IMPRISONMENT FOR DEBT IN THE 1980s

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When Frank Hardy was arrested in Sydney in July 1986 for the non-payment of $8,000 in traffic fines, he said that he was willing to be imprisoned on a point of principle. He wanted to publicise the fact that the poor are frequently imprisoned for failing to pay their court ordered financial obligations. His "debts" were owed to the state as a result of the commission of offences, and most of the publicity about the imprisonment of poor "debtors" has concerned non compliance with orders to pay criminal fines.[2] However, Hardy also mentioned at the time of his arrest that people are often arrested for default on their finance company debts,[3] an issue which receives very little publicity. Despite the myth that imprisonment for the non payment of civil debts was abolished in the middle of the nineteenth century, it is still within the power of courts in all Australian states and territories to imprison debtors who fail to comply with their civil obligations.

In most jurisdictions, the principles of the existing law of debt recovery were first enacted in the middle of the nineteenth century.[4] At that time both England and its Australian colonies

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2 See, for example, G Zdenkowski, "Imprisoning Fine Defaulters in New South Wales" (1985), 10 Legal Service Bulletin 102.

3 Though he was wrong to assume that this happens in practice in New South Wales.

4 The history of imprisonment for debt in Australia has not yet been written, though see chapter 9 of M Tilbury et al , *Remedies Cases and Commentary* (Sydney Law Book Co , forthcoming) for a documentary history of debt recovery law, including some Australian material. On the English history of this subject, see P Haagen, "Eighteenth-century English Society and the Debt Law" in S. Cohen and A. Scull (eds), *Social Control and the State Historical and Comparative Essays* (Oxford Martin Robertson, 1983), p 222, B. Kercher, "The Transformation of Imprisonment for Debt in England, 1828 to 1838" (1984), 2 *Aust J Law & Soc'y* 60, and G Rubin, "Law, Poverty and Imprisonment for Debt, 1869-1914" in G. Rubin and D. Sugarman (eds.), *Law, Economy & Society Essays in the History of English Law 1750-1914* (Abingdon: Professional Books, 1984), p 241.

"abolished" imprisonment for debt and replaced it with a form of punishment for the commission of "offences" by debtors. This was not a true abolition of imprisonment for debt. Instead, these statutes merely placed it under judicial control under fixed circumstances. In Western Australia, these statutes went even beyond that, by enacting imprisonment for debt for the first time. From 1832, Western Australia had no imprisonment for debt (apart from absconding debtors provisions). Thus its *Fraudulent Debtors Act, 1871* expanded rather than reduced imprisonment for debt in that jurisdiction.[5]

Prior to "abolition", it had been possible for creditors to have their alleged debtors imprisoned even before the trial on the merits of the debt claim (imprisonment on the mesne process). After judgment on the merits, the creditor could choose between executing the judgment against the property of the debtor, and having the debtor imprisoned until payment was made (imprisonment on the final process). In neither type of imprisonment for debt was it necessary to allege that the debtor had dishonestly refused to pay the money. The remedy of imprisonment was available to the creditor as of right. In each case, the arrest order was made by the court acting in its civil jurisdiction. However, imprisonment was a final remedy. If a creditor allowed an imprisoned debtor to be released, no further remedy against the debtor's property or person was possible. In fact though, most debtors were released by payment or composition of the debt, or by order of the insolvency courts. Insolvency led to the release of the debtor from gaol, but the debt could continue to be enforced against his or her property.

The "abolition" statutes acted on a new theory: that debtors should be arrested only when they had either acted dishonestly, or were proposing to do so. In future, only those who deserved to be imprisoned would be arrested, while the normal method of recovering debts would be execution against any or all parts of the debtor's property. Despite this introduction of apparently punitive purposes into imprisonment for debt, it clearly remained a matter for civil law in the civil courts. The orders were made upon the application of the creditor, they were made by the civil courts as part of their debt recovery business, and the debtor could obtain his or her own release at any time by paying the debt or instalments

5 See E. Russell, *History of the Law in Western Australia and its Development from 1829 to 1979* (Perth: University of W.A. Press, 1980), pp. 110-11, 161-62, 174-75.

upon which he or she had defaulted.

In one respect the new law became more closely allied to the criminal law though. After the abolition statutes, imprisoned debtors were taken to the criminal gaols and treated as if they had breached the criminal law. Under the unreformed law, imprisoned debtors had usually been treated quite differently from criminals, even when they were confined in the same gaols.[6] A further disadvantage to debtors in the new legislation was that imprisonment was no longer treated as satisfaction of the debt. That is, unlike the unreformed law, and unlike the present law of imprisonment for non payment of fines, a period of imprisonment as a civil debtor does not wipe out the debt.

The Law in the 1980s

The dividing line between what can now accurately be called imprisonment for debt, and what should be called civil contempt, is often slim.[7] In each case, the theory is that the defendant is both punished and coerced for his or her disobedience to the court. However, for present purposes this study has treated as "imprisonment for debt" those provisions which were originally introduced as an amelioration of the previously unlimited law of imprisonment for debt.[8] The other distinction between contempt and modern imprisonment for debt is that in some Australian jurisdictions imprisonment for debt is still ordered as of course, whereas that is less likely with civil contempt. The reason for that difference in practice is also historical, as judges have imprisoned debtors as of course for centuries and are merely continuing that practice.

Mesne Process[9]

In every state and territory except New South Wales, alleged debtors may be arrested and kept in custody prior to the hearing of the debt action itself. The legislation varies from jurisdiction to

6. This change, into the treatment of debtors as criminals, did not happen quickly Prison plans in the library of the East Sydney Technical College show that even under the reformed law, debtors confined in Sydney's Darlinghurst Gaol were not kept in the cellblocks, but lived in the Deputy Governor's House.

7. Queensland, for example, has specific provisions for the punishment of contempt. See *Supreme Court Rules,* O. 53, *District Courts Rules,* Pt. 31; and *Magistrates Courts Rules,* r. 227.

8. Some knowledge of legal history can, at times, clarify apparently murky distinctions.

9. See Law Reform Commission of Western Australia, *Working Paper: The Absconding Debtors Act 1877-1965* (Project No.73), 1980

jurisdiction, but the usual requirements are that the debtor owe more than a statutory minimum sum, that there are reasonable grounds for believing that he or she is about to quit the jurisdiction, and that the absence of the defendant would injure the plaintiff's case. The defendant is released if he or she gives security to pay the sum allegedly due.[10] These provisions were established in England in 1838,[11] and the modern Australian law varies only a little from that statute.[12] Even the minimum sum set by the English Act is still followed in many Australian Acts, despite the effects of inflation over 150 years.[13] That is, the present Australian law still reflects the debates and policies current 20,000 kilometres away, and 150 years ago.

The only mesne process provisions which work on recently revised principles are contained in the *Restraint of Debtors Act, 1984,* which commenced operation in Western Australia in July 1986; and in the similar *Absconding Debtors Act, 1978* of the Northern Territory. Part II of the Western Australian Act provides for the arrest of an alleged potential absconder, upon which she or he is taken before a court. The judge then has broad discretionary powers over the debtor, including power to make conditional and unconditional orders for release from custody. The judge also is given power to make orders that the debtor give security to cover the debt; that

10 A C T.: *Arrest on Mesne Process Act, 1902* (N S W) (the New South Wales Act, repealed in its original jurisdiction, still operates in the A C T), N T *Absconding Debtors Act, 1978,* Qld . *Common Law Process Act, 1867,* ss 47-51, and see ss 64-73, see also *Supreme Court Rules,* O 78, S A . *Local and District Criminal Courts Act, 1926,* s 271 282; *Supreme Court Act, 1935,* s 35; and see *Debtors Act, 1936,* s 4 of which creates a crime of absconding, punishable by two years imprisonment; Tas · *Debtors Act, 1870,* s 5(2); and Vic *Supreme Court Act, 1986,* ss 86-100. The minimum sum under the Victorian Act is $50,000 In the other jurisdictions it varies between $40 and $100

Very similar principles operated in Western Australia until July 1986, by virtue of the *Absconding Debtors Act 1877* the *District Court of Western Australia Act, 1969,* s 54; and the *Supreme Court Act 1935,* ss 63-68 In that month the *Restraint of Debtors Act, 1984* commenced operation in that State, repealing the *Absconding Debtors Act* Its principles are discussed below

As shown below, these and similar provisions also exist in some jurisdictions for the arrest and imprisonment of judgment debtors who are allegedly about to flee the state or territory

11 See (1838), 1 & 2 Vic , c 110, s 3 (Imp)

12 The Queensland *Common Law Process Act, 1867* explicitly acknowledges its source as that Act

13 The 20 limit was set even before 1838 by a series of *Frivolous Arrests Acts* The object of these Acts was to prevent arrest on the mesne process for very small sums See for example (1725), 12 Geo I, c 29, (1827), 7 & 8 Geo IV, c 71, and see Kercher, op. cit 61, 75

she or he make deposits of money; and that his or her travel documents be surrendered. There is also provision for the debtor to be required to give undertakings. In addition, Part III gives very wide powers to the courts to deal with property which debtors propose to remove from the jurisdiction. In effect then, the Act combines a modernised form of mesne process arrest with a statutory *Mareva* injunction. In each case, the Western Australian Act operates only when the alleged debt exceeds $500.

In addition to these statutory provisions, the writ of *ne exeat regno* is available for the pre-judgment enforcement of equitable debts.[14]

Final Process

All states and territories currently have statutes in force which allow for the imprisonment of judgment debtors. The legislation varies greatly from one state or territory to the next, and even from one court to the next within a given state or territory. New South Wales retains only the barest remnant of the imprisonment for debt which was a central feature of Dickens' *The Pickwick Papers,* while Victoria retains a long list of provisions governing the subject.

As will be shown below, there is just as much variation among the states and territories in the use actually made of these provisions. In most jurisdictions there has not been a thorough rethinking of the subject since the middle of the nineteenth century. Modern statutes have been introduced to supplement nineteenth century laws in many of these jurisdictions. Barnacle has been laid on barnacle, over the top of a mid-Victorian hulk. The only way to give a clear description of the present law is to do so jurisdiction by jurisdiction.

Victoria — No jurisdiction more clearly demonstrates the ad hoc nature of legal change in this area of law than Victoria. Prior to 1984, Victoria had a broad range of statutory provisions which authorised the imprisonment of judgment debtors. If those debtors failed to attend an examination hearing, they could be fined or imprisoned.[15] More importantly, all three levels of the courts

14. See *Glover v Walters* (1950), 80 C.L.R 172, and *Felton v Callis,* (1969) 1 Q.B. 200.

15. *Magistrates' Courts Act, 1971,* s.-ss. 46(1) and (1A); *Magistrates (Summary Proceedings) Act, 1975,* s. 131(3); *County Court Act, 1958,* s 54(1); *County Court Rules,* O. 29, r. 34(c); and see *Imprisonment of Fraudulent Debtors Act, 1958,* ss. 5 and 16.

had power to imprison judgment debtors under the *Imprisonment of Fraudulent Debtors Act, 1958.* By sections 5, 16 and 22, the courts could make conditional imprisonment orders which provided that, unless the debtor paid the sum due in a lump sum or by instalments, he or she would be committed to prison for periods of up to 6, 4 or 2 months (depending on the level of the court making the order). In order to make such an order, the court had to make one of five findings:

(a) that the judgment debtor had sufficient means and ability to pay the unsatisfied judgment debt but neglected or refused to do so;
(b) that the judgment debtor was about to leave Victoria without paying the debt;
(c) that the judgment debtor was about to move elsewhere within Victoria with intent to avoid paying the debt;
(d) that the judgment debtor had obtained credit under false pretences, or by means of fraud or breach of trust; or
(e) that the judgment debtor had made a gift, delivery or transfer of any property, or that he had made a charge on property, or removed or concealed property, with intent to defraud his or her creditors.

The *Judgment Debt Recovery Act, 1984*[16] lessened the harshness of these imprisonment provisions, though it did not abolish them. Non-compliance with an examination summons under this Act results in the apprehension of the judgment debtor, upon which she or he is taken before the court rather than to gaol (ss.14 and 17).[17] Other changes are to the first two of the five "offences" listed above. The first was repealed by the 1984 Act (s.23) and replaced by s.19 of that new Act. To obtain an imprisonment order under s.19, it is necessary to show that the judgment debtor has the means to pay the instalments under an instalment order, and that he or she persistently and wilfully and without an honest and reasonable excuse defaults in making the payments. The maximum sentence under s.19 is forty days imprisonment, instead of two, four or six months. Equally importantly, s.19 requires that the debtor be before

16. See B Kercher, "Judgment Debtors: Do You Want the Good News First, or ?" (1984), 58 *Law Inst J* 1218, for an analysis of the Act

17 New South Wales has a similar procedure See *Local Court (Civil Claims) Act, 1970,* s. 42; *District Court Act, 1973,* s 92; and *Supreme Court Rules,* Pt 4 2, r 7

the judge at the time the imprisonment order is made. That should reduce the chance of honest but unknowledgeable people being imprisoned. The 1984 Act also re-defined the second offence in more precise terms, though its essence and maximum sentence remained the same.[18]

As the present author argued previously, the 1984 Act was not used to rationalise this whole area of law.[19] Instead, it was another ad hoc barnacle on existing barnacles.

The other states and territories have variations on these provisions.

New South Wales — In New South Wales, the only form of imprisonment for debt is provided by sections 113 through 114 of the *District Court Act, 1973.* These sections allow the arrest, and ultimately the imprisonment, of judgment debtors who are about to flee from the Commonwealth, or to remove property from the Commonwealth, with intent to evade payment of a judgment debt.

Queensland — Queensland goes further still, as it allows the imprisonment on the final process of those who fraudulently conceal property, as well as those who are about to flee the state.[20] Similarly, in the Queensland District Court, judgment debtors may be imprisoned if they are preparing to remove property from the jurisdiction, or if they have absconded out of the state or to remote parts of Queensland with intent to evade payment of the debt.[21] In addition, judgment debtors in actions for defamation or for malicious injury are still subject to full imprisonment.[22] That is, the pre-nineteenth century unreformed type of imprisonment for debt still operates for this class of judgment debtors in Queensland. A debtor of this type who is utterly honest, but unable to pay the judgment, can be imprisoned perpetually at the whim of the creditor, regardless of the commission of an "offence". The debtor's only chance of release is bankruptcy.

A.C.T. — The Australian Capital Territory has provisions in its *Magistrates Court Ordinance, 1930* which are very similar to the language of Victoria's *Imprisonment of Fraudulent Debtors Act,* as it stood before its 1984 amendment.[23]

18 *Judgment Debt Recovery Act, 1984,* s. 23.

19. See Kercher, "Do You Want", op. cit., passim.

20 *Common Law Process Act, 1867,* ss 52-55

21. *District Courts Rules,* rr. 296-298.

22. *Common Law Process Act, 1867,* s. 52

23 *Magistrates Court Ordinance, 1930,* ss. 181-187, 189; *Magistrates Court Rules,* rr 93-96.

In addition, the New South Wales *Judgment Creditors Remedies Act, 1901,* Part IV, long repealed in its State of origin, is still in force in the A.C.T. Under it, debtors can be imprisoned on the final process if they are guilty of fraudulent concealment, or if they are about to leave the Territory without paying their debts (s.20). No intention to evade payment is necessary for the latter "offence". Furthermore, like the Queensland provision, section 21 of the *Judgment Creditors Remedies Act* provides for unlimited imprisonment for debt for the non-payment of judgments upon personal actions.

Northern Territory — In the Northern Territory, a wide variety of "offences" can give rise to imprisonment for debt. The basic law is similar to the Victorian *Imprisonment of Fraudulent Debtors Act,* though it shows some evidence of having been "modernised". The Northern Territory *Local Courts Act, 1941* provides that judgment debtors (whether of the Supreme or Local Court)[24] may be imprisoned for any period up to 40 days if —

(a) it appears to the Court that the debt has been contracted under fraud or without the debtor having a reasonable expectation of being able to pay it;
(b) there has been a disposal of property with intent to defeat the creditors;
(c) the debtor has had the means to pay the debt (in addition to means to maintain himself and his wife (sic) and family) and has neglected to do so;
(d) he or she has neglected to pay instalments; or
(e) he or she does not answer questions satisfactorily at an examination hearing.[25]

The failure to attend an examination hearing can also lead to the same sentence, though the Court has a discretion to order that the debtor be apprehended and brought to the Court instead.[26] These imprisonment orders may be suspended on condition that the debtor pay the sum by instalments.[27] Unusually among modern statutes, a Judge or Magistrate may order imprisonment even after the debt has been paid, so emphasising the punitive, rather than the coercive element of imprisonment.[28]

24 See s. 166.
25. Ibid., s.169.
26. Ibid , s.170.
27. Ibid., s.171(2).
28. Ibid., s.171(3)

Tasmania — On the face of it, the law in Tasmania is extraordinarily punitive. The *Debtors Act, 1870* is still in force. Section 3 provides for up to 6 months imprisonment for a heterogeneous group of debtors who default. The list includes solicitors whose default is linked to misconduct, defaulting trustees, employers in some circumstances, and those who default in payment of money ordered to be paid under the Act. In addition, section 4 provides for up to 6 weeks imprisonment when a debtor fails to pay a debt or instalment while having the means to do so. By sections 3 and 4 of the *Debtors Act, 1888,* however, a Judge can release a debtor imprisoned under section 3 of the 1870 Act if a lack of means is shown, and order the payment of instalments. Default in those instalments will lead to imprisonment under section 4 of the 1870 Act. Section 5 of the 1888 Act also provides for fines and imprisonment as the sanctions for non-attendance at an examination hearing.[29]

South Australia — South Australia and Western Australia are the most interesting states, as it will be shown below that they are the jurisdictions where debtors are presently being imprisoned most often. Section 3 of the South Australian *Debtors Act, 1936* is very similar to section 3 of the *Debtors Act, 1870* of Tasmania. A similar odd group of debtors is liable for up to six months in gaol for non-payment of their debts. Section 4 provides that it is a misdemeanour punishable by up to two years in gaol if a debtor absconds or prepares to abscond with intent to defraud a creditor of a debt over $20. The most frequently used imprisonment for debt provisions in South Australia are sections 175 through 183A of the *Local and District Criminal Courts Act, 1926,* which create Unsatisfied Judgment Summonses, devices similar to those of section 169 *et seq.* of the Northern Territory's *Local Courts Act.* That is, a series of "offences" punishable by up to forty days in gaol is created. The local court may make orders for instalments at the hearing.[30] If the debtor does not appear at the hearing, the commitment order can be made in her or his absence.[31] In addition, sections 271 through

29 Procedure under the *Debtors Act 1870* is regulated by the *Rules of the Supreme Court,* Appendix M, Part II See also ss 292-296 of the *Criminal Code Act, 1924* for offences by "insolvents".

30 See ss 179 and 181

31 Ibid , s.179(a)

282 provide for the imprisonment for up to forty days of judgment debtors who intend to abscond from the State.

South Australia was to have adopted a reformed debt recovery system under the terms of the *Local and District Criminal Courts Act Amendment Act, 1978,* the *Enforcement of Judgments Act, 1978* and the *Debts Repayments Act, 1978;* however, those Acts never came into force. The present Government is examining whether they should now commence operation.[32] Even if they do come into force, imprisonment for debt will not end in that State. Section 29(3) of the *Enforcement of Judgments Act* would still authorise forty days in gaol for non-compliance with orders to pay money. There would also be little amendment to the absconding debtors provisions of the *Local and District Criminal Courts Act* by its 1978 amending Act.

Western Australia — Post-judgment imprisonment for debt in Western Australia is regulated by the *Debtors Act, 1871* (which applies to the Supreme and District Courts[33]), and by the *Local Courts Act, 1904,* sections 130 through 134. Section 3 of the *Debtors Act* provides for a sentence of up to six weeks in prison for people who have the means to pay a sum, but who neglect or refuse to pay it. Section 130 of the *Local Courts Act* gives the same power to magistrates in similar circumstances. By section 130(6)(a), jurisdiction under this section can be delegated by the magistrate to the court clerk, though his or her decision is suspended until reviewed by the magistrate.[34] Debtors who fail to attend hearings are subject to apprehension, after which they are taken before the magistrate.[35] In addition, the *Restraint of Debtors Act, 1984* applies to judgment debtors.[36]

The Practice of Imprisonment for Debt in the 1980s

In 1977, David Kelly wrote a most important Report for the Poverty Commission.[37] In Chapter 3 of his Report, he pointed out that imprisonment for debt had not been abolished in the middle

32. Letters from R. Gregor and M. Moore, 22 July 1985 and 2 December 1985.
33. See *Supreme Court Act, 1935,* s. 117(1)(e); and *District Court of Western Australia Act 1969,* s. 56(1).
34. See s.130(7)
35. See s.-ss. 130(2a) and (2b).
36 See its s. 3
37. D. St. L. Kelly, *Debt Recovery in Australia* (Canberra: Australian Government Publishing Service, 1977).

of the nineteenth century, but was still flourishing in several states. He also noted that even when states had similar statutes, they were sometimes used in different ways in practice. He found that at that time, Victorian and Western Australian courts tended to imprison people for their alleged refusal to pay their debts while being able to do so, while South Australians were most often imprisoned for failing to attend examination hearings. Statewide figures were not available for Western Australia, but Kelly was able to obtain figures for most of the Perth area. In 1972-73, 32 people were actually taken to gaol for debt in that area, while in the next year, the figure was 24.[38] In South Australia in 1973, 5,100 commitment orders were made under section 179 of the *Local and District Criminal Courts Act,* but probably less than one per cent of these debtors were actually taken to gaol.[39] Unlike Western Australia, few South Australian orders were suspended on condition that the debtor pay by instalments. Most were simple ten day orders for non-attendance.[40] However, Kelly showed that the number of debtors actually imprisoned at Adelaide Gaol was in decline. It had fallen from 304 in 1962-63, to 75 in 1973-74.[41]

Equally importantly, he interviewed 27 imprisoned debtors in Adelaide, concluding that they had relatively low standards of comprehension of the system which imprisoned them. On the whole, they were at the lower end of economic and educational scales and were subject to high levels of unemployment. That is, a system designed to punish and coerce dishonest debtors was in fact imprisoning the poor and disadvantaged. "Once in debt they are among the least equipped in society, both financially and in other ways, to deal with their problems," concluded Kelly.[42]

Those who have read the literature written since the first enactment of this kind of imprisonment for debt in the mid-nineteenth century, are not surprised by Kelly's conclusion. A very strong theme of the writings of most of those who have studied the practice of "contempt" based imprisonment for debt in the past 140 years is that the wrong people, the poor and unknowledgeable, are the

38. Ibid. 48.
39. Ibid. 49-50.
40 Ibid. 50
41. Ibid. 51.
42. Ibid. 65, and see 61-64.

usual occupants of cells allocated to debtors.[43] The explanation for this is that judges in most jurisdictions do not examine the debtors as to the reasons for their default or non-attendance at hearings. Wilful breaches are assumed, rather than proved, so that ignorance, poverty and forgetfulness are confused with obstinacy.

One purpose of this paper is to bring Kelly's statistics up to date, though with less detail within particular jurisdictions. However, unlike Kelly, this study did not restrict itself to an examination of two or three representative states. Instead, it followed the simple technique of writing to the main capital city office of every magistrates' court, district or county court, and supreme court in the country. With a few reminders, they all eventually replied, though the information they revealed varied greatly.[44] The letters sought information on whether the imprisonment for debt laws are now a dead letter, and if not, how many debtors are committed to gaol, and how many are actually imprisoned each year. The present author followed up the responses with letters to the prisons departments of each of the states in which debtors are still regularly committed to gaol. From them, he sought details of how many debtors are actually imprisoned in each year, and of the conditions in which they are kept. Only the Western Australian Prisons Department replied to these follow up letters.[45]

Although all jurisdictions retain at least some remnants of imprisonment for debt, only two of them still frequently send debtors to prison.[46]

New South Wales has only one form of imprisonment for debt, and that only for alleged absconders in the District Court. Since that provision was enacted in 1973, no use has been made of it. In practice, there is no imprisonment for debt in New South Wales.

A.C.T. creditors are a little more aggressive in their approach, but no debtors have been imprisoned there in the recent past, despite

43 See note 22 of Kercher, "Judgment Debtors", op cit for a list of nineteenth and twentieth century reports and comments which reached this conclusion

44 Many people were very helpful, though none more so than Mr W U. Johnston, Manager of the Management Information Section of the Victorian Law Department.

45 The authors and dates of the letters received from the Courts, Law Departments and Prison Departments are not here set out These details may, however, be obtained upon application to the author Initial correspondence was sent in March 1985, and the final reply received by the author in November 1986

46 Both have Labor Governments

the harsh laws in operation in the Territory. Two unsuccessful applications under the "imprisonment of fraudulent debtors" provisions have been made in recent years. The conclusion of the Deputy Clerk of Petty Sessions was that, "The attitude of the Magistracy in the ACT is that no person will be imprisoned for an inability to pay a debt."[47] That is a restatement of the basic law in operation in all jurisdictions since the mid nineteenth century, although that legal principle has not prevented the issue of thousands of imprisonment warrants in other jurisdictions. Apprehension for non-attendance at hearings under the *Magistrates Court Ordinance, 1930* is quite common in the A.C.T., however. Twenty-four of those warrants were issued in 1984, six of which were executed. Under this apprehension procedure, debtors are not kept in custody for more than one or two hours.

The law in Queensland consists primarily of the arrest of alleged absconders. Apparently no one has been arrested in the District Court on these grounds in the past ten years. However, those provisions are used in the Supreme Court every couple of years. In 1983 a writ of *ne exeat regno* was issued in Queensland for the first time for very many years.

Imprisonment provisions are used only rarely in the Northern Territory as well. In the two and a half years from 1 February 1983, only four warrants of commitment were formally issued, all relating to unsatisfied judgment summonses under the *Local Courts Act.* No debtors were taken to gaol, as each of the debts was paid prior to that. However, three of the warrants were served prior to payment. The fourth debtor paid up before the writ was executed. A fifth debtor was pronounced bankrupt prior to a warrant being formally drawn up. No statistics are available on the absconding debtors provisions in the Northern Territory.

Arrest for debt is rare in Tasmania too, although it does occur occasionally. In the five years to April 1985, three warrants of arrest on a judgment summons were issued by the Supreme Court, one in 1981 and two in 1982. "The procedure of issuing a judgment summons against a debtor for examination as to his means

47 Letter to the author dated 28 May 1985

is a fairly frequent one . . ." in that Court,[48] though it is usually used only when other means of ascertaining the debtor's assets have failed. However, it is rare for a warrant of arrest to issue, and even rarer for a debtor to end up in gaol. "Judges are generally reluctant to send judgment debtors to prison unless it can be shown that there is some evidence that the Debtor has assets but is refusing to pay up."[49] This letter, from the Acting Registrar of the Supreme Court, did not mention any cases of committal for having the means to pay, but refusing to do so. However, those cases do occur in the Court of Petty Sessions. Between 1965 and 1985, the Hobart Court of Petty Sessions made 20 orders of commitment to prison for non-payment of debts, the terms of imprisonment ranging from 24 hours to 28 days. Only one of those debtors was actually imprisoned though, the others paying the debt before imprisonment. The one debtor to be taken into custody paid the debt and was released after several hours. The others paid their debts prior to the arrest, showing how attractive this extremely coercive remedy is to the most pressing of creditors.

However, *Imlach v. Rainbow*[50] shows how inappropriate fines are as a means of compelling reluctant debtors to attend examination hearings. Commissioner Dockray found that it was often cheaper for a judgment debtor to pay a fine two or three times a year, than to pay the debt by instalments, or to borrow money, at interest, to repay the loan.

Kelly found in 1977 that the South Australian courts frequently imprisoned debtors for non-attendance at examination hearings. Despite that, and the fact that a Review Committee is currently considering whether the *Enforcement of Judgments Act, 1978* should

48. Letter of Roger C Willee, Acting Registrar, Supreme Court of Tasmania, to the author, 22 April, 1985.

Mr Willee concluded that the smallness of the fine for non attendance at an examination allows smart debtors to avoid examination, while genuine debtors will usually rob Peter to pay Paul in order to avoid gaol. "The procedure is therefore most unsatisfactory", he concludes. That may be so for creditors as a group, but not for the individual creditor who manages to obtain payment by this extremely coercive method

Between 1965 and 1981, 22 people were indicted in Tasmania under s 296 of the Criminal Code for offences by insolvents There were no indictments between then and August 1985 It is submitted that this should not be classified as imprisonment for debt, as it is not a form of mitigation of civil imprisonment, but a separate criminal offence

49 Ibid

50 Unreported Court of Requests, Launceston, 19 April 1984

be brought into force, statistics on the subject are apparently not kept in that State. Replies to the author's letters indicate that orders for imprisonment are often sought in the Local Courts under unsatisfied judgment provisions, but they are not usually enforced. The most common order is still for ten days in gaol, though up to forty days may be ordered. No statistics are kept in the Supreme Court either, but the Deputy Registrar could not recall an imprisonment order being made in that Court in the last 15 years.

Imprisonment for debt appears not to be used in the Supreme or District Courts of Western Australia. Although no statistics are kept, the officers of those courts could not recollect it being used in their courts.[51] However, it is very frequently used in the Perth Local Court, and presumably in other Local Courts in Western Australia as well. The Acting Clerk of the Perth Court had not heard of anyone being imprisoned under the *Absconding Debtors Act*[52] or the *Debtors Act, 1871,* confirming the impressions of those who are employed in the Supreme and District Courts. However, orders of commitment are very often made under the *Local Courts Act* for allegedly having the means to pay the debt and refusing to do so. In 1984, 680 of these conditional orders were made in the Perth Court, the default period being from one to 42 days. The author was told that they operate as a lever to prize money out of debtors, with the threat of imprisonment if they do not keep up with their instalment payments.

Although the object of these conditional orders is explicitly coercive rather than punitive, many debtors fail to comply with the condition and are taken to gaol. In the 5 years to March 1985, 163 Western Australian debtors were imprisoned for debt "offences". The Prisons Department supplied the following statistics covering the whole State:

51. The only exceptions to this were litigants subject to attachment under s. 135 of the *Supreme Court Act, 1935* By ss. 135(2) and 117(1)(g), attachment is available against those who default in paying penalties, and against defaulting trustees.

52. In its Report on the *Absconding Debtors Act, 1877* (Project No. 73 at p. 10 (1981), the Western Australian Law Reform Commission studied the files of three Courts of Petty Sessions in Perth and Fremantle, and found that there had been 35 applications under the *Absconding Debtors Act* between 1970 and 1980

Year	*Imprisonments*
1980-'81	21
1981-'82	30
1982-'83	35
1983-'84	37
1984-'85	40

As pointed out by the Department, the maximum period of imprisonment under the *Local Courts Act* is six weeks, that time not discharging the debt. That is, debtors can be imprisoned time after time over the one debt. Those who are imprisoned are usually taken to the nearest open security prison, although under section 112 of the *Prisons Act, 1981* they can be taken to any prison in the State. Occasionally they serve their sentences at police lock ups. They are subject to the same discipline rules as other prisoners, although, unlike those convicted of criminal offences, they are not entitled to remission on their sentences. Unless they pay their debts, which they have allegedly wilfully neglected to do, they must serve the full sentence handed down by the courts.

The final State studied was Victoria. During the course of the survey period, its *Judgment Debt Recovery Act, 1984* came into force, altering the wording though not the substance of the "wilful" default provision of the *Imprisonment of Fraudulent Debtors Act,* and requiring that commitment orders on this ground be made only in the presence of the debtor. Until the new Act came into force on 1 May 1985, very many imprisonment orders were made under the *Imprisonment of Fraudulent Debtors Act,* though none in the Supreme Court. Up to that time, about 400 applications per week for commitment orders were made in the Melbourne Magistrates' Court alone. From them, about 80 Warrants of Commitment were made by that Court each month, though no statistics were kept on the number of debtors who were actually imprisoned. By contrast, about 8,000 warrants of distress against property per month were made by the Melbourne Court. When debtors were actually imprisoned, theoretically for having the means or ability to pay the debt but refusing to do so, they were usually imprisoned at a rate of $50 or $100 per day. The same rate was used for imprisonment in default of paying fines.[53]

53. Information on the rates is from a telephone conversation between the author and Mr P. Jensen, officer in the Melbourne Magistrates' Court, April 1985.

The Victorian Law Department keeps very detailed statistics of civil business in the Magistrates' Courts. In all of the Magistrates' Courts in the state, the number of imprisonment orders under the *Imprisonment of Fraudulent Debtors Act* rose in the years preceding the *Judgment Debt Recovery Act.* The figures for warrants of commitment for non-payment of money under the unamended *Imprisonment of Fraudulent Debtors Act,* including those by the Melbourne Court, were:

Year	*Warrants*
1981	1228
1982	1368
1983	701
1984	1601

In addition, between 242 and 467 debtors were fined each year in this period for non-attendance at examination hearings under the *Imprisonment of Fraudulent Debtors Act.* Unfortunately, similar statistics were not available for business in the County Courts, and there were no statistics on the number actually taken to gaol under the Act by order of any of the courts.

The Law Department conducted a detailed statistical survey of the effects of the *Judgment Debt Recovery Act* in its first year of operation. It covered only the Magistrates' Courts, but included all of those Courts in the state. These statistics do not cover fines and imprisonment under the amended *Imprisonment of Fraudulent Debtors Act* and the many other pieces of legislation which authorise the punishment of debtors in Victoria. However, prior to the Judgment Debt Recovery Act, most arrests had apparently been under the now repealed parts of the *Imprisonment of Fraudulent Debtors Act,* which the *Judgment Debt Recovery Act* has replaced. If there is no imprisonment under the *Judgment Debt Recovery Act* now, there is likely to be none under any Victorian statute, though the lack of statistical evidence about other legislation prevents a certain conclusion being drawn on that point.

These very thorough survey results on the operation of the *Judgment Debt Recovery Act* show that in the year to 30 June 1986, there was only one imprisonment order made under its new "wilful default" provisions, in all of the Victorian magistrates' courts. That debtor, from the Western Region of the state, subsequently obtained a certificate of discharge from custody under section 19(3). That is, although imprisonment for debt was not abolished in theory

by the new Act, it appears to have been almost abolished in practice. The provision which led to this single imprisonment order in 1985-'86, section 19 of the new Act, directly replaced the provisions in the Imprisonment of Fraudulent Debtors Act which had led to the commitment of 1,601 debtors in 1984. The changes to the wording of the "offence" were not sufficiently large to make such a difference in outcome. Instead, the difference is more likely to have been due to the new practice under which imprisonment orders must now be made in the presence of the debtor. It certainly cannot be assumed that Victorian debtors suddenly became more honest from June 1985. Instead, it can be concluded that prior to the commencement of the new Act, hundreds of debtors were committed to prison annually for offences of which they were assumed, without judicial investigation, to be guilty. Once examination of the reasons for default became compulsory, imprisonment appears to have almost ended.

The other important change made by the *Judgment Debt Recovery Act* was the replacement of fines for non-attendance at examination hearings, by apprehension orders under which the debtor is taken straight to court. In the year to 30 June 1986, 495 debtors were subject to warrants of apprehension, as compared to about 242 fines under the *Imprisonment of Fraudulent Debtors Act* for non-attendance during 1984.

Theory and Practice

Inconsistent statistics-keeping among the states and territories prevents a definite conclusion being drawn on the number of debtors who receive imprisonment orders, and of those who are taken to gaol in any particular year in the whole of Australia. It is clear, though, that 1984 was a plateau year, as that was the last full year in which Victorians were regularly imprisoned for failing to pay their civil debts. Since then, only South Australia and Western Australia have regularly imprisoned debtors, and South Australia is presently considering major changes.

Those changes, and those which came into force in 1985 in Victoria, are ad hoc changes to outmoded debt recovery systems. In this century, no state or territory has drafted entirely new debt recovery laws after a thorough and consistent study of its present provisions. Our present law was drafted in the early nineteenth

century, when Britain was adjusting to the industrial revolution, and when the Australian colonies were developing their agricultural capitalist economies. None of the present Australian debtor and creditor laws have been influenced to any extent by the principles of consumer protection, by electronic funds transfer systems and credit cards, nor by the mass sale of consumer finance. The Australian Law Reform Commission has been conducting a major study of debt recovery laws for several years now, during which time electronic credit facilities have developed rapidly and the major Australian jurisdictions have enacted major consumer credit reforms. The Report is in its final stages of preparation.

This paper has shown a great diversity among the Australian jurisdictions, both in the law and the practice of imprisonment for debt. Some jurisdictions which have the most punitive laws on paper, such as Victoria and the Australian Capital Territory, in fact make little use of imprisonment in practice. The reasons for this vary: there may have been a change in legal practice; the judiciary may refuse to imprison people unless it is clear that they are dishonest; or the jurisdiction may serve such a small population that even when imprisonment rates are the same as those in the large states, very few people end up in gaol. Even when imprisonment is common, such as in Victoria prior to May 1985, the number of imprisonment cases is usually very much smaller than the number of cases in which the debt is enforced by execution on property.

This paper has also shown that most debtors who are now being committed to gaol, are being sent there by the magistrates' courts. That fact fits with other evidence which shows that imprisoned debtors are usually very poor. One effect of the "abolition" of imprisonment for debt in the mid-nineteenth century was that it ensured that only the poorest of debtors were subsequently sent to gaol. In the early nineteenth century, prior to the "abolition" statutes, the debtors' prisons had contained members of all social classes, the wealthier of whom had been sent there by the superior courts.[54]

A study which is confined to only one jurisdiction can never get around an argument which is as old as debates about whether to

54 See Kercher, "Transformation", op cit., 97.

abolish imprisonment for debt. If a jurisdiction, such as Tasmania, has imprisonment laws on the books which are rarely used, those who propose to abolish those laws on the ground that they are unnecessary will be met by the argument that the threat of the use of the law may still be having a significant effect. Debtors may be paying under the fear of imprisonment. However, a multi-jurisdictional study can resolve the problem. This paper has shown that at least one State, New South Wales, is managing to survive economically despite the lack of imprisonment on its books to keep its debtors honest. Thus the experience of that State shows that it is safe, from a creditor's point of view, to abolish imprisonment fully in all jurisdictions.

It is not the purpose of this paper to argue for the abolition of imprisonment for debt. Arguments to that end have been made many times in the past 200 years, and continue to be made.[55] A modern summary of the arguments would include the following: that as practised, the poor and unknowledgeable are imprisoned rather than the dishonest; that it is a personal remedy which reflects the personal nature of eighteenth century credit, rather than the impersonal nature of modern credit; that it interrupts the income of those who are imprisoned, so driving them further into insolvency to the detriment of the debtor and other creditors; that it inflicts a severe criminal penalty, without the normal criminal law safeguards; and that it is so severely coercive that it rewards the least sympathetic of creditors, forcing all others to adopt the same tactics in order to get their pound of flesh.

There are many other arguments which this author finds convincing as well, but the interesting question is why imprisonment for debt has managed to survive so long in what seems to be a social and economic climate which is hostile to it. There seem to be at least three reasons for this. First, debt recovery law has not captured the imagination of many twentieth century reformers, so there has never been the kind of concerted campaign which we have seen about other consumer issues, and even about the imprisonment of fine defaulters. Secondly, relatively few debtors actually end up

55 The author's favourite statement of the arguments is that made by the Rev G C. Smith in 1843, in a paper entitled *The Horrible Evils of Imprisonment for Debt* It is extracted in Tilbury, et al , op cit , chap 9 Similar arguments are still being made see "Gaol for Debt Should Go," 24 *Choice* 2 (February 1983), and D. Beatson, "Debtors in Our Prisons," 114 *Listener* No 2443, (4 October 1986) (New Zealand) p. 5

in prison each year, even though thousands are threatened with it. Thirdly, from the point of view of the hastiest creditors, imprisonment is very effective. A threat of imprisonment is a threat of loss of liberty, of acute embarrassment, of income interruption and even job loss, and of physical and emotional hardship. While the remedy may be self defeating when it leads debtors into insolvency, the threat of it is powerfully effective. The power of such threats depends on whether they are credible, and that partly depends on whether the remedy is actually used in the jurisdiction in question. Victoria still has not abolished imprisonment for debt, so a threat of imprisonment still carries some weight there. However, the new changes have reduced the possibility of imprisonment and with it the credibility of the threat.

Perhaps the most common effect of the threat of imprisonment for debt is that it causes a change in the debtor's payment priorities. The possibility of losing a house or flat will usually ensure that rent or mortgage payments are among the first to be made. The threat of imprisonment may alter that order of payments, and that is especially likely when the "offence" upon which the debtor is to be imprisoned is having the means to pay the debt but failing to do so. In many cases, the debtor will have the means to pay a particular debt, but not enough to pay all of her or his other debts as well. The threat to imprison the debtor will ensure that one debt receives top priority, regardless of its broader economic or social merits.

Frank Hardy's arrest drew even more attention to the consequences of defaulting on fines in New South Wales than it had received over the prior two or three years. Those who have been seeking the abolition of imprisonment in those circumstances must have had mixed feelings about the publicity given to his case. He is hardly impoverished, and the fact that he accumulated $8,000 in parking fines which he wrote off in two or three days in gaol must have increased public cynicism about the case against imprisonment. Just one case of this kind can be used by the proponents of imprisonment to draw a false picture of the types of people who are imprisoned for non payment of fines. "Criminal" debtors, like civil debtors, usually go to gaol because they cannot afford to pay what they owe, or because they do not understand the procedures which must be followed to avoid it. Hardy's case makes the argument against civil imprisonment more difficult as well, as it leaves

the impression that debtors can write off what they owe to finance companies by spending a couple of days in a police station. Since imprisonment for debt was supposedly abolished in the middle of the nineteenth century, it has not been possible to write off civil debts by spending time in gaol. After what is usually much more than just a couple of days in gaol, without remission, civil debtors are released from prison, and left to try to cope with the full burden of their debts, frequently with even less resources to pay them than they had before their arrest.