

TRANSEARCH CORPORATION PTY. LIMITED  
CREDIT SEMINAR, TUESDAY 9 MAY 1978, 10.15 A.M.

REFORMING DEBT LAWS

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

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DEBT DEFAULT IN AUSTRALIA

Each year about half a million summonses are issued in Australia by creditors seeking to recover money owed to them. Some of the summonses are in respect of business debts. Many relate to individual credit. Several factors give rise to serious and prolonged default in the payment of debts. Some debtors seek to delay their creditors as long as possible and to pay only on receipt of a summons. Some debtors are unscrupulous, dishonest and fraudulent. Many, however, fall into debt because of defective judgments made about their ability to repay borrowed money. Others have suffered an unforeseen change in financial circumstances. They may become ill or unexpectedly unemployed. At the moment, the law tends to treat all of these cases in a single way.

In terms of quantity, the actual rate of default in Australia is not high. Most people pay their debts. If it were otherwise, the credit society would collapse. In the field of consumer credit, the bad debt rate is between one and two percent of the credit extended. If, however, rate of default is measured by the commencement of recovery proceedings, the figure is higher. In respect of secured credit for the purchase of motor vehicles, the figure for repossessions may be as high as six percent. In respect of unsecured retail debts, it is probably lower. Nevertheless, the overall rate is such as to

suggest the need for a close re-examination of debt recovery procedures and the handling of debt default in Australia. The present procedures were developed long before the general development of the post-war credit society. They are not specific to particular problems. They perpetuate antique procedures and language. They preserve, in some cases, injustice. They allow for delay and prevarication. They involve social costs as well as costs to the parties involved. These costs are passed on to society as a whole.

#### REFERENCE TO THE LAW REFORM COMMISSION

On 10 May 1976 the Commonwealth Attorney-General requested the Law Reform Commission to review certain questions relating to consumers in debt in Australia. The Commission has delivered a report, *Insolvency: The Regular Payment of Debts*, on the first stage of its inquiry. This report was tabled in Parliament in November 1977. During the course of its preparation it became clear that to tackle consumer debt problems thoroughly, it would be necessary to review State and Territory debt recovery laws and procedures in Australia. The Commission is shortly to put out a discussion paper with tentative proposals, *Debt Recovery and Insolvency*. When these proposals have been thoroughly debated throughout Australia, a report on debt recovery laws will be prepared with draft legislation to bring these laws and procedures into the twentieth century.

#### THE COMMISSION'S REPORT A.J.R.C.6

The report already delivered is currently being closely studied by the Department of Business and Consumer Affairs in Canberra. I have no reason to believe otherwise than that its main themes (possibly with some modifications) will be accepted and will pass into law. The Commission concluded that the bankruptcy system and existing debt recovery procedures were generally inappropriate for small and honest consumer debtors. Accordingly it recommended the establishment of a new set of procedures, partly modelled on a United States system that has been operating successfully for thirty years. Instead of dealing with each individual claim against the debtor, it is proposed that there should be available to debtors debt counselling and a "Regular Payment of Debts Program" which will

permit the regular reduction, by instalments, of a person's *total* debts, according to a scheme which is worked out and not disapproved by a majority of creditors. If not disapproved, the scheme becomes binding on all creditors, so long as the debtor maintains his payments. There are several detailed rules for the implementation of the system. But that is the basic idea. A procedure available to honest debtors who want a short breathing space and then a method of consolidating and paying off their *total* debt or a proper portion thereof instead of looking after *individual* debts, to the disadvantage of themselves and creditors as a whole.

#### DEBT RECOVERY LAWS

The second stage of our project will seek to modernise, simplify, speed up and alter Australia's debt recovery procedure. There are limits upon the Commonwealth's power, under the Constitution, to do this. However, the Commonwealth does have full powers to reform debt recovery procedures in the Territories. It also has a significant power, under the Constitution, to make laws with respect to bankruptcy and *insolvency*. This lastmentioned power (under s.51(xvii)) has been little used and may be a means of securing, for a basically uniform national industry, certain uniform principles which are accepted in the law in all parts of Australia. The aim of any new procedure should be to identify the debtor who is or may be on the brink of becoming *insolvent*. These are a class of debtors who need special assistance, if they are to be restored to the credit society and educated in their social responsibilities as members of it. Once identified, such *insolvent* debtors can be channeled if they are willing, into the Regular Payment of Debts Program, debt counselling and other forms of relief. This identification of *insolvent* debtors is not just desirable because of the Commonwealth's power over *insolvency*. It is desirable in itself because such people have reached a point where they need special assistance and the recognition of their special predicament in the law.

TERRITORIAL LEGISLATION

As a step towards achieving reform of debt recovery laws and procedures, new ordinances will be proposed for the Commonwealth's Territories which could provide a basis for consideration as models in the Australian States. The essence of the new proposals is as follows :

*Commencement of Legal Proceedings.*

Prior to commencement of legal proceedings, a creditor should give a prescribed notice to the debtor concerning the Regular Payment of Debts Program. Legal action would be commenced by a summons to be served either by the creditor or his agent, or by court officials using the ordinary mail. The summons would indicate in simple language the steps to be taken by the debtor and the sources of assistance available to him. The debtor would be required by the summons to enter a notice of defence or to attend for examination at the court closest to his place of residence or employment. If necessary, this examination might be held in the evening. The debtor would be advised in the summons that he might make an arrangement to discharge the debt by instalments paid directly to the creditor.

*Examination Hearing*

Judgment in an undefended case would be entered at the hearing. The debtor would be examined about his means and ability to pay the debt. When a debtor proved to be eligible for assistance under the Regular Payment of Debts Program, proceedings against him would be stayed for a period of 14 days to enable him to seek advice and assistance under that Program. When a debtor failed to attend for examination, the examining official might order his attendance at an adjourned hearing, or might issue a warrant under which the debtor might be brought before him to be examined.

*Interest and Costs*

A creditor should be able to recover interest on an overdue debt at least from the time stated in a demand for payment. The interest rate should be that applicable to judgment debts. A creditor should also be able to recover all costs reasonably incurred in the collection of the debt, including all court fees.

*Enforcement Procedures*

The prime method of enforcing a judgment debt should be an instalment order made after examination of the debtor having regard to all his circumstances, including his obligations to his dependants and to other creditors. Should default in the payment of these instalments subsequently occur, or should the making of an instalment order be inappropriate in a particular case, a court should be able to order the recovery of the debt by the following means :

- \* A third-party order attaching debts owing to the debtor
- \* A third-party order attaching other moneys owing or to become owing to the debtor
- \* An order for the sale of his goods
- \* An order for the sale of his land
- \* An order attaching his salary or wages
- \* A charging order against any of his property.

A court should be empowered to order the consolidation of multiple orders in respect of the several debts of a particular debtor.

The exemption from seizure and sale of property should be revised. In no circumstances should they be less than those contained from time to time in the *Bankruptcy Act*. The extent to which the wages of a particular debtor should be protected from a wages order should be set after examination of the debtor. A wages order should normally continue in force until the debt has been repaid. A debtor's employer should be reimbursed for the administrative expense involved in complying with a wages order. Commonwealth public servants should be subject to the same procedures as all other debtors.

COMMONWEALTH LEGISLATION

In addition to this scheme for general debt recovery laws, proposed for constitutional reasons, only in the Territory at this stage, certain principles of debt recovery are considered necessary for uniform application throughout Australia. Upon this basis it will be proposed that certain Commonwealth legislation should be passed to ensure minimum treatment of insolvent debtors.

PARTICIPATION IN LAW REFORM.

The Australian Law Reform Commission works in close consultation with the interest groups who are affected by its proposals for reform and with the community generally, which must live under any reformed laws. For this reason a Discussion Paper has been prepared and will be distributed. It will set out in detail the scheme proposed. Likewise, consultants and the finance industry and consumer groups are appointed by the Attorney-General to assist the Commission in coming to its final proposals. Public sittings and seminars will be held to encourage debate of the scheme being put forward. Only when it has been thoroughly debated will it be advanced for the Attorney-General and the Parliament. This Transearch Seminar is one further step in the consultative programme. Participants who wish to have a copy of the Discussion Paper should write for it to the Secretary, the Australian Law Reform Commission, G.P.O. Box 3708, Sydney. Copies of the Discussion Paper will be sent to all persons who are willing to read it with a view to making criticisms and suggestions for the improvement of the Commission's proposals.