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

The colourful address by Mr A. Goodman, reprinted in a recent issue of Credo ['Lest We Forget', Jan./Feb. 1983, 5], may well have confused the discussion on proposed reforms to the consumer debt laws. I take the view that a reply is warranted. In forwarding these comments, I do not propose to debate at any length Mr Goodman's opinions. He is entitled to hold and to express them. Indeed, the Australian Law Reform Commission has taken and will continue to take them into account. But Mr Goodman does a disservice to the Institute when he fails fairly to represent what the Commission's proposals were in the first place.

The Commission's proposals were contained in two documents. The first, Insolvency: The Regular Payments of Debts, was a final report recommending alternatives to bankruptcy, in particular the establishment of schemes whereby non-business debtors could pay their several debts over a period of three years by regular instalments. The second document, Debt Recovery and Insolvency, was a Discussion Paper containing the Commission's tentative views for the reform of the debt recovery system itself. Mr Goodman's comments relate to both documents, but he fails to distinguish between them and their status.

Regular Payment of Debts Program

Mr Goodman dismisses the instalment proposals in the Commission's final report as being 'a scheme for schemers', facilitating fraud by debtors. He suggests that debtors can incur debts of up to $15 000, make a few token payments, obtain a discharge, and then repeat the cycle. This is no better than a parody of the proposed system. Mr Goodman simply ignored fundamental aspects of that system. Among them were the following:

- If a debtor wished to enter the payment program, he must make a proposal to his creditors for the payment of the debts. However, the debtor's application would not be enough in itself; creditors would have an opportunity to vote on the scheme.
- If a debtor defaulted in making payments under a scheme, he would run the risk that the scheme would be ended. Once a debtor is two monthly instalments in arrears, any creditor could give notice of his intention to resume debt recovery action. The debtor in such circumstances would need to obtain court approval if a plan were to continue.
- A debtor would be discharged from the debts covered by a plan only upon successful completion of that plan. 'Successful completion' depends upon what the creditors agreed to accept when they voted on the plan. In some cases, creditors might have voted to accept 100 cents in the dollar over a three year period; in other cases, they might very well have decided to accept less than that, particularly as the debtor might otherwise simply go bankrupt. Nevertheless, any creditor could object to the discharge of the debtor from the debts covered by the plan. If the court is satisfied that the debtor had not made honest and reasonable efforts to comply with the plan, it would uphold the creditor's objection.
- The creditors would be protected during the plan itself. The court could order that a plan be terminated if it were satisfied that, by reason of a debtor's conduct, it would no longer be equitable in the interests of the creditors that the plan continue in operation. Of course, should the plan be terminated in such circumstances, the debtor would not be discharged from his debts, and creditors would have recourse to the usual legal remedies, including bankruptcy.
- Information concerning a debtor's entry upon a scheme and the termination of a scheme (whether by completion or upon default) would be available to credit bureaux and thence to prospective future creditors.

Reform of the Debt Recovery System

Access to Courts. Mr Goodman's claim that the proposals seek to deprive creditors of their right of access to courts of law is simply a silly misstatement. In fact, it is contradicted by the fears Mr Goodman expresses further in the paper that the proposals will lead to the 'wholesale arrest of hundreds of thousands of Debtors'. The position is simply this: a creditor who is being paid has no need to take action through the courts. If he is not being paid, and adequate instalment arrangements have not been reached, the courts remain available; genuinely disputed debts can be resolved according to law; enforcement measures will be improved.

Non-attendance on Examination. The Commission's tentative view was that if a debtor did not attend on a summons, the court may order his attendance at an adjourned hearing, or may authorise the registrar to issue a warrant under which the debtor may be apprehended and brought before the court for examination. However, as the Commission has previously pointed out to Mr Goodman in correspondence, this proposal was only intended to operate in the context of a system which made provision for evening court hearings and the possibility of debtors making appointments with the court for an examination at a time other than that nominally stated on the summons document. It is surprising that Mr. Goodman failed to being that point to attention. Debtors would be informed that if they made satisfactory payment arrangements with their creditors, there would be no need to attend court for examination. One of the major reasons for non-attendance is that hearings are regularly scheduled on working days and during working hours. The proposal for apprehension of debtors who remained recalcitrant despite much improved and much more convenient procedures (which remains only a tentative proposal and does not necessarily represent the Commission's final view), was designed to reduce the opportunities a debtor might have under existing procedures to delay a creditor. If the Commission does decide to persevere with this tentative proposal, detailed consideration will be given to likely numbers of persons attending for examination.

Enforcement of Judgment Debts. Not only does Mr. Goodman's paper not accurately reflect our proposals; the paper is also internally inconsistent. I am, for example, at a loss to understand why Mr Goodman on p. 11 suggested that the Commission stated that no sanctions are required to compel the debtor to pay the judgment debt. The Commission's discussion paper did indeed outline at length the enforcement measures which it thought necessary. It rejected the view that everything could be left to the market. His statement is all the more difficult to understand when one notes that the relevant enforcement measures are discussed by him on p. 7 of the same paper.

This is not the place to canvass in detail the Commission's reasons for advancing its proposals. Another report is in the course of preparation. It deals with the reform of the debt recovery system itself. Meanwhile, I remain satisfied that there is ample evidence available both in Australia and elsewhere establishing the success of schemes such as those proposed in the Commission's earlier report.

I readily accept the apologies offered by Mr Goodman at the conclusion of his address. I am sure that, in the same spirit, he will not be unduly hurt if I set the facts straight. It is to be hoped that, when next Mr Goodman delivers a talk on this topic, he has these remarks with him — lest he forget.