

Equal emphasis was placed on the need to ensure an appropriate balance between the rights of business and of consumers and the need for an efficient and competitive business life.

The Customs taskforce clearly saw a reference on Customs and Excise legislation as fitting within this aspect of the suggested overall program.

courts and tribunals. Similar considerations were addressed in relation to courts and tribunals. The ALRC Report pointed out that courts are under increasing strain because of law litigation and more complex cases. Pointing to the ALRC work, then rapidly drawing to a conclusion, on Contempt of Court and Evidence, the ALRC projects on Service and Execution of Process, Standing and Class Actions, the ALRC suggested a reference on Civil and Criminal Procedure in Federal and Territory Courts saying that such a reference would be a logical extension of these existing projects.

When completed, the Commonwealth would have recommendations suitable to take Federal and Territory Courts into the 1990s and beyond.

Similar suggestions were made in relation to the other two areas of the program identified.

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insolvency discussion paper

If ever you feel a desire to go wrong, don't prig petty cash or enter three-penny letters as sixpennies. Collar 10 000 pound and be sure to burn the bally books.

George Mendell: *The Pleasant career of a Spendthrift* (London, 1929) quoting Henry 'Money' Miller

The Australian Law Reform Commission will be issuing a major discussion paper in its general insolvency inquiry in August 1987. The Discussion Paper will cover the entire ambit of insolvency law both in relation to companies and individuals.

consultations. The proposals made in the Discussion Paper are the culmination of three years' work. Following the publication of an Issues Paper in January 1985, the Commission embarked upon a program of research, the vetting of written submissions (of which over 100 were received) made in response to the Issues Paper and an extensive and intensive process of consultation. Consultants have been drawn from both within Australia and overseas, and have included insolvency practitioners selected from a wide range of experts including judges, court officials, government bodies, members of the legal and accounting professions and organisations representative of particular interests, such as small business and social welfare recipients.

community response. The Commission hopes that the Discussion Paper will attract comment and criticism which will assist the Commission in the formulation of its final Report scheduled for publication in 1988.

public hearings. To further the opportunity for comment and criticism, public hearings will be held in capital cities around Australia in late September and October this year. The exact dates and venues appointed for the public hearings will be advertised in major newspapers appearing in all Australian capital cities.

form of the discussion paper. The Discussion Paper is divided into two parts. The first is discursive. It surveys

each area treated, overing the current position and perceived problems, suggests possible solutions to those problems, including an examination of those tried or proposed overseas, and culminates in the presentation either of a proposal or the raising, for further debate, of various possible alternatives.

draft legislation. The second part of the Discussion Paper is draft legislation which covers the main proposals in the Discussion Paper. Each piece of legislation is explained in commentary which forms part of the discussion of proposals in the first part of the Discussion Paper.

summary of major areas treated. The following is a brief summary of the major areas dealt with in the Discussion Paper.

- *voluntary administration of insolvent companies.* The proposals and legislation define a new procedure for the voluntary administration of insolvent companies, capable of implementation without undue formality, cost or delay. The procedure is designed to replace existing forms of voluntary procedure such as official management and creditors' voluntary windings up.
- *the winding up of insolvent companies.* The Commission proposes the creation of a distinct and separate form of administration for insolvent companies to be called 'winding up in insolvency'. Only those provisions relevant to this form of winding up would apply - such as the avoidance of antecedent transactions, the examination of directors and liability for insolvent trading. The distinction between Court and creditors' voluntary windings up would be abandoned. Provision is made for the conversion of the winding up of a solvent company to a winding up in insolvency.
- *receivers and floating charges.* When a receiver is appointed to the property of a company under a floating charge, the company is usually insolvent. A receivership is, in a sense, a limited form of insolvency administration. However, it is directed solely to the interests of the floating chargeholder, often to the prejudice of unsecured creditors. Although commercial considerations dictate the retention of the floating charge as a form of security, the aim of the proposals in this area is to encourage the administration of the affairs of an insolvent company as a whole, rather than a partial administration in the interests of a secured creditor.
- *corporate trading trusts.* Where a company conducts a business as trustee, particular problems arise if the company becomes insolvent. There may be conflict between the law relating to trustees and law governing the winding up of insolvent companies. The Commission's proposals are designed to effect some desirable order in insolvency administration in this area.
- *director liability and disqualification.* A director of a company should owe a statutory duty to the company to prevent the company from engaging in insolvent trading. A breach of the duty should correspond with the loss or damage suffered by the company having regard to the interest of creditors and any damages awarded

should be available for distribution among unsecured creditors in the winding up.

- *assetless companies fund.* It appears that a large number of companies are left unadministered because they have no assets. A winding up and, at least, a partial administration of all insolvent companies is important. It permits an investigation of a company's affairs and the possibility of discovering some fraud or other wrongdoing by persons connected with the company. This may lead to the recovery of property of the company and a return to creditors. To cover the costs of the winding up of such companies, the Commission proposes the establishment of a fund which would be created by a levy upon all incorporated companies out of which such costs may be met.
- *proceedings in bankruptcy.* The aim of the reforms proposed is to simplify, rationalise and modernise the present law and practice governing proceedings by creditors to make individual insolvents bankrupt. The Commission's proposals include abolition of the concepts of 'acts of bankruptcy' and relation back, the replacement of the existing bankruptcy notice with a statutory notice of demand which need not be based upon a judgment debt, and provisions to prevent disputes solely on technical grounds. It is also proposed that disputes relating to the notice may be heard by courts other than the Federal Court.
- *voluntary bankruptcy.* There are two forms of insolvency administration available to insolvent indi-

viduals who wish to make some voluntary arrangement for the payment of their debts: voluntary bankruptcy and Part X of the Bankruptcy Act. Because Part X is not accessible to the majority of consumer debtors, the Commission proposes that there be a wider range of voluntary forms of insolvency administration available to individual insolvents. Bankruptcy should be reserved for those persons whose commercial conduct leading to the insolvency has been unsatisfactory if judged by contemporary objective standards. As a necessary adjunct to the creation of alternative forms of administration, there should be a public debt counselling agency to advise and assist individuals with debt problems.

- *voluntary administration by insolvent individuals.* The Commission suggests no fundamental change to the Part X procedure. However, a number of proposals is made with a view first, to making the procedure more efficient, and secondly, to preventing the possibility of abuse and manipulation of the procedure — instances of which have recently come to light. Those most far-reaching of the proposals relate to the provision of information to creditors and creditor voting. Also, a debtor who initiates the Part X procedure should only be at risk of bankruptcy proceedings by creditors where the debtor otherwise fails to comply with one of the duties under Part X.
- *discharge from bankruptcy.* If the Commission's proposals for making available alternative forms of insolvency administration were considered desirable, the Com-

mission would be proposing only slight changes to the current discharge provisions. These include removing the present possibility of self-executing objections to discharge, so that all objections to discharge would be heard before the Court, and removing the present fetters which limit the decision-making powers of the Court in relation to discharge. If the present availability of forms of administration available to individual insolvents is to remain unchanged, some alternative approaches for the total restructuring of the discharge provisions are suggested.

- *avoidance of antecedent transactions.* Extensive changes are proposed to strengthen, simplify and modernise the existing law dealing with the recovery of property disposed of by an insolvent. In particular, the Commission proposes a category of person termed a "related person" to whom the provisions would apply with more rigour.
- *claims in insolvency.* Consistent with the principle that an insolvency administration should be an orderly process, the Commission is proposing that all debts and liabilities of an insolvent, including claims arising in tort, even though unquantified, should, where possible, be included in the insolvency administration.
- *priority among creditors.* The principle of equal sharing dictates that the distribution among creditors should result in as close to a rateable distribution as possible. The Commission therefore proposes that the existing Crown

priority be abolished. In addition, it is proposed that a wage earner protection fund be introduced to meet the claims of employees and so enable the removal of the employee priority.

- *property available for distribution.* The Commission has developed proposals to assist in the administration of estates of bankrupts whose property comprises interests in partnerships, private companies and trusts. The Commission has reviewed the categories of property exempt from distribution and has examined how residential requirements of bankrupts and their families may be accommodated.
- *insolvency practitioners.* A largely self-regulating system of registration and regulation of insolvent practitioners is proposed. The one system should deal with the qualification of persons to practise in bankruptcy and company insolvency.

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human rights in victoria

The good of the people is the chief law.

Cicero. *De Legibus*

The Legal and Constitutional Committee of the Victorian Parliament has produced a report entitled *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*. In assessing the desirability of human rights legislation, the Report examines the existing system for protection of human rights in Victoria, the limitations of that system, actual and