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WORKER PARTICIPATION & REFORM OF THE LAW

Hon Justice M D Kirby

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THE LAW REFORM COMMISSION

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The Hon. Mr. Justice M.D. Kirby*

The problem of worker participation in Australia is in part at least a problem of the reform of the law.

In 1973 the Australian Parliament passed the Law Reform Commission Act. This established a Commission of which I am Chairman. The first Members of the Commission were appointed in 1975. Its first Reports have now been published. They are already three in number. The function of the Commission is nothing less than to reform, simplify and modernise the laws of Australia in respect of which the Australian Parliament has constitutional competence. It works within References given by the Attorney-General. The first References related to Police power. The future programme of the Commission is currently under examination in Canberra, although, as can be imagined, the Government has other things on its mind just at the moment.

Until now, as you all know, it has been assumed that the Commonwealth Parliament does not have the power, on a national basis, to pass legislation governing the establishment conduct and dissolution of companies generally. Because of this assumption, established in th early days of the Federation by a decision of the High Court of Australia, the regulation of the formation and conduct of corporations has been substantially left to the States. So grotesque was this result seen to be that in 1961, following the success of endeavours to secure uniform hire purchase legislation, a Standing Committee of State Attorneys-General set about the task of drawing up the Uniform Companies Act. In fact, this uniform exercise has proved the great monument of the Standing Committee. Apart from the Uniform Companies Act, nothing much of importance has been since. The Committee has no permanent Secretariat. On-going review and reform of the legislation has proved difficult and the pace is set by the tardiest State.

Partly because of this consideration, partly because of recen decisions of the High Court and partly because events occuring elsewher in the world press upon us in this country a re-consideration of our Companies law, the time is now at hand for the crucial question of the Commonwealth's power to enact legislation to govern the establishment of corporations, to be answered. I am informed that the Bill for a national Companies Act will be introduced into the Parliament next week. It will grasp the nettle posed by placitum (xx) of Section 51 of our Constitution concerning the Commonwealth 's power to legislate for the formation of companies. This is, of course, an historic development of no mean importance. It is a development of very considerable importance for the subject matter of this Seminar. If the Parliament sees fit to pass the Bill and if the Bill is upheld in the High Court of Australia, it will become possible in this country to approach on a national basis the vital question of worker participation in corporate activity. If the Bill is not passed or if, although passed, it is struck down in a relevant way by the High Court of Australia, we will be placed in the position of disparate State companies and other legislation to deal with the question. Nothing is surer than that legislation will be needed in the near future to bring Australia into line with developments that have occurred elsewhere in the world. Alert to these developments, State and Federal Politicians have begun to make proposals and promises. In every sense, fundamental company law is at a cross roads in Australia. Not only are we at that point in time where the legislative source of company law for this country under the constitution is about to be determined. Also, the law governing companies, their management, organization and purposes is about to be subjected to new and crticial scrutiny. And whether it comes on national or a uniform basis, as I would hope - or whether it comes in a patchwork, disparate and diverse State basis - as some will predict - the scrutiny is not far off.

My task here to-day is to introduce and open these proceeding The Law Reform Commission has no reference to inquire and report on the reform of company law in Australia concerning worker participation in corporate affairs. I therefore speak for myself only.

We are all basically here because we recognise that the writing is on the wall. We recognise it - though we may not be able

to discern its message with precision: we think the message may be in German.

It is absolutely clear that the leading model for worker participation that commands our scrutiny is that of the Federal Republic of Germany. It is the leading model because the Stock Corporation Law is the essential basis for the Statute proposed for the E.E.C. [1] In this tortuous way, it is about to shake up the Company law of the United Kingdom - the spring and source of our Company law. We are therefore fortunate to have Dr. Erhardt here to tell us about the model. We will scrutinize his lecture. We will reflect on the applicability of the German model to our constitutional and legal set-up in this country. You have come at the right time. Now, we do not start with an entirely blank page.

In April 1973 the "Private Sector Committee" issued its report to the South Australian Premier, [2] who earlier addressed this Seminar:

This Committee recommended thus:

> "that the Government actively encourage the introduction of worker participation in management in South Australia, on a voluntary basis, in the form of joint consultative committees in all companies with more than fifty employees. To this end the Government should arrange for discussions with employers and trade unions to seek their co-operation. The question of legislation should be considered only after the educational campaign has been allowed to develop".

The South Australian Government accepted this (and all other recommendations) and has created a Worker Participation Branch called "the Unit for Quality of Work Life" now controlled by the Premier's Department in Adelaide.

A different approach has been advanced by the N.S.W. branch of the A.L.P. Its policy recommendation is "upon achieving Government ...to introduce legislation designed to create an effective system of Workers' Participation in Management". The effective system proposed is similar to that in operation in West Germany. I am informed that the Electoral Platform of the Liberal Party in the last Elections - without going into details of how it should be achieved - expressed

itself in support in principle of the concept of worker participation. So I do not believe that the principle is a matter of partisan politics. As so often happens, the detail may become so.

Later this month, the A.C.T.U. may be expected for its part to pave the way for its first examination of this, the most complex issue facing employees, unions and employers, with the object of establishing a full scale union policy on worker participation. The policy does not have to be actually drafted until the next Congress in 1977. But much time will be taken up studying all aspects of industrial democracy and reaching a consensus among the unions. As anyone involved in industrial relations in Australia will acknowledge this inevitably requires patient, slow labour. As if in recognition of the fact that the day could not long be posponed when worker and manager would sit together in determining the Company's affairs - The Australian Government - with the substantial support of the Opposition - secured the passage through the Federal Parliament of the "Trade Union Training Authority Act 1975" [3] This Act introduces a shcme of training which the then Minister for Labour and Immigration explained:

> "Will be aimed primarily at promoting trade union competence. Such training will go towards briding the gap between unionists' and managements' level of industrial relations knowledge and technique". [4]

It is perhaps understandable, if one reflects on the constitutional uncertainty and the difficulty of getting uniform agreemnt on such a matter as this among 6 state administrations with different philosphies - that we are laggards in Australia in reform of this part of our company law. [5]

But legal and philosphical problems are only part of the answer for our tardiness. Other reasons plainly exist, and will be around to complicate the process that is about to take place, rather rapidly I suspect in the United Kingdom: less rapidly here.

1. First is the system of compulsory arbitration which interposes the State and the law between the two conflicting industrial parties and removes negotiation from the shop floor to State and Federal Courtrooms. In Europe and North America the systems of collective bargaining tend in part to schemes of worker participation because contracts regarding wages and conditions of employment are often negotiated at the plant level. Problems which cannot be solved in <u>our</u> system of conciliation or compulsory arbitration are quite readily referred to the arbitral tribunal resulting in a failure of many managements to develop constructive policies for dealing with employee grievances within their enterprise.[6] Leave it up to the judge is an Australian response to conflict I say now that this indiginous system has been around for a long time in Australia and is unlikely to change much in the foreseeable future. It would be as well that the plans to bring the warring factions of industrial disputes together at a shop floor and at a board level should recognize the need to mould the local product to the environment of Australia. It would be possible to <u>complement</u> the conciliation and arbitration machinery of this country by worker participation. Hopefully by doing so it would diminish strife and educate all participants.(Mgt labour). In my view it would be <u>perilous</u> to import a model - German -British or otherwise which paid no regard to the special and novel part played in the life of this country by the industrial tribunals: federal and state.

2 The second complicating factor is that in Australia the Trade Unions have for one reason or another shown little interest. Some union officials may feel that the functioning of works council will lead to a diminution of their power and influence. Others hav philosophical difficulties. They see worker participation as a means of assisting the continuance of the "Capitalist" system. Also the fact that there are over 300 (predominantly occupational) trade unions in Australia, may render trade union participation, in manageable numbers, difficult. Demaracation disputes, already a substantial problem in our industrial life may take on a new dimension. Yet any system of worker participation which blythely ignored the special historical position of labour organised in the unions in this country - would in my view equally be bound to fail. We can none of us escape our history. Whatever may be the position in Germany, no reform of the company law in this country designed to promote worker participation could succeed if it were to ignore entirely the role of trade unions in our society. The theory of our company law concerning the relationship between the shareholder the management and the board of the company has probably reached the point where it is not only unacceptable socially. It does not even work - in many cases - on the ground.

I say it is not acceptable socially because it has at its heart the notion that the duty of the directors is to act bona fid in what they consider to be the best interests of the company - bearing in mind their answerability in the end to the shareholders. Not to the employees whose daily lives go together in truth to make up the corporation. Not the wider community in which the corporation exists. Not to the nation. But to the shareholders. Yet these ephemeral shareholders may, in the pursuit of profit, with perfect propriety move in and out of the company - anonymously and disinterestedly: having no real participation in its life beyond their investment, the possession of a share and a right - usually quite theoretical - to affect its destiny at shareholders' meetings. Such total disregard for the voice of the actual participants was abandoned on a political level when the franchise was extended in the second half of the last century. We now subscribe to the political philosophy of democracy : i.e. the participation by people (however indirectly) in the government of their affairs by the State. It is surprising that in the field of company structures the notion that went out with

the property franchise in political life - should have survived u. .olested so long in corporate life. The message of this seminar will be : its days are numbered. I do not underestimate the practical and legal problems of securing this end in the context of the Australian mixed economy. There are indiginous Australian problems - as I have mentioned. But there are also problems of a more general kind for our company law as we have understood it to date which quite transcend Australian eccentricities : I mention but one : the restrictive impact on worker directors of the present duty in law to act in the company's best interest.[7] This problem can be illustrated by looking at two areas (i) strikes and (ii) communication between workers and their representatives. A Geerman company sued one of the workers' representatives who participated in a strike for the damages caused by that strike.[8] The German court stated that under the then law the workers' representatives participating in a strike are not entitled to exercise their functions. Orthodox company law principles prevailed.

This is perhaps a detail of the law but it does underline a problem : once the ramparts are stormed and the workers enter the board room the "arms length" relationship - possible in the present corporate structure in Australia - is more difficult to maintain.

The problem is equally highlighted by the question of communication between workers and their representatives, whoever they may be. Workers may expect a detailed picture of the company' situation; how else can they participate outside the traditional manner. Present company law rules do not encourage continuous information. The worker directors under present law would have to continuously ask themselves whether information should not be kept to themselves in order not to violate the company's "best interest".

These reasons led the Royal Commission on Trade Unions and Employers Associations 1968 (the Donovan Report) to make the following comments on worker directors: The majority and minority reports sum up the controversy that is before us today. Listen to the majority:

"A majority of us feel unable to recommend the appointment

> of "worker directors" to the Board of companies: and have reached this conclusion for a number of reasons. One is that such an office might expose its holder at times to an almost intolerable strain when decisions unfavourable to workers (for example, on redundancy) had to be taken because they were in the interest of the company as a whole. A concurring vote by the workers' director might be unfavourable if he has to do his duty as a director; and yet could easily be misunderstood or misrepresented. The result might be to open a gap between the workers and the workers' director which it would be extremely difficult thereafter to bridge. In effect, he would cease to represent them".[10]

But then the minority put its case:

> "The present position in which the shaeholders in a concern have the exclusive right to elect directors is inapprpriate. Persons whose daily work and livelihood are bound up with a company are more personally involved in its well-being than those to whom it is merely something in which they have a financial share capable of being bought and sold; and meantime yielding dividends".[11]

So this is the conflict. Professor Simitis rightly said that as the minority position gains favour, traditional company law becomes less and less relevant:

> "To question the decision-making monopoly of the owners' representatives means to transcend the limits of traditional company law. Its instruments offer satisfactory solutions only as long as they are governed by the aim ultimately common to all owners, to secure a profitable investment. The intrusion of participation destroys the balance between the company's organs. By subordinating the position of the general meeting, it modifies profoundly the tasks of management and alters the goal of enterprise policy".[12]

In these introductory observations I have set myself a modest task. I set out to -ake 4 points. I now sum them up for you:

FIRST: Putting it at its very lowest, worker participation must be seen in a context far wider than the events of a few iron and steel works in Germany. It is in truth simply an extension of a movement begun in the last century and continuing apace, whereby in an educated and sophisticated free society, citizens feel they are entitled to and will demand [and in the end secure] ultimate say in the decisions that control their lives. Just as the property franchise has gradually disappeared from political institutions it will in my view gradually (and perhaps quite slowly) be diminished in corporate institutions. That I believe is the true over-view of the movement which we have collected to examine today. Just as in political life, it is necessary to remind ourselves that "autocratic structures are always simpler to administer than democratic ones, but are not to be preferred for that reason".

SECONDLY: The pace of change is quickened by developments in Europe and North America - by the presence in Australia of many overseas companies - and lately by the imminent changes about to take place in the traditional source of company law - the United Kingdom - under the impact of that country's adherence to the Treaty of Rome. We cannot in Australia long resist changes which are gathering momentum and strength in economies similar to our own. We turn our back on these developments at our peril because they represent the self preservation instinct of the mixed economy.

THIRDLY: The changes will require significant reappraisal of traditional company law. Pleasant though it might be to approach the job as a wallpaper and cracks affair - this will simply not be good enough. Just to provide an administrative structure - a couple of free places at the table and two more cups of tea at Board meetings ignores the challenge

to traditional company law posed by the presence in the decision making of persons representing those who hitherto have been seen as being at arms length and having another and often conflicting interest. Mr. O. Kersten, General Secretary of the International Confederation of Free Trade Unions recognised this when commenting on the failure of worker directors in the British Steel industry -

> "the mistake which was made was to insist that the worker directors cut their links with their trade unions. They thus represented nobody but themselves and were really without a proper function".

Duties and responsibilities must therefore be modelled on the commitment to basically different interests. The law must adjust to this problem. It must be reformed and renewed.

FOURTHLY: These issues face Australia at a quite critical time in the history of our company law. Within a weeek we should see a Bill of the national Parliament that asserts for the first time the power of the Commonwealth of Australia to regulate the formation as well as the conduct of companies. Perhaps we will soon know whether this law is acceptable to the Parliament and to the High Court. 14 If it is not, then we face a trying time of experimentation which will pose great problems in law and practice for company affairs: and may hold up the participation movement for a generation or more. If the venture succeeds, we will be faced with a truly national opportunity : challenging in the extreme - to fashion in this country in indiginous solution to the thrust towards participation. Such an indiginous solution would (as I have said) take account of many Australian eccentricities: including the trade union movement and our faily unique industrial conciliation and arbitration system. One should never try to explain

> that system to a German - or anyone else - for it is a complete mysterythe only merit of which is that it seems to work.

I have said enough. On your behalf I welcome Dr. Erhardt to Australia. We will listen and hopefully we will learn. Is it asking too much that we will in this generation prove equal to the reform of this vital part of our companies law?

FOOTNOTES

* B.A., L.L.M., B.EC. Chairman Law Reform Commission and Deputy President of the Australian Conciliation and Arbitration Commission.

1. Proposed Statute for the European Community, Bulletin of the European Communities, No. 8, 1970, Supplement.

2. Report of the Committee on Worker Participation in Management (Private Sector) April 1973, South Australian Government Printer.

   The former Minister for Labour, The Hon. Clyde Cameron, M.P. was a long-time advocate of worker participation. The term of office of the present Government has made a number of appointments of trade unionists to the boards of large enterprises: The A.C.T.U. President Mr. R.J. Hawke to the Board of the Commonwealth Bank, Jack Edgerton of the Queensland Trades and Labour Council to the Board of Qantas to name only two of the more publicised directorships.

3. Assented to 6 June 1975.

4. Second Reading Speech by the Minister for Labor and Immigration. The Hon. Clyde Cameron M.P., House of Representatives 6 March 1975. (See also J. Edgerton, W.A. Howard, V.J. Techritz. "Practical Training for Industrial Relations" 16 Jnl of Ind. Relations (1974) 398).

5. See M. Derber, "Cross-currents in Workers' Participation", 9 Jnl Industrial Relations, (1970 p129).

6. See generally J.R. Robbins "Workers' Participation and Industrial Democracy - Variations on a Theme" 14 Jnl of Ind. Relations (1972) p. 427 at p437 and Rydges July 1975 p92 at 93.

7. The foremost duty of directors in managing the company is to act always "bona fide in what they consider, not what a court may consider, is in the interests of the company and not for some collateral purpose". per Lord Greene M.R., Re Smith and Fawcett (1942) Ch. 306.

8. Landgericht Munchen, 1956, Betriebsberaten 240.

9. Workers' Participation in the Enterprise - Transcending Company Law S. Simitis 38 Mod L. Rev 1 at p.73.

10. p.258.

11. p.259

12. Simitis supra at 21.

13. H.O. Kersten, General Secretary of the International Confederal of Free Trade Unions "Industrial Democracy: A Trade Union Approach" in Review of Industrial Relations in 1972 G. Ford and T. Murphy (Eds) (Sydney 1971).

14. For a recent presentation of the conflicting view on the constitutional issue simply compare J.R. Taylor "The Corporations Power: Theory and Practice", (1972) 46 ALJ5 and P.L. Lane "Constitutional Law: can there be a Commonwealth Companies Act? (1972) 46ALJ407. See also (1974) 48ALJ233 and (1975) 49ALJ215.