

WORK ETHIC 2000  
SEMINAR, WENTWORTH HOTEL, SYDNEY  
SATURDAY, 12 NOVEMBER 1977

PUTTING INDUSTRIAL DEMOCRACY INTO CONTEXT

Hon Justice M D Kirby

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Hon. Mr. Justice M.D. Kirby  
Chairman of the Law Reform Commission

A CHANGING SOCIETY

Any exercise in futurology must begin with an understanding of the society in which we live and the forces that are at work to change that society. We are living through an age of rapid change and reform. It is an uncomfortable time, not least for lawyers, whose special contribution to society is to provide predictability and order for the regulation of human conduct. Lamenting the difficulties which lawyers, business executives, politicians and others face in a time of rapid change, will not make those difficulties go away. Our job is to identify the forces for change and examine their implications for society, including the legal system of society.

For good or for bad, property qualifications are becoming increasingly less important as a criterion for power in our society. We have already seen this development have its effect in the governmental system. The property qualification for the franchise has assumed diminishing importance, and is now retained in few parts of Australia, and then only in the Upper House or in local government elections.

The same movement that led to political democracy, as we understand it today, is now having its effect in two other areas important for the running of our society. The first is

the corporation where we are witnessing the beginnings of the so-called "industrial democracy" movement. The second is the courtroom : where the principles that should govern the "standing" of persons to sue are now under fresh scrutiny, and where other rights are being developed, free from the bias of property orientation.

There are many other developments which instance this general thesis : that the traditional authority and power relationships of our society are undergoing a period of rapid change. The establishment of the Administrative Appeals Tribunal in the Federal sphere, the universal spread of the power of the Ombudsman and inquiries into the Public Service demonstrate the changes that are afoot in the public sector. The introduction of long awaited Freedom of Information legislation is designed to diminish the paternalistic assumption that the Ministry and the bureaucracy are entitled to make the final decisions concerning a person's right to know about information in the hands of government. Developments of this kind betoken an endeavour in the public sector, to accommodate to the changed society in which we live. The very same forces which have promoted changes of this kind are now at work in the private sector and in the courts. It is appropriate for us to look at these forces. By recognising them, we will have a better chance of predicting future developments. They spring, I believe, from a number of changes which can be readily identified.

The first is the general movement towards participatory democracy. This is the conviction that there is decreasing justification for past power structures which "assume that only the hierarchical higher-ups are competent to utilise their thinking power and that lower-level [people] must confine their efforts to carrying out pre-packaged decisions".<sup>1</sup> In a sense, freedom of information legislation gives expression to this principle in the government's sphere. So does the universal franchise. Some observers have categorised the movement towards "industrial democracy" as a "retarded reflex action" to

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1. *Industrial Democracy in Europe : The Challenge and Management Responses*, Business International, Geneva, 1974 cited in J. Niland, *Industrial Democracy & Industrial Relations : What are we Talking About*, Aug. 1976, mimeo, 3.

democracy in society.<sup>2</sup> Notions of egalitarianism are particularly strong in Australia. From the beginning of colonisation we enjoyed a relatively unstratified social organisation with high mobility between social classes. These facts make the rather slow development of industrial democracy and what I shall call "litigious democracy", all the more surprising.

New impetus towards changing power relationships has come in the past decade or two. It has arisen in part from rising affluence levels that have turned social agitation from issues of traditional concern. In a period of sustained affluence, attention tends to stray from mere survival and increased economic goals to extra-economic things, such as the quality of life. Mr. E.G. Whitlam put it this way when addressing himself to the "fundamental change" through which the union movement is passing:

"What is happening is that the lines separating what is and what is not legitimate union activity are blurring... Unions will still be concerned with the immediate industrial issues, like wages, hours and conditions of work, but along with these traditional concerns, other issues will be proper subjects for union consideration and action.

Unions are saying "What's the use of wage rises and increased leisure time if you don't have the means of enjoying them? If the social system is inadequate? If the air isn't fit to breathe? If we don't know how usefully to fill our leisure hours?"<sup>3</sup>

The last decade has seen a growing concern in Australia with matters that go beyond one's financial or property interests. These include the concern about the environment, anxiety about

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. N. Watson, *Industrial Democracy and Industrial Relations in Australia*, Brisbane, A.N.Z.A.A.S., 1971, mimeo, 19.

.. (1976) 1 *Commonwealth Record* 1053 at 1055.

minerals in the ground, cleaner air, more forests, preservation of historical buildings, consumer protection, individual privacy and so on. Such concerns may transcend economic considerations. They may lead people to believe that it is even undesirable to continue the pursuit of "unlimited growth". An increasing number is prepared to agree with ecologists and biologists when they suggest that our previously unquestioned pursuit of unlimited growth is selfish in the extreme and even dangerous. Inhibiting (however marginally) the previously unquestioned value of economic advancement, must have its price. The price may well include diminished expectations in economic growth. Our community (along with other Western communities) may well elect to make that choice. It is a choice that has a price tag. It may be that the movement for industrial democracy also has a price tag. Certainly the movement for greater control of the bureaucracy and for freedom of information has its cost. But just as we would not be prepared to reject political democracy because it is more expensive than a benign autocracy, so we may have to come to terms with the costs that attend the expansion of participatory democracy into other areas of life.

The second recent force which adds impetus to change is the force of education. Not only are the numbers significant. The way in which people are now being educated inevitably affects their attitude to life. The table<sup>4</sup> which sets out the numbers of persons in Australia receiving university degrees between 1950 and 1975 reveals a major increase from 4,506 graduates a year to 24,216. Equally significant is the increase in the number of higher degrees.

The table which shows school retention rates in Australia over the shorter period since 1961 indicates a doubling of the number of females undertaking higher education at the age of 16 years. But the table also indicates that in the five years between 1966 and 1971 the percentage of girls receiving education

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4. See Tables attached. Source : Niland, 10,11.

at the age of 17 years doubled. The figures for boys and for the whole population are almost as startling.<sup>5</sup>

The education system of Australia has been criticised for reinforcing "many of the values which hinder or block effective participation in industry".<sup>6</sup> Making every allowance for this, it must be said that the current developments in education provide the main stimulus for participation at all levels of society, including in industry and in litigation. It is simply not possible for society to impose authority structures on highly educated and self-confident people as it is on ignorant, self-conscious people who "know their place". In the context of "industrial democracy" the Federal Minister for Productivity, Mr. MacPhee put it this way:

"What is important is that governments, unions and management recognise the fact that rising affluence and education has led most employees to have a capacity to contribute ideas regarding the discharge of their functions and those of others at the enterprise and an increasing desire to influence decisions which affect them at work. Most managers are certainly aware of the increased tendency for their employees to question decisions and judgments of management. This, then, is one of those general changes in community attitudes to which common sense must be applied. The desire for more "say" or influence at the work-place is the import of the term "industrial democracy". Citizens enjoy opportunities to gain knowledge and to influence decisions which affect them outside the work place. And they do not cease to be citizens, with those capacities and desires, merely because they enter the farmyard, factory or office. Not all

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. Ibid.

. G.W. Ford, *Worker Participation : No Educational Dimensions in Worker Participation : The Prospects for Australia*, Victorian Fabian Society, 1974, 1.

want to exert influence on decision-making at work and not all want more responsibilities delegated to them. But an increasing number does. Thus, the essence of "industrial democracy" is that all employees are entitled and enabled to exert some influence on decisions which affect them in their employment".<sup>7</sup>

A third factor which has contributed to the pressure for participatory democracy is that of technology and science. The expansion in the communication industry has resulted in the extension of education beyond the classroom and into the living room. There would be few citizens today who do not watch news and current affair broadcasts on television or listen to them on the radio. Some believe that the "instant news" phenomenon has even gone too far. The fact remains that every citizen in Australia has at his fingertips (or through readily available printed material) a vast amount of information, both in raw, undigested form and in analysis and commentary. Again, when information is not confined to the educated few, it is difficult to impose the elitist model on the rest of society.

I have sketched some of the factors that are at work in Australia's social equation so that the products of that equation will not seem so startling when they are revealed.

#### INDUSTRIAL DEMOCRACY AND WORKER PARTICIPATION

"In the development and exploitation of Australian resources, the corporation has played a pre-eminent role".<sup>8</sup> Companies remain at the heart of the industrial and commercial life of this country. Changes in the way they are managed and governed are therefore changes of the greatest importance for the economy and society. A study of the history of the corporate structure discloses, that whilst it has been continuous, changes have been taken place of a spasmodic and irregular nature.

7. I. MacPhee, *Industrial Relations and Productivity : A Challenge to Common Sense*. Speech at University of Melbourne 31 Aug. 1977, mimeo, 7.

8. H.H. Mason, *The Historical Development of the Corporation and Legal Unit* in K.E. Lindgren, H.H. Mason and B.L.J. Gordon (Eds), *The Corporation and Australian Society*, Sydney, 1974, 1.

Since the legislation which established the modern company in the middle of the last century, the corporate enterprise has flourished to an extent that would have been thought incredible at that time. What began as a relatively simple device to advantage shareholders became of critical importance to the increasing band of employees and their families dependent on the corporation and an expanding community interest in its doings. In response to the realisation that the corporation had an importance beyond making profits for the shareholders, legislative reforms tackled the power structures of the corporation. The reforms took a different course in different cultures. In the United States and Europe, strict supervisory control by independent governmental agencies (such as the Securities and Exchange Commission) were established to protect the investing public and the community generally. In England and Australia the reforms were directed rather at the greater supply of information to the public, in ever increasing detail, about accounts, mortgages, charges, directors' shareholdings and so on. It is only lately that pressure for more direct supervision has begun to evidence itself.<sup>9</sup>

Since the 1940s, an international movement has been developing which is probably the most significant challenge yet to the corporate model developed in the middle of the 19th century. It takes on many guises and goes by many names. They include "joint consultation", "participative management", "profit sharing", "self-management", "job restructuring", "job enrichment", "co-determination", "workers' management", "worker representation", "worker directors" and so on.<sup>10</sup>

A search for a common thread running through these developments usually results in a perception that what is happening is a process by which individual workers gain and exercise greater influence or power in a work context. "Influence"

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9. Mason, 9.

10. Niland, 2, lists the various movements, as does MacPhee, 22ff.



implies that one's wishes are taken into account. "Power" implies the ability to assert influence towards unilateral action.<sup>11</sup> Whether participation is "task centred" i.e. directed at increasing job satisfaction or "power centred" i.e. aimed at extending the bargaining power of employees within the enterprise and at making managerial decision-makers more accountable,<sup>12</sup> there is no doubt that the movement towards "industrial democracy" represents a challenge to our present legal system and well established institutions.

The legal system comes under challenge because until now the central premise of the company law governing a director's duty has been his obligation so to operate the company's affairs as to promote the interests of the shareholders as a whole. Whilst this obligation will itself, incidentally, involve paying some regard to the interests of employees, neighbours, commercial colleagues and even the public interest, the ultimate duty is one to the owners of the property, i.e. the shareholders.

The point is well illustrated in an English case.<sup>13</sup> A corporation sold its main assets (two newspapers) because of losses and retained only relatively minor publishing and television interests. The directors proposed to distribute the bulk of the sale price to the corporation's employees, most of whom were to lose their jobs. The actual method of distributing the residue to the employees involved a formula based on their length of service with the corporation. Minority shareholders, disagreeing with the directors' decision, challenged it on the ground that it failed to comply with the fundamental duties of the directors to "promote the prosperity of the company".<sup>14</sup> Flouman J. upheld this contention, concluding that the directors were not predominantly motivated by a regard for the interests of the corporation but rather by "the desire to treat the employees generously, beyond all entitlements and to appear to have done

1. Niland, 2.

2. This useful distinction is drawn by V. Procko, Worker Participation : The Different Forms, in *Management Bulletin*, Oct. 1974, 4-5.

3. *Parke v. Daily News Limited* [1962] Ch. 927.

so. 15

"In my judgment ... the defendants were prompted by motives which, however laudable and however enlightened from the point of view of industrial relations, were such as the law does not recognise as a sufficient justification. Stripped of all its side issues, the essence of the matter is this, that the directors of the defendant company are proposing that a very large part of its funds should be given to its former employees in order to benefit those employees rather than the company, and this is an application of the company's funds which the law, as I understand it, will not allow ... The view that directors, in having regard to the question what is in the best interests of their company, are entitled to take into account the interests of the employees, irrespective of any consequential benefit to the company, is one which may be widely held ... but no authority to support that proposition as a proposition of law was cited to me; I know of none, and in my judgment such is not the law".<sup>16</sup>

This principle, stated as recently as 1962, indicates the way in which legal institutions, developed in an earlier age, become encrusted with principles and rules that fall out of sympathy with social attitudes of later times. The rule which Plowman J. so confidently asserted now has to live with institutional arrangements that make it difficult, if not impossible, for companies to ignore the interests of employees (or the public interest). Public opinion has also shifted and the hard line duty to the shareholders and the shareholders alone becomes increasingly uncomfortable in modern circumstances. However that may be so, the law, with few modifications<sup>17</sup> remains as stated by Plowman J. Without some fairly fundamental reforms of company

15. *Ibid*, 962.

16. *Ibid*, 962-3.

17. See s.19 of the uniform *Companies Act*, Third Schedule, reg. 7, and discussion T. Presbury, *What are the Legal Powers and Responsibilities of Corporate Management* in Lindgren & Ors (Eds) 27.

law, it is simply not possible for us to muddle through to an Australian solution to the challenges of industrial democracy. The duty to the property owners, remains the legal duty of company directors. They respond to other duties at their legal peril.

Partly no doubt because of the impediments of the law and partly as a result of national apathy or conservatism in these things, Australia has done less than probably any other Westernised country in developing aspects of worker participation : whether at the work level or the board level.<sup>18</sup> To some extent the system of compulsory conciliation and arbitration of industrial disputes operates as a factor impeding the creation of systems of worker participation in management.

"The systems of collective bargaining operating in Europe and North America lend themselves more to schemes of worker participation because contracts regarding rates of pay, hours of work and other conditions of employment are often negotiated at the plant level. In Australia the attention of management and the trade unions is directed to the award-making process through statutory tribunals and this has meant that major employer organisations and some trade unions have preferred negotiation and arbitration on an industry basis and not at a plant level".<sup>19</sup>

It is certainly sometimes true that the very existence of the convenient compulsory arbitration system diminishes management initiatives towards developing constructive policies for dealing with the grievances of the modern employee.

Furthermore, it is probably not possible to look to the Arbitration Commission, despite its record of inventiveness, to provide a package answer on the issues of "worker participation" and "industrial democracy". Sir Garfield Barwick was at pains

8. This assertion is made by many writers. See e.g. M. Derber, *Crosscurrents in Worker Participation* (1970) 9, *Industrial Relations*, 123 and J.R. Robbins *Worker Participation and Industrial Democracy : Variations on a Theme*, (1972) 14 *Journal of Industrial Relations* 427.

9. Worker Participation opens up boss/employee dialogue, *Rydges*, July 1975, 92, 93.

o remind the Commission of the Constitutional limitations within which it must work:

"Whilst it is a truism that both industrial disputes and awards made in their settlement may consequentially have an impact upon the management of an enterprise and upon otherwise unfettered managerial discretions, the management of the enterprise is not itself a subject matter of industrial dispute".<sup>20</sup>

In other words, according to the Chief Justice, it is not possible through the processes of conciliation and arbitration to have a dispute about the structure of the management of a corporation itself. A claim that a board or shop committee of a company be composed of so many worker representatives would not, on this view, give rise to an "industrial dispute" warranting the intervention of the Arbitration Commission. We must look elsewhere for such developments, if they are to occur.

The arbitration system is only one of the institutions of this country that must be taken into account in explaining why, of all Western countries, Australia probably lags furthest behind in the international moves towards some kind of democracy in the work place. The perceived uncertainty about constitutional power to deal with these matters on a uniform basis throughout Australia, is undoubtedly a factor.<sup>21</sup> So is the organisation of the trade union movement in this country. Some unionists fear that the functioning of works councils or the activity of employee-elected worker directors would lead to a diminution of their power and influence in the traditional areas of trade union concern. Some union officials have even asserted that "worker participation" is a reformist manoeuvre designed to divide the trade union movement and workers.<sup>22</sup> Furthermore, the predominantly occupational structure of trade unions in Australia, and the number of them, pose institutional difficulties

0. *The Queen v. Commonwealth Conciliation and Arbitration Commission ; Ex parte The Melbourne and Metropolitan Tramways Board* (1966) 115 C.L.R. 443 at 451, emphasis added.
1. But see C. Howard, *The Corporations Power in the Australian Constitution*, in Lindgren & Ors (Eds), 12.
2. Rydges, July 1975, 93.

for representation, if the trade unions are to be, even in part only, a medium of representation. Both the Federal Minister, Mr. MacPhee<sup>23</sup> and the New South Wales Minister, Mr. Hill<sup>24</sup> have stressed the importance of accommodating local moves in this direction to our institutional setup. Mr. Hill put it this way:

"The government will be most conscious of the need to ensure that the introduction of industrial democracy ... does not cut across the traditional role of unions or the industrial tribunal".

There is one other institution that must be mentioned: the board of directors. The modern company executive is not the "tycoon" of days gone by. The social attitudes and institutions I have mentioned discourage the traditional qualities of the corporation executive and director.<sup>25</sup> Some spokesmen for labour paint a rather gloomy picture:

"Examination of the share registers of Australia's major public companies reveals that ownership is taken up by a myriad of small investors whose influence on the election of board members is negligible or by the major financial interests such as insurance companies, bank, investment funds and superannuation funds which have subscribed capital entrusted to them by a general public who also have no influence over board representation or decisions of the companies in whom their money is ultimately invested. The effective control of these companies has fallen into the hands of the self-perpetuating professional managerial oligarchy, which feeds off the old boys' system and a network of privilege.

23. MacPhee, 1976, 1 *Commonwealth Record*, 1331, 1332.

24. P.D. Hills, Speech to Labor Council Seminar on Industrial Democracy, Sydney, 7 Sep. 1977, *mimeo*, 1,2,7,8. The passage cited is at 7.

25. Lindgren & Ors (Eds), Preface V.

If one accepts the reality of this situation then it is not unreasonable to accept the philosophy that the employees of an enterprise whose well-being and futures are bound up in the success of the organisation should have a major say in how it is run. In most cases they have more at stake than the directors.

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It should not be thought from all this that there is universal acclamation at the prospect of "industrial democracy" and the changes it will bring in train. On the contrary, spokesmen from all points of view have expressed their reservations. Mr. Ian Spicer, Secretary of the Victorian Employers' Federation, told a 1976 Summer School of the Australian Institute of Political Science:

"If we are trying for [a greater share of power in the existing social and economic framework] then move for worker directors and supervisory boards of directors with equal representation of workers and shareholders. The fact that by becoming a worker director you alienate yourself from the people you are trying to represent is no problem, because their interests are not your real concern - power alone is the real issue - power for you personally or for your trade union".<sup>27</sup>

Not to put too fine a point on it, Mr. Spicer opposed replacing what some see as the "elitism" of capitalist control by control of a trade union's "elite". Other describe the movement as the greatest threat confronting managers and the free enterprise system,<sup>28</sup> one author describing the movement as "the world's biggest takeover bid".<sup>29</sup> A calmer appraisal is that of Professor Dexter Dunphy. After looking at traditional motivation techniques for reducing conflict and increasing productivity,

26. B. Unsworth, *Workers on the Board*, 7 Sep. 1977, mimeo. 9.

27. Victorian Employers' Federation, *Report*, 30 Jan. 1976, 2.

28. A. Beaton, *Worker Participation: Overseas Trends and Lessons for Australia*, (1975) 13, *Personnel Management* (Aust.) July 1975, 22.

29. B. Carroll, *Rydge's*, Feb. 1971, 29.

He asserts that the only method of motivation that will produce long-term results in today's working environment involves improving the quality of working life and changing the power structures within work organisations.

"The result [of this] is a reduction in management's power and this, in itself, may be a major obstacle retarding the introduction of such methods in organisations in both the private and public sectors".<sup>30</sup>

It should not be thought that the reservations about various forms of "industrial democracy" exist only on the corporate side. Workers' spokesmen have described it as "another con". It is perceived as stemming not from some altruistic motive but "rather a wish to have employees and their organisations accept more of the responsibilities for the economic wellbeing of industry without a corresponding increase in their authority".<sup>31</sup> Mr. John Halfpenny is also less than enthusiastic:

"I reject the notion of co-determination because it is little short of management-labour co-operation for the achievement of management objectives .... It was merely the form for achieving greater productivity or channelling the ever increasing demands of workers for greater involvement into more respectable channels which pose less of a threat to management powers ... Worker participation to me is a means of extracting from workers and their unions a commitment to your system".<sup>32</sup>

With opposition of such variety and universality, it is scarcely a matter for wonder that so little has been done in Australia. True it is, a lead has been taken in the public sector both at Commonwealth<sup>33</sup> and State<sup>34</sup> level. Equally true is it that at a Commonwealth<sup>35</sup> and State<sup>36</sup> level departmental units have been established to advise Boards of Directors in devising

0. D. Dunphy, Motivation or Manipulation, *Contemporary Australian Management*, No. 2, Sep. 1975, 19.
1. R. Richardson, Worker Participation : Is It Another Con? *Conference on Human Management*, Sydney, Inst. Engineers, 1975, 47.
2. *Sydney Morning Herald*, 18 June 1976.
3. The A.B.C. is an example.
4. The Water Board is an example in N.S.W.
5. MacPhee, 9.
6. "111 - 2"

common sense policies in conjunction with their employees to promote greater responsiveness to workers' desires. But the watchword is caution; an avoidance of "gimmicky" solutions,<sup>37</sup> a rejection of imposed solutions and a preference for achieving change by way of experimentation and the processes of trial and error.

Each of the major political parties in Australia has begun to edge towards a policy of "industrial democracy". In February 1972 the South Australian Government appointed a committee to examine the issue and its reports were released in May 1973.<sup>38</sup> A unit has been established in the Premier's Department designed to promote job enrichment and joint consultative councils.<sup>39</sup> In November 1973 the then Premier of New South Wales, Sir Robert Askin, pledged encouragement of profit sharing and involvement of employees in decision-making.<sup>40</sup> In February 1975 the Federal Platform of the Australian Labor Party was amended to express a belief that "one of the rules of government in Australia must be to spearhead legitimate attempts to promote a greater degree of industrial democracy".<sup>41</sup> It was proposed that committees should be established to investigate the matter and examine the possibility of amending company law.

In June 1975 the New South Wales Branch of the A.L.P. adopted a policy on worker participation and proposed detailed legislative changes.<sup>42</sup> Since then it has been made clear that the Labor Government in New South Wales, whilst adopting a policy of worker participation in the public sector, does not believe that it is appropriate to legislate for it in the industrial sector.<sup>43</sup>

So far as I am aware, the Prime Minister's only direct statement on the question was made shortly after he was appointed spokesman on labour affairs, when the Government Parties were

17. J.P. Ducker, *Worker Participation and Productivity: A Trade Union Point of View*, Aust. Institute of Management, Canberra, 1974, mimeo.
18. *Worker Participation in Management*, Adelaide, 1973.
19. G. Anderson, *The Quality of Work Life*, Seminar, Melbourne, 1975.
20. See R.L. Pritchard, *Industrial Democracy in Australia*, 1976, 179.
21. *Ibid*, 187.
22. *Ibid*, 188-190.
23. Hills, 1.



n Opposition. In August 1973, he told a Branch of the Liberal Party in Victoria this:

"I would support responsible unionists being placed on the boards of government corporations. I would be wanting to seek ways and means which would encourage private employers to give people who work in an industry a greater sense of participation in that industry; a sense of belonging; of being involved. That cannot occur if workers are regarded as just another input in the production process. Work and work alone is not enough. Reasonable conditions, a good life and participation are all necessary."<sup>44</sup>

The Minister for Employment and Industrial Relations, Mr. Street, like Mr. MacPhee, has stressed the need to proceed cautiously. At the same time he has suggested that schemes of participation which bring employees into the decision-making process and allow them to share in the ownership of the enterprise may solve many of the industrial relations problems which presently confront Australia.

"The commitment of the individual to his work is likely to be greater when he is a stakeholder not only in terms of his employment-wages contract, but where he also has a stakeholding in its ownership and reaps rewards accordingly. Initiatives in the areas of work reorganisation, joint consultation and financial participation are creative departures from inherited management methods".<sup>45</sup>

As recently as last month, a delegate, Mr. Alan Morgan, told the Liberal Party's Federal Conference :

"Every effort must be made to find new ways of making decisions other than through

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4. J.M. Fraser, Speech to the Yarra North Branch of the Liberal Party of Australia, 9 August 1973, *mimeo*.

5. (1976) 1 *Commonwealth Record*, 1064, 1066.

confrontation between unions and employers.

I assume most people are weary of the perpetual conflict and unpredictable disruption in their daily lives".

Mr. Morgan urged the Commonwealth Government to take the initiative in developing worker participation in Australia. That is where the debate rests today.

We have not had in this country as they have in Britain, inquiries that have helped to focus debate on the legal and social issues that are at stake in the movement for industrial democracy. There are generally favourable sounds from each side of the political spectrum, all political leaders being anxious to find new methods that will increase harmony in industrial relations, promote greater job satisfaction, increase national productivity and assist in giving participants an ultimate say in the decisions that affect their daily lives. The point I want to make is a simple one. It cannot be assumed that a few appointments to public corporations, the establishment of small departmental advisory units, and an encouraging word here or there face up adequately to the challenges and opportunities of the world-wide movement for industrial democracy. One way or the other, we have to get our thinking clear. The present industrial and economic institutions we have either impede or cannot encourage the process of industrial democracy. The legal system continues to assert the ultimate rights of property owners i.e. the shareholders. Impediments of this kind will not conveniently go away and if governments of all persuasions, are serious about encouraging greater industrial democracy at all levels in Australia, fairly fundamental reforms of the law will be necessary if present obstructions are to be removed.

#### LITIGIOUS DEMOCRACY : REMOVING MORE PROPERTY QUALIFICATIONS

In the remaining minutes, I want to concentrate on a number of matters that are before the Law Reform Commission for they also illustrate my general theme.

One of the least noticed of Mr. Ellicott's references to the Commission requires it to review Commonwealth laws relating

to :

- (a) The standing of persons to sue in Federal and other courts whilst exercising federal jurisdiction or in courts exercising jurisdiction under any law of any Territory; and

- (b) Class actions in such courts.

Anglo-Australian tradition imposes "standing" rules on parties who wish to invoke the assistance of the courts. Only those who have the requisite standing "interest" are able to obtain relief from the courts. One international legal scholar<sup>46</sup> sees increased access to the courts as the next stage of an historical trend. In the Liberal States of the 18th and 19th centuries, the procedures for civil litigation reflected the individualistic philosophy of rights which was then prevalent. Rights existed prior to the State. It did not require State action to protect them. It was sufficient that the State did not allow others to infringe them. The State remained passive with respect to protection, leaving it to aggrieved parties to assert their legal rights. The law tended to concern itself principally with property. Majestically, it assumed that all had property. Generally those who worked the legal machinery, did.

Such notions could not survive the popular democracy of this century. Widespread literacy, popular education, improved communications and universal suffrage have promoted the interests of ordinary citizens in having a part in the running of their society and the decisions of their government. The same forces that have already been mentioned, crowded cities and more affluent societies, have developed ideological causes : racial tolerance, civil rights, environmental and consumer protection. These interests may, of course, involve property. However, they are chiefly expressions of social values which individuals want a society they live in to respect.

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6. M. Cappelletti, *Rabels Z.*, 1976, 669, 672.

Proprietary interests have less relevance in this context.

"Today it is unreal to suggest that a person looks to the law solely to protect his interests in a narrow sense. It is necessary to do no more than read the newspapers to see the breadth of the interests that today's citizen expects the law to protect - and he expects the court where necessary to provide that protection. He is interested in results, not procedural niceties".<sup>47</sup>

The first fruit of this changed attitude was the move to provide legal aid to permit persons, whatever their financial position, to enforce at least some of their private legal rights; principally their property interests. This has been described as "the first wave". The second "wave" involves "reforms aimed at providing legal protection for "diffuse" interests especially in the areas of consumer and environmental protection".<sup>48</sup>

Although the first wave of legal aid has come to Australia, the second has not. In Australia, unlike many overseas countries, nothing has been done to liberalise the 19th century rule that in order to invoke the assistance of a court, a party must have a direct personal (usually financial or property) interest in the litigation.

That rule serves fairly well to defend the interests of a person knocked down by a motor car or whose home is the subject of a trespass by an unwanted intruder. It is less apt to serve the interest of a person whose only basis for claiming a breach of the Constitution is that he is a taxpayer. In Canada such an "interest" is sufficient to invoke the decision of the court.<sup>49</sup> In Australia, as at present, it is not.<sup>50</sup> Similarly, a concern that the environment is being damaged, unless one has a property interest or other personal stake in

47. Black, *The Right to be Heard* [1977] *N.Z.L.J.* 66.

48. Cappelletti, 682.

49. *Thorson v. Attorney-General of Canada* (1974) 43 *D.L.R.* (3d) 1.

50. *Anderson v. The Commonwealth of Australia* (1932) 47 *C.L.R.* 50.

he vicinity will not, a statute apart, entitle a concerned citizen to invoke the assistance of the court to uphold the law.

The principles relating to "standing to sue" extend into the world of the company. Judges have said many times :

"It is not the business of the court to manage the affairs of the company. That is for the shareholders and directors."<sup>51</sup>

Upon this premise, our system of law has severely restricted the right of minority shareholders to take action to redress wrongs committed against a company by third parties or wrongs committed by the company against the shareholder. The law has taken the stand that the internal management of a company ought to be left to the organs of government within the company i.e. the board of directors and the general meeting. The effect of this approach, known as the rule in *Foss v. Harbottle*<sup>52</sup> is to deny those shareholders who are unable to control the General Meeting (and therefore to control the composition of the Board of Directors) standing to sue in respect of the conduct of the affairs of the company. This rule is subject to exceptions, including cases of ultra vires acts and fraud on the minority.<sup>53</sup> But some suggest that the time has come to consider the rule itself. The individual union member is entitled by statute to standing to raise numerous matters relevant to the management of the union : his only qualification being that he is a member of the organisation.<sup>54</sup> Is it appropriate that a similar entitlement should exist for every shareholder of a company or would the consequence be entrapping companies into a mesh of litigation and substituting judicial for managerial decisions?

Also before the Law Reform Commission is a reference on privacy protection. Again, the protections that have been developed by the law for individual privacy tend to revolve around property interests. The tort and crime of trespass was developed to

51. Scrutton L.J. in *Shuttleworth v. Cox Eros. & Co.* [1927] 2 K.S. 9, 23.

52. (1843) 2 Hare 461, 67 E.R. 189.

53. *Edwards v. Halliwell* [1950] 2 All E.R. 1064.

54. *Conciliation and Arbitration Act 1904* (Cth), ss.140(2), 141, 159.

protect a person's dwelling and goods. Likewise, the tort of nuisance was developed. Interests of a less empirical nature, including protection of a person's feelings received much less attention from the law. The common law in Australia failed to develop a general protection for privacy.<sup>55</sup> In the age of computers, surveillance devices and electronic eavesdropping and mass communications, technology has at last forced the pace of reform. Demand is now made for greater respect for individual privacy. That is why the government has given the Law Reform Commission its major task to suggest new laws that will give ultimate legal enforcement to claims for privacy: even where these claims have no real basis in property rights or financial interests but are simply an assertion by the individual of his claim to a certain degree of anonymity, reserve, solitude and intimacy with his family and friends.

#### CONCLUSIONS

It is important for those who govern and for those who propose laws to government that they should be able to see, however obscurely, the general forces that are at work in society. Amidst the dazzling discoveries of science, the developments of technology and the mass of information which daily confronts us all, it is not difficult to overlook the major themes.

I have endeavoured to point out in this paper one such major theme. Its implications for our economy and for the law have only been lightly touched on. The theme is the diminishing importance of the property qualifications for "rights" and "power" in society. The movement that wipes out the rotten boroughs and restricted franchise in the last century is continuing to have its inexorable effect on our society. When Parliaments began to reflect the interests of every man they inevitably produced governments concerned to raise educational

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55. *Victoria Park Racing & Recreation Grounds Co. Ltd. v. Taylor* (1937) 58 C.L.R. 479.

and other levels in society. But this movement has its own consequences. Of necessity, it is impossible to submit an educated, affluent and informed community to the same control as could be exerted before the revolutions in education, general prosperity and information distribution. Interests change and the concern with economic survival becomes less important as attention is diverted to other more nebulous but nonetheless relevant concerns of modern man.

I pointed out that these concerns extend to the desire for a greater say in the work place (at the shop level up to board management) in the courtroom and in the assertion of rights, including the right to information about government, the right to review of administrative decisions and the right to privacy. There are many who observe the movements which I have described with undiluted anguish. Especially because the changes are happening so quickly, there is no doubt that this is an uncomfortable time for society. But the movement is there and seeing it clearly helps us to understand its particular manifestations. It promises opportunities and challenges for all members of society, but particularly those engaged in the work force. It provides challenges for the law and opportunities for those whose task, like mine, is to reform it, to modernise it and to simplify it.

TABLE 1 : SCHOOL RETENTION RATES IN AUSTRALIA.

1961, 1966 and 1971

% of all Male Cohort in School in:

AGE	1961	1966	1971
14	90.29	97.25	97.92
15	65.13	75.38	82.80
16	34.53	46.64	57.51
17	-	21.27	33.02

% of Female Cohort in School in:

AGE	1961	1966	1971
14	28.27	96.84	98.02
15	52.45	69.96	79.60
16	23.64	38.05	49.71
17	-	13.38	25.16

% of All Persons Cohort in School in:

AGE	1961	1966	1971
14	88.82	97.05	97.97
15	60.89	72.73	81.25
16	30.50	42.45	53.69
17	-	17.41	29.17

Source : Niland, 10



TABLE 2 : UNIVERSITY DEGREES CONFERRED IN  
AUSTRALIA, 1950-1975

	No. of Bachelors	% of Total	No. of Masters	% of Total	No. of Doctorate	% of Total	TOTAL
175	21,860	90.3	1,560	6.4	796	3.3	24,216
174	21,115	91.0	1,310	5.6	771	3.3	23,196
173	18,525	89.3	1,353	6.5	870	4.2	20,748
172	16,877	89.5	1,136	6.3	784	4.2	18,847
171	14,994	89.4	1,067	6.4	717	4.2	16,778
170	13,484	89.7	888	5.9	663	4.4	15,035
165	7,937	90.9	479	5.5	315	3.6	8,731
160	4,183	91.4	254	5.5	139	3.0	4,576
155	3,167	92.2	175	5.1	93	2.7	3,435
150	4,255	94.4	206	4.6	45	1.0	4,506
YTAL	126,397	90.2	8,478	6.0	5,193	3.7	140,068

Source : Niland, 11