AUSTRALIAN INSTITUTE OF MANAGEMENT

N.S.W. DIVISION

19TH GENERAL MANAGEMENT CONFERENCE

CANBERRA, 15 NOVEMBER 1977

THE LAW REFORM COMMISSION & BUSINESS REFORM

Hon Justice M D Kirby

November 1977

AUSTRALIAN INSTITUTE OF MANAGEMENT

N.S.W. DIVISION

19th GENERAL MANAGEMENT CONFERENCE

CANBERRA, 15 NOVEMBER 1977, 9.45 a.m.

THE LAW REFORM COMMISSION & BUSINESS REFORM

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

WHY A LAW REFORM COMMISSION?

The Australian Law Reform Commission is not three years old. It is established to "review, modernise and simplify" the laws of the Commonwealth.[1] It works on references received by it from the Commonwealth Attorney-General. Under the Constitution, the Commonwealth has significant and largely unexplored powers to provide for the national regulation of corporate business in Australia, banking, insurance, trade and commerce. About half of the matters that have been referred by successive Attorneys-General have related, directly or indirectly, to the business sector. Half of the tasks before us therefore affect this Institute and its members directly. All of our work affects you as citizens. We are likely to be seeing more of each other. The Commission is not a scholarly debating society. It is part of the regular machinery of government. Because its recommendations can affect business directly, it is useful to review who we are, how we operate and what we are doing.

The Commission is a national body. It is made up of eleven Commissioners : four of them full-time. The part-time

---

1. *Law Reform Commission Act*, 1973 (Cth), s.6(1)(a).

Commissioners are resident in the various States and travel to Sydney, where the Commission is set up, for regular meetings with the full-time Commissioners and staff. "Part-timism," as all of you would know, has its problems. But Australia is a continent and already has divided responsibilities for legal renewal. It is vital to keep a link with the communities in the different States. It is also desirable, in suggesting reform of the law, to be able to acquire the help of the best legal minds in the country : many of whom would simply not be available on a full-time basis.

All of the Commissioners but one are lawyers. The full-time Commissioners number a judge, a barrister, a solicitor and a legal academic. The same pattern is found amongst the part-time Commissioners who range from a federal judge based in Canberra (Mr. Justice Brennan), a Melbourne Q.C., an Adelaide Professor of Law and so on.

To make the most of our part-time Members, the Commission is organised, under the Act[2] in Divisions. Each time we receive a new reference from the Attorney-General, a Division of the Commission is created, comprising full-time and some part-time Members, assisted by research and other staff. For the purposes of the Act, this Division is the Commission. In this way, we have been able to make real use of the particular specialties and reasonable available time of our Commissioners.

I have said that the Commission is not simply a debating society and in saying this, I merely reflect what successive Attorneys-General have asserted. As recently as last month, the present Attorney-General, Senator Durack, put it this way :

> "... [M]y government is a government of law reform. It has gone about this task purposefully and quietly. It has not shirked from tackling difficult projects

2. *Ibid*, s.27

> and it has sought to involve as many as possible in bringing these reforms about. The government proposes to continue to tackle these difficult problems and to tackle them as fast as we can. There is no sense in having law reform commissions unless the government takes active and prompt steps to consider the reports and to implement the reports so far as they are consistent with the government's philosophies and the practical exigencies that may apply. Obviously the government cannot be expected to implement reports carte blanche. We haven't done so. But it is the obligation of governments to consider the reports promptly and to take some positive steps to implement them. That will be the policy, the government of which I am a Member, will pursue".[3]

The Commission has already delivered four substantive reports to the government, all four of them prepared to meet deadlines fixed. One of the reports was delivered in late September 1977 and is still under study. Another, delivered in 1976, has now passed into law. Both of the other two were accepted by government and a Bill introduced which, substantially, sought to implement the Commission's proposals. One of those Bills, the Criminal Investigation Bill, was described by Attorney-General Ellicott, quite rightly I think, as "a major measure of reform".[4] It will lapse with the recent dissolution of the Parliament. But there have been firm commitments by the Prime Minister,[5] Mr. Ellicott,[6] and Senator Durack[7] to the principle of this important measure. Equally, I believe, the Opposition has indicated general support.[8] It is, as Senator Durack acknowledged, a highly controversial measure but one which seeks to modernise the law

3. Address to the North Queensland Legal Convention, Townsville, 8 October 1977 (No. 66a/77) *mimeo*, 14-15.
4. *Commonwealth Parliamentary Debates* (H of R) 24 March 1977, 474.
5. Speech to Legal Convention (1977) 51 *A.L.J.* 343 at 344 and Cth.Parl.Debates, (H of R), 6 Sep. 1977, 727.
6. See n.4.
7. See n.3
8. *Cwth.Parl.Deb.* (H of R), 3 May 1977, 1486.

and render it available to Australians, substituting an available Australian statute for obscure and often unavailable English sources.

The point to be made is that unlike many Commissions, Committees of Inquiries and Royal Commissions of the past, the national Law Reform Commission has secured strong bipartisan support from successive governments and five successive Attorneys-General. It was created by Parliament to assist the legislators and the Executive in the more complex and controversial matters that might otherwise be put into the "too hard" basket.

METHODOLOGY OF REFORM

I now want to say something about the methods that have been adopted by the Commission in answering the references it has received. The methods have been unusual and deserve the attention of a few minutes. One of the endemic complaints of business about the processes of legislative preparation has been a complaint about the secretiveness that is, almost universally, the watchword. The editor of the *Australian Business Law Review* put the complaint succinctly, in the following terms :

> "In Australia the tendency has been for there to be little (although growing) consultations between government and the community on where and how law reform should take place. That does not mean that there isn't some consulting between governments and experts in various fields. This does not mean that there is not some exchange of views between governments and various industries when major changes are proposed in important areas of business legislation. But it is clear that there continues to be less confidence in the business community in Australia in the way in which the law is reformed than there is in the United States. And this is equally true for Canada.

> The reason for this great respect [in North America] is the manner in which the reform process occurs ... The usual process is for model legislation to be drawn up by a specialist committee ... This report is examined at length by a committee which is appointed from all levels of the business and legal communities ... This is no "lunchtime" committee, no "seven-to-nine" committee. This is no meeting of persons who have had a busy day at the office, or who know that tomorrow's going to be another hectic day in negotiating a new contract. These men and women are given the opportunity to look at problems with a realistic but nevertheless tight schedule, with a realistic but nevertheless tight budget for research, with a realistic but nevertheless responsible programme of seminars and conferences with experts from various parts of the country. ... Compare this to the way in which the *Trade Practices Act* was introduced in Australia. ... Compare this to the way in which legislation dealing with Privacy has been introduced in various States in Australia. Compare this with the way in which legislation dealing with Gift Duty has been introduced in the various States of Australia. All of these are examples of the rather inadequate nature of law reform as it occurs in Australia."[9]

This somewhat polemical but obviously heartfelt protest was written late in 1975. The protest is basically against the fairly well established procedures which we inherited in this country from Whitehall and which characterise the preparation of

9. Editorial (1975) 3 *Australian Business Law Review* 239, 240-241.

most Australian legislation. I would identify two causes. The first, no longer really relevant, is the conviction that a highly trained and elite group have a right and duty to prepare laws according to what they think is right and just, without the harrassing pressures of public and interested opinion. Universal education, the information explosion and modern motions of democracy in society make that thesis unacceptable.

There is, however, another consideration. In the United States, Impeachment apart, the executive government is guaranteed four years in office. That is not so under our system. Control of the Treasury Benches may be much more ephemeral. It is therefore understandable that governments and the public service working to them should seek, so far as is possible, to protect government from needless controversy. One means of doing so is by keeping a firm control on the preparation of legislation and this is one of the advantages of office. Advantages so hard won are not lightly surrendered. The rather secretive preparation of legislation, without the North American debates, can therefore be seen, in part at least, as one of the consequences of our particular system of responsible, Cabinet government.

But times are changing. Social problems are becoming more complex. The Executive and Parliament itself increasingly needs assistance of an expert kind. As laws become more numerous and more complex, the need for and advantage of widespread consultation in their preparation becomes increasingly manifest.

There are some who protest at the flood of legislation. They ask whether it is not possible for the judges simply to develop reasonable principles of common law to cope with new social situations. But the answer to this contention was given by the first Chairman of the English Law Commission, Sir Leslie Scarman, now Lord Scarman. When he abandoned his work as a law reformer and returned to the Bench he took an early opportunity to point out that the courtroom is not really a

very suitable place for major tasks of law reform :

> "Consistency is necessary to certainty - one of the great objectives of the law ... The Court of Appeal - at the very centre of our legal system - is responsible for its stability, its consistency and its predictability ... The task of law reform, which calls for wide-ranging techniques of consultation and discussion, that cannot be compressed into the forensic medium, is for others".[10]

Governments are not blind to these truths. Nor are the public servants who work in this system. The role of courts in reforming the law, renewing it, simplifying it and modernising it, has declined in direct proportion to the activism of the representative Parliament. The capacity of Parliament itself to do the hard work of reform by the processes of consultation and discussion is also obviously limited. That is why governments are now experimenting with new techniques. Bills, such as the Criminal Investigation Bill, are being laid on the table of Parliament to permit discussion, public debate and criticism. The government has also done this with the Human Rights Commission Bill and other measures where it is considered that open discussion in the community will refine and improve the initial proposals. State Governments, including the Government of New South Wales, have begun to take the same course.[11] I welcome this innovation. But it has its price.

The Criminal Investigation Bill contains many innovative reforms. Inevitably the detail attracts comment and it would be a naive reformer who expected every interest group to embrace all proposals. The very purpose of public consultation is to secure criticism. We must not be too

---

10. Scarman L.J. (as he then was) in *Farrell v. Alexander* [1976] 1 *Q.B.* 345 at 371. See also 92 *L.Q.R.* 321.

11. N.S.W. Real Property (Amendment) Bill 1977, *N.S.W. Parliamentary Debates (Leg.Ass.)*, 14 Sep. 1976, 800, 805.

distressed when the invited criticism actually comes. But the shock to the Australian system of actually being asked to comment on legislation has proved too much for some. The invitation for specific comment and ideas of improvement has produced, from one lobby group, emotional posters which insult the community and play on fears. I hope we do better in the future because, if we do not, the retreat to secret legislation will inevitably follow.

The other ways government can consult the community, after the North American mode, is through the vehicle of inquiries. They may be Royal Commissions, committees such as the Trade Practices Act Review Committee or bodies such as the Law Reform Commission. I now want to say something about the procedures we have followed. They have been novel.

Fundamental to the procedures is the endeavour to consult with interested parties and the community generally before a report is delivered containing recommendations for reform. The means of consultation vary. The purpose remains the same. In advance of any of the reports so far produced, consultative documents such as *working papers, discussion papers, issues papers* and so on have been produced. In the course of their production, the Commission has engaged the assistance of persons appointed with the approval of the Attorney-General as Consultants. They come to our meetings and, often over several days, help us to focus on the practical, social as well as legal problems to which reforming laws should be addressed. In addition to all this, we have not been limited to the written word as a medium of communication. Radio and television have been used to bring the debates about the reform of the law "into the living rooms of the nations".[12] Our tentative ideas on defamation reform and on the law which should govern the transplantation of human tissues and our approach to privacy protection have been debated before national

12. R.J. Ellicott, Address to the Second Symposium on Law and Justice, Canber 26 March 1977, *mimeo*, 1.

television audiences numbering millions. Talk-back programmes have enabled Commissioners to engage in widespread public discussion that would simply not have been possible in times gone by. Opening the Australian Legal Convention, the Prime Minister, Mr. Fraser, explained the reason for this "participatory law reform.

> "We have taken quite a new direction in law reform in Australia, a direction entirely in keeping with our traditions. We have deliberately set about promoting what I might term "participatory law reform". If the law is to be updated, if the advances of science and technology are to be acknowledged and accommodated, and if our traditional liberties are to be protected, it is vital that the community governed by the law should take part in helping to frame reforms in that law. I for one reject the notion that important reforms should just be left to the "experts"."[13]

To supplement media discussions of proposals, public sittings have been held in all of our references, generally in every State capital in the country and in Darwin and Canberra. Notification is given to groups and persons affected by the reference and to the public. These sittings are conducted informally. Information is secured by the inquisitorial rather than the adversary system. Differing points of view and lobby attitudes are "flushed out" in the course of the preparation of the law. Let nobody say that the ordinary citizen cannot make a useful contribution in this process. Our experience has been that he can and, given an opportunity, will.

In addition to public consultation of this kind, a series of seminars is frequently arranged at which those

---

13. J.M. Fraser, Address to the Legal Convention (1977) 51 *A.L.J.* 343; Also (1977) 2 *Cwth. Record* 863.

specially affected by proposals can come along to debate the wisdom or folly of proposals put forward by the Commission.

Such consultation is obviously time-consuming, not inexpensive and exhausting for those who engage in it. The aim of the exercise is the achievement of "law reform that can last".[14] The lesson of experience is that consultation will not result in the satisfaction of all interest groups. It will, however, ensure that all points of view are considered before the draft of legislation reaches the Parliamentary table.

REFERENCES TO THE COMMISSION

A number of the tasks upon which the Law Reform Commission is presently engaged relate to the business community. We have, for example, references from the Attorney-General on :

* The provision of new laws for the protection of privacy.
* The design of new laws relating to consumer debtors, including a modernised system of recovering debts.
* The suggestion of new legislation to govern insurance contracts throughout Australia to ensure that they are fair.
* The suggestion of new principles to govern standing to sue in federal courts and class actions in federal jurisdictions.
* The design of new ground rules for compulsory acquisition of property by the Commonwealth and, possibly, the provision of compensation to those whose land, though not acquired, is injuriously affected by Commonwealth works.

Before a report is delivered in any of these references, the processes of consultation and discussion which I have described will be carried on. In none will the consultation be confined to

14. (1975) 3 *Australian Business Law Review*, 239, 241.

lawyers or government personnel. For example, in our task to design a new debt recovery system, more efficient and simple than the present, cheaper and more uniform, a number of Consultants have been appointed who are presently busily engaged with the Commissioners in hammering out the tentative proposals. They include representatives from the Finance Conference of Australia, an experienced mercantile agent, a solicitor with many years of practice specialising in debt recovery, the Inspector-General in Bankruptcy and so on. One of the great needs of business is for a more equitable system of debt recovery to replace the antique collection of present laws which are a delight to legal historians but a blight on creditor and debtor in the Credit Society. I am happy to say that good progress is being made in this work. We are having outstanding assistance from the Australian Finance Conference. We are not ignoring the economic implications of changing legal procedures here. Much law reform requires social accounting In the rush of events without the benefit of widespread public consultation, it is all too easy to overlook the impact of new laws on the actual operation of business. We propose to avoid this error and to do so by ensuring the scrutiny of all proposals by the best talent and experience that can be procured.

The reference on Privacy is one of general significance in the computing age. The development of computers with their ability to marshall great masses of information, retrieving it in an instant, at increasingly low cost, often in specialised language and analysing material supplied for different purposes clearly poses a threat to individual privacy which we need to face up to. The Commonwealth has no clear power to legislate on privacy generally throughout this country. Yet, unless some uniform approach to privacy protection can be secured, the result will be a hotch potch of differing State laws which will represent a costly burden to business.

The reference on Privacy requires the Commission to look at the employment relationship, the consumer credit relationship, the banking and insurance relationships and many other situations in which individual privacy is at risk today. We are fully aware of the fact that information is the fuel of

modern society. Those who possess it, possess power. By the same token, privacy is a value which most people in our society consider worth preserving. It is more difficult to preserve in the age of big business, big bureaucracy, big computers and the information revolution. The task before the Law Reform Commission is to suggest legal regulation that will protect the respect for individual privacy, at least in some aspects of our lives, whilst at the same time refraining from unduly taxing the efficient supply of accurate information. Most people see the sense of computerised credit reference systems and police information systems. They lose their enthusiasm when the information is inaccurate, incomplete, misleading, out of context or spent by the passage of time.

The least known of all our references is that which relates to standing to sue and class actions. We have not had it for long. It directly impinges on business management in Australia and on the answerability of business in the courts. I therefore propose to devote the remaining time to a consideratic of some aspects of the reference. I hope I can enliven your interest in it, in order to procure your participation in our discharge of the reference.

STANDING TO SUE : THE MINORITY SHAREHOLDER

The Anglo-Australian legal tradition imposes so-called "standing" rules on parties who come to court seeking to invoke the assistance of the law. Only those parties who have the requisite"standing"or "interest" in the subject matter of the dispute are able to obtain relief from the court.

> "Before you can come to a court of law ... you must have suffered a legal wrong as well as an actual loss of money or amenity or anything else".[15]

The reason for this attitude is complicated and the precise "interest"which is required varies in different compartments of

15. *Gregory v. Camden L.B.C.* [1966] 1 *W.L.R.* 899, 909.

the law's concern. What the law is trying to do by imposing a threshold obligation to demonstrate an "interest" in the subject matter of the dispute, is to :

> "face the problem of adjusting conflicts between two aspects of the public interest - the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him..."[16]

In the 18th and 19th centuries, when modern rules governing "standing" were largely developed, the philosophy then prevalent, if I can dignify it by that description, was that rights preceeded the existence of the State. The State was not needed to protect rights. This function could be left to the aggrieved parties, to assert their legal rights before the independent umpire : the courts. The law tended to concern itself principally with property rights and interests. This concern accorded with the economic attitudes of the time. Majestically, the law assumed that all had property. Those seekin to work the legal machinery available, generally did have a property interest in the subject matter at stake.

Notions such as this cannot survive in tact after the spread of popular democracy and the growth of governmental activity in this century. Widespread literacy, popular education, improved communications and universal sufferage have promoted the interests of ordinary citizens in having some part in the running of their society and some control over the decisions of government and of the public service. Furthermore, these very forces operating in crowded cities and more affluent times have developed ideological causes : racial tolerance, so-called "civil rights", environmental and consumer protection. Of course, these interests may on occasions involve the property concerns of citizens. However, they are chiefly expressions of social values which individuals want the society

16. de Smith, *Judicial Review of Administrative Action*, 3rd Ed., 1973, 362.

they live in to respect.

> "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".[17]

The first result of these changing attitudes, in the context of the law, has been the move to provide legal aid to permit people, whatever their financial position, to enforce at least some of their private legal rights. In the nature of things, these are principally their property interests. The second "wave" involves "reforms aimed at providing legal protection for "diffuse" interests especially in the areas of consumer and environmental protection".[18] Although the first wave of legal aid has come to Australia, the second has not yet arrived. In Australiam unlike many overseas countries, nothing has been done to liberalise the old rule that,in order to invoke the assistance of a court, a person must have a direct personal and 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 one whose home is the subject of a trespass by an unwanted intruder or whose identity has been used, without permission, to promote the business interests of another. It is, however, less apt to serve the interest of a person whose basis for seeking interference by a court is more nebulous. For example, in Australia, it is not at present sufficient to invoke the consideration by the High Court of an assertion that the Constitution has been breached.

---

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

18. Cappelletti, *Rabels Z.*, 1976, 682.

that the plaintiff should be a taxpayer.[19] In Canada, that used to be the rule. However, two recent decisions of the Supreme Court of Canada have liberalised the previous approach to standing.[20] In respect of the rights of the taxpayer or citizen to invoke a decision by the country's highest court on compliance of a statute with the Constitution, the position in Canada is now more generous than either that of the High Court of Australia or the Supreme Court of the United States. Can we and should we adopt a similar principle in Australia? The predicted floodgates of busy-body litigation of which the Supreme Court was warned in Canada, have simply not appeared. Since the initial decision in 1975, only one other Constitutional challenge has come up for consideration. On a more mundane level, the question is raised as to whether a citizen's general concern that the environment is being damaged should be enough (if he is willing and able to pay the costs) to invoke a decision of the court. Those who say that it should not be, talk in terms of "floodgates," "academic questions" and nuisance litigants. But those who say it should cite Lord Denning's ringing words :

> "I regard it as a matter of high Constitutional principle that if there is a good ground for supposing that a government department or public authority is transgressing the law or is about to transgress it in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced and the courts in their discretion can grant whatever remedy is appropriate".[22]

No man has been more vigorous in asserting the rights of the courts to ensure compliance with the law than Lord Denning.[23]

---

19. *Anderson v. The Commonwealth* (1932) 47 *C.L.R.* 50.
20. *Thorson v. Attorney-General of Canada* (1974) 43 *D.L.R.* (3d) 1.
21. Chief Justice Laskin, Comparative Constitutional Law - (1977) 51 *A.L.J.* 45
22. *R v. Greater London Council; ex P. Blackburn* [1976] 3 All E.R. 184, 192.
23. *Cf. Barnard v. National Dock Labour Bd.* [1953] 2 *Q.B.* 18, 41.

But if we are prepared to concede that procedural impedimenta against invoking the court's jurisdiction should be removed, where does this stop? We might all be prepared to allow for courts to intervene to ensure the compliance by government and its agencies with the law. How far should this principle extend into the affairs of private business?

This is not an academic question. There is currently before the Judicial Committee of the Privy Council an argument that Aboriginals of the Aurukun Reserve in Queensland do not as private persons have any right to challenge agreements made between the State of Queensland and mining companies to exploit the bauxite wealth of the Reserve.[24] According to press reports, Counsel for the Queensland Director of Aboriginal and Islanders Advancement argued that the residents of the Reserve could not sue for alleged breaches of trust by the Director, without leave of and action taken by the State Attorney-General. Should the policy of the law be to exclude such people from litigating their alleged claims, in circumstances such as this? The Judicial Committee of the Privy Council is faced with a <u>legal</u> question : what does the present law provide? The Law Reform Commission is faced with a <u>social</u> question : what should the present law provide?

Leave aside government action and the situation of parties alleged to be external to a contract. The principles relating to "standing to sue" also 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".[25]

Upon this basis, our system of law has,so far,severely restricted the rights of minority shareholders to take action to redress wrongs committed against a company by third parties or wrongs

---

24. Reported *Sydney Morning Herald,* 29 October 1977, 25.
25. Scrutton L.J. in *Shuttleworth v. Cox Bros. & Co.* [1927] 2 *K.B.* 9, 23.

allegedly committed by the company against the shareholders. The law has taken the stand that the internal management of the 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*[26] 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.[27] However, there are some who suggest that the time has come to reconsider the rule itself. The individual union member is entitled, by statute, to standing to raise numerous matters relevant to the internal management of the union : the only qualification required is that he should be a *member* of the organisation.[28] 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? If a minority shareholder in a company considers that wrongs have been committed against the company by a third party, whom the directors are not minded to sue, is it appropriate to permit him to invoke the court's scrutiny of the directors' decision? Would it be sufficient protection to needless interference in the directors' overall control of the company's affairs if such "derivative" suits were limited to cases where the court judged that the suit was in the interest of the company and that the minority shareholder was acting bona fide? At a time when there is a significant movement towards so-called "industrial democracy"(emphasising the rights of workers and others who may have no financial stake in the company's affairs) is it appropriate to enlarge the rights of persons whose only stake may be the fleeting financial interest of a single shareholding? Is the injustice worked by the present rule, which no doubt occasionally prevents a court from

26. (1843) 2 *Hare*, 461, 67 *E.R.* 189.
27. *Edwards v. Halliwell* [1950] 2 *All E.R.* 1064.
28. *Conciliation & Arbitration Act* 1904 (Cth), ss.140(2), 141, 159.

enforcing the letter of the law outweighed by the practical considerations necessary if the effectiveness of company decision-making is not to be impeded? These are very practical questions which should concern every member of this Institute. It will be important, before the Commission reports to Parliament, that we should have the benefit of detailed and considered submissions that show an awareness of the issues that are at stake, including the social and economic issues.

FEDERAL CLASS ACTIONS

The other item in the reference on standing relates to the question of class actions in federal jurisdictions. A recent report in the *Australian Financial Review*, generally reliable in these matters, discloses that the State Labor Governments of South Australia and Tasmania are considering the introduction of "class action" law which "will give individuals and common interest groups the right to prosecute private and public bodies over environmental and consumer issues".[29]

The report points out, as is the case, that a working paper on this subject by the South Australian Law Reform Committee is expected to be published soon. Officers of the Tasmanian Attorney-General's Department are also said to be working on a somewhat narrower but related reference. The self-same question must be answered by the Australian Law Reform Commission in respect of the Commonwealth's jurisdictions.

Now, the very mention of "class actions" causes anxiety in some business hearts.[30] In the United States, where there is a long history of class actions, attempts to push the scope of such actions in the area of consumer protection have recently caused a significant controversy. On 13 October 1977 the House of Representatives of the United States voted by

---

29. *Australian Financial Review*, 31 October 1977, 5.
30. *E.G.* Address by Mr. M.H. Ware, Federal Chairman, Australian Finance Conference, Canberra Woden Rotary Club, 28 September 1977, *mimeo*.

281 to 125 to strike out of pending legislation a clause which would have permitted consumers to bring class action suits against companies that violate Federal Trade Commission orders. The *Wall Street Journal* described "class actions" in this context as a means to enable "consumers to consolidate small individual claims into major law suits covering anyone who has a similar complaint". The *Journal* described the battle :

> "Business groups, worried that the provision could produce countless nuisance suits, mounted a major drive against it. "We lost because the business community engaged in a tremendous and very effective lobbying effort" said Andrew Feinstein of Ralph Nader's Congress Watch. Some of the heaviest lobbying was done by the Business Roundtable, an organisation of top executives. This activity was considerably more extensive than the lobbying efforts of the consumer groups and the Carter administration, which backed the provision".[31]

There is therefore no doubt that class actions are controversial. The basic purpose of such an action is to reduce the units of litigation by bringing under one umbrella what might otherwise be separate but duplicating actions and (even at the expense of increasing litigation) to provide means of vindicating the rights of groups of people who, individually, would be without effective strength to bring their opponent into court.[32] In a word, class action rules permit one or more members of a specified class to sue or be sued as representative parties so long as the class involved is very numerous, common questions of law or fact are involved in the litigation, common claims or defences are involved and representation is adequate for each.

We, in Australia, are quite used to the consolidation of multiple claims where common issues are at stake. There is

---

31. *The Wall Street Journal*, October 14, 1977 "House rejects bid for Class Action Suits against Firms that Violate F.T.C. Orders".
32. Kaplan, "A Prefatory Note" (1969) 10 *B.C. Ind. Com. L. Rev.* 497.

nothing particularly unusual in this procedure which is backed by good common sense. Similary, procedures do exist for so-called "representative actions" in most of the States. Notwithstanding this, much fear is expressed, especially in business circles, at the possible expansion of class action litigation.

In a recent visit to the United States, it became clear to me that business interests were not particularly concerned about the expansion of class actions where the only relief sought is injunctive relief or declarations. But in Australia, it is difficult to see that there would be great significance in new class action legislation for cases where this is the only remedy the plaintiff seeks. In such a case, the court will, subject to the standing of the plaintiff and its discretion, make an injunction or declaration as is necessary to resolve the problem. Almost inevitably, a general injunction will extend not only for the benefit of the plaintiff but for all those who are affected by the defendant's behaviour. The plaintiff individual needs "standing" to invoke the aid of the court. But he does not need the status of a class representative on behalf of other people. A total remedy can be obtained on his own behalf, injuring to the benefit of many.

The real debate about class actions centres around relief by way of the payment of damages or specific orders. Thus, in a consumer context, a plaintiff may seek damages on behalf of numerous purchasers of a motor vehicle or he may seek an order that a motor manufacturer recall each car of a particular model in order to make a specific replacement. Highly contentious issues then are raised. They include who may share the fruits of any such order? How the costs of litigation of this magnitude are to be financed? Whether the legal profession extends beyond its proper function into promoting litigation of this kind, however well intentioned? And how are class actions of this kind to be managed both by the lawyers involved and by the courts?

There are, of course, ways around all of these problems, if we decide that we want to facilitate class actions. Suitors fund legislation, passed in most States of Australia, provides a model for the financing of litigation of this kind, without the perils of the contingent fees which raises the temperature of many lawyers and others, but not all.[33] There is a fundamental question to be answered here, which should not become confused with the machinery questions of how class actions are to be financed and what is to be done with damages, if they are allowed. The fundamental question is whether it is desirable to allow litigation to be brought on behalf of many individuals (even some who have no knowledge of it and may be unconcerned about it) where the damage suffered by those individuals is, possibly, so minor that it would be uneconomic for that person to bring an individual action but, in gross, the damage suffered by the community may be great. Is it appropriate in these cases that we should look to the courts, at the instigation of individual litigants to pursue action on behalf of the wider community? Again, this is a matter of great concern to management. It will be no good saying to the Law Reform Commission "I just don't like it" or "It means more litigation and more work for us". The issue again is a social one. Is it appropriate and desirable in our community that we should use the courts for regulation of this kind? If not, why not? If so, then what protections against mischief and abuse should be introduced?

CONCLUSIONS

I hope that what I have said will indicate the nature of the Law Reform Commission, its methods of operation and the vital interest which business generally and management in particular have in some of the tasks that are before us now. I also hope that those of you who are interested in the references we are examining will ensure that there is an adequat response to the Commission's consultative documents and reasoned reaction to the proposals for reform as they are developed by us This is an opportunity but also, I suggest to you, an obligation

33. Lord Denning M.R. shows no such reaction. See *Wallersteiner v. Moir* (No. 2) [1975] 1 *Q.B.* 373 at 395.