AUSTRALIAN FINANCE CONFERENCE

DIVISIONAL LUNCHEON, TUESDAY 26 APRIL 1977

REFORM AND THE FINANCE INDUSTRY

Hon Justice M D Kirby

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

A DIFFICULT AGE OF REFORM

There is no getting away from it. This is a difficult time to be in the Australian finance industry. Economic uncertainty, involuntary unemployment, voluntary "freezing" of interest rates and other associated problems do not make the life of those engaged in the credit industry any easier.

To compound these economic problems, the credit industry and the consumer industry generally have to live, nowadays, with consumer organisations, whose job it is to press for a better deal for consumers, truthful advertising, higher standards in products, liability upon manufacturers and so on. Ralph Nader makes occasional sorties to this country and, of course, has many counterparts here. Last week, I heard it suggested that "the toughest shopping job in the world must be picking out a gift for Ralph Nader".* There is, I am told, a new definition of "misery" about:

> "Misery is spending $350,000 to bring out a new product and then having Ralph Nader as your first customer".*

To compound these problems, you must now live under the reformer's microscope. Let there be no doubt, the credit laws of this country are under the microscope of legal reform. The movement for reform of credit laws is not isolated to Australia. Nor is this a force that can be seen in isolation from other changes in social relationships.

We are living through a new age of reform. Every so often, generally after a period of relative stability and quiet, the legal system goes through the throes of major reconsideration of previously accepted fundamentals. It happened in the 1840s. It happened at the turn of this

century. It is happening again now. Wishing that it would go away, will do no-one any good, if previous experience is any guide. It is important that people like myself bring home to those who are on the receiving end of reform, the wider contexts that must be appreciated, if not as a satisfaction, at least as a consolation.

The Crowther Committee in the United Kingdom, the Rogerson and Molomby Committees in Australia, Judge White's Inquiry in South Australia, Professor Peden's recent Report in New South Wales, Reports in nearly all of the Canadian provinces, the Trade Practices Act Review Committee and Poverty Commission's Reports and so on herald worldwide changes in the law governing the relationship between creditor and debtor. These changes in turn reflect worldwide changes in authority patterns in society. Whether it is in the relationship between police and accused, master and servant (how old-fashioned those words seem), creditor and debtor, indeed government and citizen, the old accepted rules and ways of enforcing them are coming increasingly under question. This is a time of uncomfortable change.

Therefore, when you face the prospect of substantial changes in the laws governing your industry, you should console yourself with the thought that the changes that are happening are not a case of starry-eyed victimisation of one particular hard hit section of the economy. The changes that governments of all political persuasions are introducing reflect fundamental movements in social relationships. I repeat, they will not go away. They may be postponed by rear guard action. An intelligent approach by the finance industry and the Finance Conference will be to face up to the international movements for change. You should not just respond to law reform proposals. You should be more dynamic and generate proposals for reform yourselves. Merely responding as events overtake you and trying to shore up the status quo is an approach to law reform unworthy of the dynamic of the finance industry.

THE LAW REFORM COMMISSION

Who are these troublesom people, the law reformers? There are no fewer than twelve law reform bodies in Australia. I am the Chairman of the national commission. But there are State commissions and committees established in every state of the Commonwealth working to assist Parliaments in the reform, modernisation and simplification of the law. The Australian Commission works within the limits imposed by the Australian

Constitution. But we have a special responsibility to promote, in referred matters, uniformity between the laws of the Territories (for which the Commonwealth has responsibility) and the laws of the States. Unlike the American and Canadian Federations, this country has never developed an effective regular machinery for achieving uniform laws. Of course, not every law is appropriate for uniform treatment. But the lesson of the United States and Canada and of recent experience in Australia is that it is in areas of business law especially that the diseconomies and inefficiencies of disparate laws work their greatest mischief. It is the business community which has to adjust to the practical burdens of differing State laws and standards. Much of the impetus for uniform laws in this country comes from the business community.

The national law reform commission comprises eleven Commissioners chosen from all parts of the country, some full time and some part time. They work with an expert staff and are located in Sydney. But we realised very early in the life of the Commission that lawyers have no special claim to omniscience. One of the problems of law reform in the past has been the retreat of lawyers from practical "across the table" consultation with non-lawyers in the preparation of reforming laws. This "arms length" approach is a terrible mistake and can be blamed for the air of unreality that sometimes exists in reform proposals. From the first, we have set out to enlist the inter-disciplinary expertise that is available in all parts of the country to assist in the framing of our proposals. For example, we received a reference last year from Mr. Ellicott requiring reform of the Bankruptcy Act. We were not content with seeking formal submissions from the Australian Finance Conference. We did this and the submissions were carefully considered. Nor were we content with conducting public sittings and taking oral elaboration of those submissions, although this we also did. From the very start of the project, we secured active participation at our table by senior officers of the Conference. Mr. Llewellyn, the Executive Director, Mr. Cullen and Mr. Gulson, officers of the Conference, sat down with the Commissioners as we hammered out our proposals and sought to understand the various interests that have to be balanced in the reforms we were shaping. Mr. Llewellyn was appointed under the hand of the Commonwealth Attorney-General, Mr. Ellicott, as a Consultant to the Commission. Of course, other Consultants, able to

speak for different interests, were also appointed. The interchange of ideas was a bracing experience for all of us. It is not mere tokenism. Nor is it a superficial honorific. I believe that a full understanding of the interests and viewpoints at stake can only be secured if lawyers are prepared to come out of their ivory towers and face squarely the real problem inherent in any major measure of reform.

It is not to be expected that in every case it will be possible entirely to reconcile different interests. It has not happened on this occasion. It would have been remarkable if it had. But at the very least the reformer ensures that he knows the implications of what he is doing. It need not be a tardy process. I do want to emphasise to you that it is not simply a hypothetical process. The Commission always drafts legislation to implement its proposals. The drafts included in our first reports are presently under legislative scrutiny and I have every confidence that they will pass into the law of the land. It is therefore vital that we acknowledge our responsibility, as a practical assistant to Parliaments, to get ideas and suggestions from those who are most interested in the matter under inquiry. Equally,in legal reform affecting the Australian finance industry, it is vital that the industry should so organise itself that it can respond positively to the call for assistance. It is no good grumbling about the state of our laws. The Law Reform Commission provides a vehicle, in matters referred to it, for something to be done about it: not to protect sectional interests but to achieve a national interest.

PRACTICAL CASES

A number of the matters referred to us are of practical concern to the finance industry. We have received a reference, promised by the Prime Minister in his Policy Speech, to suggest new legal protections for privacy in this country. Obviously, this will raise for consideration the question of credit records and the differing ways in which the respect for personal integrity has been achieved under the laws of Queensland and South Australia, on the one hand, and by the Privacy Committee of New South Wales, on the other.

In recent days we received a reference concerning the rules that should, in the modern age, govern standing to sue before federal courts. This reference also raises the question of whether class actions should be

introduced in Australia. We are studying with care the observations recently made by Mr. Llewellyn about this subject and as some of you may know, the South Australian Law Reform Committee, of which Judge White is a member, is shortly to deliver its report on this question to the South Australian Government.

The principal reference that throws us into contact is one which we received last May. It requires a report upon whether the Bankruptcy Act makes sufficient provision to enable small or consumer debtors to make arrangements with their creditors for payments from their assets or their future income.

The Commission has decided to respond to that report in two stages. The first stage is almost completed. I cannot outline its contents in any detail because we must first report to the Attorney-General and the Federal Parliament. The report and draft legislation will be with the printers within a week or so. Under the Act it must be tabled within a short period following receipt by the Attorney-General. It will be giving no secrets away, in the light of the Commission's working paper, if I say that we came without difficulty to the conclusion that the Bankruptcy Act is an inadequate vehicle. It extends its inadequacies with perfect equality to creditor and debtor alike. It does not provide adequate means by which genuine people in financial difficulties can secure expert counselling and the initiation of machinery for the regular, instalment payment of their total debts to all creditors. At the moment, perfectly honest and genuine people can get into severe debt problems. When they do, and fall behind in payment of their debts, the principle for creditors at the moment must be summed up in the maxim "First in first served" or "The devil take the hindmost". Doubtless, on occasions, as an informal matter, there is an attempt amongst creditors to work out a total scheme that is in the interests of all creditors and of the debtor. Doubtless on some occasions there is actual prorating of the debtor's total debts. Normally, it must be said, that rationality of this kind is discouraged by the law. I remind you that for every time the individual creditor gets in first, there are many times when he does not. For every honest debtor who is brought down by this kind of attack on the repayment of his debts, the credit society, of which we are all now part, is significantly diminished. Statutory schemes for the orderly repayment of total debts were initiated in the United States in the 1930s and in

Canada in more recent years. The Commission will report to the Attorney-General and the Parliament with draft legislation for an Australian initiative in this area. I assert that it is an initiative that will be as much in the interests of creditors and the credit industry as of honest debtors.

THE RECOVERY OF JUDGMENT DEBTS IN AUSTRALIA

I have said that the Commission intends to report upon its "debt" reference in two stages. It soon became clear to us that at the heart of the problem confronting any scheme for the regular payment of debts in Australia is the problem of identifying the person who is insolvent and who is in need of help, in his own interests and in the interests of his creditors. Identification is not easy. As you will all know, even honest debtors who become insolvent tend to hide the fact from themselves and from their creditors. The law itself seems to ignore the problem. The present debt recovery systems provided by the States and Territories allow various means for assisting creditors to recover money. But close inquiry into the debtor's overall solvency or insolvency is almost unheard of.

When the Founding Fathers drew our Constitution, it is said that they made many mistakes. But among the powers which they did confer upon the Commonwealth Parliament was a power with respect to :

51(xvii) Bankruptcy *and Insolvency*

The bankruptcy power has been used and a major code of bankruptcy law passed by the Federal Parliament. The scope of the "insolvency" power of the Commonwealth has, by contrast, received the scantest attention. It is unexplored territory. But the exploration has now begun. Those who fall behind in payment of their debts are frequently insolvent. The present means of debt recovery available throughout Australia may even cause insolvency. It may be possible for the Commonwealth, using powers conferred upon it by the Constitution, to provide a simple, uniform and fair procedure for the early identification of insolvency and the provision of efficient procedures for the adjustment of the interests of creditors and debtors, short of bankruptcy (which still carries a stigma) but equitable and rational (as present procedures are not).

Take the garnishee procedure as an instance. In New South Wales, the law allows garnishment of wages which deprives the debtor of

anything but the Sydney Basic Wage, less $8.00. This amount is taken whether the debtor is married or single. It is taken whether he has dependants or not. The creditor who obtains the first garnishee order beats competing creditors to the post. Inevitably, the debtor's ability to pay other creditors is reduced. No doubt his willingness to pay takes something of a knock. I am not saying that the garnishment of wages should be absolutely forbidden, as it is in South Australia. There may well be cases where it is an efficient tool for the recovery of a proved debt. But the procedure may well require reconsideration so that it follows in every case the examination of the debtor's total debt problems and is part of machinery for equity amongst all creditors, not just those who are prepared to act with impatient speed.

There are, of course, other systems available in Australia for the recovery of debts. Amongst the relic that still exists is the provision in South Australia where people are automatically imprisoned from time to time for trivial offences including failure to attend an examination summons. Nobody would suggest that failure to attend such a summons should be overlooked. Nobody would suggest that we should abandon attempts to determine whether a debtor has means to pay a debt. But we must surely gear our procedures to the end at which we are all aiming. To put a person in prison is not going to assist him to pay his debts. A more counter-productive sanction one could scarcely devise. The position in New South Wales where imprisonment has practically disappeared from the debt recovery machinery is surely to be preferred. The Australian Finance Conference recognised the futility of imprisonment and its submission to the Commission specifically recommended the abolition of imprisonment for debt-related offences. It also specifically recommended reform to the present law governing garnishment of wages and salaries. It took a positive stand on the definitions of "exempt property" under the Bankruptcy Act, suitable for modern circumstances. These suggestions are, in my view, a marked step forward in the approach of the Finance Conference. I am sure that exposure of the Conference to the Commission and of the Commission to the Conference will be a mutually educative experience.

Using the Commonwealth's "insolvency" power, facing up to the diversity and inefficiencies of present debt recovery laws and answering to the full the important reference which the Attorney-General has

given the Commission concerning small and honest debtors in the modern credit society, we propose to produce some tentative ideas by the end of June. At that stage, in accordance with our normal practice, we will seek public advice and comment. We will have the continuing assistance of Mr. Llewellyn and, I hope, that of his colleagues. Even at this stage, however, I should like specifically to invite those of you have practical experience in the operation of the present debt recovery laws to give us the benefit of that experience. Companies, members of the Conference, have branches throughout the Commonwealth and are subject daily to the vagaries of State and Territorial laws which differ so markedly in the effectiveness and fairness with which they treat persons with debt problems, and creditors' interests in the process.

Of one thing you can be sure. We will never report to the Attorney-General or the Parliament upon the basis of our own introspective ruminations. We will never lend ourselves to the criticism that we have got together a group of the "experts" who have designed a law protecting particular interests. All of our proposals will be passed through the filter of the many interests involved and of the public, before we report. It is impossible that you will always agree with what we say. But you will always have a full opportunity to participate, through the Conference, and otherwise, in our work.

The forward looking reference which Mr. Ellicott has given the Commission, in consultation with the Minister for Business and Consumer Affairs, Mr. Howard, promises some major changes in ways that you have no doubt learned to live with. Change is uncomfortable. Believe me, I understand the difficulties that it is my job to cause for you. My hope is that you will avoid the reflex action of opposition to change for the sake of opposition. We will, for our part, avoid change for the sake of change. Australia's debt recovery laws are, generally speaking, inefficient relics of a former age. They advantage individual creditors, but do not advantage creditors as a whole. They can on occasions be instruments of injustice to honest debtors. We must reform them; which means that we must improve them. I invite the assistance of the Conference and its members in this task.

* Readers Digest, April 1977, p.71.