

Citing changing economic circumstances and financial fortunes as matters which could easily make such a marriage contract unjust, the *Australian* urged that the situations in which such contracts would be needed would be exceptional and they would more likely lead to family friction.

Perhaps the last word should be given to Senator Durack, a member of the Opposition, who said in the Senate:

The Law Reform Commission's report on matrimonial property is of major significance . . . The Law Reform Commission has given this matter deep consideration. . . . Its most interesting and probably most important recommendation is that the parties, ahead of the breakup of a marriage, should be able to enter into contracts for the division of property in the event of a breakup occurring. That would be a major change in public policy if adopted by the Parliament. . . . We should not rule it out on the basis of past public policy or moral attitudes. It seems to me that a lot of the problems that have arisen in the division of property between the parties could be resolved if those parties had entered into some property sharing arrangements. Whether those arrangements are based simply on the possibility of separation or are entered into simply to have a better arrangement as to matrimonial property is beside the point. This central recommendation of the Commission makes a substantial contribution to solving this problem. . . . I express my concern that this matter should be given close consideration and not rejected out of hand, as it may well be.

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### debt recovery

Annual income twenty pounds, annual expenditure nineteen nineteen six, result happiness. Annual income twenty

pounds, annual expenditure twenty pounds ought and six, result misery.

Charles Dickens, *David Copperfield*

*report tabled.* *Debt Recovery and Insolvency*, a major report of the ALRC, was tabled in the Commonwealth Parliament on 21 October 1987. The report deals with the procedures in courts of summary jurisdiction for debt recovery, in particular the 'default' procedure which allows a judgment to be entered in default of appearance.

*context for the report.* The report is the second in the reference on consumers in debt. In the first report (ALRC 6) the ALRC made a number of recommendations designed to enable insolvent debtors to avoid bankruptcy by entering into appropriate arrangements with their creditors. It called for the establishment of a regular payment of debts program which was specifically designed as an alternative to bankruptcy. A debtors assistance office was also envisaged by the ALRC to help debtors with debt counselling and with the formulation of repayment plans for the regular payment of debts program. Although the Government indicated on 3 June 1984 that it proposed to implement the substance of this report, legislation has not yet been introduced into the federal parliament to do so.

The context in which debt recovery procedures are used is outlined in the report in some detail. The growth of the credit society has led to increasing reliance on debt recovery procedures as the amounts outstanding on various forms of credit, particularly consumer credit, increase. For example, by June 1985, 4.4 million bankcards were on issue — an increase of 56% over the previous five years. In that year, advances outstanding on all forms of bank

charge cards totalled \$2.541 million — an increase of 171% over the previous five years. The report indicates that the level of outstanding consumer credit per capita is understood to be higher in Australia than anywhere else in the world except the United States and Canada.

*principles for reform.* In drawing up its proposals, ALRC had regard to the following considerations:

- the need to protect creditors and debtors from conduct which is dishonest or is calculated to mislead or deceive them
- the need to minimise delay and evasion in the payment of debts
- the need to encourage defaulting debtors to act responsibly in seeking to overcome their debt problems
- the need to remove artificial limits on enforcement procedures which reduce their effectiveness
- the need to provide information to defaulting debtors to enable them to understand the nature and effect of the relevant procedures
- the need to ensure access to the courts in the event of disputes as to liability
- the need to protect defaulting debtors from unwarranted hardship resulting from the use of enforcement procedures
- the need to maximise the administrative efficiency of recovery procedures and
- the need to ensure that creditors are treated equitably as between themselves by enforcement procedures.

*furthering efficiency.* The recommendations in the ALRC report are

designed to streamline the 700 000 legal actions to recover debts that are commenced each year. ALRC identified many court procedures which are inefficient and wasteful of both court and credit resources. The Secretary and Director of Research of the ALRC, Stephen Mason said

The ALRC recommendations are designed to eliminate those that are simply excessive or wasteful and allow creditors to proceed in the most expeditious way through the courts to recover debts owed to them. The recommendations are also aimed at preventing undue or excessive hardship being visited upon debtors.

*structure of system.* The ALRC recommended that, to facilitate the coherent approach to debt recovery and to promote efficiency in its administration and decision-making, there should be a single debt recovery office created in each jurisdiction attached to the lowest level of the court's system. Debt action should be commenced at the debt recovery office unless the plaintiff is aware that the defendant intends to dispute the claim. Disputed claims should be removed from the debt recovery office by force of legislation to the appropriate court. The debt recovery office would also be responsible for the enforcement of judgment debts.

*informal recovery methods.* While emphasising that the desirability of continuing to allow creditors to recover debts informally, the ALRC points to a number of abusive practices which should be specifically prohibited:

- the use by a creditor and an agent of documents which resemble court documents or official forms
- the use by a creditor of stationery which bears the letterhead of an

independent debt collector; the use by a creditor of a business name which suggests that he or she is a debt collector rather than the creditor; and the use by a creditor or a debt collector of stationery bearing the letterhead of a solicitor

- the impersonation of police officers and of court officials, particularly bailiffs
- misleading the debtor as to recovery procedures
- misrepresenting to a debtor the procedures available to a creditor or debt collection agent in collecting a debt
- misrepresenting to a debtor the possible consequences of failure to pay the debt.

In those jurisdictions that do not have occupational regulation of debt collectors, a registration system should be adopted.

*essential services.* The report also deals with the ability of some creditors to withdraw essential services. It recommends that, in the absence of voluntary controls being developed by suppliers, legal restrictions should be imposed, including the facility for the customer to approach a court for an order that the supply be continued. The order would not be made unless the court was satisfied that the customer was unable to pay and withdrawal of supply would result in real hardship.

*preference to government.* The report recommends the repeal of s 218 of the Income Tax Assessment Act and s 136TD of the Social Security Act, two provisions which give unnecessary preference to Government in debt recovery.

*procedure reforms.* Major recommendations of the report concerning

the period from commencement of action to judgment include a simplified approach to service of process. The report, after considering the results of a detailed survey of debt recovery procedures through the NSW District Court, concludes that service by post should be adopted as an alternative form of service for debt summonses. Postal service would be by ordinary post and court officials, not creditors, would be responsible for postal service. Adequate protections for the debtor will be available by ensuring that enforcement procedures cannot be instituted unless the court is satisfied that the debtor has actually become aware of the proceedings.

*restrictions on enforcement.* After a judgment has been entered, the plaintiff should only be entitled to use an enforcement procedure which does not directly involve the defendant (for example, attachment of debts or wages), if there is clear evidence that the defendant has been made aware of the proceedings. That evidence might take several forms:

- an affidavit as to personal service of a copy of the summons or as to other direct communication with the defendant
- an acknowledgement of the receipt of a postal summons
- an application by the defendant to pay by instalments
- an affidavit as to personal service of a notice of entry of judgment.

A major part of the report is devoted to the enforcement of judgment debts. The key recommendations include reform and modernisation of the powers of bailiffs. Under the ALRC recommendations a bailiff would not be entitled to force entry or to enter simply because a door or window is open

The bailiff should try to gain entry with the consent of the occupier. A court order would be required if consent is refused. The seizure of goods by the bailiff should be effective as soon as notice of the existence of the goods come to the attention of the debtor or the bailiff has seized the goods. The bailiff should not have to obtain actual possession of the goods or to physically remove them from the premises. Purported dealings by the debtor with the goods after that time would be void and the debtor would be liable to sanctions for contempt of court. Recommendations made about bailiff's sales and auctions are designed to ensure that the maximum price is received for goods sold under the bailiff's sale.

*link with bankruptcy.* The report also recommends that the exemptions from execution available for judgment debt should be aligned more closely with those available in bankruptcy. There should also be clear powers of the court, on the application of the judgment debtor, to have other specific items or goods exempted.

*attachment of debts.* A number of recommendations in the report relate to attachment of debts. The report recommends that a number of anomalous restrictions be abolished including restrictions on the ability of creditors to garnishee savings bank, building society and credit union accounts. The principle underlying the recommendation is that attachments should no longer be confined to debts due and accruing but should extend to all monies which are or due in the future become due and payable to the debtor. In keeping with the thrust of the report of keeping so far as it is possible, bankruptcy law consistent with

debt recovery law, similar exemptions should apply to those available under the Bankruptcy Act.

*wage garnishee.* Wages and salary attachment are given particular attention. The report emphasises the necessity for a detailed examination of the debtor's circumstances before wages attachment orders are made. Again, artificial restrictions on the order should be repealed and a garnishee order should operate until satisfaction of the relevant judgment debts. In order to ensure that no undue hardship occurs, 80% of the debtor's net salary should be exempt from attachment even where two or more attachment orders are made. There should be a base limit, calculated by reference to social security payments, which should not be exceeded in any event. The report in this area also deals with a number of special protections given to public servants and other Crown officers and recommends that they be repealed.

*orders against the person.* Other recommendations relate to orders affecting the person. Instalment orders are particularly dealt with as are the appropriateness and form of examination procedures. A number of recommendations relate to the possibility of abuse of process by debtors in this area and with the debtor's failure to comply with orders for examination or for payment by instalments. While the report assumes that contempt of court will remain available as a sanction for default, the report recommends that debtors should not be treated as being in contempt of court unless the court is satisfied that

- the debtor has the capacity to pay

- the disobedience is both wilful and persistent, and
- no other means are available to the court or the creditor by which payment of the debt may be effectively enforced.

These recommendations echo those in the ALRC's Contempt Report (ALRC 35) (see [1987] *Reform* 111).

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## product liability

Breakages, Ltd, the biggest industrial corporation in the country.

GB Shaw, *The Apple Cart*

*new reference.* The ALRC is to carry out a review of product liability law in Australia.

The Terms of Reference for the review were given to the ALRC by the federal Attorney-General, Mr Lionel Bowen on 11 September 1987. The Terms of Reference call for the ALRC to review:

- whether Australian laws, including the Trade Practices Act, relating to compensation for injury and damage caused by defective or unsafe goods are adequate and appropriate to modern conditions
- the appropriate legislative means of effecting any desirable changes to the existing law, having regard to any constitutional limitations on Commonwealth power, and
- any related matter.

*national consumer affairs advisory council report.* The reference follows a report released in June 1987 by the National Consumer Affairs Advisory

Council, Product Safety. That report drew attention to the costs to individuals and to the community caused by defective or unsafe goods. It recommended that a review of the appropriateness of a 'strict liability' regime for defective and unsafe goods be investigated.

The federal government agreed with the National Consumer Affairs Advisory Council that a complete review of product liability law, focussing on the question of strict liability, was warranted.

*alrc report.* Product liability law had been identified by the ALRC in its 1986 Annual Report as a matter which fell within the business law aspect of the suggested four-pronged reform program (see [1987] *Reform* 133).

*cost considerations.* The Terms of Reference draw particular attention to the cost to business and the community of changes in the liability of manufacturers, distributors and retailers for unsafe or defective goods. The cost and availability of insurance, and the desirability of continued product innovation and availability, are especially identified in the Terms of Reference as matters that the ALRC must keep in mind. The reference also envisages close consultation with relevant government authorities and representatives of manufacturers, distributors, retailers, insurers and consumers.

*strict liability.* The reference to the ALRC is a timely one. As the National Consumer Affairs Advisory Council report points out, the trend in product liability law in recent years, both in Australia and overseas, has been to move towards a regime of strict manufacturer's liability for product related damage. A number of States of the United States have moved in that direction.