AUSTRALIAN FEDERATION OF CREDIT UNION LEAGUES

THE SEMINAR ON CONSUMER CREDIT IN THE EIGHTIES

CANBERRA 17 APRIL 1980

FINANCE AND LAW REFORM IN THE EIGHTIES

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

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LAW AND CREDIT IN A TIME OF CHANGE

This seminar is yet another exercise in futurology. The decade is getting on. Most of us are becoming a trifle bored with future speculations. But for the law and for the credit industry, is it not difficult to identify the principal challenge of the last two decades of this century. The challenge of today is the challenge of change. At a time when so many institutions, laws and procedures are coming under question and when technology is revolutionising the ways of doing things, it is a difficult time to be in the service of the community: whether in government, the law or finance.

To assist Parliament in the review, modernisation and simplification of the law, law reform bodies have been established in all parts of the English-speaking world. The idea may have originated at the end of the 16th Century when Sir Francis Bacon declared that the organisational weakness of the Common Law of England was in its dependence upon particular litigation to present the opportunity for reform and modernisation of the law. Bacon suggested a typically English solution to overcome this structural weakness. He proposed the establishment of a committee which could take the whole body of the law of England into its hands and review it, as changing circumstances

required. Bacon's suggestion was ultimately translated into action by the establishment of the Law Commissions of Great Britain in 1965.[1] The delay between 1597 and 1965 must be something of a record in inter-departmental consideration of a law reform proposal. But the Law Commissions having been established in Britain, the idea quickly spread throughout the Commonwealth of Nations. Now, in Australia, there are law reform bodies in every jurisdiction. The Commission which I head is the national agency, devoted to the review of Federal and Territory laws.[2]

The Commission works upon references received from the Federal Attorney-General. This is in the nature of a guarantee against the Commissioners expending their efforts upon tasks which have no relevance to the law makers. There are at present four full-time Commissioners and six part-time Commissioners. The Commissioners are drawn from all branches of the legal profession: the judiciary, the Bar, solicitors, law teachers and government lawyers. Amongst the distinguished lawyers who have in the past served as members of the Commission is the Governor-General of Australia, Sir Zelman Cowen.

The Commission delivers reports to the Federal Attorney-General, who must table them in Parliament within a short period. The reports therefore become public documents. To them are attached draft Bills, to facilitate the implementation of the proposals for law reform. Not only does the draft legislation help to avoid the bureaucratic pigeonhole. It also sharply focuses the reformers' zeal and requires close consideration of the detail which must always be addressed in realistic proposals for reform of the law, its institutions and procedures.

It has not been the lot of the Law Reform Commission in Australia to receive references from successive Attorneys-General on technicial or 'lawyers' law' issues. On the contrary, successive Attorneys-General of differing political persuasions have referred to the Commission highly controversial issues involving large questions of social policy. For this reason, the Commission has exposed its tentative proposals for reform before the community, in advance of the delivery of a final report. Discussion papers are widely distributed. Public hearings are held in all parts of the country. Industry and professional seminars are conducted in every capital city. Public opinion polls and other surveys are administered. The defects in the law are debated in the public media. Radio, television, talk-back programmes and the like are frequently used to raise public consciousness about the law and to

secure opinion on the way in which its reform should progress. It may be possible to commit to a group of lawyers, working alone, such issues as the Statute of Mortmain or the Rule against Perpetuities. Such a course would be inadvisable and undesirable where contentious questions of public policy are necessarily involved in the design of law reform.

Although the Commission aims at a high level of research, it is not an academic institution. It is part of the lawmaking process of Australia. It is an advisory body for the Executive Government and Parliament. Although its statute is silent upon what happens after a law reform proposal is made, it is a heartening sign that so many of the reports delivered by the Commission have either been implemented or are under close consideration for early implementation. There is no doubt that nowadays Parliament needs the best advice which can be procured if it is to be able to grapple with the complex problems posed by today's fast-moving society. If the law is to remain relevant to changing times, it is vital that it should keep pace with change. Law reform commissions, and specifically the Federal Commission in Australia, exist to help the lawmakers cope with the challenges of change.

FOUR THEMES

Before venturing on the identification of a number of specific topics of law reform relevant to credit and the finance industry, I wish to suggest four themes which describe the chief forces at work which will affect Australian society and its laws into the 1980s. These themes will, I suggest, all be relevant to the future of the finance industry in the 80's and 90's in Australia. These themes are big government, big business, big education and information and big science and technology.

So far as big government is concerned, we can all see the growth of the public sector and the increasingly important responsibilities it has, to make decisions affecting every individual in society at various stages of his or her life. There will be no going back to the so-called 'good old days' of small government. Border skirmishes will be fought to rein in the public purse, to reduce taxation, to introduce 'sunset clauses' in legislation (by which a particular Act of Parliament will lapse after a given time[3]) and to limit and control the rapacious qango.[4] But I cannot foresee a return to the laissez faire society of the 19th Century. On the contrary, I believe that the growing integration of society and its recognition of responsibility for the poor, inarticulate, under-privileged members will, if anything, gradually

increase the role of the public sector and its influence on our lives. Banks and credit unions do important work for the not so affluent members of Australian society. But the principal burden falls and will continue to fall overwhelmingly upon the Government agencies and the public purse.

It is the recognition of the trend to big government which has led governments of all political persuasions to develop protective machinery to stand up for the individual against the seemingly overwhelming and all-powerful bureaucratic state. Successive governments in the Commonwealth's sphere in Australia have reacted positively to the need to defend the individual against unreasonable administration. A national Administrative Appeals Tribunal has been established to hear appeals against administrative decisions made by Commonwealth officers. The Tribunal is empowered to hear such appeals 'on the merits' and generally to substitute for the bureaucratic decision what it feels to be the 'right or preferable' decision in the circumstances.[5] The Tribunal, headed by judges, sits in all parts of Australia. It has already built up a notable reputation for the independent and dispassionate scrutiny of administrative decisions.

In addition, an Administrative Review Council has been established to oversee the development of laws reforming administration. A Commonwealth Ombudsman (Professor Jack Richardson) has been appointed and his business expands daily. He now receives large numbers of complaints by telephone: an innovation which has promoted speed of attention to citizen complaints and an admirable cutting of red tape which secures prompt correction of bad administration.

It is expected that the Federal Attorney-General will shortly announce the proclamation of the Administrative Decisions (Judicial Review) Act 1977. That Act, which has already been passed by the Commonwealth Parliament, contains a most important provision[6] to the effect that a person affe by the discretionary decision of a Commonwealth officer will in future be entitled to demand from him the reasons for his decision, his findings of fact and a reference to any evidence upon which he has relied. No more will the citizen be faced with a bland refusal. In the future he will be entitled to know why a decision affecting him has been made by a public servant. Knowing the reasons facilitates, where appropriate, a challenge to the correctness of the decision.

Access to information is also a theme of recent legislation. The Freedom of Information Bill, which is before the Australian Parliament, establishes the rule that in future people in Australia will generally be entitled to access to government information. Privacy legislation will be proposed in due course by the Law Reform Commission to ensure that individuals have access to information about themselves. A Human Rights Commission is proposed in a Bill before Parliament, precisely to test our laws against internationally agreed human rights. Similar developments are beginning to happen in all of the States of Australia. They reflect the reaction of the legal order to the growth of the public sector. Thirty years after Lord Hewart, the Lord Chief Justice of England, wrote 'The New Depotism', lawmakers and law reformers are putting forward effective, practical and accessible machinery to assert and uphold the rights of the individual against the administrator.

In a number of the projects of the Law Reform Commission, we have addressed this very problem. Our first report on Complaints Against Police[7] dealt with the provision of new machinery to permit independent review and scrutiny of decisions made by police in respect of public complaints about them. The Attorney-General and the Minister for Administrative Services have announced that the Commission's scheme, with some modifications, will be implemented in respect of the new Australian Federal Police. Already, the scheme has been adopted, in substance, in New South Wales.[8] Particular aspects of the Commission's recommendations have been adopted in other police forces in Australia.

In the Commission's latest report on Lands Acquisition and Compensation[9], shortly to be tabled in Federal Parliament, proposals are made to deal with the predicament faced by the individual when, under compulsory process, his property is taken by the Commonwealth for public purposes. The Australian Constitution did not incorporate a Bill of Rights. However, it did borrow from the Fifth Amendment to the United States Constitution one 'guaranteed right', namely, the promise of 'just terms' to persons whose property was taken by the Commonwealth for public purposes.[10] How do we translate this pious and abbreviated constitutional guarantee of 1901 into actual fair procedures for the handling of the human problems which arise when a person's home is suddenly resumed for an airport or a quiet suburban street is suddenly turned into a busy inter-urban highway? Addressing the practical problems of law reform, the Commission has proposed many new laws and procedures to translate 'just terms' into the requirements of the 1980s.

The second theme I have mentioned is big business. This theme is specifically relevant to finance. It is scarcely likely that the same disciplines which are now being developed and enforced as against big government will not, in time, come to the rescue of the individual against large corporations. Private corporations can be equally unthinking, oppressive and even bureaucratic. The problems of big business are somewhat different to the problems of big government. At least with big government, we share an ultimate national or sub-national identity. All of us have some control, however indirect, through the ballot box. But business can operate insensitively for its own purposes, without due regard for the needs of the country in which it operates. The ever-diminishing significance of distance and the ever-increasing speed and economy of international communications makes the development of international business both inevitable and, possibly, desirable. But there are by-products, which we will see more in the last decade of this century. For example, the efficiencies which persuade electronic companies, motor manufacturers and others to centralise their research or other facilities in overseas countries may not benefit a small market economy such as Australia. A marriage of computers and data bases through satellite and other communication systems presents the very real possibility that vital data on Australian individuals and businesses will be stored outside our country. This is a concern which is in the forefront of much European thinking at this time. With memories of invasions still fresh in mind, European leaders are sensitive to the external storage of personal data, sensitive or vulnerable data, data relevant to national security and defence and data vital to the cultural identity of a country. Although these concerns are not yet in the forefront of Australian thinking, I believe that they will, in time, become matters upon which we will have to reflect. They may require new laws to protect Australian national interests, for the interests of international and trans-national corporations do not always coincide with our own.

A number of the projects committed to the Australian Law Reform Commission reflect the concern with the private sector. Of particular relevance to the finance industry and credit unions is our reference on consumer indebtedness[11] which requires us to bring the law more into accord with current conditions of consumer credit. There has been a vast expansion of consumer credit since the Second World War. But the laws dealing with credit and debt remain very much as they were in the times of debtors' prisons. As is so often the case, the law deals with particular symptoms (a specific debt) rather than with the underlying disease (an inability to handle credit). I will return to this topic.

Our task relating to insurance contracts requires us to re-examine insurance contract law to bring it more into accord with a consumer insurance industry where, do what you will, you will not persuade the insured to read the details of his policy. A project of the Commission on class actions raises the question of the most effective means of providing legal discipline for large corporations where a legal wrong has occurred affecting many people in a like way. In the United States, it has been said that the class action to deprive corporations of unjust enrichment contrary to law is sometimes a more effective sanction than the criminal penalty.

To the forces of big government and big business must be added the impact of big education and information in Australian society. No one should be surprised at recent changes in moral and social values in society. The education figures make change inevitable. Widespread literacy and universal suffrage this century have given people living in Australia the opportunity to interest themselves in community affairs. Education standards are steadily rising. The proportions of persons aged 15, 16 and 17 attending school, as disclosed in the last four censuses were:

Age	1961	1966	1971	1976
15	60.89%	73.74%	81.25%	86.43%
16	30.50%	42.45%	53.69%	59.13%
17	-	17.41%	29.17%	32.20%

Degrees conferred by Australian Universities have increased from 3 435 in 1955 to 8 731 in 1965 and 24 216 in 1975. Australians tend today to be more actively involved in the political process and in community activity than previously they were. Although our school retention rates are not yet comparable to those of the United States, Japan and many European countries, they are continuing to increase. Perhaps the most dramatic sign is the increase in the number of young women continuing their education beyond the age of 16. Within the past decade, the percentage has doubled. Our society is better educated and more inquisitive. It is daily bombarded with news and information, views and comment to an extent only made possible by the technological advances in the distribution of information. In short, in a fast-changing society, we have a better educated citizenry, liable to question received wisdom and accepted values to a degree that would have been unthinkable in previous generations. It is vital that these phenomena should be thoroughly understood by lawyers and those in the finance industry. Indeed, it is vital that they be understood by all. Not only do they help to explain

the challenge to long-established laws and institutions. They also justify many of the questions which are now being asked. They require an answer and, to some extent, the readjustment of the relationship between lawmakers, lawyers and business, on the one hand, and society on the other.

SCIENTIFIC CHANGE AND LAW REFORM

The fourth great force for change is relevant to this seminar. It is the impact on our society of big science and technology. In many ways this is the most dynamic of the forces for change and is the one which the law and lawmakers find most difficult to accommodate. I need go no further than the programme of the Australian Law Reform Commission to illustrate the way in which rapidly changing science and technology is having its impact on our legal system. In some cases, science and technology come to the rescue of the law. In other cases, science and technology present novel problems which can be swept under the carpet for a time but which ultimately require the attention of lawmakers. My thesis is that not only must we be alert to these forces for change, but we must encourage bodies such as the Law Reform Commission to provide busy Parliaments and government officials with the best possible advice on the way the legal order can adjust to the challenges of technological advances.

Perhaps the task before the Law Reform Commission which most vividly illustrates the impact of modern technology on the law is that which requires the Commission to advise on new laws for the protection of privacy. There are many new technologies which affect the privacy of the individual in today's society. They include surveillance devices, electronic telephone tapping and listening equipment, optical means of surveillance and so on. But far more important and relevant to your industry is the impact of computers on individual privacy. In its capacities to collect vast amounts of information, to retrieve it at ever-diminishing cost and ever-increasing speed, to integrate information supplied from many sources and to do all this in a form which is neither readily accessible nor understandable by the ordinary layman, the computer presents new problems which the law must seek to face up to and resolve. In Europe and North America, despite their differences of language and legal history, a generally common solution has been found. It is to uphold the right of individual access to automated personal data. Exceptions are provided for confidential and secret data, such as may be contained in national security and some police intelligence files. But it will be important, if we value individualism, that we in Australia, too, provide

accessible and effective machinery to deal with this by-product of computerisation of society. Computers present many other problems that will have to be faced by our society. In a sense, they render society more vulnerable to terrorism and accident. Vital information may be destroyed much more readily where it is stored on a small computer tape. There was a certain protection in the inefficiency of paper files. The impact of computers on national sovereignty and on levels of employment in society will, likewise, have consequences that will require the attention of those who administer the law. All of these problems will require action by lawmakers in the next decade and beyond.

CONSUMER INDEBTEDNESS IN THE EIGHTIES

Regular Payment of Debts. I have now identified the chief forces which I believe will be at work in our society promoting change in the 1980's, including change in finance and the law. It is not for me to speak of the important financial developments which will preoccupy the Australian economy and credit unions as we move to the close of this century. Obviously, this audience will fix its sights upon such issues as:

* persistently high unemployment;
* rapidly increasing automation in the service sector as well as in manufacturing;
* significantly increased competition for foreign investment;
* radically different attitudes to leisure and the 'work ethic';
* the increasing significance in trans-national corporations in the economic decisions affecting our economy;
* heightened social tensions between those who cannot find work in a society of generally widespread consumer credit and affluence and those who must pay increasing taxes to support the unemployed during a period of structural readjustment;
* regulation and deregulation of banking and financial institutions.

These important developments, or some of them will preoccupy those closely concerned with the Australian economy and its financial organs. There will be others better equiped to debate and explain their significance. I propose to limit my observations to three tasks which the Government has assigned to the Law Reform Commission, which may affect, in part, the shape of finance in Australia in the 80's. I refer to our references on consumer indebtedness, class actions and privacy.

The Law Reform Commission's work on reform of laws governing consumer indebtedness is now partly complete. As many of you will know, the Commission has delivered a report Insolvency: The Regular Payment of Debts. That report

was prepared in 1977. In the preparation of it, we had close contact with the finance industry and credit unions in particular. In 1976, even before a consultative paper had been prepared on the issues raised concerning the reform of consumer indebtedness, officers of the Commission held a number of discussions with representatives of credit unions in New South Wales and Victoria. Subsequently, Mr Kevin Murray of the Australian Federation of Credit Union Leagues was appointed an honorary consultant to assist the Commission. More recently, Mr Peter Timmins has also been appointed as a consultant. The Australian Finance Conference has also been closely involved in our work at all stages. Credit unions throughout Australia specifically assisted the Commission by providing information on arrangements which they adopted for the pro-rating of debts, debt consolidation loans and debt counselling. I want to pay tribute to the help we received from the credit union movement. It is also appropriate to pay tribute the very useful, practical and well motivated work of credit unions and their officers in providing debt counselling of this kind. The role of the credit unions is described in our report. In fact, in the preparation of the report, the Commission sent questionnaires to a majority of credit unions and credit co-operatives throughout Australia in an attempt to assess the extent to which credit counselling, pro-rating, money management and debt consolidation facilities were already provided by them. 260 replies were received. In the report, the Commission summarised its conclusion:

> It is apparent that credit unions and co-operatives form the single most significant resource for debt assistance [in the way of debt counselling, pro-rating, money management and debt consolidation facilities]. Of the 260 respondent unions and co-operatives 245 grant loans for debt consolidation purposes. Roughly 50% of respondents indicated that debt counselling was available for members, while a slightly lower proportion (forty per cent) planned to provide some form of budget planning, money management or pro-rating.[14]

The Law Reform Commission's proposal for significant changes in Australia's debt recovery laws draws inspiration from the developments that have already occurred in the largest credit economies of them all: those of the United States and Canada. But it also draws inspiration from the splendid, voluntary work already being done in Australia by credit unions for their members. At the heart of the reform idea is a very simple notion. Most good ideas for the reform of the law have a simple concept at the core. In this case, the idea is that a failure to pay debts should, at least in the first instance, be seen not as wilful wickedness on the part of the debtor deserving punishment and blame but as a signal that here is a debtor who is not able to cope with the pressures, opportunities, temptations and facilities of the modern credit economy. Once identified, such persons should, if in receipt of regular

income, be entitled to a short moratorium, the opportunity of debt counselling, and help to reorganise their total debt so that they can be restored to full participation in the credit economy. This, then, is the idea. Instead of the law attacking the latest symptom and encouraging creditors to 'get in first' for the reactive advantage which can accrue to an early writ, the reform proposal seeks to acknowledge the very different society which has followed the credit explosion of recent years. It is little wonder that some debtors fall by the way and are unable to cope. Sometimes the failure arises through illness, unemployment or other unexpected and innocent cause. Sometimes, it arises simply from lack of training and experience in budgeting and plain over extension, induced by easy credit and the temptations to which it can give rise.

In the United States, a scheme similar to that put forward by the Commission has been operating for more than 40 years. I refer to the 'wage earner plans' by which wage earners or people otherwise in receipt of regular income are given a legal right to a short respite within which they can reorganise their total debt. The information before the Law Reform Commission is that these 'wage earner plans' are working well in the United States and are a frequently used facility. Amendments to the bankruptcy laws in the United States passed by the Bankruptcy Reform Act 1978 included extension of the 'wage earner' scheme to all persons, including the self employed and pensioners, who receive a regular income. The court is empowered to discharge unsatisfied debts if the plan proposed by the debtor includes a repayment rate in excess of the dividend that would have been paid on sequestration.[15]

The proposal put forward by us is still under the consideration of Federal authorities. There have been two developments. In the first place, the South Australian Parliament enacted the Debts Repayment Act 1978. This Act has not yet been proclaimed and may be significantly modified by the new Administration in that State. The legislation differed somewhat from that proposed by the Law Reform Commission partly because, being State legislation, it was not possible to provide a moratorium against bankruptcy proceedings. Under the Australian Constitution, bankruptcy is a Commonwealth not a State responsibility. The South Australian Act entitled a debtor whose liability did not exceed $10,000 to apply for assistance to an accredited debt counsellor through the Debtors' Assistance Office. If the counsellor was satisfied that the debtor was in financial difficulties and that it would be in the interests of the debtor and his creditor to do so, he was empowered to formulate a scheme for the regular repayment of debts. Such schemes required the approval of the South Australian Credit Tribunal. During the currency of an approved

scheme, the debtor's ability to raise credit was restricted and creditors were unable to enforce debts under State law, whilst the debtor maintained his payments to all creditors.

Bankruptcy Reform. A second development is the enactment of the Bankruptcy Amendment Act 1980 by Federal Parliament. The Act received the Royal Assent on 8 April 1980, and will come into force on a date to be proclaimed. It contains a number of reforms, although the proposals of the Law Reform Commission for regular payment of debt schemes and debt counselling have not been included in the Act. One proposal included in the Commission's sixth report has been adopted by the Government in a modified form. I refer to the suggestion of the Commission for the significant reduction of the period of automatic discharge from bankruptcy. The Commission proposed that the non-business bankrupt should be automatically discharged from bankruptcy six months after the commencement of the bankruptcy, unless an objection was made by a creditor or the official receiver before discharge.[17] As introduced, the Bankruptcy Amendment Bill 1979 proposed a reduction of automatic discharge from the present five years to two years. The Minister subsequently amended this period from two years to three years.[18] The new period of bankruptcy is to apply to all bankrupts, not only non-business bankrupts.

Several of the speakers in the debate on the Bill called attention to the need to reform Australian bankruptcy, insolvency and debt recovery laws so that they accord more closely to the realities of credit extension today. Comments from both sides of the House indicate a sensitive appreciation of the rapid change in the extension of credit, which has not been matched by a similar change in the community's institutions, laws and procedures. From the Government's side, Mr Michael Hodgman put it thus:

> We have only to turn our minds back to the last century ... to recall that debtors' prisons were very much an accepted form of the economic and commercial life of the United Kingdom literally a little more than a 100 years ago. If we have done anything in the 20th century I think we have at least now reached the stage of accepting that an honest debtor who gets into debt, through no dishonest or corrupt means, should not be the subject of punishment per se, should certainly not be imprisoned, but should be counselled, rehabilitated and assisted ... The more enlightened approach to the commercial law of this country has come to a recognition that we do not, prima facie, punish people who get into debt as was the tradition in the last century and for most of this century. We now endeavour to rehabilitate them and assist them.[19]

On the Opposition side, a call was made for a comprehensive re-examination of Australia's bankruptcy laws to consider its 'basic philosophy'. Attention was

drawn to the fact that the Law Reform Commission had proposed not only a significant reduction in the period of automatic discharge as an immediate reform but a major review of the Australian Bankruptcy Act in its application to both business and non-business debtors. In our 1977 report, we said:

> The time has come for a full revision of the Bankruptcy Act in light of the social, commercial and economic changes which have taken place in the last half century. Not only the general philosophy of the Act, but many of its specific provisions are directly traceable to English legislation of the 19th and the early 20th century. Since that time, Australian credit and business practices have developed and changed quite radically, as have community attitudes towards credit and debts. Both the United States Congress and the Parliament of Canada have recently received comprehensive reports on bankruptcy from expert bodies appointed by them. Legislation is now before Congress and is shortly to be reintroducted to the Canadian Parliament. ... A further Reference to this Commission in suitable wide terms would establish a review of the law necessary to render it relevant to present conditions.20

Responding to the call for a major overhaul of the Bankruptcy Act, the Minister, Mr Garland explained that the Government was considering the Commission's proposal for a general reference on insolvency law.21 Apparently, the matter has been raised with State Ministers on the Ministerial Council for Companies and Securities but it was explained that that body had a 'lengthy agenda'. It may be hoped that the fresh calls in Parliament and the new scrutiny of Australian Bankruptcy law which the 1979 Bill has promoted, will lead on, in time, to a thorough modernising review of Australian bankruptcy law. It is a law which still has about it the air of stigma and punishment. In significant respects, it pays little regard to important, relevant developments. Amongst these are:

* the development of the credit reference system as a means with far greater potential for protecting creditors against incompetent and dishonest debtors;
* the exponential growth in credit extension and the pitifully small amount usually recovered by creditors from the estates of non-business bankrupts, as disclosed by the Law Reform Commission's research;
* the need to reconsider property exempt from bankruptcy, especially in Australia, where individual home purchase is one of the highest in the world, yet the owner occupied home is not exempt.

I have said that the Commission is at the first stage of its work on consumer indebtedness. I do not include a third stage of a general review of the Bankruptcy Act for it is not certain that such a reference will be given to the Commission. I do believe that the 80's should see a comprehensive re-examination of bankruptcy and insolvency laws in Australia. The second stage, and one which is progressing within the Commission relates to the

reform of debt recovery laws generally. In substance, this subject is being pursued in relation to the Australian Capital Territory but as a result of close co-operation with a number of law reform agencies (notably in New South Wales and Tasmania) and other State and Territory colleagues, we are hopeful of securing generally uniform progress in the reform of debt recovery laws and procedures throughout Australia. Obviously, general consistency, if not uniformity, in the approach to debt recovery law reform is desirable. Many businesses are nowadays nationally organised. Credit control is often exercised on a national basis. Significant disparities in debt recovery laws would be inconvenient, confusing and therefore undesirable.

Debt Recovery Survey. Many of you will know that the Commission published a discussion paper suggesting important changes in debt recovery laws and procedures.[22] The paper advanced its ideas tentatively, in order to induce public and industry comment and criticism. At the heart of the discussion paper was the same simple theme. Debt recovery process should, where appropriate, be used as the opportunity not for the heavy handed application of a single debt recovery procedure but rather the examination of a debtor to ascertain whether or not he is in need of counselling and to design a debt recovery procedure suitable to his means and circumstances.

To test the feasibility of the Commission's proposals, an important and novel enterprise has been initiated. This is a survey of existing debt recovery procedures in New South Wales. That State was taken as the largest jurisdiction. The survey has been conducted with the co-operation of the New South Wales Law Reform Commission, the New South Wales Attorney-General's Department and the Australian Bureau of Statistics. It involves a thorough study of every aspect of the 'life' of some 2,570 debt recovery actions in all parts of the State and in the Courts of Petty Sessions and District Courts. The files are being analysed to see just how the present system is operating and how it would be changed, if the proposals suggested by the Law Reform Commission were introduced. I do want to emphasise the care with which we are approaching the reforms advanced by us. In the business of changing laws inherited from a different society and earlier times and then applied unthinkingly in new circumstances, it is important that we do not move from one inappropriate system to another.

Preparations are in hand for the results of the survey to be processed by computer. So far as we are aware, this will be the first time that there has been such a detailed scrutiny of civil court procedures in Australia. I have no doubt that as we approach the end of this century, there

will be increased interest in applying to court procedures the same tests of efficiency, economy and good sense as are required in any activity of business of comparable size.

Two other studies are closely related to the debt recovery survey. The first is an attempt to ascertain the costs involved in service and execution of process by bailiffs. The data for this study has been gathered, and is currently being analysed by the Australian Bureau of Statistics. It is relevant to the Commission's proposal that a good deal of debt recovery process could be served by mail, as is already done in Tasmania. The second study, which we hope to undertake shortly is designed to assist the Commission to determine the time that would be required for an adequate examination of judgment debtors in order to ascertain whether they are in need of debt counselling and a regular payment of debts program and to design the system of repayment suitable to their means. It is hoped to make a study of present debtor examinations conducted in the District Court and Courts of Petty Sessions in New South Wales. Only after this study has been concluded will a final report on debt recovery procedures be presented.

The 1980's will see important changes in the laws governing consumer indebtedness. Of the details, no one can predict. But it seems safe to suggest that Australia's bankruptcy laws will be significantly revised, debt counselling will be introduced for those in the small but inevitable percentage of persons unable to cope with the credit economy, debt recovery procedures will be increasingly used as an opportunity to identify those in need of counselling and help. Debt recovery will become more finely tuned and more efficient than at present. The courts, as institutions for debt recovery will be tested by standards of efficiency and economy. The credit reference system will play an ever increasing role in protecting creditors and preventing credit problems arising in the first place.

Through all this, the credit unions of Australia will continue their invaluable work for thousands of Australian investors and borrowers. I have no doubt that if a formal system of debt counselling is introduced, to make more widely available the informal and voluntary systems now offered by many credit unions, the latter would continue to play an important part in the operation of the formal scheme. What is more, their capacity to help would be enhanced by statutory machinery designed to protect and ultimately rehabilitate the honest, persevering debtor.

CLASS ACTIONS AND THE FINANCE INDUSTRY

The second reference before the Law Reform Commission which is relevant to the credit industry is the task we have on class actions. The Commission was asked by Attorney-General Ellicott to report on whether class actions should be introduced into Federal courts in this country. The class action is a procedure by which one litigant, or a small number of litigants, can bring legal proceedings on behalf of many who are similarly affected by a common or like legal wrong. At present, court rules severely restrict the bringing of representative actions. Parties who have virtually identical contracts, but have entered them individually and separately, must generally bring separate actions.[23] In the United States 'class actions' developed as a means by which representative parties where able to 'aggregate' the claims of many into one large claim. Although abuses developed in the United States, at the heart of class actions is a good idea. It is that in a society of mass production of goods and services, when things go wrong, they tend to be repeated many times. Legal process, if it is to keep pace with the modern economy, should be adapted to deliver justice in a 'mass produced' way, consistent with the requirement to observe and allow for individual differences and adequately to protect all parties involved in the litigation.

In the United States, the representative action has been used in financial transactions. Cases arise in Australia where it is at least open to the suggestion that a representative suit would be appropriate and individual proceedings should not be required.

Take this case. Some time ago, several money lenders were specialising in advancing loans to persons who would normally be regarded as bad risks. They included pensioners and low income earners. Sums borrowed ranged from $300 to $600. In one case, the effective interest rate charged was said to be in the vicinity of 180%. Under current law, about 6,000 borrowers would have been entitled to apply to reopen their individual loans, on the ground that the interest rates involved were harsh and unconscionable. Of course, under present law requiring the bringing of individual actions, nothing happened. Even if one or two of this disadvantaged class were to bring a case, the amount at stake for them would not be outweighed by the amount of the profit procured from the thousands of innocent and needy credit victims.

This is perhaps an extreme case. But it does illustrate a potential utility of a representative suit as a means to equalise litigation in which, with proper protections, a much more equal court battle can be fought than is likely in a system that requires costly, slow and sometimes frightening court cases to be brought separately by individual citizens.

The class action debate has produced a lot of heat and, I am glad to say, some light. It is plain that we must avoid the abuses that have been identified in the United States. In particular, we must avoid blackmail litigation, entrepreneurial lawyers and court cases which are conducted for the lawyer's benefit, not the client's compensation. The precise form of Australia's representative action has still to be designed. Consistent with my view that the courts should be modifying their procedures to make them more attuned to the society of today, I believe we will see in the 80's an increasing concentration on the efforts to adapt the administration of justice to provide redress against mass produced legal wrongs. For bodies such as credit unions, dealing with the public in large numbers and complying with many statutory and contractual obligations, this possible development will obviously be one of considerable potential importance.

CREDIT PRIVACY AND EFT

Privacy and Credit Bureaux. The third reference of specific relevance to financial institutions relate to the reform of the law governing privacy in Australia. In the future the 'privacy' of the individual will be breached more through the computerised record system than through the keyhole. The Law Reform Commission plans shortly to publish discussion papers which will outline some of the chief problems of privacy in Australia and the solutions suggested at a Federal level to cope with the challenges to privacy. A research paper has been prepared for the consideration of the Commission by one of the Commissions's officer , Mr William Tearle. This paper examines the flow of information concerning individuals through the credit industry. It gives particular attention to the expanding importance of credit bureaux and the use of credit cards. It specifies details of the information which credit bureaux are likely to hold concerning individuals and the way in which this information is made available to inquirers. It also contains an outline of the present State statutory and voluntary arrangements designed to enable the subjects of credit records, in some circumstances, to have access to those records and to have errors corrected. An interesting feature of the paper is that for the first time it gives an idea of the number of persons upon whom credit bureaux in Australia maintain records. Mr Tearle estimates that conservatively, as at late 1979, credit bureaux held records on some 5.5 million individuals in Australia. This estimate is based on the fact that there are over 12 million individual credit records currently being held by Australia's credit bureaux. Allowance is made for duplication of records. Two or three bureaux may maintain records on the same individual. The resulting figure indicates that the overwhelming number of the working population in Australia are recorded somewhere in a modern (and sometimes computerised) credit reference system.

The fact that credit bureaux have become such big business and now maintain records about such a large proportion of the population is simply another reflection of the enormous expansion of the credit economy in Australia since the Second World War. The significance of this proliferation of personal credit files may be realised when it is remembered that credit bureaux are at present largely free from public scrutiny. In some States of Australia credit bureaux are subject to legislation but where this is so, the relevant laws relate only to the questions of access by subjects to their records and procedures for correcting errors and notifying those who previously received the incorrect information. If legislation does exist, it simply takes the credit bureau as established and no statutory criteria are laid down concerning such matters as:

* The general control of credit bureaux with their sensitive and personal data
* Reporting procedures to be followed by credit bureaux to preserve security and respect individual privacy.
* Criteria for the selection of subscribers

There is no doubt that credit bureaux serve an important and extremely useful function in society. They provide essential information which not only assists creditors to assess credit applications but also helps to reduce the risk of bad debts. Sometimes applicants for credit must be helped to avoid the dangers of over-commitment. Credit bureaux can help debtor and creditor alike.

For all this, Mr. Tearle's paper urges upon the Commission some form of public scrutiny for these central record-keeping systems to ensure that the privacy of individual Australians is respected and that the practices followed by each bureau conform with fair information policies acceptable in the community. A number of matters of concern are identified in the paper. They include:

* Information is sometimes provided by a credit bureau to the police on a co-operative basis or to certain government bodies simply on the production of a form of purported identification, without necessarily requiring evidence that the police or government body concerned has the authority to obtain the information sought.
* It has been a common practice for many years for RAAF officers to enter and inspect the files relating to employees in a major credit bureau.
* Details of writs or summonses issued against a person are sometimes circulated throughout the credit industry in trade gazettes, before the period allowed for the entry of a defence has expired and, indeed, in many cases, before the summons has even been served on the defendant.

* One major credit bureau does not make any inquiry at all as to the purposes for which a client would use the information obtained. Any person or organisation may become a subscriber of the bureau upon the payment of the prescribed charges. The agency thus provides an open access system to information on individual credit default in Australia.

The Right of Access. In a task I have recently concluded as chairman of an OECD committee seeking to identify common rules for the protection of privacy in Western countries in the computer age, a remarkable legal phenomenon emerged. It was that in the legislation of countries as divergent in history, language and law as the United States, Austria, France, Sweden, Luxembourg and Canada, a single principle had been adopted for the protection of the privacy of the individual in information systems. This was the right of individual access to personal information systems concerning himself. Of course, there must be some closely defined exceptions (including police intelligence, national security and the like). But in files such as those dealing with credit and like personal information, there may be much to commend a simple principle entitling the individual to have access to any data held upon him. In South Australia, where subject access to credit records is unrestricted, the rate of consumer access to credit records has not reached the 'floodgates' that were feared. On the contrary, the rate is much lower proportionately than it is in New South Wales where the access entitlement under the New South Wales Privacy Committee's Voluntary Agreement is narrower than the South Australian statutory provision. Demands of access in South Australia have certainly not been such as to impose undue burdens on the credit bureaux. One large national credit bureau has allowed the general inquirer access to his own complete record for many years, apparently without undue inconvenience. The paper prepared for the Law Reform Commission suggests that, in the first instance, the frequency of the exercise of the right of access should not be limited. If later it becomes apparent that the right is being exercised so as to diminish effective administration of the credit bureaux, it may be necessary to restrict the frequency of access. Credit bureaux should be entitled to charge a nominal fee for access to their records, except where the inquiry follows a refusal of credit, in which case no fee should be charged.

I believe that we will see more attention to the need to uphold the individual in automated data systems, including those dealing with credit. The development of computerisation of records brings in its train many advantages but also risks and dangers. Errors can occur. Unfairness to the individual may

creep in. Decisions may be made affecting the life of the individual, based on incorrect, out of date, incomplete or distorted information. The general reaction of the law will be, I believe, to uphold the openness of personal information systems, to the individual concerned.

Electronic Fund Transfers. Taking advantage of technological change, whilst keeping its dangers under control, is the theme of recent reports on Electronic Fund Transfers (EFT). In the United States a national Commission was established in 1974 to conduct a thorough study and investigation of EFT and to recommend appropriate administrative action and legislation to permit its orderly development. At the end of 1977 the Commission delivered its report. It urged that banking by EFT and computerised means should be permitted to grow with a minimum of government regulation. But it cautioned that consumer safeguards were needed for such innovations as pay-by-phone accounts, 24-hour teller machines, direct deposits of wages and social security payments, instant verification of credit accounts and so on. Many of the issues addressed in the United States Report[24] are not strictly relevant to us in Australia, because of our different, national regulation of the banking and finance industry. But in the course of the report a number of themes were touched upon that will be relevant to those who in our country are examining the implications of EFT. I refer to:

* The provision of consumer redress in the event of goods or services paid for by EFT later found to be defective.[25]
* EFT theft, error and system malfunctions and their legal consequences.[26]
* The protection of individual privacy where there is necessarily increased and readier access to sensitive and private financial information, previously subject to strict banker-customer confidentiality.[27]

There is no doubt that the development of computerised banking increases the risks to individual financial privacy:

* EFT will generate a record where cash usually left no trace.
* EFT increases the amount of information recorded at the point of sale.
* EFT records are easily retrieved in a centralised form, without the protections of decentralisation of most present banking records
* EFT will leave a 'credit trail' so that as we enter the cashless society it will become relatively easy to trace an individual by his latest purchases. The anonymity of the cash or cheque transaction will gradually disappear.

* Every pressure of economy and efficiency will move towards a single recording system. For ease of credit checking, ready access to that system by very many people will be needed. The privacy of one's credit situation will be more difficult to assure in a regime in which, with minimum preconditions, large numbers can have access to what has hitherto been regarded as intimate and private information.

This is not futurology. Anyone who has used a credit card in the United States will know how, through the telecommunications system, an automated check is made to authorise or refuse the transaction. The personal credit record no longer knows even national boundaries. A by-product of the Jumbo generation is that your credit worthiness in Sydney, Australia, can be checked in a flash at the rent-a-car desk in Palm Springs, California.

Realising the potential dangers of a misuse of EFT and like credit information, the United States Commissioners concluded that EFT called for much stricter controls than now applied to government access to an individual's financial records. Recommendations were directed at minimising the extent and collection and keeping of EFT data, forbidding its use for surveillance of individuals either as to their physical location or patterns of behaviour and limiting access to such data even in the case of law enforcement.[28] The spirit behind the United States report was that protections should provided not only against misuse and breach of security in the case of EFT data flows but also against the 'chilling effect' which too ready an access to such computerised banking records might have upon society. It is not good enough to say that law-abiding citizens have nothing to fear from constant surveillance of their whereabouts, spending and buying patterns, movements and personal conduct. Freedom to move about, without internal passports and without molestation by authority is a precious feature of our form of society. The fear that authority can have a constant surveillance upon the individual through his purchasing or other transactions is based upon the desire, not to deceive authority but to limit its function to its own proper, circumscribed area. As we approach the cashless society and the age of computerised banking and credit, it will be important that we develop laws that address the dangers to privacy and individualism which have been identified in the United States and Canada[29] and which are as real for our country.

CONCLUSIONS

I have identified some of the underlying themes which I believe to be at work in Australia and which will affect the laws governing your industry in the decade ahead.

I have called attention to the three projects that throw together the credit union movement and the Australian Law Reform Commission. In our task on consumer indebtedness, we have been closely involved with you and in a sense have put forward a scheme which draws upon the splendid and voluntary work which credit unions have done in counselling honest people who get into debt and need help. In our task on class actions, we are seeking to address the problem of the delivery of justice where large numbers of people are similarly affected by a common legal wrong. In our project on privacy we are, above all, addressing the need to ensure that the computer age takes advantage of the marvels of the new technology available to us but, in matters of credit as elsewhere, keeps its eye fixed on the need to keep a balance between technological advances and the respect for the individual human being.

We have already had much help from the credit union movement. I know that in the future we will continue to enjoy your assistance and support. Credit unions, embracing as they do thousands of good Australians in all parts of the country, of all walks of life and, doubtless, of every social persuasion, are singularly well placed to help lawmakers, and those who advise them, on the directions for reform. We live in a time of great change, and above all great technological change. My hope for credit unions is my hope for the law and its institutions. It is that we will prove equal to the challenge of change.

FOOTNOTES

1. Law Commissions Act 1965 (U.K.).

2. Law Reform Commission Act 1975 (Cwlth), s.6.

3. The Human Rights Commission Bill 1979 (Cwlth) as amended in the Senate will lapse, if enacted, after five years, in default of Parliamentary continuance.

4. Quasi autonomous non governmental organisations.

5. Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158,161; (1979) 2 ALD 60,69.

6. Administrative Decisions (Judicial Review) Act 1977 (Cwlth), s.13 (not yet proclaimed).

7. The Law Reform Commission, Complaints Against Police (ALRC 1) 1975. See also ibid, Complaints Against Police: Supplementary Report (ALRC 9) 1978.

8. Police Regulation (Allegations of Misconduct) Act 1978 (N.S.W.).

9. The Law Reform Commission, Lands Acquisition and Compensation (ALRC 14) 1980.

10. Australian Constitution, s.51(xxi).

11. The Law Reform Commission, Insolvency: The Regular Payment of Debts (ALRC 6) 1977.

12. The Law Reform Commission, Insolvency : The Regular Payment of Debts (ALRC 6), 1977).

13. ibid, 39.

14. loc cit.

15. For a description and discussion of the United States legislation and a comparison of bankruptcy reforms in Australia and the USA, see (1979) 7 Aust.Business L.Rev. 332f.

16. Commonwealth Parliamentary Debates (House of Representatives) 5 March 1980, 656f.

17. ALRC 6, 69.

18. CPD (H of R) 5 March 1980, 656.

19. ibid, 661.

20. ALRC 6, 80.

21. CPD (H of R) 5 March 1980, 679.

22. The Law Reform Commission, Discussion Paper No. 6, Debt Recovery and Insolvency, 1978.

23. For a discussion of present law and the Commission's tentative proposals see The Law Reform Commission, Discussion Paper No. 11, Access to the Courts - II, Class Actions, 1979.

24. National Commission on Electronic Fund Transfers (USA), Final Report, EFT in the United States : Policy Recommendations and the Public Interest, 1977.

25. ibid, 67.

26. ibid, 55.

27. ibid, 20.

28. ibid, 25.

29. Law Reform Commission of Canada, Working Paper 21, Payment by Credit Transfer, 1978.