Reported in the Melbourne *Age*, Professor Colin Howard, Dean of the Melbourne Law School, said that the proposal was 'an attempted intrusion by government in the judicial process'. Unnamed Sydney barristers quoted in the *Sydney Morning Herald* (29 May 1981) described the proposal as 'naive', 'a piece of nonsense' and even 'dangerous'. The dangers listed included:

- adopting the philosophy which allows you to say that although an Act says A, B and C, you think it obvious that Parliament intended to say, not A, B and C but something else;
- promoting an invitation to 'sloppy' drafting of laws.

Other critics pointed to comparable legislation in New Zealand and South Australia which has had no significant recorded effect in altering the approach to statutory interpretation there. Perhaps time *will* tell. Perhaps the mood is right for an effective change in the approach to statutory instruction. Certainly, present rules tend to encourage very great detail in legislative provisions. With the growing mass of legislation, this adds to the burden upon lawyers, courts and the community.

As Lord Scarman told the House of Lords, the debate between the 'purposivists' and the 'literalists' will never end. But the last quarter has certainly seen the pace of the debate quicken.

economics and law: symbiosis

> The age of chivalry has gone. That of sophisters, economists and calculators, has succeeded.
>
> Edmund Burke,
> *Reflections on the Revolution in France*

cost/benefit law reform. The announcement during the last quarter of significant cuts in the Federal public sector in Australia and the transfer of some functions to the States represents an Australian Federal response to moves that are already well under way in Mr. Reagan's administration in the United States and Mrs. Thatcher's government in Britain. Law reformers, reporting to government and Parliament, cannot ignore the economic environment in which their proposals will be considered. The ALRC report, *Insurance Agents and Brokers* (ALRC 16, 1980) contains the clearest statement yet of the ALRC recognition of this need to take into account, in judging the need for reform and the design of any reform machinery proposed, the costs and benefits that are inevitably involved in the law reform process. Until now, the costs of reform have rarely been identified with precision and almost never weighed against the desired benefit, to judge the results of the equation. In the ALRC report, the issue of cost/benefit is confronted in many places. For example, one of the guiding principles espoused by the Commission, and adopted from the philosophy of the Trade Practices Act 1974, is that:

> Interference with competition is to be justified, if at all, by the public benefit which results from a particular form of regulation. ... Diminution of competition might increase the cost of insurance and adversely affect the range and quality of services offered and the development of the market in response to the needs of the insuring public. Reforms of regulation which might have an anti-competitive effect on the insurance industry or on any section of it, should be avoided.

In judging the particular form of regulation for insurance brokers to be recommended, the Commission had before it several models:

- pure self-regulation;
- increased criminal penalties;
- accreditation by industry bodies, relying on advertisement and persuasion rather than legislative force;
- registration and compulsory professional indemnity private insurance; and
- licensing with compulsory insurance.

The ALRC discussed the various models and the choices before it. It assessed and explained cost estimates and concluded that the costs shown were 'amply justified' to prevent some of the breaches of financial requirements imposed on brokers which, until now, had gone undetected until major losses occurred. The report established that between 1970 and

1979 the insurance industry had had 27 broking failures, representing total losses of $7.25 million. That sum has doubled to $15 million losses in the 18 months since the ALRC report was delivered.

Whilst Federal legisation is still under consideration, Western Australia has gone ahead with a Bill to provide for the regulation of insurance brokers. New South Wales, Victoria and South Australia have also promised legislation unless Federal legislation is introduced. Whilst in May 1981 the economic editor of the *Herald* and the editorialist of the *Age* cautioned against regulation which would 'advantage brokers rather than the public interest', Ian O'Brien, Secretary, Public Affairs AMP Society, a consultant to the ALRC, declared that inaction on the ALRC report would condemn the insurance industry to chaos:

> If the Federal Government fails to act it will be turning the clock back 35 years and condemning the whole industry to the chaos that ruled ... when six States and the ACT all had their own idea of how this important industry should be controlled.

Clearly, we have not heard the end of cost/benefit analysis in law reform in Australia. Justifying the new NSW Law Reform Commission legislation, State Attorney-General Walker explained the provision for non-lawyer members of the NSWLRC by reference to the importance of economic skills:

> In references encompassing socio-economic areas lawyers make a distinctive contribution, but this is by no means the only contribution. Fresh incentive and stimulus can be given to the Commission's work by the ideas, suggestions and judgments of persons outside the legal discipline.

In its project on class actions, the ALRC has already carried out preliminary inquiries with the Centre for Policy Studies at Monash University concerning an approach to cost/benefit analysis of the respective advantages and disadvantages of class actions as against other means of enabling people to obtain justice.

administrative analysis. Nowhere is the cost/benefit debate more frequently raised in Australia than in the context of the new federal administrative law. In a discussion paper for the International Personnel Management Association's Symposium on Public Personnel Administration in Salzburg, Austria, in October 1980, the Chairman of the Australian Public Service Board, Sir William Cole, pointed out that:

> Tight resource constraints are a fact of life in most public services and are unlikely to change. Demands upon public services are more likely to increase than diminish. Within this environment, productivity improvement is essential, although it can be only marginal in its effect on total government outlay.

Whilst conceding that there are difficulties in measuring public service productivity and that there is no proved or agreed approach to the task of measurement, Sir William suggested a number of tests that could be asked concerning the 'intrusive not to say interventionist' policies of government in Australia in the past 40 years.

The Administrative Review Council has shown itself sensitive to the cost/benefit issue in a public service trapped by converging pressures to limit resources and even reduce manpower, on the one hand, and to increase and improve services to the community, on the other. In its *Fourth Annual Report 1980,* the ARC reverted to the assessment of the inevitable costs of the review process involved in the new administrative law (Administrative Appeals Tribunal, the Federal Ombudsman, judicial review legislation, the F.O.I. Bill and the ARC itself):

> 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 nevertheless real and substantial. The most general and pervasive benefit is the encouragement it provides to public confidence in the justice of government decision-making. ... [T]he 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, it recognises that the likely costs of a particular proposal should not be unreasonably high in relation to the benefits of external review. (para 43).

In the United States, the Supreme Court has ventured upon the task of balancing costs and benefits in determining whether a particular procedure argued for should be required by the United States constitutional protection of 'due process of law'. In *Mathews* v. *Eldridge* 44 USLW 319 (1976) the court developed the proposition that 'due process' did 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. Although this decision has been criticised by lawyers and economists alike, it is perhaps significant that, at last, the process of approaching open policy decisions raised by generalised constitutional or statutory language, has led a court at the highest level to seek out economic assistance. Will we see it come to Australia?

managerial look at law. In an address opening the 1981 Seventh Advanced Management Programme of Macquarie University, the ALRC Chairman, Mr. Justice Kirby, took a 'managerial look at the law'. One of the most interesting developments of recent years, he declared, was the 'clearer realisation of the interaction between law and economics'. Whilst legal developments could sometimes hamper or constrain managers and business activity, it should never be forgotten that legal developments and legal ingenuity could also actually advance the managerial art and promote market efficiency. The speaker referred to Lord Wilberforce's illustrations in his lecture, 'Law and Economics', published in B.W. Harley (ed), *'The Lawyer and Justice'*, 1978, a collection of the Holdsworth Lectures. Lord Wilbeforce pointed out:

> Invention of the limited company came about — first in [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.

Lord Wilberforce pointed out that the limited liability company was an almost accidental outgrowth of the adaption of the earlier Charter Company. Mr. Justice Kirby suggested that the process of change in the corporation had not ceased:

> What began with the Charter Company in the time of Elizabeth I and the period of overseas colonisation 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 suffrage. 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. 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.

Lord Wilberforce's lecture points to the difficulty of courts deciding complex economic issues 'dressed up' as purely legal questions. The *cri de coeur* of succeeding judges faced with such problems are recorded by Lord Wilberforce. He suggested, as a solution:

- better training of lawyers, including in economic issues;
- inclusion of non-lawyer economists in courts having economic decisions to make;
- a greater receptiveness of the court to receiving wide-ranging economic evidence to assist in giving content, in a realistic way, to economic expressions.

lord scarman's view. Addressing the Commerce and Industrial Group of the English Law Society, another English law Lord, Lord Scarman, first Chairman of the Law Commission, traversed similar territory. On the whole, he expressed the view that English judges and the English legal profession had 'done an immense amount of good work' developing commercial law since the end of the Second War. He instanced the development of the Mareva injunction, based upon continental law principles, as an instance of the creative period through which commercial law was passing. He was more cautious about the adjustment of English commercial law to the E.E.C.:

> Are we fitting in our law to the Treaty of Rome and to the regulations and now the directives emanating from the European institutions? Here I have an unpleasant feeling that we are not being sufficiently flexible and I have great fears that we shall not actively get our law moving into parallel progress with Europe.

Hot on the trail of United States moves towards so-called 'rent-a-judge' (the proliferation of retired judges offering for arbitration of cases to clear the logjam in the courts, especially in business cases) Lord Scarman sounded a note of caution about the advance of arbitration following the 1979 Arbitration Act. He expressed the fear that arbitration, if it takes hold, may tend to 'undermine' the ability of our commercial law to develop systematically in response to changing commercial needs.

keeping up with economics. At least one of Lord Wilberforce's suggestions seems to have been heeded. Increasing numbers of young students are now coming to the law after an undergraduate course in economics or commerce. A glance even at Commonwealth legal publications will disclose a growing number of papers on the interface between law and economics. Typical is the paper by Professor C.G. Veljanovski of the Centre for Socio-Legal Studies, Oxford, 'An Economic Approach to Law: A Critical Introduction'. (See (1980) 7 *British Journal of Law and Society* 158). The author outlines the major development in North American legal scholarship over the past decade in the 'increasing use of economics'. It is to be found in:

- articles in major law journals;
- teaching of law in most universities;
- appointment of economists to law schools;
- establishment of reseach institutes and centres in law and economics.

Perhaps the closest we get in Australia is the Centre for Policy Studies at Monash University, in which a number of the corporate/trade practices law teachers are taking part. Veljanovski, whilst lamenting that in Britain the field has been relatively neglected, says that the times are changing. His article is designed to illustrate why change is needed and how it can best come about, not only in market law but also in a variety of non-market activities such as family law, marriage and divorce and even suicide and abortion reform:

> The economic approach to law is part of this wider development which has resulted from the progressive realisation among some economists that the core of economics — the theory of choice — is in principle applicable to all human and institutional behaviour. ... The restriction of economics to the study of prices, money and material welfare is now no longer applicable and contemporary economics is better described as a methodological approach rather than a discipline defined by its subject matter.

Whilst concluding that lawyers have much to learn, especially in the economics of public law, the author cautions against too facile an application of economic theory to the wide range of circumstances and assumptions that arise for legal regulation. The ALRC Chairman, in his Macquarie University address, put this thought thus:

> What 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 may 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.

companies and securities commission. One of the foremost Australian spokesmen in favour of a more realistic approach to economic issues in the law is Mr. Leigh Masel, Chairman of the new national Companies and Securities Commission. In an address on 'Regulation of Securities Markets' to the Committee for Economic Development of Australia in November 1980, he not only explained the scheme and objectives of the proposed uniform companies legislation. He also argued out the advantages of self-regulation, especially to uphold 'ethical standards beyond those any law can establish'. But he pointed out that a careful watch must be made for complaceny or the tendency 'for a self-regulatory organisation to carry on its business in an anti-competitive or monopolistic manner'.

In another address, to the Institute of Directors in Victoria, he called attention to the differing ways in which economists and lawyers tend to look upon take-overs:

> Whilst market forces tend to emphasise efficiency, regulation emphasises investor confidence. Legislation affecting take-overs has, therefore, been generally directed towards trying to achieve the best of both worlds, that is increasing investor confidence by ensuring a fair and informed market, but without detracting from its efficiency.

The economic critique of the Dawson report on Conveyancing Laws, Practices and Costs in Victoria contained in *The Australian Economic Review,* Third Quarter, 1980, 29, is a forerunner of what law reformers and legal administrators and institutions have to expect in the future. Like it or not, court decisions, reform reports and the exercise of discretion will be submitted to a new and somewhat unfamiliar analysis. Things until now left vague and inexplicit will probably, in the future, have to be spelt out.

> Men of legal background have always been important in Australian politics. ... In some European countries, lawyers also dominate the higher public service, but in Australia we prefer economists. Now I see from the graduation list that there is a formidable new breed of economist/lawyer emerging and who knows where they will lead us?
>
> Prof. R.N. Spann, '*Law and Government*', Graduation Address, 28 February 1981, Sydney University.

legal gobbledygook

> We lawyers cannot write plain English. We use eight words to say what could be said in two. We use old, arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. The result is a writing style that ... is (1) wordy (2) unclear (3) pompous and (4) dull.
>
> Prof. R.C. Wydick, 'Plain English for Lawyers', 66 *Calif.L.Rev* 727 (1978)

shredding bad forms. According to *Time* magazine 'you would need to be a potential Nobel Prize physicist to fully understand the work that won the Nobel Prize for Physics this year. For all but a small group, scientific knowledge has reached the state that passes human understanding'. During the past quarter, outbursts in three common law countries have suggested that the scientists may not have a monopoly on obscurity. In England, according to the London Bureau of the *Australian* (25 April 1981) a number of moves are afoot to promote a Plain English Campaign which got off the ground in July 1979 with the public shredding of a number of specially complicated forms. The ceremony took place in Parliament Square and was declared 'a grand sight'. Now plain English awards are being offered and in May 1980 the National Consumer Council published *'Gobbledygook'*, a critical review of official forms and leaflets. The Council has now come up with a plain English training kit, devised for staff trainers in the public services, nationalised industries, companies, libraries and unions.

Tests of British adults are said to have revealed that 25% of them have a reading age of 14 years only. Another two million have a reading age of less than nine years. This group do not stand a chance when they come up against forms expressed in language which is perfectly 'plain' to the educated lawyer. Parallel problems exist in Australia. But defining the problem is easier than devising the solution.

At the New Zealand Law Conference, Mr. Ian McKay, a Wellington barrister, urged lawyers present to update their style to the 20th century. In a paper mercifully brief (four pages