AUSTRALIAN INSTITUTE OF CREDIT MANAGEMENT

NEW SOUTH WALES DIVISION

40TH ANNIVERSARY CONFERENCE

21 OCTOBER 1977, TERRIGAL, N.S.W.

REFORMING DEBT RECOVERY LAWS

Hon Justice M D Kirby

October 1977

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

THE REFERENCE ON CONSUMERS IN DEBT

The Australian Law Reform Commission is a federal authority established by the Parliament to report upon the review, simplification and modernisation of the laws of the Commonwealth. It has a statutory charter to consider proposals for uniformity between laws of the Territories and laws of the States.[1] Although it may suggest items for its programme, it can only commence work upon proposals when a reference is received from the Commonwealth Attorney-General. During the recent administration of the Attorney-General's portfolio by Mr. R.J. Ellicott, the Commission received a number of challenging and important references. One of the least spoken of, yet potentially most important, is that which deals with consumer insolvency. The reference was received on 10 May 1976. For convenience, the Commission is to report upon it in two stages. The first report, *Insolvency : The Regular Payment of Debts Program*[2] will be tabled in the Parliament later this month. Until tabled, the details of the proposals contained in it cannot be revealed. The second report, *The Recovery of*

1. *Law Reform Commission Act*, 1973 (Cth), s.6(1).
2. A.L.R.C.6, Canberra,1977. (A draft Bill is attached).

Judgment Debts will follow later and will discharge the reference. The Commission will shortly be issuing a discussion paper on this second stage of its work on the reference. This paper will outline some of the issues raised by it.

The reference requires the Commission to say whether the *Bankruptcy Act*, in its application to small or consumer debtors, makes adequate provision to enable such debtors to discharge or compromise their debts from their present or future assets or earnings. If it does not, the Commission is asked to describe the measures that could be adopted by legislation to achieve that objective, including the provision of financial counselling facilities to small or consumer debtors. The reference calls specific attention to :

> "the community's interest in the financial rehabilitation of small but honest debtors, and the need to ensure that creditors have an effective means of enforcing the payment of debts due to them".

The reference also calls specific attention to the statutory duty to consider proposals for uniformity of laws.

In the Commission's forthcoming report, detailed proposals are made, which cannot be elaborated, for the establishment of a Regular Payment of Debts Program. The aim of this program, based upon North American models, is to help small but honest debtors to grapple with their total debt problems. I have previously said that the disadvantage of the present debt recovery laws is to be found, at least, in its failure (outside the context of bankruptcy) to look at a person's total debt situation and fashion remedies apt for dealing with the totality, rather than individual debts.

I now want to address myself to the practical task of suggesting laws which do in truth balance the community's interest in financial rehabilitation of debtors and the enforcement of the payment of just debts.

PARTICIPATING IN LAW REFORM

I want first to make two points of general relevance. The first is that the Commission is not simply another scholarly body. Mr. Ellicott said many times that the Commission was not established for "window dressing". It is part of the machinery of government. Already one of its reports has been adopted and is law. Another major report is the subject of an important Bill currently before Federal Parliament.[3] In putting forward proposals to the community and to this Conference, we are not to be seen as a debating society. The aim of public consultation is to afford interest groups and ordinary citizens the opportunity of refining and improving tentative proposals for reform.

Secondly, the Commission should be seen as an instrument for achieving proper reform. Interest groups, such as the Institute, have an opportunity for taking a constructive part in law-making which pressures of time or attitudes may not permit elsewhere. Fatalism and resignation about the law's injustices and inefficiencies should give way to active participation in its improvement. I admit to being surprised that powerful interest groups in the country, with a real stake in the way the law is going, content themselves to merely reacting to the proposals of others. This is a "fortress mentality" which I deprecate. The Institute should be putting forward its own ideas for the improvement of credit laws. The credit society which has expanded enormously since the War, now embraces us all. It is little wonder that legal machinery which predates the credit society is seen as inefficient and inappropriate today. The reference to the Law Reform Commission for the improvement of debt recovery laws affords this Institute a positive opportunity not just to react to the proposals of consumer groups but to put forward positive, workable suggestions for reform of the law and practices in debt recovery. I hope that this will be done.

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3. Criminal Investigation Bill, 1977 (Cth).

UNIFORM DEBT RECOVERY

At present, bankruptcy apart, there are eight different systems for the recovery of judgment debts in Australia : six in the States and two in the mainland Territories. Historical considerations have led to significantly differing laws and practices. Especially in the past thirty years, the finance industry has grown to one of national importance and organisation. This and the inconvenience of differing State laws has led to the movement for uniformity in hire-purchase legislation and more lately in the laws governing the extension of credit by way of consumer loans. It is expected that the proposed uniform credit laws, shortly to be unveiled, will deal with several aspects of debt recovery, notably those which relate to a secured creditor's rights in respect of repossession and sale of secured property.

Few people nowadays argue for uniformity of laws for the sake of uniformity. Sometimes, where the values of local variation and experimentation are outweighed by the mischief of uncertainty, confusion and different treatment, legislators look around for a single, uniform law. In Australia, there are effectively two ways of achieving such a law. The first involves the discovery within the Constitution of sufficient Commonwealth power to support an Act of the Commonwealth Parliament. The second involves the much more time-consuming and rarely successful process of securing agreement between the States and the Commonwealth upon the principles, terms and maintenance of uniform legislation.

The Commonwealth has, under the Constitution, power to make laws with respect to "bankruptcy and insolvency".[4] This power has been exercised but not exhausted in the *Bankruptcy Act* 1966. The scope of the juxtaposed power with respect to "insolvency" has never been fully explored.[5] In the *Bankruptcy*

4. *Australian Constitution*, s.51(xvii).

5. *Sandell v. Porter* (1966) 115 *C.L.R.* 666.

Act itself the insolvency of a person is expressed in terms of his inability to meet his debts as they become due out of his own moneys.[6] The reference to "moneys" is not limited to the debtor's cash resources.

> "The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency".[7]

If uniformity of debt recovery laws in Australia is to be given the highest possible priority, attention would naturally be given to the scope of the Commonwealth's power to lay down procedures to be followed in respect of recovery against insolvent debtors. The power would undoubtedly take Commonwealth laws beyond this. There are, however, many debtors, including judgment debtors, who are not and who will not become insolvent. Problems could well arise in establishing the requisite causal relationship to permit a Commonwealth law to deal comprehensively with these debtors and, therefore, with all aspects of debt recovery in Australia.

A first issue which is before this Seminar, therefore, is : what value should be attached to the rapid achievement of a reform code of debt recovery in Australia? Is uniformity a matter of such high priority that the Commonwealth should lay down the new procedure to be followed in respect of insolvents? Surely this would embrace a great number of debtors. It may even, in practical terms, force the pace of uniform law reform. But would it simplify the law and is it desirable in principle? This is a value judgment that will, in the end, have to be left to the politicians. It will be important to give them the benefit of informed thinking on the subject.

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6. *Bankruptcy Act*, 1966 (Cth), s.122.

7. Barwick C.J. in *Sandell v. Porter*. *Ibid* at p.671. *Cf. Hymix Concrete v. Garritty*, (1977) 13 *A.L.R.* 321 and A.L.R.C.6, p.77.

The Law Reform Commission came to a conclusion, quite early in its work on the reference, that critical to a reformed debt recovery procedure was the need for an early identification of and assistance to insolvent debtors. It is because State and Territorial debt recovery laws are themselves peculiarly ill-designed for providing identification and early assistance and, on the contrary, in some cases actually exacerbate insolvency, that the Commission decided to look at debt recovery laws and practices in discharging the *Consumers in Debt* Reference.[8]

The first issue upon which assistance is invited is therefore one of policy. Is it appropriate and desirable at this stage of the Commonwealth's development to propose a uniform, reformed law concerning the recovery of debts from insolvents or should the Commission proceed to draw a reformed code for the Australian Capital Territory and Northern Territory as a basis for consideration in the several States? I have not overlooked the fact that our terms of reference relate to "small or consumer debtors". Logically, recovery procedures, particularly of judgment debts, ought probably not to distinguish between various classes of debtors, including judgment debtors. It may be a consequence of the Commission's recommendations that a wider class will take the benefit of improved procedures. This possibility gives even more emphasis to my suggestion that the Institute should provide positive ideas for the improvement of debt recovery laws.

NOTICES AND SUMMONS FORMS

Creditors do not generally seek to assist a debtor to make arrangements with *all* of his creditors. They may advise and encourage him to make suitable arrangements with all creditors but they rarely act as his agent and do it themselves. This is hardly surprising. Nevertheless, the result is that few debtors are given information and counselling about the payment of their total debt. If a facility of debt counselling, however rudimentary, is made available, and a statutory scheme for the discharge of all debts from future incomes is introduced, would it not be appropriate to require a creditor who wishes to commence proceedings against a debtor to give a

8. A.L.R.C.6, p.19

prescribed notice to the debtor informing him of the availability of debt counselling and of the Regular Payment of Debts Program? When the law establishes services, it is an empty gesture unless it informs those subject to the law of their availability.

Realism requires one to recognise that notices of this kind will usually be ignored. Proceedings for the recovery of debts will have to be commenced by a summons. An opportunity is therefore afforded to remove the antique language of some default or special summonses, reduce the verbiage on present forms and again include information about counselling and the Regular Payment Program. It may also be possible to include provision for the use of minority ethnic languages or an indication of where translations can be secured. Furthermore, it would seem appropriate to add to present forms, notification that a debtor may make an offer for payment by instalments direct to his creditor. We all know that after cumbersome and sometimes relatively expensive procedures, judgment debts will generally be the subject of an instalment order. If this is so, why not accelerate the consideration of instalments? A questionnaire could be attached to the summons form, again in simple language, to assist the debtor accurately and fairly to put his position before the creditor.

DEFAULT SUMMONSES

Many "small or consumer debtors" are unlikely to have legal knowledge or advice. Even if they secure debt counselling, it is desirable that recovery procedures should be as straightforward and simple as possible. At present, a defendant wishing to contest a claim brought on a default summons, is required to file not only notice of grounds of defence but an affidavit verifying the stated grounds. The purpose of this requirement is to frustrate delaying tactics and spurious defences in a claim which the plaintiff reduces to a specific, ascertained sum. Whilst this obligation may appear entirely appropriate where business debts or large sums are involved, it may have the effect in the case of small or consumer debtors of defeating some just defences or at least disputes as to amount. In both the Capital Territory and the Northern Territory the requirement of a sworn defence has already been abandoned in

the Small Claims jurisdiction.[9] It might well be appropriate to remove the obligation in Courts of Petty Sessions, subject to the availability of a simple procedure whereby a plaintiff could have an obviously irrelevant or unmeritorious defence struck out.

One of the endemic expenses of debt recovery litigation arises from the obligation to serve the summons on the defendant. Whether performed by court officials or by a private process server, the cost of such service is a significant component in the costs of debt recovery. Service of process by registered or certified mail is an alternative mode of service in the Small Claims jurisdiction. However apart from increasing costs, this procedure also has defects. Neither registered nor certified mail is left at a postal address when nobody is home. Furthermore, there is a growing band who refuse to accept special mail in case the communication may be an unwelcome one. Use of the ordinary post avoids these problems though it lacks proof of service and is occasionally unreliable. If court officers themselves took responsibility for postage, the only factors for which allowance would have to be made is delay or loss in the post. Appropriate procedures to set aside judgments for default of receipt of a summons would have to be instituted. Again, the question is one of policy. Given the general reliability of the mail, does the occasional failure of a debtor to receive a summons through the ordinary post warrant the very considerable expense annually involved in the personal service of summonses? Do we not thereby merely compound the problems of the small consumer debtor?

EXAMINATION HEARINGS

Once judgment has been entered varying debt recovery procedures are available to the judgment creditor. One of these is an examination of the judgment debtor concerning his means

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9. A.C.T. *Small Claims Ordinance*, 1974, s.10, Form 6.; N.T. *Small Claims Ordinance*, 1974, s.10, Form 4.

and ability to pay the debt. This hearing may be conducted by the court or by a senior court officer. It usually precedes an order for the payment of the debt by instalments, often made by consent. It may, however, be ancillary to an order for garnishment or attachment of debts or for imprisonment upon a finding of fraud. It seems to be self evident that the examination hearing procedure is an excellent opportunity to identify those debtors who are insolvent and to seek to deal not just with the one problem that brings them to the court in isolation but with the management of their debt problems generally. It also provides another opportunity to draw attention to the availability of debt counselling and the Regular Payment Program. It may therefore be appropriate to propose that the examination hearing should be the prime procedure in the enforcement of debts instead, as at the present, simply one of a number of procedures amongst which the creditor may choose. Before this conclusion can be reached, some indication will be needed of the workability, costs and effectiveness of introducing a universal rule for the examination of judgment debtors. Is it always necessary? Can it be justified in terms of the manpower required? Does it really require a judicial officer to conduct such an examination? Ought it to be available only after judgment is entered? These are matters upon which the advice and opinion of the credit industry will be manifestly vital.

One of the perennial problems with examination of debtors arises from non-attendance of those summoned to court. At present, an extreme solution to non-attendance is imprisonment of the debtor who does not attend. He is said to be in contempt of the court's order. This is the system that obtains in the Northern Territory.[10] An alternative procedure is that adopted in New South Wales.[11] If a debtor does not attend on a summons, a supplementary summons is delivered, calling on him to attend court and show cause why he should not be dealt with for disobeying the original summons. Should he ignore the second

10. *Local Courts Ordinance*, 1941 (N.T.), s.170.

11. *District Court Act 1973* (N.S.W.), s.92.

summons, he is apprehended and brought before the court. He is not imprisoned for "contempt" but is examined there and then as he would have been on the original summons. The machinery of "contempt" though doubtless effective, seems an exaggerated and misplaced response to the usual apathetic indifference to debt recovery procedures. While such indifference cannot be condoned or excused, is it not more appropriate to the mischief to deal with it in the New South Wales way?

It is appropriate here to mention the facility of night hearings. A debtor served with an examination notice requiring him to attend court in the day may well fail to attend for fear of compounding his debt problems by losing time or, at present, even losing his job. If a more informal procedure for examination of debtors at a level lower than judicial officers could be instituted, would it not be possible to arrange for these to take place at night? Burdensome though night sittings may be on creditors and courts, they might well represent a more effective and rational means of securing fair debt recovery.

EXECUTION PROCEDURES

The trend of recent experience and legislation seems to suggest that the prime means of recovering a judgment debt should be an instalment order made against the debtor after consideration (at an examination hearing) of his means and ability to pay the debt. There will, of course, be cases where the examination hearing reveals substantial capital which it is appropriate to attach so that the creditor will not be delayed. Normally the available assets of a judgment debtor , certainly a "small or consumer debtor", will be little more than his future income. Cases may exist where the debtor's circumstances do not permit even a modest instalment to be made. Those cases may be few and may be more suitable to be dealt with in bankruptcy. At least in the first instance, it seems appropriate that recovery should be directed to the debtor himself, to give him a chance to discharge the debt, rather than to a bailiff or other person. Rehabilitation of the debtor and reinforcement of the principle which is important for our society, of personal responsibility for debts, are

both likely to be served better by requiring the debtor to repay the debt rather than by taking it out of his hand. Where default is made in payments laid down by an instalment order (or where such an order would be inappropriate) it is appropriate that the court should have available to it a full range of orthodox execution orders, except imprisonment. The Finance Conference of Australia has agreed that imprisonment for debt-related matters is inappropriate and indeed counter-productive, except pursuant to the criminal law.[12] It seems inappropriate for a finding of fraud to be made and a criminal penalty imposed on a debtor in civil debt recovery proceedings. If fraud is alleged it should be proved according to the criminal law, after the usual protective procedures laid down in criminal process and in a court of criminal jurisdiction.

EXECUTION

One of the features of the variety of debt recovery laws in Australia relevant in the present context is the different attitudes taken in the various jurisdictions to the property of the debtor which is exempt from execution. In the Capital Territory, for example, exempt property is defined as "wearing apparel, bedding, tools and implements of trade" of the debtor and his family to a total value of $100. The Northern Territory exemption is similar but is limited to a value of $40.[13] Differences of this kind, and between the goods and values exempt in different levels of jurisdiction within the one State, call for reform when contrasted to the terms and policy of the *Bankruptcy Act* 1966, s.116. That section at present exempts all necessary wearing apparel and household property within a specific dollar limit, together with tools of trade not exceeding $500 in value. If it is proper that the Official Receiver should not take certain goods in bankruptcy, it seems hard to justify a lesser protection against individual creditors. It is also appropriate, in a time of

12. Australian Finance Conference, Submission to the Law Reform Commission on Consumers in Debt, *mimeo*, 1977.

13. A.C.T., s.162; N.T., s.150.

inflation, that the purpose of the exemption be considered and the value updated. In all jurisdictions procedures exist by which a judgment creditor can sell or have sold real property owned by the debtor. In a number of limited cases in Australia, protection is presently provided in respect of the sale of a debtor's home.[14] "Homestead exemptions" exist in many jurisdictions in North America. They are based on the counterproductive dislocation caused by the sale of a debtor's home. Yet it would be unjust to permit all debtors to avoid execution by the ruse of purchasing an expensive home. It may be that a court's discretion should be interposed here as an assurance that justice is done. The experience of the Institute and the opinion of its members will be important to the Commission on this as on other subjects.

ATTACHMENT OF WAGES AND GARNISHMENT OF DEBTS

In all States of Australia there are procedures for garnishment of debt. In several jurisdictions a creditor may garnish or attach the debtor's wages. The latter procedure has been forbidden in South Australia since early this century. It is a procedure which has its dangers to a judgment debtor. The compensation provided to employers, particularly those with computerised wage records, for deduction of payments, is seldom sufficient to cover the costs involved.[15] Evidence exists that some employers terminate employees who are made the subject of a garnishment order, on the basis that such an order signifies a want of reliability on the part of the employee. On the other hand, as has been said, future income is, generally, the major asset from which creditors, especially of small and consumer debtors, can expect to recoup their debts. If execution on goods or land is not available, garnishment of wages may be the sole hope of recovery to the creditors. It seems to me that an order for garnishment or attachment of wages should be a remedy available to the court where it appears that a debtor

14. See e.g. *Homesteads Act*, 1895 (S.A.), *Defence Service Homes Act*, 1918 (Cth), s.33. *Cf. Crown Lands Act*, 1895 (N.S.W.), s.8.

15. In N.S.W. in respect of some orders 10% of instalment.

is unwilling to pay his debts by instalments, intends not to comply with an instalment order or has failed to make reasonable and satisfactory payments in compliance with that order. In other words, it should be a back-up facility, available to creditors.

Having said this, there are many defects in current garnishment legislation that will be known only too well to those who use it. Provisions relating to the "protected" sum soon fall out of date in a time of rapid inflation. Failure to provide a minimum "living wage" may actually compound a debtor's ability honestly to reduce his debts. Where a garnishment order is made, directing it at a single pay packet alone would appear to be in the interests neither of the creditors nor the debtor. There is surely great need for an up-to-date and more efficient procedure for attachment where orders of this kind are made. In the case of the Public Service, specific provisions exist which require reconsideration in the light of current social attitudes.[16] A greater concern for the costs of the employer subject to recurrent orders, of the creditor in securing complete and not merely temporary relief and of the debtor in preserving a minimum standard of life is what is needed here.

PRIORITIES

Existing debt recovery systems ensure that priority is given to a judgment creditor over any other person who, though a creditor, has not yet reduced his debt to judgment. Priority extends to one judgment creditor over another, not on the relative moral merits of the claims, nor even the date of their respective judgments. What is critical is the date the given warrant, writ or order was obtained. Obviously the result of this rule is that a judgment creditor otherwise willing to forego execution procedures and to rely on a fair, informal arrangement for instalment payments, does so at the risk that others, less patient, will achieve priority

16. *Public Service Act*, 1922 (Cth), s.64. There are many State examples, see e.g. *Police Regulation Act*, 1899 (N.S.W.), s.12C.

by levying execution or obtaining an order for wage garnishment. The present rule gives incentive to premature and even unreasonable action on the part of individual creditors. But what is there to put in its place?

It is true that other creditors can protect their interests by sending the debtor bankrupt. But bankruptcy is not an appropriate way to deal with the debt problems of small and consumer debtors. It may be more appropriate to leave it to the courts to decide priorities, i.e. to lay down a scheme for the payment of total debts. If, as would normally happen, the court should decide that funds be distributed on a *pro rata* basis, it could be appropriate to nominate the Administrator of the Regular Payment of Debts Program as the person to whom funds should be paid and who should be responsible for distributing funds to creditors in proportions owing to them. Certainly, the present rule relating to priorities puts a premium on precipitate action and penalises the reasonable creditor, whilse encouraging the unreasonable.

COSTS

The above proposals lay emphasis upon three aims :

(a) The simplification of debt recovery procedures, uniformity if possible, and rational communication to debtors of how to find a fair way out of their debt predicament;

(b) the treatment of a debtor's debt problem in its totality in place of the present emphasis upon individual action by creditors which may be unfair to debtors and counter-productive to creditors as a whole; and

(c) the reduction of costs, including service fees, debt collectors' fees and so on. This is to say nothing about the long-run economic benefits that can be expected from engendering greater individual responsibility by discharging consumer debt obligations.

A modern debt recovery system will act only after proper inquiry at which the rights of the creditor to recoup his debt are balanced against the needs and capacities of the debtor to repay. If a debt recovery system acts only after proper inquiry, which ensures that no remedy is used which causes unnecessary additional loss or undeserved hardship to debtors, it is likely that it will be respected and understood by debtors and will

reinforce the principle which I take to be accepted in our society: that a person should normally discharge in full his just debts. Present debt recovery laws throughout Australia are a hotch potch of anachronistic relics and irrational procedures. They are clearly in need of reform, as much in the interests of creditors as in the interests of debtors. The current reference to the Law Reform Commission provides this Institute and its members with an opportunity to advance suggestions for developing a modern, efficient and just system and possibly also one uniform throughout Australia.

SUMMARY

The following propositions are put forward for the purpose of inviting the comment, criticism and suggestions of members of the Institute.

Notices and Summons Forms

1. A creditor wishing to commence proceedings should be required to give a prescribed notice to the debtor informing him of the availability of debt counselling and of the proposed Regular Payment of Debts Program.

2. Summons forms should be simplified and copies should be available in the main minority languages used in Australia. English language forms might contain a brief explanation in other languages of their purposes or statement of where such explanation can be had.

3. Summons forms should give the debtor information concerning debt counselling and the proposed Regular Payment of Debts Program. They should also suggest to the debtor that he may make an offer for payment of instalments direct to the creditor. A questionnaire could be attached to the summons form to assist him and the creditor to assess his position.

Default and Special Summonses

4. A defendant should not ordinarily be required to file an affidavit with a notice of intention to defend.

5. Venue should primarily be set at the court nearest to the defendant's residence or place of employment.

6. There should be established a system of service of summonses by court officers using ordinary mail. Actual personal service should be retained as an alternative means of service.

Examination Procedures

7. No execution procedures should generally be available without prior examination of the debtor at a public hearing by a court or appropriate officer.

8. The examining tribunal should ascertain whether the debtor is eligible for counselling and assistance under the Regular Payment of Debts Program. If so, he should be invited to apply for counselling and assistance and an order for a stay of proceedings should be made, if he chooses to do so.

9. A debtor who persists in failing to attend an examination hearing should be arrested and brought before the court but for the purpose of examination. Provision should be made for examinations to be conducted at night.

Execution Procedures

10. The prime method of enforcing a judgment should be by means of an instalment order made after examination of the debtor. In making the order, regard should be had to the debtor's total circumstances.

11. Where default is made upon an instalment order or where an instalment order would be inappropriate, the court should have available to it the full range of remedies with the exception of contempt-related imprisonment which should be abolished. Imprisonment (except after criminal trial) should be abolished as part of general debt recovery machinery.

Execution

12. Exemptions from execution should be revised. In no circumstances should they be less than those contained from time to time in the Bankruptcy Act.

13. It may be appropriate to restrict execution upon land, exempting homes in certain circumstances, subject to court order to the contrary.

Attachment of Wages and Garnishment of Debts

14. The protected sum in respect of a debtor's wages should be set realistically by reference to the total circumstances of the debtor, and should keep pace with inflation.

15. An attempt should be made to provide proper reimbursement to the employer subject to an attachment order. A deduction made by him in this regard should not go towards discharge of the relevant debt.

16. An attachment order should generally operate until the debt has been paid in full. Artificial limitations on the garnishment of funds belonging to the debtor should be abolished.

Priority

17. Priority should continue only to the extent necessary to ensure that a judgment creditor recovers his expenses associated with reducing his claim to judgment. It should be fixed ultimately by court order not by the chance priority secured by the obtaining of a warrant or writ.

18. Forced sale of goods or land and garnishment of debts should be for the benefit of all creditors in appropriate proportions.

19. Attachment of wages should be for the benefit of all judgment creditors of the relevant debtor in appropriate proportions.

Interest

20. Has the time come for consideration of a creditor's statutory entitlement to interest on unpaid debts where no contractual provision exists as to payment of interest?[17] Why, in a time of high inflation, should the creditor not receive some interest on a proved debt? Perhaps exceptions and qualifications should be provided for. Perhaps the rate of interest should normally be quite low. But does the present absence of interest strike a fair balance between creditor and debtor?

17. *Cf. Supreme Court Act*, 1970(N.S.W.), s.94; Law Com.W.P.66 *Interest*, 1976.

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REFERENCE: CONSUMERS IN DEBT

LAW REFORM COMMISSION ACT 1973

REFERENCE OF MATTERS TO THE LAW REFORM COMMISSION

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO -

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, namely -

(i) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and

(ii) any other laws, including laws of the Territories, that the Parliament has power to amend or repeal; and

(b) the desirability of avoiding injustice to and oppression of debtors and of facilitating the collection of debts,

HEREBY REFER the following matters to the Law Reform Commission, as provided by the Law Reform Commission Act 1973,

TO REPORT UPON -

(1) whether the Bankruptcy Act in its application to small or consumer debtors makes adequate provision to enable such debtors to discharge or compromise their debts from their present or future assets or earnings;

(2) if the answer to (1) is no, whether any and what measures could be adopted by way of legislation to achieve that objective; and

(3) what measures could be adopted by way of legislation to provide financial counselling facilities to small or consumer debtors.

IN MAKING ITS REPORT the Commission will have regard to -

(a) the community's interest in the financial rehabilitation of small but honest debtors, and the need to ensure that creditors have an effective means of enforcing the payment of debts due to them; and

(b) the function of the Commission in accordance with section 6(1) of the Law Reform Commission Act to consider proposals for uniformity between laws of the Territories and laws of the States.

DATED this tenth day of May 1976

R.J. Ellicott
Attorney-General

Correspondence or submissions concerning the above reference should be addressed to The Secretary, The Law Reform Commission, 7th Level, 99 Elizabeth Street, Sydney, 2000, N.S.W., Tel. (02) 231-1733.