MACQUARIE UNIVERSITY

MANAGEMENT STUDIES CENTRE

SEVENTH ADVANCED MANAGEMENT PROGRAM

OPENING ADDRESS, TUESDAY, 27 JANUARY 1981

A MANAGERIAL LOOK AT THE LAW

The Hon. Mr. Justice M.D. Kirby

Chairman of the Australian Law Reform Commission

January 1981

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THE SEVENTH ADVANCED MANAGEMENT PROGRAM

My task is to launch the Seventh Advanced Management Program of the Management Studies Centre of this University. My qualifications are dubious. Though I have a modest Bachelors Degree in Economics from Sydney University and have been appointed an Honorary Associate in Management within this University, I cannot in truth claim any special talent that would equip me to say things of sparkling originality on management. Indeed, my thesis tonight is quite the opposite. It is that the time has come when managers and economists have things to say to lawyers and to the courts. Law and management economics affect each other profoundly. Yet in their relationship there has been little symbiosis.

I want to start by saying a few words about management education. I will then switch tack to the intriguing interface of law and economics. I will then refer to the need, in the business of law reform, for a greater appreciation of the importance of managerial efficiency and the possible usefulness of a cost/benefit approach to at least some legal reforms. Finally, I propose to round off with a few words about the relevant work of the Law Reform Commission.

First, let me try to explain why we are all here. The evening is balmy. The wine is red. Many Australians still languidly grace the beaches. Yet we are here and whilst visitors like myself will escape, a good number of you will remain: fellow travellers in the Seventh Advanced Management Program.

You can take heart from the fact that you are not alone in your endeavour:

> There has never been a time in our history when management education was more in the public eye than it is today. In its great variety of forms, it is ubiquitous. More than 80 universities, colleges of advanced education and institutes of technology offer degrees and diplomas in Management, while hundreds of technical colleges and like institutions offer certificates and basic diplomas. In addition, post-experience institutions, some run by private enterprise, some within universities, offer long and short-term non-credit programs, while in all States and Territories the Institutes of Management provide a wide spectrum of short courses. ... Counting the in-house training activities and the vast range of courses offered by universities and colleges, we have a remarkable variety and richness of training resources for tyro manager and experienced manager alike.[1]

It is not difficult to see why there is such public and private institutional endeavour and individual effort to secure managerial education. Understanding starts from acceptance of what Bevan Bradbury, the Managing Director of Coles, recently said in his Sir Robert Webster Lecture for the Textile Institute:

> In the struggle for survival, it is impossible to over-estimate the impact for good or bad of the top individual of a company, an organisation or an industry.[2]

The qualities of good management are many. But plainly they include leadership, 'the key element which differentiates a managerial dynamo from a managerial automaton'[3], or worse still, the managerial dud. But leadership implies some knowledge of where we are going. In the midst of busy activities on a micro level, it is not always easy to find the time or the inclination to pause and reflect upon future directions. It is all too easy to be absorbed in day-to-day decision making. Institutional pressures promote this concentration on the short-term. At a political level, we can see similar institutional pressures at work in our country. The recurrent needs of short-term elections all too frequently reduce thoughtful debate to superficial packaging of issues and constant electronic campaigning.[4]

This interval, then, is your opportunity to pause. Of course, there will be new ideas, new information and if they survive the close confinement even the possibility of new friendships. All this is undoubtedly valuable in itself. But more important will be the opportunity, rarely given to those in busy managerial positions, to reflect for just a short time concerning what they are at and where they are going.

The last year saw a sudden rash of futurology. Now, when we thought we had got that all behind us until 1990, we are told that the decade really starts in 1981, not 1980 as we had thought. The futurologists have a new lease of life. In December 1980, one leading Australian management educator pointed out:

> Conferences and conventions have concerned themselves with the economy, international relations, trade, defence, women, industrial relations, Aborigines and a whole host of other topics. In the halls not only of academe but of industry and commerce the terms 'strategic planning', 'delphi technique' and 'scenario' droppeth like the gentle rain from heaven.[5]

This commentator, Professor W.G. Walker, Principal of the Australian Administrative Staff College at Mt. Elisa, ventured a list of assumptions which he protested was 'incomplete' and 'submitted with some trepidation' but which he claimed Australian managers of the future should probably have before them; particularly those furthering their education in courses such as this. Listen to Professor Walker's 10 predictions. Consider how many you agree with. Consider the implications of those for your enterprise and your own future:

(1) The population of Australia will grow very slowly, the chief contributors to growth being limited migration and greater longevity.

(2) The proportion of Australians employed in primary and secondary industry will continue to decline slowly, while the proportion employed in tertiary and quaternary industry will increase.

(3) The proportion of unemployed will not vary greatly from the present figures and youth unemployment will remain a major problem.

(4) The demand for shorter working hours, weeks and years will grow apace, with resulting industrial confrontation.

(5) Public and legislative concern for citizens' rights, including those of women, the disadvantaged and aborigines, will continue.

(6) The national political stance in favour of multi-culturalism will continue, irrespective of the party in power.

(7) Technological progress will continue at an accelerating rate.

(8) Leisure, allied with hedonism and the swing from stoic to epicurean attitudes, will place new strains on traditional value systems.

(9) The contemporary public and legislative disenchantment with formal education will continue.

(10) The recognition that Australia is an Asian rather than a European island will grow apace.[6]

Walker admits that this list is not particularly optimistic. Indeed he goes further and suggests that:

> The trends ... point to what I suspect will be a decade of catharsis, a decade in which Australians will, of necessary, come to terms with the fact that the industrial revolution is no more and that the post-industrial revolution has tiptoed in, during the late 70s, while we were apparently not taking much notice of what was going on around us.[7]

In a time of profound change, none of our institutions and none of our cherished beliefs are above scrutiny. Even in Australia, with its history of tariff protection, institutionalised industrial relations and trans-national market dominance, the market place still frequently provides a discipline that ensures that managers keep up to date. Management education must likewise adapt. The long and justly famed American management education institutions have lately been diagnosed as evidencing 'the signs of decay'.[8] European schools have been urged to follow their own course. In Australia, the establishment by the Commonwealth of a committee of inquiry chaired by Mr. John Ralph indicates serious questioning of the status quo in management education. Professor Walker has suggested that there are many more changes in the offing:

- Examination of Japanese and other management styles and the thought, distinctly uncomfortable for old Australians, that we may actually have something to gain by experimenting with management patterns of Asian origin. Walker reports that at the end of 1980 he heard two distinguished international figures suggest that United States leadership in both management practice and management education had 'passed the peak of its influence' and that leadership will pass to what we still quaintly refer to as 'the east'.[9]

- Adaptation to the special problems of women in management and female career patterns that are nonetheless consistent with family responsibilities. It has been suggested that a relatively small number of women in management education is itself a consequence of the difficulty of a working wife in a close-knit smaller family, adding to her special burdens, the obligation of attending a residential course.[10]

> According to Walker the 'impact of tensions in the home upon efficiency in the office', so long identified, is now a matter for frank, open consideration by participants in management education courses and by men as well as women.

But just as management in the market place and management education must submit to fresh scrutiny, so too must the law. It alone cannot escape the pressures of change. If it is too much to expect that the law should always embrace change, or even facilitate it, the inefficiencies caused by a legal system which lags too far behind a fast moving society are so obvious that they scarcely need exposition by me.

LAW AND ECONOMICS

One of the most interesting developments of recent years has been the clearer realisation of the interaction between law and economics. Of course the two disciplines always intersected in fact. But it was not until the development of economics as a distinct field of scholarship in the 18th century that any realistic analysis of the law by economic or managerial criteria became possible in practice.[11] Jeremy Bentham, in the generation which followed Adam Smith, provided a virtual economic analysis of laws regulating not only orthodox market behaviour but also non-market activity, such as accidents, crimes, marriage and even the legal and political processes themselves.[12]

Legal developments can sometimes hamper or constrain managers and business activity. But let it never be forgotten that legal developments and legal ingenuity can also advance the managerial art and market efficiency. This point was illustrated by Lord Wilberforce, one of the foremost living expositors of the English law, in his Holdsworth Lecture 'Law and Economics'.[13]

> Invention of the limited company came about — first in this country [England] and very soon after in France — in the middle of the XIXth century as part of what would today no doubt be called ... a legal breakthrough, in which institutions designed for the needs of an agragrian economy suddenly, by a process of radiation, became adapted to a commercial society. The company, the abolition of the laws of usury, the introduction of cheques, the formulation of Patent Law and Trade Marks, were all part of a movement which did not merely reflect the expansion of commercial practice; but also — perhaps more truly — gave an impulse to it.

> The influence of the law and economic development during this period has not been analysed by economic historians so far as I know in this country; here is surely a promising field for a joint study, not of mere historical interest, but relevant to the mid 20th century, when we may be in a similar period.[14]

Lord Wilberforce pointed out that the limited liability company lurched upon the scene almost as an accidential outgrowth of the adaption of the Charter Company — the grant of corporate status by the Crown for particular purposes specified in the Charter — and a few supportive judicial decisions and expansive legislative elaborations.[15] That process, the development of the limited liability company with its separate identity, has not ceased: frozen as it were in our time. What began with the Charter Company in the time of Elizabeth I and the period of overseas colonisations is unlikely to cease and atrophy in our generation. The process of development is still continuing. The pressures for change can be seen, in part, in the suggestion of a more realistic approach to the rights and liabilities of directors, in part in the new and national companies and securities legislation in Australia, and in part in the movement for so-called industrial democracy. In a sense, the pressure to give a greater voice in the affairs of a corporation to employees whose stake may (though less mercantile) be just as important as the proprietary shareholders, reflects the gradual retreat of English law from the powerful influence of propertied interests. At a political level, we have seen that retreat in the grant of universal sufferage. In a curial context, we are now asked to say whether 'standing' to be heard before a court of law should be extended beyond those with a property interest in the subject matter to those with other, less mercantile but nonetheless genuine and significant social concerns.[16] In the corporate field, the self same debate is being played out in the context of the issue of so-called industrial democracy and the rights of employee participants in the corporation as against shareholders with risk capital invested.

On a more practical note, Lord Wilberforce points out in his lecture that many modern so-called legal problems raise practical, economic and even managerial questions. Yet often these questions are left to be determined by judges, usually with little training in economics or management and scant assistance either from the Bar table or from experts in the witness box. Occasionally, the judges perceive and protest their inexpertise. Thus Lord Justice Fry, in the Mogul Steamship case, said that 'to draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Court'.[17] Lord Bramwell, in 1883, was even more anguished:

> Here is a contract made by a fishmonger and a carrier of fish who know their business and whether it is just or reasonable is to be settled by me who am neither fishmonger nor carrier nor with any knowledge of their business.[18]

Lord Wilberforce points out that the anxious Lord Bramwell was not saying that such a judgment cannot be made by judges. Rather he was saying that a judge, unaided, is not necessarily the best person to make that judgment. Yet we in Australia commit to courts and court-like institutions many economic decisions of the greatest complexity and highest national importance. The Australian Conciliation & Arbitration Commission, of which I am a member, is the prime example of a body making profoundly important economic decisions but utilising overwhelmingly court-like procedures of forensic argument.

But among the Commonwealth's tribunals, the Arbitration Commission is not alone. Other bodies may be cited. The Prices Justification Tribunal, the Remuneration Tribunal, the Academic Salaries Tribunal, the Flight Crew Officers' Industrial Tribunal: all of these are bodies, generally manned by lawyers, typically proceeding in a curial fashion, to make decisions of a complex economic and managerial quality.

Nor are the courts — the orthodox courts of the land — exempt. Lord Wilberforce, in his lecture, points to the decisions that must be made by the court under the Restrictive Trade Practices Act of 1956 in England.[19] But the point could be made with equal force in respect of some of the decisions which fall to be made by the Federal Court of Australia under the Trade Practices Act. Nowhere is this more true than in the judgments that must be made by the court under the several provisions in Part IV of that Act dealing with restrictive trade practices. There is no gainsaying the economic consequences of decisions made by the court in relation to such matters as contracts, arrangements or understandings restricting or affecting competition[20], secondary boycotts[21], monopolisation[22], exclusive dealing[23], resale price maintenance[24], price discrimination[25] and merges[26]. Not only do these decisions inevitably have economic consequences. Many court decisions have this quality. Here, the decisions of a court involve the application of words which themselves stem from the economic discipline and moreover from a particular economic philosophy which the Parliament has entrusted to the court to uphold and, where need be, enforce.

The existence and indeed the proliferation of provisions of this kind led Lord Wilbeforce, scarcely a legal radical, to appeal for 'the development of a new type of lawyer-economist and of economist-lawyer, people who understand the other's discipline and its tools or methods.[27] He even went further:

> It also makes the case for the presence of an economist on the court; ... which in turn strengthens the need for lawyers to be able to communicate with him and for him to be able to communicate with the judge.[28]

Our constitutional arrangements in Australia probably make it impossible for the inclusion of non-judge economists in federal courts at least. But there are many other ways to meet this problem. First, Lord Wilberforce's appeal needs to be heeded. More and more young lawyers are now approaching the discipline of the law through first degrees in economics or commerce. Lawyers trained in these disciplines will ultimately reach judicial office in the courts. Secondly, tribunals are already constituted to include economic and managerial skills. Thus Professor Isaac is a Deputy President of the Arbitration Commission. Professor Maureen Brunt and Professor J. McB. Grant are members of the Trade Practices Tribunal and Sir Andrew Grimwade and Mr. R.G. Porter, both experienced managers, are members of the Remuneration Tribunal. Thirdly, the range of evidence which courts may receive to assist in giving content, in a realistic, consistent and conceptually acceptable way to economic expressions, is a matter now under the study of the Law Reform Commission. We have been asked to advise on the reform of the law of evidence in Australia's federal courts.[29] The need for reform here is illustrated, for example, by the difficulty of getting before the court, survey evidence concerning public perceptions in trade practices cases.[30] The Federal Court recently felt forced to reject survey evidence in the case involving public perceptions of the trade name 'Big Mac'. The application of rules of evidence developed in earlier times for the resolution of other problems can plainly impede the efficient and businesslike discharge by the courts of their difficult new functions, with so many implications for the economy and business management.

Nor is our highest court, the High Court of Australia, exempt. On the contrary, many of its constitutional decisions have profound economic implications. Section 92 almost demands, as it has been interpreted, a constitutional economic hypothesis. Criticism in the media of the pronouncements of High Court judges concerning economic questions has become much more visible of late. The phenomenon came to the notice of the editor of the Australian Law Journal in a note in 1979 titled 'Pronouncements of Judges on Questions of Economics'.[31] An article by Mr. P.P. McGuinness, now editor of the Australian Financial Review, in characteristically blunt terms, tackled the High Court's alleged 'pretentions as an economic legislature'[32]:

> Fine distinctions are made that have absolutely no meaning in economic terms, and assertions made about matters of economics in which the Court has no knowledge or expertise, as if they had the same force as legal argument.

Specific criticism was addressed to the joint judgment of Justices Mason and Jacobs in a case involving the compatability of the Wheat Industry Stabilisation Act 1974, together with complementary State legislation, with s.92 of the Constitution. Observers of the wheat scene will know that the issue is not yet dead. Part of the problem arises from the fact that lawyers, skilled in verbal argument and in applying precedent, are forced to read down the absolutist expression of s.92 ('... trade, commerce and intercourse among the States ... shall be absolutely free') to mean something short of 'absolutely free' so as to permit legitimate regulation and control. This remnant of a past economic theory (Free Trade) continues to require of lawyers the most exquisite ingenuity. In the Bank Nationalisation Case, the Privy Council was guilty of lawyerly utterances which to an economist, looking at the purposes of s.92, must seem strange indeed:

> Their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition such as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that interstate trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free.[33]

Mr. McGuinness scathingly characterised this judicial effort as 'a wonderful piece of judicial logic'.[34] The editor of The Australian Law Journal called it 'an odd mixture of platitudes and Catch-22 language' and 'not authority for anything'. Chief Justice Barwick said of it that Their Lordships:

> seemed to have conceived that in some age the only practical and reasonable manner of accommodating one man's freedom to that of another, in that sense to 'regulate' trade, was to deny all freedom to the other. For my part, the possibility strains my credulity: but that I must attribute to the limitations of my own imagination.[35]

Although a report of the Commonwealth Industries Assistance Commission expressed a view contrary to that reached by Justices Mason and Jacobs (namely that the wheat stabilisation legislation was not, in the language of the Privy Council, the 'only practical and reasonable manner of regulation'), McGuinness points out that no weight was given to the findings of the report. Indeed Their Honours 'did not even refer to it and showed no evidence of having read it'.[36] At least in the given case the High Court had the

relevant material before it. In cases before other courts and tribunals, relevant material has sometimes been positively excluded, generally because it is not considered relevant to the narrow legal issues perceived by the Bench or because it is considered to offend the hearsay rule and thus not admissible against the immediate parties to the case.[37]

The recent wave of interest in the High Court's approach to tax avoidance also reflects the growing pressure for a more realistic approach to statutory interpretation, where the statute's business is principally economic. Though Chief Justice Barwick declared that a literalist approach to taxation statutes was essential if the rule of law itself were not to be subverted[38], Mr. Justice Murphy was more caustic:

> In my opinion strictly literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no-one believes it intended, so that income tax becomes optional for the rich whilst remaining compulsory for most income earners.[39]

This latter observation inspired many editorialists to pick up their pens. Typical was The Australian Financial Review:

> It has now become standard practice for the majority of the High Court Bench to rule in favour of any tax avoidance scheme, no matter how fantastic.[40]

This is not just a local problem of transient controversy. It is a fundamental problem that exists, at least in those English language countries outside the United States, which have inherited from Britain a narrow approach to statutory interpetation. Lord Wilberforce explained why:

> Law in relation to taxation has for too long enjoyed rather a poor reputation, whether because it is thought to be banausic or because in the public mind it has become associated with tax avoidance or tax dodging, a subject incidentally which badly requires some objective and scientific research. This is I think regrettable: it is not the case in America.[41]

Lord Wilberforce points out that the United States is virtually alone of the English-speaking countries. It has a more realistic approach to statutory interpretation that broadens the sources of material to which courts can have regard to divine the legislative intent. Much more regard can be had in tax, company, patent and other law

to the economic and commercial realities of the situation. For example, courts will 'pierce the veil' of the formal separation of legally distinct corporations to look realistically at the "enterprise entity" based upon economic considerations of the factual coincidence of business aims rather than formal legal appearances.[42] There is a need for more realism and less formalism in statutory interpretation generally. But this may be particularly so where the statute is part of the machinery by which the national economy is regulated. There are many obstacles. The laws of evidence limit courts receiving material which managers, businessmen and economists would regard as plainly relevant. The Bench itself is not always equipped with the understanding of and sensitivity to economic issues. The Bar is frequently incapable of providing assistance that goes beyond the formalistic skills of verbal dexterity and analogous argument. A significant obstacle to change is the abiding faith of many at the apex of the law in Australia in the merits of oral argumentation without formal time limits.[43] No-one has a more unshakeable faith in this system of advancing understanding than the present Chief Justice, Sir Garfield Barwick. He was an incomparable master of such oral advocacy. Yet the very technique may encourage a concentration on superficial verbal issues, and a retreat from the uncomfortable and unfamiliar world of economic, commercial and business reality.

The move of the High Court of Australia to Canberra and change of the court's personnel may lead Australian courts down the same track as their American counterparts to written briefs of argument, with supporting documents and analysis of social issues. The cost of bringing counsel to Canberra may result, in time, in curtailing, limiting and even in some cases obviating altogether, oral argument. With this may come less emphasis upon verbal form and more concern with social and economic reality.

COSTS AND BENEFITS IN LAW REFORM

It is not only in the courts that changes are required. The business of law reform, and indeed law making generally, needs to adopt a more realistic approach to the economics of its endeavours. The costs and benefits of legal change need to be weighed more carefully and even scientifically than at present. Though lawyers do not generally like to acknowledge it, justice does have a price and fairness must be paid for. Cost benefit analysis in the law, as in managing a business, is not concerned with reaching absolutely correct decisions. It is addressed at overcoming inadequacies in the decision making process and ensuring that decision makers recognise and consider the reasonably foreseeable economic consequences of proposals for legal change. The social welfare choices and the predictable costs of alternative courses of action can be identified rather more clearly than we tend at present to do.[44] Obviously the usefulness of this analysis depends upon the extent to which relevant considerations are factual or are capable of

being made factual.[45] From the lawyer's point of view, a difficulty is posed by reducing intangible factors to a money value. What, for example, is the value of a park to environmentally sensitive people in the neighbourhood? What is the value of a transplanted kidney to a dialysed recipient? An economist might tell us that the 'benefit' of education for literacy can be valued only in terms of the increase of a person's future income earning potential. However, money values cannot readily be placed upon the opening of doors in a person's mind.

Yet the difficulty of valuing intangibles and the differing monetary values which individuals would put upon obtaining various legal benefits, should not discourage law makers and law reformers entirely from a cost/benefit analysis of what they are doing and alternatives open to them. In fact, even in the courts a number of recent cases has seen the United States Supreme Court balancing costs and benefits in determining whether particular procedures argued for are required by the United States constitutional protection of 'due process of law'.[46] The Supreme Court developed the proposition that 'due process' does not necessarily and in every case require a trial type hearing but can be satisfied by lesser procedural safeguards. In reaching that view, the court took into account the rate of error, the direct cost of hearings and the fiscal and administrative burdens which additional or substitute procedural requirements would entail.[47]

Though the effort of the court has been criticised by lawyers and economists alike[48], it is significant that at last the process of approaching the administration of justice in a managerial way has begun in earnest in a common law country and at the highest level. Just as in the health services field where we must begin to face the cruel fact that there is an equation to be struck between the maintenance of an individual life and the cost to the community of medical services involved in that maintenance, so in the law there must be a franker acknowledgement that the provision of access to justice, too, has its price. There may be wrongs, there may be unfairness which, balancing cost and benefit, we simply choose to do nothing about. In a way, the law has always illicitly acknowedged this formula. But it has done so in an unscientific fashion, without any real endeavour to identify precisely the competing costs and benefits. My appeal is for a more businesslike approach to this equation. That does not mean an equation that ignores the difficult to measure 'value perspectives' or the long-run benefits of providing society with institutions and laws that command general acceptance and promote social well-being.

In the area of administrative law reform, the Commonwealth's Administrative Review Council, of which I am a member, has ventured upon an assessment of the costs

and benefits of administrative reforms. The provision of review by the Commonwealth Ombudsman, the Administrative Appeals Tribunal, the Federal Court, through the political process and elsewhere involves at least complex assessment of the advantages secured against the inevitable costs of the review process. In its Second Annual Report, the Administrative Review Council recognised the need to consider costs as well as benefits when making its recommendations on the review of administrative decisions.[49] In its most recent Fourth Annual Report, the Council has reverted to this issue:

> There are difficulties in comparing the costs and benefits of particular proposals for administrative review. ... Most of the costs of administrative review are, in principle, able to be expressed in monetary terms. ... The main benefits, however, are not quantifiable in monetary (or other) terms. The non-quantifiable benefits are nonetheless real and substantial. The most general and pervasive benefit is the encouragement it provides to public confidence in the justice of government decision-making. ... The administration will also benefit from independent review to the extent that it promotes an improvement in the quality of primary decision making. ... [T]he costs of administrative review are borne by government agencies in their budgets, while the benefits arise mainly outside the government structure and are obtained by the community and the individual members of it. The benefits which accrue to government are less immediate and are difficult to quantify. In these circumstances the Council believes that there is a danger that the costs may at times appear to loom larger than the benefits, particularly to the departments and authorities immediately concerned. ... However [the Council] recognises that the likely costs of a particular proposal should not be unreasonably high in relation to the benefits of external review. In the final analysis, the weighing of benefits and costs (so far as they can be estimated) is, in the absence of a means of quantitative analysis, a matter of judgment to be exercised by the Government.[50]

THE ECONOMICS OF LAW REFORM

Institutional law reform is not exempt from the obligations of cost benefit analysis, wherever the 'buck' finally stops: whether in the Treasury or in the Cabinet Room. Although Schools of Judicial Administration have been established overseas, none has yet been set up in this country. Court administrators have been appointed to some courts in Australia, but the adoption of well tried managerial techniques in the running of courts and the dispensation of justice, is still in its infancy in Australia. As a method of resolving disputes, courtroom trials and the adversary system itself would not score

high in an efficiency rating. The emphasis upon oral testimony which is the special feature of the common law trial procedure (but which is not reflected in the civil law traditions of Europe) involves considerable cost. This includes the cost of marshalling all the witnesses to be available at a given time, the cost of witnesses waiting to be heard, the resistance to documentary evidence and to short cuts, the virtual lack of limitation on cross-examination and indeed the whole process of the trial, and the cancellation of cases not reached with consequent costs to the litigants and to the community. All of this represents a managerial nightmare about what is after all basically a formal decision-making process. Yet that is not to say that the forms and ceremonies do not have their purpose or that the rituals, developed in some cases over eight centuries, do not perform valuable functions. Just the same, it is important for lawyers and judges to keep an open mind about improvements in the administration of justice. The reference to the Law Reform Commission on the reform of the law of evidence in federal courts in Australia may provide a useful means of testing some of our assumptions about our trial procedures. The advance of computers, particularly linked by telecommunications, will present courts with masses of documentary evidence, originating from multiple hands, which will simply have to be admitted in evidence, if the courts are not to grow unacceptably distant from the world of business, commerce and everyday life.

But evidence law reform is only one relevant task. The Australian Law Reform Commission has been given several projects which illustrate the themes I have been discussing. The reform of the law governing consumer indebtedness illustrates the need to update legal rules and procedures to reflect the enormous expansion of consumer credit which has changed indebtedness in a decade or two from a moral blemish to an everyday commercial reality. With the assistance of computer analysis of debt recovery process in New South Wales courts over a given period, we are examining a legal procedure that would encourage the aggregation of claims against consumer debtors. Non-payment of a debt is usually evidence of credit incompetence, whether permanent or transient. Instead of tackling the symptoms, with individual summonses, we may do better to use non payment of a debt as an indication of an underlying problem and seek to treat the disease, including by the provision of facilities for credit counselling.[51]

The law of insurance contracts is also under our study. Again this represents a body of legal principles developed in earlier commercial times applied today to a very different insurance market. Principles apt for the relationship between an insurer and a merchant venturing to the colonies may not be appropriate for the relationship with an insured who purchases his insurance pursuant to television or newspaper advertisements or through an independent broker.[52]

The Law Reform Commission's inquiry into class actions has led us to seek specifically the assistance of the Centre for Policy Studies at Monash University so that the costs and benefits of the class action procedure can be identified and weighed against alternative means of facilitating effective access to justice. In recent days, a number of Australian Vietnam veterans were given leave in the United States to join in a class action against certain chemical manufacturers. No facility for class actions for damages yet exists in Australia. The Law Reform Commission has been asked to say whether such a procedure for aggregating like issues of law and fact should be introduced in federal courts.[53] Australian industry has denounced the notion as 'business' final nightmare'. Yet it must be frankly acknowledged that, without the class action procedure, it is not really likely that an individual serviceman or even a small group of them could wage an equal litigious battle with powerful, well-funded, well-lawyered, resourceful chemical corporations. The Law Reform Commission's statutory charter requires it to advise on the adoption of 'new or more effective methods for the administration of the law and the dispensation of justice'.[54] A legal system which contents itself with paper rights, and is unconcerned about access to those rights, may not have its cost/benefit equation in proper equilibrium.

CONCLUSIONS

I have ranged widely but not, I hope, irrelevantly, for this audience on this occasion. My themes were four. In concluding I recapitulate them:

- First, the times in which we are living are changing rapidly. The microchip alone will make the life of managers and lawyers more unpredictable in the next 20 years. Business management, the law and the courts will not be exempt from the implications of change. Nor will management education which must itself be sensitive to changes at home and changes in our place in the world.

- Secondly, the law, my discipline, has to become more realistic, practical and, if you like, businesslike, in its dealing with economic issues. The law's procedures and personnel must adapt from a formal and verbalist approach to economic, tax and commercial issues, to one which looks at the economic realities. Such an approach, facilitated by different rules of evidence, different rules of interpretation and different professional training, has already been adopted in the United States: the greatest merchant economy and busiest common law country of them all. We in Australia can do better.

- Thirdly, a businesslike approach to law making will require closer attention in the future to the cost/benefit equation. An endeavour will be made, including by those advising in law reform, to assist government by identifying the costs and benefits of various social proposals. A realisation that justice and fairness have a price tag will restrain needless expense necessarily incurred by the proliferation of costly social equipment or the provision of regulation where the benefits gained, including the intangible benefits, may not be warranted by the cost society has to pay.

- Fourthly, in the business of institutional law reform, there is a need specifically to update the laws as they affect business and commerce. A number of the tasks given to the Australian Law Reform Commission specifically address these problems.

As you face the coming days of 'splendid isolation' I hope that you will take the opportunity, rarely afforded in a busy life, to consider the dynamic forces for change that are at work and the implications these forces have for you, your family, your enterprise and for Australia.

FOOTNOTES

* Honorary Associate in Management in the School of Economic and Financial Studies of Macquarie University.

1. W.G. Walker, 'Looking into the 1990s: Trends in Management Education', Address to the Australian Institute of Tertiary Educational Administrators, Canberra, December 1980, mimeo, 1, 2.

2. Cited Walker, 19.

3. ibid, 18.

4. See G.S. Reid, 'The Parliamentary Contribution to Lawmaking', Politics, XV(1), May 1980, 40.

5. Walker, 7.

6. ibid, 7-8.

7. ibid, 8.

8. Professor Berry of INSEAD, Fountainbleau, cited Walker, 18.

9. Walker, 15.

10. ibid, 11.

11. R.A. Posner, 'Some Uses and Abuses of Economics in Law', 46 Uni of Chicago Law Rev. 281 (1979).

12. ibid, 282.

13. Lord Wilberforce, 'Law and Economics', in B.W. Harvey (ed), 'The Lawyer and Justice', 1978, 73.

14. ibid, 75.

15. ibid, 76ff.

16. Australian Law Reform Commission, Discussion Paper No. 4, Access to the Courts — I, Standing : Public Interest Suits, 1978.

17. Mogul S.S. Co. v. M'Gregor, Gow & Co. (1892) 22 QBD 625.

18. 8 App. Cas., 716.

19. Wilberforce, 92.

20. Trade Practices Act 1974 (Cwlth), s.45.

21. ibid, s.45D.

22. ibid, s.46.

23. ibid, s.47.

24. ibid, s.48.

25. ibid, s.49.

26. ibid, s.60.

27. Wilberforce, 97.

28. loc cit.

29. The terms of reference are set out in Australian Law Reform Commission, Annual Report 1980 (ALRC 17), 63. See ibid, 43-44.

30. For example, Macdonald's Systems of Australia Pty Ltd v. McWilliam's Wines Pty Ltd & Anor (The Big Mac case), (1979) ATPR 40 — 108. See also J.A. Farmer, 'The Use of Survey Evidence in Trade Practices Cases', CCH Australia Trade Practices Reporter, 15-000. See also Australian Law Reform Commission, Discussion Paper No. 16, Reform of Evidence Law 1980, 1980, 8.

31. (1979) 53 ALJ 7.

32. P.P. McGuinness, 'The High Court Review' in National Times, 7 October 1978, cited (1979) 53 ALJ 7.

33. The Commonwealth v. Bank of New South Wales (the Bank Nationalisation Case), (1949) 79 CLR 497, 640-1.

34. Cited (1979) 53 ALJ 8.

35. Barwick CJ in Clark King & Co. Pty Ltd v. Australian Wheat Board and the State of New South Wales (1977-1978) 140 CLR 120, 156.

36. McGuinness, op cit, 8.

37. This problem is referred to in the author's note, 'Administrative Review on the Merits: The Right or Preferable Decision' in (1980) 6 Monash Uni Law Rev 171. See e.g. Pacific Film Laboratories Pty Ltd v. Collector of Customs (1979) 2 ALD 144, discussed ibid.

38. Commissioner of Taxation v. Westraders Pty Ltd (1980) 30 ALR 353, 355 (Barwick C.J. citing with approval Deane J. in the Federal Court).

39. ibid, Murphy J. at 371

40. The Australian Financial Review, 7 August 1980.

41. Wilberforce, 88.

42. ibid, 80.

43. See for example the observations of Sir Garfield Barwick (1979) 53 ALJ 36, 37.

44. D.L. Williams, 'Benefit-Cost in Natural Resources Decision Making: An Economic and Legal Overview', (1979) 11 National Resources Lawyer 761, 794.

45. H.P. Green, 'Cost-Risk-Benefit Assessment and the Law: Introduction and Perspective', 45 George Washington Uni Law Rev 901, 910 (1977).

46. The leading case is Mathews v. Eldridge, 424 US 319 (1976).

47. ibid, 334-5.

48. See e.g. J.L. Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication', 44 Uni of Chicago Law Rev 28 (1976).

49. Administrative Review Council, Second Annual Report, 1978, para. 9.

50. Administrative Review Council, Fourth Annual Report, 1980, paras. 43ff. Note that economists are beginning to look critically at reports concerning legal issues. For example, the recent report of the Victorian Committee on Conveyancing Laws (Mr. D. Dawson QC, Chairman) which recommended retention of the lawyers' monopoly in paid land conveyancing in Victoria, came in for scathing criticism by two economists. See J. Niewenhuysen and M. Williams-Wynn, 'Conveyancing: The Pitfalls of Monopoly Regulation Pricing', The Australian Economic Review, 3/1980, 29. Care must be taken in venturing into cost/benefit analysis. A recent unpublished paper by P.L. Swan, Is Law Reform Too Important to be Left to Lawyers? takes the Australian Law Reform Commission to task for proposing in its report, Human Tissue Transplants (ALRC 7) that commerce in human tissues should be forbidden by law. Swan sees this as evidence of a 'distrust of and dislike for market mechanisms'. However the Commission did not feel able to analogise body parts with automobile parts as Swan does. Sometimes cultural and emotional factors must be weighed in a realistic cost/benefit exercise

51. Australian Law Reform Commission, Insolvency: The Regular Payment of Debts (ALRC 6) 1976.

52. ibid, Insurance Agents and Brokers (ALRC 16) 1980.

53. ibid, Discussion Paper No. 11, Access to the Courts - II, Class Actions, 1979.

54. Law Reform Commission Act 1973, s.6(1)(a)(iv).