

NSW Law Reform Commission

REPORT 35 (1983) - COMMUNITY LAW REFORM PROGRAM: SECOND REPORT - INTEREST ON CERTAIN DEBTS

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REPORT 35 (1983) - COMMUNITY LAW REFORM PROGRAM: SECOND REPORT - INTEREST ON CERTAIN DEBTS

Terms of Reference and Participants

New South Wales Law Reform Commission

The Honourable D.P. Landa, LL.B., M.L.C.,

Attorney General for New South Wales.

COMMUNITY LAW REFORM PROGRAM

Attached to this document is the report of this Commission pursuant to the reference from you dated 28 July, 1982 and headed Interest on Certain Debts.

Ronald Sackville,

Chairman.

Russell Scott,

Deputy Chairman.

J.R.T. Wood,

Commissioner.

February, 1983.

Terms of Reference

Pursuant to section 10 of the Law Reform Commission Act 1967, I *HEREBY REFER* to the Law Reform Commission the following matters for inquiry and report to me:

(1) *Interest on Certain Debts*

Whether the courts of New South Wales or any one or more of them, should be empowered to award interest on debts where payment is made, whether in whole or in part, before judgment.

. . .

(4) Any matter incidental to the foregoing matters or any of them.

F.J. WALKER

Attorney General.

28 July, 1982.

New South Wales Law Reform Commission

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

Chairman:	Professor Ronald Sackville
Deputy Chairman:	Mr. Russell Scott
Full-time Commissioners:	Mr. Denis Gressier Mr. J.R.T. Wood, Q.C.
Part-time Commissioners:	Mr. I.McC. Barker, Q.C. Mrs. B. Cass Mr. J.H.P. Disney The Hon Mr. Justice P.E. Nygh The Hon. Mr. Justice Adrian Roden The Hon Mr. Justice Andrew Rogers Ms. P. Smith Mr. H.D. Sperling, Q.C.
Research Director:	Ms. Marcia Neave
Members of the research staff are:	Ms. Ruth Jones Ms. Philippa McDonald Ms. Helen Mills Ms. Fiona Tito

The Secretary of the Commission is Mr. Bruce Buchanan and its offices are at 16th Level Goodsell Building, 8-12 Chifley Square, Sydney, N.S.W. 2000 (telephone: (02) 238 7213).

This is the Second Report of the Commission under the Community Law Reform Program. Its short citation is L.R.C. 35.

Participants

Commission Members:

For the purpose of the reference the Chairman, in accordance with section 12A of the Law Reform Commission Act, 1967 created a Division comprising the following members of the Commission:

Professor Ronald Sackville (Chairman).

Mr. Russell Scott (Deputy Chairman - in charge of this reference).

Mr. J.R.T. Wood, Q.C.

Consultant to the Commission:

Mr. D.I. Cassidy, Q.C.

Secretary:

Mr. Bruce Buchanan.

Word Processing:

Mrs. Zoya Wynnyk.

Summary of Recommendations

The recommendations in this report may be summarised as follows:

1. Courts, Tribunals and Arbitrators - the Power to Award Interest (see paras 4.249)

Amendment of the Courts of Petty Sessions (Civil Claims) Act 1970 so as to confer upon Courts of Petty Sessions a power to award interest in respect of the period prior to the time when a judgment takes effect similar to the power conferred upon the Supreme Court and District Court (see also recommendation in third paragraph of section 4 of this Summary).

Amendment of the Commercial Arbitration Bill, 1982 or any legislation based thereon, in accordance with the amendments proposed in respect of the Supreme Court Act 1970 in section 4 of this Summary.

2. Default Judgements and Liquidated Demands Where a Claim for Interest is Made (see paras 4.10-4.22)

Amendment of the rules of the Supreme Court to ensure that where there is a claim for interest under section 94 of the Supreme Court Act, 1970 together with a claim for a liquidated demand, a defendant can be required to verify his or her defence.

Amendment of the rules of the Supreme Court to ensure that where there is a claim for interest under section 94 of the Supreme Court Act, 1970 together with a claim for a liquidated demand, a defendant can obtain a stay by payment in accordance with Part 7 rule 4, and that a plaintiff can endorse the statement of claim with a note to that effect.

Amendment of the rules of the Supreme Court to allow a default judgment to be obtained where there is a claim for interest under section 94 of the Supreme Court Act, 1970 together with a claim for a liquidated demand. The plaintiff should be required to specify in the statement of claim the portion of the claim on which interest is claimed, the date from which it is claimed and the rate at which it is claimed. The plaintiff should be required to include in an affidavit any facts relied upon in support of the claim for interest. A defendant wishing to oppose the award of interest claimed should be able to give notice of dispute and file an affidavit containing particulars of any facts upon which he or she relies. The amount payable for interest should be assessed by the Registrar at the time when the default judgment is filed or processed, and save, in special circumstances, should be at the rate fixed from time to time by practice direction.

In relation to proceedings brought for the recovery of a liquidated sum together with interest under section 94 of the Supreme Court Act, 1970 amendment of the rules of the Supreme Court to enable the obtaining of a default judgment which will include interest under section 94 in respect of the whole or any part of the period between the date when the cause of action arose and the date when the default judgment takes effect.

Amendment of the District Court Act, 1973 so as to achieve the same effect as the foregoing recommendations, and to allow Judgements by confession to include interest claims as envisaged by paragraph 4.19.

Amendment of the Courts of Petty Sessions (Civil Claims) Act 1970 so as to achieve the same result.

3. Payment into Court After Action Brought (Including Defence of Tender) (paras 2.18, 4.23- 4.26)

Amendment of the District Court Rules to ensure that under section 83A of the District Court Act 1973 interest is taken into account in determining whether an amount paid into court is greater than the amount for which judgment is given or entered.

No recommendation is made in relation to moneys paid into court with a defence of tender, except for a minor amendment to rules of court as described in paragraphs 2.18 and 4.24.

No recommendation is made in respect of payment into court in the case of Courts of Petty Sessions.

4. Payment After Action Brought Otherwise than by Payment into Court (paras 4.27-4.34)

Amendment of section 94 of the Supreme Court Act 1970 so as to allow the discretionary award of interest up to the date of payment where the debt claimed is paid after proceedings are instituted but before judgment is obtained.

Amendment of section 83A of the District Court Act 1973 so as to achieve the same result.

Amendment of the Courts of Petty Sessions (Civil Claims) Act 1970 so as to introduce a section similar to section 94 of the Supreme Court Act 1970 and section 83A of the District Court Act 1973 as amended in accordance with our recommendations above.

5. Debts Paid Before Action Brought (see paras 4.35-4.37)

No recommendation is presently made in respect of such payments.

Chapter 1 - Community Law Reform Program and This Reference

1.1 This is the second report in the Community Law Reform Program. The Program was established by the Attorney General by letter dated 24 May, 1982 addressed to the Chairman of the Commission. The letter included the following statement:

This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s.10 of the Law Reform Commission Act 1967.

1.2 The Commission wrote on 9 June, 1982 seeking its first Community Law Reform references. By letter of reply dated 28 July, 1982 the Attorney General referred three matters to the Commission the first of which is the subject of this report.¹ The reference requires the Commission to inquire and report in the following terms:

(1) *Interest on Certain Debts*

Whether the courts of New South Wales or any one or more of them, should be empowered to award interest on debts where payment is made, whether in whole or in part before judgment.

...

(4) Any matter incidental to the foregoing matters or any of them.

The background of the Community Law Reform Program is described in greater detail in the Commission's Annual Report for 1982.

1.3 The immediate reason for the Commission giving preliminary consideration to the subject matter of this report was the receipt of a letter from a member of the Supreme Court of New South Wales suggesting that section 94 of the Supreme Court Act, 1970 is deficient in that it permits the award of interest only where the court gives a judgment for a "sum" of money. The letter was written by Mr. Justice Rogers who is a part-time member of the Commission. The deficiency is illustrated by cases where a debtor, prior to judgment, discharges the debt or sum claimed. In such a case, the court will be unable to give judgment for a sum of money and will therefore be unable to award interest to the creditor, unless there is a contractual right to it. Section 94 provides as follows:

(1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods), the Court may order that there shall be included, in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect.

(2) This section does not -

(a) authorise the giving of interest upon interest

(b) apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) affect the damages recoverable for the dishonour of a bill of exchange.

1.4 In England the Law Commission dealt with the subject of interest on debts in June 1978 in its "Report on Interest" and recommended reform of the relevant law of England upon which the provisions presently in force in New South Wales are based.² A Bill in partial implementation of the recommendations of the Law Commission was introduced into the English Parliament in February 1982.³

1.5 As part of its preliminary inquiries the Commission held discussions with a number of firms of solicitors in Sydney, examined judicial criticism of the present law in recent reported decisions of English courts,⁴ and came to the conclusion that the subject is one on which a reference to the Commission is warranted.

The Problem and Need for Reform

1.6 The problem is not difficult to describe, although it has several aspects. First the general rule is that overdue debts do not carry interest. Specific exceptions have been made by statute and, of course, the parties to any transaction may agree that interest will be payable. However, usually no such agreement is made as the parties do not contemplate the possibility of default or delay in payment. As a consequence unpaid creditors may suffer substantial loss while kept out of money which is due to be paid. This may present particular difficulties in times of economic uncertainty and fluctuations in interest rates. Secondly, the law at present allows courts to award interest in a variety of cases but this power has not been given to all courts concerned with debt recovery. Thirdly, as mentioned in paragraph 1.3 above, the exercise of the power in a claim for debt depends on the award to the plaintiff of a judgment for a "sum" of money. Where full payment is made before judgment no interest can be recovered.

The Scope of this Reference and of this Report

1.7 Our concern is with moneys payable by way of debt for it is to "debts" that our terms of reference are directed. It should be noted that the power to award interest conferred upon the Supreme Court by section 94 of the Supreme Court Act, 1970 and the power conferred upon English courts under the English legislation,⁵ extends to the award of interest in any proceedings for the recovery of "debt or damages". The restriction of our terms of reference to "debts" is due to the fact that the critical problems addressed by this report are likely to arise only in proceedings for recovery of a debt or liquidated sum.

Underlying Principle

1.8 The principle upon which we have based our recommendations is this: persons to whom money is properly owed should, when it is just to do so, be compensated for being deprived of or "kept out of" their money. The courts are suitable institutions to be entrusted with power to award such compensation (in the form of interest).

Summary of Our Recommendations

1.9 We have formed the view that all courts having jurisdiction in debt claims should be able to award interest. We have also formed the view that interest should be recoverable in certain cases where overdue debts are paid before judgment, and that a number of procedural changes should be made to facilitate recovery of interest. Accordingly, in this report we recommend enlargement of the powers of the Supreme Court and the District Court, and amendment of certain procedural rules. We also recommend that like jurisdiction be given to Courts of Petty Sessions. Draft legislative provisions reflecting our recommendations are submitted with this report. We have not drafted amendments to the rules as we consider that the question of procedural reform and alteration of rules of court is more appropriately the province of Standing Rules Committees.

Parliamentary Counsel

1.10 We record our thanks to Parliamentary Counsel Mr. D.R. Murphy for his assistance and advice on the form and content of the draft legislation submitted with this report in Appendix I.

FOOTNOTES

1. See p.2 above.
2. Law of Contract Report on Interest H.M.S.O , Cmnd 7229 (1978), (Law Corn No.88).
3. Administration of justice Bill 1981, cl.15 and Sch.I. See also paras 3.1-3.9 below.
4. *Tehno-Impex v. Gebr. Van Weelde Scheepvaartkantoor B.V.* [1980] 1 Lloyd's Rep.484, at p.489, per Parker J.; *Tharros Shipping Co.Ltd. v. Mitsubishi Corporation* [1981] 1 Lloyd's Rep. 166.
5. See para.2.8 below.

Chapter 2 - Present Law in New South Wales - Its Background - United Kingdom Origins

How Money Becomes Payable

2.1 Money may become payable by one person to another in many ways, for example, as a contract debt that is, as a sum stipulated to be paid, in return for goods supplied or services provided. It may be due as a debt by reason of a liability arising under statute, as in the case of rates, taxes and duties. Again, money may become payable as damages for breach of contract or as damages consequent upon wrongful conduct giving rise to a liability in tort upon the part of the wrongdoer. Our concern in this report is with money payable as a debt.

Money Payable by Statute

2.2 In the case of a liability to pay moneys arising under statute, it is usual for an express provision to specify the date upon which payment becomes due. That date is commonly fixed by reference to the time of making or notifying of an assessment.¹ Often the statute fixes or authorizes the charge of an additional sum by way of penalty or interest for non- payment or late payment.² We do not see any need for reform in this area of the law. It is a matter for the legislature to determine whether interest should be payable on such overdue debts, and if so, at what rate, and for what period.

Common Law Principles

2.3 The general rule at common law is that, in the absence of an express or implied contractual stipulation a creditor is unable to recover interest where there is late payment or non- payment of a contract debt.³ Similarly, in the case of damages for breach of contract interest is not recoverable unless the parties have expressly or by implication otherwise agreed. Subject to certain exceptions,⁴ interest is not recoverable on debts that are actionable in quasi-contract. Finally, at common law, interest is not recoverable in actions arising out of tort either as a component of the damages, or as compensation for delay in payment.

Equity

2.4 Equity did not follow the common law. Courts having an equitable jurisdiction commonly awarded interest where moneys had been withheld or misapplied by persons owing fiduciary duties,⁵ or where moneys were obtained or retained by fraud.⁶ Interest has also been awarded by way of ancillary relief in suits for specific performance or for rescission of contracts.

Admiralty

2.5 In admiralty cases too, the rule at common law was not followed. The general rule in admiralty was that a plaintiff entitled to damages arising out of a collision at sea could recover interest where prejudice by delay in meeting the claim could be shown.⁷

Other Cases

2.6 Recovery of interest in respect of certain classes of private debts and certain kinds of damage is permitted by statute. The cases where recovery of this kind is permitted include the right to interest on dishonoured bills of exchange,⁸ and the right of a partner, subject to agreement to the contrary, to interest on moneys advanced for the purposes of the partnership beyond the amount of capital which he or she has agreed to subscribe.⁹

Interest After Judgment

2.7 The judgments and orders of most courts carry interest by virtue of their constituent statutes from the date on which the judgment or order takes effect until payment, at the rates specified therein or as prescribed by rules of court.¹⁰ Interest payable under such provisions is distinct from interest the subject of this report. In some courts, liability to pay interest does not arise if payment is made within a specified period from the date of the judgment or order.¹¹ Again our report is not concerned with such provisions.

Statutory Alteration of the Common Law- Power Given to New South Wales Courts to Award Interest on Debts

2.8 Some courts in New South Wales have been given power under their constituent statutes to award interest in proceedings for the recovery of money (including debt or damages or the value of goods) in respect of a period prior to judgment. These provisions have given rise to the reference upon which this report is based. The model for this form of legislation is in section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 (U.K.) (in this report called the United Kingdom Act of 1934). Under this section power is given to courts of record to include an award of interest in the sum for which judgment is awarded in proceedings for the recovery of debt or damages.¹²

2.9 The courts which have been empowered to award interest in New South Wales are the Supreme Court¹³ and the District Court.¹⁴ No such power has been given to Courts of Petty Sessions exercising civil claims jurisdiction, even though their general jurisdiction has been raised to \$3,000 and legislation has been passed, although not yet proclaimed further increasing that jurisdiction to \$5,000. The Workers' Compensation Commission has no power to award interest up to the date of award or order.

2.10 The power of awarding interest is discretionary. It allows interest to be included in the sum for which judgment is given at such rate as the court thinks fit, on the whole or any part of the money, for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect. The provisions do not authorise the award of interest upon interest, nor do they apply in relation to any debt upon which interest is payable as of right. In addition they do not affect the damages recoverable for the dishonour of a bill of exchange.

Federal Courts

2.11 Neither the Federal Court,¹⁵ even though sitting in a State where the Supreme Court has such power, nor the High Court,¹⁶ even when applying New South Wales law, has any such power.

Arbitration

2.12 There is power in an arbitrator to award interest in respect of the period prior to the making of an award where interest is payable at law or in equity and the question of interest is referred. The arbitrator may also award interest where the parties agree expressly or by implication that he or she may do so. It is now established, at least in mercantile arbitrations and possibly in every arbitration that a term will be implied that an arbitrator might award interest upon the same principles as apply to awards of interest by the Supreme Court,¹⁷ and may do so even where the arbitration arises out of a Scott v. Avery clause.¹⁸ This is a matter which was the subject of our Report on Commercial Arbitration¹⁹ and for which provision is made in the Commercial Arbitration Bill, 1982.²⁰

Interest Rates - New South Wales Courts

2.13 The rate of interest awarded up to judgment under the provisions mentioned in paragraph 2.9 above need not be the same as that payable after judgment. In the former case the rate is left to the discretion of the court (subject to practice direction), while in the latter it is at the rate prescribed from time to time.

Payment Before Proceedings - Some Legal inadequacies

2.14 Save in the special cases we have mentioned²¹ a debtor paying out a monetary claim before proceedings are instituted, may do so without paying interest. This is a result of the rule of common law to which reference has been made. No account is taken by the law of the respective circumstances in which debtor and creditor find themselves, nor of the relationship between them nor of the fact that the debtor has kept the creditor out of his or her money and has had the use of it without justification. It was this which Lord Denning described as the basis upon which an award of interest should be made under the United Kingdom Act of 1934.²² The debtor, in other words, is able to have a period of interest-free credit. In times of high interest rates, this can cause substantial hardship to a creditor.

Claims for Interest - New South Wales Courts

2.15 If interest is to be claimed by a creditor for the period up to judgment a statement to that effect must be made in the statement of claim.²³ Suggestions have been made to the effect that it may be desirable for procedures to be prescribed, probably by rule of court for the supply of particulars in the statement of claim to ensure that adequate notice is given of a proposed claim for interest,²⁴ or that evidence is placed before the trial judge of any special facts relevant to the exercise of his discretion.²⁵ We agree with these suggestions and recommend that the rules be amended accordingly.

Tender of Payment Before Legal Proceedings

2.16 In certain circumstances tender of payment of a debt by a debtor to the creditor before the commencement of proceedings will constitute an answer to the creditor's claim. A defence of tender is available to a debtor who has "been always ready and willing to pay the debt and [has] tendered it before action to the plaintiff [creditor] who refused to accept it".²⁶ In other words, where a creditor sues for a liquidated amount the defence of tender may be pleaded by the defendant if the latter made a valid tender of the amount before the commencement of proceedings. The essence of the defence is that because the defendant has always been ready to pay the debt claimed, the proceedings are unjustified. Except for certain special cases²⁷ the significant date is the last moment before commencement of proceedings. It is not relevant that for a considerable time the defendant may have been unwilling to pay, or that demands had been made upon him or her which were not met. Nor is it relevant that prior to the tender the creditor was forced to borrow a sum of money at a substantial rate of interest or lost the opportunity of investing the sum owed.

2.17 The defence of tender is not available in answer to a claim for unliquidated damages.²⁸ Further, a defendant pleading this defence in the Supreme Court or the District Court must bring into court the amount alleged to have been tendered.²⁹ It seems that such a defendant would not need to pay into court any sum on account of interest claimed under the relevant statutory provisions³⁰ allowing recovery of interest to judgment because if the defence of tender is successful the defendant will normally be entitled to judgment including judgment for the costs of the action.³¹ The defence of tender, if successful, is a "complete defence".³² In such a case it will be held that "the plaintiff had no right to bring his action".³³

2.18 The defence of tender presents certain problems even when successful because until payment is made the plaintiff remains entitled to the amount of the debt. As mentioned, it is necessary when the defence of tender is raised in the Supreme Court or District Court for the defendant to pay the amount tendered into court. If the plaintiff accepts the amount paid in, he or she may take it out only with a court order.³⁴ If the plaintiff does not accept the amount paid into court then, under the rules as presently framed, it seems that the defendant may have the right to take the money out of court and still leave the issue of tender to be tried.³⁵ It may be open to the defendant to argue that by making the payment there has been compliance with the rules and that the issue raised by the plea must be tried. To overcome this argument we recommend that Part 22, rule 12 of the Supreme Court Rules be amended so that a defendant who has pleaded tender and has paid money into

court may not take it out of court without an order. If the defence of tender fails then the court's power to award interest under section 94 will be available, since the plaintiff will be entitled to a judgment for a sum of money. On the other hand, if the defence of tender succeeds the plaintiff should not recover interest for the period after tender because the defendant will have established that "the plaintiff had no right to bring his or her action". So far as the plaintiff's merits in relation to a claim for interest for the period prior to tender is concerned, this question raises the same issues as are raised by the payment in full of a debt prior to action.³⁶

Payment of Money into Court After Action is Brought

2.19 If payment is sought to be made after proceedings for recovery of a debt or damages have been commenced, then the question of recovery of interest up to judgment is to some extent affected by the rules of court relating to payment of money into court. Payment into court is simply an offer to dispose of a claim upon terms,³⁷ which may affect the ultimate liability to costs. It does not constitute a defence which may be pleaded by way of payment or tender, or otherwise.³⁸

2.20 In the Supreme Court, the rules provide that a defendant may bring money into court in answer to any one or more causes of action on which a plaintiff claims³⁹ and where an order for interest to the time of judgment is claimed under section 94 of the Supreme Court Act, 1970 in respect of the interest which is the subject of the claim. The rules⁴⁰ also provide that where such an order for interest to judgment is claimed on any debt or damages and money is brought into court in answer to, or allotted to, the cause of action for the recovery of the debtor damages, the money shall be presumed to include the interest which is the subject of the claim.

2.21 These provisions have not been included in the District Court Rules, although that court was given jurisdiction in 1978 to award interest to the time of judgment.⁴¹ It is accordingly not entirely clear whether that court should take into account interest to the time of judgment in determining whether the amount paid in is greater than the amount recovered,⁴² and in exercising the discretion as to costs in the action.⁴³ We recommend that the rules be amended to resolve this doubt and further recommend that the approach taken in the Supreme Court be adopted.

Other Kinds of Payment After Action is Brought

2.22 Later we discuss in detail the consequences of a defendant attempting to make payment to a plaintiff after action is brought without making payment into court.⁴⁴ For the moment it suffices to observe that if such a payment is made and accepted the law presently does not permit recovery of interest since such recovery is dependent upon a judgment being given for the debt claimed. Accordingly, such a payment or offer of payment is likely to pose a substantial dilemma for the plaintiff.

Conclusion - Legal Inadequacies Identified

2.23 The Supreme Court Act 1970 and the District Court Act, 1973 based on the United Kingdom Act of 1934⁴⁵ went part of the way in meeting the problem of the dilatory debtor. The law, however, provides no solution for the plaintiff who finds it necessary to institute proceedings in a court or tribunal not vested with discretionary power to award interest up to judgment. The law does not afford any redress in any court where a debt becomes overdue but is paid without any sum for interest before proceedings are commenced. Further, the law does not afford any redress where the debt is paid after proceedings have been commenced but before judgment is obtained.

FOOTNOTES

1. See, for example, Land Tax Management Act 1956, s39; Local Government Act 1919, s. 143; Pay- Roll Tax Act 1971, s.17; Income Tax Assessment Act 1936 (Cth), s.204.

2. Byway of illustration an additional sum is made payable by way of penalty under the Land Tax Management Act 1956, s.40, and the Pay- Roll Tax Act 1971, s.22. An additional charge in the nature of interest may become payable upon overdue rates under the Local Government Act 1919, s.158, and on overdue income tax under the Income Tax Assessment Act 1936 (Cth), s.207.

3. *Page v. Newman* (1829) 9 B. & C. 378; 109 E. R- 140: *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [18931 AC. 429. The basis of the rule of Lord Ellenborough C.J. in *De Havilland v. Bowerbank* (1807) 1 Camp. 50, was that unless the creditor stipulated for the payment of interest he was presumed to have agreed not to require it

4. A purchaser of land may recover the return of his deposit together with interest where the vendor has failed to make title: *De Bernales v. Wood* (1812) 3 Camp. 258. A surety who has become liable to make payment to a principal creditor may recover the amount paid together with interest. in a quasi-contract claim for indemnity. *Petre v. Duncombe* (1851) 20 L.J.Q.B.. 242.

5. *Wallersteiner v. Moir (No.2)* [19751 Q. B. 373.

6. *Johnson v. R.* [19041 A.C. 817.

7. *The Aldora* [19751 Q.B. 748.

8. Bills of Exchange Act 1909 (Cth), s.62. See also *De Havilland v. Bowerbank* (1807) 1 Camp. 50: the right to recover damages by way of interest on a dishonoured bill of exchange at common law is a recognised exception to the general rule refusing interest on debts.

9. Partnership Act- 1892, s.24.

10. Supreme Court Act 1970, s.95(1) and Supreme Court Rules, 1970, Pt 40 r.7(2)~ District Court Act. 1973, s.85(1); Courts of Petty Sessions (Civil Claims) Act 1970, s.39(1), and Courts of Petty Sessions (Civil Claims) Rules. r.32; Workers' Compensation Act 1926, s.62A; judiciary Act 1903 (Cth), s.77N and High Court Rules, 0.43A, Federal Court Act 1976 (Cth), s.52 and Federal Court Rules. 0.35 r.8.

11. Supreme Court Act 1970, s.95(2); District Court Act 1973, s.85(3).

12. 3.

(1) In any proceedings tried in any court of record for the recovery of any debtor damages. the court may, if it thinks fit order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment

Provided that nothing in this section -

(a) shall authorise the giving of interest upon interest: or

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

13. Supreme Court Act 1970, s.94.

14. District Court Act 1973, s.83A.

15. *Hubbards Pty. Ltd. v. Simpson Ltd.* (1982) 41 A.L.R. 509.

16. *Australian National Airlines Commission v. The Commonwealth* (1975) 49 A.L.J.R., 338.
17. *Government Insurance Office of New South Wales v. Atkinson- Leighton joint Venture* (1980) 31 A.L.R. 193, at p.220, per Stephen J; at p.230, per Mason J. (with whom Murphy J. agreed, Barwick C.J. and Wilson J. dissented on this point).
18. *Codelfa Construction Pty. Limited v. State Rail Authority of New South Wales* (1982) 56 A.L.J.R. 459, at p.471, per Mason J. (Stephen Aickin and Wilson JJ. agreeing with him Brennan J. dissenting).
19. *Report on Commercial Arbitration* (1976, L.R.C. 27).
20. Cl.27 this Bill was introduced into Parliament on 7 April 1982.
21. See paras 23-2.6 above.
22. *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447. at p.468.
23. Supreme Court Rules, Pt 7 r.1(1); *Pheaney v. Doolan* [1977] 1 N.S.W.L.R. 601; District Court Rules, Pt 5 r.6(g).
24. *Pheaney v. Doolan* [1977] 1 N.S.W.L.R. 601, at p.606, per Moffitt P~ and see *Callinan v. Borovina* [1977] 1 Qd.R. 366, at pp.377-8, per Douglas J.
25. *Pheaney v. Doolan* [1977] 1 N.S.W.L.R. 601, at p.619, per Mahoney J.A.
26. *Bullen & Leake & Jacob's Precedents of Pleadings* (12th ed- 1975), p.1314.
27. For example, if a debt is payable on a day fixed, as by the acceptance of a bill (*Poole v. Tumberidge* (1837) 2 M. & W. 223), or by the making of a promissory note (*Dobie v. Larkan* (1855) 10 E x. 776), the debtor cannot plead a tender made after the due date.
28. *Davys v. Richardson* (1888) 20 Q.B.D. 722; *The Mona* [1894] P. 265.
29. Supreme Court Rules, Pt 15 r.24; District Court Rules, Pt 10 r(d).
30. Supreme Court Act 1970, s.94; District Court Act, 1973, s.83A.
31. *Dixon v. Clark* (1847) 5 C.B. 365, at p.377; *Griffiths v. School Board of Ystradyfodwg* (1890) 24 Q.B.D. 307.
32. I.H. Jacob, *The Supreme Court Practice (UK)*, 1976 edn., vol.1, p.147.
33. See *Griffiths v. School Board of Ystradyfodwg* (1890) 24 Q.B.D. 307. at p.308.
34. Supreme Court Rules. Pt 22 r. 11 (1) (c).
35. See Supreme Court Rules, Pt 22 r.12 and Pt 15 r.24.
36. See paras 4.23-4.26 below.
37. *A Martin French v. Kingswood Hill Ltd.* [1961] 1 Q.B. 96, at p.103.
38. *Cumper v. Potheary* [1941] 2 Q.B. 58.
39. Supreme Court Rules, Pt 22 r.2(1).
40. Supreme Court Rules. Pt 22 r.2(3).

41. Act No.8, 1978, s.2 and Schl inserting s.83A into the principal Act

42. In *Murphy v. Murphy* [1963] V.R. 610, which the Full Court declined to overrule in *East v. Breen* [1975] V.R. 19 without being asked to convene a Full Bench, it was held that interest could be paid into court. In *Jefford v. Gee* [1970] Q.B. 130 it was held that since money could only be paid into court "in answer to a cause of action, and since the claim for interest under the Act of 1934 is no part of the cause of action money cannot be paid into court in respect of interest. The rules of the courts concerned are in different terms. In the District Court the rule (Pt 19 r.1(1)) allows a defendant to bring into court the whole of the amount claimed". In the Supreme Court of Victoria, the rule (O.22 r.1(1)) allows the defendant to pay into court a sum of money "in satisfaction of the claim or in satisfaction of any or all of the causes of action'. The English rule (O.22 r.1(1)) only permits payment into court "in satisfaction of the cause of action'. In the Supreme Court of New South Wales the rule (Pt22 r.2(1)) permits the bringing into court of money not only "in answer to any one or more causes of action', but in respect of interest where an order for interest under s.94 of the Supreme Court Act 1970 is claimed. The effect of the decision in *Murphy v. Murphy* has now been embodied in O.22 r.6A of the rules of the Supreme Court (Vic). It is suggested that provided the plaintiff claims interest under s.83A of the District Court Act 1973 the defendant is entitled to pay money into court in respect of that interest and that the court is entitled to take into account any sum awarded for interest when exercising its discretion as to costs under Pt 19 r.9~

43. District Court Rules, Pt 19 r.9.

44. See paras 4.27-4.34 below.

45. See para.2.8 above and note 12 above.

Chapter 3 - Recommendations for Reform in the United Kingdom - Conclusions in Relation to New South Wales

3.1 The question of recovery of interest on contract debts where payment is made before action is brought was examined by the Law Commission in England in a report presented to the United Kingdom Parliament in June 1978.¹ In that report consideration was given to the power conferred by the United Kingdom Act of 1934 to make a discretionary award of interest. That power may only be exercised in "proceedings tried in any court of record", and the United Kingdom Act of 1934² provides that interest may be "included in the sum for which judgment is given". Limitations on the discretionary power were noted by the Law Commission. These arose from the requirement of a trial in the proceedings, and the necessity of a "sum" for which judgment is given, before any order for interest can be made.³ The Law Commission also noted that it is doubtful whether interest can be recovered where the debtor does not contest liability,⁴ or where the debtor tenders payment before action⁵ and further, that interest is not recoverable where the debtor pays the debt before judgment.⁶

A Statutory Entitlement to Interest on Debts, and Wider judicial Powers?

3.2 Two possible solutions to the problem were examined by the Law Commission. One was to amend the United Kingdom Act of 1934⁷ so as to allow the courts wider discretionary powers. The other was to provide creditors with a statutory entitlement to interest in respect of unpaid contract debts. The Law Commission concluded that the latter approach was "appropriate and necessary", and that in addition there should be a widening of judicial discretionary powers.⁸

3.3 Commentators in favour of the creation of a wider discretion said that it could empower the courts to award (or refuse) interest at whatever rate and over whatever period might appear just. As well, it could allow a distinction to be drawn between the wilful defaulter who makes a deliberate policy of withholding payment as long as possible, and the debtor who desires to make payment but does not have the means.⁹

3.4 Arguments in favour of a statutory entitlement to interest are that it would be simple to administer, quick, and cheap in terms of legal costs.¹⁰ In cases where the debt is undisputed, statutory interest could be recoverable by the default procedure without any need for a court hearing of the kind which would be involved if the matter were left to the exercise of the court's discretion. The Law Commission commented that the creditor's loss was the same in the case of a poor debtor as in the case of a rich debtor, and "urged" that the creditor's right of redress should not depend upon the debtor's ability to provide it.¹¹ Finally, it was suggested¹² that a statutory entitlement to interest would make for greater certainty. The debtor would know what he or she was required to pay, and the creditor would know what he or she was entitled to receive. There would be less room for dispute than there would be under a system of discretionary awards and there would be a likely saving in costs.

3.5 The recommendations of the Law Commission were confined to contract debts and were subject to exceptions for rent (and other sums payable by a tenant to a landlord)¹³, foreign money liabilities,¹⁴ quasi - contract,¹⁵ interest payable under contract,¹⁶ and sums payable under an obligation to indemnify against loss.¹⁷ The view was expressed that debts incurred in the course of a business should be treated similarly to non- business debts, and that there was no reason for excluding small debts or imposing an arbitrary lower limit.¹⁸

3.6 The essence of the scheme was that it should provide for payment of interest at a rate which is commercially realistic, and from a date by which, in a commercial setting, persons acting honestly and reasonably would be expected to have paid the debt.¹⁹ Where a date for payment is agreed, whether expressly or by implication interest should run from that date; in other cases it should begin to accrue 28 days after service upon the debtor of a written demand for payment.²⁰ The interest recoverable would be simple interest at a rate calculated and declared in advance for every quarter, being based on the average minimum lending rate plus a margin and rounded up to the nearest half per cent the intention being to compensate the creditor for having to borrow money rather than for losing investment income.²¹ It was proposed that a discretion be reserved to the court to suspend or stop the running of statutory interest.²²

3.7 The scheme would not prevent the parties from agreeing on their own special terms for interest or from contracting out of the liability to statutory interest.²³ In addition it was not intended to alter the equitable jurisdiction to award interest,²⁴ although it might well in certain cases supplant that jurisdiction as being more attractive to creditors. The scope and exercise of other rights and remedies under a contract were to be preserved.²⁵

3.8 The Law Commission also proposed a widening of the discretions under the United Kingdom Act of 1934²⁶ so as to empower the courts to award interest in cases excepted from the scheme for statutory interest.²⁷ It did not, however, recommend extension of the jurisdiction beyond the power to award interest on debts the subject matter of proceedings.²⁸ The Commission concluded that the best way of implementing its recommendations was not to amend the relevant provisions of the 1934 Act but to repeal them and start again by including the necessary provision in the Act creating the entitlement to statutory interest.²⁹

Legislative Implementation of the Law Commission's Recommendations

3.9 By way of postscript to the Law Commission's report on interest we set out some of the provisions of the Administration of Justice Bill 1981 introduced into the English Parliament in February 1982. We also set out some of the comment made upon that Bill in the *New Law Journal*. The Bill provides, *inter alia*, for a new section 35A(1) to be inserted in the Supreme Court Act 1981:³⁰

Subject to rules of court in proceedings (whenever instituted) before the High Court for the recovery of a debtor damages there maybe included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment for all or any part of the period between the date when the cause of action arose and -

- (a) in the case of any sum paid before judgment the date of the payment; and
- (b) in the case of the sum for which judgment is given, the date of the judgment.

The comment in the *New Law Journal*, in April, 1982 was as follows:

... [T]here are only two further amendments of any controversy. The first concerns interest on contract debts. The Law Commission, it will be remembered, recommended in 1978 that contract debts (with some exceptions) should all automatically bear statutory interest after the due date. It also recommended that the courts should have wider powers to include interest in judgments. The Government has accepted the second of the proposals, but not the first. Under the Bill there will be rules of court which may provide for interest to be included both on a sum for which judgment is given and on any sum paid before judgment, and the interest may relate to the period since the cause of action arose. Although therefore debts will not formally by law carry interest before judgment, the net effect may well be similar. A creditor will be able to demand interest on an overdue debt by the threat of court proceedings (in which he would be awarded interest) ...³¹

Our Conclusions for New South Wales

3.10 We have given careful consideration to the report of the Law Commission, and to judicial criticisms of the current law. This has involved examination of the possibility of a general rule that contract debts should carry the right to interest at a statutory rate save where the parties have agreed otherwise. It is plain that the introduction of a scheme for statutory interest on contract debts would have a significant social impact, for example, on traders and consumers, and would seriously affect substantive rights. In our opinion wide consultation would be necessary and decisions would have to be taken as matters of policy, on the types of debt to which the scheme should apply, and on the extent to which, if any, contracting out should be allowed.

3.11 We have reached the conclusion that we should not further consider, or recommend, the introduction of a general scheme for statutory interest. The reason is that this reference is part of the Community Law Reform Program the object of which is to achieve the prompt examination and provision of solutions for deficiencies in discrete areas of the law. This Program is not intended to deal with issues of substantial social significance. Nevertheless our work leads us to believe that there is a strong argument for suggesting reform of the common law rule, and that there is a case to be made for the introduction of a scheme for statutory interest on contract debts. The subject is appropriate for further examination and consultation.

FOOTNOTES

1. *Law of Contract Report on Interest* (H.M.S.O., Cmnd.7229, 1978) (Law Corn. No.88).
2. See para.2.8 above and note 12, Chapter 2.
3. *Law of Contract Report on Interest* (H.M.S.O., Cmnd.7229, 1978) (Law Corn. No.88), paras 31 and 32.
4. *Ibid.*, para.31.
5. *Ibid.*, para 33.

6. *Ibid.*, para-32.
7. See para-2.8 and note 12, Chapter 2.
8. *Law of Contract Report on Interest* (H.M.S.O Cmnd.7229, 1978) (Law Com. No.88), paras 43 and 44.
9. *Ibid.*, paras 36 and 37.
10. *Ibid.*, para.38.
11. *Ibid.*
12. *Ibid.*, para.39.
13. *Ibid.*, paras 53-61.
14. *Ibid.*, paras 62-64.
15. *Ibid.*, paras 65-66.
16. *Ibid.*, para.67.
17. *Ibid.*, paras 68-73.
18. *Ibid.*, para.53.
19. *Ibid.*, para.47.
20. *Ibid.*, paras 47 and 74-82.
21. *Ibid.*, paras 84-90.
22. *Ibid.*, paras 47 and 91-94.
23. *Ibid.*, paras 49 and 95-100.
24. *Ibid.*, para.50.
25. *Ibid.*, para.51.
26. See para.2.8 and note 12, Chapter 2.
27. *Law of Contract Report on Interest* (H. M. S.O. Cmnd.7229, 1978) (Law Com. No.88). para.148.
28. *Ibid.*
29. *Ibid.*, para.145.
30. See Administration of justice Bill 1981 (U.K.), Sch.I.
31. W. Merricks, "First the Damages Bill: Next the interest Bill" (1982) *New Law Journal* 333.3.1 The question of recovery of interest on contract debts where payment is made before action is brought was examined by the Law Commission in England in a report presented to the United Kingdom Parliament in June 1978.' In that report consideration was given to the power conferred by the United Kingdom Act of 1934 to make a discretionary award of interest That power may only be exercised in "proceedings tried in any court of record, and the United Kingdom Act of 1934 2 provides that interest maybe "included in the sum for which judgment is given'. Limitations on the

discretionary power were noted by the Law Commission These arose from the requirement of a trial in the proceedings, and the necessity of a "sum" for which judgment is given, before any order for interest can be made.' The Law Commission also noted that it is doubtful whether interest can be recovered where the debtor does not contest liability,⁴ or where the debtor tenders payment before action' and further, that interest is not recoverable where the debtor pays the debt before judgment'

Chapter 4 - Reasons and Recommendations

4.1 We believe that the question posed by this reference is best answered by recommending reform of the law applicable to proceedings for the recovery of contract debts. The following reforms are desirable:

the grant to Courts of Petty Sessions of a like power to that given to the Supreme Court and District Court in respect of discretionary awards of interest (discretionary interest);

the extension of existing procedures for obtaining default judgments so as to allow default judgments which will include a sum for discretionary interest;

clarification in relation to payment into court after action is brought to ensure that the defendant does not obtain the benefit of the costs provisions unless the sum paid into court includes the discretionary interest ultimately awarded, and to ensure that money paid into court is not taken out without an order of the court;

the extension of existing jurisdiction of the courts and arbitrators so as to allow recovery of discretionary interest where payment of the debt is made after proceedings for recovery have been instituted, but before judgment is obtained.

These proposals are considered in more detail in the succeeding paragraphs.

Courts, Tribunals and Arbitrators - the Power to Award Interest

4.2 As mentioned earlier, power to award discretionary interest has been conferred only on the Supreme Court and the District Court. We believe that like power should be conferred on Courts of Petty Sessions, which presently have jurisdiction to hear and determine actions for the recovery of any debt, demand or damage, whether liquidated or unliquidated, or the detention of goods, in which the amount claimed is not more than \$3,000, whether on a balance of account or after an admitted set-off or otherwise.¹ Legislation has been passed, but not yet proclaimed, enlarging the jurisdictional limit of Courts of Petty Sessions to \$5,000,² and we understand that consideration is being given to a further increase. By amendments to the District Court Act, 1973³ plaintiffs bringing proceedings in the District Court which could have been brought in Courts of Petty Sessions as a result of this increase in jurisdiction maybe disadvantaged as to recovery of costs.

4.3 We have been informed that the number of civil claims instituted in all Courts of Petty Sessions in the State during the calendar year 1981 was 215,486. Of these proceedings, some 195,857 were instituted by default summons for recovery of debt. During the same calendar year 75,285 default judgments were obtained, having a value slightly in excess of \$46 million. judgments by such courts in contested proceedings, including proceedings for debt recovery, were given for a total sum of \$6.25 million.

4.4 We see no reason in principle why a plaintiff seeking recovery of a debt in a Court of Petty Sessions should have any less right to recover interest than a plaintiff suing in the Supreme Court or District court. Such a plaintiff suffers the same loss by being out of his or her money as a plaintiff who is able to sue in the other courts. Further, in the case of small businesses, slow payment of debts is likely to present a substantial problem.

4.5 The needs of debtors in genuine difficulty are dealt with by provisions already contained in the Courts of Petty Sessions (Civil Claims) Act 1970 relating to judgment by confession or agreement⁴

and payment by instalments.⁵ We observe that interest is payable on judgment debts from the time when judgment is given or entered up,⁶ at the rate prescribed from time to time.

4.6 We have also given consideration to the question whether a discretionary power to award interest should be conferred on consumer claims tribunals, and on the Workers' Compensation Commission. Although consumer claims falling within the jurisdiction of the consumer claims tribunals under the Consumer Claims Tribunals Act, 1974 arise out of contracts, the nature of those claims and the avenues of relief available have led us to conclude that they are outside the scope of our reference. Such claims usually assert the supply of defective goods or the provision of defective services and are analogous to claims for breach of contract rather than claims for recovery of contract debts. Further, the tribunals already have wide powers to make orders adjusting the rights of the consumer by way of compulsory payment of money, relief from payment of money, and work orders.⁷ In exercising its powers a tribunal is enjoined to make such an order as is in its opinion fair and equitable to all the parties to the proceeding before it.⁸ These considerations have led us to the preliminary view that there is no present need for a discretionary power to award interest. However, we should mention that we have not embarked upon public consultation or detailed consideration of these tribunals, as we consider their functions not to be included in our terms of reference.

4.7 We have reached a similar conclusion in relation to the Workers' Compensation Commission. So far as it is concerned with making awards and orders for the payment of compensation the rights involved fall outside the terms of our reference. The question of interest upon moneys payable as compensation up to the date of the award or order is more appropriate for consideration in our reference on accident compensation. Interest is payable on every award or order for the payment of compensation at the prescribed rate from the time when the award or order is entered up or made, or from the time when the money is payable (whichever is the later) until the money is paid. The remaining matters entrusted to the Workers' Compensation Commission for decision or enforcement do not in our view raise the issue of discretionary interest. For example, orders or awards requiring money payments may be made for the purpose of adjusting rights between insurers and between employers and insurers. Such orders or awards may extend to premium adjustments where there has been a dispute as to the amount of premium payable, or where there has been an underestimate of wages in the declaration required of an employer. Orders or awards may also be made involving payments between insurers by way of contribution or by uninsured employers by way of indemnification of the uninsured liability scheme. These are all special cases.

4.8 Similarly, we have not considered it appropriate in this reference to examine the question of discretionary interest in relation to specialised courts and tribunals such as the Land and Environment Court, Mining Wardens Courts, and the Industrial Commission of New South Wales.

4.9 We have referred to the power of arbitrators to award interest and note that provision is included in the Commercial Arbitration Bill, 1982 to allow for the award of interest up to the making of an award.⁹ The relevant provision is modelled on section 94 of the Supreme Court Act 1970 with certain differences. The power is subject to intention to the contrary expressed in the arbitration agreement and is also subject to a ceiling rate, namely the rate at which interest is payable on a judgment debt of the Supreme Court. These qualifications do not cause us concern. However, if our recommendations are accepted in relation to those cases where payment is made between commencement of recovery proceedings and judgment and provisions are introduced by way of amendment or otherwise to allow interest in such cases, then we believe similar provisions should apply to proceedings before arbitrators where payment is made after commencement of the arbitration and before award. We so recommend.

Default judgments and Liquidated Demands Where a Claim for Interest is Made

4.10 A plaintiff in the Supreme Court making a claim against a defendant for a liquidated demand, but no other claim, may by note in the statement of claim require the defendant to verify the defence.¹⁰ Where a plaintiff by the originating process claims a liquidated sum and makes no claim of any other kind, the defendant may obtain a stay of further proceedings where, within the time

limited for appearance, the defendant pays to the plaintiff the amount claimed and the prescribed amount for costs, and files notice of that payment.¹¹

4.11 The rules of the Supreme Court provide that a claim for a liquidated demand together with interest, is a claim for a liquidated demand whether or not the claim includes interest accruing "after the date of the claim", or whether or not a rate of interest is specified.¹² The rules further provide that in the event of a defendant defaulting in entering an appearance, filing a defence, or verifying a defence, where required to do so, the plaintiff may enter judgment according to the nature of the claim.¹³

4.12 In the case of a claim for a liquidated demand only, the rules¹⁴ provide that the plaintiff may enter judgment against the defendant for a sum not exceeding the sum claimed in the statement of claim on that demand and for costs. If the claim includes interest at an unspecified rate, the rules provide that interest accruing after (but not before) the date of filing the statement of claim to the date of entry of judgment shall for the purpose of judgment be reckoned at a specified rate.¹⁵

4.13 The rules of the Supreme Court relating to claims for liquidated demands specify procedures whereby a defendant may obtain a stay of proceedings on payment of the sum claimed within the time limited for appearance, and whereby a plaintiff may sign default judgment.¹⁶ It was held in 1980 in *Dalgety Futures Pty. Limited v. Poretsky*¹⁷ that these rules are incapable of accommodating the situation in which there is, in addition to a demand for a liquidated sum, a claim for interest under section 94. In other words, a claim for interest under section 94 is not a claim for a liquidated sum but a claim for "damages in the nature of interest".¹⁸ A plaintiff in such a case cannot endorse the statement of claim with a notice advising the manner in which a defendant may obtain a stay or with a notice requiring verification of the defence.¹⁹ Further, it is not possible for the plaintiff to obtain a default judgment nor is it possible for the defendant to obtain a stay by making payment to the plaintiff within the time limited for appearance.

4.14 The decision in *Dalgety Futures Pty. Limited v. Poretsky* considerably limits the utility of the rules mentioned in the preceding paragraph, which were designed to permit prompt disposal of debt recovery proceedings. However, even if it was possible to obtain a default judgment on the basis that by reason of Part 1 rule 8(4) a claim for interest under section 94 was to be treated as a claim for a liquidated sum, the rules as presently worded would not appear to allow recovery of interest in respect of any period prior to the filing of the statement of claim.²⁰ Further the rules do not afford any clear assessment procedure in respect of the period between the filing of the statement of claim and the entry of default judgment.

4.15 We recommend that the rules of the Supreme Court be amended in four respects.

The first amendment should ensure that the inclusion of a claim for interest under section 94 does not preclude a plaintiff from requiring a defendant to verify his or her defence.

Secondly, the rules should ensure that the inclusion of such an interest claim does not preclude a defendant from obtaining a stay by making payment of the debt and interest claimed within the time limited for appearance, or preclude a plaintiff from endorsing the statement of claim with a note to that effect. Consequential amendment of the rules such as Part 7 rule 1(5) and Part 16 rule 1(3) would be required to ensure that the interest claim is clearly particularised and readily calculable.

Thirdly, the rules should be altered to allow a default judgment to be obtained where there is a claim for interest under section 94 together with a claim for a liquidated demand. The plaintiff should be required to specify in the statement of claim the portion of the claim on which interest is claimed, the date from which it is claimed, and the rate. Further, the plaintiff should be required to include in an affidavit any special facts relied upon in support of the claim for interest.

In our view, the amount payable for interest should be assessed by the Registrar at the time when the default judgment is filed or processed." Provided the defendant is given notice of the claim and the basis of assessment sought, we see no injustice in having that assessment made at the time of entry of the default judgment. For the case where the defendant wishes to assert that the claim is excessive or that interest should not be awarded we propose a procedure whereby a notice of dispute as to interest and affidavits in support be filed. In the affidavits the defendant would state any facts relevant to the exercise of the discretion.

We believe that the Registrar and the courts would be aided in the exercise of the statutory discretion by the issue from time to time of practice notes specifying the rate of interest to be awarded up to judgment, subject to evidence justifying a different rate. Such practice notes would declare the rate generally to be applied. In special cases, for good cause shown a different rate could be applied. Normally we would not expect any material to be placed before the Registrar, either by the plaintiff or by the defendant, opposing the award of interest or seeking interest other than at the rate declared by practice note from the date the moneys became due. Further, in those cases where the plaintiff, in the statement of claim, foreshadows a claim for interest at a rate in excess of the general rate and has filed an affidavit in support, without any response from the defendant we would not anticipate any need for a formal hearing. In those cases where a defendant files a notice of dispute and affidavits, the matter would be appropriate for determination by the Registrar personally, or by referral to the Master.

Fourthly, the rules should be amended to ensure that it is possible to obtain a default judgment which will include interest not only from the date of filing the statement of claim, **but for the whole** or any part of the period between the date when the cause of action arose and the date when the default judgment takes effect. Section 94 already contemplates such a power. Assuming that as a result of our recommendations it becomes possible for a default judgment to be obtained where interest under section 94 is claimed, the provisions of Part 17 rule 4(2), as presently framed, would not accommodate a calculation of interest in respect of a period prior to the date of the filing of the statement of claim.

4.16 Similarly, in relation to the District Court and Courts of Petty Sessions, amendments should be made to ensure that it is possible to obtain a default judgment which will include interest in respect of the period preceding the commencement of proceedings. It would again be necessary to require the plaintiff to give particulars of the claim for interest, in the statement of liquidated claim or other originating process, and to provide similar machinery for determining a general rate of interest, and for resolving disputes as to interest.

4.17 The rules of the District Court do not include the provision which appears in the Supreme Court rules extending the definition of a claim for a liquidated demand to include such a claim together with interest. Nor do they include any provision entitling a plaintiff, by notice, to require verification or any provision comparable to those contained in Supreme Court Rules Part 17 rule 4(2), or in Part 7 rule 4.

4.18 However, the District Court Act 1973 does contain a provision²² requiring a defendant to an action commenced by a statement of liquidated claim to verify the grounds of defence. Further, the Act permits a plaintiff in such an action to have a default judgment entered against the defendant where there is a failure to file verified grounds of defence within the time prescribed.²³ Judgment is entered for the amount which is shown in a filed statement²⁴ to be the amount due to the plaintiff in respect of the cause of action for which the action was commenced, or the amount specified in the statement of claim (whichever is the less), and the prescribed costs. These provisions do not appear to permit a default judgment for interest under section 83A District Court Act 1973 and we understand that it is not the practice to allow a plaintiff to obtain a default judgment for such interest.

4.19 In the case of a judgment by confession the District Court Act, 1973²⁵ permits a defendant before judgment to sign a statement confessing to the amount, or part of the amount of the claim of the plaintiff. The Act does not make clear what is to be done in such a case in respect of any claim for interest under section 83A. We believe the section should be amended to make it clear that the confession extends to the interest claim in an amount either to be assessed by the Registrar or acknowledged by the defendant as payable. Where particulars of the plaintiff's claim for interest are included in the statement of Claim, it will be a simple matter for the defendant to make the necessary calculation.

4.20 In relation to Courts of Petty Sessions, the provisions for default judgments are also contained in the Act rather than in the rules of court. The use of a default summons instead of an ordinary summons in an action for recovery of "a debt or liquidated demand" is permitted.²⁶ Where a defendant to an action commenced by default summons does not file a verified notice of defence within 14 days after service of the summons, the plaintiff may apply to have default judgment entered.²⁷ The entry of judgment is made by the Registrar for the amount specified in the statement verified and filed by the plaintiff as being the amount due to the plaintiff in respect of the cause of action for which the default summons was filed, together with costs as prescribed.²⁸

4.21 Although it has been held that the duty of the Registrar in Courts of Petty Sessions to enter judgment is purely administrative,²⁹ we do not see any difficulty in amending the Act so as to confer discretionary powers on that officer to award interest in respect of the period up to judgment.

4.22 The provisions of section 28 of the Courts of Petty Sessions (Civil Claims) Act 1970 relating to judgments by confession, should be amended in the same way as we have recommended for the District Court.

Payment into Court After Action Brought (Including Defence of Tender)

4.23 After an action is commenced money maybe brought into court by a defendant in two ways. First the payment in may be accompanied by a defence of tender before action. Secondly, the payment in may be made as an offer of settlement in accordance with the rules, without there having been any offer before action.

4.24 The subject of tender before action and the defence of tender call for no reform.³⁰ If the defence of tender fails section 94 would still be available to a plaintiff. if the defence succeeds there would be no merit in the plaintiff s favour for an award of interest in respect of the period after tender. We have already given our reasons for not making recommendations in relation to the period prior to tender.³¹ In passing, we repeat that there is a possible lacuna in the Supreme Court Rules in relation to the payment into court of money in association with a defence of tender. For reasons already stated it may be desirable to consider an amendment to Part 22 rule 12 so as to require a defendant to obtain the leave of the court before being able to take out of court money paid into court in association with a defence of tender.

4.25 The second way in which moneys maybe brought into court has been discussed by us earlier.³² In the case of the Supreme Court, the rules appear to deal adequately with the subject. However, in the case of the District Court some doubt exists as to whether or not the defendant can bring monies into court to meet a claim for interest under section 83A District Court Act, 1973 or whether such interest should be taken into account in determining whether the amount paid in is greater than the amount recovered. We recommend that the rules of the District Court be amended so as to remove any doubt and so as to bring them in line with the Supreme Court Rules.

4.26 In the case of Courts of Petty Sessions there are no provisions allowing the payment of money into court Accordingly, we make no recommendations on this subject for those courts. However, if their limits of jurisdiction are expanded as mentioned in paragraph 4.2 above, then a strong case for allowing payment into court will exist.

Payment After Action Brought Otherwise than by Payment into Court

4.27 Payment of a debt maybe made by the defendant to the plaintiff after proceedings have been instituted, without any monies having been brought into court. In such cases the plaintiff maybe confronted with a debtor who has ignored demands for payment, and who has waited until the last moment before judgment. Such a debtor maybe aware that there is no defence to the claim. Further, the debtor may be advised that there is no point in using the procedures for payment into court as a means of inducing a compromise for less than the full amount of the debt.

4.28 As the law currently stands, a plaintiff receiving such a payment or an offer of payment without any interest is in a quandary. If the money is accepted it will not be possible for the plaintiff to obtain judgment for the debt. Since the present provisions conferring discretionary jurisdiction to award interest depend on the obtaining of a judgment it follows that interest cannot presently be recovered under those provisions unless a judgment is obtained.

4.29 If the plaintiff refuses to accept the payment for the reason that he or she wishes to recover interest then the consequences may be inconvenient or worse. First, there is likely to be delay and cost to the plaintiff while the matter is set down for hearing. Secondly, there will be uncertainty about the recovery of interest because a defendant pleading payment or tender after action would have an arguable case that interest should not run at least from the date of the attempted payment. Thirdly, there is the risk that the defendants financial position will have deteriorated by the time the matter is determined, so that recovery may be frustrated.

4.30 Considerations of justice suggest that a plaintiff who is offered payment or who receives payment after action has been commenced without interest should be able to accept it without prejudicing a claim for discretionary interest and without the uncertainties described above. The plaintiff will have been kept out of moneys to which he or she was entitled, and will have suffered loss. The position of the defendant would also be strengthened, for by making the payment he or she could confidently expect that interest would cease to run from that moment. The amount in issue would be confined to the period between the accrual of the cause of action and the date of payment. At present such a defendant does not know with certainty whether payment would carry that consequence, the assessment of interest being entirely discretionary.

4.31 An alteration of the law to give the courts a discretion to award interest in such cases would not affect the power of the parties to agree upon an accord and satisfaction at the time of payment it could suit the parties to negotiate a compromise as to interest at that time. For the plaintiff there could be the advantage of early finality and certainty as to the amount recovered. For the defendant there could be the advantage of an opportunity for a final discharge. For each party, there would be the possibility of lessening costs.

4.32 To allow recovery of interest in these circumstances appears to be consistent with the intention of the existing discretionary interest provisions. These provisions presuppose the commencement of proceedings by the plaintiff to recover the principal debt. Once that step has been taken the right of the plaintiff to recover interest and the liability of the defendant to pay interest should not depend on the plaintiff obtaining formal judgment for the debt. In our view there is no justification for a difference between the plaintiff who obtains judgment after a hearing and the plaintiff who after commencing proceedings either receives payment of the debt or obtains default judgment without a hearing.

4.33 We note that the problem of payment has been overcome in Victoria. In that State section 78 of the Supreme Court Act 1958 introduced in 1962, provides as follows:

Upon all debts or sums certain hereafter recovered in any action the judge at the hearing shall upon application unless good cause is shown to the contrary allow interest to the creditor at a rate not exceeding eight per cent per annum from the time when such debt or sum was payable.

In *Melbourne and Metropolitan Board of Works v. Bevelon Investments Pty Ltd.*³³ it was held that a debt or liquidated amount paid to the plaintiff after the issue of a writ is "recovered in the action" even though judgment is not thereafter entered. The reasoning in that case is not applicable to

section 94 of the Supreme Court Act, 1970 having regard to the different wording of the sections. However, we are reinforced in our conclusion as to the desirability of the reform proposed by the fact that it has been implemented in Victoria without apparent criticism. A provision to similar effect is contained in section 34 of the Supreme Court Civil Procedure Act 1932 (Tas.), although the time from which interest is calculated is the time when the debt or sum certain "recovered" in the action was payable if payable by virtue of a written instrument at a date or time certain. Otherwise, it is payable from the time when written demand of payment is made giving notice that interest would be claimed. We have given consideration to whether the necessary reform could be made to the legislation in force in New South Wales along the lines of the Victorian or Tasmanian legislation. In the result we have concluded that it is preferable to envisage the enactment of provisions specifically directed to the problem. Amendment of section 94 of the Supreme Court Act, 1970 by means of provisions which would result in wording similar to section 78 of the Supreme Court Act 1958 (Vic.) would have two disadvantages. The first is that such an amendment would presuppose that the New South Wales Supreme Court would agree with the decision in *Melbourne and Metropolitan Board of Works v. Bevelon Investments Pty Ltd*. The second is that those practising members of the profession who may not be aware of that decision may not fully appreciate the intention of the amendment. In our view, the best way to achieve the recommended reform is to amend section 94 by using provisions in or to the effect of those in Appendix 1.

4.34 We also recommend that the necessary reforms be effected by amending section 83A of the District Court Act 1973 and by placing corresponding provisions in the Courts of Petty Sessions (Civil Claims) Act, 1970.

Debts Paid Before Action Brought

4.35 The principle upon which our recommendations are based is that justice requires the fair compensation of a person (creditor) who has not been paid money at the time when payment should have been made. In other words, the creditor has been unreasonably or unfairly kept out of his or her money.³⁴ It could be said to follow as a matter of logic that the discretionary power to award interest which we have recommended should extend to interest on debts paid before action brought. However, we do not recommend that this extension be made or provided for in the amendments proposed at this stage. If the extension were to be made, it could be said to amount to introducing, in the context of procedural reform, a general substantive requirement that debts should carry interest. We have already discussed this in Chapter 3 where we concluded that the introduction of a general rule should not be recommended in this report.³⁵ We believe that the discretion given to the courts to award interest on debts should be confined to debts that have not been paid before the commencement of proceedings. Once proceedings have been commenced, that power should, however, extend to allow recovery of interest in respect of periods prior to commencement.

4.36 We repeat that if after consultation and consideration of the changes to substantive law which would be required, it was felt that a general scheme for statutory interest is desirable, the proposals we have made could serve as a foundation.

4.37 There are other reasons for not extending the discretionary powers of courts so that after payment of a debt proceedings could be commenced by the creditor solely to recover interest. One is that in the absence of a scheme for statutory interest, a debtor making a payment after the date on which the debt became due and payable would not know whether the creditor desired, or was entitled to, interest. The debtor could not make payment with certainty that the liability was discharged. Difficulties could arise in relation to the principles governing discharge by payment and by performance, and also in relation to accord and satisfaction for a prudent debtor will wish to secure a complete discharge when making payment. Debtors untrained in the law would be ignorant of such matters and would be vulnerable to unexpected claims for interest, possibly well after the event.

FOOTNOTES

1. Courts of Petty Sessions (Civil Claims) Act, 1970, s.12.
2. Courts of Petty Sessions (Civil Claims) Amendment Act. 1982 (Act No.42 of 1982).
3. District Court (Amendment) Act- 1982 (Act No.41 of 1982).
4. Courts of Petty Sessions (Civil Claims) Act. 1970, s.28.
5. Courts of Petty Sessions (Civil Claims) Act 1970, s.40.
6. Courts of Petty Sessions (Civil Claims) Act 1970. s.39.
7. Consumer Claims Tribunals Act 1974, s.23.
8. Consumer Claims Tribunals Act. 1974. s.23(2).
9. Commercial Arbitration Bill, 1982. cl.27.
10. Supreme Court Rule & Pt 15 r.23.
11. Supreme Court Rules. Pt 7 r.4.
12. Supreme Court Rules, Pt 1 r.8(4). and see Pt 7 r.4(2) and Pt 17 r.4(2).
13. Supreme Court Rules. Pt 17 r.3(a).
14. Supreme Court Rules, Pt 17 r.4(l).
15. Supreme Court Rules. Pt 17 r.4(2)).
16. Supreme Court Rules, Pt 7 r.4. and Pt 17.
17. *Dalgety Futures Pty. Limited v. Poretsky* 1198012 N.S.W.L.R. 646.
18. *Ibid.*, at p.650.
19. *Ibid.*, at p.648.
20. See rules referred to in note 12 above, and para.4.12 above.
21. We have considered two other possible procedures. but neither is satisfactory. the first is to follow the approach taken in respect of claims for interest under s.3 of the United Kingdom Act of 1934. The English practice is to enter final judgment (by default) for the debt and interlocutory judgment for interest The assessment of interest is referred to the Master(*Alex Lawrie Factors Limited v. Modern Injection Moulds Ltd.* 1198113 All E.R. 658). In *Gardner Steel Ltd. v. Sheffield Brothers (Profiles) Ltd.* [197811 W.L.R. 916, this practice was described as cumbrous and expensive and attributable to the conservatism of the profession The second possible approach is to leave the plaintiff to seek summary judgment under Pt 13 of the rules. Cf the practice in Queensland: *A.N.I Australia Pty Ltd. v. Hannay* [19811 Qd.R. 598. Under those rules where a plaintiff proves the facts on which the claim or part is based, and proves that the defendant has no defence(or no defence except as to the amount of damages claimed), the court may direct the entry of judgment We do not favour any solution automatically involving a separate hearing as this must increase costs and cause delay.
22. District Court Act 1973, s.56(2).
23. District Court Act 1973, s.58 and District Court Rules, Pt 13 r.l.

24. See District Court Act. 1973, s.58(1) (d) and District Court Rules. Pt 30 r.I.
25. District Court Act 1973, s.60.
26. Courts of Petty Sessions (Civil Claims) Act. 1970. s.24.
27. Courts of Petty Sessions (Civil Claims) Act 1970, ss.25 and 27(1).
28. Courts of Petty Sessions (Civil Claims) Act 1970, s.27(1).
29. *Beale v. Brady: ex p. Beale* (1888) 4 W.N. 180.
30. See paras 2.16-2.18 above.
31. See para.2.18 above.
32. See paras 2.19-2.21 above.
33. [1977] V.R. 473.
34. See D. O'Connor, "Interest on Awards of Damages for Personal Injury and Death" (1982) 56 A.L.J. 456, at pp.458-459.
35. See paras 3.10 and 3.11 above.

Appendix I - Supreme Court (Interest) Amendment Bill, 1983

A BILL FOR

An Act to amend section 94 of the Supreme Court Act 1970, so as to authorise the Supreme Court to order the payment of interest in certain cases.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

Short title.

1. This Act may be cited as the "Supreme Court (Interest) Amendment Act 1983".

Commencement.

2. (1) Except as provided by subsection (2), this Act shall commence on the date of assent to this Act

(2) Section 3 shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Amendment of Act No. 52, 1970.

3. The Supreme Court Act 1970, is amended by inserting after section 94(1) the following subsection:-

(1A) Where -

(a) proceedings have been commenced for the recovery of a debt or liquidated damages; and

(b) payment of the whole or a part of the debt or damages is made during the currency of the proceedings and before judgment is, in the proceedings, given in respect of the debt or damages, and

the Court may order that interest be paid at such rate as it thinks fit on the whole or any part of the money paid for the whole or any part of the period between the date when the cause of action arose and the date of the payment

Transitional provision.

4. The provisions of section 94 (1A) of the Supreme Court Act 1970, as amended by this Act, apply to proceedings commenced before the day appointed and notified under section 2(2), as well as to proceedings commenced on or after that day, but do not operate to authorise the giving of interest on money paid before that day.

Appendix II - Interest on Costs

1. In the course of our reference we have had occasion to consider the recovery of interest on unpaid costs awarded to a party. This is a question affecting all types of proceedings including those for the recovery of debts. It is not a matter strictly within our terms of reference, but in this Appendix we note some problems that may be worthy of further consideration.

2. In the Supreme Court, interest is payable, subject to order of the court to the contrary, "from the date when the judgment or order takes effect"¹. This provision is in contrast to the earlier provision, contained in the Common Law Procedure Act, 1899 whereby interest was made payable "from the time of entering up the judgment".² It has been held,³ upon the proper interpretation of the Supreme Court Act 1970 and the Supreme Court Rules, 1970⁴ that the date on which judgment is given or an order is made for the payment of costs, is the date on which entry of judgment is directed, but that the date upon which such judgment or order takes effect is the date of the certificate of taxation of the costs. The consequence is that interest on costs does not commence to run until the date of the certificate of taxation or the date on which the amount of costs is ascertained. This accords with the rule formerly adopted by the courts of equity,⁵ and in later times with customary usage of solicitors practising at common law. The rule in the courts of equity has been described as "a sensible view".⁶

3. A different conclusion has been reached in respect of a judgment for costs given in the Supreme Court of the Australian Capital Territory.⁷ That decision, however, turned on the interpretation of a section⁸ providing for judgments to carry interest "from the date as of which the judgment is entered". It was held as a matter of interpretation that in the ordinary course interest on costs should run from the date of the pronouncement of the judgment.

4. The relevant provision of the District Court Act, 1973 is in different terms, in that interest payable in respect of a judgment debt is "calculated as from the date when the judgment debt came into being or from such later date as the court in any particular case fixes".⁹ Neither the Act nor the rules expressly declare or define the time at which a judgment "comes into being". We think that the expression is likely to be interpreted to mean the day on which a judgment is given or entered.¹⁰

5. Provision is made in each of the Acts regarding the Supreme Court and District Court to excuse the payment of interest on costs, subject to order of the court to the contrary, where the costs are paid within twenty-one days after ascertainment of the amount thereof by taxation or otherwise.¹¹ In the case of the Supreme Court this provision is confined to proceedings for damages on a common law claim, while in the District Court it is applicable to proceedings on all claims. We shall not here consider the justification if any for the difference in treatment in the Supreme Court, but we do draw attention to it.

6. In the District Court, therefore, a question arises as to whether the provision saving interest or costs if paid within twenty-one days of ascertainment means, by implication that the date from which interest on costs commences to run is the date of ascertainment rather than the date on which judgment was given. Master Allen has indicated¹² that he would not have been disposed to such view in relation to the similar provision¹³ inserted into the Common Law Procedure Act, 1899 by section 18 of the Law Reform (Miscellaneous Provisions) Act 1965. He did, however, observe that the practical effect of the new section was that it was generally assumed by practitioners that the position that interest ran from the certificate of taxation had been recognised by the legislature. This certainly was true where the costs were paid within twenty-one days of their ascertainment, but was not necessarily the case where they were not paid within such period. Accordingly, in the District Court where a party ordered to pay costs complies with that order within twenty-one days after ascertainment thereof, that party will not in the absence of order to the contrary, have to pay interest thereon. If, however, the costs are not paid within such period, then the question arises as to

whether or not they should run from the date the judgment was given or entered, or from the date the amount is ascertained. Having regard to the wording of section 85 of the District Court Act, 1973 and to the history of similar provisions, we incline to the former view. If we are correct in this conclusion, then a difference exists between the Supreme Court and the District Court for which there is no apparent justification.

7. The Courts of Petty Sessions (Civil Claims) Act, 1970 follows yet another form of wording in that it provides for judgment debts to carry interest "from the time when the judgment is given or entered up".¹⁴ The position in these courts would therefore appear to be the same as that previously existing at common law, and as held to apply in the Supreme Court of the Australian Capital Territory. The Act does not contain any provision concerning the payment of interest when paid within a prescribed period. In practice, there should be no delay or difficulty in ascertaining costs in Courts of Petty Sessions, since they are fixed by the court at the time of judgment and do not depend on later taxation.¹⁵ Having regard to the special position in the Courts of Petty Sessions we do not see any occasion for difficulty or any need for reform in this area.

8. The competing policy considerations were identified in the recent judgment of Mr. Justice Kelly in *Tarlinton v. Hall*.¹⁶

There is much to be said for a rule that the party required to pay taxed costs should not be required to pay interest on those costs until he can calculate it. He cannot do this until the costs are taxed. It may be said that it rests in the hands of the successful party to tax his bill as soon as possible. It may be said too, that it is unjust, in one sense, to require a debtor to pay interest on an amount which he cannot be forced immediately to pay.

On the other hand, it seems unjust that the sum of money represented by the costs should be "fructifying in the wrong pocket" of the unsuccessful party until taxation. Taxation is normally a lengthy process requiring much care and detailed work. True it is that one is aware of some extremely efficient practices in solicitors' offices which minimize to the utmost the time taken to prepare a bill of costs for taxation. That said, it still remains a fact that some time must necessarily elapse before a bill of costs can be taxed even if it is prepared as quickly as possible.

9. We mention two further considerations. First, in some cases the successful party may not pay to his or her solicitors the whole or part of the costs and disbursements incurred, until well after judgment is given. In other cases, some of the costs eventually taxed might not have been incurred at the time of judgment. To the extent that interest is made payable on these costs and disbursements, there may be injustice in requiring the unsuccessful party to pay interest from the date of judgment on costs or disbursements not then actually incurred or paid out by the successful party. Secondly, if interest is payable from the date of judgment injustice may occur when the successful party is dilatory in taxing the costs or in attempting to reach agreement as to the amount payable.

10. In answer to the second point, it could be said that the unsuccessful party can help himself or herself by tendering an appropriate amount or following the procedures permitting the costs of the successful party to be certified.¹⁷ It might also be said in relation to both points in paragraph 9 that the party liable to pay the costs has had the use of the moneys in the meantime and the opportunity to earn interest to meet the future payment.

11. We turn to consider a possible injustice to the successful party if interest is payable only from the time the costs are ascertained. Where an unsuccessful party appeals against the judgment carrying with it the costs order, there is likely to be substantial delay in the finalisation of the proceedings and in the taxation or ascertainment of the costs. One such case has been drawn to our attention where, by reason of an appeal to the Privy Council, costs could not be taxed until almost two years after there had been a verdict for the defendant with costs. The consequence was that the successful defendant not only had to bear the difference between party and party and solicitor and client costs, but also lost the use of a very substantial sum of money paid out in costs for almost two years.

12. We do not make any recommendation in this report concerning the question of interest on costs, for it is a question extending beyond proceedings for debt recovery and hence is beyond the terms of our reference. We do, however, believe that important questions are raised for consideration which we have endeavoured to outline. In passing we note that *ad hoc* solutions to the problem can be supplied by the courts in exercising their statutory power in any case to declare the time from which interest should run on costs, and to specify the portions of the costs on which interest should run. As we have mentioned both the Supreme Court Act 1970 and the District Court Act, 1973 confer some measure of discretion in these respects, and even allow the provisions excusing the payment of interest where paid within twenty-one days of ascertainment to be overridden.¹⁸ Further, as Mr. Justice Kelly has suggested, cost orders can be framed, declaring that interest

... is not to be payable on any profit costs not actually incurred or disbursements not actually made until such time as they are respectively incurred or made.¹⁹

It may well be that the problems we have identified can be overcome by greater exercise of judicial discretion in framing costs orders to suit the needs of any given case, without any need for further legislative intervention.

FOOTNOTES

1. Supreme Court Act 1970, s.95(1).
2. Common Law Procedure Act 1899, s.143(1). It maybe noted that this expression has been held to mean the date of pronouncement of the judgment and not the time of the formal entry in the judgment roll: *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd. (No.2)* [1982] 3 All E. R. 312.
3. *TA Field Pty Ltd. v. Frigmobile of Australia Pty. Ltd.* ~19781 2 N.S.W.L.R. 488.
4. Supreme Court Rules, Pt 40 r.3.
5. Attorney- General v. Lord *Carrington* (1843) 6 Beav. 454, at p.460; 49 E.R. 901, atp.904; Kv. K[1977] 2 W.L.R. 55. at p.60, per Lord Denning, M. R.
6. *Ibid.*; his Lordship also said, at p.61:

Interest should be payable whenever money is "wrongly withheld" from the one who is entitled to it: see *Jefford v Gee* [[1970] 11 All E.R. 202, at 1205,1206]; [1970] 2 Q.B. 130, at 140-146. When the sum is unascertained, the debtor cannot be expected to pay it until it is quantified. He cannot make a tender until he knows how much it is. He cannot be said to be "wrongfully with holding the money until it is fixed. So in all fairness interest should only run from the date of quantification
7. *Tarlinton v. Hall* (1981) 38 A.C.T.R. 1.
8. Australian Capital Territory Supreme Court Act 1933, s.54.
9. District Court Act 1973, s.85(2)(a).
10. Cf. District Court Rules, Pt 31 r.13A(2).
11. Supreme Court Act 1970, s.95(3); District Court Act- 1973, s.85(3).
12. *TA Field Pty Ltd. v. Frigmobile of Australia Pty. Ltd.* [1978] 12 N.S.W.L.R- 488, at p.490.
13. Common Law Procedure Act 1899. s.143.

14. Courts of Petty Sessions (Civil Claims) Act 1970, s.39(1).
15. Courts of Petty Sessions (Civil Claims) Act 1970, ss.33-38.
16. (1981) 38 A.C.T.R. 1, at pp.7-8.
17. Supreme Court Rules, Pt 52 r.55; District Court Act 1973, s.85.
18. *Tarlinton v. Hall* (1981) 38 A.C.T.R. 1, at p.S.
19. *Ibid.*, at p.9.