheries by assisting pollution actions wherever the need arose.

> The Association collected a fighting fund and gave to sponsored members who started approved actions in the courts, an indemnity for the costs of both sides, thus removing one great difficulty in the way of enforcing the common law. The Association assembled a team of counsel, solicitors and expert witnesses who became accustomed to working together . . .[61]

It achieved a great deal despite opposition from several sources. As awareness of Australia's environmental problems increases the class action could well become an invaluable tool for groups seeking to shape an environmental common law to supplement existing statutory provisions.

It has been suggested that as class actions gain acceptance and maturity 'the logical common law development would be to eliminate the necessity for a nominal defendant who is himself a riparian owner'.[62] It is submitted that *Martell's* case is capable of application to a far wider range of nominal plaintiffs than those who are riparian owners, providing of course the individual concerned has a cause of action. It would also be applicable in other areas of environmental pollution. But more importantly, in the opinion of the present writer, the above suggestion by Garbesi is in fact a most unlikely, and to some extent, an undesirable, development. The reluctance of even the U.S. Supreme Court to take such a step is surely significant. Also to abolish the existing liberal requirement for standing would be to leave the courts without any firm measuring stick at all to guide them. Uncertainty rather than ease and convenience would be the major by-product.

In conclusion, it is to be hoped that the tremendous potential of the class action in Australia is recognized by conservation and environment groups, in whose hands it could well become an extremely effective weapon in the battle to protect our environment.

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[61] Newsom, *op. cit.* 386.

[62] Garbesi, *Common Law and Environmental Control* (1972). Paper presented to Seminar at University of N.S.W., June 1972.

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