be interesting to compare and contrast the emerging reports. There is little doubt that on the subject matter of reform of the legal profession, it is the NSWLRC which sets the pace. One day, someone will write an analysis of the reforms which were adopted, in advance of the NSWLRC final report, not only in N.S.W. but in other states of Australia. Points upon which there has already been distinct progress include:

- lay involvement in complaints procedures
- adoption of compulsory professional indemnity insurance
- advertising by lawyers
- specialisation reform

The NSWLRC Annual Report deals, of course, with the other references before the Commission. It contains a handy list of all references made to the Commission and an 'action record' which boasts the high measure of success attained by the Commission in the implemention of its proposals. During the year under review, the proposals on frustrated contracts were implemented. Members of both sides of the Houses of State Parliament praised the 'high quality' of the NSWLRC report and its 'innovative' proposals. The report ends on a gracious note, even praising these pages!

tax avoidance reform?

> Once upon a time, Robin Hood was an outlaw, but now it's the Sheriff of Nottingham who dresses in forest green!
>
> R.B. Cook, 8 *Australian Accountant,* Sept. 1980, 523.

Recent decisions of the High Court of Australia concerning 'ingenious' manipulation of the Income Tax Assessment Act 1936, to reduce the incidence for certain taxpayers, of income tax liability, have produced something of a storm and calls for reform. Specifically, proposals have been made that section 260 of the Act, which deals (ineffectively) with the voiding of every 'contract, agreement or arrangement' designed to defeat, evade or avoid tax, should be referred to the Australian Law Reform Commission.

The debate about this subject has been going on for years. It took on a new lease of life with the conference of the Australian Institute of Political Science in Canberra in 1980. The proceedings of that conference have now been published under the title *'The Politics of Taxation'* (edited by John Wilkes). Lord Ralph Harris urged that 'the momentum of government spending, taxation and resulting inflation must be halted ... [and] reversed'. Professor Russell Matthews of Canberra asserted that the attempt to achieve equity in the Australian tax system through progressive income tax had 'failed'. He said that the system of taxation in Australia was unsuitable in relation to most of the other objectives of a modern taxation policy. But it was the paper of Mr. S.E.K. Hulme Q.C. of the Melbourne Bar which became the subject of the greatest public controversy. Mr. Hulme's comments were to the effect that he was the only person in Australia humble enough to think he could not redraft the section and arrogant enough to believe that nobody else could either!

One decision of the High Court on this subject drew extensive newspaper attention. On 5 August 1980 reasons for judgment were handed down in *Commissioner of Taxation* v. *Westraders Pty Ltd* by a scheme described by the Chief Justice (Sir Garfield Barwick) as 'ingenious'. A pastoral company claimed a large deduction from tax by reason of a tax loss assigned to the taxpayer from a share trading partnership. The majority of the High Court justices upheld the 'ingenious' design and dismissed the Tax Commissioner's appeal from the Full Federal Court. But Justices Murphy and Wilson dissented vigorously and their dissent caught the editorialists' eye.

Chief Justice Barwick led the majority view:

> [T]he case affords an opportunity to point out the respective functions of the Parliament and of the Courts in relation to the imposition of taxation. It is for Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax. The function of the Court is to interpret and apply

> the language in which the Parliament has specified those circumstances. The Court is to do so by determining the meaning of the words employed by the Parliament according to the intention of the Parliament which is discoverable from the language used by the Parliament. It is not for the Court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament may have intended to achieve, though not expressed in the actual language employed.

The Chief Justice expressly endorsed the language of Mr. Justice Deane in the Full Federal Court, when the latter said:

> For a court to arrogate to itself, without legislative warrant, the function of overriding the plain words of the Act in any case where it considers that overall considerations of fairness or some general policy of the Act would be best served by a decision against the taxpayer would be to substitute arbitrary taxation for taxation under the rule of law and, indeed, to subvert the rule of law itself.

The well-worn case of *I.R.C.* v. *Duke of Westminster* [1936] AC 1, was called in aid. The Chief Justice even felt that the 'principle to which [Justice Deane] calls attention is basic to the maintenance of a free society'.

Mr. Justice Murphy, after dealing with the legal issues, turned his attention to some of the wider implications of the majority view. He propounded a novel thesis that such 'literalist' interpretation of the income tax legislation, far from being good legal technique (as it is claimed to be in orthodox circles) was in fact a distortion of good lawyering and bound to undermine the proper relationship between the courts and Parliament:

> The transactions in this case are conceded to be a major tax avoidance scheme. The supporters of the scheme seize upon the bare word of s.36A [of the Income Tax Assessment Act] and claim that these should be applied literally even if for purposes not contemplated by Parliament. The history of interpretation shows the existence of two schools, the literalists who insist that only the words of an Act should be looked at, and those who insist that the judicial duty is to interpret Acts in the way Parliament must have intended even if this means a departure from the strict literal meaning. ... It is an error to think that the only acceptable method of interpretion is strict literalism. On the contrary, legal history suggests that strict literal interpretation is an extreme which has generally been rejected as unworkable and a less than ideal performance of the judicial function. It is universally accepted that in the general language, it is wrong to take a sentence or statement out of context and treat it literally so that it has a meaning not intended by the author. It is just as wrong to take a section of the tax Act out of context, treat it literally and apply it in a way which Parliament could not have intended.

The judge then turned to a possible undesirable context that could flow from what he described as 'the literalist' approach, so often the refuge of tax avoiders:

> In tax cases, the prevailing trend in Australia is now so absolutely literalistic that it is becoming a disquieting phenomenon. Because of it, scorn for tax decisions is being expressed constantly, not only by legislators who consider that their Acts are being mocked, but even by those who benefit. In my opinion strictly literal interpretion 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. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.

The appeal was dismissed 3:2.

Perhaps it is a sign of the times that, with the High Court in a permanent place, newspapers are paying more attention to its decisions. The editorialist of *The Australian Financial Review* (7 August) sprang to life:

> It has by 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. ... Ever since the High Court made it clear that it held s.260 of the Act to have little value, then the way was laid open for the discovery of even more ingenious schemes which required only consistency with the letter of the law. The spirit was considered to be irrelevant.

The editor, after asserting that Mr. Justice Murphy's 'eloquent arguments' would increasingly strike a chord in the hearts of the vast majority of the community 'who do not benefit' from the devices which find favour with the High Court majority, he went on to explore solutions including:

- a non-legal final tax tribunal (difficult from a constitutional point of view)
- reform and simplification of the entire tax Act
- reform of s.260 of the Act to strike effectively at avoidance

The last, it was suggested, 'might be a task which could be committed to a body like the Law Reform Commission'. Of wider scope was the suggestion of the lead editorial in the Melbourne *Age* (8 August 1980):

> The Government should continue to plug the loopholes as they come to notice until it can thoroughly review the entire system, preferably by referring the legislation to the Law Reform Commission or a special inquiry. Ultimately, responsibility for a fair and reasonable taxation system must rest with Parliament which is accountable to the people, not with the Courts or bureaucrats.

In Parliament on 9 September, Federal Treasurer John Howard declared that a reference to the ALRC would not solve the tax avoidance problem. Responding to a question by Mr. Ralph Jacobi (Lab. S.A.) he said:

> There has rarely been an Act or network of laws as much inquired into as the Australian taxation laws. But I don't believe the problem is to be solved by referring it to the Law Reform Commission. There is a common and misplaced view that all we have to do is get hold of expert draftsmen, put them to work on the taxation laws and all our problems would be solved.

It was difficult to reach a consensus on the laws, declared the Treasurer. Meanwhile it is understood that a Departmental inquiry is on foot in the Treasury addressed to s.260 of the Income Tax Assessment Act. It may not be true, but rumour even has it that Mr. S.E.K. Hulme Q.C., despite earlier 'arrogant' assertions, is advising on this 'impossible' task!

well met in Lagos

> But we from here are to go: some to desert Africa ... and others of us amongst the Britons who are kept far away from the whole world
>
> Virgil, *Eclogue*, i, 64

The end of August 1980 saw a gathering, without precedent, in Lagos, Nigeria, of lawyers from all parts of the Commonwealth of Nations. It was a remarkable meeting of common lawyers from different continents, cultures, languages, linked only by their common inheritance of the English tongue and of the traditions of the common law of England which now flourishes amidst more than a quarter of mankind.

The conference was opened by the President of the Federal Republic of Nigeria, Alhaji Shehu Shagari, on 18 August 1980. In his opening paragraph, the President struck a note familiar to law reformers.

> Like any other sphere of knowledge, Law is dynamic and admits changes and new experiences. ... As Law is meant to serve the society as an accepted means of ensuring justice, it must be so fashioned and geared towards the achievement of that goal. This is what makes it dynamic. Since society is by nature dynamic, the laws that regulate its activities and orderly existence must be reviewed from time to time so as to make them relevant. I am sure it is in this kind of conference that you can look at and discuss those areas of law which are susceptible to abuse or whose relevance to modern society can be questioned.

The President pointed out that this was the first such meeting of Commonwealth lawyers on the African Continent. The meeting was dominated by participants from Africa, nearly 2,000 of them, far outnumbering lawyers attending from the Old Commonwealth. From Australia, the Chief Justice, Sir Garfield Barwick, delivered a lead paper on 'The Judicial Process Today' and the Chairman of the Law Reform Commission, Mr. Justice Kirby, delivered a paper on 'Law Reform in the Commonwealth of Nations'. He also chaired a session on 'The Role of the Judiciary in the New Commonwealth Countries'.

Chief Justice Barwick, speaking without notes for more than an hour, addressed himself to the problems which beset the due and efficient administration of the judicial process in common law countries. He expressed concern about such matters as:

- the prolongation of cases by expanding legal aid
- the increase in complexity of litigation, including by reason of law reforms