



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 16 Part II

**Enforcement of Judgments
of Local Courts**

DISCUSSION PAPER

FEBRUARY 1995

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Commonwealth of Australia (1995)

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PREFACE

The Commission has been asked to review the *Local Courts Act 1904* and *Rules*.

The reference has been divided into parts.

In June 1988 the Commission issued its report *Local Courts: Jurisdiction, Procedures and Administration* to complete the first part of the reference. This discussion paper is preliminary to preparation of a report on the second and final part of the reference. This second part of the reference deals with enforcement of judgments or orders of Local Courts.

The Commission has not formed a final view on the issues raised in this discussion paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by 28 April 1995.

Unless it is advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them. Any request for a copy of a submission will be determined in accordance with the *Freedom of Information Act 1992*.

The research material on which this paper is based can be studied at the Commission's office by anyone wishing to do so.

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ABBREVIATIONS

ALRC	Australian Law Reform Commission
ALRC Report	Australian Law Reform Commission <i>Debt Recovery and Insolvency</i> (Report No 36 1987)
ALRI	Alberta Law Reform Institute
ALRI Report	Alberta Law Reform Institute, <i>Enforcement of Money Judgments</i> , 2 Vols (Report No 61 1991)
Cairns	B C Cairns <i>Australian Civil Procedure</i> (3rd ed 1992)
Kelly Report	David St L Kelly <i>Debt Recovery in Australia</i> (Australian Government Commission of Inquiry into Poverty, Law and Poverty Series 1977)
Kercher	B Kercher <i>Australian Debt Recovery Law</i> (1990)
LCA	<i>Local Courts Act 1904</i>
LCR	<i>Local Court Rules 1961</i>
NB Report	New Brunswick Department of Justice, Law Reform Division, <i>Third Report of the Consumer Protection Project</i> , Vol II, <i>Legal Remedies of the Unsecured Creditor After Judgment</i> (1976)
NI Report	<i>Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland</i> (1965)
NSWLRC	New South Wales Law Reform Commission
NSWLRC Draft	<i>New South Wales Law Reform Commission, Draft Proposal Relating to the Enforcement of Money Judgments</i> (1975)
OLRC	Ontario Law Reform Commission
OLRC Report	Ontario Law Reform Commission <i>Report on The Enforcement of Judgment Debts and Related Matters</i> , 2 parts (1981)
Part I Report	Western Australian Law Reform Commission Report on <i>Local Courts: (Jurisdiction, Procedures and Administration</i> (Project No 16 Part I, 1988)
RSC	<i>Rules of the Supreme Court 1971</i>
SCA	<i>Supreme Court Act 1935</i>

UK Report

Report of the *Committee on the Enforcement of Judgment Debts* 1969
Cmnd 3909

WALRC Report

Law Reform Commission of Western Australia *Report on
Enforcement of Judgment Debts* (Project No 61 1977)

The pronouns and adjectives "he", "him" and "his", as used in this discussion paper, are not intended to convey the masculine gender alone, but include also the female equivalents "she", "her" and "hers"

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked to review the *Local Courts Act 1904* and *Rules*.

1.2 In 1988 the Commission issued its report *Local Courts: Jurisdiction, Procedures and Administration* dealing with the first part of this reference. The second and final part of the reference, the subject of this discussion paper, deals with the enforcement of judgments or orders of Local Courts.

2. PRELIMINARY SUBMISSIONS

1.3 The Commission wrote to a number of organisations and individuals asking for their preliminary submissions to help it identify issues for consideration in this reference, and many replied. The preparation of this discussion paper has been assisted by those responses and the Commission expresses its thanks to those concerned. The organisations and individuals who made preliminary submissions to the Commission are listed in Appendix I.

3. JURISDICTION OF LOCAL COURTS

1.4 Local Courts, which are presided over by a stipendiary magistrate, are courts of inferior jurisdiction. Their money jurisdiction was originally fixed at £100 in 1904 but has since been increased several times and is now \$25,000.¹ Local Court actions are usually claims for debt or damages for breach of contract or in tort. Except in exceptional circumstances,² judgments will be for less than \$25,000. In certain circumstances, a magistrate may make an order, not for the payment of money, but for the doing of an act or

¹ LCA s 30.

² For example, where the Court has jurisdiction to determine a counterclaim exceeding \$25,000: see LCA s 34.

for the ceasing of an act.³ Within the limits of the jurisdiction of Local Courts, judgment may be given for the recovery of land⁴ and for the delivery of goods.⁵

1.5 Local Courts have a Small Disputes Division to enable small claims to be resolved in an inexpensive, informal and expeditious manner. The jurisdiction money limit of the Division is \$3,000.⁶ A plaintiff, but not a defendant, can choose whether to have the action determined in the Division or under the general provisions of the Act.⁷

1.6 Although Local Courts deal with the vast majority of civil claims brought in Western Australia, only a small fraction of the claims commenced in those courts proceed to trial. Many are not defended and proceed in a routine administrative way to judgment and execution without judicial intervention while others are settled by the parties themselves.

4. PROBLEMS WITH THE EXISTING SYSTEM

1.7 Where judgments or orders of Local Courts are not complied with, a just and efficient system for the enforcement of judgments or orders is a fundamental requirement. If the system is not just and efficient, confidence in the court system will be reduced. The Crown Law Department, now the Ministry of Justice, in a preliminary submission, suggested that this had occurred and that creditors are totally disillusioned with the court system because the present system of enforcement is inefficient. An inefficient enforcement mechanism is also undesirable because it is likely to increase the cost of credit and reduce its availability. At the same time the legitimate interests of judgment debtors in being free from enforcement procedures which are unreasonable and not being deprived of property necessary for a dignified existence need to be met. Preliminary submissions suggest that the present system does not meet the latter requirement. These problems with the existing system result in a system which is not necessarily always efficient and just to both the judgment creditor and the judgment debtor.

³ For example, a magistrate probably has power by virtue of s 33 of the LCA to grant an injunction as ancillary relief in a money claim within its jurisdiction: see second paragraph of footnote 42 to ch 2 below. An injunction is a form of equitable relief.

⁴ Para 2.23 below.

⁵ Para 2.24 below.

⁶ LCA s 106C.

⁷ Ibid.

1.8 The following suggestions made by the Commission in this paper will improve the efficiency of the enforcement system -

- * expanding the range of debts which can be attached to meet a judgment debt;
- * providing for the garnishment of earnings such as wages and salaries; and
- * applying to Local Courts the provisions, or some of them, relating to the enforcement of judgments in the Supreme Court.

1.9 At the same time the following suggestions will protect the legitimate interests of judgment debtors -

- * repeal of imprisonment for debt, whether or not it is replaced with a provision for punishment for contempt of court; and
- * reviewing the property exempt from execution to ensure that a judgment debtor is not deprived of property necessary for a frugal but dignified existence and to ensure that his ability to earn income is not unduly impaired.

5. PRINCIPLES OF ENFORCEMENT: SELF-HELP OR JUDICIAL DIRECTION

(a) Self-help

1.10 The principle of self-help is a feature of enforcement of judgments in Local Courts. The Court, having entered judgment, takes no step to obtain the fruits of the judgment for the judgment creditor. It is left to the judgment creditor to decide which of the alternative steps he will take, and to take those steps at his own expense except insofar as he may later be able to recover the expense from the judgment debtor. The principle of self-help in enforcement of judgments in Local Courts also applies in the enforcement of judgments in the District Court and the Supreme Court. The principle originated in England and was widely followed in countries which had a legal system based on that of England.⁸

⁸ See ALRI *Remedies of Unsecured Creditors* (Report for Discussion No 3, 1986) para 5.27.

1.11 Under the self-help principle, the judgment creditor, and not the court, controls both the choice of which step to take to obtain the benefit of the judgment and the frequency with which steps are taken. However, as can be expected, there are provisions that provide a degree of protection to the judgment debtor and enable the court to exercise some supervision over enforcement processes. Examples of provisions in the LCA which are aimed at protecting the judgment debtor are those which exempt certain property of the debtor from being taken and sold,⁹ which prohibit some sources of a debtor's income from being diverted to the creditor,¹⁰ and which enable a judgment debtor to apply to the magistrate for a stay of execution if the judgment debtor is unable from "sickness or other sufficient cause" to discharge the debt or an instalment of it.¹¹ An example of a provision in the LCA which enables the magistrate to exercise a degree of supervision over enforcement processes is the requirement that an order of commitment pursuant to the judgment summons procedure may only be made by the magistrate if the magistrate is satisfied that the judgment debtor has, or has had since the judgment or since the date of an order to pay by instalments, the means to have paid the judgment debt or to have paid an instalment which is due under the order, but is in default in payment.¹²

(b) Judicial direction

1.12 A contrasting principle may be called that of judicial direction of the enforcement process, in which the court or a statutory agency takes an active role in deciding upon the steps to be taken to obtain satisfaction from the judgment debtor. Recommendations which embody this principle to a greater or lesser extent have been made for reform of the law in a number of jurisdictions.¹³ Under some proposals, courts at least in certain circumstances could make the choice between the available modes of execution. For example, the Kelly Report¹⁴ recommended that at the hearing of an examination of the judgment debtor there should be no artificial limit placed on the orders which might be made and the choice between

⁹ LCA s 126.

¹⁰ Id s 145.

¹¹ LCA s 139. See also LCR O 25 (Div 1) r 12 and O 26 r 26

¹² LCA s 130 and paras 2.13-2.17 below.

¹³ For example, in the Kelly Report, the NSWLRC Draft, the *Report of the Committee on the Enforcement of Judgment Debts* (a report to the Lord Chancellor) (1969 Cmnd 3909) (The Payne Committee), the NB Report and the NI Report.

¹⁴ This is a report prepared by David St L Kelly on debt recovery in Australia for the Australian Government Commission of Inquiry into Poverty in 1977.

the available modes of execution should be made by the court itself.¹⁵ Under other proposals, a new specialised agency, endowed with the usual powers of courts, would be set up to carry out enforcement steps in a proactive fashion.¹⁶

1.13 The principle of judicial direction of enforcement process has been implemented in a very extensive manner in Northern Ireland by the *Judgments (Enforcement) Act* (Northern Ireland) 1969.¹⁷ The Act established an Enforcement of Judgments Office. The jurisdiction of the courts in Northern Ireland to enforce judgments for the payment of money was, with some exceptions, transferred to the Enforcement of Judgments Office. Under the Act, a judgment creditor may apply to the Office to enforce a judgment. When the application is accepted, the Office conducts an examination of the judgment debtor as to his means. When the examination is complete, the Office (not the judgment creditor) decides upon and institutes an appropriate mode of enforcement. The Office is vested with a wide range of means of enforcement with similarities to those of the High Court of England.¹⁸ It is very expensive to apply for enforcement in Northern Ireland,¹⁹ and the whole fee must be paid on the initial application.²⁰ Despite this, the Enforcement Office apparently runs at a loss.²¹ Although in England the *Report of the Committee on Enforcement of Judgment Debts*²² recommended the establishment of an Enforcement Office, the idea was rejected there on the grounds of cost and the availability of manpower.²³

¹⁵ Kelly Report 28.

¹⁶ The NSWLRC Draft is an example.

¹⁷ The Act implemented most of the recommendations of the NI Report referred to in fn 13 above.

¹⁸ The Enforcement Office can, for example, make an instalment order, a seizure order (which permits the seizure and sale of non-exempt goods), an order charging land, an order appointing a receiver, an attachment of debts order and an attachment of earnings order.

A detailed outline of the Northern Ireland legislation and of the operation of the Enforcement Office system is contained in the ALRI Report for Discussion No 3 *Remedies of Unsecured Creditors* (1986) paras 5.27-5.47.

¹⁹ Some examples taken from the fee schedule reprinted in the ALRI Report for Discussion No 3 *Remedies of Unsecured Creditors* (1986) at 198 are:

<u>Sum due</u>	<u>Fee</u>
£ 200	£60
1,000	108
3,000	168
10,000	238

²⁰ Id.

²¹ The Working Party which recommended the establishment of the Enforcement Office intended the Office to be self supporting: NI Report 20. The ALRI in its Report for Discussion No 3 *Remedies of Unsecured Creditors* (1986) said that the Enforcement Office had never achieved this goal. In its best year (1984) it collected about one million pounds in fees but its expenditure was 1.25 million pounds.

²² Cmnd 3909 (1969).

²³ C Glasser *Administration of Justice Act 1970: Enforcement of Debt Provisions* (1971) 34 MLR 61, 67.

The Scottish Law Commission has considered and rejected the Enforcement Office idea: *First Memorandum on Diligence: General Issues and Introduction* (Memorandum No 47, 1980) 30-31, 43-50.

(c) The Commission's approach

1.14 The Commission does not intend to recommend the establishment of an Enforcement Office along the lines of that operating in Northern Ireland because of the cost of operating the system and the delay associated with it. Under the Northern Ireland scheme, the Office examines every judgment debtor in respect of whom an application for enforcement is made, either at its office or by an officer attending the judgment debtor's home. The cost of doing this would be greater in Western Australia which is much larger in area than Northern Ireland. The need for an examination in each case will create delay particularly as many judgment debtors will fail to attend the hearing. By way of contrast, the self-help principle offers economy and also maintains the court's largely neutral role in the adversary system as a referee between the parties.

6. ORGANISATION OF THIS PAPER

1.15 The following matters are examined in the subsequent chapters of this paper -

- * the existing methods of enforcement of judgments under the LCA (Chapter 2);
- * the use of instalments to pay judgment debts²⁴ (Chapter 3);
- * examination in aid of execution (Chapter 4);
- * garnishment of earnings and the scope of debts (other than wages) that can be attached by a judgment creditor (Chapter 5);
- * imprisonment for debt (Chapter 6);
- * warrants of execution against land or goods (Chapter 7);

In 1975 the NSWLRC Draft recommended an enforcement office very close in design to that which operates in Northern Ireland. However, no final report was ever produced on the subject and no legislative action has followed. The project is not being actively worked on by the NSWLRC.

²⁴ The expression "judgment debt" is intended by the Commission to refer to the amount of the judgment and costs for which the judgment debtor is liable and which may be recovered with the judgment.

- * various issues including interpleader and poundage (Chapter 8):

- * whether or not Local Courts should have the same powers and procedures as the superior courts to enforce a judgment (Chapter 9).

Chapter 2

PRESENT LAW

1. INTRODUCTION

2.1 The principal methods in the LCA for enforcing judgments or orders of Local Courts for the payment of money are by -

- (a) a warrant of execution,
- (b) commitment to prison pursuant to the judgment summons provisions of the Act,
- (c) a garnishee order.

In addition, the LCR have provisions dealing with receivership. The appointment of a receiver can be a way in which a judgment debt can be recovered.

2.2 A judgment or order for the recovery of or the delivery up of possession of land may be enforced by warrant of possession. A judgment for the delivery up of goods may be enforced by a warrant of delivery.

2.3 Where a magistrate makes an order, not for the payment of money, but for the doing of an act or for the ceasing of an act, section 155 of the LCA empowers the magistrate to impose a penalty if the order is disobeyed. The penalty is a sum not exceeding \$5,000 or imprisonment for a term not exceeding 12 months.

2. ENFORCEMENT OF JUDGMENTS OR ORDERS FOR THE PAYMENT OF MONEY

(a) Warrant of execution

2.4 A warrant of execution is in the form of a command directed to the bailiff of the Local Court in which it is issued to obtain the amount of the judgment debt by the seizure and sale

of any of the debtor's lands and goods.¹ Once the judgment creditor has lodged a praecipe with the Clerk of the Local Court requesting the issue of a warrant of execution, the clerk is required to issue the warrant.²

2.5 The bailiff need not make an actual seizure of land which is the subject of a warrant of execution in order to authorise the sale of the land. Section 123 of the LCA provides that instead the bailiff can publish in the manner prescribed in the LCR (or as the magistrate might direct) "notice of the warrant and of the intended day and place of sale, and the particulars of the property".³ Advertising requirements are less stringent where the bailiff makes an actual seizure of the land.⁴

2.6 In the case of goods, a seizure is necessary.⁵ Usually when the bailiff seizes goods he does not remove them from the judgment debtor's possession until they are to be sold. In the meantime he prepares an inventory and leaves them in the judgment debtor's custody.⁶ Normally notice of the proposed sale must be advertised.⁷ "Goods" are widely defined in the Act and include money, cheques, shares and other personal property.⁸ The judgment creditor is entitled to sue in the name of the judgment debtor on any cheques, promissory notes, specialities or other securities for the recovery of money secured or made payable by the instrument concerned when the time for payment arrives.⁹

2.7 Section 126 of the LCA sets out a list of goods which are protected from seizure but their range and value is very small.¹⁰

¹ LCA ss 122, 126; LCR O 25 (Div 1) r 18; LCR Appendix Part I form 104. The bailiff may only sell at a price which is reasonable, having regard to what is offered, namely, a debtor's right title and interest, if any, and the circumstances of the sale: see *Anderson v Liddell* (1968) 117 CLR 36, 45 per Barwick CJ and para 7.24 below. If there is no such bid, the bailiff should make a return to the effect that the warrant is returned unexecuted as he was unable to obtain a reasonable price at the sale.

² LCA s 121; LCR O 25 (Div 1) r 6.
A praecipe is a form in which a party writes the particulars of a document which he wishes to have issued. In the case of a warrant of execution, the praecipe also recites that default has been made in payment according to the judgment or order concerned and also shows how the amount to be levied is made up: LCR Appendix Part I form 102.

³ LCA s 123. The publication of the notice is the equivalent of an actual levy by the bailiff on the land: *ibid.* As to the prescribed manner of publication, see para 7.28 below.

⁴ Para 7.27 below.

⁵ LCA s 126.

⁶ This is done under s 128 of the LCA which authorises the bailiff to leave the goods in the custody of a fit person approved by the bailiff to be put in possession of the goods by the bailiff.

⁷ Paras 7.27 and 7.28 below.

⁸ LCA s 3.

⁹ LCA s 127.

¹⁰ Para 7.3 below.

2.8 Goods taken in execution may not be sold by the bailiff until at least five days after they were seized.¹¹ The bailiff must advertise notice of the intended sale of the goods at least once in a newspaper circulating in the town or district in which the goods are to be sold.¹² The day appointed for the sale must not be earlier than the sixth day from the day of seizure and notice of the sale must be advertised at least four days before the day of the sale.¹³

2.9 Except where the magistrate otherwise orders, goods sold in execution must be sold publicly and for "ready money" by the bailiff to the highest bidder.¹⁴ The goods must be sold at the place where they were levied upon or at such other place as the bailiff considers is more suitable or convenient for their sale.¹⁵

2.10 A bailiff who has seized a judgment debtor's goods in execution of a judgment of a Local Court is in a vulnerable position when ownership of those goods is claimed by a person other than the judgment debtor. To alleviate the situation, the LCA and the LCR provide an interpleader procedure under which the dispute as to the ownership of the goods¹⁶ can be resolved.¹⁷ The procedure under the Act and the LCR does not expressly extend to land.¹⁸

2.11 Section 136 of the LCA provides that when more than one warrant of execution is delivered to a bailiff to be executed against the same person the bailiff is to execute them in the order of the times when application for the warrants was made to the clerk of the Local Court.¹⁹

¹¹ LCA s 128. During this period the goods are to be stored by the bailiff or remain in the custody of a fit person approved by the bailiff and put in possession by him: LCA s 128. Where property has been seized a person who knowingly and with intention to hinder or defeat the process receives, removes, retains, conceals or disposes of the property is guilty of a misdemeanour and is liable to imprisonment for up to three years: *Criminal Code* s 150.

¹² LCR O 25 (Div 1) r 17(1). If there is no such newspaper in circulation the bailiff is to affix notice of the sale conspicuously at or near the place where the sale is to be held: *ibid*.
If the value of any goods seized by the bailiff under a warrant of execution is less than \$100, the bailiff may sell the goods by public auction in any public auction room approved by the magistrate without advertising notice of the sale in a newspaper: *id* O 25 (Div 1) r 17(2).

¹³ LCR O 25 (Div 1) r 17(1). However, where the goods to be sold are of a perishable nature, or where the execution debtor so requests, the goods may be sold immediately without notice of sale, or may be sold earlier than four days after notice of the sale: *ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid*. O 25 (Div 1) r 17(1) also applies to land where an actual seizure has been made. However, except insofar as it provides that the sale must be public, r 17 does not apply to land of which an actual seizure has not been made. It is normal in the case of land for the bailiff to proceed under s 123 of the LCA (para 7.28 below) in which case he does not make an actual seizure of the land.

¹⁶ "Goods" are widely defined in the LCA: para 2.6 above.

¹⁷ LCA s 143 and LCR O 30: see also Part I Report paras 15.33 and 15.36 and also paras 8.10 and 8.11 below.

¹⁸ Para 8.15 below.

¹⁹ But see para 2.12 and footnote 20 below.

2.12 Section 125 of the LCA applies the provisions of section 133 of the *Transfer of Land Act 1893* to a sale under a warrant of execution issued under the LCA.²⁰

(b) Commitment

2.13 In certain circumstances a judgment debtor can be imprisoned for up to six weeks under section 130(1) of the LCA if the judgment debtor fails to pay a judgment debt or an instalment of a judgment debt due from the judgment debtor pursuant to a judgment or order of a Local Court. Section 130(1) provides as follows:

" (1) Subject to the provisions hereinafter contained, and to the rules of court, any magistrate may commit to prison, for a term not exceeding 6 weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any judgment or order of a Local Court:

Provided that such jurisdiction shall only be exercised where it is proved to the satisfaction of the magistrate that the person making default either has or has had, since the date of the judgment or order, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

Section 130(3) provides that:

" (3) For the purposes of this section, the magistrate may direct any debt due from any person, in pursuance of any judgment or order, to be paid by instalments, and may from time to time vary or rescind such order."

Applications for orders under these provisions are to be made by means of a judgment summons.²¹

²⁰ As a result of this, the Registrar of Titles on being served with a copy of a warrant of execution issued out of a Local Court, accompanied by a statement signed by an interested party specifying the land sought to be affected, is to enter the copy in the register book. Upon such service the warrant of execution binds the land. An unregistered document or an equitable mortgage or charge by deposit or otherwise without writing will not prevail against a sale by the bailiff under the warrant of execution unless the document, mortgage or charge is protected by a caveat lodged before the service of the copy of the warrant of execution on the Registrar. The warrant ceases to bind the land unless a transfer upon a sale by the bailiff under the writ is lodged for registration within four months from the day on which the copy of the writ was served on the Registrar.

The question of whether priority between warrants of execution (where more than one is issued against the same land) depends on the time of application to the clerk for the issue of the warrant or the time when a copy of the warrant is lodged with the Registrar of Titles under s 133 of the *Transfer of Land Act 1893* will be considered by the Commission in its project *Writs and Warrants of Execution* (Project No 67).

2.14 In *Rural & Industries Bank of Western Australia v McConnell*,²² which was a recent appeal from the Local Court at Perth to the District Court, Blaxell DCJ had to consider the question of whether a Local Court could order commitment on the hearing of a judgment summons when the judgment debtor had, since the judgment, the means to pay a part of the judgment debt, but not the means to have paid the whole of the judgment debt in one lump sum. His Honour said that Local Courts clearly have power to order commitment when the judgment debtor has not had the means since the date of judgment to pay the whole of the judgment debt in one lump sum but has had the means to do so by periodic payments. The judge also said that Local Courts have power to order commitment when the judgment debtor has since the judgment only had the means to have paid part of the judgment debt. However, under the statute the Court has a discretion as to whether commitment should be ordered and Blaxell DCJ held that the discretion should not be exercised to make an order of commitment on the first application for an order except in "exceptional circumstances". Payment by instalments, adjusted according to the debtor's means, should be ordered first unless it is a most exceptional case.²³

2.15 If the judgment debtor fails to pay an instalment, the judgment creditor can apply for the issue of a second judgment summons. If at the conclusion of the examination of the judgment debtor at the hearing, the magistrate is satisfied that the judgment debtor has, or has had since the date of the order for instalments, the means to pay the instalments which are in arrears but has refused or neglected or refuses or neglects to pay them, the magistrate may make an order for the commitment of the judgment debtor to prison. Normally, the order of commitment, if made, will be suspended for a period in which the judgment debtor is to pay the arrears by instalments specified by the magistrate.²⁴ In addition, the magistrate will generally order that the original order for payment by instalments be suspended for this

²¹ LCR O 26 r 1.

An order for payment by instalments can also be obtained under O 23 r 8 of the LCR, as well as under s 130(3). Under this rule, the judgment creditor may apply ex parte to the court for an order that the judgment debt be paid by instalments and the magistrate may make an order accordingly. The application may be made by letter and should state the instalments by which the judgment creditor desires the amount to be paid. An order made under this rule has the same effect as a fresh order for payment by instalments made on a hearing of a judgment summons: LCR O 23 r 8(4). By leave of the magistrate, the clerk can deal with an application under this rule: id O 23 r 8(3).

²² (1993) 9 SR (WA) 248.

²³ An example of an exceptional case would be where it becomes evident at the hearing that the judgment debtor has sufficient money in a bank account to pay the whole judgment debt and has access to the account but refuses to use money from that account to pay the debt. In this situation the magistrate might very well decide to make a suspended order of commitment immediately.

²⁴ Suspension of an order of commitment is provided for in the LCR O 26 r 22.

period.²⁵ Normally, he will also order that the amount which will be outstanding at the end of this period be paid by instalments of the same amount and regularity as under the original order or in accordance with a variation of the original order. However, as a general rule the order of commitment will only be in respect of the arrears at the time of the hearing of the second judgment summons.²⁶

2.16 At the hearing of a judgment summons the judgment debtor will be examined concerning the means he has or has had to satisfy the debt.²⁷ Under Order 26 rule 13A of the LCR where the debtor consents to pay the amount in respect of which an order is sought under a judgment summons, he may forward to the clerk of the court an affidavit (referred to in the LCR as a "consent affidavit") setting out any facts which the debtor might wish to place before the court prior to any order being made on the summons.²⁸ The rule empowers the magistrate to admit the affidavit as the evidence of the judgment debtor on the hearing of the judgment summons.

2.17 Imprisonment under section 130 does not extinguish the debt and it does not deprive the creditor of the right to take out execution against the land or goods of the person imprisoned in the same manner as if the imprisonment had not taken place.²⁹

(c) Attachment of debts (garnishee order)

2.18 Under section 145 of the LCA, the magistrate or clerk on the ex parte application of the judgment creditor may order that all debts "owing or accruing" from a third person ("the garnishee") be attached in payment of the judgment debt.³⁰ By the same or a subsequent

²⁵ LCR O 26 r 25 provides that the magistrate may do this.

²⁶ If it becomes evident at the hearing of the second judgment summons that the judgment debtor has the means to pay the whole of the balance of the judgment debt and not simply the arrears, but refuses to pay out the judgment debt, the magistrate might decide to make a suspended order of commitment in respect of the whole of that balance.

Para 2.15 above is based on the practice of the Local Court at Perth. The Commission is unable to say whether there are significant differences in practice in other Local Courts.

Authority to exercise the jurisdiction conferred on a magistrate by s 130 of the LCA may be delegated to the clerk pursuant to s 130(6). The effectiveness of an order or decision made by a clerk acting under power of delegation is suspended until the order or decision is reviewed by the magistrate: s 130(7).

²⁷ LCA s 130; LCR Appendix Part I form 119.

²⁸ The affidavit may be in accordance with form 119A in the Appendix to the LCR.

²⁹ LCA s 130(4).

³⁰ As the application is ex parte, there is no requirement that prior notice of the application be given to the judgment debtor or the third person. The application must be supported by an affidavit in which the judgment creditor or his solicitor swears that a third person named in the affidavit is indebted to the judgment debtor: LCA s 145; see also LCR O 28 r 1 and Appendix Part I form 139.

order, the magistrate or clerk may order that a summons be issued requiring the garnishee to appear before the magistrate to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much of the debt as is sufficient to satisfy the judgment and the costs endorsed on the summons.³¹ If the garnishee does not -

- (a) dispute the debt due or claimed to be due from him to the judgment debtor;
or
- (b) appear in obedience to the summons; and
- (c) in either case, does not forthwith pay into court the amount due from him to the judgment debtor or an amount equal to the judgment debt,

the magistrate may order a warrant of execution to be issued against the garnishee's land and goods for the amount due from the garnishee, or so much of it as is sufficient to satisfy the judgment.³² If the garnishee disputes his liability, the magistrate, instead of ordering that a warrant of execution may issue, may order that any issue necessary for determining the garnishee's liability be tried.³³ Payment made by or execution levied upon a garnishee under the proceedings is a valid discharge to him as against the judgment debtor to the amount paid or levied.³⁴

Service of the order on, or notice of it in such manner as the magistrate directs to, the garnishee binds the debts in his hands: LCA s 146; see also LCR Appendix Part I form 140.

³¹ LCA s 145; LCR O 28 r 1 and Appendix Part I form 140. The magistrate on the return of the summons may set aside the order attaching the debts.

³² LCA s 147. The magistrate may direct that the payment be made by instalments: *ibid.*

³³ *Id* s 148.

A procedure is also provided in the LCA to determine whether the debt belongs to a person other than the garnishee or whether a person other than the garnishee has a lien or charge upon it, when in proceedings to obtain an attachment of debts either of those situations is suggested by the garnishee or it otherwise so appears: *id* ss 149-150.

³⁴ *Id* s 151.

If the judgment creditor elects to accept the money paid into court in satisfaction of his claim against the garnishee, then before the money can be paid out, the clerk is required to send the judgment debtor a notice that the money will be paid out to the judgment creditor unless the debtor appears on the day stated in the notice and shows cause according to the notice, and the magistrate may thereupon make such order as to the money paid into court as he deems fit: LCR O 28 r 5.

O 28 r 10 of the LCR governs the situation where money has been paid into court in an action by the judgment debtor against a third party. The judgment creditor may apply for an order that the sum be paid to him and the magistrate may make such order as he deems fit. Such money cannot be garnisheed.

2.19 To be attachable, the debt must be "owing or accruing" at the time of the garnishee order.³⁵ Future wages are not immediately payable and thus are not attachable. It is possible to attach wages as they fall due but section 145 of the LCA prohibits the making of an order for the attachment of the wages of "any servant, labourer, or workman".³⁶

(d) Appointment of receiver

2.20 Receivership as a method of enforcing a judgment is referred to as equitable execution, but it does not of itself execute on the debtor's property.³⁷ It is the appointment of a person to receive the debtor's interest when that interest is not legally susceptible to ordinary process of law.³⁸ It puts the receiver in the same position as the debtor to receive the income or other money in respect of the property.³⁹ If legal execution is available, it should be invoked and found wanting before the execution creditor seeks equitable assistance by way of the appointment of a receiver.⁴⁰ Equitable execution by means of a receiver is to be distinguished from the pre-trial appointment of a receiver. In the latter case the power is exercised when the plaintiff shows a prima facie right to property which is in danger of being injuriously affected unless it is preserved for the final decision in the proceedings.⁴¹

2.21 The LCA does not expressly empower a Local Court to appoint a receiver by way of equitable execution. However, section 33 of the LCA empowers a Local Court, as regards all causes of action within its jurisdiction, to grant in any proceeding before the Court such "relief, redress, or remedy" in as full and ample a manner as might be done in the like case by the Supreme Court.⁴² The Commission is not aware of any Western Australian decision on

³⁵ This limitation and the issue of attachment of future and conditional debts are considered in paras 5.25 and 5.6-5.21 below.

³⁶ The issue of garnishment of wages is considered in paras 5.27-5.81 below.

³⁷ Cairns 556.

³⁸ Ibid. Thus a receiver can be appointed to receive a legacy not yet payable: D B Casson and I H Dennis *Ogders' Principles of Pleading and Practice in Civil Actions in the High Court of Justice* (22nd ed 1981) 359. The appointment of a receiver is sometimes a way by which a judgment creditor can secure payment of his debt out of an interest in land which could not be reached by the ordinary process of execution at law: *ibid.*

³⁹ Cairns 557.

⁴⁰ Ibid.

⁴¹ Cairns 412.

⁴² By s 117 (1)(d) of the SCA, a judgment for the payment of money may be enforced by an equitable execution by means of a receiver or charging order supplemented, if necessary, by an injunction restraining the judgment debtor or any other person from dealing with any property or interest in it.

In the Part I Report, the Commission said that a Local Court probably has power by virtue of s 33 of the LCA to grant equitable remedies as ancillary relief on a common law claim within its jurisdiction, although this was less certain where it was sought to recover a sum of money or damages in an equitable claim under s 32: paras 4.16-4.21 and 4.44. The Commission said that power to award equitable relief

the point, but there is authority in England which suggests that a Local Court in Western Australia may have power by virtue of section 33 to enforce a judgment in a money claim within its jurisdiction by equitable execution by means of a receiver.⁴³

2.22 Order 29 of the LCR contains provisions dealing with receivership and clearly assumes that a magistrate may appoint a receiver by way of equitable execution. The order deals with the provision of security by the receiver, the passing of the receiver's accounts and the matters to which the magistrate is to have regard in determining whether it is just or convenient that a receiver should be appointed.

3. RECOVERY OF LAND AND DELIVERY OF GOODS

(a) Recovery of land: warrant of possession

2.23 Sections 99 to 106 of the LCA give Local Courts a limited jurisdiction in recovery of land. If an order for recovery of possession of land is made, a warrant may be issued to the bailiff authorising and requiring the bailiff to give possession of the land to the plaintiff.⁴⁴ Where pursuant to the sections, the Court has also given judgment for rent, mesne profits or damages for unlawful occupation, the warrant may require the bailiff to obtain the amount for which judgment is given and costs by seizure and sale of goods and land of the defendant.⁴⁵

(b) Delivery of goods: warrant of delivery

2.24 A judgment for the delivery of goods may be enforced by a warrant of delivery.⁴⁶ The warrant may be issued before an assessment of the value of the goods has been obtained.⁴⁷

was a valuable adjunct to the Court's general jurisdiction and it recommended that s 33 be reworded to put the matter beyond doubt: para 4.45.

⁴³ In *R v Selfe* [1908] 2 KB 121, it was held that a provision similar in its wording to s 33 of the LCA empowered a County Court as regards a cause of action within its jurisdiction to appoint a receiver by way of execution against equitable interests in land. The Court in *R v Selfe* said that the appointment of a receiver was a form of "relief" within the provision. It was equitable relief, which the court gave because execution at law could not be had.

⁴⁴ LCA ss 99, 100 and 103; LCR Appendix Part I form 172. The warrant authorises and requires the bailiff to give possession of the land to the plaintiff "and for such purposes to enter and remove there from all persons, and all goods and chattels not being the property of the plaintiff". The bailiff may only enter the land between 9 am and 4 pm: LCA s 105.

Ss 99 and 100 give a limited jurisdiction in the recovery of land where the term of the tenant has expired or rent is in arrears. S 103 gives a limited jurisdiction in the recovery of land held without right, title or licence.

⁴⁵ LCA ss 101, 103; and LCR Appendix Part I form 172.

⁴⁶ LCR O 27 r 5.

After an assessment of the value has been obtained, the plaintiff is entitled⁴⁸ to enforce delivery of the goods or to enforce the payment of their value at his option.⁴⁹ When the warrant of delivery is issued after the value of the goods has been obtained, the bailiff is required to seize and deliver the goods to the plaintiff or at the request of the plaintiff to obtain the amount of that value by the seizure and sale of goods and land of the defendant.⁵⁰

4. OTHER METHODS OF ENFORCEMENT OF JUDGMENTS AND ORDERS

2.25 Where a magistrate makes an order, not for the payment of money, but for the doing of an act or for the ceasing of an act, section 155 of the LCA empowers the magistrate to impose a penalty if the order is disobeyed. The penalty is a sum not exceeding \$5,000 or imprisonment for a term not exceeding 12 months.⁵¹ An example of an order which could result in proceedings under section 155 would be an injunction.

2.26 Sections 66 and 67 of the LCA deal with discovery and inspection of documents relating to matters in dispute. Section 68 provides that a magistrate, in exercise of the powers conferred on the magistrate by sections 66 and 67, has the same powers for compelling obedience to and for punishing disobedience of orders made under sections 66 and 67 as a Supreme Court judge may exercise to compel obedience to, or punish disobedience of, such an order. One of the methods by which an order of this nature may be enforced in the Supreme Court is by a writ of attachment which can lead to the imprisonment of the defaulting party. The LCR provide for a warrant of attachment. The magistrate may order a warrant of attachment to issue whenever the magistrate deems it necessary so to do for the purposes of section 68 of the LCA.⁵² The warrant requires that the defaulting party be arrested and imprisoned until further order of the Court. Apart from attachment, other powers which a Supreme Court judge may exercise in the event of non-compliance with an order to give discovery of documents or to produce documents for inspection include the power to

⁴⁷ LCA s 91A(2).

⁴⁸ Subject to any order of the magistrate: LCA s 91A(2).

⁴⁹ Ibid.

⁵⁰ LCR O 27 r 8; Appendix Part I form 175.

A warrant of delivery may also require the bailiff to obtain by seizure and sale any damages awarded in the proceedings for detention or trespass of or against the goods, and also costs: LCR O 27 r 7; Appendix Part I form 175.

⁵¹ When it is necessary to proceed against a person under s 155, that person may be summoned in the manner provided in the *Justices Act 1902* in respect of simple offences and the provisions of that Act apply in respect of the matter as if he were charged with a simple offence and summoned before the magistrate sitting as a court of summary jurisdiction: LCR O 27 r 1.

⁵² LCR O 27 r 2.

order that the action be dismissed or that the defence be struck out and judgment entered accordingly.⁵³

2.27 Under Order 27 rule 3 of the LCR, a person in custody under an order made under section 155 or section 68 may apply to the Local Court for release from custody.⁵⁴

5. EXAMINATION IN AID OF EXECUTION

2.28 At present the LCA and the LCR provide for a judgment creditor to obtain from the judgment debtor information on the judgment debtor's income, assets and liabilities. The information might reveal, for example, assets of the judgment creditor which can be executed against, debts due to the judgment debtor which can be attached or income which would justify the making of an order for payment by instalments. Under section 144 of the LCA a judgment debtor may be examined as to the debts due to him and required to produce any books, deeds or papers relating to his financial affairs. Order 27 rule 13 of the LCR provides that a judgment creditor can apply to the clerk of the Court for the issue of a summons requiring the judgment debtor to be orally examined before the magistrate "as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment".⁵⁵

2.29 The judgment summons procedure⁵⁶ can be a method of obtaining information which will assist the judgment creditor in enforcing payment of the judgment debt. Most often the object of issuing a judgment summons will be to obtain an order for payment of the debt by instalments.⁵⁷ However, at the hearing of the judgment summons, the judgment debtor will be examined concerning the means he has or has had to satisfy the debt.⁵⁸ The information obtained could lead to the judgment creditor enforcing the payment of the debt by some other means such as a warrant of execution or a garnishee order.

⁵³ RSC O 26 r 15.

⁵⁴ The discharge, if granted, is to be given in the form in the Appendix Part I form 188.

⁵⁵ If the clerk refuses the application, the applicant may make application to the magistrate in chambers for the issue of the summons: LCR O 27 r 13(2)(a).

⁵⁶ Paras 2.13-2.16 above.

⁵⁷ Para 2.14 above.

⁵⁸ LCA s 130; LCR Appendix Part I form 119.

6. SUSPENSION OF EXECUTION

2.30 Section 139 of the LCA gives a magistrate power to suspend or stay execution which has already issued. Under that section, if it appears to a magistrate that the defendant is unable from sickness or other sufficient cause to pay the judgment debt or any instalment of it, the magistrate may suspend execution which has already issued in the action or matter for such time and upon such terms as the magistrate thinks fit and so from time to time until it appears that the cause of inability has ceased.⁵⁹

2.31 Under section 139, a magistrate may also discharge a debtor who is confined to prison where the magistrate is of the opinion that because of sickness or other sufficient cause, the debtor ought to be discharged.

7. REMOVAL OF JUDGMENT TO THE SUPREME COURT

2.32 Where a Supreme Court judge is satisfied that a judgment debtor in a Local Court has no goods which can be conveniently taken to satisfy the judgment he may by order remove the judgment to the Supreme Court.⁶⁰ When removed the judgment has the same force and effect, and the same proceedings may be had on it, as in the case of a judgment of the Supreme Court.

⁵⁹ O 25 (Div 1) r 12 of the LCR sets out the procedure in the case of an application to suspend or stay a warrant of execution which has issued. O 26 r 26 sets out the procedure in the case of an instalment order or execution pursuant to an order made on the hearing of a judgment summons.

⁶⁰ LCA s 142. The power only applies in the case of a judgment for an amount exceeding \$40 exclusive of costs.

Chapter 3

ORDERS FOR PAYMENT BY INSTALMENTS

1. PRINCIPAL ISSUES

3.1 A judgment debtor may be unable to pay the judgment debt immediately but might be able to pay it off by instalments. In the Commission's opinion, the existing provisions in the LCA and LCR dealing with payment by instalments are in need of review. The following major issues are discussed in this Chapter -

- * Should a magistrate be able to order payment by instalments at the time of delivering judgment and, if so, should the power be confined to judgments within a specified monetary limit?
- * What procedures should apply where the judgment creditor wishes to obtain an instalment order after entry of judgment?
- * Should the judgment debtor be able to apply for an instalment order and, if so, what procedures should apply in applications by a judgment debtor?
- * Should an application for an instalment order bring a stay of execution into effect?
- * What should the position be when the judgment debtor fails to comply with an instalment order?

2. PRESENT POSITION

3.2 At common law, judgment creditors are not required to accept payment by instalments. However, there are four circumstances in which an order for payment by instalments may be made in Local Courts. They are -

1. At the time a judgment is obtained for a sum not exceeding \$100, excluding costs, the magistrate may order the sum and costs to be paid by instalments. The section also provides that if the plaintiff consents to the judgment debt being paid by instalments, the magistrate may order it to be paid by the instalments consented to irrespective of the amount of the judgment debt.¹
2. Where a judgment has been given or an order made for the payment of a sum not exceeding \$100, exclusive of costs, by instalments or otherwise, the magistrate on the application of the judgment debtor may order that the amount unpaid be paid by instalments or, if already payable by instalments, by the like or smaller instalments.²
3. A judgment creditor may apply ex parte to the Court for an order that the judgment debt be paid by instalments and the magistrate may make an order accordingly.³
4. Under the judgment summons procedure the magistrate is empowered to order that a debt be paid by instalments.⁴

3.3 If a magistrate makes an order for payment of a sum of money by instalments, execution on the order may not be issued until after default in payment of some instalment.⁵ Upon default being made, execution may be issued for -

- (a) the whole of the balance of the sum of money and costs then remaining unpaid;
or

¹ LCA s 91.

² LCR O 23 r 9. The magistrate must first be satisfied that the judgment debtor is unable to pay the sum ordered to be paid at the time or by the instalments already ordered. Notice of the application must be served on the judgment creditor at least two days before the hearing: *ibid*.
By O 23 r 10, a fresh order for payment in one sum or by increased instalments may be made on the application of the judgment creditor where the magistrate is satisfied that the debtor under any such judgment or order referred to in r 9 can pay in one sum or by larger instalments.

³ LCR O 23 r 8. The application may be made by letter and should state the instalments by which the judgment creditor desires the amount to be paid. An order made under the rule has the same effect as a fresh order for payment by instalments made on the hearing of a judgment summons.

⁴ LCA s 130. See paras 2.13-2.14 above.

⁵ LCA s 138.

- (b) for such portions thereof as the magistrate may have ordered at the time of making the original order, or at a subsequent time.⁶

3. ORDERS MADE AT JUDGMENT

3.4 In the absence of the plaintiff's consent the magistrate can only order payment by instalments at the time of judgment where the amount of the judgment is small, namely, not in excess of \$100.⁷ In these cases the costs of execution, for example against the judgment debtor's goods, which he must bear would be out of proportion to the judgment debt. They might even be greater than the judgment debt.

3.5 It can be argued that the present money limit of \$100 should be extended to several thousand dollars or even as the Commission previously recommended⁸ to the full extent of the money limit of the jurisdiction of Local Courts, namely to \$25,000.⁹ Where judgment is given for an amount exceeding \$100 and a warrant of execution is later issued but is returned *nulla bona*, costs will have been incurred which could have been avoided if the judgment debtor had been able to apply at judgment for an order for payment by instalments.¹⁰

3.6 From the point of view of the judgment creditor the question of whether the judgment debt is to be paid by instalments is important. From the creditor's perspective, payment by instalments is not as satisfactory as prompt payment of the whole debt.¹¹ If an application for payment by instalments is to be dealt with at judgment, the creditor may have to carry out some investigation into the debtor's financial position before judgment but if judgment is not

⁶ Ibid.

⁷ Para 3.2 sub-para 1 above.

⁸ The Commission in its report in Part I of this project recommended that a magistrate at the time of judgment should be able to make an order for payment by instalments in all cases within the monetary jurisdiction of the Local Court regardless of the amount of the judgment: Part I Report para 15.51. At the time when that report was presented the monetary jurisdiction of Local Courts was \$10,000.

⁹ In some Australian jurisdictions, the court whether on the application of a party to an action or not, when giving judgment may order that the judgment debt irrespective of its amount be paid by instalments, for example, the District Court in New South Wales (*District Court Rules 1973* (NSW) Pt 31A r 1), a Local Court in New South Wales (*Local Courts (Civil Claims) Rules 1988* (NSW) Pt 27 r 1) and the Magistrates' Court in the Australian Capital Territory: *Magistrates Court (Civil Jurisdiction) Act 1980* (ACT) s 278F. Under the Victorian *Judgment Debt Recovery Act 1984*, the Supreme Court, a County Court or the Magistrates' Court, in giving judgment, may of its own motion or on the application of a party order that the judgment debt be paid by instalments: s 5.

¹⁰ As to the costs of an unproductive warrant of execution, see LCR O 25 (Div 1) r 15, O 26 r 36 and item 4 to Part 2 of the appendix to the LCR.

¹¹ Para 3.19 below.

given in his favour the investigation will be wasted. Without such an investigation the information he has is unlikely to be adequate or reliable.

3.7 In Victoria, a magistrate in giving judgment can of his own motion or on the application of any of the parties order that the judgment debt be paid by instalments.¹² In practice magistrates do not make instalment orders when giving judgment but if a party indicates at that time that he wishes to apply for such an order, the magistrate will stay enforcement for a short period, usually one month, so that an application for an instalment order can be filed at a later date.¹³

3.8 Having reconsidered the factors for and against, it is now the Commission's preliminary view that provision for instalment orders at the time of judgment should continue to be limited to judgments for small amounts but that there should be some increase in the limit of \$100. Bearing in mind that the instalment order will also apply to costs even though they bring the amount above the limit, perhaps an increase from \$100 to say \$500 would be justified.¹⁴

4. ORDERS MADE AFTER JUDGMENT

(a) Introduction

3.9 At present it is not possible for a judgment debtor to apply after judgment for an order for payment by instalments if the judgment is for more than \$100 exclusive of costs. Victoria and New South Wales have made reforms in this area and the ALRC has also made proposals for reform.

¹² *Judgment Debt Recovery Act 1984* (Vic) s 5: fn 9 above in this ch.

¹³ Under *Judgment Debt Recovery Act 1984* (Vic) s 6: para 3.10 below.

¹⁴ It should be made clear that s 91 of the LCA applies to all judgments and not merely to those in which judgment was given in favour of the plaintiff. This would make it plain that the section also applies where, for example, the defendant succeeds on a counterclaim or a third party claim. It should also be made clear that the instalments include any post-judgment interest payable: fn 43 below in this ch.

(b) The Victorian *Judgment Debt Recovery Act 1984*

3.10 In Victoria either the judgment creditor or the judgment debtor can apply at any time after judgment has been given to the Principal Registrar, a Registrar or a Deputy Registrar of the Magistrates' Court¹⁵ for an instalment order or if one has already been made at judgment for another instalment order in substitution for that order. An application must, if made by a judgment debtor, be accompanied by a Statement of Affairs in Form 28B. Form 28B is detailed in the information it requires and a copy of it is set out in Appendix II. Where the application for an instalment order is made by the judgment creditor, the judgment creditor serves a blank copy of Form 28B on the debtor. It will normally be in the debtor's interest to complete Form 28B and return it to the Court. The registrar can reach a decision on the application even though the judgment debtor has not returned the form.

3.11 Service of the application operates as a stay of enforcement or execution until the registrar or a magistrate deals with the matter.¹⁶ The registrar may without notice to either party and whether or not either party is before it -

- (a) order that the judgment debt be paid by the instalments and at the times specified in the application;
- or
- (b) refuse to make an order.¹⁷

In practice, the registrar reaches his decision "on the papers" and neither party is present when he does so. Having made or refused the order, the registrar is required to notify the judgment creditor and the judgment debtor either of whom may within 14 days file a notice of objection, the filing of which obliges the registrar to set the matter down for hearing by a magistrate.¹⁸ The magistrate may -

¹⁵ *Judgment Debt Recovery Act 1984* (Vic) s 6. In this part of the paper, the word "registrar" means any of these officers.

As to the making of an order at judgment for payment by instalments under the *Judgment Debt Recovery Act 1984* (Vic) s 5, see para 3.7 above.

¹⁶ *Judgment Debt Recovery Act 1984* (Vic) s 6(8). If the judgment creditor wishes to request the issue of a warrant of execution after application for an instalment order is made, the Court's registry will not even allow the request to be lodged. If a warrant of execution against the defendant's property has been issued but not executed, the registry informs the sheriff, who is the officer to whom it is directed, of the filing of the application and the consequent stay of execution. It also advises the sheriff of the outcome of the application.

¹⁷ *Judgment Debt Recovery Act 1984* (Vic) s 6(3).

¹⁸ *Id* s 6(4) - (5).

- (a) where the registrar refused to make an order, either make an order for payment by instalments or refuse to make such an order;
or
- (b) where the registrar has made an order for payment by instalments, confirm, vary or cancel that order.¹⁹

An instalment order may not be made, confirmed, varied or cancelled by the magistrate unless the magistrate -

- (a) has orally examined the judgment debtor;
or
- (b) is otherwise satisfied that in the circumstances an instalment order should be made, confirmed, varied or cancelled.²⁰

3.12 The judgment creditor or judgment debtor may at any time apply to the magistrate for a variation or cancellation of the instalment order but a judgment creditor may apply only on the ground that there has been a substantial increase in the property or means of the judgment debtor or on the ground that information given in support of the application for the instalment order was inaccurate.²¹ An instalment order may not be made without the consent of the judgment debtor if the income of the judgment debtor is derived solely from a pension, benefit, allowance or other regular payment under the Commonwealth *Social Security Act 1991* or Division 2 of Part III of the Victorian *Community Services Act 1970*.²² An instalment agreement in the prescribed form and made between the judgment debtor and the judgment creditor may be filed with the registrar at any time after judgment.²³ On receiving the agreement the registrar is required to make an order that the judgment debt be paid by the instalments and at the times specified in the agreement.

¹⁹ Id s 6(7).

²⁰ Id s 13. Where the magistrate is not satisfied, the magistrate can have the judgment debtor brought before him under procedures laid down in s 14. S 13 does not apply to orders made by the registrar under s 6 (para 3.10 above) or under s 7 (para 3.12 below).

²¹ *Judgment Debt Recovery Act 1984* (Vic) s 8.

²² Id s 12.

²³ Id s 7.

3.13 While an instalment order is in force and is being complied with, the instalment order operates as a stay of enforcement or execution of the judgment in respect of which the instalment order was made.²⁴ Default in payment of an instalment does not of itself mean that the judgment creditor can proceed to enforce the judgment. It means that the judgment creditor is entitled to have the debtor called before a magistrate. The magistrate will examine the debtor and consider the circumstances of the default and may confirm, vary or cancel the instalment order.²⁵ If the instalment order is cancelled by the magistrate, the judgment creditor can proceed to enforce the judgment by, for example, issuing a warrant of execution.

3.14 A judgment debtor who has the means to pay the instalment under an instalment order but persistently and wilfully and without an honest and reasonable excuse defaults in the payment of the instalments is liable to be imprisoned for not more than 40 days.²⁶ An imprisonment order cannot be made unless the judgment debtor is before the Court. A judgment debtor who is imprisoned under such an order must be discharged if he pays the instalments of which default was made.²⁷

(c) Orders under the New South Wales *Local Courts (Civil Claims) Act 1970*

3.15 Provisions along the same lines as those which operate in Victoria also apply in New South Wales pursuant to that State's *Local Courts (Civil Claims) Act 1970*. A notable difference is that under the New South Wales Act, where judgment has already been given, only the judgment debtor is entitled to make an application for an instalment order²⁸ and that in the event of default in payment there is no provision for imprisonment even where default is wilful and persistent. Another difference is that under the New South Wales legislation, an examination before the magistrate is not necessary before the instalment order may be cancelled following default in payment of an instalment. Instead, on default, the judgment may be enforced for the balance of the judgment debt owing, "except where otherwise

²⁴ Id s 9.

²⁵ Id ss 17-18.

²⁶ Id s 19(1).

²⁷ Id s 19(3).

²⁸ *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 27 r 2. However, the judgment creditor can have an examination summons issued, directed to the judgment debtor, and the registrar before or by whom the examination as to the debtor's property and means is conducted may make an instalment order: *Local Courts (Civil Claims) Act 1970* (NSW) s 41 and *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 28 r 4. The judgment creditor may apply to vary or rescind an instalment order on the ground that there has been a substantial increase in the property or means of the judgment debtor: id Pt 27 r 3.

directed by the court".²⁹ Where judgment has already been given, the judgment debtor's application must be supported by an affidavit as to his property and means.³⁰ This provision is similar to the requirements relating to the filing of a statement of affairs (Form 28B) under the Victorian legislation.³¹ Under the New South Wales Act an instalment order operates as a stay of enforcement of the judgment for so long as the judgment debtor complies with the order.³² There is one exception: the stay does not operate on an existing continuous wage garnishment order.³³

(d) The ALRC's proposals

3.16 The ALRC in its report *Debt Recovery and Insolvency*³⁴ proposed that there should be provision for instalment orders.³⁵ The details of the scheme which it recommended have much in common with the procedures which operate in the Magistrates' Court in Victoria under the *Judgment Debt Recovery Act 1984*. The ALRC recommended that, as in Victoria, each party should be entitled to make application for an instalment order.³⁶ It recommended that while an instalment order was being complied with, it should operate as a stay of enforcement of the judgment concerned but failure to comply with the instalment order should not terminate the stay until the failure had continued for a specified time, say 14 days.³⁷

3.17 It has been noted that in Victoria the registrar makes his decision in the absence of the parties.³⁸ Where the creditor makes the application, the registrar has the power to make an

²⁹ Id Pt 27 r 3(2).

³⁰ Id Pt 27 r 2(1).

³¹ Para 3.10 above.

³² *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 27 r 2(13).

Where the registrar refuses to make an order pursuant to an application, the registrar must set the judgment debtor's application down for hearing by a magistrate. Where the registrar so refuses, the application until dealt with by the magistrate, and unless the court otherwise orders, operates as a stay of enforcement of the judgment. There is one exception and that is that an existing continuous wage garnishment order is not stayed: id Pt 27 r 2(9) and (12).

³³ Id Pt 27 r 2(13). However, the amount taken under each garnishment payment is reduced to the level of the instalment order: para 5.30 below.

³⁴ This was the ALRC's second report on a reference requiring it to consider whether the law makes adequate provision to enable small or consumer debtors to discharge or compromise their debts from their present or future assets or earnings. The first report made a number of recommendations designed to enable insolvent debtors to avoid bankruptcy by entering into appropriate arrangements with their creditors. The second report was concerned with State and Territory debt recovery procedures.

³⁵ ALRC Report paras 239-243.

³⁶ Id para 238.

³⁷ Id para 242.

³⁸ Para 3.11 above.

instalment order even though he has no evidence of the debtor's financial circumstances.³⁹ The ALRC proposal for this situation was somewhat different.⁴⁰ It said that where the application for an instalment order was made by the creditor, a decision on the application should normally be delayed until after the debtor has been examined. However, there was no reason why the debtor should be required to attend for formal examination in all cases. It recommended that the judgment creditor could indicate in his application whether he wished to have a prescribed form containing a questionnaire served on the debtor with the notification of the creditor's application. Where he wished to have the prescribed form served, the notification to the debtor should advise that the debtor had either to provide to the Court written answers to the questions or attend a hearing at a specified time and place. The prescribed form containing the questionnaire should require an indication from the debtor whether he wished to make any proposal for payment of the debt, including an offer of payment by instalments. An offer by the debtor to pay by instalments should have the same effect as if it were an application by the debtor for an instalment order.

3.18 The ALRC recommended that failure to comply with the instalment order should not terminate the stay of enforcement until the failure had continued for at least 14 days.⁴¹ It also recommended that should the default be cured after the expiry of the prescribed period, the relevant payment having been accepted by the creditor, the stay of enforcement should revive.

(e) Kelly Report proposals

3.19 The Kelly Report laid emphasis on payment by instalments. It recommended that an examination hearing, followed by an order for payment by instalments, should be regarded as the central means for the recovery of judgment debts owed by consumer debtors. An instalment order should be the preferred mode of recovery except where the creditor's interests would be seriously prejudiced.⁴² However, the report's recommendation would mean a substantial increase in examination hearings and as a consequence an increase in the overall cost of debt collection as well as an added burden on court resources. A requirement to hold

³⁹ Para 3.10 above. The registrar can only make the order in the terms sought by the creditor in his application: para 3.11 above. If the debtor is dissatisfied with the order, he can file notice of objection and the matter is then set down for hearing by the Court. The Court may not make, vary, confirm or cancel an order unless it has orally examined the debtor or is otherwise satisfied that an instalment order should be made, confirmed, varied or cancelled: para 3.11 above.

⁴⁰ ALRC Report para 239.

⁴¹ Id para 242; para 3.16 above.

⁴² Kelly Report 28.

an examination hearing would give the debtor more time to dispose of assets to the prejudice of the creditor, if the debtor wished to do so. From the point of view of a creditor, payment by instalments is not as satisfactory as prompt payment of the whole judgment, even where the instalments carry interest.⁴³ The issue of a warrant of execution, for example, will often result in comparatively prompt payment from the debtor who might in reality have been able to pay the judgment debt. A provision which requires that a warrant of execution may not be issued, until it is shown that the creditor's interest would be seriously prejudiced if it were not issued, may not be justified.

5. DISCUSSION

(a) Rationale

3.20 Instalment orders are intended to cater for judgment debtors who have a genuine inability to pay the judgment debt and need time to pay off the debt by instalments. Provision for instalment orders in these circumstances is desirable and the Commission considers that provision for making of instalment orders after judgment should be retained.⁴⁴

3.21 The Commission's preliminary view is that not only the judgment creditor but also the judgment debtor should be entitled to apply to the Court for an instalment order after judgment regardless of the amount of the judgment debt.⁴⁵ The Commission is also of the preliminary view that an instalment order procedure of the type operating in New South Wales and Victoria should replace the method of obtaining orders for payment by instalments under the existing judgment summons procedure.⁴⁶ The instalment order procedure would also supersede the provision which gives the judgment debtor the right to apply after judgment for an instalment order where the judgment does not exceed \$100.⁴⁷ The question of whether imprisonment which can be imposed as a sanction for failure to comply with an instalment order should be retained is considered in Chapter 6 below.

⁴³ By s 142 of the SCA every judgment of a Local Court exceeding \$750 carries interest at a rate from time to time published in the *Government Gazette*. The Commission in its Part I Report recommended that interest should run in all Local Court proceedings, whether or not judgment exceeded \$750, including those in the Small Disputes Division: Part I Report para 17.9.

⁴⁴ As to the making of instalment orders at judgment, see paras 3.4-3.8 above.

⁴⁵ This would be an important exception to the notion that it is the creditor and not the debtor who has the right to choose whichever remedy he thinks fit: paras 2.1-2.2 above.

⁴⁶ LCA s 130 and LCR O 23 r 8: para 3.2 above.

⁴⁷ LCR O 23 r 9. Para 3.2 above.

3.22 The value and effectiveness of a general power to order instalments will be affected by the extent of information available to the court concerning the debtor's circumstances and the degree of encouragement to the debtor and creditor in seeking the exercise of the power on behalf of the debtor or creditor. At this stage the Commission considers that the Victorian requirement that the debtor should submit a statement of affairs with his application and the practice of giving the debtor the opportunity to complete such a statement when the creditor applies are both desirable. Assuming correct completion of the form, it will present a more precise account of the debtor's situation than could often be presented by oral evidence.

(b) Stay of execution

3.23 A key question in relation to instalment orders is whether there should be a stay of enforcement of the judgment either from the date of the service of the application for the instalment order, as in the Victorian Magistrates' Court,⁴⁸ or from the time of the making of the order, as in Local Courts in New South Wales,⁴⁹ or from some other time.⁵⁰

3.24 The Commission's preliminary view is that a stay of execution should operate from the time of the making of the order, unless the court order otherwise provides. However, a stay of enforcement of the judgment could prejudice the judgment creditor. Other creditors would not be bound by the stay of enforcement. Thus a second creditor with a judgment in a Local Court, the District Court or the Supreme Court might benefit from the stay against the first judgment creditor by, for example, obtaining the issue of a warrant of execution or a writ of *fi fa* against the judgment debtor's land and goods. Even though the first judgment creditor would have the right to lodge an objection seeking to have the instalment order cancelled, he could lose priority to another judgment creditor before the order is cancelled and the stay of enforcement ceases. Furthermore, while the stay of enforcement is in operation, the judgment debtor could dispose of assets and thereby prejudice the creditor's prospects of later recovering the judgment debt by means of a warrant of execution.⁵¹

⁴⁸ Para 3.11 above. As well, the instalment order itself while in force and being complied with operates as a stay of enforcement: para 3.13 above.

⁴⁹ Para 3.15 above.

⁵⁰ It is presumably because of this stay of execution that Kercher says at 112 that the "ability of judgment debtors to apply for an instalment order is the most important tactical manoeuvre open to them after judgment, especially as most consumer default is due to inability to pay rather than obstinate refusal to do so."

⁵¹ By s 89(1) of the *Property Law Act 1969*, an alienation of property made with intent to defraud creditors is voidable at the instance of a creditor. However, it is left to the creditor to take the proceedings to have the transaction set aside. Also s 89(1) does not extend to property alienated for valuable consideration

3.25 One possible solution to this problem would be to provide that an instalment order may only be made on the application of the judgment debtor where the judgment debtor has no assets which could be seized under a warrant of execution. However, the order for payment by instalments requested by the judgment debtor might be acceptable to the judgment creditor despite a stay of execution. Furthermore, by the time expenses such as advertising, cartage and auctioneer's charges⁵² are taken into account, a warrant of execution might be unproductive even though there are assets which can be lawfully seized.

3.26 Another way of dealing with the problem would be to adapt the Victorian procedure so that when the clerk receives an application by a judgment debtor for payment by instalments, he would be required to forward a copy of the application and the statement of affairs to the judgment creditor. The judgment creditor would then have 14 days in which to set the application down for hearing by a magistrate. The parties would be notified of the date of the hearing and after considering evidence given at the hearing and the submissions of the parties, the magistrate would decide whether there should be an order for payment by instalments and consequently a stay of execution. The instalments ordered by the magistrate under this suggestion would not have to be those originally requested by the judgment debtor. By setting the application down for hearing before a magistrate within 14 days of receiving a copy of the application from the clerk, the judgment creditor would be able to ensure that he did not lose priority to another creditor until the question of whether there should be an order for instalments has been determined by the magistrate after a hearing. If he did not set the application down for hearing within the 14 days, the clerk would proceed to deal with the application in the normal way.⁵³ The judgment creditor could still file a notice of objection to the clerk's order. The matter would then be set down for hearing by a magistrate⁵⁴ but the judgment creditor could in the meantime lose priority to another creditor.⁵⁵

and in good faith to a person not having, at the time of the alienation, notice of the intent to defraud creditors: id s 89(3).

⁵² Para 7.5 above.

⁵³ Para 3.11 above. Under the Commission's preliminary view there would be a stay of execution upon the clerk making an order for payment by instalments: para 3.24 above.

⁵⁴ Para 3.11 above.

⁵⁵ Paras 2.11 and 2.12 above.

(c) Examination of the judgment debtor

3.27 Where a judgment creditor applies for an instalment order, the judgment debtor may not have lodged a completed statement of affairs. The Commission's opinion at this stage is that the clerk of a Local Court should be able to make the instalment order sought by the judgment creditor or to refuse to make it, without an oral examination and notwithstanding that the judgment debtor has not returned a completed statement of affairs. The clerk will consider the amount of the instalment sought and will exercise a discretion whether to grant or refuse the order sought. The judgment debtor will still be entitled to lodge an objection to the making of the order within the prescribed time and thus have the issue decided by the magistrate.⁵⁶ Similarly, the judgment creditor could lodge an objection to a refusal by the clerk to make the order sought.⁵⁷

3.28 If the judgment debtor defaults in payment under the instalment order, the judgment creditor may wish to apply for an attachment of earnings order.⁵⁸ It may be that an attachment of earnings order should not be made unless the debtor has been orally examined by the Court or has submitted a statement of affairs. That is a different question from the one under consideration in the previous paragraph and is discussed elsewhere in this paper.⁵⁹

(d) Effect of default in payment

3.29 The Commission's preliminary view is that a requirement that there be an examination of the debtor by a magistrate before the creditor can proceed to enforce the judgment after defaulting under an instalment order, as in Victoria, is not justified. The judgment debtor will still retain his right under section 139 of the LCA to apply to the magistrate for a stay of execution where he is unable because of sickness "or other sufficient cause" to pay the judgment debt. If attachment of earnings orders are introduced, then depending on the terms of the legislation, it may be that an earnings attachment order could only be made following

⁵⁶ Para 3.11 above. It is an important principle in the Victorian system that the initial order be made by the clerk. It would be unsatisfactory for the magistrate to make it because if there was an objection, he would be called upon to review a decision made by himself.

⁵⁷ Para 3.11 above.

⁵⁸ The judgment creditor is less likely to apply for the issue of a warrant of execution or make an application to the Court to attach a debt (as distinct from future wages) because, if either of these methods was likely to be successful, the creditor would probably have chosen one of them instead of applying for an instalment order.

⁵⁹ Paras 5.53-5.54 below.

default in an instalment order and that an examination of the judgment debtor by the Court would be required before an attachment of earnings order could be made.⁶⁰

3.30 To cater for payments which have been delayed in the mail or delayed because the debtor has been unable to attend to payment because of, for example, a short illness or a family emergency, it could be provided that failure to comply with an instalment order should not terminate the stay of enforcement until the failure had continued for at least 14 days.⁶¹ The Commission would also welcome comments on the ALRC proposal that the stay of enforcement should revive if the relevant payment were accepted by the creditor.⁶² Such a provision has the advantage that it avoids the need for a further application to the Court.

3.31 The question of whether magistrates should ever be able to make an order for imprisonment or punish for contempt where the judgment debtor defaults in paying the amount of the judgment debt or an instalment of it is discussed in Chapter 6.⁶³

3.32 When there has been default in the payment of an instalment and the stay of enforcement has ceased to operate, then normally the judgment creditor should be able to enforce the judgment debt for the whole of the balance owing. However, there could be instances where a magistrate might consider that payment of a sum which is part only of that balance should be enforced. The Commission at this stage feels that a provision along the lines of the second paragraph of section 138 of the LCA should apply.⁶⁴

⁶⁰ Paras 5.50-5.52 below.

⁶¹ As proposed by the ALRC: para 3.18 above.

⁶² Ibid. A provision catering for the issues referred to in para 3.30 would apply whether the order for instalments was made at judgment (paras 3.4-3.8 above) or after judgment.

⁶³ Paras 6.14-6.20 below.

⁶⁴ The second paragraph of s 138 is explained in para 3.3 above.

Chapter 4

EXAMINATION IN AID OF EXECUTION

1. PRINCIPAL ISSUES

4.1 In a Local Court, a judgment debtor can be examined before a magistrate as to his property and means of satisfying a judgment debt. The basic purpose of the provisions under which the examination takes place is to help the creditor find out what assets the judgment debtor has and thus to work out the best means of enforcing the judgment. The procedure is known as examination in aid of execution.

4.2 The Commission's study of the topic has revealed that the following issues call for examination -

- * Should it be compulsory for an examination to be held before any enforcement step may be taken?
- * Should the debtor be given the opportunity to complete and file a questionnaire and so perhaps avoid the need for an examination hearing?
- * Can the procedure be made more effective than it is at present?
- * If the judgment debtor fails to appear before the magistrate in response to the summons, what procedure should be provided?
- * At the end of the hearing should the magistrate be able to make any enforcement orders and, if so, which orders?

2. PRESENT POSITION

4.3 A judgment creditor may file a praecipe with the clerk for a summons to issue to a judgment debtor requiring that the judgment debtor, or where the judgment debtor is a

corporation then any officer of the corporation, be orally examined.¹ If the clerk refuses the application, the applicant can apply to the magistrate for a direction that the summons should be issued.² In addition to requiring the judgment debtor to appear for oral examination, the summons requires the debtor to produce at the hearing "all Savings Bank Pass Books and other Bank Pass Books in [the debtor's] name and all books deeds papers and writings of whatsoever nature in [the debtor's] possession or power, in any way relating to [his] financial affairs." The summons is served on the judgment debtor. However, if the judgment debtor fails to appear and cause is not shown for his non-appearance, the magistrate may issue a warrant requiring the debtor to be arrested and brought before him for examination.³

4.4 The use of examination in aid of execution in Local Courts in Western Australia is significant. In the Perth Local Court, for example, about 18 examinations will normally be set down for hearing each week. In more than half of the applications the judgment debtor is a firm or company. At the examination the judgment creditor will be concentrating his efforts on obtaining information on the debtor's assets (including debts owed to the judgment debtor). He may also be seeking information on the debtor's liabilities, for example, the amount owing on the mortgage over the debtor's land where the creditor wishes the land sold under a warrant of execution. He will not be focusing on the debtor's income as he would be if examining the debtor pursuant to a judgment summons.⁴

3. EXAMINATION AS A PREREQUISITE TO ENFORCEMENT

4.5 It is desirable that the means and financial affairs of the debtor should be fully known, so that a suitable enforcement process can be utilised by the judgment creditor. Under the recommendations of the Kelly Report, there would always be an examination before a judgment could be enforced against a consumer debtor.⁵ The Commission does not favour this approach. It would mean a slight shift away from the self-help principle.⁶ The judgment creditor might, for example, wish to have a warrant of execution issued without first having the judgment debtor examined. Admittedly, in a large proportion of cases there will have to

¹ LCR O 27 r 13(1).

² Id O 27 r 13(2). The fact that the clerk may refuse to issue the summons, leaving it to the applicant to apply to the magistrate for a direction, is some protection against a creditor who wishes to conduct an examination which is not justified.

³ LCA s 144(2).

⁴ Paras 2.13-2.14 above. Of course, occasionally an examination on a judgment summons will reveal that the judgment debtor has an asset that, for example, is susceptible to seizure and sale.

⁵ Para 3.19 above.

⁶ Para 1.10 above.

be an examination anyway so that an instalment order can be made or an attachment of earnings order made if that remedy is introduced. However, a requirement that there be an examination in every case will increase the overall cost of debt collection as well as impose an added burden on court resources. The requirement would also give the debtor more time to dispose of assets to the prejudice of the creditor, if the debtor wished to do so.

4. FILING OF A STATEMENT BY THE DEBTOR

4.6 There have been proposals by law reform agencies to alter the traditional procedure for an examination by introducing a questionnaire designed to obtain information from the judgment debtor as to his assets, liabilities, income and outgoings. For example, the Alberta Law Reform Institute has recommended that the judgment debtor be given the opportunity to lodge at the court a sworn statement of his assets and liabilities and the dispositions of property he has made since the debt was incurred.⁷ The form for the statement should be readily available from officers of the court. The debtor should be obliged to submit to cross-examination on the statement if the creditor wanted it. The examination would be in addition to examination in aid of execution if the creditor wished to avail himself of both processes separately.⁸ The Institute said that a judgment creditor might subject a debtor who has no exigible assets to considerable hardship and inconvenience before the judgment creditor eventually discovers this. It saw the sworn statement as a way of avoiding that hardship and inconvenience.⁹

4.7 In Local Courts in New South Wales an alternative procedure to examination in aid of execution has been established.¹⁰ This is provided by an examination notice. The notice, which is in a prescribed form, contains a questionnaire.¹¹ The registrar of a Local Court, on the application of the judgment creditor, may issue and serve the notice by posting it to the judgment debtor. The judgment debtor has the period specified in the notice, which is to be

⁷ ALRI Report Vol 1, 60.

In England the UK Report at para 485 recommended the use of a questionnaire in a prescribed form. Similar proposals were made by the New South Wales Law Reform Commission in NSWLRC Draft 48-51. The Commission also proposed the establishment of a separate office for the enforcement of judgments in New South Wales: id 4.

⁸ ALRI Report Vol 1, 60.

⁹ Ibid.

¹⁰ *Local Courts (Civil Claims) Act 1970* (NSW) s 43A. The section was inserted into the Act by Act No 106 of 1975.

¹¹ A copy of the notice is appended as Appendix III to this paper. For a form used in Victoria where an examination of an officer of a judgment debtor which is a corporation is to be conducted by the registrar in the absence of the judgment creditor, see Appendix IV.

not less than 14 days, in which to complete the questionnaire contained in the notice and return the notice direct to the judgment creditor. If the notice is truthfully completed and returned to the judgment creditor within the time specified in the notice, and the judgment debtor is examined pursuant to an examination summons within three months of the date of service of the examination notice, the costs associated with the examination summons will not be added to the judgment debt. The notice procedure can thus save the judgment creditor the necessity of issuing an examination summons, and the judgment debtor appearing on that summons. There is a costs incentive to the debtor to complete the notice correctly and return the notice. The judgment debtor is not under a legal duty to complete and return the notice.

4.8 A judgment creditor in a Local Court in New South Wales does not have to request an examination notice and may prefer not to in order to avoid the delay which could be caused by the issue of the notice. Many judgment debtors will either ignore the notice or fail to complete it within the prescribed time because of procrastination. There will be cases where for one reason or another, the response will be deficient. In deciding whether the scheme should be adopted in Local Courts in Western Australia, the costs involved in issuing the notice would need to be borne in mind. Alternatively, a judgment debtor could be given an opportunity to lodge with the Court a statement showing his financial position, including his assets, debts, income and expenditure, as proposed in Alberta. Both approaches could enable the judgment creditor to avoid the costs of execution where it would prove to be unsuccessful.

5. PRODUCTION OF DOCUMENTS AT THE EXAMINATION

4.9 The prescribed form of summons to the judgment debtor to appear at an examination in aid of execution requires the judgment debtor to produce:

" . . . all Savings Bank Pass Books and other Bank Pass Books in your name and all books deeds papers and writings of whatsoever nature in your possession or power, in any way relating to your financial affairs".¹²

4.10 In its preliminary submission to the Commission, the Institute of Mercantile Agents Ltd said that examination in aid of execution should be retained in Local Courts but modifications were needed to improve its effectiveness. One of the modifications suggested by the Institute was that the prescribed form of summons should be amended so that without

¹² LCR Appendix Part I form 185.

affecting the generality of the present requirement, it should be stated in the summons that the documents to be produced by the judgment debtor are to include -

- (a) bank statements;
- (b) pay slips;
- (c) mortgage statements;
- (d) documents relating to the title of any land owned by the debtor; and
- (e) tax returns for the two years prior to the judgment.

The Commission's preliminary view is that the Institute's proposal should be adopted. It enables the judgment creditor to require the judgment debtor to produce all relevant documents but gives the judgment debtor a better indication of the type of documents he should produce.

6. FAILURE TO ATTEND

4.11 If the judgment debtor refuses or neglects to obey the summons, the magistrate may "if good cause is not shown for the non-appearance of the debtor" issue his warrant to bring the judgment debtor before a magistrate to be examined.¹³ A different approach has been adopted in New South Wales. In that State examinations in Local Courts are by or before the registrar and where a judgment debtor fails to attend in answer to an examination summons, the *Local Court (Civil Claims) Act 1970* expressly grants the Court a discretion to authorise the issue of a warrant for his arrest or to adjourn the proceedings and order that the judgment debtor attend before the registrar on a date and at a time specified in the order.¹⁴ The registrar serves the judgment debtor with a notice informing him of the action which the Court has taken.¹⁵ Where the Court has authorised the issue of a warrant for the judgment debtor's arrest, the warrant may not be issued until after the expiration of 14 days from the service of the notice but may then issue on the application of the judgment creditor if the judgment debtor has not attended by arrangement with the registrar to be examined.¹⁶

¹³ LCA s 144(2); LCR Appendix Part I form 185B.

¹⁴ S 42(2). The functions of the Court under this subsection may be exercised by the registrar: id s 42(4B). Where the registrar adjourns the proceedings and orders the attendance of the judgment debtor on a specified date and time and the judgment debtor fails to comply with the order, the registrar could authorise the issue of a warrant.

¹⁵ *Local Courts (Civil Claims) Act 1970* (NSW) s 42(2).

¹⁶ Id s 42(3) and (4).

4.12 No doubt, the New South Wales provision was enacted because of the severe nature of the arrest process. The New South Wales approach raises the question of whether the judgment debtor should be given a second chance before a warrant is issued. It must be remembered, however, that if the judgment debtor fails to attend in response to an order to do so significant legal costs may have been incurred to no avail including those for the attendance of the creditor's legal representative at court. The judgment creditor will also have been put to loss by the delay and may be disadvantaged in other ways such as the judgment debtor disposing of an asset which could be seized if the judgment creditor obtained information on it.

7. DURATION OF WARRANT

4.13 The Crown Law Department in its preliminary submission to the Commission pointed out that in practice the issue of a warrant under section 144(2) does not take place on the magistrate making the order and it is necessary for the judgment creditor to file a praecipe¹⁷ before the warrant will actually be issued. It added that there was no limitation on the life of a warrant. It submitted that to ensure that the judgment creditor acted within a reasonable time, the warrant should, unless extended by leave, only continue in force for 12 months after the date on which the original leave to issue was granted. In the Commission's view, the suggestion has merit.

8. ENFORCEMENT ORDERS AT THE END OF THE EXAMINATION

4.14 The ALRC has pointed to the variety of examination procedures within single jurisdictions in Australia.¹⁸ Each examination order had a limited purpose and the court was severely restricted in the orders it might make. It pointed out that in Victoria, for example, there was one examination procedure for wage attachment orders, a second for instalment orders and a third for determining whether assets or debts exist for execution or attachment. The variety of procedures was confusing and unnecessary. It added to the cost of enforcement. There should be a single streamlined procedure and the court should have the

¹⁷ LCR Appendix Part I form 185A.

¹⁸ ALRC Report para 244.

power to make such enforcement orders as it sees fit. The choice of procedure should not impose artificial restrictions on the outcome of the hearing.¹⁹

4.15 At present a judgment creditor initiates an examination in aid of execution for the express purpose of ascertaining what assets the judgment debtor has. Usually his hope would be to obtain information on an asset which could be seized under a warrant of execution or on a debt which could be attached. It would change the present object of an examination in aid if, at the end of the examination, the magistrate could make an order for payment by instalments or an order of attachment of wages against the wishes of the judgment creditor. There is, however, a need to avoid duplication of examination procedures. Accordingly, the Commission's preliminary view is that if seizable assets are disclosed during the examination, the judgment creditor should be able to apply to the magistrate for the issue of a warrant of execution or a further warrant of execution. If no seizable assets are disclosed or if the judgment creditor does not apply for the issue of a warrant of execution but the information obtained from the judgment debtor indicates that some other form of relief is available, the judgment creditor should be able to apply for an appropriate order, for example, an order for -

- * payment by instalments;
- * attachment of debts; or
- * attachment of earnings.²⁰

¹⁹ Ibid.

²⁰ In its preliminary submission to the Commission, the Crown Law Department (now Ministry of Justice) made a submission which was concerned with avoiding duplication of procedures. It proposed that after obtaining judgment, the judgment creditor could apply to the Court for the issue of an "enforcement summons" against the debtor. In the application for the enforcement summons the judgment creditor could request either the issue of a warrant of execution or an examination in aid which could be conducted by a clerk delegate. If a warrant of execution were issued and returned "nulla bona" or "part executed" the judgment creditor could still request an examination in aid hearing. The judgment creditor could attend any examination hearing to examine the debtor to ascertain his assets and means of income. If seizable assets were disclosed during the examination whether it was held before a warrant of execution had issued or after a return nulla bona or part executed, the judgment creditor could apply to the Court for a further warrant of execution. If no seizable assets were disclosed, but the information obtained from the judgment debtor indicated that some other form of relief was available, such as attachment of earnings or debts, the judgment creditor could apply to the Court for an appropriate order.

Chapter 5

ATTACHMENT OF DEBTS AND EARNINGS

1. PRINCIPAL ISSUES

5.1 The LCA permits attachment (garnishment) of debts "owing or accruing" to a judgment debtor for the benefit of a judgment creditor which has the effect of diverting payment to satisfaction of the judgment debt.¹ This remedy is a desirable one from the perspective of both judgment creditor and debtor since no conversion of property to cash by sale is required with the usual discounting of value and associated costs. However, the remedy of attachment of debts is limited in its scope.² The main issues discussed in this Chapter are -

- * Should the range of ordinary debts that can be attached be extended?
- * Should provision be made for the attachment of wages and salaries?

2. ATTACHMENT OF ORDINARY DEBTS

(a) Existing position

5.2 The existing remedy of attachment is limited by the fact that the debt must be "owing or accruing" to the judgment debtor.³ A debt is owing to the judgment debtor if it is one for which on the day on which the garnishee order is made "the judgment debtor could have immediately and effectively sued the garnishee".⁴ If there are conditions to be fulfilled prior to being allowed to withdraw money from a bank account, this may prevent the account from being attached.⁵ A debt is accruing if it will mature into a present debt by the passage of

¹ LCA ss 144-153.

² Furthermore, s 145 of the LCA prohibits the attachment of the wages of "any servant, labourer or workman."

³ For the procedure under the LCA for attachment of debts see paras 2.18 above.

⁴ LCA s 145; LCR O 28 r 1; *Bank of New South Wales Savings Bank Ltd v Fremantle Auto Centre Pty Ltd and Poland* [1973] WAR 161, 164.

⁵ *Bank of New South Wales Savings Bank Ltd v Fremantle Auto Centre Pty Ltd and Poland* [1973] WAR 161, 162-163. Accounts which require the presentation of a passbook or card cannot be attached because they require the satisfaction of this condition before a withdrawal can be made. However, current or

time.⁶ If a debt is not owing or accruing, but may be payable at some uncertain future time, it cannot be attached by way of garnishment. The effect of this is to exclude monies which are to become payable in the future, such as wages or rents, or upon completion of work, such as building work,⁷ or fulfilment of some other condition by the debtor, such as the payment of commission on the sale of a property.

5.3 Where a debt is owed to the judgment debtor and another person jointly, the debt cannot be attached if one or more of the owners of the account is not a judgment debtor, even if it is possible to determine the exact portion of the joint debt that the judgment debtor is to receive.⁸ However, a joint debt may be attached if all the owners of the account are also joint judgment debtors.

5.4 A debt owed by the Crown or a Crown instrumentality to, for example, an independent contractor or a supplier of goods, is immune from attachment under the general principle of Crown immunity.⁹ A statutory body which is sufficiently removed from the shield of the Crown is liable in garnishee proceedings.¹⁰ However, it is often difficult to determine whether a particular government authority is covered by the immunity.

5.5 Commonwealth social security payments in the hands of the Commonwealth Government are not subject to attachment or garnishment.¹¹ They are also protected from garnishment when credited to an account with a financial institution.¹²

(b) General approach to reform

5.6 The Commission's preliminary view is that all debts, present, conditional, contingent or future, should be attachable subject to any exemptions. These matters are discussed below.

cheque accounts may be attached because a garnishee notice satisfies the requirement for a demand from the account holder before payment: Kercher 128.

⁶ *Bank of New South Wales Savings Bank Ltd v Fremantle Auto Centre Pty Ltd and Poland* [1973] WAR 161, 164.

⁷ In *Dunlop and Ranken Ltd v Hendall Steel Structures Ltd; Pitchers Ltd* (Garnishees) [1957] 1 WLR 1102 a debt was held not to be one which was owing or accruing where all that remained to be done under a building contract was to deliver an architect's certificate.

⁸ *Lloyd v Jacobs* (1887) 3 WN(NSW) 144.

⁹ *Samuel Allen and Sons Ltd v Mayfield Homes Pty Ltd; Commissioner for Railways* (garnishee) [1979] Qd R 68; Kercher 116.

¹⁰ *WA Purvis Stores Pty Ltd v Richardson; Country Roads Board* (Garnishee) [1941] VLR 56.

¹¹ See for example s 66(1) of the *Social Security Act 1991* (Cth) in relation to the age pension.

¹² See for example s 67 of the *Social Security Act 1991* (Cth) in relation to the age pension.

(c) Conditional debts*(i) Introduction*

5.7 Various jurisdictions have provided that conditional accounts may be subject to attachment or garnishment despite the existence of certain conditions in the arrangement between the judgment debtor and his debtor (the garnishee) which have not been satisfied, such that the debt is not "owing or accruing". These provisions are discussed below.

(ii) Victoria

5.8 In the Victorian Supreme Court and County Courts, savings accounts in banks and cooperative societies may be attached notwithstanding that the following conditions have not been satisfied:

- "(a) that a demand or notice is required before money is withdrawn;
- (b) that a personal application must be made before money is withdrawn;
- (c) that a deposit book must be produced before money is withdrawn;
- (d) that a receipt for money deposited in the account must be produced before money is withdrawn"¹³

5.9 The position which applies in Magistrates' Courts in Victoria is different. It is wider in that it applies to banks, building societies and cooperatives, credit unions, credit societies, and investment funds and corporations. However, it is narrower in that the only conditions mentioned are that a demand or notice is required before money can be withdrawn. Money standing to the credit of a judgment debtor in an account in one of these institutions is deemed to be a debt due or owing to him, whether or not a demand or notice is required before money may be withdrawn.¹⁴

¹³ *General Rules of Procedure in Civil Proceedings 1986* (Vic) r 71.03(1).

¹⁴ *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.01(2).

(iii) *New South Wales*

5.10 In New South Wales the legislation is wider in scope than that in Victoria. It applies to the Supreme Court, District Court and Local Courts.¹⁵ It applies not only to deposit accounts but also to withdrawable share accounts¹⁶ despite the fact that those accounts do not create the relationship of debtor and creditor.¹⁷ It applies to banks, building societies and credit unions, but not the other institutions covered in the Victorian Magistrates' Courts.¹⁸ The accounts may be attached notwithstanding that the following conditions have not been satisfied:

- "(a) a condition that a demand must be made before any money or share is withdrawn;
- (b) a condition relating to the manner in which or the place at which any such demand is to be made;
- (c) a condition that a passbook, receipt or other document must be produced before any money or share is withdrawn;
- (d) a condition that notice is required before any money or share is withdrawn;
- (e) except in the case of an account in a Starr-Bowkett society,¹⁹ a condition that any money or share must not be withdrawn for any specified period;
- (f) a condition prescribing a minimum amount in respect of any withdrawal from the account;
- (g) a condition that a minimum balance must be maintained in the account;
- (h) a condition relating to the account prescribed by the rules for the purpose of this subsection."²⁰

¹⁵ *Supreme Court Rules 1970* (NSW) Pt 46 r 10A, *District Court Act 1973* (NSW) s 103, *Local Courts (Civil Claims) Act 1970* (NSW) s 52A. The provisions implement the report of the New South Wales Law Reform Commission *Attachment of Money Deposited with Building Societies and Credit Unions* (LRC 46 1985).

¹⁶ In New South Wales the bulk of funds held by building societies is held as withdrawable share capital: New South Wales Law Reform Commission *Attachment of Moneys Deposited With Building Societies and Credit Unions* (LRC46 1985) para 2.25. Members of credit unions also hold withdrawable share capital though most money held by credit unions is on deposit by members: *ibid*.

¹⁷ See, for example, *Local Courts (Civil Claims) Act 1970* (NSW) s 52A(1), definition of "account".

¹⁸ See, for example, *Local Courts (Civil Claims) Act 1970* (NSW) s 52A(1), definition of "deposit-taking institution".

¹⁹ This is a type of building society.

²⁰ See, for example, *Local Courts (Civil Claims) Act 1970* (NSW) s 52A(2).

5.11 In the case of New South Wales Local Courts, these conditions are contained in section 52A(2) of the *Local Courts (Civil Claims) Act 1970*. Section 52A(2) is supplemented by subsection (4) of that section which provides:

" Where an amount standing to the credit of a judgment debtor in an account in a deposit-taking institution is attached, the garnishee order shall be deemed to operate as a notice of withdrawal or demand for payment under the contract between the garnishee and judgment debtor in respect of the account, and that notice or demand is, while the order remains in force, irrevocable and shall be deemed to have been received by the garnishee:

- (a) on the date of service of the order; or
- (b) where the judgment debtor is not entitled under the contract to give a notice of withdrawal or make a demand for payment on the date of service of the order - on the date on which the judgment debtor would, but for the order, have become so entitled."

The subsection has the general effect that where an amount in an account is attached, service of the garnishee order has the contractual consequences which would have followed if the garnishee had received a notice of withdrawal or demand of payment either when the order was served or, if the judgment debtor was not then entitled to give notice of withdrawal or demand payment, immediately the judgment debtor was entitled to do so. For example, if the account is subject to an unexpired non-withdrawal period after which moneys in the account are payable on demand, the amount attached becomes due for payment under the contract when the non-withdrawal period expires. However, as a further example, if the account is subject to an unexpired non-withdrawal period and a notice condition, the amount attached becomes due for payment under the contract on expiry of the notice period, commencing when the non-withdrawal period expires. In both cases, the actual attachment, as distinct from the requirement on the garnishee to make payment, would have taken place when the garnishee order was served.

5.12 Where it is a condition of an account that a passbook must be produced when making withdrawals, a double payment could be made by the financial institution: one by complying with the garnishee order and the other by making an "over-the-counter" payment on presentation of the judgment debtor's passbook. Where there is such a condition, the institution can deposit the debt attached to the extent of the attachment with the registrar of the court for a period of up to two months. If the institution acts with reasonable diligence to

give effect to the attachment order but pays the whole or part of the attached debt to the judgment debtor, either before or during this period, the court, on the application of the institution, may order the registrar to repay to the institution an amount equal to the amount it paid out.²¹ The registrar cannot pay the judgment creditor the moneys paid into the court by the institution until the period specified has expired unless he is satisfied that the institution has recovered the passbook.²² By utilising these provisions, the institution can avoid loss through a double payment caused by a payment made on presentation of the passbook. In view of the use of computers to record the state of the account such a provision may no longer be necessary.

(iv) *Family Law Rules*

5.13 In order to satisfy certain Family Court orders for the payment of money, such as maintenance orders, the following may be subject to a garnishment order -

1. any debt or other sum of money due or accruing to the respondent; and
2. a sum standing to the credit of the respondent in a bank, building society, cooperative housing society or similar society, credit union, credit society or investment fund or corporation that is payable to the respondent on call or on notice.²³

The use of the term "on call or on notice" is intended to:

". . . encompass all money in one of the institutions described which is payable immediately or after a period stipulated in a notice, no matter what method of payment is required by the conditions of the contract between the institution and the customer."²⁴

5.14 If the sum standing to the credit of the respondent in one these bodies is payable to the respondent on call or on notice, it shall be a debt due to the respondent notwithstanding that any condition relating to the account or a demand or notice for payment under the account is

²¹ Id s 52A(6) and (7).

²² Id s 52A(8).

²³ *Family Law Rules* (Cth) O 33 r 4(4).

²⁴ *In the Marriage of Paleopoulos* (1979) 38 FLR 171, 183.

unsatisfied and may be made the subject of a garnishment order.²⁵ The order only operates to require payment of the amount when any necessary period of notice has expired, but service on the garnishee of the order for payment of the amount is deemed to be the giving of the notice.²⁶

5.15 It is not clear whether all conditions relating to accounts can be disregarded. While those relating to the method of payment can be, it may not be possible to disregard those that require a minimum balance to be maintained in an account or that withdrawals be for a minimum amount.

(v) *Provisions or recommendations elsewhere*

5.16 A similar approach to that in Victoria and New South Wales has also been taken in England where a list of avoidable conditions is set out in legislation²⁷ and it has also been recommended in Alberta.²⁸ The Commonwealth *Bankruptcy Act 1966* has recently been amended to allow collection of payments for the bankrupt estate in a wide variety of circumstances other than when debts are "owing or accruing".²⁹

5.17 The Alberta Law Reform Institute also recognised that there are likely to be situations, both within and outside the context of institutional deposits, where a contractual precondition to the payment of a debt which is not in the list would unreasonably prevent attachment. In these cases, the Institute recommended that the court should have the authority to require the garnishee to ignore the condition or to order some alternative method of satisfying the condition.³⁰ No such order should have the effect of requiring the garnishee to make payment into court pursuant to a garnishee summons before the earliest time that he could have been

²⁵ *Family Law Rules* (Cth) O 33 r 4(18).

²⁶ Id O 33 r 4(19).

²⁷ *Supreme Court Act 1981* (UK) ss 40 and 40A; *County Courts Act 1984* (UK) ss 108 and 109.

²⁸ ALRI Report Vol 1 221-225.

²⁹ *Bankruptcy Amendment Act 1991* (Cth) s 25. S 139ZK(3) which has been added to the *Bankruptcy Act 1966* (Cth) provides, inter alia:

"If, apart from this subsection, money would not be due, or would not be repayable on demand, to a person, or the obligation to transfer property to a person would not arise, unless a condition were fulfilled, then, for the purposes of this section, the money is taken to be due or to be repayable on demand, or the obligation to transfer the property to the person is taken to arise, as the case may be, even though the condition has not been fulfilled."

³⁰ ALRI Report Vol 1, 224-225.

required to make such payment pursuant to the terms of his relationship with the judgment debtor.³¹

(d) Future debts

5.18 The ALRC has recommended that all moneys which are, or will in the future be, due and payable to the debtor should be attachable.³² The only exceptions would be moneys exempt in bankruptcy under the Commonwealth *Bankruptcy Act 1966*³³ and the *Life Assurance Act 1945*³⁴ and payments in the form of salary and wages, pensions and periodical payments by way of workers' and accident compensation which should be excluded and required separate legislative treatment.³⁵ Subject to existing rights of third parties, the creditor would have an overriding right to payment at the time the debt becomes due and owing. Dealings with an investment or contingent right which would defeat the judgment creditor's interest would be prohibited and rendered void except in favour of a purchaser in good faith for value without notice.³⁶

5.19 Both the Ontario Law Reform Commission and the Alberta Law Reform Institute have also recommended legislation making it clear that future debts may be attached.³⁷ The Alberta Law Reform Institute recommended that the attachment of future debts should be subject to the following limitations -

- (a) It should be limited to entitlements that might reasonably be expected to arise out of a legal relationship existing between the judgment debtor and the proposed garnishee at the time of the attachment.³⁸ This would include an existing lease under which rent will become payable to the judgment debtor and an existing agreement by which the proposed garnishee will pay a

³¹ Ibid.

³² ALRC Report para 224.

³³ S 116.

³⁴ S 92.

³⁵ See paras 5.55-5.56 below. It seems to the Commission (WALRC) that spousal maintenance following a separation and maintenance or child support in respect of a child whose parents have separated may need to be excluded. Whether or not there should be separate legislative treatment in respect of spousal maintenance is discussed in paras 5.57-5.58 below.

³⁶ ALRC Report para 224.

³⁷ OLRC Report Part II, 138-142; ALRI Report Vol 1, 200-206. The Alberta report included some limitations on the right to attach future debts, such as that a garnishment order should expire after one year if the debt had not become payable in that time unless renewed by application to the court.

³⁸ ALRI Report Vol I 204.

commission to the debtor upon the debtor effecting a sale. It would also include a judgment debtor's possible future entitlement arising out of a cause of action for damages for personal injury or other damage.³⁹ It also recommended that the remedy should extend to future obligations that might reasonably arise out of a trust or other kind of fiduciary relationship between the proposed garnishee and the judgment debtor.⁴⁰

- (b) The garnishment should expire one year after the date it is served on the garnishee unless it is renewed and served before the end of the year.⁴¹
- (c) Deposit accounts should not be susceptible to garnishment except in respect of the balance held in the account at the time of service of the garnishment.⁴² If funds were credited to an account after it had been emptied by a garnishment, it would not be subject to further garnishment.

5.20 One matter which needs to be addressed if attachment of debts is to be applied to future debts is the need for the garnishment remedy to have a continuous effect.⁴³ If it did not have a continuous effect, a judgment creditor would have to seek a fresh garnishee order as each debt arose, for example, in the case of a payment of rent or remuneration under a contract for services. The need to seek fresh garnishment orders of recurring or periodic debts would make attachment of these debts not worth undertaking. This problem can be addressed by a garnishment process that would attach any debt that becomes due during a specified period of time or until the judgment debt is satisfied. Continuing garnishment may cause administrative difficulties for some garnishees. However, it does away with the premium placed on timeous applications for attachments of debts. It may also reduce the risk that a judgment debtor will frustrate the enforcement process by the assignment of a future debt.

5.21 If the scope of attachment of debts is expanded to include future debts such as rents, injustice could result if a judgment creditor could divert the debtor's entire cash flow to the satisfaction of a judgment debt. The judgment debtor may need some of the attached debt to

³⁹ Id 208-210.

⁴⁰ Id 203.

⁴¹ Id 206.

⁴² Id 208.

⁴³ The OLRC recommended that the garnishment remedy should have a continuous effect: OLRC Report Part II 150-153.

pay expenses associated with the production of the income that has been attached, for example, to meet payments on a mortgage on the rental property and other outgoings associated with the property. This form of hardship could be addressed by giving the court power to exempt a portion of the attached debt to ensure that expenses associated with the production of the attached debt are paid.⁴⁴ The court would need to be given powers to ensure that arrangements were made to apply the exempted portion of the attached debt to defraying the expenses.

(e) Joint debts

5.22 At present a joint debt cannot be attached unless all the owners of the account are also joint judgment debtors.⁴⁵ Both the Ontario Law Reform Commission and the Alberta Law Reform Institute have recommended that it should be possible to attach a judgment debtor's interest in obligations due to him and another, or others, jointly.⁴⁶ The Alberta Law Reform Institute concluded that the following reasons given by the courts for refusing to permit garnishment of joint debts did not justify the exemption -

- (a) Where money is due to a judgment debtor and another person jointly, neither has any independent right against the creditor. To permit a judgment creditor to attach the money would be to grant him a greater right in respect of the money than is held by the judgment debtor and the other person. The Alberta Law Reform Institute pointed out that a joint estate in personalty is severable at the instance of either joint owner and the judgment debtor could sever the joint estate and pay his share to his creditors.⁴⁷ Attachment might therefore be considered to be a forced severance of the joint interest. Care would need to be taken to ensure that the judgment creditor only had access to the debtor's

⁴⁴ See ALRI Report Vol 1, 210-211.

⁴⁵ Para 5.3 above.

⁴⁶ OLRC Report Part II 143; ALRI Report Vol 1, 195.

The one exception made by the Ontario Law Reform Commission was a debt owed to a partnership. It did so because there was another mechanism for reaching a judgment debtor's interest in partnership property and profits: OLRC Report Part II 143, 145-146.

⁴⁷ In Western Australia the authorities on whether personal property can be severed are conflicting. Some authorities hold that all that is required is a written notice whilst others hold that it is not sufficient: see *Burgess v Rawnsley* [1975] 1 Ch 429, 439-440 per Lord Denning MR. See also *Partriche v Poulet* (1740) 2 Atk 54, 55, per Hardwicke LC, cited by B A Helmore *Personal Property and Mercantile Law in New South Wales* (7th ed 1965) 159.

The Commission recommends in its report *Joint Tenancy and Tenancy in Common* (Project No 78 1994) at para 3.34 that it should be possible to sever a joint tenancy by written notice.

interest in the joint debt and that the non-debtor was not prejudiced by such access.⁴⁸

- (b) There is no established court procedure for the court to conduct an inquiry into the relative interests of two persons in a debt due to both of them.⁴⁹
- (c) It would be contrary to justice to permit a creditor to attach a debt due to two persons to answer the debt of one.⁵⁰ The Alberta Law Reform Institute considered at appropriate provisions could eliminate this source of injustice. To deal with this problem, the Institute recommended that there should be a presumption that joint owners have an equal interest and the judgment creditor would be entitled to that amount. This presumption could be rebutted by the judgment creditor, the judgment debtor or a joint owner other than the judgment debtor. A mechanism would be provided under which the court could resolve disputes as to the judgment debtor's interest.

5.23 If joint debts are made attachable, debts owed to partnerships could be dealt with by a separate mechanism in the *Partnership Act 1895*. The Act provides that no writ of execution shall be issued against any partnership property, except on a judgment against the firm.⁵¹ However, the Supreme Court may, on the application of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt or interest thereon.⁵² It may also appoint a receiver of that partner's share of profits and of any other money which may be coming to him in respect of the partnership. This provision probably does not apply to debts recovered in a Local Court. The Commission suggests that the matter be clarified by making the provision expressly applicable to a debt recovered in a Local Court.

⁴⁸ ALRI Report Vol 1, 193-194.

⁴⁹ Id 194.

⁵⁰ Ibid.

⁵¹ *Partnership Act 1895* s 28(1).

⁵² Id s 28(2).

(f) Crown debts

5.24 At present a debt owed by the Crown is not attachable.⁵³ This is at odds with the general principle which prevails in modern law that in civil proceedings the Crown is in the same position as a subject.⁵⁴ Moreover, the Crown is a huge purchaser of goods and services.

5.25 In other jurisdictions Crown debts can be used to meet judgment debts. In Tasmania the rules relating to garnishee proceedings apply to and bind the Government of Tasmania,⁵⁵ though proceedings must be taken against the Attorney-General.⁵⁶ In England the High Court and a County Court may make an order restraining a judgment debtor from receiving money payable by the Crown to him and directing that it be paid to a person who would otherwise be entitled to obtain an order for attachment of the debt.⁵⁷

5.26 Generally the special position of the Crown in civil proceedings between it and other plaintiffs and defendants has been eroded, and, in the Commission's view, there is no cogent reason for maintaining the special position of the Crown in relation to garnishee proceedings.⁵⁸ If, as with Commonwealth social security payments,⁵⁹ there are special reasons for protecting a debt from garnishee proceedings, that should be done expressly.

3. ATTACHMENT OF EARNINGS**(a) Existing position**

5.27 Future wages cannot be attached because they are not a debt owing or accruing to the employee.⁶⁰ Furthermore, section 145 of the LCA prohibits the attachment of the wages of "any servant, labourer or workman".⁶¹ South Australia is the only other Australian

⁵³ Para 5.4 above.

⁵⁴ *Crown Suits Act 1947* s 5.

⁵⁵ *Rules of the Supreme Court* (Tas) O 50 rr 15-17.

⁵⁶ Id r 15.

⁵⁷ *Crown Proceedings Act 1947* (UK) s 27.

⁵⁸ The OLRC recommended that all debts for which the Crown might be liable should be available to a judgment creditor by way of garnishment: OLRC Report Part II 146-150.

⁵⁹ Para 5.5 above.

⁶⁰ Para 5.2 above.

⁶¹ In the case of the SCA, the same prohibition is contained in s 123 of that Act. S 123 also extends to weekly payments under the *Workers' Compensation and Rehabilitation Act 1981* and a sum payable in redemption of those payments.

jurisdiction having such a restriction.⁶² The removal of the prohibition in section 145 of the LCA would still leave the limitation that the order could only operate in relation to one payday. Future wages could not be attached and a new order would have to be served each payday. In some Australian jurisdictions, statutory provision has been made for continuous attachment of wages.

(b) The object of a continuous scheme

5.28 The basic object of a continuous attachment of wages scheme is to deduct a set amount from the figure due to the employee (the judgment debtor) on each payday and to pay it to the judgment creditor until eventually the whole of the judgment debt is paid.

5.29 There is statutory provision for wage and salary attachment in all Australian States except Western Australia and South Australia. The following is an outline of the provisions which apply in magistrates' courts in New South Wales and Victoria.

(c) New South Wales: *Local Courts (Civil Claims) Act 1970*

5.30 The New South Wales *Local Courts (Civil Claims) Act 1970* provides for three types of wages attachment as follows -

1. A single attachment of the next wage payment due within four weeks.⁶³
2. A "continuous" order. This attaches all wages in the four week period after the order.⁶⁴
3. The "continuous" order becomes the third type and operates indefinitely if an instalment order is made while a "continuous" order is in force. The garnishment order will then operate for an indefinite period until the debt is satisfied. However, it will only operate at the instalment rate. This only occurs if the garnishment order is made before the instalment order.⁶⁵

⁶² *Mercantile Law Act 1936 (SA)* s 18.

⁶³ *Local Courts (Civil Claims) Act 1970 (NSW)* s 47.

⁶⁴ *Id* s 48.

⁶⁵ *Ibid*; *Local Courts (Civil Claims) Rules 1988 (NSW)* Pt 27 r 2 (13).

The first and second type of orders are subject to a general exemption limit: an amount per week equal to 80 per cent of the maximum single weekly payment of compensation for the time being referred to in section 37(1)(a)(i) of the New South Wales *Workers' Compensation Act 1987* (as adjusted under that Act) is protected from the garnishee order.⁶⁶ The third type of order which continues indefinitely operates only at the rate of the instalment order, which attempts to reflect the debtor's individual circumstances.⁶⁷ If an instalment order is in force first, any subsequent attempt to obtain a garnishment order must fail.⁶⁸ This is because instalment orders operate as a stay on subsequent coercive enforcement.⁶⁹ While the debtor continues to meet his instalment obligations, no other enforcement is available. Under the second and third type of order, the employer may keep 10% of each payment under the garnishee order as compensation for its administrative cost.⁷⁰

(d) Victoria: *Magistrates' Court Act 1989* and *Magistrates' Court Civil Procedure Rules 1989*

5.31 In the Victorian Magistrates' Court, there is a system of attachment of earnings. Since its enactment the Victorian system has been adopted in the Northern Territory.⁷¹ The object of the system is that full information be available to the court, so that it can mould the order to the circumstances of the debtor. The procedure is commenced by an application by the judgment creditor for an order to attach the judgment debtor's earnings.⁷²

5.32 The Court's power to make the order is discretionary.⁷³ The application is by summons and must be supported by an affidavit by the judgment creditor in which the judgment creditor sets out details concerning the judgment debt and the name and address of the judgment debtor's employer. The summons, a copy of the affidavit and also an uncompleted form headed "Judgment Debtor's Statement of Financial Position" must be served on the judgment debtor.⁷⁴ The form (Form 27F), which is detailed in the information it

⁶⁶ *Local Courts (Civil Claims) Act 1970* (NSW) s 49.

⁶⁷ Kercher 139.

⁶⁸ *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 27 r 2 (13).

⁶⁹ Para 3.15 above.

⁷⁰ *Local Courts (Civil Claims) Act 1970* (NSW) s 50.

⁷¹ *Local Court Act 1989* (NT) s 22 and *Local Court Rules* (NT) rr 29.01 and 29.13-29.26.

⁷² *Magistrates' Court Act 1989* (Vic) s 111(1); *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.15 (1).

⁷³ *Magistrates' Court Civil Procedure Rules* (Vic) r 27.13(1).

⁷⁴ *Id* r 27.15(4).

requires, is to be completed by the judgment debtor⁷⁵ and sent to the Court before the date of the hearing.⁷⁶

5.33 The aim of the legislation is for the Court to obtain sufficient information to set both a "normal deduction rate" and a "protected earnings rate". The normal deduction rate is "the rate at which the Court considers it to be reasonable that the earnings of the judgment debtor should be applied in satisfying the order to which the attachment of earnings order relates".⁷⁷ The second rate, the protected earnings rate, takes into account the needs of the debtor and of his dependants. It is described in the rules as:

". . . the rate below which, having regard to the resources and needs of the judgment debtor and of any other person for whom the judgment debtor must or reasonably may provide, the Court considers it to be reasonable that the earnings to which the order relates should not be reduced by a payment under the order."⁷⁸

In order to set these rates, the Court is given broad powers to obtain information. It may -

- (a) direct the judgment debtor to attend for an oral examination to be carried out by the Court at the time and place specified in the direction; and
- (b) require a written statement from the employer or a debtor of the judgment debtor.⁷⁹

The rules provide that unless the Court has received a completed "Judgment Debtor's Statement of Financial Position" form or has examined the judgment debtor, it must not specify a protected earnings rate which is less than 80 per cent of the net earnings of the judgment debtor.⁸⁰ No order can be made unless the debtor's income exceeds the protected earnings rate. If it does, the employer is ordered in respect of each payday to pay the

⁷⁵ Id Form 27F.

⁷⁶ See *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.18(5)(a). In practice, completed form 27F is sent to the Court, not the judgment creditor. A copy of the form is set out in Appendix V to this paper.

⁷⁷ Id r 27.18(1). This subrule goes on to provide that the normal deduction rate must not exceed:

". . . a rate that appears to the Court to be necessary for the purpose of -

- (a) securing payment of the amount due and unpaid under the order; and
- (b) securing payment within a reasonable time of any costs ordered by the Court to be paid by the judgment debtor."

⁷⁸ Id r 27.18(3).

⁷⁹ Id r 27.16.

⁸⁰ Id r 27.18(5).

judgment creditor the excess over the protected earnings rate up to a maximum of the normal deduction.⁸¹

5.34 The Court can make an attachment of earnings order in the absence of the judgment debtor. However, it may only do this if satisfied -

- (a) that the judgment debtor has been served with a copy of the application;
- (b) that the judgment debtor has had a reasonable opportunity of attending the hearing;
- (c) that the judgment debtor is employed by a known employer; and
- (d) as to the earnings of the judgment debtor.⁸²

For the purposes of this provision, the Court may act upon a statement obtained by it from the employer⁸³ or evidence given by the judgment debtor's spouse.⁸⁴ If the Court in considering an application in the absence of the judgment debtor or his spouse does not have before it sufficient evidence to comply with the requirement that it specify a protected earnings rate and a normal deduction rate,⁸⁵ it may make an order requiring the payment by the debtor of such amount as the Court thinks reasonable having regard to the circumstances of the judgment debtor so far as they are known to the Court.⁸⁶

5.35 Other provisions in the Victorian Magistrates' Court system of attachment of earnings include -

⁸¹ Id r 27.20. If for a particular payday, net earnings have fallen below the protected earnings rate, there is provision in r 27.20 protecting the judgment debtor for this shortfall when net earnings for a subsequent payday exceed the protected earnings rate. The rule also contains provision under which shortfalls to the judgment creditor in payment of the normal deduction rate can be made up to the judgment creditor. The rule achieves these objectives by providing that the employer will in respect of each payday whilst the order is in force, if the net earnings of the judgment debtor exceed the sum of -

- (a) the protected earnings of the judgment debtor; and
- (b) so much of any amount by which the net earnings that became payable on any previous payday were less than the protected earnings in relation to that payday as has not been made good on any previous payday -

pay, so far as that excess permits, to the judgment debtor the normal deduction in relation to that payday and so much of the normal deduction in relation to any previous payday as was not paid on that payday and has not been paid on any other previous payday.

The prescribed form of attachment of earnings order which is served on the employer follows the wording of r 27.20: *Magistrates' Court Civil Procedure Rules 1989* Form 27L.

⁸² Id r 27.17(1).

⁸³ Id r 27.17(2). The Court's power to obtain the statement is referred to in para 5.33 above.

⁸⁴ *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.17(2).

⁸⁵ Para 5.33 above.

⁸⁶ *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.17(3).

- * A requirement that an attachment of earnings order specify an amount in respect of the clerical and administrative costs of making payments under the order which an employer will be entitled to deduct in respect of each payment from the earnings of the judgment creditor.⁸⁷
- * A requirement that the employer who makes a payment in compliance with an attachment of earnings order give the judgment debtor a notice specifying the particulars of the payment.⁸⁸
- * A prohibition on the issue of any process of execution and the making of orders for the enforcement of the judgment debt, unless the Court orders otherwise.⁸⁹
- * A provision granting power to the Court to discharge, suspend or vary an attachment of earnings order on the application of the judgment creditor or the judgment debtor.⁹⁰
- * A provision which prohibits an employer from dismissing an employee, injuring him in his employment or altering his position to his prejudice, because of an attachment of earnings order.⁹¹

(e) The Commission's preliminary view

5.36 Modern credit is based upon the principle of payment of debt over time from a stream of income as an alternative to saving for the purpose to which the saved money is put. For most debtors the income which is earmarked to repay debt is their regular earnings from employment. Likewise, credit providers usually look to an applicant's earning potential when considering whether to extend credit. As the Alberta Law Reform Institute Report commented: "Wage garnishment taps the resource from which the debtor, if he or she were

⁸⁷ Id r 27.18(4). See also para 5.66 below.

⁸⁸ *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.24(1).

⁸⁹ Id r 27.13(2).

⁹⁰ Id r 27.21(1).

⁹¹ *Magistrates' Court Act 1989* (Vic) s 111(10). See para 5.75 below.

cooperating, would most likely pay the debt.⁹² When a debtor makes default in payment it will often be reasonable to divert earned income directly to a creditor rather than leaving it in the hands of the debtor to make the allocation.

5.37 Attachment of wages is an effective method of debt recovery. Writing of the Australian situation, the ALRC commented: "Wage attachment is a most effective and popular means of debt recovery in most of the jurisdictions where it is available."⁹³

5.38 It is also likely that the threat of attachment of wages would significantly reduce the need to rely on imprisonment as a sanction. Further, attachment of wages would ensure that a debtor who does not own seizable assets but earns substantial wages will not avoid the execution process.

5.39 There are two main arguments against the garnishment of wages. First, wages, in the case of most individual judgment debtors, represent the sole, or at least the main, source of income. It might be argued that wage garnishment would cause many judgment debtors to default on other obligations, and deprive them and their dependants of the means to meet immediate basic needs.

5.40 The Commission considers that this argument can be met to a large extent by requiring the amount to be deducted from the judgment debtor's wages to be determined by a court and requiring the court to take into account the needs of the debtor and of his dependants when determining the amount to be deducted.

5.41 Secondly it might be argued that garnishment of wages involves an invasion of privacy when the debt information is disclosed to the employer who has no independent interest in it. Further, when the information comes to the knowledge of the debtor's fellow employees this may cause embarrassment. More important, however, is the risk to the debtor's employment security by dismissal, by discrimination or by voluntary termination.

5.42 The risk of dismissal of judgment debtors from their employment where a wages garnishment order has been served on their employer arises from at least two sources. The first is employer distrust of persons who do not pay their debts and the second is the

⁹² ALRI Report Vol I, 226.

⁹³ ALRC Report para 129.

inconvenience and expense to the employer which are involved in the wage garnishment process.⁹⁴

5.43 The Commission is not aware of any detailed studies of the effects of wage garnishment in Australia. However, the Kelly Report⁹⁵ speaking of the author's enquiries in this regard in relation to New South Wales legislation said:

"Interviews with a leading debt-collecting lawyer and a suburban magistrate, however, support the view that perhaps 10 to 15 per cent of debtors whose wages are garnisheed in Sydney are, in fact, dismissed for that reason. On the other hand, of 30 trade union secretaries who responded to inquiries concerning the garnishee of wages, only three claimed to have knowledge of sackings consequent upon wage garnishee orders, each of these being located in New South Wales. Notwithstanding the lack of union complaints from Victoria, there can be no doubt that the problem exists in that State, too, for the Moloney Committee, in recommending to the Victorian Parliament the abolition of wage garnishees, clearly regarded discharge of employees as an ever-present danger arising from wage garnishment."⁹⁶

The Commission is of the view that appropriate legislative protection for employees whose earnings are subject to wage garnishment orders will reduce the incidence of employers dismissing or damaging the employment of judgment debtors because of garnishee wage orders.⁹⁷

5.44 Reports of law reform agencies which the Commission has studied on the topic of wage garnishment have been supportive of the concept. The ALRC, for example, considered arguments for the abolition of attachment but supported its retention.⁹⁸ It said there had to be a sanction for failure to comply with a court order for the payment of a judgment debt by instalments. It then went on to say:

"Imprisonment is generally the only available sanction in the absence of wage attachment. In the last resort, then, the choice must be made between wage attachment and imprisonment as the normal ultimate sanction for failure to repay debts. Whatever

⁹⁴ Kelly Report 82.

⁹⁵ Published in 1977.

⁹⁶ Kelly Report 84. The Moloney Committee's recommendation that wage garnishment be abolished in Victoria was not implemented.

Shortly before the Kelly Report was published, the *Magistrates (Summary Proceedings) Act 1975* was enacted in Victoria and s 128 of this Act specifically prohibited the discharge of an employee whose wages have been garnisheed for civil debts. The Act was repealed by the *Magistrates' Court Act 1989*. However, the provisions prohibiting the discharge of the employee have been re-enacted in the 1989 Act and are explained in paras 5.74-5.75 below. There is no equivalent provision in New South Wales.

⁹⁷ Para 5.74-5.77 below.

⁹⁸ ALRC Report paras 129-130.

its drawbacks, wage attachment is far less damaging to the individual and less costly to society than imprisonment. For that reason, wage attachment should not be abolished."⁹⁹

It recommended a number of modifications to procedures to give protection to debtors from collateral harm.¹⁰⁰

5.45 The Commission's preliminary view is that the LCA and the LCR should be amended to provide for attachment of earnings as a method of enforcing judgments provided provisions are put in place which will provide a satisfactory degree of protection for the job security of the debtor and the financial security of the debtor and his dependants. The Commission will now consider what it sees as the main issues to be resolved in establishing a garnishee of earnings scheme.

(f) Main issues to be resolved

(i) Duration of the order

5.46 In some jurisdictions a wages attachment order may only operate in respect of a very limited number of paydays, for example, the next payday only or those paydays which fall within the four week period after the order.¹⁰¹ Only infrequently does a single attachment or attachments in respect of wages paid within a four week period satisfy the relevant judgment debt. The effect is that judgment creditors are required to make repeated applications in order to obtain satisfaction of the judgment debts. Imposing additional costs on creditors in this way does not appear to be justified. At this stage, it is the view of the Commission that there should be no time limits and that an attachment of earnings order should operate until satisfaction of the relevant judgment debt with the Court having power on the application of the judgment creditor or the judgment debtor to discharge, suspend or vary the order. This is the position under the Victorian *Magistrates' Court Civil Procedure Rules 1989*.¹⁰²

5.47 An alternative would be for the attachment of earnings order to operate only until the arrears of instalments are paid. This would parallel the position with respect to an order of

⁹⁹ Id para 130.

¹⁰⁰ These appear in Ch 9 of the report. Some of the proposed modifications are referred to in para 5.47, in a footnote to para 5.61 and in para 5.76 below.

¹⁰¹ See para 5.30 above.

¹⁰² Rr 27.13, 27.20 and 27.21.

commitment under section 130.¹⁰³ However, because of the time, inconvenience and cost to the parties involved in obtaining an attachment of earnings order and the desirability of ensuring that future instalments are paid on time and of keeping to a minimum the number of applications on default to the Court, it does not appear to be appropriate to confine the operation of the order to the elimination of arrears. The ALRC proposed that although the Court should be empowered to order that the wage attachment order should continue until satisfaction of the judgment debt, it could specify otherwise.¹⁰⁴

(ii) *When the remedy may be used*

5.48 In the Victorian Magistrates' Court and New South Wales Local Courts, attachment of wages is a prime mode of judgment debt recovery. The general rule is that where a judgment debt has not been satisfied the Court, on the application of the judgment creditor, may make an order of attachment of wages.¹⁰⁵ By contrast, the Kelly Report recommended that orders for attachment of wages should not be regarded as the prime mode of judgment debt recovery.¹⁰⁶ It recommended that an order for attachment of wages should not be made without a prior examination hearing and then only if an order for payment by instalments would seriously prejudice the creditor's interests.¹⁰⁷ Wage attachment, the report recommended, should be restricted to those debtors who, wilfully or negligently or through

¹⁰³ Paras 2.14-2.15 above.

¹⁰⁴ ALRC Report para 229.

¹⁰⁵ There are important exceptions. For example, under Victoria's *Judgment Debt Recovery Act 1984* (as explained in paras 3.10-3.13 above) after judgment, either party may apply to have the judgment debt paid by instalments, or apply for a variation of those instalments. An application for an instalment order can also be made by either party, or even on the motion of the court itself, at the time of judgment. The parties can also file an instalment agreement. While the instalment order remains in force and is being complied with, it operates as a stay on enforcement or execution. However, in the context of wages attachment, provided neither party has obtained an instalment order which is still on foot, an application could be made for an order for attachment of wages without any other procedure having been first utilised.

The ALRC recommended that a judgment debtor should be able to apply for an order to pay by instalments and that while an instalment order was being complied with it should operate as a stay of enforcement of the judgment concerned: para 3.6 above. The ALRC would have had this in mind when it proposed in its report that notice of the application for the order of attachment of earnings should be given to the judgment debtor and that the notice should inform the debtor that he might -

- (a) attend the hearing of the application or submit to the clerk, being the hearing, a statement in writing as to his financial circumstances;
- (b) *apply for the making of an instalment order; or*
- (c) apply for an order that enforcement of the judgment be stayed:

s 52 of the draft Magistrates Court (Debt Recovery) Ordinance 1987 which is appended to the ALRC Report. The emphasis in (b) is inserted by the WALRC.

¹⁰⁶ Kelly Report 29-30.

¹⁰⁷ Id 30.

incompetence in handling their affairs, have persistently failed to comply with reasonable court orders for payment by instalments.¹⁰⁸

5.49 Another approach would be to empower the Court where a judgment debt has not been satisfied to -

- (a) make an order of attachment of earnings, or
- (b) order payment of the judgment debt by instalments.

If the Court were not satisfied that an order of attachment of earnings should be made, it could still order payment by instalments.

5.50 When one bears in mind the invasion of privacy which a wages attachment involves¹⁰⁹ and the risk of damage to the judgment debtor in terms of his employment,¹¹⁰ there is much to be said for the principle that attachment of earnings should only be used in the event of failure to comply with a court order for payment by instalments. A further reason for adopting this approach is that the cost to the employer of complying with an attachment of earnings order, which the Commission considers should be borne by the judgment debtor,¹¹¹ is significant.¹¹² At this stage, the Commission does not consider that an order for attachment of earnings should be limited to cases of persistent failure to comply with a court order for payment by instalments as suggested by the Kelly Report. However, the Court should not necessarily have to make an order for attachment of earnings where the judgment debtor has failed to comply with an instalment order. The Court should have a discretion as to whether to make an order for attachment and could take into account, among other things, the circumstances of the judgment debtor's failure to pay in deciding whether an order for attachment of wages or a further order for payment by instalments should be made.

5.51 It would be possible to empower the Court to make an order of attachment of earnings and also to order that the execution of the order be suspended as long as the debtor pays the

¹⁰⁸

Ibid.

¹⁰⁹

Para 5.41 above.

¹¹⁰

Paras 5.42-5.43 above.

¹¹¹

Para 5.72 below.

¹¹²

Paras 5.67-5.69 below.

judgment debt by the instalments and at the times set out in the order.¹¹³ This would have the advantage that there would only be the one examination of the judgment debtor instead of an examination on making of an order to pay by instalments and a further examination when application is made for an order of attachment of wages. However, there could be considerable time between the making of the order of attachment of earnings and its execution and by the time the order comes into operation, there might have been variations in the debtor's earnings or in the debtor's needs.¹¹⁴ During the period before the execution of the order of attachment of earnings, the judgment debtor would not have the advantage of the protection provided by the Victorian provisions - if they were adopted - in the event of the wages dropping: in that State the employer is only required to pay whatever excess there is above the protected earnings rate.¹¹⁵

5.52 The Commission's preliminary view is that a Local Court should be empowered to make an order for attachment of earnings only where the judgment debtor has first defaulted in complying with an order for payment by instalments.

(iii) *The question of prior examination of the judgment debtor*

5.53 The question arises as to whether there should be an examination of the judgment debtor as to his financial position before an order for attachment of wages is made. In Victoria, the judgment debtor will know from the summons what the date and time of the hearing of the application is and will also have the opportunity to complete and return the form headed "Judgment Debtor's Statement of Financial Position".¹¹⁶ However, orders can be made in the absence of the judgment debtor, even though the statement of financial position has not been returned.¹¹⁷ Such orders are in fact made in Victoria. The Court need only be satisfied that the judgment debtor has been served with a copy of the application, that the judgment debtor has had a reasonable opportunity of attending the hearing, and as to the name and address of the employer and the judgment debtor's earnings. This is information which

¹¹³ Suspended attachment of earnings orders are apparently made in Northern Ireland: ALRI *Remedies of Unsecured Creditors* (Report for Discussion No 3 1986) 204.

¹¹⁴ Admittedly, a party who is prejudiced could apply to the Court for a variation of the order: see, for example, r 27.21 of the *Magistrates' Court Civil Procedure Rules 1989* (Vic). That party, however, may not know how to use the procedures or may be deterred from applying because of the inconvenience to him of obtaining a variation order.

¹¹⁵ Para 5.33 above. However, the judgment debtor could always apply to the Court for a variation of the order.

¹¹⁶ Para 5.32 above. A copy of the form is set out in Appendix V.

¹¹⁷ Para 5.34 above.

the judgment creditor might be able to provide on his evidence alone. The ALRC in its report also contemplated that an order could be made in the absence of the judgment debtor.¹¹⁸ However, the Kelly Report recommended that an attachment of wages order should not be made without a prior examination hearing.¹¹⁹

5.54 An order made without the benefit of evidence provided by the debtor in court or by the debtor through a statement of his financial position is less likely to be satisfactory than one made with the help of such evidence. It will usually be in a judgment debtor's interest to attend the hearing or submit a statement. A judgment debtor who does not do either of these things may not have known how to use the procedures or may not have appreciated the implications of the court making an attachment of wages order. It is arguable that an order of attachment of wages should not be made unless the debtor is before the Court at the time the order is made or has submitted a completed statement of his financial position. If the debtor does not appear or submit a statement, an order could be made for his attendance at a later date, and if he failed to comply with that order, a warrant could issue for him to be brought before the Court to be examined. However, this would involve additional costs even if the procedure is shortened so that a warrant is issued following the initial failure to appear, or to submit a statement. The adoption of the Victorian approach might well be justified. This would mean that the Court could make an order of attachment of wages if it was satisfied that the judgment debtor had been served with a copy of the application, the judgment debtor had had a reasonable opportunity of attending the hearing, and as to the name and address of the employer and the judgment debtor's earnings.

(iv) *Earnings*

5.55 The Victorian *Magistrates' Court Civil Procedure Rules 1989* provide for attachment of "earnings", and not simply attachment of wages. Earnings are defined to mean any amounts payable to the judgment debtor -

- (a) by way of wages or salary, including any fees, bonus commission, overtime pay or other emoluments; or
- (b) by way of pension, including -

¹¹⁸ ALRC Report para 231.

¹¹⁹ Kelly Report 30.

- (i) an annuity in respect of past services; and
- (ii) periodical payments for the loss of any office or employment.¹²⁰

The definition concludes by providing that earnings do not include pensions payable to the judgment debtor under the following Commonwealth Acts: the *Social Security Act 1947*, the *Veterans' Entitlement Act 1986* and the *Seamen's War Pensions and Allowances Act 1940*. The *Social Security Act 1947* has been repealed and replaced by the *Social Security Act 1991*. The Commission's present view is that the amounts described in (a) and (b) should be liable to attachment. There are provisions in the *Social Security Act 1991*, the *Veterans' Entitlements Act 1986* and the *Seamen's War Pensions and Allowances Act 1940* which exempt pensions under those Acts from attachment.¹²¹ The express exclusion of these pensions from the definition of "earnings", as in the Victorian provision, is therefore appropriate.

5.56 The ALRC recommended that a court should be able to order the attachment of workers' compensation payments but that such an order should only be made after full inquiry as to the debtor's circumstances.¹²² It also recommended that the same rule should apply in respect of periodical payments under personal accident, disability and sickness insurance policies as well as to superannuation and private pension payments.¹²³ To that extent attachment legislation, it said, should extend to all forms of periodical payment, other than social welfare pensions, designed to provide the debtor with security in the event of loss, for whatever reason, of salary or wages.¹²⁴

5.57 Maintenance payments paid by one spouse to another following their separation are akin to income. Under existing law, future maintenance payments ordered to be paid by a court to a spouse are exempt from garnishment on the grounds of public policy.¹²⁵ The Ontario Law Reform Commission recommended that support and maintenance payments,

¹²⁰ R 27.01.

¹²¹ *Social Security Act 1991* (Cth) s 66 (in respect of age pension), s 119 (invalid pension), s 170 (wife pension), s 220 (carer pension), s 280 (sole parent pension), s 339 (widowed person allowance), s 387 (widow B pension), s 433 (sheltered employment allowance), s 485 (rehabilitation allowance), s 570 (unemployment benefit), s 642 (job search allowance), s 711 (sickness benefit), s 757 (special benefit), s 806 (special needs pension), s 869 (family allowance), s 928 (family allowance supplement), s 976 (child disability allowance), s 1019 (double orphan pension) and s 1052 (mobility allowance); *Veterans' Entitlements Act 1986* (Cth) s 125; *Seamen's War Pensions and Allowances Act 1940* (Cth) s 49.

¹²² ALRC Report para 234. The question of whether the judgment debtor should always have to be before the Court before an order of attachment of wages may be made was raised in paras 5.53 and 5.54 above.

¹²³ ALRC Report para 234.

¹²⁴ Ibid.

¹²⁵ *Re Robinson* (1884) 27 Ch D 160 (CA); *Watkins v Watkins* [1896] P 222 (CA).

whether payable in accordance with a judicial support or maintenance order, or under a cohabitation agreement, marriage contract, separation agreement or paternity agreement, should prima facie be exempt from garnishment. However, it further recommended the judgment creditor of a maintenance creditor should have the right to apply to a court to permit some or all of such proceeds to be garnished, having regard to the needs and means of the maintenance creditor.¹²⁶ In England the *Report of the Committee on the Enforcement of Judgment Debts*¹²⁷ supported the existing prohibition¹²⁸ but later in the report it proposed that a court should have power to appoint a receiver of maintenance payable to a wife under a court order so that it can use the money to pay the judgment creditor.¹²⁹ The ALRC Report did not consider the question of whether it should be possible to garnishee future maintenance payments and, as far as the Commission is aware, this is not possible in any Local Courts in Australia.

5.58 The Commission can see a number of arguments against the garnishment of future maintenance payments ordered to be paid by a court. First, in many cases the maintenance payments would not be sufficient to make application for a garnishee order worthwhile. Secondly, the courts exercising jurisdiction under the *Family Law Act* have the power to vary maintenance orders. Such variations could create complications. Thirdly, an application for a garnishee order would be likely to harm an already difficult relationship between the spouses concerned. It may very well be that provision in Local Courts at any rate for the garnishment of future maintenance payments which have been ordered by a court would not be justified.

(v) *Exempt income*

5.59 In those Australian jurisdictions where attachment of wages legislation operates, there are provisions exempting part of the debtor's wages. Exemptions are necessary to ensure that the debtor is left with a sufficient amount to provide for his own and his family's basic living needs.

5.60 Under the New South Wales *Local Courts (Civil Claims) Act 1970*, where the attachment is for the next wage payment due within four weeks or all wages in the four week

¹²⁶ OLRC Report Part II 183-184.

¹²⁷ 1969 Cmnd 3909.

¹²⁸ Report para 724.

¹²⁹ Id para 886.

period after the order, the exemption is an amount per week equal to 80 per cent of the maximum weekly payment of compensation for the time being under the *Workers' Compensation Act*. The merit of the exemption lies in its inbuilt inflation counter but the exemption sets the sum without reference to the circumstances of the individual debtor and his dependants.¹³⁰ Another example of an exemption with an inbuilt inflation counter is found in Queensland where the exemption for a single worker with dependants or a married worker is the amount of the minimum wage.¹³¹

5.61 The New South Wales and Queensland exemptions described above are examples of the exempted amount being calculated by reference to a legislative formula. However, in the Victorian Magistrates' Court the exempt amount is set by the Court, regard being had to the circumstances of the individual debtor and his dependants. The aim of the requirement that the Court set both a "normal deduction rate" and "a protected earnings rate" is to mould the order to the circumstances of the debtor.¹³² If the debtor is not examined by the Court or does not submit a completed "Judgment Debtor's Statement of Financial Position" form, the Court can still specify a protected earnings rate but it must be not less than 80 per cent of the net earnings of the judgment debtor.¹³³

5.62 An interesting proposal was made by the Californian Law Revision Commission. It recommended a scheme whereunder 30 times the minimum hourly rate under an industrial

¹³⁰ See Kelly Report 86. The third type of order operates indefinitely but only at the rate of the instalment order made while the second type of attachment order is in force. Instalment orders are set with an attempt to adjust the rate to the debtor's individual circumstances.

¹³¹ The *Wages Attachment Act 1936* (Qld) s 3.

¹³² See para 5.33 above for the definitions of "normal deduction rate" and "protected earnings rate".

¹³³ *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.18(5). The Rules also provide that if the Court in considering an application in the absence of the judgment debtor or his spouse does not have before it sufficient evidence to comply with the requirement that it specify a protected earnings rate *and* a normal deduction rate, it may make an order requiring the payment by the debtor of such amount as the Court thinks reasonable having regard to the circumstances of the judgment debtor so far as they are known to the Court: r 27.17(3); para 5.34 above.

The Scheme in the Victorian Magistrates' Court contrasts with that proposed by the ALRC Report. The ALRC recommended that -

- (a) 80% of the debtor's net salary should be exempt from attachment.
- (b) Attachment should not extend to an amount which would result in a debtor being left with less than as prescribed amount. This amount should be determined by reference to social welfare payments.

The ALRC qualified these recommendations by also recommending that -

- (i) the creditor should be entitled to apply at an examination hearing, or on the basis of detailed information supplied by the debtor, for an order for the attachment of an amount in excess of that permitted under the recommendation referred to in (a) and (b) of this footnote, and
- (ii) the debtor should be allowed to apply for an order under which the amount attached is less than that under the recommendations referred in (a) and (b): ALRC Report para 231.

relations enactment would remain the basic exemption, but only 25% of the non-exempt earnings above that sum would be subject to wage garnishment.¹³⁴

5.63 The Commission's preliminary view is that any attachment of wages scheme introduced into Local Courts in Western Australia should ensure that the amounts deducted from the judgment debtor's wages are of such a size that the judgment debtor should not because of the attachment order be deprived of the means to provide for his own and his dependant's basic living needs.¹³⁵ Of the methods used in Local Courts in New South Wales and in the Magistrates' Court in Victoria,¹³⁶ it is the Victorian scheme which best caters for this objective. Under that scheme the Court is to set a rate - the protected earnings rate - below which it considers it to be reasonable that the debtor's earnings should not be reduced by a payment under the earnings attachment order. In doing this, the Court is required to have regard "to the resources and needs of the judgment debtor and of any other person for whom the judgment debtor must or reasonably may provide".¹³⁷ Because of this requirement, the needs of the judgment debtor and those dependent on him would be taken into account in deciding the figure which it is reasonable that the earnings should not be reduced below by a payment under the order. A system which endeavours to fix the exempted amount with reference to the circumstances of the individual judgment debtor will, of course, require more information to be placed before the Court than a system in which this is not done.

5.64 The Commission's preliminary view is that the concept of the protected earnings rate contained in the Victorian *Magistrates' Court Civil Procedure Rules 1989* should be adopted as the method for determining the exempt amount if an attachment of wages scheme is to be brought into operation in Local Courts in Western Australia.

(vi) *Costs of complying with the order*

5.65 In the opinion of the Commission, the employer should be reimbursed for the money and time expended in complying with the attachment of earnings order. This is fair to the employer and may minimise the risk of employers dismissing employees when an attachment of earnings order is served.

¹³⁴ California Law Revision Commission *Wage Garnishment and Related Matters* (1972) 117.

¹³⁵ See paras 5.39, 5.40 and 5.45 above.

¹³⁶ The New South Wales and Victorian methods are described in paras 5.30, 5.33 and 5.34 above.

¹³⁷ *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.18(3); para 5.33 above.

5.66 If employers are to be reimbursed, the question arises of how much should be paid to the employer and who should carry the burden of the payment. In the equivalent courts to Local Courts in Tasmania, there is no provision for compensation to employers in respect of an attachment of wages order.¹³⁸ However, in the Victorian Magistrates' Court, an employer when making payment to the judgment creditor from the judgment debtor's earnings is entitled to deduct and retain from the earnings of the judgment debtor an amount in respect of the clerical and administrative costs of making the payment. The amount which may be deducted and retained on each occasion is specified by the Court in the attachment of earnings order.¹³⁹ An inquiry made by the Commission at the Melbourne registry of the Court revealed that the amount specified is usually \$1.50 in respect of each payment, although sometimes an amount of \$1 or \$2 is specified. The amount set will be the same for both the initial and subsequent payments.

5.67 Under the second and third types of order which operate under the New South Wales *Local Courts (Civil Claims) Act 1970*,¹⁴⁰ the employer may keep an amount equal to 10 per cent of each payment made under the garnishee order in reduction of the judgment debt.¹⁴¹ In case of a small payment compensation to the employer would be inadequate. However, because the compensation is on a percentage basis, the larger the amount ordered to be deducted from each wage payment, the greater will be the compensation to the employer.

5.68 The Kelly Report said that reimbursement to the employer should be set at a realistic level. The report, which was published in 1977, said that the right to retain a proportion of 25 per cent of the amounts withdrawn from an employee's wages, at least where the order is made on a creditor's application, might go some way towards proper recompense.¹⁴²

5.69 The ALRC said that payments made to employers in those Australian jurisdictions which had wage attachment legislation was quite inadequate to cover employers' costs in collecting and paying the relevant moneys.¹⁴³ The ALRC adopted a different approach from

¹³⁸ See *Local Courts Act 1896* (Tas) ss 84-85A.

¹³⁹ *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.18(4).

¹⁴⁰ Para 5.30 above.

¹⁴¹ *Local Courts (Civil Claims) Act 1970* (NSW) s 50. Under the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT), the employers may deduct up to 10 per cent of each payment for the reasonable expenses incurred by him in complying with the order: s 278AY(2).

¹⁴² Report 88.

¹⁴³ ALRC Report para 235.

that operating in either the Victorian Magistrates' Court or Local Courts in New South Wales.

It recommended that:

"Employers should be entitled to deduct a prescribed sum from the amount attached. That sum should be set by regulations at a level which adequately compensates employers for the average expense of attachment. As initial processing is likely to be more expensive than subsequent deductions, different sums should be set for initial and subsequent attachment."¹⁴⁴

5.70 Inquiry by the Commission at the Melbourne registry of the Victorian Magistrates' Court showed that the amount ordered to be attached from judgment debtors' wages (the normal deduction rate) on each payday varied. Amounts of \$20.00 or \$30.00 a week were common, although the "normal deduction rate" could be a much higher figure. It all depended on the circumstances. From these amounts the employer retained an amount also specified by the Court for his clerical and administrative costs.

5.71 The Commission has not carried out investigation into what would be the likely cost to an employer of complying with an attachment of wages order in Western Australia.¹⁴⁵ However, if investigation later shows that the cost in respect of each payment is over say \$15, the reimbursement of that cost would be a significant burden on the party ultimately bearing the cost. If that party is the judgment creditor, the effect would be that in many cases it would not be worth the judgment creditor applying for an order. However, if the party bearing the burden is the judgment debtor - as the Commission at this stage considers it should be¹⁴⁶ - the amount retained by the employer from the judgment debtor's wages will usually be quite significant by the time the debt is paid, particularly for a judgment debtor whose wage is comparatively low.

5.72 In the Victorian Magistrates' Court, it is the judgment debtor who carries the burden of the compensation paid to the employer.¹⁴⁷ In the Queensland Magistrates' Court, the fee retained by the employer is not applied in reduction of the debt.¹⁴⁸ The fee is therefore at the judgment debtor's expense. In the case of those orders in the New South Wales Local Courts

¹⁴⁴ Ibid. The ALRC also recommended that all available steps should be taken to minimise the costs incurred by employers. In particular, they should be allowed to pay on a monthly basis, rather than weekly or fortnightly at the time of each salary payment: *ibid.*

¹⁴⁵ The Commission is not aware of any recent research in Australia into the cost of complying with an attachment of wages order.

¹⁴⁶ Para 5.72 below.

¹⁴⁷ *Magistrates' Court Civil Procedure Rules 1989* (Vic) rr 27.18(1), 27.18(4), 27.20 and Form 27M.

¹⁴⁸ *Magistrates' Courts Rules 1960* (Qld) r 261B(3).

where the employer may deduct ten per cent from each payment for his own use, this is also at the judgment debtor's expense.¹⁴⁹ The Commission's preliminary view is that the judgment debtor, and not the judgment creditor, should bear the cost of reimbursing the employer for money and time expended in complying with the attachment order. The money retained by the employer for his own use should be deemed to have been paid to the judgment debtor but should not reduce the amount of the judgment debt owing by the judgment debtor to the judgment creditor. This would be consistent with the existing position under the LCR that the prescribed fees and costs associated with the enforcement of a judgment are recoverable by the judgment creditor from the judgment debtor.

(vii) *Stay on other enforcement measures*

5.73 The Victorian *Magistrates' Court Civil Procedure Rules 1989* provide that unless the Court otherwise orders, if an attachment of earnings order is in force, then -

- (a) no warrant or other process of execution may be issued; and
- (b) no order may be made for the enforcement of the order to which the attachment of earnings order relates.¹⁵⁰

Money coming in under other process would create a difficulty with the attachment order under which the Court has ordered the employer to deduct instalments from the judgment debtor's wages until the amount of the judgment debt notified in the order is paid. Furthermore, if, for example, a warrant of execution was successful in bringing in the amount of the judgment debt, it would mean that time and costs had been unnecessarily expended in obtaining the attachment order. Bearing in mind that the prohibition does not apply where the Court otherwise orders, the Victorian provision seems to be a reasonable one.

(viii) *Protection of the employee's employment*

5.74 An important disadvantage of an attachment of earnings system is the risk to the judgment debtor's employment security.¹⁵¹ Because of this, legislation is necessary to protect

¹⁴⁹ *Local Courts (Civil Claims) Act 1970* (NSW) s 50(1) and (3); Kercher 140.

¹⁵⁰ R 27.13(2).

¹⁵¹ Paras 5.41-5.43 above.

the employee against dismissal or other prejudice in his employment because of the attachment order.¹⁵²

5.75 Such a provision is contained in section 111(10) of Victoria's *Magistrates' Court Act 1989*. Section 111 (10) provides that an employer must not -

- (a) dismiss an employee,
- (b) injure an employee in the employee's employment, or
- (c) alter an employee's position to the prejudice of the employee,

because of a garnishment of earnings order.¹⁵³ The penalty is a fine. By section 111(11) the Court also has power to order a repayment of lost wages and to order the debtor's reinstatement.¹⁵⁴

5.76 In practice there may be some difficulty in establishing a violation of section 111(10) of the Victorian legislation. To counter this problem the ALRC recommended that dismissal within six months of the processing of an attachment order should raise a rebuttable presumption of breach of the relevant provision. If the employer were charged, it would be up to the employer to prove that the dismissal or prejudice within the six months did not occur because of the making of the order.¹⁵⁵

5.77 The Ontario Law Reform Commission has proposed that there should not be a penal sanction but instead a simple civil remedy. It recommended that upon finding that an employee has been disciplined because garnishment proceedings were or might have been

¹⁵² See paras 5.43 and 5.45 above.

¹⁵³ There are no provisions in the equivalent enactment in New South Wales - the *Local Courts (Civil Claims) Act 1970* - prohibiting discharge of an employee whose wages have been garnisheed.

¹⁵⁴ There is a provision similar to s 111(10) in the *Enforcement of Judgments Act 1991* (SA).

¹⁵⁵ ALRC Report para 236. Apart from this, the recommendations of the ALRC in relation to the protection of the employee are in similar terms to the provisions of s 111(10): *ibid*. As a result of amendments in 1992, the *Bankruptcy Act 1966* (Cth) contains provisions in similar terms to ss 111(10) and 111(11) where contributions from a bankrupt's income are enforced by giving notice to the bankrupt's employer to make payment in or towards the discharge of the liability of the bankrupt to make the contribution: *Bankruptcy Act 1966* (Cth) ss 139ZP(1) and (3). If the employer is charged, it is he who must prove that the dismissal, injury to the bankrupt's employment or alteration to the position of the bankrupt to the bankrupt's prejudice was not made because of the giving of the notice: *id* s 139ZP(2). The ALRI recommended that the equivalent in Alberta of an attachment of earnings order should not be acceptable as even a partial justification for the dismissal of an employee: ALRI Report Vol 1, 226-227.

taken against him, the court should be empowered to order the employee to be reinstated and to award him compensation for loss of wages and other benefits.¹⁵⁶

(ix) *The problem of more than one attachment order*

5.78 Under the attachment of earnings system which operates in the Victorian Magistrates' Court, if there is more than one attachment of earnings order in force, priority between the judgment creditors is determined by the dates on which the orders took effect. This is achieved by rule 27.23(1) of the *Magistrates' Court Civil Procedure Rules 1989* which provides:

"(1) If earnings become payable to a judgment debtor and there are in force 2 or more attachment of earnings orders, whether made under this Act or otherwise, in relation to those earnings, the person to whom the orders are directed -

- (a) must comply with those orders according to the respective dates on which they took effect and must disregard any order until the earlier order has been complied with; and
- (b) must comply with any order as if the earnings to which the order relates were the residue of the earnings of the judgment debtor after the making of any payment under an earlier order."

5.79 Rule 27.23(1) does not mean that payments under the second attachment order must not commence until the first attachment order has ceased due to the payment of the judgment debt or for some other reason. By rule 27.23(1)(b), the employer is required to comply with the second earnings attachment order as if the judgment debtor's earnings for a particular payday were the amount remaining after the making of any payment under the first earnings attachment order. Of this remaining amount, the figure which the Court has set as the protected earnings rate when granting the second order will be exempt but there will very often still be a surplus which can be applied in payment or towards payment of the normal deduction rate under the second order.¹⁵⁷ Where the surplus is sufficient to pay only part of

¹⁵⁶ OLRC Report Part II 170-171.

¹⁵⁷ An example would be -

First Order

At the time of the making of the first attachment of earnings order, the net earnings of judgment debtor were \$300 a week. The Magistrate in making the order specified the protected earnings rate at \$240 a week and the normal deduction rate at \$40 a week.

Second order

the normal deduction rate under the second order, it could be expected that once the first order has been paid out there would be sufficient surplus to enable the employer to pay the whole of the normal deduction each payday under the second order.¹⁵⁸

5.80 The Victorian approach is in line with the first in first served approach which normally determines who is entitled to the proceeds of an enforcement process.¹⁵⁹ The ALRC in its report adopted a different stance. It said, that money paid under a wage attachment order should be distributed to all judgment creditors who had successfully applied for a wage attachment order at the time of the relevant deduction. To facilitate appropriate division of the amount attached and to minimise the risk of overpayment, the employer should be required to pay the relevant money into court.¹⁶⁰

5.81 At this stage, the Commission does not favour the ALRC proposal. The proposal, if implemented, would make it more difficult for a creditor to decide whether it would be worth his while obtaining an attachment of earnings order. An additional administrative burden would also be imposed on court staff who would have to attend to the distribution of each deduction between the judgment creditors.¹⁶¹ Furthermore, the fact that the proceeds of an enforcement process are not shared with other judgment creditors will be counterbalanced to an extent if the judgment debtor is made bankrupt.¹⁶²

The magistrate in making the second order determines that the protected earnings rate should be \$240 a week and specifies accordingly in the order. He specifies the normal deduction rate for this order at \$40 a week. There will not be sufficient surplus to pay the whole of the \$40 each week. The surplus is only sufficient to enable \$20 a week to be paid. Pursuant to r 27.20 of the *Magistrates' Court Civil Procedure Rules 1989* the employer's responsibility is to pay the \$20 each payday to the judgment creditor under the second attachment order.

Notes to the example

(a) "Net earnings" means earnings less amounts which have to be deducted for income tax and certain amounts deducted from earnings that are allowable deductions under the Commonwealth's *Income Tax Assessment Act 1936: Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.01.

(b) The example, of course, is a simplified one.

¹⁵⁸ And see the provision in r 27.20 set out in footnote 81 above.

¹⁵⁹ See, for example, para 2.11 below.

¹⁶⁰ ALRC Report para 230. The method of division is not specified in the report. However, the draft Magistrates Court (Debt Recovery) Ordinance which is appended to the report provides that:

"The clerk shall distribute each amount received between the judgment creditors of the debtor on whose applications the orders were made in proportion to the amounts of their judgment debts then remaining unpaid": cl 54(2).

¹⁶¹ Although some Local Courts now have a computer system, there are no plans in place for a comprehensive computer system operating in all Local Courts in Western Australia under which it could be quickly ascertained which creditors had obtained an attachment of earnings order.

¹⁶² Subject to limited exceptions, all debts proved in a bankruptcy rank equally and, if the proceeds of the property of the bankrupt are insufficient to meet them in full, they are to be paid proportionately: *Bankruptcy Act 1966* (Cth) s 108. A creditor must always pay to a trustee in bankruptcy any money received by the creditor within six months before the presentation of the petition as a result of the

4. PROCEDURAL AND OTHER MATTERS

(a) Costs of compliance

5.82 The costs of an application for an attachment, and of the proceedings arising from or incidental to the application, are in the discretion of the magistrate.¹⁶³ If the garnishee pays into the court the debt due, owing or accruing from him to the judgment debtor, or so much of it as is sufficient to satisfy the judgment debt, five days before the return day of the summons, he is not liable for any costs incurred by the judgment creditor.¹⁶⁴

5.83 When a garnishee complies with a garnishee order by making a payment into court five days before the return day of the summons, the garnishee is not entitled to make any deduction from the attached debt for any expenses incurred in complying with the order. At present the garnishee is not permitted to deduct anything from the money he pays into court for his own work in making the payment into court. In New South Wales, the Local Courts legislation provides that the garnishee may retain for himself out of the debt attached an amount not exceeding that prescribed by the Rules.¹⁶⁵ The amount deducted is deemed to have been paid by the garnishee to the judgment debtor.¹⁶⁶ The deduction is at the judgment debtor's expense. The Commission's preliminary view is that provided the garnishee makes the payment into court at least five days before the return day of the summons he should be entitled to retain out of the debt a prescribed amount for his work in making the payment into court.

(b) Debts not due at date of order

5.84 One difficulty with the present procedure under the LCA and LCR¹⁶⁷ is that it does not take account of the fact that some debts may not be due at the time the garnishee order is made: the debt may be one which matures into a present debt by the passage of time.¹⁶⁸ Nor

attachment by him of a debt due to the debtor: id s 118. The requirement does not apply to the taxed costs of the attachment: *ibid*.

¹⁶³ LCA s 153.

¹⁶⁴ *Ibid*. As to the costs when the payment is not so made see LCR O 28 r 4(5).

¹⁶⁵ *Local Courts (Civil Claims) Act 1970* (NSW) s 47D.

¹⁶⁶ *Ibid*.

¹⁶⁷ The existing procedure is outlined in para 2.18 above.

¹⁶⁸ Para 5.2 above.

would it take account of future debts should they be made attachable.¹⁶⁹ In these cases, the garnishee should be required to pay the money into court on the date on which the debt is due for payment to the judgment debtor.¹⁷⁰ If the judgment debt had been satisfied in the meantime, the judgment debtor could show cause why the money should be paid to him and not to the judgment creditor. Where the garnishee is insured with respect to an attached debt, provision could be made for the garnishee to direct the insurer to pay the appropriate portion of the insurance proceeds into court when the liability of the garnishee to the judgment debtor is determined. The insurer would be required to comply with the direction.¹⁷¹

(c) Effect on set-off or counterclaim

5.85 Another difficulty that arises with regard to future debts or a debt which matures with the passage of time is that a right to set-off or counterclaim may arise between the date of the attachment and the payment into court. Where these rights arise before the date of attachment, the garnishee could avail himself of them by disputing his liability to the debt due to the judgment debtor.¹⁷² The Alberta Law Reform Institute has pointed out that a right to set-off accruing after attachment provided an opportunity for garnishees and enforcement debtors to collude to the prejudice of enforcement creditors.¹⁷³ To provide an appropriate balance it recommended that a set-off arising after attachment should be available but that only if the garnishee establishes:

- "(a) that the set-off arose pursuant to a binding commitment entered into before service of the garnishment, or
- (b) that it would be inequitable to deny the set-off."¹⁷⁴

¹⁶⁹ Paras 5.2 and 5.18-5.21 above.

¹⁷⁰ It would also be necessary to amend the LCA or the LCR to allow for a garnishee to dispute the existence of the legal relationship upon which the garnishment is founded: see ALRI Report Vol I, 212-214.

¹⁷¹ See ALRI Report Vol 1, 218-219.

¹⁷² Para 2.18 above.

¹⁷³ ALRI Report Vol 1, 217.

¹⁷⁴ Id 217-218.

Chapter 6

IMPRISONMENT FOR DEBT

1. PRESENT POSITION UNDER THE LCA

6.1 In English law, criminal sanctions were for a long time a central means of enforcing payment of judgment debts. The creditor was not required to establish anything more than that the debt remained unpaid.

6.2 The first Act passed in the colony of Western Australia, an Act for establishing a *Court of Civil Judicature 1832*, provided in section 8 that all process of execution issued out of the new Civil Court set up by the Act was to be directed against property only and not against the person. The imprisonment of a debtor for failure to comply with a judgment or order of the Court for the payment of money was thus barred. Western Australia's *Supreme Court Ordinance 1861* followed this approach.¹ However, the *Small Debts Ordinance 1863* which is a forerunner to the LCA permitted imprisonment by Local Courts in particular circumstances.² Then by section 3 of the *Debtors Act 1871*, imprisonment was allowed in similar circumstances to those in the *Small Debts Ordinance 1863* by any court in Western Australia. Section 130 of the LCA is closely based on section of the *Debtors Act 1871*. Section 130 empowers the magistrate to make an order committing the judgment debtor to prison for up to six weeks if the magistrate is satisfied that the judgment debtor has, or has had, since the date of the judgment or since the date of an order to pay by instalments, the means to have paid the whole of the judgment debt or to have paid an instalment which is due under the order, but has refused or neglected, or refuses or neglects, to pay the same.³

6.3 Section 130 is designed to deal with those debtors who wilfully⁴ or through neglect⁵ fail to pay debts which they are able to pay and who flaunt their legal obligations to pay their

¹ s 23.

² s 52.

³ For a more detailed explanation of s 130, see paras 2.13-2.17 above. s 3 of the *Debtors Act 1871* does not apply to judgments or orders under the LCA: LCA s 134.

⁴ *Stonor v Fowle* (1887) 13 AC 20, 24.

⁵ *Ex parte Fryer: In re Fryer* (1886) 17 QBD 718, 724.

debts.⁶ However, in practice, rather than being a process which is reserved for such debtors, the judgment summons has become a procedure which is routinely used against any type of debtor where a warrant of execution would not be likely to be successful in obtaining payment of the judgment debt. It is used for two purposes. If the judgment creditor decides not to issue a warrant of execution, the main purpose of a judgment summons under section 130 is to obtain an order for payment by instalments.⁷ It is not possible to garnishee the debtor's wages⁸ and there may not be debts which the creditor can garnishee.⁹ Furthermore, the provision in the LCR for the filing of consent affidavits by debtors¹⁰ tends to facilitate routine use of the judgment summons procedure. The second purpose is to provide an incentive for payment. Although the first judgment summons will normally only result in an order for payment by instalments,¹¹ the fact that ultimately an order for imprisonment might be made under the procedure is an incentive for paying instalments on time and for making up any instalment which falls into arrears.¹² The judgment creditor's intention is to use the section in a coercive, not a punitive, manner.¹³

6.4 The number of judgment summonses which are issued out of Local Courts in Western Australia is large and there is no doubt that the judgment summons procedure plays a big role in the enforcement processes of Local Courts, though the number of debtors who are ultimately imprisoned under section 130 appears to be comparatively small. Even when an

⁶ Defaulters may fall into one of four distinct categories: principled, calculating, negligent and indigent: see R Morgan and R Bowles *Fines: The Case for Review* [1981] Crim LR 203, 212. The *principled* are those who, because of a matter of conscience or hostility, wilfully refuse to pay while being able to do so. The *calculating* are those who wilfully refuse to pay while being able to do so. The *negligent* are those who can afford to pay but simply make no effort to do so. The *indigent* are those who are simply unable to pay: see Law Reform Commission of Western Australia *Report on Enforcement of Orders Under the Justices Act 1902* (Project No 55 Part III 1994) paras 2.3-2.4 in relation to fine defaulters

⁷ Under s 130(3): para 2.13 above.

The examination of the debtor on the hearing of the judgment summons will therefore normally be mainly concerned with his income and expenditure. Occasionally, the examination will reveal an asset which the judgment creditor later decides to issue a warrant of execution against or a debt which he decides to garnishee.

⁸ Para 5.27 above. One author notes that ". . . only South Australia and Western Australia regularly imprison debtors. It can be no coincidence that they are the only two States in which wage garnishment is prohibited": Kercher 152.

⁹ Para 5.2 above.

¹⁰ Para 2.16 above.

¹¹ See para 2.14 above.

¹² If the judgment debtor is eventually imprisoned, imprisonment will end if the judgment debt is paid before the term expires: LCA s 132.

¹³ This is a fact which underlies this comment of the ALRC when writing of imprisonment orders in Australia:

"The sad fact is that imprisonment orders are used by creditors, with the complicity of the legal system, simply as enforcement weapons. It is a notorious fact that those who go to prison do so simply because they do not have access to the funds necessary to pay the relevant debts. It is the poor and the uneducated who go to prison, not the dishonest and the recalcitrant": ALRC Report 88.

order of commitment has been issued,¹⁴ many debtors who are aware of the issue of the order will somehow find the money to pay the order out or make arrangements with the creditor in order to avoid going to gaol.¹⁵ It is difficult to obtain precise figures on how many debtors are imprisoned under section 130 because not all serve their time in prisons: some are held in police lockups. According to the Ministry of Justice's prison database 89 persons were imprisoned for "debt" in Western Australia pursuant to Local Court orders during the six year period 1 July 1988 to 30 June 1994. The break up of this figure by reference to financial years (1 July to 30 June) and the sex of those imprisoned was as follows:¹⁶

Financial Year	Males	Females	Total
1988/1989	12	3	15
1989/1990	13	2	15
1990/1991	14	3	17
1991/1992	17	3	20
1992/1993	9	3	12
1993/1994	<u>8</u>	<u>2</u>	<u>10</u>
Totals :	<u>73</u>	<u>16</u>	<u>89</u>

¹⁴ In recent years there has been a significant fall in the number of warrants of committal issued by the Perth Local Court to the Perth bailiff. In 1992, 92 were issued, in 1993, 26 were issued and in 1994, until 8 August, only 9 had been issued.

¹⁵ In the years 1989 - 8 August 1994 642 orders of commitment were issued by the Perth Local Court to the Perth bailiff. 263 of the orders could not be executed because the judgment debtor could not be found. Of the rest (379), only 39 (10.29%) led to arrest for non-payment of the judgment debt. 93 (24.54%) paid the debt in full. 15 (3.96%) were bankrupt. In 13 cases (3.43%) the order was either varied by the court or expired while in the hands of the bailiff. In the rest of the cases (219, 57.78%) the order was not executed at the creditor's request, in many cases because they were partially satisfied by payment to the creditor or the bailiff.

The information in this footnote and in the previous footnote is derived from statistics provided to the Commission by the Perth bailiff. He also provided the Commission with the information at the end of para 6.4 concerning the numbers of debtors held at the East Perth police lock up as a result of warrants of commitment executed by him.

¹⁶ When supplying the figures to the Commission the Ministry of Justice said that due to possible coding errors (for example: incorrect coding of court type), a number of the imprisonments might, in fact, originate from criminal matters, whilst other imprisonments for civil debt might not have been included for the same reason. The figures do not include prisoners convicted for a criminal offence who were "cutting out" imprisonment for debt at the same time as serving a custodial period for the criminal offence.

By comparison the following debtors were held at the East Perth police lockup as a result of warrants of commitment executed by the Perth bailiff -

Year	Held in Lockup
1989	9
1990	8
1991	12
1992	4
1993	<u>4</u>
Total:	<u>37</u>

6.5 Under section 130 the magistrate may only exercise his discretion to imprison a debtor where he is satisfied that ". . . the person making default either has or has had, since the date of the judgment or order, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."¹⁷ This provision has been criticised because it contains no express indication whether account should be taken of the judgment debtor's obligation to pay other debts or the need to provide for his own basic needs and those of his family.¹⁸ For a debtor on a modest wage or social security income, these matters will have pressing claims on his income. However, a consideration of these matters is arguably implied in the use of the term "means to pay". Even if that is not the case, the magistrate still has a discretion whether to order the commitment of the judgment debtor and these matters are taken into account in the exercise of that discretion.

2. THE POSITION ELSEWHERE

6.6 In Australia, there has been a slow drift away from imprisonment as a method of enforcing payment of a judgment debt. There is no equivalent provision to section 130 of the LCA and no other sanction in New South Wales, South Australia, Queensland and the Northern Territory.¹⁹ There is an equivalent provision to section 130 in Tasmania²⁰ and the

¹⁷ S 130(1): paras 2.13-2.17 above.

¹⁸ I Macdonald *Overview of Current Law*, a paper delivered at the Debt Recovery Forum held on 25 June 1993. The forum was a joint project of Financial Counsellor Resource Project Inc and Consumer Credit Legal Service (WA) Inc.

¹⁹ A similar provision to s 130 of the LCA was contained in s 169(f) of the *Local Courts Ordinance 1941* (NT). However the Ordinance was repealed and replaced by the *Local Courts Act 1989* (NT) which does not contain an equivalent provision to s 130 of the LCA.

Australian Capital Territory.²¹ The equivalent provision in Victoria has been repealed, although an analogous but much more restricted ground for imprisonment to that contained in section 130 of the LCA has been enacted in the Victorian *Judgment Debt Recovery Act 1984*. This change in Victoria has had the effect of almost abolishing imprisonment in practice.²² There is also a more restricted provision in New Zealand.²³ In England, imprisonment under the equivalent provision to section 130 of the LCA has been severely restricted.²⁴ The Commission has not studied the position on imprisonment for debt in the various Canadian provinces but is aware that in Alberta imprisonment for debt has been abolished.²⁵

3. SHOULD SECTION 130 BE RETAINED?

6.7 There are a number of arguments against the continued use of imprisonment as a sanction in enforcement of judgments of Local Courts.

6.8 If the judgment debtor is imprisoned pursuant to an order of commitment, he will be prevented from earning income while he is in a prison or lockup and this, of course, is self defeating from the point of view of the creditor. Furthermore, if the debtor's period in custody is of some duration, he might find that his employer has not been prepared to hold his job for him. Society as a whole could be put to the cost of providing emergency relief for the debtor's family while he is in custody and to further cost if the judgment debtor has lost his job. Society will have also borne the cost of keeping the judgment debtor in custody. In Western Australia, the cost of imprisonment per person in prison per day is about \$140.²⁶

²⁰ *Debtors Act 1888* (Tas) s 3.

²¹ *Magistrates Court Act 1930* (ACT) ss 181-187, 189. Ss 181-187 are repealed by the *Magistrates Court (Enforcement of Judgments) Act 1994* s 42(a) which is yet to commence.

²² Kercher 154.

²³ Para 6.15 below.

²⁴ *Administration of Justice Act 1970* (UK) s 11. This section provides that the jurisdiction given by section 5 of the *Debtors Act 1869* (UK) to commit to prison a person who makes default in payment of a debt, or instalment of a debt, due from him in pursuance of an order or judgment shall be exercisable only -

(a) by the High Court in respect of a High Court maintenance order; and

(b) by a county court in respect of -

(i) a High Court or a county court maintenance order; or

(ii) a judgment or order for payment of certain taxes or State contributions (including income tax and National Insurance contributions) as mentioned in Schedule 4 to the Act.

²⁵ The ALRI Report *Remedies of Unsecured Creditors* (Report for Discussion No 3, 1986) para 2.160 points out that under the *Debtors Act 1869* (UK) a form of imprisonment was permitted but this was reversed by two Alberta enactments which, read together, made it clear that imprisonment for debt, whether based on statute or on the common law, is abolished.

²⁶ The *Annual Report of the Western Australian Department of Corrective Services for the Financial Year ending 30 June 1993* at 21 states that the annual cost per prisoner for that financial year was \$51,188. This is \$140.24 a day.

6.9 As a general rule, people do not like having to give evidence in court and in addition many judgment debtors find it a considerable inconvenience to attend a judgment summons hearing. Under the existing practice, factors such as these can lead to debtors offering to pay instalments which they cannot realistically expect to meet. Very often the judgment debtor will not even be assisted by someone versed in the judgment summons procedures and might not fully understand what is happening. The absence of independent assistance would be particularly pertinent in the case of a consent affidavit. One of the clauses in the prescribed form of affidavit reads:

"I admit that I have, or have had, since the date of the judgment (order) the means to pay the sum in respect of which I have made default."

If the judgment debtor swears the affidavit without realising the correct meaning of that clause, the plaintiff might apply for a suspended order for commitment when an analysis of the defendant's financial position would show that he did not have the means to pay the sum in respect of which he had made default. On the other hand, some judgment debtors because of the fear of imprisonment might either at the court hearing or by means of a consent affidavit make an offer to pay by instalments which are less onerous than the judgment debtor should be able to manage. The Legal Aid Commission in its preliminary submission to the Commission said that the consent affidavit appeared to be contrary to the LCR and to be unfair to an uninformed judgment debtor. It said that this form should be rewritten.

6.10 Usually the execution of an order of commitment will be suspended while instalments, set by the magistrate, are paid by the judgment debtor,²⁷ but the debtor might be imprisoned if he defaults in paying the instalments. The default could be due to something unexpected and outside the debtor's control which occurred after the time of the hearing. However, when the order of commitment is issued there is at that time no opportunity for the judgment creditor to give an explanation to the court and no inquiry by the court about the reason for the actual default.

6.11 It is argued by many that imprisonment should play no role in the civil law of debt recovery and should be kept exclusively to the criminal law.²⁸ If a debtor acts dishonestly, he

²⁷ Para 2.15 above.

²⁸ For example, by Kercher at 156.

should be charged with a criminal offence, like any other white collar criminal.²⁹ An action between subjects concerning a debt is a civil proceeding but imprisonment is a criminal sanction. Under section 130 of the LCA, a sentence of imprisonment can be imposed without the careful safeguards of the criminal law. The "offence" need not be proved beyond reasonable doubt and the prosecution is not overseen by the Police or the Director of Public Prosecutions. Furthermore, in relation to fines imposed by Courts of Petty Sessions or by infringement notices, Acts have recently been enacted which should significantly reduce the use of imprisonment as a means of enforcement of the payment of fines for criminal and "regulatory" offences.³⁰ Under the proposed system, imprisonment would be used as a last resort and then only as a means of enforcing compliance with work and development orders. It would be incongruous for imprisonment to continue to be used as a means of enforcing the payment of judgment debts if its use as a means of enforcing the payment of a criminal sanction had been so severely restricted. Under the proposed system, suspension of motor vehicle driver's licence or motor vehicle registration would be the principal means of enforcing the payment of fines. This is an appropriate means of enforcing the payment of fines owing to the Government, which is responsible for issuing the licence or granting the registration, but not where the money owing is a sum due to a private person.

6.12 A number of reports of law reform agencies have opposed the concept of imprisonment for debt. For example, in 1969 the New South Wales Law Reform Commission concluded that: "Imprisonment for debt is the survival of an archaic procedure and . . . has no place in a modern system."³¹ More recently the Alberta Law Reform Institute re-examined the long-standing prohibition of imprisonment for debt in that jurisdiction and concluded that no change should be made.³² In its preliminary Report for Discussion the Alberta Law Reform Institute remarked that:

"Imprisonment is a punitive, criminal sanction which is not appropriate for commercial disputes, particularly when many debtors fail to pay because they are unable to do so Even if the creditor is to pay for the debtor's upkeep while in prison, the cost of imprisonment to the society will far outweigh any social benefit to be gained."³³

²⁹ Ibid.

³⁰ *Fines, Penalties and Infringement Notices Enforcement Act 1994 and Acts Amendment (Fines, Penalties and Infringement Notices) Act 1994.*

For a discussion of the proposed system see Law Reform Commission of Western Australia *Report on Enforcement of Orders Under the Justices Act 1902* (Project No 55 Part III 1994) Ch 5.

³¹ NSWLRC *Supreme Court Procedure* (Report No 7, 1969) 15.

³² ALRI Report Vol 1, 28-29.

³³ ALRI *Remedies of Unsecured Creditors* (Report for Discussion No 3 1986) 223-224.

The ALRC in its report *Debt Recovery and Insolvency* said:

"[Imprisonment's] sole value lies in the encouragement which it provides to others to pay their debts. The availability of a streamlined system of wage attachment and the removal of unnecessary restrictions on execution and on the attachment of ordinary debts would offer a more than adequate substitute in that regard The reforms commenced in the nineteenth century should be completed. Imprisonment for debt should be abolished. Proper use of contempt laws should be preserved."³⁴

6.13 For these reasons the Commission's preliminary view is that section 130 should be repealed if Local Courts are given power to punish for contempt of court or for conduct akin to contempt of court where the judgment debtor has the capacity to pay the amount of the judgment or an instalment but wilfully refuses to do so³⁵ and if other changes to the enforcement process make it more efficient. In order of importance these changes are -

- * Providing for the garnishment of earnings.³⁶
- * Extending the scope of debts (other than wages) that can be attached by a judgment creditor.³⁷

These enforcement methods are less damaging to the judgment debtor than imprisonment and do not impose on society the costs associated with imprisonment.

³⁴ ALRC Report para 135.

It is noteworthy that Article 11 of the International Covenant on Civil and Political Rights provides that "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation," and that the Covenant has been incorporated in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) as Schedule 2.

International conventions do not become a part of Australian domestic law until specifically so incorporated by domestic legislation, even though Australia has ratified the convention: see *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262, 272-274 per Kirby P. The fact that the Covenant has been incorporated in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) is not sufficient to incorporate it into Australian domestic law.

³⁵ See paras 6.14-6.20 below.

The repeal of s 130 would mean consequential repeals to a number of other provisions in the LCA, such as s 132 which provides that a person arrested or imprisoned under a warrant of commitment is entitled to discharge on payment of the amount of the warrant, and also to a number of provisions in the LCR.

³⁶ Paras 5.27-5.81 above.

³⁷ Paras 5.2-5.26 above.

4. PUNISHMENT FOR CONTEMPT

6.14 At present, a magistrate has power under the LCA to impose a penalty on a person who disobeys an order of the court.³⁸ However, this does not extend to an order for the payment of money, such as an order that the judgment debt be paid by instalments. If there was default in payment of an instalment, the creditor could proceed with a warrant of execution, garnishment of a debt owing to the judgment debtor or, if it is introduced, garnishment of earnings. There will be cases where none of these modes of enforcement is likely to succeed. However, the judgment debtor might have access to funds to which recourse is not possible, for example, cash the whereabouts of which cannot be located by the judgment debtor (or the bailiff).³⁹ The judgment debtor might be able to maintain a life style of comfort while ignoring the order of the court. The ALRC came to the conclusion that the solution to the problem lay in providing courts such as Local Courts with appropriate contempt powers. It recommended that the court should have power to treat the judgment debtor who fails to pay an instalment under an instalment order as being in contempt of court where the court is satisfied that -

- (a) the judgment debtor has the capacity to pay;
- (b) disobedience is both wilful and persistent; and
- (c) there are no other means available to the court or the judgment creditor by which payment of the relevant debt may be effectively enforced.⁴⁰

6.15 A similar approach exists in New Zealand. There the District Court may, on the application of the judgment creditor, order the respondent to undergo periodic detention for

³⁸ LCA s 155. The magistrate at his discretion may impose a penalty not exceeding \$5,000 for each offence with imprisonment in default of payment or the magistrate may commit the person to prison for a term not exceeding 12 months: *ibid*.

³⁹ The Commission is not speaking here of property to which recourse is not possible because it has been transferred by the judgment debtor. In this context, it is noteworthy that by s 89 of the *Property Law Act 1969*, an alienation of property with intent to defraud creditors is voidable at the instance of any person thereby prejudiced. The section does not extend to property alienated for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the alienation, notice of the intent to defraud creditors: s 89(3).

Where property has been transferred, the creditors might decide that their interests are best served by bankrupting the debtor. By s 121 of the *Bankruptcy Act 1966* (Cth) a disposition of property with intent to defraud creditors which is not a disposition for valuable consideration in favour of a person who acted in good faith is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy. By s 120 of this Act certain voluntary and marriage settlements are void as against the trustee and by s 122 certain conveyances, transfers, charges on property, payments made or obligations incurred in favour of a creditor which have the effect of giving that creditor a preference, priority or advantage over other creditors are also void as against the trustee in the bankruptcy.

⁴⁰ ALRC Report para 243, and para 43 of the Summary of Recommendations in the report.

such period, not exceeding six months, as the Court thinks fit if the Court is satisfied beyond reasonable doubt that:

- "(i) The judgment debtor has sufficient means to pay the judgment debt but refuses to do so; and
- (ii) All other methods of enforcing the judgment have been considered or tried and are inappropriate or unsuccessful".⁴¹

Detention under this provision does not operate to extinguish or affect the liability of the judgment debtor to pay the judgment debt.⁴²

6.16 A similar but not identical provision to that proposed by the ALRC is contained in section 19 of the Victorian *Judgment Debt Recovery Act 1984*. The Act provides for orders for payment of judgment debts by instalments. The judgment debtor is liable to be imprisoned by order of the court for not more than 40 days for default in payment of the instalments. However, the following stringent conditions must be met before an order for imprisonment may be made -

- (a) the debtor must be before the court;
- (b) he must have the means to pay the instalments; and
- (c) the default must be wilful and persistent, and without an honest and reasonable excuse.

When an order for imprisonment is made and later the judgment debtor pays the instalments which are in default, the judgment debtor is to be discharged from custody. Section 19 replaced statutory provisions⁴³ which had the same effect as section 130 of the LCA. The change led to a drop from 1600 Magistrates' Court commitment orders in 1984 under the old law to only one in the first full year of operation under section 19.⁴⁴

6.17 The following significant differences exist between section 19 of the Victorian *Judgment Debt Recovery Act 1984* and the ALRC proposal -

⁴¹ *District Courts Act 1947* (NZ) s 84o(1)(b).

⁴² *Id* s 84o(9).

⁴³ In the *Imprisonment of Fraudulent Debtors Act 1958*(Vic).

⁴⁴ Kercher 160.

- * Section 19 requires that the judgment debtor be before the court at the time the imprisonment order is made. This is not expressly required by the ALRC's proposal, although presumably in practice the court would call the judgment debtor before it before convicting the judgment debtor of contempt of court.⁴⁵
- * Under the ALRC proposal it would be a prerequisite to a contempt order that there be no other means available to the judgment creditor by which payment of the relevant debt might be effectively enforced. This is not the case under section 19 of the Victorian Act.
- * Under section 19, it must be proved to the court that there was no honest and reasonable excuse for the default. The judgment debtor does not bear the onus of proof.⁴⁶ The civil standard of proof applies.⁴⁷

6.18 Requirements that an order may not be made unless the judgment debtor is before the court, that the default is wilful and persistent and that there is no honest and reasonable excuse for the default would ensure that the procedure is not used in the routine manner. They would also have the effect of confining imprisonment to judgment debtors who are flaunting their legal obligation to pay amounts due by them under court order.

6.19 The Commission's preliminary view is that a provision along the lines of section 19 of the Victorian *Judgment Debt Recovery Act 1984* should be adopted. It has the advantage that it would provide a possible remedy where the judgment debtor has the means to pay the debt but recourse to the debtor's funds is not possible in practice under the laws relating to the enforcement of judgments. It also provides a possible remedy against a recalcitrant judgment debtor who has the means to pay the instalments but without any reasonable excuse simply refuses to pay. Another argument in favour of the provision is that by providing a sanction - admittedly only where the debtor's conduct is tantamount to dishonesty - the provision is assisting to preserve the standing of the courts in the community and public confidence in them. Against this is to be weighed the argument already alluded to in this chapter that criminal sanctions should play no role in the civil law of debt recovery.

⁴⁵ An express legislative provision that the judgment debtor is actually before the magistrate at the time the imprisonment order is made (as in the case in Victoria) appears to the Commission to be a desirable one.

⁴⁶ *Jendell Australia Pty Ltd v Kesby* [1983] 1 NSWLR 127, 134.

⁴⁷ Id 136.

6.20 The Victorian provision provides that the judgment debtor is liable to be imprisoned for not more than 40 days for default in payment of the instalments. Because of the undesirable consequences of imprisonment referred to above, the Commission's preliminary view is that the Court's powers should not be confined to imprisonment but should extend to -

- * imposing a fine; or
- * ordering the suspension of the judgment debtor's motor vehicle driving licence or registration of his motor vehicle,⁴⁸

until the judgment debt is paid in full.

⁴⁸ As may be done in the case of an unpaid fine under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* s 43.

Chapter 7

SEIZURE AND SALE UNDER WARRANTS OF EXECUTION

1. PRINCIPAL ISSUES

7.1 A warrant of execution is one of the main methods provided for in the LCA and the LCR for enforcing judgments or orders of Local Courts for the payment of money. The warrant directs the bailiff of the Local Court in which it is issued to obtain the amount of the judgment debt by the seizure and sale of any of the debtor's lands and goods.¹ In the Commission's view, the existing law relating to warrants of execution is in need of review. The following issues are discussed in this chapter -

- * Should the list of goods exempted by the LCA from seizure be reformed and, if so, in what way?
- * What should be the bailiff's responsibilities in relation to advertising before sale?
- * Should bailiffs' advertisements of land do more than at present to indicate the encumbrances to which the sale will be subject?
- * Should the LCR make provision for potential purchasers to be informed before the auction of any information in the bailiff's possession as to amounts owing under encumbrances?
- * Should the judgment debtor be given notice of the time and place of the proposed sale of his land under a warrant of execution?
- * Should the bailiff have a discretion to sell goods by private treaty instead of public auction?

¹ Paras 2.1 and 2.4 above.

- * Should the LCA or the LCR detail conditions under which a sale of goods or land can be effected by private treaty if the auction fails?
- * Should the bailiff in any event be able to offer property for sale by public auction on a second occasion?
- * Should there be provision in the LCR for the payment of a deposit by the judgment creditor to meet bailiff fees?
- * Where should the sale of the property take place?
- * Should there be a warranty of title to goods purchased at a bailiff's auction?
- * When should a bailiff who sells goods which are not those of the judgment debtor be liable?
- * Should the present right of the landlord of the judgment debtor to obtain payment of certain arrears of rent from the proceeds of a sale under a warrant of execution in priority to the judgment creditor under the warrant be abolished?²

2. EXEMPTIONS FROM SEIZURE AND SALE

(a) General

7.2 All major common law jurisdictions set limits on the exigibility of property in enforcement proceedings.³ Such limits typically exempt certain types of property from being taken from the debtor and sold to satisfy the debt, or protect items of property to a certain value. In this paper the term "exemption" will be used to refer to both approaches. One aim of exemptions is to ensure that a debtor is not deprived of property necessary for a frugal but

² In *Anderson v Liddell* (1968) 117 CLR 36, 43, Barwick CJ said that there was a need for statutory revision of the requisites of a sheriff's sale. The Commission is not concerned with sheriff's sales in this project but would agree that there is a need for legislative revision of the requisites for bailiffs' sales in Local Courts. Many of the issues listed in para 7.1 above relate to this topic.

³ By exigibility is meant the availability of property of a judgment debtor to be taken from him through processes of enforcement and disposed of in order to satisfy the debt.

dignified existence.⁴ Another aim of exemption provisions is to ensure that the debtor's ability to earn income is not unduly impaired.⁵

7.3 Section 126 of the LCA contains the only exemptions from seizure by a bailiff executing a warrant. The applicable part of the section reads as follows:

"Provided that the following goods shall be protected from seizure :-

Wearing apparel of such person to the value of \$100 and of his wife to the value of \$100 and of his family to the value of \$50 for each member thereof dependent on him; household furniture and effects to a value not exceeding in the aggregate \$300; implements of trade to the value of \$100; all beds and bedding; family photographs and portraits."⁶

The extent of exemptions provided in the LCA was last considered by Parliament in 1958 when the current amounts were set.⁷

7.4 The exemption provision in section 126 of the LCA envisages that the debtor is a married man and is the sole breadwinner in the family. Because he has paid for the clothes of his dependent wife and children, their clothes are his property and beyond the specified values can be seized to pay for his debts. In a large percentage of families, the situation envisaged by the provision does not exist in Western Australia. Even where one spouse has paid for clothing of the other, their mutual belief would usually be that the clothing belonged to the latter.

7.5 There are significant disbursements involved in the sale of goods by bailiffs. These include cartage, advertising, the bailiff's fee for attendance at auction, very often storage and usually auctioneer's commission. In the case of clothing and furniture, prices obtained on sale will normally be low. Because of these considerations, a seizure of goods will usually not take place where the debtor has no goods other than clothes and basic furniture.

⁴ See ALRC Report para 214.

⁵ Ibid.

⁶ The corresponding section in the SCA is s 118 which is on the same lines but with slightly higher exemption values. This is another example of inconsistency in enforcement systems in Western Australia.

⁷ *Local Courts Act Amendment Act 1958* s 4.

7.6 However, the present low exemption limits in Local Courts can result in goods being taken which are normally regarded as essentials. The debtor might obtain credit to buy replacements, thus worsening the debt cycle. This, of course, is to the disadvantage of other creditors.

7.7 There is a disparity between the exemptions allowed under section 126 of the LCA and those allowed in sequestration under the Commonwealth *Bankruptcy Act 1966* in relation to the property which is divisible among the creditors of the bankrupt. The list of exemptions in the latter case is set out in section 116(2) of the *Bankruptcy Act 1966* which is reproduced in Appendix VI. With respect to clothing, household property and implements of trade, the exemptions under section 116(2) are much wider than those in section 126 of the LCA. Section 116(2)(b) exempts "necessary wearing apparel [and] necessary household property of the bankrupt"⁸ and section 116(2)(c) exempts "ordinary tools of trade, plant and equipment, professional instruments, and reference books, of the bankrupt whose aggregate value does not exceed the prescribed amount"⁹ which is now \$2,000.¹⁰ The result of these disparities is that a single creditor is allowed by the LCA to seize and sell goods which, if the debtor were made bankrupt could not be seized and sold for the benefit of all the creditors.

7.8 Except in the case of Victoria and the Northern Territory, the statutory limits on the property which may be seized in other Australian jurisdictions are slight, as they are in Western Australia. For example, in Local Courts in New South Wales, only the following are exempt from seizure -

- (a) wearing apparel and any bedroom or kitchen furniture, and

⁸ And also "such other household property of the bankrupt, if any, as the creditors by resolution determine at any time before the trustee realises that other household property".

⁹ And also "such other property, if any, being such tools, plant and equipment, professional instruments or reference books as :

- (i) the creditors determine by resolution; or
- (ii) the Court, on application by the bankrupt, determines;

at any time before the trustee realises that other property".

¹⁰ *Bankruptcy Act 1966* (Cth) s 116 (2)(c) and s 116(2A)(a) and *Bankruptcy Rules* r 40B. The limit was \$1000 in 1985 but is now \$2,000: r 40B.

The two disparities can result in an anomaly where bankruptcy is preceded by execution. Where the execution is within a certain period of the commencement of the bankruptcy, the creditor is required to hand over to the Official Receiver the proceeds of the execution. Given the restricted nature of the exemptions under s 126 of the LCA, those proceeds may well represent, either in whole or in part, goods of the debtor which would have been exempt in bankruptcy; yet the Official Receiver will take those proceeds for the benefit of all the creditors of the bankrupt. The bankrupt debtor is not entitled to the proceeds insofar as they represent goods which would have been exempted from sequestration.

- (b) any ordinary tools of trade, plant and equipment, professional instruments and reference books, not exceeding in the aggregate \$500 in value.¹¹

In the Victorian Magistrates' Court, a more generous exemption level applies. The property which is exempt from seizure is:

". . . any property of a judgment debtor which if the judgment debtor were bankrupt under the Commonwealth *Bankruptcy Act 1966* would not under section 116(2)(b) and (c) of that Act be property divisible amongst the creditors of the judgment debtor."¹²

In the Northern Territory, "all personal property necessary for adequate living and continuation of work" is exempt from seizure.¹³

7.9 One preliminary submission received by the Commission maintained that the low level of exemptions provided for in section 126 of the LCA was causing some debtors to petition for bankruptcy rather than allow execution to proceed against goods not exempt under section 126. Bankruptcy may be an unsatisfactory result for the judgment creditor. Whatever is available for distribution by the trustee in bankruptcy will be distributed to all the unsecured creditors who have proved their debts. It can, of course, be argued that the level of protected income and property in the enforcement of judgments through the courts should be set a little lower than in bankruptcy law in order to balance the advantage that the judgment debtor will not have to endure the long term effects of bankruptcy.¹⁴

(b) Discussion

7.10 It seems to the Commission that an exemption of necessary wearing apparel and necessary household furniture and effects would be consistent with the aim of ensuring that a

¹¹ *Local Courts (Civil Claims) Act 1970* (NSW) s 59.

¹² R 27.09 of the *Magistrates' Court Civil Procedure Rules 1989* (Vic) which applies s 42 of the *Supreme Court Act 1986* (Vic) to Magistrates' Courts. The passage quoted in para 7.8 above is from s 42 of the *Supreme Court Act 1986* (Vic).

S 42 of the *Supreme Court Act 1986* (Vic) provides that for the purposes of that section, s 116(2)(b) and (c) of the Commonwealth *Bankruptcy Act 1966* are to be construed as if they did not contain any reference to a determination by the creditors by resolution or by the court in relation to other property of the bankrupt: see footnotes 8 and 9 above in this ch.

¹³ *Local Court Rules 1990* (NT) r 29.09(2).

¹⁴ It is, for example, an offence if an undischarged bankrupt obtains credit to the extent of \$3,000 or more from a person without informing that person that he is an undischarged bankrupt: *Bankruptcy Act 1966* (Cth) s 269(1)(a). The fact that a person has been bankrupt can affect his ability to borrow money or obtain credit even though he has been discharged from bankruptcy.

debtor is not deprived of property necessary for a frugal but dignified existence.¹⁵ The extent of the exemption could not be eroded by inflation and the exemption would be along the same lines as that applying in respect of these items in the case of a sequestration under the Commonwealth *Bankruptcy Act 1966*.¹⁶

7.11 However, as the ALRC pointed out in its report, the limitation of the exemptions in relation to wearing apparel and household furniture and effects by reference to what is "necessary" would mean that the exemptions would not be easy to apply in practice.¹⁷ The ALRC said that even in bankruptcy, the limitation must be difficult to apply. A bailiff would face additional difficulty in applying them. The bailiff would not have the benefit, as does the Official Receiver in bankruptcy, of a detailed statement of the debtor's affairs. Nor would there be time to arrange for valuation prior to seizure of the goods. The ALRC said the problem might be resolved in any of three ways -

- * The bailiff could be required, without making a seizure of the relevant items, to list any items of value and to provide the list to the creditor. The creditor could then apply to the court for an order authorising the seizure and sale of any of the items.
- * Administrative guidelines might be developed to assist bailiffs in making the relevant decision. The debtor would be entitled to challenge the seizure and to have the matter determined by the court.
- * Regulations might specify what was to be regarded as necessary for this purpose.

The ALRC rejected the first method because it was administratively cumbersome and would always require recourse to the court. The second method would be administratively simple and would involve recourse to the court only when there was a dispute as to the application of the relevant exemption. However, the ALRC said that administrative guidelines would not be binding on the courts and might be readily overturned. For reasons of cost, convenience and

¹⁵ Para 7.2 above.

¹⁶ Para 7.7 above. In its report, the ALRC expressed its belief that State execution laws should conform, as far as possible, with federal bankruptcy and insolvency laws: ALRC Report para 222.

¹⁷ ALRC Report para 214.

certainty, it said that the third option should be adopted. The regulations should be detailed and should take account of differences between the circumstances, particularly the family circumstances, of individual debtors.¹⁸ Although the preparation of the content for the regulations proposed by the ALRC would be a difficult task, the Commission's preliminary view is that the ALRC's recommendation is the desirable solution to the problem. However, in the case of Local Courts in Western Australia, the details should be set out in the LCR and not in regulations.

7.12 Another aim of exemption provisions is to ensure that the debtor's ability to earn income is not unduly impaired. The ALRC said that on this basis, items required by the debtor to earn a living, including tools, implements of trade, professional instruments and books, should be exempt. It said that the present exemptions¹⁹ in Australian jurisdictions in regard to such items were too low. It recommended that the money limit should be set at a more realistic level, say \$3,000. It also said that the existing exemptions took insufficient account of the variety of occupations and range of items required.²⁰ Pursuant to these recommendations, the exemption was drafted in the draft Ordinance appended to the ALRC's report as follows:

". . . any thing used by the person in the person's employment, trade, profession or business (including tools, instruments, plant and equipment and reference books) not exceeding \$3,000 in value in the aggregate."²¹

7.13 An alternative to the ALRC's proposal would be to confine the exemption to the narrower range of items in section 116(2)(c) of the *Bankruptcy Act 1966* namely "ordinary tools of trade, plant and equipment, professional instruments, and reference books" whose aggregate value does not exceed the prescribed amount. This would mean that the range of exempt items would be the same as that allowed in sequestration under the *Bankruptcy Act 1966*. It seems to the Commission that this range of items does not include stock in trade.²²

¹⁸ Ibid. This part of the recommendation is worded slightly differently in the summary of recommendations in the report. The summary says that the regulations should be detailed and "should take account of differences between different categories of household": summary para 21. No illustrations were given by the ALRC. The recommendation appears to be desirable because, for example, the furniture and effects which would be necessary for a judgment debtor living in a flat by himself would be less extensive than those which would be necessary for a judgment debtor living in a house with his spouse and children.

¹⁹ The Report stated the law as at 31 December 1985.

²⁰ ALRC Report para 214.

²¹ Draft Magistrate's Court (Debt Recovery) Ordinance 1987 cl 33(c).

²² In the Local Court jurisdictions in Australia, only the Northern Territory has an exemption which may be wide enough to include stock in trade (subject, of course, to the statutory limit to the exemption): para 7.8 above.

The ability of a credit provider to have access to the stock in trade of a retailer or a grazier is an inducement to the credit provider to make credit available to the retailer or grazier. An exemption to a maximum of \$3,000 would not alone enable the retailer or grazier to continue in business. The range of items set out in section 116(2)(c) of the *Bankruptcy Act 1966* might therefore be satisfactory for adoption in the LCA.

7.14 To enable the money limit to be easily amended so as to take account of inflation, the limit should in the case of Local Courts in Western Australia be set out in the LCR, and not in the LCA.

(c) Hardship

7.15 In its report, the ALRC pointed out that some judgment debtors are more susceptible than others to the loss of particular property.²³ The problem was a general one but was probably most noticeable in the case of motor vehicles. For one judgment debtor, the loss of a vehicle might only involve limited inconvenience. For another, such as an ill or handicapped person, the inconvenience might affect access to medical treatment or might otherwise involve quite unusual and unacceptable hardship.²⁴ The ALRC was of the opinion that the judgment debtor should be entitled to apply to the court for relief against execution in the case of exceptional hardship. It recommended that when execution is effected, the debtor should be entitled to apply to the Court within a limited period for an order exempting particular property from execution where the debtor or a member of his family would otherwise be likely to suffer exceptional hardship.²⁵ The recommendation was intended to apply to both real and personal estate.²⁶

7.16 As far as the Commission is aware a provision empowering the court to exempt particular property from execution on the ground of hardship does not apply in Local Courts in any of the Australian jurisdictions. However, provisions enabling the court to stay a warrant of execution are common. For example, under section 139 of the LCA where a defendant is unable because of sickness "or other sufficient cause" to pay the debt or damages

²³ ALRC Report para 216.

²⁴ Ibid.

²⁵ Ibid and the report's summary of recommendations para 22. In the case of the LCR, the period within which application could be made to the Court would need to be short because of the shortness of the minimum time which need elapse between seizure and sale (paras 2.8 above and 7.27-7.28 below) but there could be different periods for goods and land.

²⁶ ALRC Report summary of recommendations paras 22 and 27.

recovered against him, the magistrate may suspend or stay any execution which has been issued for such time and upon such terms as he thinks fit "and so from time to time until it appears that the cause of inability has ceased". It seems to the Commission that there is some doubt as to whether the magistrate can stay a warrant of execution permanently under section 139.²⁷

7.17 An alternative approach to that proposed by the ALRC would be expressly to extend the powers of the magistrate so that he could stay execution by the warrant of execution absolutely. It could be provided that the magistrate could stay execution by warrant of execution either absolutely or for such period and subject to such conditions as he thinks fit and also that any such order whether absolute or not could be varied or revoked by a subsequent order. There is a provision along these lines in the English *Rules of the Supreme Court 1965*.²⁸ Under that provision the Court must be satisfied before making an order that there are special circumstances which render it inexpedient to enforce the judgment or that the applicant is unable from any cause to pay the money.

(d) Judgment debtor's motor vehicle

7.18 For some people such as taxi drivers and house painters, a motor vehicle might be regarded as a tool of trade. However, the monetary limits for exemptions in respect of tools and implements of trade in Australia are generally so low that a motor vehicle would not normally fall within them.²⁹ In Local Courts in the Northern Territory, where the judgment debtor's motor vehicle is necessary for the continuation of his work, it is exempt from execution.³⁰ However, apart from these provisions, motor vehicles are not exempt from seizure in Local Courts in Australia.

7.19 A more generous exemption is allowed in respect of a motor vehicle in relation to the property which is divisible among the creditors of a bankrupt in a sequestration. This is by virtue of section 116(2)(ca) of the *Bankruptcy Act 1966* which exempts:

²⁷ It is of interest to note that the form (form 116) for an Order for Stay of Warrant of Execution contained in Part I of the appendix to the LCR provides that: "Upon hearing the Defendant, it is ordered that the Warrant of Execution issued herein be stayed until . . . 19.. ."

²⁸ O 47 rr 1(1) and (5).

²⁹ Except in Victoria where the monetary limit to the exemption is \$2,000: see paras 7.8 and 7.7 above.

³⁰ This is because by r 29.09(2) of the *Local Court Rules 1990* (NT) "all personal property necessary for . . . continuation of work" is exempt from seizure: para 7.8 above.

"property used by the bankrupt primarily as a means of transport, being property whose aggregate value does not exceed the prescribed amount".³¹

The prescribed amount is \$2500.³² By section 116(2C) of the Act where the trustee sells relevant transport property vested in him, he is required to repay to the bankrupt so much of the proceeds of realising the property as do not exceed the prescribed amount.

7.20 The Kelly Report recommended that consideration be given to exempting the debtor's motor vehicle, subject to an appropriate money value limitation, from execution. The Report pointed out that a motor vehicle may in some circumstances be regarded as a tool or implement of trade. It added that while there may seem little reason for exempting a motor vehicle as such, it should be remembered that employment mobility may well be dependent on it.³³ The report said that a motor car was exempted by a number of states in the United States of America, normally by reference to its use in the debtor's profession or trade but sometimes simply to a modest monetary value. In Canada, motor vehicles necessary to the debtor's employment were exempted in several provinces.³⁴

7.21 It is true that a debtor's motor vehicle may be necessary for him to continue in existing employment even though it does not fall within the tools and implements of trade exemption. Examples which come readily to mind are the cases of judgment debtors who work at sites which are not accessible by public transport or whose work commences or finishes in the early hours of the morning. Where the vehicle is necessary for the debtor to continue in existing employment, it is certainly arguable that an exemption of the judgment debtor's vehicle would be justified, at least up to a prescribed money value limit, on the ground that the judgment debtor's ability to earn income should not be unduly impaired.³⁵

7.22 It would be possible to provide that a motor vehicle is exempt where it is used in the judgment debtor's trade or calling or is necessary for the continuation of his employment. Under such a proposal, the amount of use of the motor vehicle in the judgment debtor's trade or calling could be comparatively small. Also occasions could arise where there would be some uncertainty over whether the motor vehicle was necessary for the continuation of the judgment debtor's employment. However, the proposal has a degree of merit. If there are to

³¹ The creditors can by resolution determine a greater amount than the prescribed amount: s 116(2)(ca).

³² *Bankruptcy Act 1966* (Cth) s 116 (2A)(b).

³³ Kelly Report 29 and 76.

³⁴ Id 75. The Report stated the law as at 1 January 1975.

³⁵ See para 7.2 above.

be exemptions along these lines in respect of motor vehicles it may well be that they should be subject to prescribed money value limits.³⁶ Without these, debtors could frustrate their creditors by putting money into expensive cars.

7.23 An alternative approach would be to empower the Court on the application of the judgment debtor made within a limited time of his motor vehicle being seized to make an order exempting the vehicle from execution where the judgment debtor or a member of his family would otherwise be likely to suffer exceptional hardship. The Commission's preliminary view is that this is the approach which should be adopted. The fact that the circumstances would be considered by the magistrate would suggest that there should not be a money value limit to the exemption. The matter could be covered by the enactment of the ALRC's proposal referred to in paragraph 7.15 above.

3. SEIZURE AND SALE

(a) The bailiff's common law duty to act reasonably

7.24 The law governing the sale of land or goods by a bailiff under a warrant of execution is governed in part by the LCA and LCR and in part by common law. By virtue of the common law, the bailiff is under a duty to act reasonably in the interests of the judgment creditor and the judgment debtor in order to obtain a fair price.³⁷ That price need not necessarily be the market value of the property being sold, for it is well recognised that compulsory sales under legal process rarely bring the full value of the property sold.³⁸ A bailiff has a duty to act reasonably with due regard to the interests of both sides and can be liable in damages if he fails to exercise reasonable care.³⁹ The bailiff is entitled to accept at the auction a highest bid which is genuinely made and which bears a fair relationship to what is being sold.⁴⁰ The bid must be for an amount which is reasonable "having regard to what is offered, namely, a debtor's right title and interest, if any, and the circumstances of the sale."⁴¹

³⁶ To enable the money value limit to be easily amended to take account of inflation and changes in the real value of motor vehicles, the money value limit should be prescribed in the LCR and not in the LCA.

³⁷ *Owen v Daly* [1955] VLR 442.

³⁸ Id 446. In the case of land there are factors apart from the forced sale operating to bring the fair price below market value: see para 7.25 below.

³⁹ *Owen v Daly* [1955] VLR 442, 446.

⁴⁰ *Anderson v Liddell* (1968) 117 CLR 36, 44 per Barwick CJ.

⁴¹ Id 45. Where there is no such bid in a sheriff's sale the sheriff should return "a want of buyers": *ibid*. This enables application to be made for a writ of venditioni exponas which directs the sheriff to sell for

7.25 In the case of a sale of land under a warrant of execution, a number of factors will usually operate to affect adversely the price which could otherwise be obtained. These include the fact that it is only the judgment debtor's interest in the land which is being sold. Thus, the sale will, for example, be subject to mortgages registered on the certificate of title⁴² and to statutory charges for rates.⁴³ Without the consent of the judgment debtor, the bailiff is unable to erect an advertising sign on the land, allow potential purchasers to inspect the land and the buildings on it or conduct the auction on the land. Furthermore, the bailiff is unable to guarantee possession to the purchaser. If after the sale it becomes necessary to apply for an order for possession, it is the purchaser's task to seek the order.

7.26 In the case of a sale of goods under a warrant of execution, the purchaser acquires only the interest possessed by the judgment debtor in the goods, subject to all charges and encumbrances to which they were subject in the hands of the debtor.⁴⁴ Furthermore, no warranty of title is implied in a sale by a sheriff or a bailiff.⁴⁵ The bailiff can be liable when he sells goods which are not those of the judgment debtor.⁴⁶

(b) Advertising

(i) Requirements

7.27 The provisions in the LCA and the LCR relating to advertising of sales in execution are somewhat confusing. Notice of the sale must be advertised "at least once in a newspaper circulating in the town or district in which the land or goods are to be sold".⁴⁷ The day appointed for the sale must not be earlier than the sixth day from the day of levying⁴⁸ and

the best price which can be obtained. As that writ is not available in Local Courts a return to the effect that the warrant is returned unexecuted as he was unable to obtain a reasonable price at the sale.

⁴² If the mortgage was unregistered the sale will be subject to the mortgage if a caveat in respect of the mortgage had been lodged at the Titles Office before a copy of the warrant of execution is served on the Registrar of Titles: see s 133 of the *Transfer of Land Act 1893*.

⁴³ *The South-Eastern Drainage Board (South Australia) v The Savings Bank of South Australia* (1939) 62 CLR 603.

⁴⁴ 14 Halsbury *Laws of England* (1st ed 1910) 57.

⁴⁵ *Ibid.*

⁴⁶ *Jelks v Hayward* [1905] 2 KB 460: see para 7.54 below.

⁴⁷ LCR O 25 (Div 1) r 17. If there is no such newspaper in circulation the bailiff is to affix notice of the sale conspicuously at or near the place where the sale is to be held: *ibid.*

⁴⁸ *Ibid.* In the case of goods this is repeated in s 128 of the LCA. During this period the goods are to be stored by the bailiff or remain in the custody of a fit person approved by the bailiff and put in possession by him: LCA s 128.

notice of the sale must be advertised at least four days before the day appointed for the sale.⁴⁹ These requirements do not apply to land of which an actual seizure has not been made.⁵⁰

7.28 Section 123 of the LCA provides that instead of making an actual seizure of land the subject of a warrant of execution the bailiff can publish in the manner prescribed in the LCR (or as the magistrate might direct) "notice of the warrant and of the intended day and place of sale, and the particulars of the property." The prescribed manner of publication is by advertisement appearing twice in a newspaper circulating in the neighbourhood of the land.⁵¹ The advertisement must appear first at least 14 days before the day appointed for the sale.⁵² The publication of the notice is the equivalent of an actual levy by the bailiff on the land.⁵³ In practice, bailiffs in Western Australia do not make an actual seizure of the land and instead always proceed under section 123.⁵⁴

7.29 In Local Courts, because of section 123, advertising in the case of land is associated with the seizure of land. The position in the Supreme Court is different from that in Local Courts. In the SCA, the relevant provision is in section 120 of the Act and is as follows:

"(1) It shall not be necessary for the sheriff or other officer having the execution of a writ of *fiery facias* or other like process to make any actual seizure of land, or of the right, title and interest of any person to or in any land, under any writ of execution before the sale of such land, right, title or interest, any law to the contrary hereof notwithstanding.

(1a) (a) The sale of any land, or right, title or interest of a person in the land under a writ of *fiery facias* or other like process shall be made by public auction, of which at least 7 days' notice of the auction, the time when and the place where it is to be held, has been published in a newspaper circulating in the neighbourhood where the land is situated.

...

(2) Nothing in this Part shall affect the provisions of the *Transfer of Land Act 1893*, relating to execution against land under the operation of that Act."

⁴⁹ LCR O 25 (Div 1) r 17(1).

⁵⁰ Ibid.

⁵¹ LCR O 25 (Div 1) r 22.

⁵² Ibid.

⁵³ LCA s 123.

⁵⁴ In the case of goods, a seizure is always necessary: id s 126.

Order 82 rule 1(1) of the RSC is also relevant and provides that subject to the Act, where the sheriff intends to put up for sale any property taken in execution:

". . . he shall cause notice of the time and place and particulars of the property to be given in such manner as appears to him best calculated to give due publicity to such sale".

7.30 Section 120(1a)(a) of the SCA provides that in the case of land, at least seven days' notice of the auction, the time when and the place where it is to be held must be published in a newspaper circulating in the neighbourhood where the land is situated. Under rule 22 of Order 25 (Division 1) of the LCR, the advertisement is published twice in a newspaper circulating in the neighbourhood of the property. The advertisement must appear first at least 14 days before the day appointed for the sale. The Commission's preliminary view is that two advertisements should be a statutory minimum in the case of a sale of land under a Local Court warrant of execution. An advertisement at least 14 days before the sale would give potential buyers who wished to make enquiries or arrange finance adequate time to do so.

7.31 On the other hand, the Commission sees considerable merit in the adoption in Local Courts of a provision along the lines of rule 1(1) of Order 82 of the RSC. The extent and type of advertising which is appropriate when it is intended to sell goods or land varies according to circumstances such as the value and nature of what is being sold. The Supreme Court provision, if adopted in Local Courts, would cater for this as it would require the bailiff to advertise the sale in the manner which appears to him best calculated to give due publicity to the sale. The bailiff could decide that due publicity would be best obtained, for example, by advertising in more than one place in the same paper such as under "auctions" and under "real estate", advertising in more than one newspaper (such as *The West Australian* and a country town newspaper), advertising in a newspaper designed for the farming community, or by publication of or inclusion in advertising brochures.⁵⁵

7.32 One possible solution to these questions would be along the following lines -

⁵⁵ A similar approach is used in the *Local Courts (Civil Claims) Rules 1988* (NSW) in the case of goods. Under Pt 30 r 14 of those rules the bailiff is to cause notice of the intended sale of goods under a warrant of execution to be affixed on or near the door of the place where the sale is to be held; or where the sale is not to be held in a city or town, at the court house or some convenient place, 4 days at least before the date appointed for the sale. In addition, the bailiff is to give such further notice, by advertisement in a newspaper or otherwise, as appears to him necessary give due publicity to the sale.

- (a) Where the bailiff intends to put up for sale under a warrant of execution any goods or land he should cause notice of the time and place and particulars of the property to be given in such manner as appears to him best calculated to give due publicity to the sale.
- (b) But in any event,
 - (i) in the case of goods, the bailiff should advertise notice of the sale at least once in a newspaper circulating in the town or district in which the goods are to be sold;⁵⁶
 - (ii) in the case of land, the bailiff should advertise notice of the warrant and of the intended day and place of sale, and of the particulars of the property concerned twice in a newspaper circulating in the neighbourhood of the property and the advertisement shall appear first at least 14 days before the day appointed for the sale.
- (c) The publication of a notice complying with (b)(ii), even if it contains additional matters, should be deemed to be a seizure of the land by the bailiff and actual seizure of the land under the warrant of execution before the sale of the land shall not be necessary.

(ii) *The problem of indicating that only the debtor's interest is being sold*

7.33 It has already been mentioned that it is only the judgment debtor's interest in the property which is sold.⁵⁷ In the case of sales of land, this principle often causes difficulty. Bailiffs' advertisements always refer to the fact that it is the "debtor's interest" in the land described in the advertisement which is being sold. It is left to potential purchasers to find out what that interest is so that they can then arrive at a figure up to which they would be prepared to bid at the auction. The advertisement shows the bailiff's phone number and often a potential purchaser will phone the bailiff for information, for example on what the registered encumbrances are and the amounts owing under them. A few will make their own enquiries.

⁵⁶ There would be exceptions to the requirement to advertise in the case of goods: para 7.38 below, and para 7.28 above in regard to the power of the magistrate to give a direction as to advertising.

⁵⁷ Para 7.25 above.

Unless a person interested in buying the land was acquainted with the concept of a bailiff's or sheriff's sale, he may not even realise that the reference to "debtor's interest" in the advertisement meant that the purchaser in probability would not be buying the land free of encumbrances.

7.34 In general, in Australian jurisdictions there seems to be no requirement that the bailiff should provide information in the advertisement which will assist potential purchasers in ascertaining what the judgment debtor's interest in the land is. However, in Victoria the bailiff is required to include in the advertisement in the case of land under the operation of the Victorian *Transfer of Land Act 1958* a statement "of the entries in the Register Book which affect or may affect the land as at the date of service upon the Registrar of Titles of the warrant".⁵⁸ If such a statement were required in advertisements published by Local Court bailiffs in Western Australia, the statement would be of some assistance to potential purchasers in their efforts to work out what they should bid for the judgment debtor's interest. It would at least provide potential purchasers with the registered numbers of any mortgages registered or caveats lodged against the title and would help some potential purchasers to realise that they would be buying subject to these encumbrances. It would still be left to potential purchasers to find out the amounts owing under the mortgages.

7.35 The purchaser of land at a bailiff's sale purchases subject to the statutory charges for outstanding rates and land tax, although the charges are not notified on the certificate of title. To bring this to the attention of potential purchasers an additional sentence could be added in the advertisement as follows: "Any outstanding rates and land tax are charges on the land."

7.36 There would be some disadvantages in adopting the Victorian approach of listing the encumbrances notified on the title in the advertisement. The bailiff in preparing the advertisement could miss one of the encumbrances and this possibility raises the question of who should bear the loss which might arise from such a mistake.

⁵⁸ R 69.06(3)(d) of the Victorian *General Rules of Procedure in Civil Proceedings 1986*. R 69.06 is set out in Part A of Appendix VI. The Victorian *Magistrates' Court Civil Procedure Rules 1989* appear to apply the rule to the execution of warrants of execution in Magistrate's Courts: r 27.09(6).

The Victorian *General Rules of Procedure in Civil Proceedings 1986* prescribe a form of advertisement of sale by the sheriff. The form (form 69A) is set out in Part B of Appendix VII. It will be noted that the second last line of the form reads:

"[Registered Mortgage No. affects the said estate and interest]".

7.37 It seems to the Commission at this stage that it would be preferable for the advertisement to state that only the debtor's interest will be sold, to briefly explain the effect of this in general terms and to state that further information is available from the bailiff. It could be provided in the LCR that the statement and explanation which would be in a prescribed form should appear in all advertisements for the sale of land under warrants of execution.⁵⁹

(c) Sale of goods by auction without advertising

7.38 Notice of the sale of goods must be advertised at least four days before the day appointed for the sale.⁶⁰ However, where the value of any goods seized is less than \$100, the bailiff may sell the goods by public auction in a public auction room approved by the magistrate without advertising.⁶¹ The Metropolitan and Country Bailiffs Association in its preliminary submission to the Commission suggested that the sum of \$100 was too low and should be increased to say \$500. With increased costs for advertising and other matters, goods valued in total at less than \$300 can produce no reduction in the actual debt after paying out of pocket expenses. The Commission's preliminary view is that the figure of \$100 should be increased to a figure in the vicinity of that suggested by the Association. It should be made clear that the provision only applies where the value of all the goods seized does not exceed the specified figure.

(d) Venue of sale

7.39 The RSC provide that the sheriff may cause any property to be sold at the place of levy or elsewhere, as he deems most advantageous.⁶² The wording in this rule appears to be more satisfactory than that in rule 17(1) of Order 25 (Div 1) of the LCR which provides that except where the magistrate otherwise orders all land or goods shall be sold at the place where the same were levied or at such other place as the bailiff or his deputy considers is more

⁵⁹ As to the bailiff's responsibility to find out the amount owing under mortgages, see paras 7.47-7.52 below.

⁶⁰ LCR O 25 (Div 1) r 17 (1) : see para 7.27 above.

⁶¹ Id r 17(2). Also where the goods to be sold are of a perishable nature, or where the judgment debtor so requests, the goods may be sold immediately without notice of sale, or may be sold earlier than four days after notice of the sale has been advertised: id r 17(1).

⁶² O 82 r 2.

suitable or convenient for the sale thereof.⁶³ The Commission's preliminary view is that a provision in similar terms to that in the RSC should be adopted in the LCR.⁶⁴

(e) Notice to debtor of intended sale of land

7.40 The LCR require the bailiff on making a levy to deliver a notice, which complies with form 103 in the Appendix to the LCR, to the judgment debtor or to leave the form at the place where the execution is levied.⁶⁵ This form sets out the total amount to be levied against the goods and land of the judgment debtor. It then lists -

- * the bailiff's fees for executing the warrant,
- * the bailiff's fees for keeping possession,
- * incidental expenses,

and also describes the method of calculating the bailiff's poundage. In practice a warrant of execution which is issued against land will also be issued against goods. If the bailiff seizes any goods he will deliver to or leave for the judgment debtor a notice complying with form 103. If the bailiff finds that the judgment debtor has no goods which can be seized but the warrant is against land also and he intends to levy on the land, he will still deliver to or leave for the judgment debtor the form 103 notice.

7.41 When goods seized by the bailiff are removed from the premises where he seized them, the LCR require the bailiff to give the judgment debtor -

- (a) an inventory of the goods removed; and
- (b) written notice of the time and place where the goods will be sold.⁶⁶

The inventory or notice is to be given to the judgment debtor -

⁶³ It is of interest to note that s 59(2) of the *Local Courts (Civil Claims) Act 1970* (NSW) provides: "The Sheriff or a bailiff shall, before he sells any property, diligently inform himself whether it would be best, with the view of obtaining the highest prices for the property, to cause the sale to be at the place of levy or elsewhere, and shall sell at the place where, in his or her judgment, those prices are most likely to be obtained."

⁶⁴ The power of the magistrate to order otherwise should be retained. Care should be taken to see that the rule also applies where the bailiff has not made an actual seizure of land, as at present O 25 (Div 1) r 17(1) is expressed not to apply in that situation.

⁶⁵ LCR O 25 (Div 1) r 13.

⁶⁶ LCR O 25 (Div 1) r 19.

- (a) personally;
- (b) sent to him by post to his place of residence, if known; or
- (c) if that residence is not known, is to be left at or sent by post addressed to the judgment debtor at the place from which the goods are removed.

The inventory is to be given at or immediately after removal of the goods. The notice is to be given or sent at least 24 hours before the time fixed for the sale. There is no equivalent requirement in the LCA or LCR for the bailiff to give notice to the judgment debtor of the time and place where land will be sold under the warrant of execution. Unless the judgment debtor sees an advertisement in the press relating to the proposed sale by the bailiff, it is possible that the actual time and place of the sale of his land will not come to his notice.⁶⁷

7.42 The Commission considers that the debtor should know that the bailiff is taking steps to sell his land and the date of the proposed sale. In some cases, the debtor may be unaware that a warrant of execution has issued against his land. The debtor might be able to avoid the sale by raising the money to pay out the warrant⁶⁸ or he might, on application to the magistrate, be entitled to a stay of execution.⁶⁹

7.43 In Victoria, the *General Rules of Procedure in Civil Proceedings 1986* require the judgment debtor to be informed of the time and place of the sale of his land. Rule 69.06(4) requires the creditor to serve personally on the debtor a copy of the sale advertisement not less than 14 days before the date of the intended sale. The advertisement includes the time and place of the sale. Not less than three days before the date advertised for the sale, the creditor must -

- (a) file an affidavit of service of a copy of the advertisement or, where the Court makes an order for substituted service of the advertisement, an affidavit showing due compliance with the order;
- (b) deliver to the sheriff -

⁶⁷ Although before the sale is advertised, the judgment creditor must serve a copy of the warrant at the Titles Office (s 133 of the *Transfer of Land Act 1893*: (footnote 33 to ch 8 below), the Titles Office does not now notify the judgment debtor of the registration of the warrant.

⁶⁸ The notice might in fact prompt the debtor into making arrangements to pay out the debt.

⁶⁹ Para 2.30 above.

- (i) where a copy of the advertisement is served on the debtor, a copy of the affidavit of service;
- (ii) where the Court makes an order dispensing with service of a copy of the advertisement, a copy of the order;
- (iii) where the Court makes an order for substituted service of the advertisement, a copy of the order and of the affidavit showing due compliance.⁷⁰

7.44 The practice of the sheriff of the Supreme Court of Western Australia is to write a letter to the debtor shortly before the commencement of advertising advising that arrangements have been made for the sale at the place and time specified in the letter and that advertising will commence in the newspaper and on the date specified in the letter.⁷¹ The letter is sent to the judgment debtor by mail.

7.45 The ALRC proposed that a notice should be given to the debtor when the time and place for the sale of goods or land has been set.⁷² It recommended that a bailiff who proposes to sell goods or land seized in execution should be required to give the judgment debtor a notice in writing -

- (a) specifying the time and place of the proposed sale;
- (b) specifying the amount the payment of which is necessary to satisfy the judgment, including costs; and

⁷⁰ It seems that r 69.06 is applied in the Magistrates' Court in Victoria: see fn 58 above in this ch. The rule is set out in Part A of Appendix VII to this paper.

⁷¹ The practice of the sheriff is also to give the judgment debtor earlier in the proceedings a notice informing the debtor of the sheriff's intention to execute against the land. The notice is usually given soon after the sheriff receives the writ of fi fa and is either served personally or sent to the debtor through the mail.

⁷² ALRC Report para 217.

- (c) informing the debtor that he may specify the order in which the property is to be offered for sale.⁷³

7.46 It seems to the Commission to be desirable that the LCR require the bailiff to give written notice to the judgment debtor of the time and place for the sale of land. The adoption of the Victorian requirement of personal service on the debtor by the creditor, the filing of an affidavit of service and the delivery of a copy of that affidavit on the bailiff would add significantly to the cost of execution. Even a requirement that the notice be served personally on the debtor by the bailiff or be left for the debtor by the bailiff on the land which is the subject of the proposed sale would involve a further visit by the bailiff to the property and thus incur a not insignificant cost. The Commission's preliminary view is that the bailiff should be required to post the notice to the judgment debtor.

(f) Amounts owing to encumbrance holders

7.47 It has already been mentioned that it is only the debtor's interest in the land concerned which is sold under a warrant of execution.⁷⁴

7.48 The bailiff should enquire of encumbrance holders to ascertain the maximum amount secured, present balance outstanding and the daily rate of interest. If the property is subject to an encumbrance where liability is not measured by principal sum and interest, such as a lease, he should enquire as to the terms of the lease. The bailiff should also enquire of the Western Australian Water Authority, the Commissioner of State Taxation and the relevant local authority to ascertain outstanding rates and taxes.

7.49 The bailiff should make these enquiries for at least two reasons. First, he needs this information to help him determine whether the highest bid made at the auction for the debtor's interest is one which he will be entitled to accept.⁷⁵ Secondly, the bailiff has a duty to act reasonably in the interests of the judgment creditor and the judgment debtor in order to obtain

⁷³ Cl 36 of the draft *Magistrate's Court (Debt Recovery) Ordinance 1987* contained in Appendix A of the ALRC Report. The right of the judgment debtor to specify the order in which property is to be sold is not something which the LCA or LCR provide for.

⁷⁴ Paras 7.25 above.

⁷⁵ Para 7.24 above. Speaking of the sheriff, Barwick C J said in *Anderson v Liddell*: "the sheriff must know what he is selling for it is rightly said, in my opinion, that he must obtain a reasonable price for what he sells": (1968) 117 CLR 36, 45.

The bailiff will in fact need the information referred to in para 7.48 above to make a decision on the preliminary question of whether he should sell or not.

a fair price.⁷⁶ Without the information referred to, a potential purchaser could be in a position where because of the uncertainty the only sensible thing is for him not to make a bid or to make a very low bid. If the information is available to potential purchasers, they can bid with more confidence and this will improve the price at the auction. The bailiff is the person from whom prospective purchasers normally obtain the information and consequently he should have carried out the relevant enquiries. Although prospective purchasers can search the title at the Titles Office, the search will not tell them how much money is owing at the time of the search under mortgages registered against the title.

7.50 Although the bailiff should enquire of the encumbrance holders for the information which the Commission has referred to, the encumbrance holder may be prevented from disclosing the information because of the Commonwealth *Privacy Act 1988*. Where the encumbrance holder is a "credit provider", the Act prohibits the encumbrance holder disclosing the information without the judgment debtor's consent.⁷⁷ The consent may not be forthcoming. Where this occurs the bailiff may not be in a position to proceed further until the judgment creditor has had the judgment debtor examined before a magistrate and ascertained the relevant information from him at the examination.⁷⁸ The prohibition under the *Privacy Act 1988* only applies to credit providers, as defined under the Act, for example banks, building societies and credit unions.⁷⁹

7.51 Once the bailiff has obtained the information concerned the *Privacy Act 1988* does not prohibit him disclosing it to potential purchasers and in fact he should do so.⁸⁰

7.52 The question arises as to whether either the LCA or the LCR should impose on the bailiff an express obligation to make enquiries about the amount owing to encumbrance holders over the land and the amount of outstanding rates and taxes and also to disclose the information to potential purchasers on request and at the auction before calling for bids. The only Local Court legislation in Australia where there is a provision of this nature in respect of land is the New South Wales *Local Courts (Civil Claims) Rules 1988*. Under those rules, the sheriff's officer or bailiff who is required to sell the land under the writ of execution must, before proceeding to the sale, fix so far as he can by the exercise of reasonable diligence the

⁷⁶ Para 7.24 above.

⁷⁷ S 18N.

⁷⁸ As to examinations in aid of execution, see paras 4.3-4.4 above.

⁷⁹ *Privacy Act 1988* (Cth) s 11B.

⁸⁰ Para 7.49 above.

approximate market value of the land to be sold.⁸¹ However, there is no express requirement in the rules that the information be disclosed to potential purchasers on request or at the auction.⁸²

7.53 There is the possibility that the information supplied to the bailiff may not be correct. The bailiff's potential liability in this regard can be avoided by the insertion of an appropriate disclaimer in the conditions of sale. Another way of protecting the bailiff would be to provide in the LCA that no action should lie against the bailiff for any information furnished by the bailiff in good faith and after making reasonable inquiry, pursuant to his obligation to disclose information concerning the judgment debtor's liability to encumbrance holders. The Commission is of the preliminary view that provided such a provision is enacted the LCR should impose express obligations on the bailiff along the lines discussed.

(g) Title to goods: section 159 of the SCA

7.54 The common law position that the purchaser of goods at a bailiff's sale buys the goods subject to any charges and encumbrances to which they were subject in the hands of the debtor and that no warranty of title is implied in the purchaser's favour⁸³ is an unsatisfactory situation from the purchaser's aspect. The purchaser can later be confronted with a claim, for example, that the goods belonged to someone other than the judgment debtor. Also, at common law, the bailiff can be liable when he sells goods which are not those of the judgment debtor. In *Jelks v Hayward*,⁸⁴ for example, it was held that where a bailiff sells goods which are not in fact the goods of the judgment debtor, and the owner (and not the judgment debtor) has the right to possession of those goods, the bailiff is liable to the true owner in conversion. These common law rules have not been altered by either the LCA or the LCR.⁸⁵

⁸¹ Pt 30A r 6(1). The same provision appears in these rules in respect of personal property (Pt 30 r 17(1)) and also in respect of personal property in the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 278 BW (to be procl) and in the *Fines, Penalties and Infringement Notices Enforcement Act 1994* s 81.

⁸² Nor is there such a requirement in the legislation referred to in the previous footnote.

⁸³ Para 7.26 above.

⁸⁴ [1905] 2 KB 460.

⁸⁵ The common law provisions may have been varied by s 36(3) of the *Fair Trading Act 1987*, which provides that certain warranties as to charges or encumbrances and as to quiet possession of the goods are implied in "a contract for the supply of goods to a consumer in the case of where there appears from the contract or is to be inferred from the circumstances of the contract an intention that the supplier should transfer only such title as he or a third party may have".

7.55 In the case of sales under writs of fieri facias issued out of the Supreme Court, the common law has been varied by section 159 of the *Supreme Court Act 1935* to improve the position of the purchaser and of the sheriff. Subsection (1) of that section provides that where any goods in the possession of an execution debtor at the time of seizure by the sheriff are sold by him without any claim having been made to the goods, the purchaser of those goods acquires a good title to them. The subsection also provides that a person is not entitled to recover against the sheriff by reason of the sale of the goods unless it is proved that the sheriff "had notice or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor". Section 159(2) provides that nothing in subsection (1) affects the right of a claimant to any remedy to which he is entitled against any person *other than the sheriff or the purchaser* of the goods if the claimant proves that at the time of the sale he had a title to the goods.

7.56 The section therefore protects the purchaser at a sheriff's sale. Lord Reid in *Dyal Singh v Kenyan Insurance Ltd* said of a similarly worded provision operating in Kenya:

". . . it is not impossible to find reasons which might have led the legislature to confer such an unusual right on purchasers. . . . It may have been thought advantageous to assure all purchasers that they could buy without risk, even if that meant that, in some cases, the true owner would be deprived of one of his remedies."⁸⁶

The protection afforded to the purchaser by the section is at the expense of the third party who cannot recover the goods or their value from the purchaser where the third party was the owner of them. The third party can only succeed in a damages claim against the sheriff if the sheriff "had notice or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor". There may be others besides the sheriff and the purchaser against whom the third party has a remedy, for example the execution creditor, and that remedy is not affected by the section. The third party, of course, can make a claim to the goods under the procedure which can lead to an interpleader, but he may be unaware of the seizure.

⁸⁶ [1954] 1 All ER 847, 850.

7.57 Section 34 of the SCA provides that:

"The several rules of law enacted and declared by this Act shall be in force and take effect in all courts whatsoever in Western Australia so far as the matters to which such rules relate shall be respectively cognizable by such courts."

Section 34 of the SCA appears in a division of the Act which is headed "Miscellaneous Rules of Law". Section 35 of the LCA provides:

"The several rules of law enacted and declared by the *Supreme Court Act 1935*, shall be in force and receive effect in Local Courts, so far as the matters to which such rules relate shall be respectively cognisable by such courts."

7.58 The Commission is not aware of any court decision on the question of whether section 159 of the SCA applies in Local Courts by virtue of section 34 of the SCA or section 35 of the LCA. However, section 159 refers to the sheriff and other officers of the Supreme Court and not to Local Court bailiffs. In addition, the heading "Miscellaneous Rules of Law" to the division in the SCA in which section 34 is situated suggests that the "rules of law" referred to in section 34 of the SCA and in section 35 of the LCA are the rules of law in that division. It appears that section 159 does not apply in Local Courts.

7.59 The inclusion of a section along the lines of section 159 of the SCA seems to have merit.

(h) Property unsold at auction

7.60 If at the auction,⁸⁷ there is no bid or no bid which is "reasonable",⁸⁸ the Local Court bailiff should make a return to the effect that the warrant is unexecuted as he was unable to obtain a reasonable price at the sale.⁸⁹ There appears to be no provision in the LCA or LCR under which the land or goods could be sold for less than a fair price.⁹⁰

⁸⁷ As to the requirement to sell by auction, see para 7.66 below.

⁸⁸ As to which see para 7.24 above.

⁸⁹ See fn 41 above in this ch.

⁹⁰ As to a "fair price", see para 7.24 above.

In the case of goods, where there has been no bid or no bid which is reasonable at the auction, it seems that the judgment creditor could still apply for an order by the magistrate that the goods be sold by private treaty. This would also be so in the case of land except where the bailiff has proceeded under s 123 of the LCA: LCR O 25 r 17(1). It seems that in the latter case, the sale must always be public: *ibid* and see para 7.66 below.

7.61 The position is different in the Supreme Court. When the sheriff has been unable to obtain a reasonable price for goods or land at the auction, the Supreme Court may grant leave for the issue of a writ of *venditioni exponas* and also make an order that the land be sold otherwise than by auction.⁹¹ The application to the Court for leave and for the order can be made either by the sheriff or the judgment creditor. The writ of *venditioni exponas* directs the sheriff to sell the property for the best price which can be got.⁹²

7.62 A different approach to that which operates in Local Courts in Western Australia has been taken in the New South Wales *Local Courts (Civil Claims) Rules 1988*. By rule 13 of Part 30A of those rules where at a public auction in respect of land to be sold under a writ of execution being executed by a sheriff's officer, the highest bid is substantially below the approximate market value of the land fixed by the sheriff's officer under rule 6(1) of Part 30A of those rules,⁹³ the sheriff's officer may sell the land by private contract. However, he is to first determine "a fair value" for the land and is not to sell the land at a price "substantially below" that fair value. In determining a fair value in respect of the land, the sheriff's officer is to take into account all relevant circumstances, including but not limited to -

- (a) the approximate market value of the land fixed by the sheriff's officer under rule 6(1);
- (b) the amount of the highest bid for the land at the public auction; and
- (c) the likelihood or otherwise of there being a higher bid if the land is again put up for sale by public auction.

The Sheriff's officer is not to determine a fair value which is substantially below the amount of the highest bid for the land at the public auction.⁹⁴ Rule 18 of Part 30 which is similar to rule 13 of Part 30A operates in respect of goods. The only difference between rule 13 and rule 18 is that under rule 18 the sheriff's officer must have the approval of the sheriff to sell the goods by private contract after an unsuccessful auction. In the case of goods, it is the sheriff, not the sheriff's officer, who determines a fair value of the goods and the sheriff may

⁹¹ The leave of the Court is necessary for the issue of a writ of *venditioni exponas*: RSC O 47 r 2.

⁹² SCA s 125(3); RSC O 47 r 5 and second schedule form no 47.

⁹³ Para 7.52 above.

⁹⁴ Pt 30A r 13(3)(b).

not approve a sale of the goods by private contract at a price substantially below that fair value. In Western Australia, the Sheriff is not involved in executions under Local Court warrants of execution.

7.63 The ALRC Report proposed a variation of the New South Wales procedure. It proposed that a realistic reserve price should normally be set for the auction. If it is unlikely that the property will be sold at the reserve price in a reasonable time, a sale by private contract should be permitted. However, the property should not be sold at a price substantially below its value.⁹⁵ If the property cannot be sold except at a price substantially below its value, the property should be returned to the debtor. If the creditor wished to insist upon a sale of the property in any event, he could apply to the court for an appropriate order. The order should not issue as of right, but the court should be required to exercise its discretion, taking into account the amount of the debt and the hardship likely to be occasioned to debtor and creditor.⁹⁶

7.64 It seems to the Commission that the question at issue in this area in the case of Local Courts in Western Australia is whether when the auction has been unsuccessful the magistrate should have the power to order that the property be sold by public tender or private contract and, if so, whether he should be required to set a minimum price. There is the further issue of whether it should be left to the judgment creditor to make the application or whether the bailiff should be able to apply. If the magistrate is to have a discretion to refuse the application, it is arguable that the creditor is the person who should be arguing for the exercise of the discretion and that he is the appropriate person to make the application. On the other hand the bailiff would know more about the potential purchasers by private contract.

7.65 In 1993, the RSC were amended to provide that:

"Where property, whether real or personal, offered for sale by the Sheriff by public auction was not sold at the first auction, the Sheriff may, with the written consent of the judgment creditor, offer the property for sale by public auction on a second occasion."⁹⁷

⁹⁵ ALRC Report para 217. Para 217 uses the words "disproportionately below" but cl 39(1) of the draft Magistrate's Court (Debt Recovery) Ordinance 1987 in Appendix A to the Report uses the words "substantially below".

⁹⁶ ALRC Report para 217.

⁹⁷ O 82 r 3(3).

There might be merit in adopting this provision in the LCR.

(i) Methods of sale of property taken under a warrant of execution

7.66 By rule 17(1) of Order 25 (Division 1) of the LCR, except where the magistrate otherwise orders, property sold under a warrant of execution is to be sold publicly by the bailiff to the highest bidder. Rule 17(1) provides for a number of other matters such as advertising but states that the rule "except insofar as it provides that the sale shall be public" does not apply to land where the bailiff proceeds under section 123 (which is the practice) and so avoids the need to make an actual seizure.⁹⁸ Probably the exception to the requirement of a public auction, namely where the magistrate otherwise orders, does not apply where the bailiff proceeds under section 123.⁹⁹

7.67 The position in the Supreme Court is clear. By section 120(1a)(a) of the SCA, the sale of any land under a writ of fieri facias must be by public auction.¹⁰⁰ By section 124 of the Act, unless the Court otherwise orders, the sheriff when selling goods under a writ of fieri facias for a sum exceeding \$40 must sell by public auction. By rule 15 of Order 47 of the RSC an application for an order under section 124 is to be made by summons supported by an affidavit. The application may be made by the judgment creditor, the judgment debtor or the sheriff. At the hearing of the summons, the Court may make such order as to the mode of sale as might be just.

7.68 In Local Courts in New South Wales goods and land sold under a writ of execution are to be sold by public auction.¹⁰¹ In the Magistrates' Court in Victoria where only goods can be seized, the sheriff may as he thinks fit sell the goods either by private contract or public auction.¹⁰²

7.69 The ALRC Report recommended a different approach to those described above. It proposed that property seized in execution should normally be sold by public auction but that

⁹⁸ Para 7.28 above.

⁹⁹ It is noteworthy that the forms in the appendix to the LCR only provide for an application for the sale of goods, and not of land, otherwise than by public auction: LCR Appendix Part I form 109.

¹⁰⁰ As to when the land is not sold at the auction: see para 7.61 above.

¹⁰¹ *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 30 r 15 and Pt 30A r 1(2). As to where the highest bid is substantially below the market value of the property, see para 7.62 above.

¹⁰² *Magistrates' Court Civil Procedure Rules* (Vic) 1989 r 27.09(6) and r 69.05(2) of the *Victorian General Rules of Procedure in Civil Proceedings 1986*. Under the *Magistrates' Court Civil Procedure Rules 1989*(Vic), a warrant of execution is directed to the sheriff.

the bailiff should have a discretion to arrange for sale by private treaty when that is likely to produce a higher price.¹⁰³

7.70 A sale under a warrant of execution is by an officer of the Court and is part of the proceedings in the action concerned and it is therefore appropriate that the sale should be open to the public and thus subject to public scrutiny. The Commission's preliminary view is that the bailiff should not be given a discretion to sell land by private contract.

7.71 However, it may be desirable to empower the magistrate, on the application of the judgment creditor, to order that the land may be sold by the bailiff by public tender or private contract at a price and on terms set out in the order. This would resolve the question of the price at which the land should be available for sale and would enable the bailiff to point to the court order if questioned by a potential buyer on how the price at which the land is for sale was derived. The process would mean that the question whether there should be a public auction or a private sale would not be the concern of the bailiff. Provision for such an order could be advantageous where it appears that an auction will be unsuccessful but that there are reasonable prospects of obtaining a fair price by public tender or private contract.

7.72 A major problem with executing against goods is the high cost of disposing of them. The cost includes cartage, advertising, the bailiff's fee for attendance at the auction, very often storage and usually the auctioneer's commission.¹⁰⁴ Ultimately, the judgment debtor, who may be already hard pressed, bears this cost which could be disproportionate to the price obtained at the auction. The cost of the storage, advertising and the auctioneer's commission could all be avoided if the goods were sold privately. Appliances like television sets, videos, stereo systems and cameras could be disposed of by the bailiff without a great deal of administrative work. The disposal would not take place publicly. However, a bailiff has a common law duty to act reasonably in the interests of the judgment creditor and the judgment debtor in order to obtain a fair price.¹⁰⁵

¹⁰³ ALRC Report paras 23 and 217 and cl 37 of the draft Magistrate's Court (Debt Recovery) Ordinance 1987 in Appendix A to the Report.

¹⁰⁴ The bailiff's own poundage (commission) will be less if he employs an auctioneer: para 8.8 below.

¹⁰⁵ Para 7.24 above.

If the bailiff is unable to sell at a fair price, it may be that the magistrate should have power to set a minimum price at which the goods may be sold: see para 7.64 above in relation to unsuccessful auctions.

7.73 At this stage it seems to the Commission that there are substantial arguments in favour of granting bailiffs a discretion to sell goods either by private contract or public auction.

(j) Priority for arrears of rents

7.74 By section 129 of the LCA a landlord of premises in which goods are seized under a warrant of execution may make a claim to the bailiff for any arrears of rent on the premises which are owing to the landlord. If the landlord makes such a claim then when the goods are sold by the bailiff the arrears of rent up to the limits set down in the section are payable to the landlord out of the proceeds of the sale in priority to the amount for which the warrant of execution issued. This puts the judgment creditor who issued the warrant at a disadvantage because there might not be enough money left over to pay in full the amount for which the warrant issued. The limits to the arrears of rent prescribed in section 129 are as follows -

- (a) where the premises are let by the week: the rent for four weeks;
- (b) where the premises are let by the month: the rent for two months; and
- (c) in any other case: the rent for three months.

These provisions are a re-enactment of part of the United Kingdom's *Landlord and Tenant Act 1709*.

7.75 The priority given to the landlord by section 129 of the LCA in respect of arrears of rent¹⁰⁶ is understandable only when it is recalled that, at common law, a landlord had the right to distrain for arrears of rent by seizing and selling a tenant's chattels. The right to obtain rent from the execution creditor compensated the landlord for his inability to seize the goods as distress for rent owed. In Western Australia, however, the right to distrain for arrears of rent was abolished by statute in 1936.¹⁰⁷ This removed the foundation for the enactment of section 129.

7.76 The Ontario Law Reform Commission in its report recommended that provisions similar to those in section 129 should apply to arrears of rent under all tenancies in Ontario. However, the circumstances in Ontario were different from those in Western Australia. In Ontario it was still possible for landlords to distrain for rent in the case of non-residential

¹⁰⁶ Para 7.74 above.

¹⁰⁷ *Distress for Rent Abolition Act 1936*.

tenancies and all landlords were given a measure of priority for arrears of rent where tenants had become bankrupt. Neither of these circumstances applies in Western Australia. There are other means by which the landlord can protect rent, including the obtaining of a bond from the tenant. The provisions are an exception to the priority principle which allows the diligent creditor to obtain satisfaction of a claim ahead of a more dilatory one.¹⁰⁸ Since the landlord's right to distrain for arrears of rent has been abolished in Western Australia, there is no reason why landlords should be given priority.¹⁰⁹ The Commission's preliminary view is that the provisions should be repealed and that it should be expressly provided that the relevant provisions in the United Kingdom's *Landlord and Tenant Act 1709* do not apply in respect of an execution under a warrant of execution issued out of a Local Court in Western Australia.

(k) Deposit to secure costs of execution

7.77 There is no provision under the LCA or the LCR under which the judgment creditor can be required to pay a deposit on account of those bailiff fees which do not arise until the bailiff has paid for the costs involved in carrying out his responsibilities. The cost of advertising is an example. Because these costs are quite significant, a requirement under which the judgment creditor could be required to pay a deposit on account of the bailiff's fees and costs seems to be reasonable.

7.78 It is of interest that under rule 11 of Order 82 of the RSC, on request being made for the execution or service of any process or document, or for any work for which fees are chargeable in the Sheriff's office, the Sheriff may require a deposit of money to meet the fees except poundage.¹¹⁰ The sheriff may also under this rule require an undertaking in writing from the solicitor, or if no solicitor is acting, from the party making the request, to pay any further fees or charges which might become payable beyond the amount deposited. In New South Wales, Part 30 rule 5 of the *Local Courts (Civil Claims) Rules 1988* provides as follows:

"(1) The registrar of a home court may before issuing a writ of execution, and at any time, and from time to time, during the execution of a writ, require the judgment

¹⁰⁸ For an example of this principle, see para 2.11 above.

¹⁰⁹ This was also the view of the ALRC. It recommended that the priority of the landlord in this regard should be abolished: ALRC Report para 219.

¹¹⁰ S 163(2) of the SCA is in similar terms.

creditor to make a deposit with the registrar of a sum sufficient to meet the costs incurred or likely to be incurred by the Sheriff's officer or bailiff in executing the writ.

(2) Where a registrar requires a deposit to be made under subrule (1) and the deposit is not made forthwith:

- (a) the registrar may refuse to issue the writ of execution; or
- (b) the Sheriff's officer or bailiff may withdraw from any possession into which the Sheriff's officer or bailiff may have entered under the writ and may return the writ of execution,

as the case may require."

7.79 Bearing in mind the fees paid on the issuing of a summons or other process, a deposit would usually not be justified except for a warrant of execution. If there is to be provision in the LCR for the ability to require the payment of a deposit, it may be that it should be limited to the case of warrants of execution. In New South Wales the registrar can refuse to issue the warrant of execution until the deposit is paid. This can be used as a means of making sure that the money is in hand before advertisements, for example, have to be paid for.

Chapter 8

OTHER ISSUES

1. AUCTIONS BY BAILIFFS - EXEMPTION FROM LICENSING REQUIREMENTS

(a) Issues

8.1 The question has been raised whether bailiffs who conduct auctions at which land taken under a warrant of execution is sold are required to be licensed under the *Real Estate and Business Agents Act 1978* and, if so, whether they should be exempt from the requirement.¹

8.2 A bailiff will not normally be licensed under the *Real Estate and Business Agents Act 1978* but can employ a licensed auctioneer who is licensed under the *Real Estate and Business Agents Act 1978* to conduct the auction of the land. In some bailiffs' sales of land such a licensed auctioneer is employed to conduct the auction. In some - probably most - bailiffs' sales of land, the auction is conducted by the bailiff himself.

(b) Present position

8.3 By clause 13 of the schedule to the *Real Estate and Business Agents Act 1978* an auction of real estate may only be conducted by a person:

"(a) who may lawfully conduct such an auction under the *Auction Sales Act 1973*;
and

(b) who -

¹ The same point arises where a bailiff sells a business or a share or interest in a business or the goodwill of it: *Real Estate and Business Agents Act 1978* s 4 (definitions of "agent" and "business transaction"), s 60 and schedule clause 14.

- (i) is, under this Act, a licensee with a current triennial certificate and conducts the auction in the course of his business as such a licensee; or
- (ii) is a person who conducts the auction on behalf of, in the course of the business of, and under the supervision and control of such a licensee."

In this clause "licensee" means a person licensed under the *Real Estate and Business Agents Act 1978*. Thus clause 13 provides that except where a licensed auctioneer conducts an auction of land on behalf of and under the control of a person holding a licence under the *Real Estate and Business Agents Act 1978*, an auctioneer of land must be entitled by the *Auction Sales Act 1973* to conduct the auction and have a licence under the *Real Estate and Business Agents Act 1978*. By the *Auction Sales Act 1973*, a bailiff is entitled to conduct an auction of land pursuant to a warrant of execution and need not be licensed under that Act. This is because section 5(1)(h) of the *Auction Sales Act 1973* states that:

"Nothing in this Act applies to . . . any person who, under or pursuant to any Act, is for the time being authorised to sell by auction without holding an auctioneer's licence"

and section 19 of the LCA gives a bailiff such authority. Section 19 provides:

"A bailiff or other officer duly authorised to execute a warrant of execution issued under the authority of this Act may sell land or goods without taking out an auctioneer's licence."²

However, there is no provision in either the LCA or the *Real Estate and Business Agents Act 1978* exempting a bailiff acting under a warrant of execution from being licensed under the latter Act.

8.4 The history of the legislation is of interest. In 1904, when section 19 of the LCA was enacted, the *Auctioneers Act 1873* was in operation. It was repealed by the *Auctioneers Act 1921*, which was in turn repealed by the *Auction Sales Act 1973*. Each enactment required a person conducting an auction to hold an auctioneer's licence but contained an exemption for a sale under a process of execution issued out of a court. In 1904, there was no legislation regarding real estate agents' licences. The *Land Agents Act 1921* first legislated regarding

² The wording of s 19 has never been altered since the LCA was enacted in 1904.

land agents. The requirement of a person conducting an auction sale of land to hold not only an auctioneer's license but also a real estate agent's licence is new, first enacted in the *Real Estate and Business Agents Act 1978*.

8.5 The LCA empowers the bailiff to sell the goods and land of the judgment debtor³ and section 19 of the LCA makes it clear that the power to sell should include power for the bailiff to sell by auction. It is a principle of statutory interpretation that where two statutes are in conflict, the later statute is deemed to impliedly repeal the earlier. Clause 13 of the schedule to the *Real Estate and Business Agents Act 1978* in providing that no person can lawfully conduct an auction sale without holding a licence under that Act does appear to create a direct conflict with the provision of the LCA which authorise a bailiff to conduct an auction sale of land. Hence, unless the *Real Estate and Business Agents Act 1978* and the provision of the LCA authorising a sale by auction can be reconciled, the provisions of the *Real Estate and Business Agents Act 1978* will prevail. The *Real Estate and Business Agents Act 1978* exempts certain categories of persons from the application of its provisions but these do not include bailiffs.⁴ This suggests that Parliament did not intend to exclude bailiffs. However, courts sometimes avoid finding an implied repeal by finding that the two enactments can both operate, with the earlier more specific provision being an exception to the later more general enactment. If one considers the *Real Estate and Business Agents Act 1978* in terms of the regulation it imposes, one finds that provisions in that Act regarding suitability, controls on fees and remuneration and the supervision and discipline of real estate agents have equivalents in the LCA in relation to bailiffs. There are, in effect, two parallel systems: that created by the *Real Estate and Business Agents Act 1978* for the appointment, remuneration and discipline of real estate agents, and that created by the LCA for the appointment, remuneration and discipline of bailiffs. It may very well be that a court would find that clause 13 of the schedule to the *Real Estate and Business Agents 1978 Act* does not apply to a bailiff when selling land by auction under a warrant of execution.

³ Ss 122 and 126.

⁴ The exempted persons are a court-appointed receiver and manager and an official receiver or trustee in bankruptcy (s 4(1)) and also a company authorised by law to obtain a grant of probate of a will when exercising its power to do so or any other power conferred on it by the law and stockbrokers when dealing in securities (s 4(4)).

(c) Should a bailiff be licensed under *Real Estate and Business Agents Act 1978*?

8.6 As the legal position is not completely clear, the Commission feels that it is appropriate in this discussion paper to raise the issue of whether a bailiff authorised to execute a warrant of execution over land should himself be able to auction the land, although he is not licensed under the *Real Estate and Business Agents Act 1978*. Unless the bailiff can auction the land without being licensed, bailiffs in practice would always have to utilise the services of a person who is both licensed under the *Auction Sales Act 1973* and the *Real Estate and Business Agents Act 1978*. The possibility of bailiffs avoiding this by becoming licensed under the *Real Estate and Business Agents Act 1978* may not be a feasible alternative because of the academic qualifications and practical experience which are prerequisites for qualification for the grant of a licence under that Act.⁵

8.7 There are advantages in a bailiff always using the services of an auctioneer who is licensed under both the *Auction Sales Act 1973* and the *Real Estate and Business Agents Act 1978* under a warrant of execution. The knowledge and experience of the auctioneer are brought to bear at the auction. In addition, any party interested in the sale such as the judgment creditor, the judgment debtor, the purchaser and even the bailiff can apply to the Real Estate and Business Agents Supervisory Board for it to exercise its powers to enquire into the conduct of the agent.⁶ The Board is empowered to hold an enquiry into the conduct of an agent to determine a number of matters including whether the agent has been complying with the agents' code of conduct or with the requirements of the Act. If after conducting its enquiry the Board is satisfied that proper cause exists for disciplinary action, there is a range

⁵ To be qualified for the grant of a licence, an applicant must have -

- (a) a certificate in Real Estate Management from TAFE ; or
- (b) an associate Diploma of Business (Real Estate) stage 1 from TAFE; or
- (c) a Diploma in Valuations together with Accounting 203 and Property Marketing and Management from Curtin University of Technology;
- (d) an Associate Diploma in Valuation, a Bachelor of Business (Valuation and Land Administration) or a Bachelor of Commerce (Property) from the Curtin University of Technology, together with (also from that University) -
 - (i) Property Marketing and Management and either Accounting Systems 153 or Accounting 203;
 - (ii) Real Estate Business 250 and Real Estate Business 300; or
 - (iii) Real Estate Business 305 and Property Management 330:

Real Estate and Business Agents Act 1978 schedule cl 1(a) and *Real Estate and Business Agents (General) Regulations 1979* reg 6.

In addition, the applicant must have had "sufficient practical experience in negotiating transactions to enable him to carry on the business of an agent satisfactorily": *Real Estate and Business Agents Act 1978* schedule cl 1(a).

⁶ *Real Estate and Business Agents Act 1978* ss 102 and 103.

of penalties which it can impose on the agent.⁷ The system provides a means of resolving disputes quickly and without expense to parties. The cost and greater inconvenience of dealing with the dispute in the courts is avoided.

8.8 There are, however, arguments against requiring the bailiff to always use the services of an auctioneer who is licensed under the *Auction Sales Act 1973* and the *Real Estate and Business Agents Act 1978*. The first relates to the costs of executing the warrant. Although when an auctioneer is used by the bailiff, the bailiff's poundage⁸ will be approximately halved, the reduced poundage plus the maximum fee which the auctioneer is permitted to charge under the *Real Estate and Business Agents Act 1978* will exceed what the poundage would have been if an auctioneer had not been instructed.⁹ This will be so because the maximum fee under the *Real Estate and Business Agents Act 1978* is higher than poundage where an auctioneer is not instructed. Where the only work which the auctioneer does is to attend at the venue of the auction and conduct the auction, the bailiff may be able to agree a fee with the auctioneer which would only be a portion of the maximum fee and which when added to the reduced poundage would produce a sum which would not exceed the poundage which would have been payable if an auctioneer had not been instructed. However, this may not occur in all cases and this possibility is a drawback to the proposal. Another difficulty is that bailiffs' incomes are related to the fees payable to them for processes served or executed,¹⁰ unlike some other jurisdictions where there is a system of salaried bailiffs. If in every sale of land under a warrant of execution, the bailiff had to engage an auctioneer and reduce his poundage by roughly half, this would have an effect on the income of bailiffs.

⁷ Id s 103.

⁸ "Poundage" is the term used to describe the percentage amounts payable to a bailiff when engaged in the seizure and sale of goods or land. There is discussion on the topic of poundage in paras 8.17-8.21 below.

⁹ The maximum amount upon which poundage is to be calculated is the amount of the judgment debt, notwithstanding sale proceeds may exceed the amount of the judgment debt: LCR Part II of Appendix, Table of Bailiffs' Fees, note to item 6. If, for example, the judgment debt was \$10,000 and the land the subject of the warrant of execution was sold for \$10,000, the bailiff's poundage where an auctioneer is not employed is 5% namely \$500: *ibid* item 6(a). Because the sale was without the intervention of an auctioneer or agent, poundage of one per cent of the proceeds of sale (in addition to that prescribed by item 6(a)) but not exceeding \$80 is chargeable under item 7. This makes a total of \$580. Where a successful auction of the land is conducted by a licensed auctioneer instructed by the bailiff only one half of the 5% is payable namely \$250. However, the maximum prescribed remuneration for an auctioneer who is also licensed under the *Real Estate and Business Agents Act* where land is sold for \$10,000 is \$675: *Real Estate and Business Agents (Remuneration) Notice 1991 (Government Gazette 3/5/91)* as amended by *Real Estate and Business Agents (Remuneration) Amendment Notice 1992 (Government Gazette 20/3/92)*.

¹⁰ See LCA s 20.

8.9 The equivalent provision to section 19 of the LCA in the *District Court of Western Australia Act 1969* is section 31 of that Act. Section 31 makes it clear that the bailiff in the District Court is exempt from the requirements of clause 13 of the schedule to the *Real Estate and Business Agents Act 1978*. The section provides:

"A bailiff or person appointed under this Act to assist him who is duly authorized to execute a writ of fieri facias issued under the authority of this Act, may in doing so sell land or goods without being the holder of a licence under the *Auctioneers Act 1921*, or any other Act."

The words "or any other Act" would include the *Real Estate and Business Agents Act 1978*.¹¹ Even if it is expressly provided that a Local Court bailiff may sell land or goods without being the holder of a licence under the *Auction Sales Act 1973* or the *Real Estate and Business Agents Act 1978*, the bailiff would retain the ability to employ an auctioneer. The Commission's preliminary view is that such express provision should be enacted and such an ability retained.¹²

2. INTERPLEADER

(a) Goods

8.10 Interpleader is a procedure by which a party, faced with competing claims for the same debt or property, may protect himself by forcing the claimants to resolve the dispute among themselves.¹³ A bailiff who has seized a judgment debtor's goods under a warrant of execution is in a vulnerable position when ownership of those goods is claimed by a person

¹¹ *Interpretation Act 1984* s 8. It would also extend to a sale of liquor taken in execution without a licence under the *Liquor Licensing Act 1988* which has replaced the *Liquor Act 1970*.

The equivalent provision to s 19 of the LCA in the SCA is s 162 of that Act which provides:

"It shall be lawful for the sheriff or his deputy to sell by auction all property of whatever nature which may be taken by him in execution without having taken out an auctioneer's licence, or to sell liquor taken in execution without any licence under the *Liquor Act 1970*, anything in any law now in force to the contrary notwithstanding."

By virtue of this provision, the sheriff in selling by auction land taken in execution is regarded as not being subject to the provisions of cl 13 of the schedule to the *Real Estate and Business Agents Act 1978*.

¹² It is noteworthy that the use of a real estate agent by the bailiff to market the property can be appropriate. This is recognised in the Table of Bailiff Fees: LCR Appendix Part II item 10. The Commission understands that depending on the nature of property, the sheriff of the Supreme Court has at various times handed over the marketing of it to various real estate firms (who were licensed auctioneers as well as being licensed under the *Real Estate and Business Agents Act 1978*).

¹³ Cairns 268. The topic of interpleaders where a party is faced with competing claims for the same debt was dealt by the Commission in Part I of this project: Part I Report paras 15.33 - 15.35. The LCA also contains provisions to resolve the problem which arises when it is alleged that a debt which has been attached belongs to a third person: fn 32 in ch 2 above.

other than the judgment debtor.¹⁴ To alleviate the situation, the LCA and LCR provide an interpleader procedure under which the dispute as to the ownership of the goods or of an interest in them can be resolved.

8.11 The LCR provide that where a person other than the judgment debtor makes a claim in respect of goods which have been seized under a warrant of execution, the claim must be in writing.¹⁵ The bailiff is required to send notice of the claim to the judgment creditor immediately.¹⁶ If the judgment creditor admits the claim and gives notice to the bailiff of that admission "by return of post", the judgment creditor is only liable to the bailiff for possession fees and expenses incurred by the bailiff prior to the receipt of that notice by the bailiff.¹⁷ If the judgment creditor does not so admit the title of the claimant, the bailiff is to apply to the clerk of the court for the issue of an interpleader summons¹⁸ which the clerk may issue by virtue of the LCA.¹⁹ The interpleader summons calls before the Local Court the execution creditor and the person making the claim in respect of the goods seized (the claimant) so that the magistrate can decide the ownership of the goods.²⁰ The LCR require that at least five days before the return day of the summons, the claimant must lodge with the clerk of the court two copies of the particulars of any goods alleged to be the property of the claimant and of the grounds of his claim.²¹

8.12 In the Part I Report the Commission recommended that the period prescribed in the LCR within which the creditor might admit the title of the claimant in response to the notice of claim should be extended from by "return of post" to four days after receipt of that notice.²² At the time that the report was submitted, the time limit in the Supreme Court was four days after the receipt of the notice of the sheriff. Since then the time limit in the Supreme Court has been extended to 14 days.²³ For the sake of consistency, the Commission suggests that the period now be extended to 14 days.

¹⁴ Para 7.54 above.

¹⁵ O 30 r 1. There is an underlying problem, namely that if this other person is unaware of the seizure or ignorant of his right to make a claim the sale might proceed without any claim by him.

¹⁶ LCR O 30 r 1 and Form 144 in Part I of the Appendix to the LCR.

¹⁷ LCR O 30 r 2 and Form 145. Form 144 (previous footnote) says that the notice of admission is to be given by "return of post".

¹⁸ LCR O 30 r 4.

¹⁹ S 143.

²⁰ Ibid. The interpleader procedure can be used where the claim is one of a joint ownership with the judgment debtor as well as where the claim is one of entire ownership.

²¹ LCR O 30 r 6.

²² Part I Report para 15.36.

²³ RSC O 17 r 12(2).

8.13 Where a claim in respect of goods is made, the claim need not contain the grounds of the claim. These grounds can be supplied five days before the return day of the interpleader summons. The Commission's preliminary view is that they should be supplied with the claim because it would be of assistance to the judgment creditor in deciding whether to admit the claim.

8.14 The existing procedures might seem onerous to the third party particularly if he has merely put the judgment debtor in possession of goods by way of loan.²⁴ However, the possibility of a third party making a claim which is groundless and which is aimed at protecting goods which the bailiff is entitled to dispose of has to be borne in mind. A mechanism must be available to test claims. In the absence of knowledge of any other defects, the Commission does not propose to undertake a substantial revision of the interpleader procedure in Local Courts. Perhaps the LCA or LCR should contain a form of claim for third parties which should also explain the procedures involved in an interpleader from the point of view of the claimant. Copies of the form could be available from Local Court registries and possibly from bailiffs.

(b) Land

8.15 The above provisions relating to bailiff's interpleader do not expressly deal with bailiff interpleaders in relation to land. A Local Court does not have jurisdiction to hear and determine an action in which the title to land is in question²⁵ unless the title to land incidentally comes in question in an action. In the latter case, the Court may decide the claim which is the immediate object of the action, but the judgment of the Court is not evidence of title between the parties or their privies in another action in the Court or in any proceedings in any other court. It is therefore doubtful whether a Local Court can grant relief in a bailiff interpleader in relation to land.

8.16 Relief by way of interpleader in relation to land may be granted by the Supreme Court where the applicant is the Sheriff or other officer charged with the execution of process under the authority of the Court.²⁶ It therefore does not apply to a bailiff of a Local Court. As Local

²⁴ As to costs, see LCA s 143.

²⁵ LCA s 30(2)(b).

²⁶ RSC O 17 r 1(b).

Courts do not have jurisdiction to determine an action in which the title to land is in question, the Commission suggests that the bailiff should also be able to utilise the Supreme Court procedure to obtain relief by way of interpleader.²⁷

3. POUNDAGE FEES

8.17 When a bailiff has made a seizure of land or goods under a warrant of execution and monies have been paid either to him or to the creditor under compulsion of the warrant subsequent to the seizure, the bailiff is entitled to a remuneration known as poundage. Poundage is calculated basically on the amount paid but where there has been a sale may not exceed the amount of the judgment debt.²⁸ Because poundage is calculated on the amount paid, it may not reflect the amount of work which the bailiff has had to do. Due to a special provision in the LCR under which for the purpose of poundage land is deemed to be seized on the service of the warrant on the Registrar of Titles under section 133 of the *Transfer of Land Act 1893*,²⁹ it is possible for the bailiff to be entitled to poundage where payment is made direct to the creditor after the service on the Registrar but before the bailiff has taken any action on the warrant. It has been suggested to the Commission that the payment of full poundage cannot be justified if no service has been rendered. It is the judgment creditor who serves the warrant on the Registrar of Titles.

²⁷ Examples where it could be convenient are the following -

- (a) Where the warrant of execution is registered against land registered in the name of the judgment debtor and a third party then claims that although he had not lodged a caveat against the land, the judgment debtor held the land in trust for the third party.
- (b) Where the warrant of execution is registered against land in the name of the judgment debtor and a third party claims that although he had not lodged a caveat against the land, the judgment debtor sold the land to him under a contract of sale signed before the registration of the warrant.

²⁸ LCR Appendix Part II Bailiff fees item 6. The scale applicable to poundage is set out in items 6 and 7. Briefly, the poundage to which bailiffs are entitled under the scale is:

- 6. (a) Poundage on executing a warrant of execution or other process under or by reason of which money is received by the bailiff or by the judgment creditor - after seizure 5% on the first \$10,000 and 2.5% on the balance above that amount.
- (b) Where the sale of land, interest in land, or goods or chattels is conducted by a licensed auctioneer instructed by the bailiff, poundage shall be charged at one-half the abovementioned rates.
- 7. Where the sale, whether by public auction or otherwise, is conducted by the bailiff or his officer without the intervention of an auctioneer or agent, poundage of one per cent of the proceeds of sale (in addition to that prescribed by item 6(a)) shall be chargeable; but the amount chargeable under this item shall not exceed \$80.

²⁹ The provision which appears in LCR Appendix Pt II Bailiff Fees item 6 provides:

"NOTE: In the case of land or an interest in land, service of the Warrant of Execution on the Registrar of Titles under s.133 of the *Transfer of Land Act 1893* shall be deemed to be 'seizure' for the purpose of this item."

8.18 At common law the bailiff is only entitled to poundage when he has seized the goods of the judgment debtor.³⁰ The rationale of this principle is that the bailiff should not be entitled to poundage until he has seized the goods and thus placed himself in the position to eventually sell them. The position at common law would be the same in relation to land. In practice, bailiffs in Western Australia do not make an actual seizure of land but carry out the advertising prescribed under section 123 of the LCA and this is equivalent to a seizure.³¹ One would expect that the bailiff could not be entitled to poundage until he had carried out the advertising. However, under the LCR land is deemed to be seized for the purpose of poundage on service of the warrant on the Registrar of Titles.³² This occurs before the advertising is carried out.³³ The common law position in relation to the seizure of goods has not been altered by the LCA or the LCR.

8.19 To be entitled to poundage, the money does not necessarily have to be paid to the bailiff. This was explained in relation to the sheriff by Brett LJ in *Mortimore v Cragg*³⁴ where he said:

"The money may be paid by the execution debtor either directly or indirectly: directly by virtue of the seizure to the sheriff; indirectly where payment is made by means of a compromise which is the consequence of the seizure; in either of those cases the sheriff is entitled to poundage. If a sale takes place, again the sheriff is entitled to poundage."³⁵

The comments would be equally applicable to a Local Court bailiff.

8.20 It does seem to be incongruous that the bailiff is entitled to full poundage where the property is not sold and money is paid to the judgment creditor by reason of the warrant of execution. The bailiff may have done no more than publish the notice under section 123 of

³⁰ *Bissicks v Bath Colliery Company Ltd* (1878) 3 Ex D 174.

³¹ Para 7.28 above.

³² Para 8.17 above. It is doubtful whether without this provision land would be seized for the purpose of poundage simply because the warrant was served on the Registrar of Titles and entered in the register book. In the case of goods, entry by the sheriff on to the premises where the goods are situated seems to be a prerequisite of seizure: 17 Halsbury's *Laws of England* (4th ed 1976) para 465.

³³ By virtue of r 18(1) of O 25 (Div 1) of the LCR, the bailiff cannot carry out the advertising pursuant to s 123 of the LCA until he has received from the judgment creditor a certified copy of the certificate of title to the land which has been certified after a copy of the warrant of execution has been served on the Registrar of Titles by the judgment creditor and the warrant entered as an encumbrance on the certificate of title pursuant to s 133 of the *Transfer of Land Act 1893*.

³⁴ (1889) 3 CPD 216.

³⁵ Id 219.

the LCA, for which he is in any case entitled to a fee.³⁶ In fact, he could be entitled to the poundage even though he has not taken any active enforcement steps and the land is not sold.³⁷ It can be argued that in these cases the bailiff should be entitled to a fixed fee.³⁸ Another approach would be to provide for a lower rate of poundage where the goods or land are not sold. There could be a scale with a graduation or graduations in it dependent on the work which the bailiff had done when the money was paid.

8.21 The Commission appreciates that poundage is an integral part of the remuneration of bailiffs who are not public sector workers but private individuals. Any fall in revenue resulting from a change in the law would have to be addressed.

4. ENFORCEMENT OF JUDGMENTS OR ORDERS OF COURTS OTHER THAN LOCAL COURTS IN LOCAL COURTS

8.22 Judgments or orders of courts other than Local Courts may be enforced in Local Courts by commitment by filing an office copy of the judgment or order in a Local Court. Where this is done, the clerk is required to issue a judgment summons.³⁹ This remedy is used to enforce judgments or orders of the Supreme Court and the District Court notwithstanding that there is no express statutory authority to do so.⁴⁰

8.23 Because proceedings in Local Courts are generally not as costly as those in the Supreme Court and District Court and because the locations of Local Courts are more convenient than the Supreme Court and District Court, the Commission suggests that express provision be made to the effect that judgments or orders of the Supreme Court and District Court may be enforced in Local Courts in the same manner as a judgment or order of a Local Court, at least so long as the sum due does not exceed \$25,000, the monetary limit of the jurisdiction of Local Courts. Such an approach would also have the advantage that

³⁶ LCR Appendix Part II Bailiff Fees item 4 provides a fee of \$40 for implementation of an advertising programme.

³⁷ Para 8.17 above.

³⁸ Poundage has been abolished in the corresponding courts in New South Wales and Queensland. It is still payable in Victoria but only on "money obtained by the seizure" and at the lower rate of 5% up to \$200 and 2.5% for excess over \$200: *Supreme Court (Sheriff's Fees No 2) Regulations 1986* (Vic) Item 11(a).

³⁹ LCR O 26 r 8. This remedy is used notwithstanding that these judgments or orders can be enforced by commitment under s 3 of the *Debtors Act 1871*.

⁴⁰ Unlike the position with some orders of Courts of Petty Sessions: s 155(6) of the *Justices Act 1902* provides that where a Court of Petty Sessions orders that money be paid in relation to certain matters set out in the Eighth Schedule the sum ordered to be paid is recoverable in the same manner as a judgment of a Local Court.

enforcement means other than commitment could be considered if the examination on a judgment summons disclosed, for example, that the judgment debtor had assets susceptible to seizure and sale.⁴¹

5. COSTS OF ENFORCEMENT

8.24 The general rule is that the costs of enforcing a judgment are payable by the judgment debtor.⁴² There are exceptions to the general rule. For example, where on the hearing of a judgment summons the magistrate, in lieu of making an order of commitment, makes a fresh order for payment of the amount remaining due and unpaid under the judgment or order, no costs for fees or witnesses shall be allowed to the judgment creditor unless the magistrate is satisfied that the debtor has had since the date of the original judgment or order the means to pay the sum in payment of which he had made default.⁴³ The fresh order for payment will normally be an order for payment by instalments.

8.25 Until recent years, the fees to be allowed to legal practitioners for acting on behalf of a party to a proceeding were according to the scale prescribed by the LCR.⁴⁴ However, now those fees are fixed by the scale contained in periodic determinations by the Legal Costs Committee.⁴⁵ The same scale applies in the taxation of bills of costs as between party and

⁴¹ According to one of those who made a preliminary submission, one difficulty at present is that if no order of commitment or new order is made, the judgment creditor may not issue a warrant of execution or other process of execution out of the Local Court but must return to the court in which the judgment or order was made to obtain the appropriate enforcement process.

⁴² See for example, LCR O 25 (Div 1) r 15 and O 28 r 8 and LCA s 81. In the Part I Report the Commission made a number of recommendations in relation to costs: paras 14.15-14.17 and 15.42-15.49. The recommendations have not yet been implemented. Of particular relevance to enforcement of judgments and orders were recommendations that -

- (a) In any chambers application, the magistrate should have the power to fix the costs of the application: paras 14.15-14.17.
- (b) Local Courts should have power to award costs greater than the scale in appropriate cases: paras 15.44-15.45.
- (c) Where any costs of a litigant in person are ordered to be paid by any other party to the proceedings or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs, sums in respect of any work, and any expenses and losses incurred, by the litigant in or in connection with the proceedings: para 15.48.

⁴³ LCR O 26 r 34. Another example is found in O 26 r 36 which provides that the costs of an abortive execution against the property of the debtor may not be included in the amount due under the judgment for the purposes of a judgment summons. There are, however, special provisions in relation to the court fees: O 26 r 36 and LCR schedule Part II (Table of Court fees) item 4.

⁴⁴ Prior to the enactment of the *Acts Amendment (Legal Practitioners, Costs and Taxation Act) 1987*, s 83 of the LCA provided that these fees were to be according to the scales provided by rules of court.

⁴⁵ *Legal Practitioners Act 1893* s 58W, which was inserted by the *Acts Amendment (Legal Practitioners, Costs and Taxation) Act 1987*. This Act also amended s 83 of the LCA to provide that the fees allowed to legal practitioners for appearing or acting on behalf of a party to proceedings shall be fixed by determinations under s 58W of the *Legal Practitioners Act 1893*.

party.⁴⁶ The scale does not apply to solicitors and client costs where the solicitor and the client enter into a written agreement as to costs.⁴⁷ To a very large extent, because of these new provisions, the topic of the costs of enforcing judgments is outside the scope of this project. This is particularly the case in respect of items for which costs are awarded and the amounts awarded in respect of them.

8.26 However, one of those who made a preliminary submission to the Commission said that the effect of the exception - referred to in the paragraph 8.24 above was to penalise judgment creditors. Even though the fees are not allowed to the judgment creditor, on a taxation of costs as between solicitor and client (that is to say the creditor), the fees might very well be allowed to the solicitor. Where they would be allowed, it is correct that the creditor would be penalised. It is certainly arguable that as the debtor has made default in payment of the judgment debt or is in arrears under an existing order for payment by instalments, the debtor should have to pay the fees. On the other hand, it can be argued that because there is at present no provision for the debtor to obtain an order for payment by instalments,⁴⁸ the debtor should not be penalised simply because he has not had the means to pay the judgment debt or the arrears in full.

6. HOURS OF COURTS

8.27 One organisation that made a preliminary submission to the Commission suggested that it would be of assistance to debtors if more flexible times could be set for hearings of judgment summonses and examinations in aid of execution. Local Courts are open for the transaction of business with litigants from Monday to Friday during the hours of 9 am to 4 pm. These hours will of course fall within the normal working day of most parties. However, magistrates may hear matters other than trials or applications for new trials in "chambers" at any time.⁴⁹

8.28 The Kelly Report recommended that hearings in enforcement matters be held also at night to allow debtors to attend without requiring leave from an employer and likely loss of

The last determination of the Legal Costs Committee was published in the *Government Gazette* of 28 October 1994.

⁴⁶ *Legal Practitioners Act 1893* s 58ZB.

⁴⁷ *Id* s 59.

⁴⁸ Except where judgment has been given or an order made for a sum not exceeding \$100: LCR O 23 r 9 and para 3.2 sub-para 2 above.

⁴⁹ LCA s 11.

income. It proposed that debtors should be given the option of attending during the day or in the evening.⁵⁰ The Commission noted in 1977 that such a step would be costly and the need for such access was difficult to assess.⁵¹

8.29 If inability to pay is a leading cause of involvement in enforcement proceedings it would certainly be counterproductive to require court attendance at times which have the effect of decreasing income still further or even creating a risk of loss of employment. Providing for alternatives to court appearance, such as submission of questionnaires or affidavits, would tend to reduce the problem. It has already been observed that in Victoria, for example, a judgment debtor may lodge with the registrar an application, accompanied by a statement of affairs, for an order to pay the judgment debt by instalments.⁵²

⁵⁰ Kelly Report 6.

⁵¹ WALRC Report 11.

⁵² Paras 3.10-3.11 above.

Chapter 9

UNIFORM ENFORCEMENT PROCEDURE

1. THE PRESENT POSITION

9.1 At present the means of enforcement of judgments in the District Court of Western Australia are assimilated to those of the Supreme Court.¹ This is not the case with the enforcement of judgments in the Local Courts. Nevertheless, the LCA shows strong links in several areas with the SCA: a judgment may be obtained in the Supreme Court based upon a Local Court judgment,² and in certain cases a Local Court judgment may be removed into the Supreme Court to be further enforced there.³

9.2 There are inconsistencies in the enforcement rules between the superior and inferior courts such as those relating to the setting of priorities among creditors.⁴ Some provisions, while parallel, are not identical and remain open to varying interpretations.⁵ Different terms are used to refer to the same sort of enforcement process.⁶

9.3 The SCA⁷ sets out detailed provisions for the enforcement of judgments and orders. These provisions do not take away or curtail any mode of enforcing judgments which existed before the coming into the operation of the *Supreme Court Act 1935*. Furthermore, the Supreme Court is invested with and is to exercise the jurisdiction, powers and authority of the courts at Westminster at the time of the commencement of the *Supreme Court Ordinance 1861*.⁸ The following table compares the means of enforcement available in the Supreme Court and the Local Courts.

¹ *District Court of Western Australia Act 1969* ss 52 and 56.

² LCA s 120.

³ Id s 142.

⁴ See s 86A of the *District Court of Western Australia Act 1969* which deals with the priority of Supreme Court, District Court and Local Court executions.

⁵ See, for example, ss 122-125 of the LCA (sale of land under execution) as contrasted with the corresponding ss 119-121 of the SCA. There does not seem to be any good reason why they should not be identical. Some of the other differences between enforcement provisions in the Supreme Court and in Local Courts are referred to in paras 9.7-9.30 below.

⁶ See the Table which commences on the next page.

⁷ Ss 117-145.

⁸ SCA s 16(1)(a).

**COMPARISON OF ENFORCEMENT POWERS IN THE SUPREME COURT AND
LOCAL COURTS**

SUPREME COURT

LOCAL COURT

JUDGEMENT FOR PAYMENT OF MONEY

Writ of fieri facias

Warrant of execution

Attachment of debts

Attachment of debts

Order charging stocks and shares. In addition judgment creditor who has obtained a charging order may serve a stop notice on a company.

No equivalent of a charging order or a stop notice

Equitable execution by means of a receiver or charging order, supplemented if necessary by an injunction restraining the judgment debtor or any other person from dealing with property

No express equivalent, but a Local Court may have power under section 33 of the LCA to enforce a judgment in a money claim by equitable execution by means of a receiver⁹

Commitment under the *Debtors Act 1871*

Committal under section 130 of the LCA

Writ of sequestration

No equivalent

Writ of attachment

No equivalent

JUDGMENT FOR THE POSSESSION OF LAND

Writ of possession

Writ of possession

Writ of sequestration

No equivalent

Writ of attachment or order of committal

No equivalent, but penalty may be imposed under section 155 of the LCA

Writ of restitution

No equivalent

⁹ See fn 42 to Ch 2 above.

JUDGMENT FOR THE RECOVERY OF PROPERTY OTHER THAN LAND OR MONEY

Writ of delivery	Warrant of delivery
If the defendant is ordered to deliver within a given time: writ of attachment	No equivalent, but penalty may be imposed under section 155 of the LCA
If the defendant is ordered to deliver within a given time: writ of sequestration	No equivalent, but penalty may be imposed under section 155 of the LCA

JUDGMENT DIRECTING A PERSON TO DO AN ACT IN A LIMITED TIME

Writ of sequestration	No equivalent
Except where the act is the payment of money, by a writ of attachment or by committal	No equivalent, but penalty may be imposed under section 155 of the LCA

JUDGMENT REQUIRING A PERSON TO ABSTAIN FROM DOING ANYTHING

Writ of attachment or by committal	Penalty may be imposed under section 155 of the LCA
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2. POSSIBLE REFORMS

(a) Introduction

9.4 Where there are different systems for enforcement of judgments, as in Western Australia, disadvantages flow from the confusion and inconvenience which can result from having to deal with inconsistent and independent procedure in the various courts. The application of the provisions relating to enforcement of judgments and orders in the Supreme Court of Western Australia to Local Courts in this State is a possibility which is worthy of consideration. A number of law reform agencies have reached the conclusion that ". . . the continued existence of parallel systems for the recovery of judgment debts is totally unwarranted".¹⁰ However, the advantages of uniformity might be outweighed if some Supreme Court procedures were thought to be unnecessary or inappropriate to circumstances

¹⁰ OLRC Report Part I, 79, citing UK Report, NSWLRC Draft, NB Report, and NI Report.

prevailing in Local Courts. Some examination of Supreme Court provisions and the means of harmonising the powers of enforcement in the Supreme Court and Local Courts is therefore required.

9.5 Four approaches could be adopted to harmonising the powers of enforcement in the Local Courts with those in the Supreme Court. These are -

1. The Supreme Court provisions as to enforcement that were relevant to the jurisdiction of Local Courts¹¹ could be applied to Local Courts as is done in the District Court.¹² A judgment of the District Court may be enforced in the same manner and to the same extent as though it were a judgment of the Supreme Court. This approach ought not be adopted if it were thought that provision should be made for the garnishment of earnings¹³ because this means of enforcement is not available in the Supreme Court or if it were thought that imprisonment for debt should be abolished.¹⁴
2. The relevant current Supreme Court enforcement methods could be used with additional methods, for example, by providing for the garnishment of earnings. As with the first approach, it ought not to be adopted if it were thought that imprisonment for debt should be abolished.
3. Particular means of enforcement in the Supreme Court that are appropriate to the jurisdiction of Local Courts could be adopted in those Courts. This approach has been adopted in New South Wales for example where a writ of execution in the nature of a writ of fieri facias may be issued by Local Courts.¹⁵ It may be executed in the same manner as a process of a similar nature issuing out of the Supreme Court may be executed by the sheriff.

¹¹ Some of the enforcement means in the Supreme Court are directed at jurisdiction that has been conferred on it but which has not been conferred on Local Courts. These means need not be available to enforce Local Court judgments.

¹² Para 9.1 above. This approach has been adopted in Tasmania: *Magistrates Court (Civil Division) Act 1992* s 31A. Alternatively, as in South Australia, a separate enforcement statute could be enacted which applied to all civil courts: *Enforcement of Judgments Act 1991* (SA). The Law Reform Commission of the Australian Capital Territory recommended ". . . that execution of all Court of Petty Sessions judgments should be effected by a system of registration of the judgment in the Supreme Court": *Report on the Civil Procedure of the Court of Petty Sessions* para 2.34.

¹³ Paras 5.27-5.81 above.

¹⁴ Ch 6 above.

¹⁵ *Local Courts (Civil Claims) Act 1970* (NSW) s 58(1).

Another example appears in rule 27.09(6) of the Victorian *Magistrates' Court Civil Procedure Rules 1989* which provides:

"(6) Subject to this Order and except where otherwise expressly provided by these Rules, the rules, practice and procedure of the Supreme Court which apply to or are adopted by the sheriff in the execution of warrants of execution apply, with such modifications as are necessary, to the execution of warrants to seize property."

4. Separate enforcement provisions could be kept for Local Courts but wherever practicable they could be harmonised with those applicable to the Supreme Court. The same names could also be adopted in Local Courts for processes which have the same effect as those in the Supreme Court. For example, a warrant of possession could be called a writ of possession.

9.6 The following paragraphs contain a discussion of the benefits and disadvantages of a number of means of enforcement that are available in the Supreme Court that would apply in Local Courts if either the first or second approach referred to above were adopted. These matters could also be taken into account if either the third or fourth approach were adopted. Whatever approach is adopted, the Commission's preliminary view is that the enforcement provisions in the Local Courts should be the same as those in the Supreme Court unless there is a significant defect in the Supreme Court provision or a provision is not relevant to the jurisdiction of Local Courts.

(b) Writs of fi fa

9.7 The main benefits of applying to Local Courts the provisions relating to writs of fi fa in the SCA and the RSC are -

- * The confusion which exists in Local Courts because of the alternatives of seizing land the subject of a warrant of execution and proceeding without a seizure¹⁶ does not exist in the Supreme Court. Section 120 of the SCA simply provides that it is not necessary for the Sheriff to make any actual seizure of land under a writ of fi fa before the sale of the land.¹⁷

¹⁶ Paras 7.27-7.28 above.

¹⁷ S 118 of the SCA provides that the land may be seized under a writ of fi fa.

- * Sections 122 and 123 of the SCA, which give the Sheriff certain powers by virtue of the writ of fi fa, are more extensive than section 127 of the LCA which is the equivalent provision in that Act. Among other things, sections 122 and 123 empower the Sheriff to seize and retain for 48 hours the books and accounts of the judgment debtor's business and to give a notice which will restrain a person who according to those books and accounts is indebted to the judgment debtor from paying the debt otherwise than to the Sheriff.

- * The application to Local Courts of section 159 of the SCA which does not have a statutory equivalent in the LCA.¹⁸ Section 159(1) provides that where any goods in the possession of an execution debtor at the time of seizure by the Sheriff are sold by him without any claim having been made to the goods, the purchaser of those goods acquires a good title to them. The subsection also provides that a person is not entitled to recover against the Sheriff by reason of the sale of the goods unless it is proved that the Sheriff ". . . had notice or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor".¹⁹

- * The fact that by virtue of Order 82 rule 11 of the RSC, the Sheriff can require a deposit of money to meet fees including advertising. This is not provided for in Local Courts.²⁰

- * In the Supreme Court, where property offered for sale by the Sheriff by public auction was not sold at the first auction, the Sheriff can with the written consent of the judgment creditor offer the property for sale by public auction on a second occasion.²¹

9.8 The Supreme Court provision in relation to advertising requires the Sheriff to cause "notice of the time and place and particulars of the property to be given in such manner as

¹⁸ It appears that s 159 does not apply to Local Courts: see para 7.58 above.

¹⁹ S 159(2) provides that nothing in subsection (1) affects the right of a claimant to any remedy to which he is entitled against any person other than the Sheriff or the purchaser of the goods if the claimant proves that at the time of the sale he had a title to the goods. The possible adoption of s 159 in Local Courts is discussed at greater length in paras 7.54-7.59 above.

²⁰ The point is considered in paras 7.77-7.79 above.

²¹ RSC O 82 r 3(3). The point is considered in para 7.65 above.

appears to him best calculated to give due publicity to such sale".²² This places an emphasis on due publicity and is therefore aimed more at promotion of the price than are the provisions operating in Local Courts.²³ On the other hand, it can be argued that there should continue to be prescribed particulars and details because of the certainty that that advertising will appear in every case.

9.9 The main disadvantages of applying the Supreme Court provisions to Local Courts are

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- * In the Supreme Court, interpleader proceedings in which the Sheriff is the applicant can relate to land and goods²⁴ and not only to goods as in Local Courts.²⁵ Local Courts do not have jurisdiction to hear matters in which the title to land is in question. They should not have jurisdiction to do so in interpleader proceedings.
- * The Sheriff's power to sell other than by public auction is more limited than that of the bailiff of a Local Court.²⁶
- * The writ of venditioni exponas²⁷ which may be issued in the Supreme Court may not be a desirable method of enforcing judgments in Local Courts. In the Supreme Court such a writ may issue by leave of a judge where the Sheriff has attempted to sell the judgment debtor's property but has been unable to do so because he could not obtain a reasonable price.²⁸ The writ directs the Sheriff to sell at the best price obtainable.²⁹ That price may be an undervalue.

²² RSC O 82 r 1(1). As in Local Courts (LCR O 25 Div 1 r 17(1)), there is an exception in the case of property of a perishable nature: O 82 r 1(2).

²³ As to which, see paras 7.29 and 7.31 above.

²⁴ RSC O 17. The point is considered in paras 8.15-8.16 above.

²⁵ Paras 8.10-8.11 above.

²⁶ Under s 124 of the SCA, a sale of goods by the Sheriff under a writ of execution for a sum exceeding \$40 must be made by public auction unless the Court otherwise orders. Under O 25 (Div 1) r 17(2) of the LCR where the value of goods seized under a warrant of execution is less than \$100, the bailiff may sell the goods by public auction in a public auction room approved by the magistrate without advertising notice of the sale. (In its preliminary submission to the Commission, the Metropolitan & Country Bailiffs' Association submitted that the figure of \$100 should be increased to say \$500).

²⁷ Which is a writ of execution in aid of a writ of fi fa: Cairns 547.

²⁸ SCA s 125(3); RSC O 47 r 2.

²⁹ RSC form 47.

- * In the Supreme Court, it is necessary before a writ of fi fa may be issued for the judgment to be drawn up, signed by the Registrar and sealed with the seal of the Court.³⁰ In Local Courts, it is not necessary where judgment has been given for the payment of money or costs to draw up any formal judgment as a prerequisite to further proceedings on the judgment.³¹

(c) Attachment of debts

9.10 The provisions in the LCA dealing with attachment of debts are set out in sections 144 to 153. They are already very similar to the provisions dealing with attachment of debts in the SCA which are contained in section 126 of that Act.

9.11 Under the RSC, the order nisi ordering the garnishee to appear to show cause why he should not pay to the judgment creditor the debt due from the garnishee to the judgment debtor must be served not only on the garnishee but also unless the Court otherwise directs, on the judgment debtor.³² The Commission sees this as an advantage, as it would enable the judgment debtor to show cause, if he wished to do so, at the same time as the garnishee is given the opportunity to do so, instead of later in the procedure as is the case in Local Courts.³³

9.12 In both the Supreme Court and Local Courts, the costs of the garnishee proceedings are in the discretion of the court. However, there is a provision relating to costs in the LCA which is not contained in the SCA or the RSC and which the Commission considers is useful in Local Courts. Under this provision, where the garnishee pays into court all debts due, owing or accruing from him to the judgment debtor, or so much of them as is sufficient to satisfy the judgment debt, five clear days from the return day of the summons, he will not be liable for any costs incurred by the judgment creditor.³⁴

³⁰ RSC O 43.

³¹ LCR O 23 r 4; Part I Report paras 15.37-15.39.

³² O 49 r 2.

³³ O 28 r 5 of the LCR provides that where the garnishee has paid money into court and the judgment creditor elects to accept the money in satisfaction of his claim against the garnishee, then before the money is paid out to the judgment creditor, the clerk of the court must send notice to the judgment debtor stating that the money will be paid out unless the debtor appears on the day stated in the notice and shows cause.

³⁴ LCA s 153: paras 5.82-5.83 above. It would seem that he would have to pay in the fees and costs endorsed on the summons to the garnishee: see LCR Appendix Part I form 140. However, he would not be liable for further costs incurred by the judgment creditor in preparing for the hearing of the summons. See also LCR O 28 rr 4(5) and 4(6).

9.13 It is of interest that the exemptions from attachment are wider under the SCA than the LCA. Under the LCA, the only exemptions from attachment are "the wages of any servant, labourer, or workman".³⁵ In the Supreme Court, this exemption applies but is extended to the wages of "any seaman or apprentice to the sea service".³⁶ In addition in the Supreme Court, an order of attachment may not be made of any weekly payment under the *Workers' Compensation and Rehabilitation Act 1981* or a sum payable in redemption of the weekly payments.³⁷ The SCA also provides that the provisions of section 6 of the *Workmen's Wages Act 1898* are not to be affected.³⁸

(d) Order charging stock and shares or money in court

9.14 In the Supreme Court, an order may be made charging stocks and shares.³⁹ The charge imposed by the Court has the effect of entitling the judgment creditor to use such remedies as he would have been entitled to if the charge had been made in his favour by the judgment debtor, except that no proceedings to enforce the charge may be taken until after the expiration of six months from the date of the orders.

9.15 In addition, the RSC provide for a stop notice which can be a means of enforcing a judgment. A judgment creditor who has obtained a charging order may serve a stop notice on a company. When the notice has been served on the company, then as long as it remains in force, the company must not register a transfer of any stock, or make a payment of any dividend or interest restrained by the notice, without serving on the person on whose behalf the notice was filed a notice informing him of the request for such transfer or payment.⁴⁰

³⁵ S 145. For a discussion on widening the type of earnings that could be attached see paras 5.55-5.58 above.

³⁶ SCA s 126(1).

³⁷ Ibid. The *Workers' Compensation and Rehabilitation Act 1981* was formerly named the *Workers' Compensation and Assistance Act 1981* and is still referred to by its old name in the SCA.

³⁸ SCA s 126(1). S 6 of the *Workmen's Wages Act 1898* provides that money received by a contractor from the contractor's employer in respect of a contract, work or undertaking is not liable to be attached until all wages due or to accrue due to the contractor's workmen have been paid. The Act, however, provides a procedure under which money due or to become due from the employer to the contractor may be attached for the payment of overdue wages: ss 7-24.

³⁹ SCA ss 127-129.

⁴⁰ RSC O 50 rr 2-6. Thus, the order will prevent the payment of dividends, for example, without notice to the execution creditor. The company must not, by reason only of the notice, refuse to register the transfer or make payment for longer than eight days after receipt of the request, except under the authority of an order of the Court: id O 50 r 6(2).

9.16 No doubt, instances would occasionally arise in Local Courts when these powers could be used effectively in recovering money owing under a judgment. If these means of enforcement were not given to Local Courts, a judgment creditor wishing to avail himself of these means of enforcement could apply to a Supreme Court judge for the removal of the judgment to the Supreme Court.⁴¹

(e) Equitable execution by means of a receiver

9.17 By section 117(1)(d) of the SCA a judgment for the payment of money may be enforced by equitable execution by means of a receiver supplemented, if necessary, by an injunction restraining the judgment debtor or any other person from dealing with any property. Apart from section 117(1)(d), the Supreme Court provisions relating to equitable execution by means of a receiver are contained in Order 51 of the RSC. Many of the provisions in Order 51 are similar to those contained in Order 29 of the LCR. The provisions of Order 29 are the only express provisions in either the LCA or the LCR dealing with receivers.⁴²

9.18 It is clear that the Supreme Court can grant an injunction, which is ancillary to an order appointing a receiver, restraining the judgment debtor from dealing with property the subject of the receivership.⁴³ Probably such an injunction could be made by a Local Court where a receiver is appointed to enforce judgment in a money claim within the Court's jurisdiction.⁴⁴

⁴¹ The judge may make the order if satisfied that the judgment debtor has no goods which can be conveniently taken to satisfy the judgment: para 2.32 above.

⁴² As to the concept of receivership, the power of a Local Court to appoint a receiver and a brief outline of O 29 of the LCR, see paras 2.20-2.22 above.

⁴³ O 51 r 1(2) of the RSC provides that an application for an injunction ancillary or incidental to an order appointing a receiver can be joined with an application for an order for the appointment of a receiver.

O 51 r 1(3) of the RSC provides that in special circumstances the application may be made *ex parte*. Where this occurs an interim injunction may be granted pending the hearing of a summons for the appointment of a receiver: O 51 r 1(4).

⁴⁴ See fn 42 in Ch 2 above.

It is probably already implied in s 33 of the LCA that the power to grant ancillary remedies extends to interlocutory proceedings. However, the Commission has previously recommended that s 33 should expressly provide that the power to grant ancillary remedies should extend to interlocutory proceedings: Part I Report para 4.46.

9.19 Under the LCR, the security for accounting for money received, which the receiver must give before being appointed, is determined by the magistrate.⁴⁵ Under the RSC, the security required is prescribed in the rules⁴⁶ and this could be an advantage.

9.20 Under the procedure for passing accounts in the Supreme Court, the receiver must serve the accounts with a note of the appointment with the Registrar on each party interested. This serving of the account is not provided for in the LCR and is obviously desirable.

9.21 There are two possible disadvantages in applying Order 51 to Local Courts in the context of enforcement of judgments. First, rule 9 of the Order provides that unless the Court otherwise orders, the making of an application for the appointment of a receiver is deemed to include an undertaking by the applicant that he will pay a party affected by the order such compensation as the Court may in its discretion consider to be just. The rule seems to be aimed at a pre-trial appointment of a receiver to preserve property where the question of the defendant's liability remains to be determined.⁴⁷ The provisions may not be appropriate in the context of enforcing a judgment already obtained. Secondly, rule 6 of Order 29 of the LCR provides that the bailiff may be appointed a receiver and that he should not be required to give any security unless the magistrate should specially direct security to be given. This provision which seems to be a desirable one in Local Courts would not be available if the Supreme Court rules on receivers replaced those of Local Courts.

(f) Commitment under section 3 of the *Debtors Act 1871*

9.22 The following discussion is subject to the Commission's suggestion in Chapter 6 that imprisonment for debt should be abolished. The provisions in the LCA governing commitment to prison where the judgment debtor fails to pay a judgment debt or an instalment of a judgment debt are based on the words of section 3 of the *Debtors Act 1871*. The provision in the LCA giving the magistrate a discretion to make an order for instalments without ordering commitment in default of payment has been adopted from the *Debtors Act 1871*.⁴⁸ Although section 3 is expressed to apply to any courts in Western Australia, section 134 of the LCA provides that section 3 of the *Debtors Act 1871* does not apply to judgments

⁴⁵ LCR O 29 r 1.

⁴⁶ Unless the Court otherwise directs, it is by recognisance in Form No 63 to the rules, or if the amount for which security is to be given does not exceed \$7,500, by an undertaking: O 51 r 3(3).

⁴⁷ Para 2.20 above.

⁴⁸ Para 6.2 above.

or orders of Local Courts. The only provision in section 3 of the *Debtors Act 1871* which was not included in the LCA and which would have been desirable in the LCA is a requirement that the jurisdiction of committing a person to prison in the case of a court other than the Supreme Court should be exercised only by an order made in open court showing on its face the ground on which it is issued. This, in fact, is the practice in Local Courts, although it is not a legislative requirement.⁴⁹

9.23 The RSC contain only two rules which relate to section 3 of the *Debtors Act 1871*. One of these rules provides that an order of commitment under section 3 of the *Debtors Act 1871* is to bear the date of the day on which the order was made and is to continue in force for one year from that date but may be renewed.⁵⁰ There is a comparable provision to this in the LCR.⁵¹ The other rule states that a summons under section 3 of the *Debtors Act 1871* may not be issued by the Supreme Court unless the judgment creditor has first applied for and obtained an order of a judge for the issue of the summons.⁵² The Commission considers that it would be unnecessary to apply to a magistrate in every case for the issue of a judgment summons⁵³ and would regard the adoption of this particular rule into Local Courts as disadvantageous. The rule would militate against an efficient and expeditious judgment summons procedure which is desirable in Local Courts.

9.24 There are a number of provisions in the LCA and the LCR relating to commitment, and the judgment summons procedure associated with it, which the Commission considers to be desirable but which would no longer exist if the provisions operating in the Supreme Court replaced those of the LCR. These provisions include -

- * The provisions enabling the jurisdiction to be delegated to the clerk of the Court subject to any order by the clerk being suspended until reviewed by the magistrate.⁵⁴ The provisions have a practical value.

⁴⁹ S 11 of the LCA says that subject to rules of court, a magistrate may exercise in chambers any jurisdiction of the court, except the trial of actions and the hearing of applications for new trials.

⁵⁰ RSC O 81 r 3.

⁵¹ LCR O 26 r 24(1).

⁵² RSC O 81 r 2.

⁵³ O 26 r 4 of the LCR provides that a judgment summons may be issued without leave by the court nearest to the place where the debtor resides or carries on business or is employed.

⁵⁴ LCA s 130 (6)-(8).

- * The special provisions in the LCR governing judgment summonses against a firm.⁵⁵
- * The provision in the LCR under which when a judgment summons is issued from the court in which judgment was given, the bailiff is to lodge in court any warrant of execution which has issued against the debtor's goods or land.⁵⁶
- * The provisions enabling the judgment debtor or judgment creditor to apply to the magistrate to vary, suspend or stay an order made upon the hearing of a judgment summons.⁵⁷
- * The provision enabling the magistrate to suspend an order for payment by instalments for so long as the execution of the order of commitment in relation to arrears of instalments is suspended to enable those arrears to be paid.⁵⁸
- * The provision under which the judgment debtor is to be discharged from custody on the request of the judgment creditor.⁵⁹
- * The provision under which a magistrate may discharge a debtor confined to prison where the magistrate is of the opinion that the debtor should be discharged by reason of sickness or other sufficient cause.⁶⁰

While a Supreme Court judge would without express provision possess some of the powers referred to which are vested in magistrates, it is more satisfactory for the powers and procedures applicable to them to be set out in the legislation, as has been done in the LCA and the LCR.

9.25 The Local Court provisions governing judgment summons and commitment are more detailed than those in the Supreme Court but the Commission considers that they cater better

⁵⁵ LCR O 26 r 6.

⁵⁶ O 26 r 14. The warrant, if not fully executed, may be reissued by leave of the magistrate.

⁵⁷ LCR O 26 r 26.

⁵⁸ Id O 26 r 25. See para 2.15 above.

⁵⁹ LCR O 26 r 31.

⁶⁰ LCA s 139.

Unlike the RSC, the LCR makes provision for consent affidavits by the judgment debtor: para 2.16 above. In some respects, the desirability of this provision seems questionable: para 6.9 above.

for and are more responsive to the circumstances of judgment debtors typically found in Local Court proceedings.

(g) Writs of sequestration

9.26 Sequestration acts against the goods of the person liable under the judgment.⁶¹ The goods are held by sequestrators or commissioners until the judgment debt is paid.⁶² Sequestration when utilised would be ineffective in recovering money in some circumstances, for example, where the debtor is prepared to manage without the use of the goods.⁶³ It may be therefore that its introduction into Local Courts would be of little benefit. If this means of enforcement were not given to Local Courts, a judgment creditor wishing to avail himself of sequestration could apply to a Supreme Court judge for the removal of the judgment to the Supreme Court.⁶⁴

(h) Writs of attachment

9.27 A writ of attachment can lead to the imprisonment of the defaulting party. Even in the Supreme Court, it is only available in two cases⁶⁵ which would rarely arise in Local Courts. Furthermore, committal under section 130 of the LCA is a similar method of enforcement and it does not appear to be necessary to vest a power of attachment in Local Courts in relation to the recovery of money owing under a judgment.⁶⁶

(i) Writs of possession or of delivery

9.28 The principal method of enforcing an order for recovery of possession of land in Local Courts is by means of a warrant of possession⁶⁷ and that of enforcing a judgment for the

⁶¹ A court order is necessary for sequestration to issue.

⁶² Cairns 558. In this way the process compels obedience to the Court's order.

⁶³ It is noteworthy that orders made under the *Family Law Act 1975* (Cth) may be enforced by an order sequestrating the estate of the defaulting party: *Family Law Rules* O 33 r 6. Prescribed personal property is exempt: id O 33 r 6(9).

⁶⁴ The judge may make the order if satisfied that the judgment debtor has no goods which can be conveniently taken to satisfy the judgment: para 2.32 above.

⁶⁵ These are -

(i) default in payment of a penalty, or a sum in the nature of a penalty;

(ii) default by a trustee or a person acting in a fiduciary capacity, and ordered by the Court to pay any sum in his possession or under his control: SCA s 117(1)(g).

⁶⁶ In Local Courts, there is a power to order a warrant of attachment to issue when there has been default in regard to an order for discovery or inspection of documents: para 2.26 above.

⁶⁷ Para 2.23 above.

delivery of goods is by a warrant of delivery.⁶⁸ A person who fails to comply with such an order is also liable at the discretion of the magistrate to a penalty not exceeding \$5,000 or imprisonment.⁶⁹ In the preliminary submissions made to the Commission there were no criticisms of the concepts underlying the provisions in the LCA relating to the enforcement of orders for recovery of possession of land or warrants of delivery of goods.⁷⁰ Nor was there any suggestion that further methods of enforcement were required. At this stage, the Commission is not aware of any pressing need to apply to Local Courts the provisions operating in the Supreme Court relating to the recovery of land and the delivery of goods.

9.29 As already mentioned, where a magistrate makes an order, not for the payment of money, but for the doing of an act or for the ceasing of an act, section 155 of the LCA empowers the magistrate to impose a penalty if the order is disobeyed.⁷¹ The methods of enforcing such orders in the Supreme Court are more extensive. However, it is rare in Local Courts for recourse to be had to section 155 and the sanctions imposed by the sections, and in particular imprisonment for a term not exceeding 12 months appear to be adequate.

(j) Writs of restitution

9.30 A writ of restitution may issue if the defendant resumes possession of land after the sheriff has restored possession to the plaintiff under a writ of possession.⁷² The plaintiff should not seek to enforce the writ of possession by seeking to commit the defendant.⁷³ A writ of restitution has the advantage that it enables the sheriff to evict any person he finds on the premises even if they were not parties to the writ of possession.⁷⁴

9.31 In a Local Court if a defendant breached an order that possession of the land be given to the plaintiff by resuming possession after the plaintiff has been restored to possession, the

⁶⁸ Para 2.24 above.

⁶⁹ Para 2.25 above.

⁷⁰ The Metropolitan & Country Bailiffs' Association made suggestions which did not relate to the underlying concepts. The suggestions were that the times of entry under the warrant (para 2.23 above) should be altered to between 8am and 5pm and that consideration should be given to the adoption of s 160 of the SCA which, among other things, provides that on the execution of a writ of possession it should be lawful but not obligatory for the sheriff to remove any chattels found on the land: cf fn 44 in Ch 2 above.

⁷¹ Para 2.25 above.

⁷² D B Casson & I H Dennis *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice* (22nd ed 1981) 363.

⁷³ *Alliance Building Society v Austen* [1951] 2 All ER 1068, 1070.

⁷⁴ *Wiltshire County Council v Frazer* (No 2) [1986] 1 WLR 109, 112.

defendant would be liable to a penalty for disobeying an order of the court.⁷⁵ It may be therefore that the introduction of restitution into Local Courts would be of little benefit.

⁷⁵ Para 9.29 above.

Chapter 10

QUESTIONS AT ISSUE

10.1 The Commission seeks comment on the issues raised in this Discussion Paper, and in particular on all or any of the following questions -

ORDERS FOR PAYMENT BY INSTALMENTS

Instalment orders at judgment

1. Should the magistrate when delivering judgment have the power to make an order for payment by instalments?

Paragraphs 3.2 - 3.4 above

2. If so, should the magistrate be able to exercise the power to the full extent of the money limit of the jurisdiction of Local Courts or only if the amount of the judgment is below a specified figure and, if the latter, what should that figure be?

Paragraphs 3.5 - 3.8 above

Instalment orders made at a time after judgment

3. Should a Local Court be empowered to make an instalment order at a time after the granting of judgment on the application of either the judgment creditor or the judgment debtor?

Paragraphs 3.9 - 3.21 above

4. (i) What procedures should apply where the judgment creditor wishes to obtain an instalment order at a time after judgment has been entered?

- (ii) Should the application specify the order sought?

- (iii) Should a blank copy of a statement of financial affairs (in a prescribed form) be served on the judgment debtor with a copy of the application?
- (iv) Should the judgment debtor be able to complete and return the statement to the Court within a prescribed time?
- (v) Should the judgment creditor and the judgment debtor have a right to object to the clerk's decision on the application within a prescribed time with the result that the matter will be set down before and heard by the magistrate who will be empowered to confirm, cancel or vary the clerk's decision?
- (vi) Should the clerk still be able to decide whether the order requested be granted or refused with the judgment creditor and judgment debtor having the same right to object later to the decision, where the debtor has not returned the statement to the Court within the prescribed time?

Paragraphs 3.10 - 3.22 and 3.27-3.28 above

5. What procedures should apply where the judgment debtor wishes to obtain an instalment order at a time after judgment has been entered?

Paragraphs 3.10-3.26 above

6. Where the judgment creditor applies for an instalment order, when (if at all) should a stay of enforcement of the judgment come into operation?

Paragraphs 3.11, 3.13, 3.15, 3.16, 3.23 and 3.24 above

7. (i) Where the judgment debtor applies for an instalment order, when (if at all) should a stay of enforcement of the judgment come into operation?

- (ii) Should there be provisions aimed at protecting the judgment creditor from loss of priority to other creditors and, if so, what should they be?

Paragraphs 3.11, 3.13, 3.15, 3.16 and 3.23 - 3.26 above

Effect of default in payment

8. If the judgment debtor defaults in payment under an instalment order, should there have to be examination of the debtor by the Court with the Court having power to confirm, vary or cancel the order and with the effect that the judgment can only be enforced by other methods if the order is cancelled?

Paragraphs 3.13, 3.15, 3.16 and 3.29 above

9. If the reader answers question 8 in the negative, then should a failure to comply with an instalment order immediately terminate the stay of enforcement or should the stay terminate only when default has continued for say 14 days?

Paragraphs 3.16 and 3.30 above

10. As an exception to the principle that when the stay of execution ceases the judgment creditor may enforce the judgment debt for the whole of the balance owing, should the magistrate be empowered to order at any time that execution may issue for only a portion of the judgment debt?

Paragraphs 3.3 and 3.32 above

EXAMINATION IN AID OF EXECUTION

Examination as a prerequisite to enforcement

11. Should there always be an examination before a judgment can be enforced either -
- (a) generally; or
 - (b) against a consumer debtor?

Paragraph 4.5 above

Filing of a statement by the debtor

12. Should there be provision under which the clerk of the Court, on the application of the judgment creditor, would offer the judgment debtor by writing to him the opportunity

to complete and return to the Court a statement of his financial affairs (in a prescribed form)?

Paragraphs 4.6 - 4.8 above

13. Alternatively, should a judgment debtor be given an opportunity voluntarily to file a statement of his financial affairs (using a prescribed form) with the Court?

Paragraphs 4.6 and 4.8 above

Production of documents at the examination in aid

14. Should the prescribed form of summons to the judgment debtor to appear at an examination in aid of execution be amended and, if so, in what way?

Paragraphs 4.3 and 4.9 - 4.10 above

Failure to attend

15. Should a judgment debtor who fails to attend an examination in aid of execution be given a second chance before a warrant issues for his arrest?

Paragraphs 4.11 - 4.12 above

Duration of warrant

16. Should a warrant issued under section 144(2) continue in force only for 12 months unless extended by leave?

Paragraph 4.13 above

Enforcement of orders at the end of the examination

17. At the end of an examination in aid of execution, should the magistrate, on the application of the judgment creditor, be able to make orders for the enforcement of the judgment and, if so, what orders?

Paragraphs 4.14 - 4.15 above

ATTACHMENT OF DEBTS

Attachment of debts

18. Should a Local Court be empowered to attach debts notwithstanding that the judgment debtor has not satisfied certain conditions in the arrangements between himself and his debtor (the garnishee)?

Paragraphs 5.1 - 5.2, 5.6 - 5.10 and 5.13 - 5.15 above

19. If the Court should be so empowered, then -

- (a) What should be the conditions which need not be satisfied?

Paragraphs 5.6 - 5.10 and 5.13 - 5.15 above

- (b) In respect of which institutions should this exemption from satisfaction of conditions apply?

Paragraphs 5.6, 5.8 - 5.10 and 5.13 above

- (c) In respect of what debts should this exemption from satisfaction of conditions apply?

Paragraphs 5.6, 5.8 - 5.10 and 5.13 above

- (d) Should section 52A(4) of the New South Wales *Local Courts (Civil Claims) Act 1970* (quoted in paragraph 5.11 above), which deals with the time when institutions should pay the amount attached, be adopted?

Paragraph 5.11 and see also paragraph 5.14 above

- (e) Where it is a condition of an account that a passbook must be produced when making withdrawals, should some protection against double payment be afforded to the institution and, if so, how should this be provided?

Paragraph 5.12 above

- (f) Where a condition is not included in the statutory list of the conditions which have not been satisfied but it would be unreasonable to prevent attachment,

should the Court have authority to require the garnishee to ignore the condition or to order some alternative method of satisfying the condition?

Paragraph 5.17 above

20. Should future debts be attachable in Local Courts and, if so, what exceptions or limitations should there be to the attachability of future debts?

Paragraphs 5.18 - 5.19 and 5.21 above

21. If a Local Court should be empowered to attach future debts, then -

- (a) How should dealings with future debts which would defeat the judgment creditor's interest be dealt with?

Paragraph 5.18 above

- (b) How could a garnishee order of future debts best be given a continuous effect in relation to such future debts, for example, in relation to payments of rent or remuneration under a contract for services?

Paragraph 5.20 above

22. Should a Local Court be given power to exempt a portion of the attached debt to ensure that expenses associated with the production of the attached debt, such as the outgoings on a rental property the rent of which has been attached, are met?

Paragraph 5.21 above

23. Should there be provisions operating in Local Courts under which a judgment debtor's interest in a debt owed to him and another or others may be attached? Should there be a presumption that joint owners of a debt have an equal interest in the debt?

Paragraphs 5.3 and 5.22 above

24. For garnishee proceedings in Local Courts, should the general immunity of debts owed by the Crown from garnishee proceedings be removed?

Paragraphs 5.4 and 5.24 - 5.26 above

Attachment of earnings

25. If an attachment of earnings scheme is to be introduced into Local Courts in Western Australia, what should be the terms of the scheme? In particular :

- (a) What should the duration of an attachment of earnings order be? Should the order operate until satisfaction of the relevant judgment debt with the Court having power on the application of the judgment creditor or the judgment debtor to discharge, suspend or vary the order? If the Court is to be empowered to order that the attachment of earnings should continue until satisfaction of the debt, should the Court be able to specify otherwise?

Paragraphs 5.27 - 5.30, 5.35 and 5.46 - 5.47 above

- (b) In what circumstances should the Court be empowered to make an attachment of earnings order? For example:

- (i) Should the Court be empowered to make an order of attachment of earnings, even though no other method of enforcement has been utilised?
- (ii) If so, on an application for such an order should the Court have a discretion to order payment of the judgment debt by instalments instead of making an order for attachment of earnings?
- (iii) Alternatively, should there have to be a failure to comply with an order to pay by instalments before the Court could make an order for attachment of earnings?
- (iv) Should there be provision under which the Court may make an order of attachment of earnings and also order that the execution of the order be suspended so long as the debtor pays the judgment debt by the instalments and at the times set out in the order?

Paragraphs 5.48 - 5.52 above

- (c) Should the judgment debtor always have to appear before the Court to be examined before an order of attachment of earnings may be made, and if not, in what circumstances could such an order still be made? Should the

submission of a completed statement in a prescribed form of the judgment debtor's financial affairs be sufficient? If so, should there be any other circumstance in which an order could be made by the Court in the absence of the judgment debtor?

Paragraphs 5.53 - 5.54 above

- (d) (i) Should the attachment scheme provide for attachment of "earnings" and not simply attachment of wages and, if so, what periodical payments should be deemed to be earnings for the purposes of the provision?
- (ii) Should the Court be able to order the attachment of workers' compensation payments, periodical payments under personal accident, disability and sickness insurance policies as well as superannuation and private pension payments and, if so, should there be any special provisions in these cases and, if so, what provisions?
- (iii) Should the Court be empowered to order the attachment of future maintenance payments ordered by a court to be paid by one spouse to the other spouse (the judgment debtor)? If so, should there be any special provisions in these cases and what should these provisions be?

Paragraphs 5.55 - 5.58 above

- (e) How should the amount exempt from an attachment of earnings order be determined?

Paragraphs 5.30, 5.33 and 5.59 - 5.64 above

- (f) (i) Should employers be reimbursed for the money and time expended in complying with an attachment of earnings order?
- (ii) If they should be reimbursed, should the amount be decided by the Court each time an attachment of earnings is made and be specified in the order? Or should there be a fixed amount set by regulations? Or should employers be compensated by the deduction of an amount

representing a fixed percentage of each payment to the judgment creditor?

- (iii) Who should bear the cost of reimbursing the employer for money and time expended in complying with the attachment order?

Paragraphs 5.65 - 5.72 above

- (g) While an attachment of earnings order is in force, should there be a prohibition on other enforcement measures unless the Court orders otherwise?

Paragraph 5.73 above

- (h) What should be the terms of the legislative provisions aimed at protecting the judgment debtor against dismissal or other prejudice in his employment because an order has been made attaching the earnings of the judgment debtor?

Paragraphs 5.74 - 5.77 above

- (i) What should be the position when there is more than one attachment of earnings order in force?

Paragraph 5.78-5.81 above

26. Given the views expressed in responses to the above questions (the questions in 25), does the person or organisation replying to those questions consider that an attachment of earnings scheme should be introduced into Local Courts in Western Australia? If the person or organisation is opposed to the introduction of an attachment of earnings scheme, the reasons for their view would be appreciated.

Procedural and other matters

27. Should a garnishee be permitted to deduct a prescribed amount for costs incurred in complying with the garnishee order?

Paragraph 5.82 - 5.83 above

28. What procedural changes should be made to take account of the fact that some debts may not be due at the time the garnishee order is made?

Paragraph 5.84 above

29. Should a set-off or counterclaim arising after the attachment of a future debt or a debt which matures with the passage of time be available and, if so, in what circumstances?

Paragraph 5.85 above

IMPRISONMENT FOR DEBT

30. Should section 130 of the LCA (under which the magistrate may commit the judgment debtor to prison for a term not exceeding six weeks if the magistrate is satisfied the judgment debtor has, or has had since the date of the judgment or since the date of an order to pay by instalments, the means to have paid the judgment debt or to have paid an instalment which is due under the order, but has refused or neglected, or refuses or neglects, to pay the same) be repealed?

Paragraphs 6.1 - 6.12 above

31. Should section 130 only be repealed if satisfactory alternatives can be put in place?

Paragraph 6.13 above

32. If section 130 of the LCA is repealed, should magistrates ever have the power to punish for contempt, or make an order for imprisonment, where the judgment debtor defaults in paying the amount of the judgment debt or an instalment of it?

Paragraphs 6.14-6.20 above

33. If the answer to question 32 is in the affirmative, what conditions should be met before a contempt order or an imprisonment order might be made?

Paragraphs 6.14-6.20 above

SEIZURE AND SALE UNDER WARRANTS OF EXECUTION

Exemptions from execution

Wearing apparel and household property

34. If necessary wearing apparel and necessary household property are to be exempt from seizure and sale by a bailiff under a warrant of execution, then -

- (a) should the exemption be left in these broad terms, or
- (b) should the LCR specify what is to be regarded as necessary, or
- (c) should there be some other method for determining or for assisting in ascertaining the wearing apparel or household furniture which should be regarded as necessary and, if so, what should the method be?

Paragraphs 7.2 - 7.11 above

35. If it is not considered desirable that necessary wearing apparel and necessary household property should be exempt, then what wearing apparel and household property should be exempt?

Paragraphs 7.2 - 7.11 above

36. What property should be exempt from seizure and sale on the ground that it is required by the judgment debtor to earn a living?

Paragraphs 7.2 - 7.9 and 7.12 - 7.14 above

37. In relation to question 36, should a money value limit be set to the exemption and, if so, what should this be?

Paragraphs 7.12 - 7.14 above

Hardship

38. Should the judgment debtor be entitled to apply to the Court within a limited period of seizure for an order exempting particular property from execution where the debtor or a member of his family would otherwise be likely to suffer exceptional hardship?

Paragraph 7.15 above

39. Should the Court be able to stay execution under a warrant of execution absolutely with power to vary or revoke the order by a subsequent order? If so, in what circumstances should it be able to stay the execution absolutely?

Paragraph 7.16 - 7.17 above

Motor Vehicle

40. Should a judgment debtor's motor vehicle ever be exempt from seizure or execution under a warrant of execution and, if so, when?

Paragraphs 7.18 - 7.23 above

General

41. Should there be any further property, apart from that alluded to in these questions, which should be exempt from seizure and sale and, if so, what should that be?

Paragraph 7.8 above

42. How should any money value limits to exemptions be kept current?

Paragraph 7.14 above

Advertising

43. What should the advertising requirements be where a bailiff wishes to put goods or land up for sale under a warrant of execution?

Paragraphs 7.27 - 7.32

44. Should the bailiff always be required to advertise notice of an intended sale of land at least twice?

Paragraphs 7.30 and 7.32 above

Indication of debtor's interest

45. (a) Should the notice of proposed sale of land under a warrant of execution which the bailiff is required to advertise -

- (i) set out the type (for example, mortgage) and registered number of encumbrances registered or lodged against the title to the debtor's land which the sale will be subject to; and
 - (ii) state that any outstanding rates or land tax are charges on the land?
- (b) Should the notice state that only the judgment debtor's interest will be sold, briefly explain the effect of this in general terms and state that further information is available from the bailiff? (In this case, the information in (a) would not be set out in the notice).
- (c) Should the notice provide other or additional information which will assist potential purchasers in ascertaining what the judgment debtor's interest in the land is and, if so, what information?

Paragraphs 7.33 - 7.37 above

Sale of goods by auction without advertising

46. What should be the maximum value of goods which may be sold without advertising by public auction in a public auction room approved by the magistrate?

Paragraph 7.38 above

Venue

47. Should the provision in the LCR governing the place of sale under a warrant of execution of goods or land be that the bailiff may cause property to be sold at the place of levy or elsewhere, as he deems most advantageous?

Paragraph 7.39 above

Notice to debtor of intended sale of land

48. Should there be a requirement in the LCR that the judgment debtor be given notice of the time and place of the proposed sale of his land under a warrant of execution?

Paragraphs 7.40 - 7.46 above

49. If so, should the notice be given by the judgment creditor or the bailiff?

Paragraphs 7.43 - 7.46 above

50. How should the notice be given?

Paragraphs 7.46 above

Amounts owing to encumbrance holders

51. In the case of execution against land, should the bailiff's responsibility to make enquiries of encumbrance holders and to ascertain outstanding rates and taxes on the land be written into the LCA or the LCR?

Paragraphs 7.47 - 7.53 above

52. Should the LCA or LCR require that the bailiff is to announce the results of his enquiries to potential purchasers on request and at the auction before calling for bids?

Paragraphs 7.47 - 7.53 above

53. Should the bailiff be exempted from liability in respect of information furnished under any such obligations?

Paragraph 7.53 above

Title to goods: section 159 of the SCA

54. Should a provision along the lines of section 159 of the *Supreme Court Act 1935* be included in the LCA?

Paragraphs 7.54 - 7.59 above

Property unsold at auction

55. If at the auction, there is no bid or no bid which is "reasonable", should there be provision in the LCA or LCR under which the bailiff can then sell the goods or land by public tender or private contract?

Paragraphs 7.60-7.64 above

56. If so, then -

- (a) should it be necessary to obtain an order of the magistrate first?
- (b) should the magistrate set the price for the sale?
- (c) who should be able to apply to the magistrate for an order?

Paragraphs 7.61 - 7.64 above

57. Where property offered for sale by a bailiff by public auction is not sold at the first auction, should the bailiff, with the consent of the judgment creditor, be able to offer the property for sale by public auction on a second occasion?

Paragraphs 7.65 above

Methods of sale of property taken under a warrant of execution

58. (a) Should bailiffs have a discretion to sell land by private contract, instead of by public auction?

Paragraphs 7.66 - 7.70 above

- (b) If not, should the magistrate be empowered to order that land may be sold by the bailiff by public tender or private contract at a price and on terms set by the magistrate?

Paragraph 7.71 above

- (c) If so, who should be able to apply to the magistrate for such an order?

Paragraph 7.71 above

59. (a) Should the bailiff have a discretion to sell goods by private contract, instead of by public auction?

Paragraphs 7.66 - 7.70 and 7.72 - 7.73 above

- (b) If so, should the LCR specify any criterion which has to be met before the bailiff can sell goods by private contract?

Paragraphs 7.69 above

Priority of arrears of rent

60. Should the present right of the landlord of the judgment debtor to obtain payment of certain arrears of rent from the proceeds of a sale under a warrant of execution in priority to the judgment creditor under the warrant be abolished?

Paragraphs 7.74 - 7.76 above

Deposits to secure costs of execution

61. Should there be a provision in the LCR for the payment of a deposit by the judgment creditor to meet bailiff fees and, if so, what should the provision provide?

Paragraph 7.77 - 7.79 above

OTHER ISSUES

Auctions by bailiffs - exemption from licensing requirements

62. Should a bailiff authorised to execute a warrant of execution over land be able to conduct the auction of the land himself, although he is not licensed under the *Real Estate and Business Agents Act 1978*?

Paragraphs 8.1 - 8.9 above

Interpleader

63. Should the period in the LCR within which the judgment creditor may admit the title of the claimant in response to the notice of claim be extended to 14 days?

Paragraph 8.10 - 8.12 above

64. Should a claim in respect of goods contain the grounds of the claim?

Paragraph 8.13 above

65. Should there be any other changes to procedure in bailiff interpleaders, and if so, what should they be?

Paragraph 8.10-8.14 above

66. Should the bailiff be able to utilise the relief by way of interpleader in relation to land which may be granted by the Supreme Court?

Paragraph 8.15 - 8.16 above

Poundage fees

67. Should poundage at the full rate be payable to the bailiff where goods have been seized by him or land deemed to have been seized by the service of the warrant on the Registrar of Titles and money has been paid to the bailiff or the judgment creditor by reason of the warrant but the property was never sold.

Paragraphs 8.17 -8.21 above

68. If the answer to question 67 is in the negative, what principle or principles should be applied to remunerate bailiffs in these situations?

Paragraphs 8.20 - 8.21 above

Enforcement of judgments or orders of courts other than Local Courts in Local Courts

69. Should express provision be made for judgments or orders of the Supreme Court and District Court to be enforced in Local Courts in the same manner as a judgment or order of a Local Court, at least so long as the sum due does not exceed \$25,000?

Paragraphs 8.22 - 8.23 above

Costs of enforcement

70. Should the exception contained in Order 26 rule 34 of the LCR to the general rule that the costs of enforcing a judgment are payable by the judgment debtor be abolished?

Paragraphs 8.24 - 8.26 above

Hours of courts

71. Is hardship being caused to debtors through being required to attend court during normal working hours in answer to enforcement proceedings? If so, should provision be made for judgment summonses and examinations in aid of execution to be heard outside normal court hours, for example, in the evenings of weekdays or on Saturdays, or should the requirement for a court appearance be replaced with other means of obtaining information such as questionnaires or affidavits?

Paragraphs 8.27-8.29 above

UNIFORM ENFORCEMENT PROCEDURE

72. Should Local Courts have the same powers and procedures to enforce a judgment or order as the Supreme Court would have if the same judgment or order had been obtained in the Supreme Court?¹

(Chapter 9 above)

73. If not, should some other approach be utilised to reduce the diversity of powers and procedures, relating to the enforcement of judgments and orders, between Local Courts on the one hand and the Supreme Court (and the District Court²) on the other hand? For example, should certain of the Supreme Court provisions be applied in Local Courts, and if so, which ones?

(Chapter 9 above)

¹ Some amendments to the provisions relating to enforcement of judgments in the Supreme Court in their application to Local Courts would have to be made of necessity. For example, amendments would be required to cater for the fact that there are more than 30 Local Courts in Western Australia and procedures would need to be prescribed where a warrant of execution is issued from the Court in which judgment was given but the Court to which the goods and land are nearest is a different Local Court. The problem does not arise in the case of the Supreme Court because there is only the one Court. An affirmative response by a respondent to this discussion paper to the first question posed in Question 72 above will be assumed by the Commission to also be in favour of the making of such necessary amendments, unless the respondent indicates otherwise. Apart from this, an affirmative response will be taken by the Commission as indicating that the respondent proposes that the Supreme Court provisions should apply in Local Courts with, for example, the benefits and disadvantages indicated in paras 9.7-9.31 above.

² Para 9.1 above

Appendix I

LIST OF THOSE WHO MADE PRELIMINARY SUBMISSIONS TO THE COMMISSION

Australian Bankers' Association (Western Australia)

Birman & Ride on behalf of the Australian Institute of Credit Management
(W A Division)

Mr R H Burton, SM (Senior Referee, Small Claims Tribunal)

Consumer Credit Legal Service Inc.

Credit Union Services Corporation (Australia) Limited

Crown Law Department

Insolvency and Trustee Service Australia

Institute of Mercantile Agents Ltd

Legal Aid Commission of Western Australia

Metropolitan & Country Bailiffs' Association

R & I Bank of Western Australia Ltd

Mr C Zempilas, CSM

Appendix II

FORM 28B TO THE VICTORIAN MAGISTRATES' COURT CIVIL PROCEDURE

RULES 1989

FORM 28B

STATEMENT OF AFFAIRS

(Judgment Debt Recovery Act 1984)

IN THE MAGISTRATES' COURT

OF VICTORIA

AT

A.B. Judgment creditor

and

C.D. Judgment debtor

To the Registrar,

1. *Amount and Source of Weekly Income:*

Occupation:

Name and address of employer:

Gross wage:

Current overtime (if any):

Car and other allowances and commissions:

Average earnings from self-employment or partnership for last 12 months:

If unemployed, state length of last employment, date when last employment ceased,
and gross weekly amount earned:

Pension or Benefit received:

Workers' compensation received:

Maintenance received:

Superannuation received:

Board or rent received:

Average weekly income from bank, building society, shares etc.:

Other (give details):

TOTAL GROSS WEEKLY INCOME: \$

2. *Property and Assets*

	\$
Market value of house (place of residence) owned:	\$
Amount owing on mortgage:	\$
Net value of interest in house:	
Market value of any other house or land owned:	\$
Amount owing on mortgage:	\$
Net value or interest in other house or land owned:	
Market value of motor vehicle(s)	
Year:	
Make/Model:	
Year:	
Make/Model:	
Amounts owing to creditor(s):	\$
Net value of interest(s):	
Cash in banks, building societies etc.	
Other investments including shares, debentures, bonds:	
Money owing to you:	
From:	
From: TOTAL	
Value of interest in partnership or business:	
State approximate re-sale value of furniture and personal goods:	\$
Amount owing on these:	
Net value of interest:	
Other assets (give details):	
TOTAL NET VALUE	
Life insurance policies: Specify, giving surrender value(s).	
TOTAL PROPERTY AND ASSETS:	\$

3. *Cash that is readily available or can be made so available.
(e.g. deposits on call, deposits on short-term etc.)*

<i>Source</i>	<i>Amount</i>
TOTAL: \$	

4. *Debts, Liabilities and other Financial Obligations:* \$

(a) *Weekly Expenses:*

Income tax:

Superannuation:

Housing (mortgage, board, rent, hospital or institution):

Municipal rates:

Water and sewerage rates:

Land tax:

Child care costs - necessary for the purpose of earning income:

Maintenance actually paid:

Instalment payments:

e.g. Household goods payable to: \$

Tools of trade payable to: \$ TOTAL:

Electricity and gas:

Food:

Other general household expenses:

Car expenses (registration, insurance, maintenance, fuel):

Fares:

Telecom:

Insurance policies:

School fees and other schooling costs:

Clothing and shoes:

Medical and chemist expenses:

Entertainment:

Payments on court orders and fines:

Other expenses (give details):

TOTAL WEEKLY EXPENSES: \$

(b) *Other debts Outstanding* (give details)

(Hire, purchase, leases, credit cards, credit contracts, personal loans, store accounts, guarantees being paid off etc.):

Amount: \$ To: Payable by:

Amount: \$ To: Payable by:

Amount: \$ To: Payable by:

TOTAL OTHER DEBTS: \$

5. Are any assets jointly owned: (give details).

6. Have any of the above debts been jointly incurred with any other person?

(Give details).

7. Give details of any other circumstances which affect financial position (e.g.: number and age of dependants; marital status, health etc.)
(Give details).

Date: [e.g. 5 September, 19]

[Signature]

WARNING

ANY PERSON WHO MAKES A FALSE STATEMENT MAY HAVE THE
INSTALMENT ORDER VARIED OR CANCELLED

Appendix III

EXAMINATION NOTICE UNDER SECTION 43A OF LOCAL COURTS

(CIVIL CLAIMS) ACT 1970 (NSW)

Form 52

Examination Notice

(S.43A)

*In the Local Court
(Civil Claims)*

Issued at

Number: _____ of 19

Judgment Creditor:

Judgment Debtor:

To the Registrar:

The judgment creditor applies for the issue of an examination notice in the form hereunder. Judgment was recovered against the judgment debtor named herein on 19 for \$ _____, in respect of which \$ _____ is outstanding.

Dated:

(Solicitor for the) judgment creditor Address:

To the judgment debtor:

*The judgment creditor has recovered judgment against you as indicated above, and is entitled to enforce the judgment against you. One way in which the judgment creditor may do this is to summon you to attend before the Registrar of a Local Court to be examined as to your property and other means of satisfying the judgment debt and generally as to your financial circumstances. However, if you answer all the questions contained elsewhere in this notice fairly and truthfully and forward the completed notice to the judgment creditor or his solicitor within a period of _____ days** after the date of this notice you may avoid being summoned for examination. Where the judgment creditor does summon you to attend for examination within 3 months after the service on you of this notice and you comply with that summons, if you can prove that you answered the questions fairly and truthfully and forwarded the completed notice as required, you will not be liable for any costs incurred by the judgment creditor in connection with your examination.*

You may attend at the office of any Local Court (other than the Courts located at St James Centre, 107 Elizabeth Street, Sydney, 98 Liverpool Street, Sydney, and 44-46 Parramatta Road, Glebe) between the hours during which the Court office is open for business and complete an application to pay the judgment debt by instalments, which must then be filed with, or posted to, the Registrar of the court at which this judgment was recorded. If the application is granted, the judgment creditor may not summon you to attend for examination, or take any other step for the enforcement of the judgment against you, while you comply with the instalment order.

Dated:

Registrar

***Period to be not less than 14 days*

*Questions**Answers*

1. *What is your full name?*
2. *State the address at which you presently reside.*
3. *Do you propose to change that address in the near future? If so, state your new address.*
4. *What is your occupation?*
5. *Is the judgment debt still owing?*
6. *Are you married?*
7. *How many dependants do you support?*
8. *Do you own or are you purchasing any real property (land)? Give details.*
9. *Do you own or are you purchasing a motor vehicle? Give details.*
10. *Do you own or are you purchasing any furniture other than bedroom or kitchen furniture? Give details.*
11. *Does any person owe you any money? Give details.*
12. *Have you any bank or building society accounts? Give details, including balances and whether savings bank or trading bank, and whether held solely by you or jointly with any other person. Where possible, give account numbers.*
13. *How much cash on-on-hand do you have?*
14. *Have you any other personal property or assets, including any other deposits or investments not previously mentioned, held either in your name or jointly with any other person or persons? Give details.*
15. *Who is your employer? What is your employer's address?*
16. *What income do you receive weekly, after income tax is deducted?*
17. *What other sources of income do you have? Give details of sources and amounts.*

18. *What are the regular expenses of running your household and from whose money are these expenses paid?*
19. *Are there any unsatisfied judgments against you? Give details.*
20. *What other debts and liabilities have you? Give details.*
21. *What arrangements are you prepared to make to satisfy this judgment debt?*

Signature of the judgment debtor.

Date:

Appendix IV

**FORM 27CD TO THE VICTORIAN MAGISTRATES'
COURT CIVIL PROCEDURE RULES 1989**

FORM 27CD

**EXAMINATION OF AN OFFICER OF A JUDGMENT DEBTOR WHICH
IS A CORPORATION**

[heading as in Form 4A]

[name of person being examined], an officer of the judgment debtor corporation, having been sworn, has answered the questions set out in column 1 below in the manner set out in column 2 below –

<i>Column 1</i>	<i>Column 2</i>
<i>Questions</i>	<i>Answers</i>

1. Is the judgment debt still owing?
2. What is your full name?
3. What is your date of birth?
4. What is the address/phone number of your present permanent residence?
5. Are you an officer of the judgment debtor corporation? Give details.
6. What is the address of the registered office of the corporation?
7. Is the corporation registered or deregistered at the Corporate Affairs Office?
8. Is the corporation still trading? If not, when did it last trade?

9. At what addresses does the corporation carry on business?
10. What is the current financial position of the corporation? Give details.
11. Does any person/corporation/firm owe the corporation money? For each such person/corporation/firm give details, including -
 - (1) name of person/corporation/firm;
 - (2) address/phone number;
 - (3) reference number (if any).
12. Does the corporation have any accounts at any bank/building society/credit union/etc? For each account give details, including -
 - (1) name of bank etc.;
 - (2) type of account;
 - (3) account number;
 - (4) present balance of account.
13. How much cash-on-hand does the corporation have?
14. What other assets does the corporation have? Give details of all -
 - (1) real estate, listing -
 - (a) addresses;
 - (b) values;
 - (c) mortgages (+ financier);
 - (2) plant and equipment (not included elsewhere), listing -
 - (a) locations/addresses;
 - (b) values;
 - (c) charges (+ financier);
 - (3) motor vehicles, listing for each -
 - (a) make/model/condition;
 - (b) registration number;
 - (c) lease details;
 - (d) charges (+ financier);
 - (4) stock (not included elsewhere), listing -
 - (a) locations/addresses;
 - (b) values;
 - (c) charges (+ financier);
 - (5) other deposits, investments, shares and debentures, giving for each details of value and in what business/corporation/firm;
 - (6) other assets.
15. What sources of income does the corporation have? Give details of all sources and amounts.

16. Are there any other unsatisfied judgments against the corporation; If so, give details of each judgment, including -
 - (1) name/address/phone number of judgment creditor;
 - (2) date of judgment;
 - (3) amount outstanding;
 - (4) reference number (if any).
 17. What other debts and liabilities does the corporation have? Give details.
 18. What are the corporation's future income prospects? Give details.
 19. Does the corporation have a proposal to pay the amount claimed by the judgment creditor?
-

[Signature of officer of judgment debtor]

Recorded at

on *[date]*

[Signature of registrar]

Appendix V

**FORM 27F TO THE VICTORIAN MAGISTRATES' COURT
CIVIL PROCEDURE RULES 1989**

FORM 27F

JUDGMENT DEBTOR'S STATEMENT OF FINANCIAL POSITION

[heading as in Form 4A]

To *[judgment debtor]*

of *[address]*

TAKE NOTICE that you must complete this form by giving the information requested below. The completed form signed by you must be sent to *[judgment creditor]* at *[address for service]* before *[day of hearing named in the summons]*. If you do not do this, the Court may make an order that you attend before the Court and give the information.

Dated: [e.g. 5 September, 19].

[Signed by judgment creditor or solicitor].

1. Amount and source of weekly income

Occupation:

If working for an employer:

Name and address of employer:

Gross wage:

Current overtime (if any):

Car and other allowances and commission:

If self-employed or in partnership:

Average pre-tax earnings for last 12 months:

If unemployed:

State length of last employment, when last employment ceased and gross weekly amount earned:

Pension or other benefit received:

Workers' compensation received:

Maintenance received:

Superannuation received:

Board or rent received:

Average weekly interest on bank or building society deposit, debentures etc:

Average weekly dividend on shares:

Other income (give particulars):

Total gross weekly income:

2. Property and assets

Land, including vacant land:

For each piece of land -

Market value:

Amount of mortgage:

Net value:

Motor vehicle:

For each motor vehicle-

Year, make and model:

Market value:

Amount owing to finance company:

Net value:

Deposit in bank, building society, etc.:

Other investments including shares, debentures, bonds:

Money owing to you:

From , \$

From , \$

Total:

Value of interest in partnership or business:

Furniture, household and personal goods:

Market value:

Amount owing to finance company:

Net value:

Life insurance policies:

Give particulars and state surrender value of each policy:

Other assets (give particulars):

Total property and assets:

3. Debts, liabilities and other financial obligations

(a) Weekly expenses

Income tax:

Superannuation:

Housing (mortgage, rent, board, hospital or institution):

Municipal rates:

Water and sewerage rates:

Land tax:

Child care expenses incurred for the purpose of earning income:

Maintenance actually paid:

Instalment payments such as for household goods or tools of trade:

To , \$

To , \$

Total:

Electricity and gas:

Food:

Other general household expenses:

Motor vehicle expenses (registration, insurance, maintenance, fuel):

Fares:

Telephone:

Insurance policy premiums:

School fees and other school expenses:

Clothing and shoes:

Medical and chemist expenses:

Entertainment:

Payment on court orders and fines:

Other expenses (give particulars):

Total:

(b) Other debts outstanding

Give particulars of debts under hire purchase, leasing, credit card or other credit contracts, department store accounts, guarantee or personal loan:

\$, to , due on

\$, to , due on

Total:

4. If any of the assets referred to in paragraph 2 above is owned jointly, identify each asset and give the name of the other owner or owners:
5. If any of the debts referred to in paragraph 3 is due jointly, identify each debt and give the name of the other debtor or debtors:
6. Give particulars of any other circumstances which affect the financial situation of the judgment debtor such as the number and age of dependants, marital status and health:

Signature of judgment debtor:

Date:

Appendix VI

SECTION 116(2) OF THE BANKRUPTCY ACT 1966

- (2) Subsection (1) does not extend to the following property:
- (a) property held by the bankrupt in trust for another person;
 - (b) necessary wearing apparel, necessary household property of the bankrupt (including any sewing machine used for domestic purposes) and such other household property of the bankrupt, if any, as the creditors by resolution determine at any time before the trustee realises that other household property;
 - (c) ordinary tools of trade, plant and equipment, professional instruments, and reference books, of the bankrupt whose aggregate value does not exceed the prescribed amount, and such other property, if any, being such tools, plant and equipment, professional instruments or reference books, as:
 - (i) the creditors determine by resolution; or
 - (ii) the Court, on application by the bankrupt, determines;at any time before the trustee realises that other property;
 - (ca) property used by the bankrupt primarily as a means of transport, being property whose aggregate value does not exceed the prescribed amount or, if before the trustee realises the last-mentioned property the creditors determine by resolution a greater amount in relation to that property, that greater amount;
 - (d) policies of life assurance or endowment assurance (other than policies for pure endowment) in respect of the life of the bankrupt or the spouse of the bankrupt that have been in force for not less than 2 years before the commencement of the bankruptcy and the proceeds of such policies received on or after the date of the bankruptcy or not earlier than one year before that date;
 - (e) policies for pure endowment that have been in force for not less than 5 years before the commencement of the bankruptcy and the proceeds of such policies received on or after the date of the bankruptcy or not earlier than one year before that date;
 - (f) policies for annuities that have been in force for not less than 5 years before the date of the bankruptcy to the extent to which they provide for payment of an annuity not exceeding, in the aggregate, the prescribed amount;
 - (fa) payments made on or after the date of the bankruptcy under policies for annuities to the extent to which those payment do not exceed, in the aggregate, the prescribed amount per annum;

- (g) any right of the bankrupt to recover damages or compensation:
- (i) for personal injury or wrong done to the bankrupt, the spouse of the bankrupt or a member of the family of the bankrupt; or
 - (ii) in respect of the death of the spouse of the bankrupt or a member of the family of the bankrupt;
- and any damages or compensation recovered by the bankrupt (whether before or after he became a bankrupt) in respect of such an injury or wrong or the death of such a person;
- (h) subject to section 131, the separate property of a married woman the income of which is subject to a restraint on anticipation;
- (k) amounts paid to the bankrupt under a scheme established and operated by a State in accordance with the agreement between the Commonwealth and the States the execution of which on behalf of the Commonwealth, was approved by the *States Grants (Rural Reconstruction) Act 1971*, or in accordance with that agreement as subsequently amended, being amounts paid by way of loan as assistance for the purpose of rehabilitation;
- (m) amounts paid to the bankrupt under a scheme established and operated by a State or the Northern Territory in accordance with the agreement between the Commonwealth and the States the execution of which, on behalf of the Commonwealth, was approved by the *States Grants (Rural Adjustment) Act 1976*, or that agreement as subsequently amended (including that agreement as amended by the agreement between the Commonwealth, the States and the Northern Territory the execution of which, on behalf of the Commonwealth, was approved by the *States and Northern Territory Grants (Rural Adjustment) Act 1979*, or that last-mentioned agreement as subsequently amended), being amounts paid by way of grant or loan as assistance for the purpose of rehabilitation or household support;
- (ma) amounts paid to the bankrupt under a scheme established and operated by a State or the Northern Territory in accordance with the agreement between the Commonwealth and the States and the Northern Territory the execution of which, on behalf of the Commonwealth, was approved by the *States and Northern Territory Grants (Rural Adjustment) Act 1985*, or in accordance with that agreement as subsequently amended, being amounts paid by way of grant or loan as assistance for the purpose of rehabilitation or household support;
- (mb) amounts paid to the bankrupt under a scheme established and operated by a State or the Northern Territory in accordance with an agreement between the Commonwealth and that State or Territory whose execution, on behalf of the Commonwealth, was approved by the *States and Northern Territory Grants (Rural Adjustment) Act 1988*, or in accordance with that agreement as subsequently amended, being amounts paid by way of grant or loan as assistance for the purpose of rehabilitation or household support;
- (n) property to which, by virtue of subsection (3), this paragraph applies; and
- (p) amounts paid to the bankrupt under subsection (2C) or (4).

Appendix VII

Part A

RULE 69.06 OF THE VICTORIAN GENERAL RULES OF PROCEDURE IN CIVIL PROCEEDINGS 1986

69.06 (1) Before putting property up for sale under a warrant the Sheriff shall advertise the sale by giving notice of the time and place of sale and of particulars of the property in the manner which seems to him best to give publicity to the sale.

...

(3) An advertisement relating to the intended sale of land by the Sheriff shall be in Form 69A and include -

(a) a concise description of the land, including its location, stated in terms calculated to enable interested persons to identify it;

(b) a statement in general terms of the improvements, if any, believed by him to be on the land;

(c) a statement of the last known address of the debtor; and

(d) in the case of land under the operation of the *Transfer of Land Act 1958*, a statement of the interest, if any, of the debtor according to the Register Book and of the entries in the Register Book which affect or may affect the land as at the date of service upon the Registrar of Titles of the warrant.

(4) The creditor shall serve personally on the debtor a copy of the advertisement not less than 14 days before the date of the intended sale.

(5) The Court may dispense with service under paragraph (4).

(6) Not less than three days or such lesser period as the Sheriff may allow before the date advertised for the sale the creditor shall -

(a) file an affidavit of service of a copy of the advertisement or, where the Court makes an order for substituted service of the advertisement, an affidavit showing due compliance with the order;

(b) deliver to the Sheriff -

(i) where a copy of the advertisement is served on the debtor, a copy of the affidavit of service;

(ii) where the Court makes an order dispensing with service of a copy of the advertisement, a copy of the order;

(iii) where the Court makes an order for substituted service of the advertisement, a copy of the order and of the affidavit showing due compliance.

Part B

FORM 69A TO THE VICTORIAN GENERAL RULES OF PROCEDURE IN CIVIL PROCEEDINGS 1986

FORM 69A

ADVERTISEMENT OF SALE BY THE SHERIFF

On _____, 19____ at _____ a.m. [or p.m.] at _____ (unless process is stayed or satisfied) all the estate and interest (if any) of the [*debtor*] of _____ as [proprietor of an estate in fee simple in the land described in Certificate of Title Volume _____ Folio _____ upon which is erected a brick factory known as No. _____ Street _____].
[Registered Mortgage No. _____ affects the said estate and interest].
Terms: Cash only.

Sheriff