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MEXICO CITY, MEXICO, JULY - AUGUST 1981

Sub-Theme 1 : The Legal Order and Economics

LAW REFORM AND ECONOMICS

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

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THE HON. MR. JUSTICE M.D. KIRBY

BIOGRAPHICAL NOTE

Mr. Justice Kirby is Chairman of the Australian Law Reform Commission, a permanent federal authority established by the Australian Parliament to report on the review, modernisation and simplification of federal laws in Australia. He is a Deputy President of the Australian Conciliation and Arbitration Commission, a national industrial law body. He is also a Member of the Administrative Review Council, a body established to advise on federal administrative law reforms.

Between 1978 and 1980 he was Chairman of an Expert Committee of the Organisation for Economic Co-operation and Development (OECD) in Paris. The committee devised Guidelines, recently adopted by the Council of the OECD, governing trans border data barriers and the protection of privacy. He was recently appointed to the Australian National Commission for UNESCO.

Mr. Justice Kirby was educated at Sydney University where he took degrees in Arts, Laws and Economics. He is an Honorary Associate in Management in the School of Economic and Financial Studies of Macquarie University (Sydney, Australia) and Deputy Chancellor of the University of Newcastle (Australia).

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ABSTRACT

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The legal order today in all countries is facing unprecedented challenges from changing social conditions, business methods and from fast developing science and technology. The incapacity of current lawmaking institutions to cope with the pressures of change have been recognised in many common law countries by the development of permanent law reform agencies. But the establishment of these agencies requires their members to identify, more clearly than in the past, the normative values by which legal reform is to be judged.

In the search for these values, economic considerations are plainly relevant. These include a more realistic approach by legal institutions and practitioners to the economic and commercial realities of the law. But they also include a more frank and systematic approach to the assessment of the costs and benefits of legal reform. Although this endeavour is in its infancy, it is suggested that lawmakers generally will have to pay more regard in the future to the cost/benefit analysis of the economic consequences of their actions.

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THE LAW REFORM MOVEMENT

All societies today face the challenge of change. This challenge affects the law, its practitioners and institutions. Among the forces for change that are at work in the law are the growth of the number and importance of decisions made by government affecting all persons in society, the changing size and methods of modern business corporation, including trans-national corporations, changing ethical and social values, attitudes to the family, sexuality, racial and religious discrimination and the like, but above all the dynamic of science and technology. Developments in the new information sciences, biological sciences and nuclear sciences all pose challenging problems for mankind, upon which the legal order will be expected to have relevant things to say.

Throughout the common law world, including Australia, these pressures for change have coincided with a recognition of the inability of established law-making institutions to cope adequately with the needs of reform. Parliament, the Executive Government and the judiciary move slowly in the development of new laws. The pressures for change wait for no man and no institution. It is for this reason that throughout the common law world, but especially in the countries of the Commonwealth of Nations, a remarkable development has occurred, principally within the past decade. I refer to the development of law reform agencies, specifically set up to assist their respective Parliaments and Executive Governments in the reform, modernisation and simplification of the law. An institutional defect of the common law system of judge-made law, developed 'from precedent to precedent', is the inability of the judicial law reformer to choose suitable occasions for reform. Too much is left to chance: the chance that an important principle will arise in inter-partes litigation, the chance that the litigant will pursue his case and appeal to an authoritative court, the chance that the judges will feel able and willing to press forward the principle and develop an apt new rule.

Since the development of the elected representative parliament, the judges of the common law tradition, at least in Australia, have been less inclined than their predecessors were, boldly to develop new principles and reform laws everywhere old precedents are considered out of keeping with the need and mood of the present time. With notable exceptions, judges in Australia[1] and Britain[2] assert that the forensic medium is not well adjusted to major efforts in law reform. They prefer to leave it to Parliament. But Parliament is all-too-often unequipped, uninterested, distracted by political battles and the recurring pressures of democracy. It is in these circumstances that law reform agencies have been established to assist Parliament. These bodies are generally set up with a small nucleus of commissioners drawn from the various branches of the legal profession: the judiciary, practitioners and law teachers. Uniformly, they operate by processes of consultation. The Australian Law Reform Commission, for example, never reports before conducting national seminars and public hearings in all parts of the Australian continent.

The finding and application of a given rule, whether in a code, legislation or judicial pronouncement, is a craft with which lawyers are familiar. The development of new rules, appropriate for changing times, imposes on lawyers, including law reformers, new and different rigours. One of the most severe is the identification of the values according to which reforms will be proposed. In English-speaking countries, it is rare to find committees of inquiry, departmental officers or even judges, going beyond criteria of such generality as 'fair', 'just', 'rational' or 'supportable'. Institutional bodies set up to propose fundamental, significant and enduring reform of the law should be able to do better than this. Increasingly, there is a demand that the values which motivate and guide institutional law reformers should be spelt out. Some urge this to avoid ad hoc, casual judgments.[3] Others contend that it is necessary if law reform is to be more than 'hobby-horsing'[4] or 'tinkering'[5].

Elsewhere, the present writer has explored this issue[6] and the difficulty of achieving institutional consensus about fundamental values. Most commentators who have addressed the problem have agreed that one of the issues to be faced is the economic cost/benefit question: when the existing law or lack of law is compared with the new proposal and an attempt is made to assess the competing costs and benefits of change.[7] A disciplined approach to the costs of benefits of law reform is something new. The proliferation and development of law reforming agencies throughout one of the world's major legal systems suggests that we are going to hear more about law and economics.

LAW AND ECONOMICS

The clearer realisation of the interaction between law and economics is one of the most interesting developments of recent years. 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.[8] 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.[9]

Legal developments can sometimes hamper or constrain managers and business activity. Businessmen constantly complain, but it should never be forgotten that legal developments and legal ingenuity can also advance the economy and market efficiency. This point was illustrated by Lord Wilberforce, one of the foremost living expositors of the English law, in his Holdsworth Lecture titled 'Law and Economics'.[10]

> 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 agrarian 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.[11]

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 British Crown for particular purposes specified in the Charter — and a few supportive judicial decisions and expansive legislative elaborations.[12] 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 Queen Elizabeth I of England 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, and in the international 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 to society as the proprietary shareholders, reflects the gradual retreat of the common law inherited from England from the powerful influence of propertied interests. At a political level, we have seen that same retreat in the grant of universal suffrage. In a curial context, one of the questions the Australian Law Reform Commission has been asked to examine is whether 'standing' to be heard before a court 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.[13] 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 common law 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'.[14] 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.[15]

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, perhaps more than most countries, commit to courts and court-like tribunals many economic decisions of the greatest complexity and highest national importance. The national minimum wage, for example, is fixed by a commission, manned in very large proportion by lawyers, typically proceeding in a curial fashion with evidence and submissions, yet making decisions of a complex economic and managerial character.

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. 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 national Trade Practices Act which deals with anti-trust matters. 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[16], secondary boycotts[17], monopolisation[18], exclusive dealing[19], resale price maintenance[20], price discrimination[21] and merges[22]. 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 apply, elaborate, uphold and, where need be, enforce.

The existence and indeed the proliferation of provisions of this kind led Lord Wilberforce 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.[23] 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.[24]

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, non court tribunals dealing in economic issues should be constituted to include economic and managerial as well as legal skills. 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 must be broadened. In Australia this is another 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.[25] The need for reform is illustrated, for example, by the difficulty of getting before the court, survey evidence concerning relevant public perceptions in anti-trust cases.[26]

The Federal Court of Australia recently rejected survey evidence in the case involving public perceptions of a 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 the highest court in Australia, the High Court of Australia, exempt from involvement in economic questions. On the contrary, many of its constitutional decisions have profound economic implications. Section 92 of the Australian Constitution, for example, almost demands, as it has been interpreted, a constitutional economic hypothesis ('... trade, commerce and intercourse among the States ... shall be absolutely free'). Criticism in the media of the pronouncements of Australia's High Court judges concerning economic questions has become much more visible of late. The phenomenon was called to notice by the editor of the Australian Law Journal in a note in 1979 titled 'Pronouncements of Judges on Questions of Economics'.[27] An article by a prominent economic journalist and now editor of the Australian Financial Review, in blunt terms, had tackled the High Court's alleged 'pretentions as an economic legislature'[28]:

> 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.

A recent wave of interest in Australia in the Court's approach to tax avoidance cases also reflects a growing pressure for a more realistic approach to statutory interpretation, where the statute's business is principally economic and fiscal. Though Chief Justice Barwick declared that a strictly literalist approach to taxation statutes was essential if the rule of law itself were not to be subverted[29], Mr. Justice Murphy, another member of the Court, 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.[30]

This latter observation inspired many Australian editorialists. 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.[31]

This is not just a local Australian 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 rather 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.[32]

Lord Wilberforce points out that in this respect 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.[33] 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 applicable in most common law countries limit courts receiving material which managers, businessmen and economists would regard as plainly relevant. The judges themselves are not always equipped with the understanding of and sensitivity to economic issues. Legal practitioners are frequently incapable of providing assistance that goes beyond the formalistic skills of verbal dexterity and analogous argument. A common obstacle to change is the abiding faith of those at the apex of the law in many common law countries in the merits of oral argumentation without formal time limits.[34] Yet this 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. It would be my hope that the next decade will see other common law courts venturing down the same track as their American counterparts to written briefs of argument, with supporting documents and analyses of social issues. 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 lawmaking 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 accurately than at present. Though lawyers do not generally like to acknowledge it, frankly, 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.[35] Obviously the usefulness of this analysis depends upon the extent to which relevant considerations are factual or are capable of being made factual.[36] From the lawyer's point of view, it is often difficult to reduce intangible factors to money values. 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 the alternatives open to them. In fact, even in the courts a number of recent cases has seen the United States Supreme Court overtly balancing costs and benefits in determining whether particular procedures argued for are required by the United States constitutional protection of 'due process' of law.[37] The Supreme Court developed the proposition that 'due process' does not necessarily and in every case require a trial type of 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.[38]

Though the effort of the Court has been criticised by lawyers and economists alike[39], 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 have begun 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 about which, balancing costs and benefits, we simply choose to do nothing effective. 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 disciplined approach to this equation. That does not mean an equation which 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, in Australia the national Administrative Review Council, of which I am a member, has ventured upon an assessment of the costs and benefits of administrative law reforms. The provision of review by a Federal Ombudsman, a new Federal Administrative Appeals Tribunal, the Federal Court of Australia, through the political process and elsewhere involves at least complex assessment of the advantages secured from new forms of review 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.[40] In its most recent Fourth Annual Report, the Council has reverted to this issue expressing clearly the need for caution:

> 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 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.[41]

Institutional law reform is not exempt from the obligations of cost/benefit analysis, wherever the 'buck' finally stops: whether in the Treasury Department, in the Cabinet room or on the Prime Minister's desk. Although Schools of Judicial Administration have been established overseas, none has yet been set up in Australia. 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. 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 to anything like the same extent in the civil law tradition) involves considerable cost. It 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.

CONCLUSIONS

The law, its personnel and institution, are passing through a period of remarkable change, common to most countries. The change in society promotes the need for change in the law. A recognition of the institutional incapacities of current lawmaking machinery has led most of the countries of the common law world to develop, in the past decade or so, permanent law reform commissions.

The establishment of these commissions has posed, more directly than hitherto for the lawyer members that make them up, questions about the normative values which should guide change and development in the law. One at least of these values is said to be an efficient use of scarce resources and an assessment of the costs and benefits of the particular reform proposed.

There is a growing realisation of the need for the discipline of the law to become more realistic, practical and, if you like, businesslike in its dealings 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: possessor of the greatest merchant economy and the busiest common law country of them all. It is needed elsewhere.

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 more precisely 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.

There is no doubt that a study of this issue and an assessment of its importance is one worthy of those concerned with the philosophy of law.

FOOTNOTES

1. A startling recent example in Australia is the decision in The Queen v. O'Connor (1980) 29 Australian Law Reports 449. In that case it was held that a defendant might escape criminal liability for want of the requisite criminal intent by reason of his voluntarily induced alcohol or drug intoxication. The social problem created by the decision was recognised, but was said to be one for Parliament, not the courts. There are many other recent examples of this approach in Australia.

2. See, for example, Myers v. Director of Public Prosecutions [1965] AC 1001, especially Lord Reid at 1022.

3. G. Woodman, 'A Basis for a Theory for Law Reform', (1975) 12 Uni. of Ghana LJ, 1.

4. (1976) 50 Australian Law Journal 259, 260.

5. 'Games People Play', (1976) 126 New LJ 1006.

6. M.D. Kirby, 'Reforming the Law' in A.E.S. Tay & E. Kamenka, 'Law-making in Australia', Melbourne, 1980, 39.

7. See, for example, G. Sawer, 'The Legal Theory of Law Reform' (1970) 20 Uni. Toronto LJ, 183, 188.

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

9. ibid, 282.

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

11. ibid, 75.

12. ibid, 76ff.

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

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

15. 8 App. Cas., 716.

16. Trade Practices Act 1974 (Aust.), section(s) 45.

17. ibid, s.45D.

18. ibid, s.46.

19. ibid, s.47.

20. ibid, s.48.

21. ibid, s.49.

22. ibid, s.60.

23. Wilberforce, 97.

24. loc cit.

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

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

27. (1979) 53 Australian Law Journal 7.

28. P.P. McGuinness, 'The High Court Review' in National Times, 7 October 1978, cited (1979) 53 Australian Law Journal 7.

29. Commissioner of Taxation v. Westraders Pty Ltd (1980) 30 Australian Law Reports 353, 355 (Chief Justice Barwick citing with approval Justice Deane in the Federal Court).

30. ibid, Justice Murphy at 371

31. The Australian Financial Review, 7 August 1980.

32. Wilberforce, 88.

33. ibid, 80.

34. See, for example, the observations of Sir Garfield Barwick in (1979) 53 Australian Law Journal 36, 37.

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

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

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

39. ibid, 334-5.

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

41. Administrative Review Council (Aust), Second Annual Report, 1978, para. 9.