recently been the subject of an extensive review in the UK, by a Committee chaired by Professor Sir Robert Jack, whose report was published earlier this year and which will be reviewed in a future issue of *Reform*.

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great exploitations

credit reform association report. On 13 March 1989 the Australian Financial Counselling and Credit Reform Association (AFCCRA) released a report entitled 'Great Exploitations'. The report urges the federal government to introduce a group litigation procedure for consumer borrowers who have been the victims of illegal practices by financial institutions. The report follows the tabling in Parliament of the ALRC's report entitled *Grouped Proceedings in the Federal Court* (see 1988 [*Reform*] 71) and is based, with some exceptions, on the recommendations in the ALRC's report.

the need for consumer redress. The AFCCRA report points out that existing procedures render consumer borrowers largely powerless to enforce their rights because of the relatively small amounts which may be involved for each individual and because of the superior bargaining power of large financial institutions. In the few cases where an individual pursues a claim, the report asserts that financial institutions generally settle the matter out of court - thereby avoiding a public airing of the case in court and preventing a ruling on the matter. However, the report also suggests that, where there are numerous individual claims, a financial institution may choose to litigate one of the claims, the lender being careful to select a case that has arisen in circumstances most favourable to the lender. The lender can then rely on the favourable result to discourage other litigants. On the other hand, where a case is decided in favour of the borrower the lender, according to the report, will not treat the judgment as having any application outside the particular case. The provision of credit on a mass scale means that multiplied small individual losses result in substantial gains to institutions engaging in illegal practices.

examples of illegal practices. AFCCRA lists five practices which it alleges are currently being employed by some financial institutions.

- Failing to give or pass on to borrowers a rebate on insurance policies taken out to cover the period of a loan, when the loan is paid out early. In some cases where a rebate has been given it has been miscalculated by underestimating the amount due.
- Treating all future interest payments as capital when an instalment payment is missed and charging interest on the total amount including future interest.
- Breaching legislation which confers responsibilities on credit providers for traders who act as their agents in offering finance to consumers who want to take up offers for services provided by the traders.
- Charging excessive interest rates — sometimes as high as 200%.
- Lodging caveats on the titles of borrowers' homes even though such caveat misrepresents a borrower's legal position and would be removed by a Court if application were made by the borrower.

why borrowers need grouped proceedings. The report asserts that, despite all concerted attempts to prevent these practices by, for example, individual litigation,

test cases, lodging objections to the licensing of financial institutions which engage in illegal practices, media coverage and lobbying government to establish inquiries or to step up enforcement, the illegal practices continue. Many of these methods of redress have their own associated difficulties, however. A group litigation procedure is essential, the report argues, to enable all affected borrowers to enforce their rights.

alrc proposals. AFCCRA supports the ALRC's recommendations on grouped proceedings subject to a few minor exceptions.

- The ALRC recommended in its report that grouped proceedings not be allowed to continue where the cost to the respondent of identifying group members and distributing to them any monetary relief would be excessive having regard to the amount of any monetary relief which would be payable. AFCCRA advocates legislation which would compensate consumers regardless of the cost to a defendant financial institution of distributing any money illegally obtained. The report argues that even if the cost of distributing amounts to consumers is excessive having regard to the amount at stake, the lender should nevertheless be made to pay.

- AFCCRA also argues that defendants should be made to disgorge any ill-gotten gains even where all the consumers who have suffered loss cannot be located. The ALRC proposed that after the lender has taken such steps to locate group members as the court considers reasonable, any undistributed amounts be returned to the defendant if it was just to do so. If it was not possible to do so or if it was not just in the circumstances, any monies not distributed to group members should be paid into a fund to assist the financing of future group proceedings. AFCCRA agrees that any unclaimed monies should be used in this way but maintains that unclaimed monies should not be returned to the defendant in any circumstance.

business arguments against group litigation. The report considers the principal arguments raised by business against the introduction of group proceedings and concludes that the financial industry's resistance to introduction of the procedure is not justified. Some of the arguments are as follows.

- AFCCRA disputes the belief that business will gain no benefit from introduction of the procedure claiming that honest and responsible lenders will gain a considerable advantage over their less scrupulous competitors and make the whole industry more efficient. Further, the procedure has the potential for considerable savings of litigation costs for financial institutions because only one set of legal costs would be payable in respect of the claims of an entire class of borrower.

- Another argument relied upon by business is that the procedure will be used to enforce statutes which are very easy to breach technically. AFCCRA rejects this argument maintaining that legislation introduced to counter unlawful lending practices is based on sound consumer protection principles. The liability of a financial institution under such legislation arises because the lender has not complied with those principles, not because of any grouping procedure. The possibility for group litigation will not affect the substantive law. It

is merely a procedural expedient enabling access, not otherwise available, to legal remedies for persons with similar claims. The report stresses that the procedure should be available to both applicants and respondents.

- Business has also challenged the procedure on the basis that it will put individual rights at risk, result in unacceptable delays and huge managerial problems. AFCCRA asserts that these legitimate concerns have been addressed in the ALRC report. It points out that the ALRC's recommendations have been formulated with considerable care to ensure that the rights of individuals are protected. This argument by financial institutions is not, according to the AFCCRA report, sufficient justification against the procedure, but rather a reason to ensure that the procedure contains adequate safeguards. Those safeguards should include explaining to group members the circumstances surrounding the litigation and ensuring that the right to opt out is always available.

government action. AFCCRA urges the federal government to legislate to introduce a group procedure for consumer borrowers along similar lines to that recommended by the ALRC. It also urges State and Territory governments to introduce a group litigation procedure in the superior courts of each State and Territory and in the relevant commercial and credit tribunals. Finally the AFCCRA report urges the establishment of a legal aid fund for the purpose of assisting consumer borrowers to conduct group litigation.

government reaction. In a report in the *Age* on 14 March 1989 (page 16) Senator Bolkus is reported to have said that the government would take the AFCCRA report into account when it considered submissions on the issue of class actions. He said

> I do not believe that the public will accept a situation where business is effectively protected by inefficiencies in the legal system. People have often been harshly treated by financial and insurance institutions in Australia, and the struggle for redress is often demoralising.

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product liability in America

> Perhaps the essence of the judicial function, when we are deciding cases between individuals in desperate straits and anonymous, bloodless corporate giants, is striking some balance between the demands of equity (which often means charity) and considerations of economic policy.
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> Judge Richard W Neely, of the West Virginia Court of Appeals, *The Product Liability Mess,* New York, 1988, p 66.

ALRC Commissioner John Goldring recently visited the United States to examine the operation of product liability laws and found a number of characteristics of American law which make it different from the law in Australia. These include

- the role of the jury
- court procedures, including selection of parties
- the different approach of courts to the application of precedent, and to certainty and predictability in the law.

The American tort system is now more a system of wealth redistribution than of