



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 16 – Part II**

**Enforcement of Judgments  
of Local Courts**

**REPORT**

**DECEMBER 1995**

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In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on enforcement of judgements of Local Courts.

**P G CREIGHTON**, *Chairman*  
22<sup>nd</sup> December 1995

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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)
Discussion Paper	Law Reform Commission of Western Australia <i>Discussion Paper on Enforcement of Judgments of Local Courts</i> (Project No 16 Part II, 1995)
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, Vol II, 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	New South Wales Law Reform Commission, <i>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	<i>Report of the Committee on the Enforcement of Judgment Debts 1969</i> Cmnd 3909
WALRC Report	Law Reform Commission of Western Australia <i>Report on</i> <i>Enforcement of Judgment Debts</i> (Project No 61 1977)

The pronouns and adjectives "he", "him" and "his", as used in this report, 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 report, deals with the enforcement of judgments or orders of Local Courts.

### 2. DISCUSSION PAPER

1.3 The Commission issued a Discussion Paper in February 1995. Eighteen organisations and individuals made submissions to the Commission. Their names are listed in Appendix I. The Commission expresses its appreciation to all the commentators for the time and trouble they took in making comments on the Discussion Paper. All views expressed have been taken into account in the preparation of this report.

### 3. JURISDICTION OF LOCAL COURTS

1.4 Local Courts, which are presided over by a stipendiary magistrate, are courts of inferior jurisdiction. The limit on their money jurisdiction was fixed at £100 in 1904 when the LCA was enacted but has since been increased several times and is now \$25,000.<sup>1</sup> Local Court actions are usually claims for debt or damages for breach of contract or in tort. In certain circumstances, a magistrate may make an order, not for the payment of money, but for the doing of an act or for the ceasing of an act.<sup>2</sup> Within the limits of the jurisdiction of Local Courts, judgment may be given for the recovery of land<sup>3</sup> and for the delivery of goods.<sup>4</sup>

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<sup>1</sup> LCA s 30.

<sup>2</sup> 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 44 in ch 2 below. An injunction is a form of equitable relief.

<sup>3</sup> Para 2.23 below.

<sup>4</sup> Para 2.24 below.

1.5 Local Courts have a Small Disputes Division to enable small claims to be resolved in an inexpensive, informal and expeditious manner. The limit on the money jurisdiction of the Division is \$3,000.<sup>5</sup> 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.<sup>6</sup>

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. For many plaintiffs, obtaining judgment is but a step in the process of obtaining redress as the defendant is unwilling or unable to comply with the judgment. It is with these cases that this report is concerned.

#### **4. THE NEED FOR A JUST AND EFFICIENT ENFORCEMENT SYSTEM**

1.7 A just and efficient system for the enforcement of judgments or orders is fundamental to maintaining confidence in the court system. The Crown Law Department, now the Ministry of Justice, in a preliminary submission, suggested that creditors are totally disillusioned with the court system because of inefficiencies in the present system of enforcement. 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 judgment debtors should be free from unreasonable enforcement procedures and from seizure of property necessary for a dignified existence.

1.8 Many of the recommendations made by the Commission in this report should improve the efficiency of the enforcement system. The main recommendations likely to have this effect are -

- \* replacing two proceedings, the examination in aid and the judgment summons, with a single proceeding, the enforcement hearing;
- \* expanding the range of debts which can be attached to meet a judgment debt;

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<sup>5</sup> LCA s 106C.

<sup>6</sup> Ibid.

- \* providing for the attachment of earnings such as wages and salaries where a judgment debtor defaults under an order for payment by instalments; and
- \* making a debtor liable for contempt of court where he has the means to pay by instalments but wilfully and persistently and without honest and reasonable excuse defaults in making the payments.

1.9 At the same time the following recommendations are directed to protecting the legitimate interests of judgment debtors -

- \* repeal of imprisonment for debt;
- \* allowing a judgment debtor to apply to the Court for an instalment order both at the time of and after judgment, regardless of the amount of the judgment; and
- \* widening the range of 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: RETAINING SELF-HELP**

1.10 The principle of self-help is a feature of enforcement of judgments in Local Courts, as it is in the Supreme Court and District Court. 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 originated in England and was widely followed in countries which had a legal system based on that of England.<sup>7</sup>

1.11 As might be expected, there are provisions in the LCA that provide a degree of protection to the judgment debtor. Examples of provisions in the LCA which are aimed at protecting the judgment debtor are those which exempt certain property of the debtor from

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<sup>7</sup> See ALRI *Remedies of Unsecured Creditors* (Report for Discussion No 3, 1986) para 5.27.

being taken and sold,<sup>8</sup> which prohibit some sources of a debtor's income from being diverted to the creditor,<sup>9</sup> 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.<sup>10</sup>

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 for reform of the law which embody this principle to a greater or lesser extent have been made in a number of jurisdictions.<sup>11</sup> The principle of judicial direction of enforcement process has been implemented in Northern Ireland by the *Judgments (Enforcement) Act (Northern Ireland) 1969*.<sup>12</sup> 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 English High Court.<sup>13</sup> It is very expensive to apply for enforcement in Northern Ireland,<sup>14</sup> and the whole fee must be paid on the initial application.<sup>15</sup> Despite this, the Enforcement Office apparently runs at a loss.<sup>16</sup>

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<sup>8</sup> LCA s 126.

<sup>9</sup> Id s 145.

<sup>10</sup> LCA s 139. See also LCR O 25 (Div 1) r 12 and O 26 r 26.

<sup>11</sup> 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.

<sup>12</sup> The Act implemented most of the recommendations of the NI Report referred to in footnote 11 above.

<sup>13</sup> 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 *Remedies of Unsecured Creditors* (No 3 1986) paras 5.27-5.47.

<sup>14</sup> Some examples taken from the fee schedule reprinted in the ALRI Report for Discussion No 3 *Remedies of Unsecured Creditors* (1986) at 198 are:

Sum due	Fee
£ 200	£60
1,000	108
3,000	168
10,000	238

<sup>15</sup> Id.

<sup>16</sup> 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 *Remedies of Unsecured*

Although in England the *Report of the Committee on Enforcement of Judgment Debts*<sup>17</sup> recommended the establishment of an Enforcement Office, the idea was rejected there on the grounds of cost and the availability of manpower.<sup>18</sup>

1.13 In the Discussion Paper the Commission indicated that it did not intend to recommend the adoption of an enforcement process involving judicial direction because of its cost and the delays involved with such a process. No commentators favoured the introduction of this enforcement process and the Commission does not recommend that it be introduced. It considers that the self-help approach should be retained because it offers economy and also maintains the court's largely neutral role in the adversary system as a referee between the parties.

## 6. UNIFORM ENFORCEMENT PROCEDURE

1.14 At present the means of enforcement of judgments in the District Court of Western Australia are assimilated to those of the Supreme Court.<sup>19</sup> This is not the case with the enforcement of judgments in 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,<sup>20</sup> and in certain cases a Local Court judgment may be removed into the Supreme Court to be further enforced there.<sup>21</sup>

1.15 There are inconsistencies in the enforcement rules between the Supreme Court and Local Courts, such as those relating to the setting of priorities among creditors.<sup>22</sup> Other

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*Creditors* (No 3 1986) said that the Enforcement Office had never achieved this goal. In its best year (1984) it collected about £1,000,000 in fees but its expenditure was £1,250,000.

<sup>17</sup> Cmnd 3909 (1969).

<sup>18</sup> C Glasser *Administration of Justice Act 1970: Enforcement of Debt Provisions* (1971) 34 MLR 61, 67. The Scottish Law Commission has also considered and rejected the Enforcement Office idea: *First Memorandum on Diligence: General Issues and Introduction* (Memorandum No 47, 1980) 30-31, 43-50. 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.

<sup>19</sup> *District Court of Western Australia Act 1969* ss 52 and 56.

<sup>20</sup> LCA s 120.

<sup>21</sup> Id s 142.

<sup>22</sup> 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.

provisions, while parallel, are not identical and remain open to varying interpretations.<sup>23</sup> Different terms are used to refer to the same sort of enforcement process.<sup>24</sup>

1.16 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*.<sup>25</sup> The SCA sets out a considerable number of detailed provisions for the enforcement of judgments and orders.<sup>26</sup> Appendix VI of this report contains a table which compares the means of enforcement available in the Supreme Court and the Local Courts.

1.17 Any confusion or inconvenience caused by the existence of different systems for enforcing judgments could be overcome by having uniform procedures. However, if the recommendations of the Commission in this report were adopted, there will still be significant differences of substance between the enforcement procedures available in Local Courts and those in the Supreme Court. Accordingly, the Commission considers that it will be necessary to retain separate enforcement procedures for Local Courts although it has attempted to harmonise them with Supreme Court procedures wherever practicable.

## **7. ORGANISATION OF THIS REPORT**

1.18 The following matters are examined in the subsequent chapters of this Report -

- \* the existing methods of enforcement of judgments under the LCA (Chapter 2);
- \* the introduction of an enforcement hearing (Chapter 3);
- \* the use of instalments to pay judgment debts<sup>27</sup> (Chapter 4);
- \* attachment of earnings and the scope of debts (other than wages) that can be attached by a judgment creditor (Chapter 5);

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<sup>23</sup> See, for example, ss 122-125 of the LCA (sale of land under execution) as contrasted with the corresponding sections in the SCA, ss 119-121.

<sup>24</sup> See Appendix VI.

<sup>25</sup> SCA s 16(1)(a).

<sup>26</sup> Ss 117-145.

<sup>27</sup> The expression "judgment debt" is intended by the Commission to include costs for which the judgment debtor is liable and which may be recovered with the judgment.

- \* imprisonment for debt (Chapter 6);
- \* warrants of execution against land or goods (Chapter 7);
- \* various other issues including interpleader and poundage (Chapter 8).

## **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.<sup>1</sup> Once the judgment creditor has lodged a praecipe<sup>2</sup> with the clerk of the Local Court requesting the issue of a warrant of execution, the clerk is required to issue the warrant.<sup>3</sup>

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".<sup>4</sup> Advertising requirements are less stringent where the bailiff makes an actual seizure of the land.<sup>5</sup>

2.6 In the case of goods, a seizure is necessary.<sup>6</sup> 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.<sup>7</sup> Normally notice of the proposed sale must be advertised.<sup>8</sup> "Goods" are widely defined in the Act and include money, cheques, shares and other personal property.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

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<sup>1</sup> 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 7.25 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.

<sup>2</sup> A form requesting a court officer to issue or prepare some document.

<sup>3</sup> LCA s 121; LCR O 25 (Div 1) r 6.

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.

<sup>4</sup> 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 7.41 below.

<sup>5</sup> Para 7.40 below.

<sup>6</sup> LCA s 126.

<sup>7</sup> 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.

<sup>8</sup> Paras 7.40 and 7.45 below.

<sup>9</sup> LCA s 3.

<sup>10</sup> LCA s 127.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

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 goods<sup>17</sup> can be resolved.<sup>18</sup> The procedure under the Act and the LCR does not expressly extend to land.<sup>19</sup>

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.<sup>20</sup>

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<sup>12</sup> 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.

<sup>13</sup> 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).

<sup>14</sup> 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*.

<sup>15</sup> *Ibid*.

<sup>16</sup> *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 7.41 below) in which case he does not make an actual seizure of the land.

<sup>17</sup> "Goods" are widely defined in the LCA: para 2.6 above.

<sup>18</sup> LCA s 143 and LCR O 30: see also Part I Report paras 15.33 and 15.36 and also para 8.4 below.

<sup>19</sup> Para 8.9 below.

<sup>20</sup> But see para 2.12 and footnote 21 below in this Ch.

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.<sup>21</sup>

**(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.<sup>22</sup>

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<sup>21</sup> 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*,<sup>23</sup> which was an 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. After considering the cases the judge also said there was support for the view 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.<sup>24</sup> However, Blaxell DCJ said that under the statute the Court has a discretion as to whether commitment should be ordered and held that the discretion should not be exercised to make an order of commitment 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.<sup>25</sup>

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

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<sup>22</sup> LCR O 26 r 1. Service of the judgment summons will be personal service. An order of commitment under s 130 may not be made unless a judgment summons has been personally served on the judgment debtor: LCR O 26 r 1(1). If the debtor fails to obey the summons, then if good cause is not shown for the non-appearance of the debtor the magistrate may issue his warrant to bring the judgment debtor before a magistrate to be examined: LCA s 130 (2a).

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).

<sup>23</sup> (1993) 9 SR (WA) 248.

<sup>24</sup> Blaxell DCJ said that one of the cases (*Re Synnot* (1885) 7 ALT 101) was seemingly to the contrary.

<sup>25</sup> 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.

the arrears by instalments specified by the magistrate.<sup>26</sup> In addition, the magistrate will generally order that the original order for payment by instalments be suspended for this period.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

**(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

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<sup>26</sup> Suspension of an order of commitment is provided for in the LCR O 26 r 22.

<sup>27</sup> LCR O 26 r 25 provides that the magistrate may do this.

<sup>28</sup> 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).

<sup>29</sup> LCA s 130; LCR Appendix Part I form 119.

<sup>30</sup> The affidavit may be in accordance with form 119A in the Appendix to the LCR.

<sup>31</sup> LCA s 130(4).

garnishee") be attached in payment of the judgment debt.<sup>32</sup> This order is known as a garnishee order nisi. By the same or a subsequent 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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<sup>32</sup> 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.

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.

<sup>33</sup> 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.

<sup>34</sup> LCA s 147. The magistrate may direct that the payment be made by instalments: *ibid.*

<sup>35</sup> *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.

<sup>36</sup> *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.<sup>37</sup> Future wages are not immediately payable and thus are not attachable. It would be 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".<sup>38</sup>

**(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.<sup>39</sup> 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.<sup>40</sup> It puts the receiver in the same position as the debtor to receive the income or other money in respect of the property.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> There is authority in England the effect of which suggests that a Local

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<sup>37</sup> This limitation and the issue of attachment of future debts are considered in paras 5.1 and 5.6-5.15 below.

<sup>38</sup> The issue of garnishment of wages is considered in paras 5.33-5.71 below.

<sup>39</sup> Cairns 556.

<sup>40</sup> 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.*

<sup>41</sup> Cairns 557.

<sup>42</sup> Ibid.

<sup>43</sup> Cairns 412.

<sup>44</sup> 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

Court in Western Australia has 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.<sup>45</sup>

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. An enquiry at the Perth Local Court revealed that that Court occasionally appoints a receiver by way of equitable execution.<sup>46</sup>

### 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.<sup>47</sup> Where, pursuant to these 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.<sup>48</sup>

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claim under s 32: paras 4.16-4.21 and 4.44. The Commission said that power to award equitable relief 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.

<sup>45</sup> *R v Selfe* [1908] 2 KB 121. In this case 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.

<sup>46</sup> Normally the bailiff is appointed as the receiver. The bailiff is not required to give any security unless the magistrate specially directs security to be given: LCR O 29 r 6.

<sup>47</sup> 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 therefrom 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.

<sup>48</sup> LCA ss 101, 103; and LCR Appendix Part I form 172.

**(b) Delivery of goods: warrant of delivery**

2.24 A judgment for the delivery of goods may be enforced by a warrant of delivery.<sup>49</sup> The warrant may be issued before an assessment of the value of the goods has been obtained.<sup>50</sup> After an assessment of the value has been obtained, the plaintiff is entitled<sup>51</sup> to enforce delivery of the goods or to enforce the payment of their value at his option.<sup>52</sup> 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.<sup>53</sup>

**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.<sup>54</sup>

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

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<sup>49</sup> LCR O 27 r 5.

<sup>50</sup> LCA s 91A(2).

<sup>51</sup> Subject to any order of the magistrate: LCA s 91A(2).

<sup>52</sup> Ibid.

<sup>53</sup> 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.

<sup>54</sup> 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.

purposes of section 68 of the LCA.<sup>55</sup> 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 order that the action be dismissed or that the defence be struck out and judgment entered accordingly.<sup>56</sup>

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.<sup>57</sup>

## 5. EXAMINATION IN AID OF EXECUTION

2.28 At present the LCA and the LCR contain provisions 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".<sup>58</sup>

2.29 The judgment summons procedure<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> The information

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<sup>55</sup> LCR O 27 r 2.

<sup>56</sup> RSC O 26 r 15.

<sup>57</sup> The discharge, if granted, is to be given in the form in the LCR Appendix Part I form 188.

<sup>58</sup> 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).

<sup>59</sup> Paras 2.13-2.17 above.

<sup>60</sup> Para 2.14 above.

<sup>61</sup> LCA s 130; LCR Appendix Part I form 119.

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.

## **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.<sup>62</sup>

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.<sup>63</sup> When removed the judgment has the same force and effect, and the same proceedings may be taken on it, as in the case of a judgment of the Supreme Court.

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<sup>62</sup> 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. The procedure in the case of an application to suspend an order of commitment made on the hearing of a judgment summons is contained in O 21 r 26 of the LCR.

<sup>63</sup> LCA s 142. The power only applies in the case of a judgment for an amount exceeding \$40 exclusive of costs.

## Chapter 3

### ENFORCEMENT HEARING

#### 1. PRESENT POSITION

##### (a) Introduction

3.1 In some cases, the judgment creditor may have sufficient knowledge of the financial position of a judgment debtor to make decisions as to the most effective enforcement measure or will wish to try to enforce the judgment even where he is unsure of the judgment debtor's assets. However, if the judgment creditor wishes to obtain information about the judgment debtor's financial position before deciding on the most effective enforcement measure, there are at present two procedures in Local Courts under which the judgment debtor can be compelled to disclose information concerning his means and financial affairs. One of these is the examination in aid of execution procedure and the other is the judgment summons procedure.

##### (b) Examination in aid

3.2 Under the examination in aid procedure, a judgment debtor can be examined before a magistrate as to whether any debts are owing to him, or whether he has any other property and means of satisfying a judgment debt. The 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.

3.3 To initiate the procedure, the judgment creditor files 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.<sup>1</sup> If the clerk refuses the application, the judgment creditor can apply to the magistrate for a

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<sup>1</sup> LCR O 27 r 13(1).

direction that the summons should be issued.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

3.4 At the examination the judgment creditor concentrates his efforts on obtaining information on the judgment debtor's assets (including debts owed to the debtor) which will assist him in enforcing the judgment. He may also seek 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. The creditor may also seek information on the debtor's income where the debtor is a natural person because he may wish to seek an instalment order if the debtor has no assets which can be seized under a warrant of execution or attached under a garnishee order.

3.5 The magistrate is not empowered by either the LCA or the LCR to make any orders at the hearing of the examination in aid of execution for the enforcement of the judgment debt. The making of such orders is not the purpose of the procedure. After the hearing, the judgment creditor can obtain a warrant of execution, or make an application for an order attaching all debts owing or accruing to the judgment debtor or an instalment order.<sup>5</sup>

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<sup>2</sup> 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.

<sup>3</sup> Service of the summons must be personal service unless the magistrate orders otherwise: LCR O 27 r 13(3) (c). Service of a judgment summons is by personal service: footnote 22 in Ch 2 above.

<sup>4</sup> LCA s 144(2). 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.

<sup>5</sup> In Local Courts in New South Wales, there is an alternative procedure for obtaining information from the judgment debtor. There the registrar of a Local Court, on the application of the judgment creditor, may issue and serve an examination notice by posting it to the judgment debtor: *Local Courts (Civil Claims) Act 1970* (NSW) s 43A. The notice, which is in a prescribed form, contains a questionnaire. The judgment debtor has 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 registrar of the Local Court at Sydney has informed the Commission that examination notices are hardly ever used in his Court. He said that the practice of solicitors acting for judgment creditors is to

(c) **Judgment summons**

3.6 At the hearing of a judgment summons<sup>6</sup> the judgment debtor will be examined concerning the means he has or has had to satisfy the debt.<sup>7</sup> As an order for payment by instalments can be made at the hearing of a judgment summons,<sup>8</sup> the examination will often focus on the judgment debtor's income and expenditure in order that the amount of the instalments might be determined.<sup>9</sup> Apart from making orders for payment by instalments, orders varying the instalments and orders for commitment where there has been default in payment of instalments, the Court cannot make any other order for the enforcement of a judgment debt, such as an order for attachment of a debt, on the hearing of a judgment summons.

## 2. AN ENFORCEMENT HEARING

3.7 The ALRC Report pointed to the variety of examination procedures within single jurisdictions in Australia.<sup>10</sup> Each examination order had a limited purpose. 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 ALRC said the choice of procedure should not impose artificial restrictions on the outcome of the hearing.<sup>11</sup> It therefore proposed that there should be a single streamlined procedure.

3.8 In Local Courts in Western Australian, there are the two examination procedures: the examination in aid of execution procedure and the judgment summons procedure. Each procedure has a limited purpose. To simplify the procedure for the enforcement of judgment debts, the Commission **recommends** that these two examination procedures should be replaced by a single system involving an enforcement hearing at which various orders can be

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issue an examination summons, examine the judgment debtor at the hearing and seek to have an instalment order made at the end of the hearing: see para 4.6 below. After giving consideration to the matter, the Commission decided not to recommend that provision for an examination notice procedure be introduced in Local Courts in Western Australia.

<sup>6</sup> The judgment summons procedure is explained in paras 2.13-2.16 above.

<sup>7</sup> LCA s 130; LCR Appendix Part I form 119.

<sup>8</sup> Paras 2.13-2.15 above.

<sup>9</sup> 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.

<sup>10</sup> ALRC Report para 244.

<sup>11</sup> Ibid.

made. For the judgment creditor, the enforcement hearing would have two uses, namely to obtain information about the judgment debtor's financial affairs and to obtain an order enforcing the judgment. The judgment creditor would not be obligated to apply for an enforcement order at the hearing. He might be satisfied with obtaining further information about the judgment debtor's financial position. On the other hand, in the case of a number of the enforcement orders which could be made at an enforcement hearing, the judgment creditor would have the option of applying under the enforcement hearing system for the order on an ex parte basis.<sup>12</sup> Where he did this, there would be no examination of the judgment debtor at the enforcement hearing. The enforcement hearing procedure could also be utilised by the judgment debtor to apply for one of a number of specified orders which could be made on his application including an order for payment by instalments.

### 3. ORDERS WHICH MAY BE MADE AT THE HEARING

3.9 The Commission **recommends** that where an enforcement hearing is held, the Court, on the application of the judgment creditor, should have the power to order -<sup>13</sup>

- \* payment by instalments;
- \* the variation or cancellation of an instalment order;
- \* attachment of earnings;<sup>14</sup>
- \* the discharge, suspension or variation of an attachment of earnings order;
- \* attachment of debts (other than earnings); or
- \* the appointment of a receiver by way of equitable execution and an injunction ancillary or incidental to an order appointing a receiver.<sup>15</sup>

The Commission has not included an order for the issue of a warrant of execution in its recommendation because it considers that the decision to have a warrant of execution issued

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<sup>12</sup> Para 3.13 below.

<sup>13</sup> In the Discussion Paper at para 4.15 the Commission raised the question of whether at the end of an examination in aid of execution the magistrate should, on the application of the judgment creditor, be able to make orders for the enforcement of the judgment. All of those who responded on this issue were in favour of the Court being able to make orders for enforcement of the judgment at the end of the examination. Most of the respondents thought that the magistrate on the application of the judgment creditor should be able to make a range of enforcement orders. Consumer Credit Legal Service (WA) Inc submitted that this should only be the case if there are principles in place that give priority to payment by instalments where the debtor has the means to do so. The Law Society considered that the Court should have the power to make such enforcement orders as it thought fit.

<sup>14</sup> Under a Commission recommendation below (para 5.45) an attachment of earnings order would be suspended so long as the debtor paid the judgment debt by instalments.

<sup>15</sup> Separate consideration is given to these orders later in this report: paras 8.19-8.21 below.

administratively should remain with the judgment creditor: it should not be something which requires the leave of the Court.<sup>16</sup>

3.10 The Commission **recommends** that at an enforcement hearing, the Court, on the application of the judgment debtor, should be able to order -

- \* payment by instalments;
- \* the variation or cancellation of an instalment order; or
- \* the discharge, suspension or variation of an attachment of earnings order.

3.11 There would thus be a range of orders which could be made at the examination hearing. The Commission considers that the judgment creditor should as far as possible retain his existing choice as to the method of enforcement. Accordingly, orders for attachment of earnings, attachment of debts and the appointment of a receiver should only be made at the examination hearing on the application of the judgment creditor. However, as the orders listed in paragraph 3.10 above are potentially advantageous to either the judgment creditor or the judgment debtor, both parties should be able to apply for them.<sup>17</sup> The Court should not of its own motion be able to make at the enforcement hearing any of the orders listed in paragraphs 3.9 and 3.10 above<sup>18</sup> and the Commission **recommends** accordingly.

3.12 Except where an instalment order is made at judgment<sup>19</sup> or there is an instalment agreement after judgment<sup>20</sup> or an agreement as to the variation or cancellation of an instalment order,<sup>21</sup> the enforcement hearing procedure should be the only means by which the judgment creditor should be able to obtain an order for -

- \* payment by instalments;
- \* the variation or cancellation of an instalment order;
- \* attachment of earnings;

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<sup>16</sup> The judgment creditor's ability to have a warrant of execution issued would, of course, be limited by the stay of execution which would come into operation if the judgment debtor successfully applied for an instalment order under the Commission's proposals giving the Court a restricted power to make instalment orders on the application of the judgment debtor: paras 4.10 and 4.22 below.

<sup>17</sup> In the following chapter of this report the Commission recommends that where the judgment debtor applies for an instalment order the Court should have only a limited power to make the order: para 4.10 below.

<sup>18</sup> As to the costs of an enforcement hearing, see paras 8.24-8.25 below.

<sup>19</sup> Paras 4.9-4.10. below.

<sup>20</sup> Para 4.16 below.

<sup>21</sup> Para 4.17 below.

- \* the discharge, suspension or variation of an attachment of earnings order;
- \* attachment of debts (other than earnings);
- \* the appointment of a receiver by way of equitable execution and an injunction ancillary or incidental to an order appointing a receiver.

The Commission **recommends** accordingly.

#### **4. PROCEDURE FOR THE ENFORCEMENT HEARING**

##### **(a) Initiating the procedure**

3.13 The Commission **recommends** that the enforcement hearing procedure should be initiated by an enforcement hearing summons and that either the judgment creditor or the judgment debtor should be able to require the issue of the summons. However, where the judgment creditor seeks an order for either -

- (a) attachment of debts (other than earnings); or
- (b) the appointment of a receiver by way of equitable execution with or without an injunction ancillary or incidental to the order,

instead of requiring a summons to be issued, he should be able to apply ex parte on affidavit for an enforcement hearing and for the order which he seeks. The Commission **recommends** accordingly. The Commission also **recommends** that where an enforcement hearing has been initiated by an enforcement hearing summons -

- (a) the judgment creditor should be able to apply at the hearing for any of the orders listed in paragraph 3.9 above whether or not he was the party who required the summons to issue, and
- (b) the judgment debtor should be able to apply at the hearing for any of the orders listed in paragraph 3.10 above whether or not he was the party who required the summons to issue.

3.14 Where the judgment creditor applies *ex parte* for an enforcement hearing there will be no examination of the judgment debtor at the enforcement hearing. The judgment creditor would have been satisfied that he already had sufficient information about the judgment debtor's assets to enable him to apply for the order for which he is entitled to make *ex parte* application. It would be unnecessary and therefore unjustifiable to require an examination of the judgment debtor in this situation.<sup>22</sup>

3.15 As already indicated, one of the purposes of an enforcement hearing is to require the judgment debtor to appear to be examined as to his property and financial circumstances and his means and ability of satisfying the judgment debt. Where the judgment debtor is summoned to attend an enforcement hearing, his ability to give precise evidence as to his property and financial circumstances and his means and ability of satisfying the judgment debt will be increased if he completes a statement of financial affairs before coming to the Court. To enable this statement of financial affairs to be completed, the Commission **recommends** that a prescribed form of statement of financial affairs should be annexed to the copy of the summons to attend the enforcement hearing which is served on the judgment debtor and that he should be required to complete the form and bring it to the enforcement hearing. The judgment creditor should be provided with a copy of the statement at the enforcement hearing. So far as the statement of financial affairs for a non-corporate judgment debtor is concerned, the forms used in Victoria (Form 28B) and the Australian Capital Territory (Form 80) could be adapted<sup>23</sup> and in the case of a corporate judgment debtor the

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<sup>22</sup> The same point can be made in respect of the issue of a warrant of execution which the judgment creditor would be able to issue, as at present, without leave: see para 3.9 above. To require that the judgment debtor be examined as to his financial affairs in every case would also impose an added burden on Court resources and increase the overall cost of debt collection. Such a requirement would also give the judgment debtor more time to dispose of assets to the prejudice of the judgment creditor, if the debtor wished to do so. If the judgment creditor believes that there may be assets against which the judgment could be executed but he cannot identify them without examining the debtor, then he could require an enforcement hearing summons to be issued and examine the judgment debtor at the enforcement hearing.

<sup>23</sup> Form 28B is set out in Appendix II. It is used in the Victorian Magistrates Court in applications for instalment orders by judgment debtors: para 4.6 below. Form 80 is set out in Appendix III. It is used in the Magistrates Court in the Australian Capital Territory in applications by judgment debtors for instalment orders or for orders varying or revoking instalment orders: *Magistrates Court (Civil Jurisdiction) Act 1982 (ACT)* ss 308(2) and see also s 331(2).

The Commission has not examined the detail in these forms but there is a matter arising from this report which should be taken into account in preparing the form for a statement of affairs. The item headed "Cash that is readily available or can be made so available", which appears in both forms, should be redrafted because under the Commission's recommendations money in an account could be attached, although not readily available: paras 5.7-5.9 below. The Commission suggests that the item could be worded "Money in bank/building society/credit union (including deposits)" with headings beneath this under which the name of the bank/building society/credit union, the branch, the type of account, the account number and the amount held would be inserted. It should appear under the heading "Property and Assets" as it does in the case of form 80.

form used in Victoria (Form 27CD) could be adapted.<sup>24</sup> The Court should be able to make an enforcement order notwithstanding that the judgment debtor has not returned a completed statement of financial affairs or without an oral examination of the judgment debtor. Otherwise, the judgment debtor could use failure to complete the form or failure to attend the hearing as a means of frustrating the enforcement process.

3.16 The Law Society in its comments on the Discussion Paper suggested that the summons form should encourage the person summoned to seek advice before the examination date if he is unsure of the procedures. The Commission agrees with the suggestion and **recommends** that a notice be included in the prescribed form of summons to attend an enforcement hearing informing the person to whom it is addressed that he should seek advice before the hearing date if he is unsure of the procedures relating to the examination hearing.

**(b) Judgment debtor to produce documents at enforcement hearing**

3.17 At present, 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".<sup>25</sup>

The Commission **recommends** that the prescribed form of summons to the judgment debtor to appear at an enforcement hearing should continue to require the judgment debtor to produce at the enforcement hearing all books, deeds, papers and writings of whatsoever nature in the judgment debtor's possession or power in any way relating to his financial affairs. To give the judgment debtor a better indication of the type of documents he should produce, the Commission **recommends** that the prescribed form of summons to the judgment debtor to appear at an enforcement hearing should go on to say that the documents to be produced by the judgment debtor are to include -

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The Commission does not contemplate that the judgment debtor would have to swear to the truth of the statement before returning it.

<sup>24</sup> Form 27CD is set out in Appendix IV. Form 27CD is used when an examination of an officer of a judgment debtor which is a corporation is conducted by a registrar: *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.12(7). The matter referred to in the second paragraph of the previous footnote should be taken into account in preparing a statement of affairs for a corporate judgment debtor. The Commission does not contemplate that the officer of the corporation which is the judgment debtor should have to swear to the truth of the statement before returning it.

<sup>25</sup> LCR Appendix Part I form 185.

1. passbooks and statements for all bank/building society/credit union accounts;
2. pay slips;
3. mortgage statements;
4. documents relating to the title of any land owned by the debtor; and
5. copies of tax returns for the two years prior to the judgment.

There should also be a space in the form where the judgment creditor can fill in the details of further documents he particularly wants produced.<sup>26</sup> The express inclusion of the documents listed would not of course affect the generality of the requirement. However, because of the wording of that requirement, the judgment debtor would only be obliged to produce documents whether in the list or not if they are in his possession or power and in some way related to his financial affairs.

3.18 In some cases, the judgment creditor may consider that the production of some or all of the documents which would be covered by the prescribed form of summons would not be necessary.<sup>27</sup> The Commission therefore **recommends** that the judgment creditor should be able if he wishes to delete from the prescribed form any of the documents covered by it or delete entirely the requirement to produce documents.

3.19 Where it is the judgment debtor who required the enforcement hearing summons to issue,<sup>28</sup> he should be required to produce at the enforcement hearing all books, deeds, papers and writings of whatsoever nature in the judgment debtor's possession or power in any way relating to his financial affairs including those listed in items 1 to 5 in paragraph 3.17 above. The form of summons for use by the judgment debtor should inform him of the requirement. The Commission **recommends** accordingly.

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<sup>26</sup> The recommendation is based on a proposal, referred to in the Discussion Paper (para 4.10), made to the Commission by the Institute of Mercantile Agents Ltd in a preliminary submission to the Commission. Most of those who commented on the issue when it was raised in the Discussion Paper supported the suggestion. A similar approach is taken in the form of summons (Form 76) to attend for examination prescribed under s 295 of the Australian Capital Territory's *Magistrates Court (Civil Jurisdiction) Act 1982*.

<sup>27</sup> The existing prescribed form of judgment summons (form 119 to Part I of the appendix to the LCR) does not require the judgment debtor to produce any documents at the judgment summons hearing.

<sup>28</sup> See, for example, paras 3.13 above and 4.10 below.

**(c) Summons to a person other than the judgment debtor**

3.20 At present the summons for examination in aid may only be issued to the judgment debtor or, where the judgment debtor is a corporation, an officer of the corporation.<sup>29</sup> The Commission **recommends** that the clerk, on the application of the judgment creditor or the judgment debtor, should be empowered to issue a summons calling on other persons to give evidence or produce documents or to give evidence and produce documents at the enforcement hearing.<sup>30</sup> Sometimes someone other than the judgment debtor, for example his accountant, is in a far better position to be able to give evidence concerning the judgment debtor's property and his means of satisfying the judgment debt and it is desirable that he be present to give that evidence.<sup>31</sup>

**(d) Failure of judgment debtor to attend the enforcement hearing in response to a summons to him**

3.21 Under the existing law, if the judgment debtor refuses or neglects to obey the summons to attend an examination in aid, 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.<sup>32</sup> Pursuant to the warrant, the judgment debtor will be apprehended by the bailiff and brought before a magistrate.

3.22 A different approach is used 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 Court has 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.<sup>33</sup> The registrar serves the judgment

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<sup>29</sup> LCR O 27 r 13 and appendix form 185.

<sup>30</sup> As to neglect of a witness to attend in response to a summons, see LCA ss 63 and 64.

<sup>31</sup> At present where a judgment summons is issued, witnesses may be summoned to prove the means of a judgment debtor in the same manner as witnesses are summoned to give evidence on the trial of an action: see LCR O 26 r 12(1) and LCA s 62.

The provisions governing examination of a judgment debtor under the *Magistrates' Court Civil Procedure Rules 1989* (Vic) empower the registrar to issue a summons to a person other than the judgment debtor to give evidence: r 27.12.1(4).

<sup>32</sup> LCA s 144(2). It is still necessary for the creditor to apply to the clerk for the issue of the warrant even though the magistrate has ordered that the warrant issue: LCR Appendix I Form 185A. The form of warrant is prescribed in Form 185B.

<sup>33</sup> *Local Court (Civil Claims) Act 1970* (NSW) s 42(2). The functions of the Court under this subsection may be exercised by the registrar: id s 42(4B).

debtor with a notice informing him of the action which the Court has taken.<sup>34</sup> 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 by the registrar.<sup>35</sup>

3.23 Where successful, the New South Wales approach has the following advantages -

1. It avoids the severe nature of the arrest process.
2. It avoids the costs associated with the issue of a bench warrant.<sup>36</sup>

Its disadvantages are -

1. It delays the enforcement process and the judgment debt will be unpaid for a longer period of time.
2. It provides greater opportunity for the judgment debtor to dispose of an asset which could be seized if the judgment creditor obtained information on it.

Given that it is the judgment debtor who has failed to comply with the summons to attend to be examined, the Commission considers that the judgment creditor should not be put to the risk of increased costs and delay which are involved in the New South Wales approach. The Commission therefore does not recommend the adoption of the New South Wales approach in Western Australia.<sup>37</sup> The Commission **recommends** that the magistrate should continue to

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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.

<sup>34</sup> *Local Courts (Civil Claims) Act 1970* (NSW) s 42(2).

<sup>35</sup> Id s 42(3) and (4). Provisions along the same lines have recently been adopted in the Magistrates Court in the Australian Capital Territory: ss302-305 of the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT).

<sup>36</sup> In the case of Local Courts in Western Australia, these costs comprise the solicitor's costs of \$30 for preparing and lodging the application for the issue of the warrant, the bailiff's fee which is \$30 and the bailiff's travelling costs: Item 16(b) of the Local Court Scale of Costs and LCR Appendix Part II Bailiff Fees.

<sup>37</sup> Those who commented on this issue in response to the Discussion Paper were divided on whether the New South Wales system should be utilised in Local Courts in Western Australia. One of those opposed to the New South Wales system was the (WA) Acting Executive Officer Magistrates Courts. He said that to allow a judgment debtor a second chance to attend an examination before a warrant for arrest was

have power to order the apprehension of a judgment debtor who fails to comply with the summons to attend an enforcement hearing.<sup>38</sup>

3.24 At present the judgment creditor must apply for the issue of a warrant to apprehend a judgment debtor even though the magistrate has ordered that it issue. This is done by filing a praecipe at the Court's office.<sup>39</sup> The Commission **recommends** that the warrant should issue when the Court makes its order that it issue. This is what occurs under the *Justices Act 1902* and would avoid the costs associated with the filing of a praecipe.<sup>40</sup> The Commission also **recommends** that the Court should only make an order on the application of the judgment creditor because he might not necessarily want a warrant of apprehension to be issued. He might have made an agreement to get an adjournment or he might be able to get an enforcement order notwithstanding the judgment debtor's failure to attend the hearing.

3.25 Neither the LCA nor the LCR place a limitation on the life of a warrant issued under section 144(2) of the LCA. One issue raised in the Discussion Paper was whether 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.<sup>41</sup>

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issued would be an unnecessary delay and incur additional expenses. It might result in the examination procedure not being utilised by judgment creditors.

On the other hand the Aboriginal Legal Service of Western Australia (Inc) (ALS) and Consumer Credit Legal Service (WA) Inc both strongly opposed the continuation of the present position. The ALS maintained that the use of arrest as a means of bringing people before the court in relation to a civil matter should be avoided as a matter of principle. It said that although the Royal Commission into Aboriginal Deaths in Custody was primarily concerned with Aboriginal people's involvement in the criminal justice system it recommended that arrest should always be the sanction of last resort. The ALS said that aboriginal debtors should always be given a second chance before the issuing of a warrant because of cultural considerations. The Consumer Credit Legal Service said that procedures should enable debtors who are in difficulty in attending on the day of the summons to apply for a rescheduling of the date, a point also made by the ALS. A warrant for arrest should allow the debtor to remedy the default before an arrest is made.

The ALS maintained that before a warrant is issued the summons should have been personally served on the judgment debtor. Consumer Credit Legal Service (WA) Inc contended that a warrant should not issue unless material was provided to show that the debtor had actually been properly notified of the examination in the first place.

The Law Society also supported the New South Wales provision.

<sup>38</sup> Service of the summons should be personal unless the magistrate otherwise orders. This would continue the policy under LCR O 27 r 13(3)(c): footnote 3 above in this Ch. It is a desirable approach because a debtor should not be apprehended for failing to comply with a summons unless the magistrate is satisfied that he received the summons.

<sup>39</sup> LCR Appendix Part I form 185A.

<sup>40</sup> The Deputy Chief Magistrate in his comments on the Discussion Paper supported the change recommended by the Commission. Two other commentators did also, although the point had not been raised in the Discussion Paper.

<sup>41</sup> Discussion Paper para 4.13.

3.26 The suggestion had the support of most of those who commented on the issue in response to the Discussion Paper. As a limitation period of 12 months from the date on which the magistrate ordered that the warrant issue would help to ensure that the apprehension of the judgment debtor occurred within a reasonable time, the Commission **recommends** that a warrant to apprehend a judgment debtor who fails to attend an enforcement hearing should only continue in force for 12 months from the date on which the magistrate ordered the warrant to issue. A magistrate should be able, on application, to order that the time be extended for a further period not exceeding 12 months or for successive periods not exceeding 12 months but the time should not be extended for any period unless the application is made within the currency of the last preceding period.

## 5. MAGISTRATE MAY DELEGATE JURISDICTION AND POWERS TO CLERK

3.27 At present a magistrate's jurisdiction in relation to judgment summonses may be delegated to the clerk.<sup>42</sup> However, only a magistrate may hear an examination in aid of execution.<sup>43</sup> To reduce the delay in the holding of enforcement hearings, the Commission **recommends** that the magistrate should be able to delegate the jurisdiction and powers conferred on him in relation to an enforcement hearing to the clerk.<sup>44</sup>

3.28 If the judgment creditor applies for the appointment of a receiver by way of equitable execution, it may be that because of the issues involved in the application,<sup>45</sup> it would be appropriate for the application to be determined by the magistrate instead of the clerk delegate. The Commission **recommends** that where the judgment creditor applies for the appointment of a receiver with or without an injunction ancillary or incidental to the order, and it appears to the clerk delegate that it would be proper for the magistrate instead of himself to determine the application, then he should refer the application to the magistrate who should determine it.

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<sup>42</sup> LCA s 130(6).

<sup>43</sup> Para 2.28 above.

<sup>44</sup> This would be particularly advantageous in those Local Courts in the country which are only visited by a magistrate each two or three weeks. An application by a judgment debtor for an instalment order could be urgent because of the question of a stay of execution depending on the decision made at the examination hearing.

<sup>45</sup> Paras 2.20-2.22 above and 8.19-8.21 below.

## Chapter 4

### ORDERS FOR PAYMENT BY INSTALMENTS

#### 1. INTRODUCTION

##### (a) Present position in Local Courts

4.1 A judgment debtor may be unable to pay the judgment debt immediately but might be able to pay it off by instalments. 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. If the plaintiff consents to the judgment debt being paid by instalments, the magistrate must order it to be paid by the instalments consented to irrespective of the amount of the judgment debt.<sup>1</sup> Subject to these limitations the magistrate can make the order for payment by instalments on the application of either party or of his own motion.
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 made at a time after the giving of the judgment or the making of the order, may order that the amount unpaid be paid by instalments or, if already payable by instalments, by the like or smaller instalments.<sup>2</sup>

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<sup>1</sup> LCA s 91.

<sup>2</sup> 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.  
An order made under O 23 r 9 or O 23 r 10 has the same affect as a fresh order for payment made on the hearing of a judgment summons: LCR O 23 r 10.

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. The ex parte application may be made at any sitting of the Court or it may be made at any other time by letter.<sup>3</sup>

4. Under the judgment summons procedure, when a judgment debtor is in default in payment under a judgment or order of a Local Court, the magistrate is empowered to order that a debt be paid by instalments.<sup>4</sup>

4.2 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.<sup>5</sup> 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
- (b) for such portions thereof as the magistrate may have ordered at the time of making the original order, or at a subsequent time.<sup>6</sup>

**(b) Present provision in the Supreme Court**

4.3 In the Supreme Court, the Court may direct any debt due from any person pursuant to an order or judgment of the Court to be paid by instalments.<sup>7</sup> However, it is not usual for instalment orders to be made in the Supreme Court.

**(c) Previous recommendation**

4.4 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.<sup>8</sup>

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<sup>3</sup> LCR O 23 r 8. The application 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.

<sup>4</sup> LCA s 130. See paras 2.13-2.14 above.

<sup>5</sup> LCA s 138.

<sup>6</sup> Ibid.

<sup>7</sup> *Debtors Act 1871* s 3.

<sup>8</sup> Part I Report para 15.51.

At the time when that report was presented the monetary jurisdiction of Local Courts was \$10,000.

**(d) The law elsewhere**

4.5 In some Australian jurisdictions, the court, on the application of a party or on the court's own motion, may when giving judgment order that the judgment debt amount be paid by instalments.<sup>9</sup> The power applies irrespective of the amount of the judgment debt.

4.6 So far as applications for instalment orders after judgment are concerned, different approaches have been adopted to reform in Victoria and New South Wales. In Victoria either party can apply after judgment to have the judgment debt paid by instalments.<sup>10</sup> In New South Wales only the judgment debtor can apply for an instalment order. 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.<sup>11</sup> The Northern Territory has adopted the Victorian approach<sup>12</sup> while in Queensland and the Australian Capital Territory there is a similar scheme

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<sup>9</sup> For example, the District Court in New South Wales ((NSW) District Court Rules 1973 Pt 31A r 1), a Local Court in New South Wales ((NSW) Local Court (Civil Claims) Rules 1988 Pt 27 r 1), the Magistrates' Court in the Australian Capital Territory (*Magistrates Court (Civil Jurisdiction) Act 1980* (ACT) s 292) and in the Supreme Court, a County Court or the Magistrates Court in Victoria (*Judgment Debt Recovery Act 1984* (Vic)s 5).

<sup>10</sup> *Judgment Debt Recovery Act 1984* s 6.

A suggestion in the Discussion Paper that the Victorian system be adopted in Local Courts in Western Australia was supported in principle by the following commentators on the Discussion Paper: (WA) Acting Executive Officer Magistrates' Court, Australian Finance Conference, Consumer Credit Legal Service (WA) Inc and the Law Society.

Deputy Chief Magistrate Martin said that he was in favour of the concept of the Court at a time after judgment being able to make orders for payment by instalments on the application of either the judgment creditor or the judgment debtor. However, he had a warning with respect to the Victorian and New South Wales models. This was that if it is made too easy to apply for an instalment order, this could create the problem of debtors applying for an order when payment by instalments was not justified. Debtors would be able to drag out the payment of the judgment debt.

Mr G C Farr said that an instalment order should only be made on the application of the judgment debtor after notice to the judgment creditor and the Court and if the judgment debtor attends a hearing.

The Metropolitan and Country Bailiffs' Association said that an application for payment by instalments after judgment should only be able to be made on the application of the judgment creditor, not the judgment debtor.

<sup>11</sup> *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 28 r 4.

The Victorian and New South Wales provisions were explained in greater detail in the Discussion Paper: paras 3.9-3.15.

<sup>12</sup> *Local Court Rules 1990* (NT) O 31.

to that of New South Wales.<sup>13</sup> In South Australia only the judgment creditor can apply for an instalment order.<sup>14</sup>

## 2. THE COMMISSION'S RECOMMENDATIONS

### (a) Retention of instalment orders

4.7 As stated above, the common law does not require judgment creditors to accept payment by instalments but in Local Courts there are four statutory exceptions to this position. The common law position recognises that, from the point of view of the judgment creditor, payment by instalments is not as satisfactory as prompt payment of the whole debt.

4.8 The Commission considers that once a creditor has obtained a judgment for the payment of a sum of money he should be entitled to the prompt payment of the whole amount. However, there may be circumstances in which an instalment order would be the only method by which the judgment could be enforced successfully. This would be the case if a judgment debtor was receiving a salary but had no valuable assets. For these reasons, the Commission **recommends** that provision for instalment orders should be retained.

### (b) Instalment orders on the application of the judgment creditor

4.9 Where it is a judgment creditor who wishes to apply to the Court for an instalment order, for example because he is aware that it is the only means of recovering the debt, the Commission **recommends** that he should be able to apply to the Court either at the time of judgment, or after judgment under the enforcement hearing procedure. Where an application is made under the enforcement hearing procedure the judgment debtor would be required to complete a statement of his financial affairs, a copy of which would be given to the judgment creditor at the hearing.<sup>15</sup> The judgment creditor would also be able to examine the judgment debtor at the hearing and, if assets were disclosed against which the judgment could be enforced, the judgment creditor could apply for an order for attachment of debts or an order appointing a receiver, or after the hearing have a warrant of execution issued.<sup>16</sup>

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<sup>13</sup> *Magistrates Courts Rules* (Qld) r 198; *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) ss 308-316.

<sup>14</sup> *Enforcement of Judgments Act 1991* (SA) s 5(1).

<sup>15</sup> Para 3.15 above.

<sup>16</sup> Paras 3.9 and 3.11 above.

(c) **Instalment orders on the application of the judgment debtor**

4.10 The Commission **recommends** that the judgment debtor should also be able to apply for an instalment order, either at judgment or under the enforcement hearing procedure, but that the Court's power to make an instalment order on the application of the judgment debtor should be restricted, except where the judgment creditor consents to the order sought. In deciding the application, the Commission **recommends** that the Court should apply the principle that if the judgment debtor has assets against which the judgment debt could be enforced, the judgment creditor should prima facie be entitled to have the judgment enforced against those assets and an instalment order should not be made. It has come to this conclusion for two reasons. First, as a general rule, a judgment creditor should receive prompt payment of the whole of the judgment debt.<sup>17</sup> Secondly, an instalment order will result in a stay of execution.<sup>18</sup> A stay of enforcement of the judgment debt could prejudice the judgment creditor. The stay of enforcement might well result in recovery of the judgment debt taking longer to complete than would have been the case if, for example, a sale of property had proceeded under a warrant of execution which had already issued or under a warrant of execution which the judgment creditor could otherwise have issued. Also 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. 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.<sup>19</sup>

4.11 The Commission **recommends** that where the judgment debtor applies for an instalment order in an enforcement hearing summons, the summons should be served on the

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<sup>17</sup> Writing of the Victorian *Judgment Debt Recovery Act 1984* under which the judgment debtor can apply for an instalment order, R White *Debt Recovery in Victoria* (1993) at 193 says that ". . . the *Judgment Debt Recovery Act* is best known as legislation designed to assist debtors in staying and delaying creditors' enforcement procedures."

<sup>18</sup> Para 4.22 below.

<sup>19</sup> It would, however, be an offence for the judgment debtor to dispose of goods once they have been seized by the bailiff under a warrant of execution: footnote 12 in Ch 2 above.

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 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).

judgment creditor by the judgment debtor at least five days before the date of the hearing.<sup>20</sup> The summons would set out the date and time of the hearing.

4.12 It should, of course, be possible to make an instalment order at judgment or under the enforcement hearing procedure on the application of the judgment debtor where the judgment creditor consents to the order sought. The Commission **recommends** accordingly. Where the judgment debtor applies for an instalment order in an enforcement hearing summons and the summons sets out the instalment order sought by the judgment debtor, the judgment creditor should be able to consent to the proposed order by endorsing his consent on the copy of the summons served on him and returning it to the Court. The Court should be empowered to make an order in the terms sought in the summons either before or at the enforcement hearing.

4.13 If the judgment creditor does not consent to the order sought, the Court's power to make an instalment order on the judgment debtor's application would be restricted by it having to apply the principle set out above in deciding the application.<sup>21</sup>

**(d) Provision of a statement of financial affairs of the judgment debtor**

4.14 To enable the Court to decide whether the judgment debtor's circumstances warrant the making of an instalment order without the judgment creditor's consent, the judgment debtor should provide the Court and the judgment creditor with details of his financial affairs. The Commission **recommends** that where a judgment debtor applies for an instalment order in an enforcement hearing summons the summons should be accompanied by a statement of his financial affairs and a copy of it should be served on the judgment creditor with the summons. It is important that the judgment debtor's true financial position should be known before an instalment order is made particularly as execution may not issue until the judgment debtor defaults in payment of an instalment.<sup>22</sup> The same forms of statement of financial affairs as prescribed to be annexed to an enforcement hearing summons when served on a judgment debtor should be used.<sup>23</sup>

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<sup>20</sup> This should also be the case, where the judgment debtor applies in an enforcement hearing summons for the variation or cancellation of an instalment order (see para 4.31) below or the discharge, suspension or variation of an attachment of earnings order (see para 5.71 below).

<sup>21</sup> Para 4.10 above.

<sup>22</sup> Para 4.25 below. Then default must first continue for seven days: *ibid.*

<sup>23</sup> Para 3.15 above.

4.15 The Commission **recommends** that the summons issued to the defendant at the commencement of proceedings<sup>24</sup> should contain information about the methods by which judgments may be enforced and in particular should advise the defendant that an application for an instalment order can be made either at or after judgment and of the principle which must be applied in deciding the application.<sup>25</sup> This would give a defendant an opportunity to prepare a statement of his financial affairs before the trial of the claim and thus facilitate the making and determination of an application for an instalment order at judgment. The Court should have a discretion to adjourn an application for an instalment order if no statement of financial affairs has been provided or there is insufficient information to make a determination at judgment but there should be no stay of enforcement. This should encourage the judgment debtor to prepare a statement of financial affairs before the trial of the claim. Encouraging applications to be made at the hearing would also avoid the inconvenience which can later occur if a stay of execution is obtained after a warrant of execution is issued but before the property seized is sold. If more than one avenue of enforcement is being pursued at the same time, the judgment would be enforced in a manner which is not cost effective and furthermore in a manner which would be unfair to the judgment debtor if he had to pay the costs of more than one procedure.

**(e) Instalment agreements**

4.16 In Victoria 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.<sup>26</sup> 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.<sup>27</sup> The Commission **recommends** that this provision be adopted in Western Australia. It has benefits for both judgment creditors and judgment debtors. For the judgment creditor it means that the methods of enforcement which can follow a default in payment will be available in the event

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In para 3.19 above, the Commission has recommended that the judgment debtor should be required to produce at the enforcement hearing documents in his possession or power in any way relating to his financial affairs.

<sup>24</sup> LCA s 41.

<sup>25</sup> See para 4.10 above.

<sup>26</sup> *Judgment Debt Recovery Act 1984* (Vic) s 7. The form must be executed in the prescribed manner: *ibid.*

<sup>27</sup> *Ibid.*

of default.<sup>28</sup> For the judgment debtor the order, while in force, operates as a stay of enforcement.<sup>29</sup>

4.17 The Commission considers that this facility should also operate in respect of variations and cancellations of instalment orders.<sup>30</sup> It accordingly **recommends** that an agreement in a prescribed form and made between the judgment debtor and the judgment creditor may be filed with the clerk as to the variation or cancellation of an instalment order. On receiving the agreement the clerk should be required to make an order varying or cancelling the instalment order as specified in the agreement.<sup>31</sup>

**(f) Stay of enforcement**

4.18 In the Discussion Paper the Commission raised the question of when the stay of enforcement should come into operation where the judgment debtor applies for an instalment order. It could operate either from the date of the application for an instalment order or from the date an instalment order is made. The issue is important because the judgment creditor can be prejudiced by a stay of enforcement.<sup>32</sup>

4.19 Arguments put to the Commission for a stay to operate from the date of the application are -

1. If it did not operate from the date of the application there might be injustice to the judgment debtor and his family.<sup>33</sup>
2. An immediate stay is a powerful incentive to the judgment debtor to face his financial situation and make an application.<sup>34</sup>
3. If more than one remedy was being pursued at one time it would defeat the objectives of equity with cost-effectiveness.<sup>35</sup>

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<sup>28</sup> Second recommendation in para 4.25 below. This would include applying for an attachment of earnings order: para 5.45 below.

<sup>29</sup> Para 4.22 below.

<sup>30</sup> In para 4.31 below, the Commission recommends that either the judgment creditor or the judgment debtor should be able to apply to the Court for the variation or cancellation of an instalment order.

<sup>31</sup> There is a similar provision under the *Magistrates Court (Civil Jurisdiction) Act 1982 (ACT)*: s 309.

<sup>32</sup> Para 4.10 above.

<sup>33</sup> Consumer Credit Legal Service (WA) Inc.

<sup>34</sup> Consumer Credit Legal Service (WA) Inc and the Law Society of Western Australia.

However, the Commission believes that these concerns can be met by encouraging the judgment debtor to be in a position to seek an instalment order at the time the judgment is given or shortly thereafter, particularly as the Court may order that the full amount of the judgment be paid either forthwith or within 14 days from the date of the judgment.<sup>36</sup>

4.20 If there were to be a stay of enforcement on the filing of the application, the scheme will be too much in favour of judgment debtors. Many may leave it to the last minute to make an application. They will not do anything about the judgment debt until the bailiff comes to their house with a warrant of execution and they will then fall back on an application to pay by instalments.<sup>37</sup> This has been the experience in Victoria where the service of the application by the judgment debtor on the judgment creditor operates as a stay of enforcement.<sup>38</sup> Recent enquiries by the Commission concerning the experience in Victoria have revealed that, in the Melbourne Magistrates' Court, ninety per cent of applications for instalment orders are made by judgment debtors. In most of these, the debtor has already been visited by the sheriff armed with a warrant of execution and the visit has led to the debtor applying for an instalment order. Thus in Victoria, a large percentage of the applications occur when a sale by the Sheriff of property belonging to the judgment debtor is imminent.

4.21 Another problem with an automatic stay on the filing of the application is that the Commission recommends below after default in payment under an instalment order the judgment creditor should be able to enforce the judgment, for example, by issuing a warrant of execution against the judgment debtor's property.<sup>39</sup> If a stay of enforcement could be effected by simply filing an application for an instalment order, this warrant of execution

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<sup>35</sup> Law Society of Western Australia.

<sup>36</sup> LCA s 91.

<sup>37</sup> The officer in charge at the Melbourne Magistrates' Court said that this occurred in Victoria. In his opinion, the Victorian system was too favourable to the judgment debtor. He gave as an additional reason for his opinion the fact before any action can be taken by the judgment creditor after default in payment of the instalments, the debtor must be examined by a magistrate: para 4.27 below. This usually only resulted in a further instalment order.

<sup>38</sup> The practice of the Court requires service to be effected before any documents are filed at the Court. The judgment debtor completes the application and the statement of affairs, serves a copy of each on the judgment creditor and then files the original of these documents and an affidavit of service at the Court. The Court immediately sends a letter by facsimile transmission to the sheriff to advise him of the stay of enforcement.

<sup>39</sup> Para 4.25. The default must first continue for 7 days.

could be immediately stayed by applying for an instalment order irrespective of the merits of the application.

4.22 The Commission therefore **recommends** that a stay of enforcement should come into effect on the making of the instalment order by either the clerk or the magistrate whether the application is made by the judgment debtor or the judgment creditor. This should also be the case where there is an instalment order following an instalment agreement.<sup>40</sup>

4.23 As an instalment order operates as a stay of execution it is likely that many applications by judgment debtors for such orders will be made when the bailiff has already seized property under a warrant of execution. At present goods seized by the bailiff may be sold on the sixth day from the date of seizure.<sup>41</sup> To give enough time for a judgment debtor's application for an instalment order to be dealt with before the goods are sold, the Commission **recommends** that goods should not be sold until after the expiration of 21 days from the date of seizure.

4.24 A further question is when a stay should come into effect if the clerk refuses the judgment debtor's application and the judgment debtor within the prescribed period after notification of the decision<sup>42</sup> files a notice of objection to the refusal, so that the matter is set down for hearing by the magistrate.<sup>43</sup> If the filing of the notice of objection operated as a stay of enforcement this could be used by the judgment debtor to delay enforcement irrespective of the merit of his objection.<sup>44</sup> On the other hand, if a stay is only to come into operation on the magistrate upholding the objection, a sale under a warrant of execution might have taken place before the objection can be heard. The Commission **recommends** that if the judgment debtor files a notice of objection to the clerk's refusal to make an instalment order, a stay of enforcement should only come into effect on the magistrate upholding the objection.

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<sup>40</sup> Para 4.16 above.

<sup>41</sup> Para 2.8 above.

<sup>42</sup> This is 14 days in Victoria: para 4.33 below.

<sup>43</sup> The Commission recommends in para 3.27 above that the magistrate should be able to delegate the jurisdiction and powers conferred on him in relation to an enforcement hearing to the clerk and in para 4.34 below that the judgment debtor should be able to object to a magistrate against the clerk's refusal to make an order.

<sup>44</sup> In New South Wales a refusal of a debtor's application for an instalment order is automatically referred to the Court for a hearing and, unless the Court otherwise orders, a stay will only come into operation on the registrar's refusal. However, a stay is not to come into operation if the debtor has made a previous application for an instalment order in respect of the judgment debt: *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 27 r 2(12). This provision is no doubt intended to make it harder for the judgment debtor to frustrate enforcement by warrant by execution.

However, on the ex parte application of the judgment debtor supported by affidavit both the clerk and the magistrate should have a discretion to make an interim order staying enforcement of the judgment. The order should stay enforcement of the judgment until the date of the hearing.

**(g) Effect of default in payment**

4.25 The Commission **recommends** that where an order for payment by instalments is in force together with an attachment of earnings order which has been suspended<sup>45</sup> and default is made in payment of any instalment payable under the order and the default continues for seven days after the day on which the payment was due, then the instalment order should cease to be in force and the attachment of earnings order should come into force. It **recommends** that where no attachment of earnings order has been made, the stay of enforcement should cease when default is made in payment of any instalment payable under the order and the default continues for seven days after the day on which the payment was due. The judgment could then be enforced for the balance of the judgment debt owing to the judgment creditor. The judgment debtor would 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.

4.26 The Commission has recommended that the default should continue for seven days before the suspended attachment of earnings order comes into force or the judgment may be enforced, as the case might be, to allow for the possibility that payments may have been delayed in the mail or on account of excusable delays, for example, those caused by a short illness or a family emergency.<sup>46</sup>

4.27 The Commission does not support the Victorian approach under which an examination of the debtor by the magistrate must take place before there is any possibility of enforcing the judgment after a default.<sup>47</sup> The magistrate after examining the judgment debtor and considering the circumstances of the default may confirm, vary or cancel the instalment

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<sup>45</sup> Para 5.45 below.

<sup>46</sup> If this recommendation is implemented, an amendment should be made to s 138 of the LCA: see para 4.29 below.

<sup>47</sup> *Judgment Debt Recovery Act 1984* (Vic) s 17.

order.<sup>48</sup> The officer in charge of the Melbourne Magistrates' Court has told the Commission that usually the examination results in a further instalment order. The Commission does not consider that the Victorian approach is justified because it reduces the incentive for the debtor to observe the instalment order and this diminishes the effectiveness of the enforcement process.

4.28 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.<sup>49</sup>

4.29 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 considers that a provision along the lines of the second paragraph of section 138 of the LCA should apply<sup>50</sup> so that where the default has continued for the seven days, execution may be issued for the whole of the judgment debt or such portion of it as the magistrate may have ordered at the time of making the original order, or at a subsequent time.<sup>51</sup> The Commission therefore **recommends** that as an exception to the principle that, when the stay of enforcement ceases because of default in payment under an instalment order, the judgment creditor may enforce the judgment debt for the whole of the balance owing, the magistrate should be empowered to order at any time that execution may issue for only a portion of the judgment debt. This power should be exercisable only by the magistrate and not by the clerk.

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<sup>48</sup> Id s 18. Some of the commentators on the Discussion Paper supported the Victorian approach: Mr G C Farr, Consumer Credit Legal Service (WA) Inc and the Law Society. The (WA) Acting Executive Officer Magistrates' Courts said that in Local Courts in New South Wales, except where otherwise directed by the Court, the balance of the judgment debt owing may be enforced on default under an instalment order. However, there was no need in New South Wales to bring the debtor before the Court as there was no provision there for imprisonment where default is made. He said that if imprisonment for default continued to be an option in Western Australia, the Victorian procedure would be more practical.

<sup>49</sup> Paras 6.6-6.13 below.

<sup>50</sup> This provision is explained in para 4.2 above.

<sup>51</sup> The proposal had the support of most of those who commented on the issue when it was raised on the Discussion Paper.

## (h) Variation or cancellation of instalment orders

4.30 After an instalment order has been made, the circumstances of the judgment debtor may alter. In Victoria, in order to take this into account, 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.<sup>52</sup>

4.31 The Commission **recommends** that either the judgment creditor or the judgment debtor should be able to apply under the enforcement hearing procedure<sup>53</sup> for the variation or cancellation of an instalment order. Where the judgment debtor applies for the variation or cancellation, the summons should be accompanied by a statement of his financial affairs in the prescribed form.<sup>54</sup>

4.32 The Commission **recommends** that an order for variation or cancellation should only be made on the application of the judgment creditor where there has been a substantial increase in the property or means of the judgment debtor or because information given in support of the application for an instalment order was inaccurate. Furthermore, where the judgment creditor applies for a cancellation of the instalment order, in deciding the application the Court should apply the principle that if the judgment debtor has assets against which the judgment debt could be enforced, the judgment creditor should prima facie be entitled to have the judgment enforced against those assets and the instalment order should be cancelled. The Commission has recommended that a corresponding principle should apply on the making of the original application for an instalment order<sup>55</sup> and the same approach should apply when the judgment creditor applies for a cancellation. His object in applying to have the instalment order cancelled may be to enforce the judgment against assets which, for

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<sup>52</sup> *Judgment Debt Recovery Act 1984* (Vic) s 8.

<sup>53</sup> Ch 3 above.

<sup>54</sup> The same forms of statement of financial affairs as prescribed to be annexed to an enforcement hearing summons when served on a judgment debtor should be used.

Where the judgment creditor applies the judgment debtor would also in this case be required to complete a statement of his financial affairs: para 3.15 above.

Where it is the judgment debtor who has required the enforcement hearing summons to issue, the Commission has proposed that it should be served on the judgment creditor at least five days before the date of the hearing: para 4.11 above and footnote 20 to that para.

<sup>55</sup> Para 4.10 above.

example, have been acquired by the judgment debtor during the operation of the instalment order.

**(i) Review of decisions**

4.33 In Victoria applications for instalment orders are dealt with by the registrar. 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.<sup>56</sup> The magistrate may -

- (i) where the registrar refused to make an order, either make an order for payment by instalments or refuse to make such an order; or
- (ii) where the registrar has made an order for payment by instalments, confirm, vary or cancel that order.<sup>57</sup>

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

- (i) has orally examined the judgment debtor; or
- (ii) is otherwise satisfied that in the circumstances an instalment order should be made, confirmed, varied or cancelled.<sup>58</sup>

4.34 In Western Australia a decision made by a clerk delegate (or a magistrate) in relation to an application for an instalment order could, by leave of the District Court, be subject to an appeal to that Court.<sup>59</sup> Where decisions in relation to instalment orders are made by a clerk, the Commission believes that a less expensive and more direct means of reviewing the decisions than an appeal to the District Court should be provided. It therefore **recommends**

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<sup>56</sup> *Judgment Debt Recovery Act 1984* (Vic) s 6(4)-(5) and *Magistrates' Court Civil Procedure Rules 1989* r 28.04.

<sup>57</sup> *Judgment Debt Recovery Act 1984* (Vic) s 6(7).

<sup>58</sup> 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.

There is a similar objection procedure in New South Wales: *Local Court (Civil Claims) Rules 1988* (NSW) Pt 27 r 2(8)-(10).

<sup>59</sup> LCA s 107(1)(b).

that where a decision in relation to an instalment order has been made by a clerk an objection procedure similar to that in Victoria should be provided in Western Australia.

**(j) Counterclaims or third party claims**

4.35 In some cases a judgment for the payment of money may be given not to the plaintiff but, for example, in favour of a defendant where he succeeds on a counterclaim or a third party claim. The Commission considers that the above recommendations should apply to all judgments and not only to those in which judgment was given in favour of the plaintiff and **recommends** accordingly.

**(k) Successive applications by the judgment debtor**

4.36 The Commission **recommends** that where a judgment debtor has applied for an instalment order after judgment and the clerk or the magistrate (as the case might be) has refused to make the instalment order, the judgment debtor should not be able to make another application within three months after that refusal.<sup>60</sup> Each application creates work for the Court and the judgment creditor. The Commission considers it is reasonable not to allow a further application within three months after an application has been refused.

**(l) Costs where decision is reviewed**

4.37 In paragraphs 8.24 and 8.25 below, the Commission has recommended that the costs of applications to the Court which are associated with the enforcement of judgments should be in the discretion of the magistrate or the clerk delegate who should have the power to fix those costs. This recommendation would extend to an application for an instalment order or for a variation or cancellation of an instalment order. The Commission **recommends** that where a notice of objection to a decision by a clerk in relation to an instalment order has been filed<sup>61</sup>, the costs of the hearing before the magistrate (and the costs of any application for an interim order staying execution<sup>62</sup>) should also be in the discretion of the magistrate and the magistrate should have power to fix the costs at the hearing. It also **recommends** that the

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<sup>60</sup> This is the position under the *Judgment Debt Recovery Act 1984* (Vic)s 6(9). Again the judgment debtor will retain his right to apply for a stay of enforcement under s 139 of the LCA: para 2.30 above.

<sup>61</sup> Para 4.33-4.34 above.

<sup>62</sup> Para 4.24 above.

magistrate should have the power to confirm, vary or cancel any order for costs made by the clerk in respect of the initial application and to fix or refix the amount of those costs.

**(m) Provisions to be in the LCR**

4.38 The Commission **recommends** that except where otherwise indicated in this chapter the provisions governing instalment orders should appear in the LCR and not the LCA. The provisions could then easily be amended in the light of experience.

## Chapter 5

### ATTACHMENT OF DEBTS AND EARNINGS

#### 1. ATTACHMENT OF ORDINARY DEBTS

##### (a) Existing position in Local Courts

5.1 The existing remedy of attachment of debts is limited by the fact that the debt must be "owing or accruing" to the judgment debtor at the date of the garnishee order nisi.<sup>1</sup> A debt is owing to the judgment debtor if it is one for which on the day on which the attachment order is made "the judgment debtor could have immediately and effectively sued the garnishee".<sup>2</sup> A debt accruing to the judgment debtor is a present debt which is not yet payable but does not include anything further, however probable it may be that in the result there will be a debt, and however soon a debt is likely to arise.<sup>3</sup> It is a debt which is payable at a definable future date by reason of a present obligation.<sup>4</sup> The practical test for determining whether a debt is accruing is whether, given the contractual arrangements between the garnishee and the judgment debtor, the debt is one for which the judgment debtor could, on a future date and subject solely to the passage of time, immediately and effectively sue the garnishee.<sup>5</sup> Thus to satisfy either of the expressions "owing or accruing" there must be an actual present debt.<sup>6</sup> It follows that there is no debt owing or accruing from a garnishee if there is any precondition to be satisfied before the debt is or becomes payable to the judgment debtor.<sup>7</sup> 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.<sup>8</sup> If the dealings between the judgment debtor

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<sup>1</sup> LCA s 145; *Universal Guarantee Pty Ltd v Derepink* [1958] VR 51. For the procedure under the LCA for attachment of debts see para 2.18 above.

<sup>2</sup> *Bank of New South Wales Savings Bank Ltd v Fremantle Auto Centre Pty Ltd and Poland* [1973] WAR 161, 164.

<sup>3</sup> See *Webb v Stenton* (1883) 11 QBD 518, 525.

<sup>4</sup> See *Re Australia and New Zealand Savings Bank Limited; Mellis v Evriniadis* [1972] VR 690, 692-693. A simple example of a debt accruing is a loan from the judgment debtor to the garnishee which is repayable by monthly instalments.

<sup>5</sup> NSWLRC *Attachment of Moneys Deposited with Building Societies and Credit Unions* (Report LRC 46, 1985) 16.

<sup>6</sup> *Webb v Stenton* (1883) 11 QBD 518, 528 per Fry LJ. He added that the words debts owing or accruing include all present debts: id 529.

<sup>7</sup> *Richardson v Elmit* (1876) 2 CPD 9.

<sup>8</sup> *Bank of New South Wales Savings Bank Ltd v Fremantle Auto Centre Pty Ltd and Poland* [1973] WAR 161. In this case, a judgment debtor in Local Court proceedings had money sufficient to satisfy the judgment standing to his credit in a savings bank account with the Bank of New South Wales Savings

and the garnishee are such that a debt may become owing or accruing from the garnishee, the future debt cannot be attached. Future wages are an example of debts which are not attachable for this reason.

5.2 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 debt 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.<sup>9</sup> However, a joint debt may be attached if all the owners of that debt are the judgment debtors.

5.3 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.<sup>10</sup> However, a statutory body which is sufficiently removed from the shield of the Crown is liable in attachment proceedings.<sup>11</sup>

5.4 Commonwealth social security payments in the hands of the Commonwealth Government are not subject to attachment.<sup>12</sup> They are also protected from attachment when credited to an account with a financial institution.<sup>13</sup>

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Bank Ltd. The judgment creditor applied for and obtained a garnishee order against the bank. Under the contract between the judgment debtor and the bank, the production of the passbook was a condition precedent to the obligation of the bank to pay. On appeal to the Full Court, it was held that because the condition precedent had not been met, there was not a debt owing or accruing from the bank to the judgment debtor which was capable of being attached by way of garnishee proceedings.

Where money stands to the credit of a customer in a current account with a bank, a demand for payment by the customer is a prerequisite to the customer bringing an action to recover the money: *Joachimson v Swiss Bank Corporation* [1921] All ER Rep 92. Thus before a debt is owing from the bank to the customer, a demand for payment must be made. It is accepted in England that service of the garnishee order nisi on the bank constitutes a sufficient demand: *Rekstin v Severo Sibirsko* [1932] All ER Rep 534 which adopted obiter dicta in *Joachimson v Swiss Bank Corporation*; see also *Bagley v Winsom* [1952] 1 All ER 637, 639 per Evershed MR. In *Rekstin v Severo Sibirsko*, the Court of Appeal held that as such service could operate as a demand, it could equally operate as a revocation of a direction by the customer to transfer the balance in his current account to another account in the name of a third party. In the Supreme Court of Western Australia, the question of the effectiveness of service of the order nisi on the bank in the case of a current account was discussed by Anderson J in *Coyne v Citizen Finance Ltd* (1991) 4 WAR 213 but he did not have to make any decision on the point.

<sup>9</sup> *Lloyd v Jacobs* (1887) 3 WN(NSW) 144.

<sup>10</sup> *Samuel Allen and Sons Ltd v Mayfield Homes Pty Ltd; Commissioner for Railways (Garnishee)* [1979] Qd R 68; Kercher 116.

<sup>11</sup> *WA Purvis Stores Pty Ltd v Richardson; Country Roads Board (Garnishee)* [1941] VLR 56.

<sup>12</sup> See for example s 66(1) of the *Social Security Act 1991* (Cth) in relation to the age pension.

<sup>13</sup> See for example s 67 of the *Social Security Act 1991* (Cth) in relation to the age pension: the order does not apply to the "saved amount" worked out in accordance with s 67.

**(b) Existing position in the Supreme Court**

5.5 The scope of debts that can be attached in the Supreme Court is similar to that in Local Courts in that section 126 of the *Supreme Court Act 1935* provides that debts, legal or equitable, "owing or accruing" from any other person to the judgment debtor may be attached to answer the judgment or order together with the costs of the proceedings.

**(c) Recommendations***(i) Introduction*

5.6 In order to make the enforcement process more efficient, the Commission considers that the range of debts that can be attached should be expanded. Accordingly, in the following paragraphs it makes recommendations which would make all debts, whether present, future, joint or State Crown debts, attachable subject to specified limitations.

*(ii) Accounts with banks and similar institutions*

5.7 Various conditions may be attached to an account with a bank or similar institution such as a building society or credit union which must be fulfilled prior to the depositor being allowed to withdraw money from the account. A depositor may be required to -

- \* make a demand or give notice before any money or share is withdrawn;
- \* make a personal application before any money or share is withdrawn;
- \* make a demand in a particular manner or at a particular place;
- \* produce a passbook, receipt or other document before any money or share is withdrawn;
- \* keep the money or share in the account for a specified period;
- \* withdraw a minimum amount in respect of any withdrawal from the account; or

- \* maintain a minimum balance in the account.

The existence of any of these conditions may prevent the account being attached because the debt is not "owing or accruing".

5.8 Various jurisdictions have provided that debts may be subject to attachment 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". A number of these provisions were examined in the Discussion Paper.<sup>14</sup>

5.9 To provide the widest possible coverage of accounts that can be attached, the Commission **recommends** that any sum standing to the credit of a judgment debtor with any deposit-taking institution, that is, an institution such as a bank, building society, credit union, or investment fund or corporation, should be attachable<sup>15</sup> as a debt owing or accruing to the judgment debtor<sup>16</sup> notwithstanding that the conditions referred to in paragraph 5.7 above have not been satisfied.<sup>17</sup> However, any amount in a withdrawable share account required to be maintained in the account to allow the judgment debtor to retain membership of the institution concerned should not be attachable. Generally, the effect of the recommendation is that where an amount in an account is attached, service of the attachment order would have the contractual consequences which would have followed if the depositor had complied with the condition but not so as to put the judgment creditor in a better position than the judgment debtor.<sup>18</sup> In the case of a condition requiring notice or a demand, service of the attachment order should have the consequence 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

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<sup>14</sup> Paras 5.8-5.15 discuss the provisions in Victoria, New South Wales and the Family Court. A provision has since been introduced in the ACT: see *Magistrates Court (Civil Jurisdiction) Act 1982* s 325.

<sup>15</sup> See *Family Law Rules* (Cth) O 33 r 4(4). In Victoria and New South Wales the list of institutions covered is narrower than that under these Rules. In the Victorian Supreme Court and County Court the list is confined to savings accounts in banks and cooperative societies: *General Rules of Procedure in Civil Proceedings 1986* (Vic) r 71.03(1). However, in the Victorian Magistrates' Courts it is wider and applies to banks, building societies and cooperatives, credit unions, credit societies, and investment funds and corporations: *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.01(2). In New South Wales, the institutions covered are banks, building societies and credit unions, but not the other institutions covered in the Victorian Magistrates' Courts: see, for example, *Local Courts (Civil Claims) Act 1970* (NSW) s 52A(1), definition of "deposit-taking institution".

<sup>16</sup> The debt would therefore not be a future debt for the purposes of the recommendations made in paras 5.12-5.15 below.

<sup>17</sup> This approach was supported by the two commentators on the issue: Australian Finance Conference and the Law Society of Western Australia.

<sup>18</sup> *Local Courts (Civil Claims) Act 1970* (NSW) s 52A.

judgment debtor was not then entitled to give notice of withdrawal or demand payment, immediately the judgment debtor was entitled to do so. If the account is subject to an unexpired non-withdrawal period after which moneys in the account are payable on demand, the amount attached would become due for payment when the non-withdrawal period expired. If the account is subject to an unexpired nonwithdrawal period and a notice condition, the amount attached would become due for payment on expiry of the notice period, commencing when the non-withdrawal period expires. It should be provided that the deemed notice of withdrawal or demand is irrevocable while the garnishee order remains in force. This would ensure that the judgment debtor could not exercise any right he might otherwise have to countermand a notice of demand and so circumvent the contractual effect of the garnishee order.<sup>19</sup>

5.10 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. In New South Wales, to protect financial institutions where there is such a condition, the institution may 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.<sup>20</sup> 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.<sup>21</sup> 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 accounts, it is unlikely that financial institutions would utilise such a provision and the Commission does not consider that it is necessary.<sup>22</sup>

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<sup>19</sup> Ibid.

<sup>20</sup> *Local Courts (Civil Claims) Act 1970* (NSW) s 52A(6), (7) and (9).

<sup>21</sup> Id s 52A(8).

<sup>22</sup> This conclusion was supported by the Australian Finance Conference in its comments on the Discussion Paper.

*(iii) Judicial discretion regarding conditions*

5.11 The recommendations in paragraph 5.9 above would provide a significant source of possible recovery for judgment creditors. There are, however, in addition likely to be situations where a contractual precondition to the payment of a debt to a judgment debtor will unreasonably prevent attachment. This could, for example, arise where the judgment debtor has lent money to a person or body which is not a deposit-taking institution under the recommendation in paragraph 5.9 above.<sup>23</sup> The issue is of practical importance because the judgment debtor might be unwilling to satisfy the precondition in the light of the fact that if he did so the money might be attached. To deal with these situations, the Commission **recommends** that the Court should have authority to require the garnishee to ignore a contractual precondition to the payment of a debt or to order some alternative method of satisfying the condition. However, no such order should have the effect of requiring the garnishee to make payment into court pursuant to an attachment order before the earliest time that he could have been required to make payment pursuant to the terms of his relationship with the judgment debtor.<sup>24</sup>

*(iv) Future debts*

5.12 If the dealings between the judgment debtor and the garnishee are such that a debt may become owing or accruing from the garnishee, the future debt cannot be attached.<sup>25</sup> This is so even though in the ordinary course a debt will become payable to the debtor.<sup>26</sup> Only present debts are attachable.<sup>27</sup> Subject to the limitations in the following paragraph, the Commission **recommends** that the scope of attachment should be expanded to permit a judgment creditor to attach future debts of the judgment debtor.<sup>28</sup> This would include but not

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<sup>23</sup> It could also occur where the money has been lent to a deposit-taking institution but the precondition is not one of those referred to in para 5.7 above.

<sup>24</sup> Similar recommendations were made by the ALRI Report: report Vol 1, 224-225 and s 149 of the model *Judgment Enforcement Act* which appears in Volume 2 of the report.

<sup>25</sup> Para 5.1 above.

<sup>26</sup> As in the case of a contract of employment. Since under the contract, no monetary obligation arises until the terms of the contract have been fulfilled, there is no present debt until the conditions of the contract have been satisfied.

<sup>27</sup> Para 5.1 above.

<sup>28</sup> The three commentators who referred to the matter supported the concept of attachment of future debts. Some future debts may be exempt. For example, s 92 of the *Life Insurance Act 1945* (Cth) provides that the property and interest of any person in a policy effected upon his life shall not be liable to be applied in payment of his debts by any judgment, order or process of any court.

be confined to conditional debts.<sup>29</sup> Payments in the form of salary and wages, pensions and periodical payments by way of workers' and accident compensation, which require special consideration, are discussed below.<sup>30</sup> They should be excluded from ordinary attachment of debts. Subject to existing rights of third parties, the judgment creditor should have an overriding right to payment at the time a future debt becomes due and owing. To avoid attempts to frustrate the judgment creditor, the Commission **recommends** that dealings with an investment or contingent right which would defeat the judgment creditor's interest should be prohibited and rendered void except in favour of a purchaser in good faith for value without notice.<sup>31</sup>

5.13 The Commission **recommends** that the attachment of future debts should be subject to the following limitations -

- (a) To provide some certainty, 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<sup>32</sup> at the time the attachment order is made.<sup>33</sup> This would include an existing lease under which rents will become payable to the judgment debtor and an existing agreement by which the proposed garnishee will pay a

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<sup>29</sup> An example of a conditional debt is money which is payable under a building contract upon delivery of the architect's certificate: *Dunlop and Ranken Ltd v Hendall Street Structures Ltd; Pitchers Ltd (Garnishees)* [1957] 3 All ER 344.

<sup>30</sup> See paras 5.37-5.42 below. It seems to the Commission that spousal maintenance following a separation and maintenance or child support in respect of a child whose parents have separated should be excluded: para 5.43 below.

<sup>31</sup> Such an approach has been recommended by the ALRC: ALRC Report para 224. Both the Ontario Law Reform Commission and the ALRI have also recommended legislation making it clear that future debts may be attached: OLRC Report Part II, 138-142; ALRI Report Vol I, 200-206. The Alberta report included some limitations on the right to attach future debts, such as that a garnishment order should expire one year after service if the debt had not become payable in that time unless a renewed order was issued and served within the year.

<sup>32</sup> It would be necessary to amend the LCA or the LCR to cater for the situation where the garnishee disputes the existence of the legal relationship upon which the attachment is founded: see ALRI Report Vol I, 212-214.

<sup>33</sup> A similar recommendation was made by the ALRI: ALRI Report Vol I, 201-204. The ALRI Report said that the remedy should be available in situations where there is a legal relationship existing by reason of -

- (a) a contract or trust,
- (b) a cause of action,
- (c) an employment relation, or
- (d) a statutory right, a statutory right to claim, or a statutory duty: id 204.

See also the definition of "future obligation" in s 117 of the model *Judgment Enforcement Act* which appears in Volume 2 of the Report. In reading this definition, it must be remembered that the model Act lumps together accruing debts and future debts: s 117(1)(d). This is not the approach of the Commission in paras 5.12-5.15 above.

The reference to attachment order in the recommendation in para 5.13(a) assumes the implementation of the procedures in paras 5.27-5.28 below.

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<sup>34</sup> and future obligations that might reasonably arise out of a trust or other kind of fiduciary relationship between the proposed garnishee and the judgment debtor.<sup>35</sup>

- (b) The attachment should expire one year after the date on which the attachment order is served on the garnishee unless the order is renewed and served before the end of the year.<sup>36</sup> This limitation would protect a garnishee who might forget about the attachment order and many years later pay the debt to the judgment debtor in violation of the order.

5.14 Subject to paragraph 5.13(b) above, the Commission **recommends** that the attachment remedy in respect of future debts arising from the same legal obligation should have a continuous effect, that is the attachment process should attach any debt that becomes due until the attachment expires or the judgment debt is satisfied. This will ensure that it will not be necessary to wait and see whether a debt such as future rent becomes due before acting. At present the need to seek fresh garnishee orders for recurring debts such as rent as they arise often makes attachment not worth undertaking. Continuing attachment may cause administrative difficulties for some garnishees. However, it does away with the premium placed on timely 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.

5.15 The expansion of the attachment of debts to include future debts such as rents could result in injustice and hardship if a judgment creditor could divert the debtor's entire cash flow from an asset to the satisfaction of a judgment debt. The judgment debtor may need some of the attached debt to pay expenses associated with the production of the income that has been attached, for example, to meet payments on a mortgage on a rental property and other outgoings associated with the property. The judgment debtor may also rely on the income to meet his own and his family's basic living needs and he may suffer hardship if all the debt is diverted to the satisfaction of a judgment debt. To avoid this hardship, the Commission **recommends** that the Court should have power to exempt a portion of the attached debt to

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<sup>34</sup> Id 208-210

<sup>35</sup> Id 203.

<sup>36</sup> Id 206.

ensure that expenses associated with the production of the attached debt are paid<sup>37</sup> or to meet the basic living needs of the judgment debtor and his family. The Court should have a discretion to impose such terms as are appropriate to ensure that the exempted portion of the obligation is used for the purpose for which it is required.

(v) *Joint debts*

5.16 At present a joint debt cannot be attached unless all the owners of that debt are also the judgment debtors.<sup>38</sup> The Commission **recommends** that it should be possible to attach a judgment debtor's interest in a joint debt.<sup>39</sup> Both the Ontario Law Reform Commission and the Alberta Law Reform Institute have made a similar recommendation.<sup>40</sup> It might be argued that 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. However, it may be that a joint estate in personalty is severable at the instance of either joint owner, so that the judgment debtor could sever the joint estate and pay his share to his creditors.<sup>41</sup> Attachment might therefore be considered to be a forced severance of the joint interest.

5.17 A judgment creditor should, of course, only have access to the judgment debtor's interest in the joint debt and a non-judgment debtor should not be prejudiced by such access.<sup>42</sup> It would be contrary to justice to permit a creditor to attach a debt owed to two persons to answer the debt of one.<sup>43</sup> If necessary, the enforcement hearing should be used to conduct an enquiry to determine the judgment debtor's interest in the joint debt.<sup>44</sup> There should be a

<sup>37</sup> A similar recommendation was made by the ALRI: ALRI Report Vol 1, 210-211. This approach was supported by the four commentators who referred to the matter.

<sup>38</sup> Para 5.2 above.

The word "joint" in "joint debt" does not mean that the co-owners of the debt hold as joint tenants. In a joint debt, the money is to be paid to two or more persons jointly. None of them has a right to the money without the other or others.

<sup>39</sup> This approach was supported by the four commentators who referred to the matter.

<sup>40</sup> 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.

<sup>41</sup> Authorities on whether personal property can be severed by a mere declaration by one joint tenant 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 recommended 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 in personal property by written notice.

<sup>42</sup> ALRI Report Vol 1, 193-194.

<sup>43</sup> *Ibid.*

<sup>44</sup> Ch 3 above.

presumption that joint owners have an equal interest so that the judgment creditor would be entitled to that amount. Of course, the judgment creditor, the judgment debtor or a joint owner other than the judgment debtor should be able to rebut the presumption.<sup>45</sup>

5.18 The *Partnership Act 1895* provides that no writ of execution shall be issued against any partnership property, except on a judgment against the firm.<sup>46</sup> 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.<sup>47</sup> 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 because subsection (1) refers to a "writ of execution" not a "warrant of execution" which is the process used in Local Courts. The Commission **recommends** that the matter be clarified by making the provision expressly applicable to a debt recovered in a Local Court.

(vi) *Crown debts*

5.19 At present a debt owed by the Crown in right of the State of Western Australia to a supplier of goods or services to the Crown is not attachable.<sup>48</sup> The Commission **recommends** that Crown debts should be attachable<sup>49</sup> because 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.<sup>50</sup> In other jurisdictions Crown debts can be used to meet judgment debts. In Tasmania the rules relating to attachment proceedings apply to and bind the Government of Tasmania,<sup>51</sup> though proceedings must be taken against the Attorney-General.<sup>52</sup> In the Australian Capital Territory proceedings to attach earnings or other debts due or accruing may be taken against the Australian Capital Territory.<sup>53</sup> In England the High Court and a County Court may make an order restraining a judgment debtor

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<sup>45</sup> Para 5.25 below.

<sup>46</sup> *Partnership Act 1895* s 28(1).

<sup>47</sup> *Id* s 28(2).

<sup>48</sup> Para 5.3 above.

<sup>49</sup> This approach was supported by the four commentators who referred to the matter.

<sup>50</sup> 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.

<sup>51</sup> *Rules of the Supreme Court (Tas)* O 50 rr 15-17.

<sup>52</sup> *Id* r 15.

<sup>53</sup> *Crown Proceedings Act 1992 (ACT)* s 5(3).

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.<sup>54</sup> If, as with Commonwealth social security payments,<sup>55</sup> there are special reasons for protecting a debt from garnishee proceedings, that should be done expressly.

(vii) *Costs of compliance*

5.20 The costs of an application for an attachment of a debt, and of the proceedings arising from or incidental to the application, are in the discretion of the magistrate.<sup>56</sup> 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.<sup>57</sup>

5.21 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.<sup>58</sup> The amount deducted is deemed to have been paid by the garnishee to the judgment debtor.<sup>59</sup> The deduction is at the judgment debtor's expense. The Commission considers that it is unfair that a garnishee cannot recover compensation for expenses incurred in complying with an attachment order and accordingly **recommends** that, provided the garnishee makes the payment into court at least five days before the return day of the summons,<sup>60</sup> he should be entitled to retain out of the debt a prescribed amount for his work in making the payment into court.<sup>61</sup> That sum should be at the expense of the judgment debtor.

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<sup>54</sup> *Crown Proceedings Act 1947* (UK) s 27.

<sup>55</sup> Para 5.4 above.

<sup>56</sup> LCA s 153.

<sup>57</sup> *Ibid.* As to the costs when the payment is not so made, see LCR O 28 r 4(5).

<sup>58</sup> *Local Courts (Civil Claims) Act 1970* (NSW) s 47D; *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 29 r 3. See also *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 339(1); *Magistrates Court (Civil Jurisdiction) Regulations* (ACT) reg 4.

<sup>59</sup> *Local Courts (Civil Claims) Act 1970* (NSW) s 47D. See also Magistrates' Court Rules (Qld) r 261B(3).

<sup>60</sup> Or to the clerk or judgment creditor in accordance with the new procedure recommended in paras 5.27-5.32 below.

If this procedure is adopted, to be entitled to retain the prescribed amount the garnishee would have to comply with the requirements indicated in para 5.30 below.

<sup>61</sup> This approach was supported by the four commentators who referred to the matter.

*(viii) Debts not due at date of order*

5.22 One difficulty with the present procedure under the LCA and LCR<sup>62</sup> is that it does not take account of the fact that some debts may not be due at the time the attachment order is made: the debt may be one which is payable at a definable future date by reason of a present obligation (that is, a debt which is accruing).<sup>63</sup> Nor does it take account of future debts should they be made attachable.<sup>64</sup> In these cases, the Commission **recommends** that the garnishee should be required to pay the money into court or to the judgment creditor on the date on which the debt is due for payment to the judgment debtor<sup>65</sup> less any prescribed amount that he is entitled to retain for his work in making the payment into court. If the judgment debt has been satisfied in the meantime, the judgment debtor should be able to apply for the attachment order to be discharged in whole or part.

5.23 In some cases the garnishee may be insured with respect to an attached debt. This can arise where the judgment debtor has a cause of action for personal injury against the garnishee and the garnishee has insurance to cover that potential liability. In these cases, the Commission **recommends** that the judgment creditor should be able to serve the attachment order on the garnishee's insurer and to attach so much of the insurance proceeds that might become payable to the judgment debtor as are necessary to discharge the judgment debt. Where an insurer has been served with an attachment order and fails to comply with it, but pays the insurance to the judgment debtor, the garnishee should be discharged from his obligation. Instead the judgment creditor should have a claim against the insurer for failure to comply with the attachment order.

*(ix) Effect on set-off*

5.24 Another difficulty that arises with regard to future debts or debts which are accruing is that a right to set-off may arise between the date of the attachment and the payment into court or to the judgment creditor. Where this right arises before the date of attachment, the garnishee could avail himself of it by disputing his liability to the debt due to the judgment

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<sup>62</sup> The existing procedure is outlined in para 2.18 above.

<sup>63</sup> Para 5.1 above.

<sup>64</sup> Paras 5.1 and 5.12-5.15 above.

<sup>65</sup> This approach was supported by the Law Society of Western Australia which was the only commentator which expressly referred to the matter.

debtor.<sup>66</sup> The Alberta Law Reform Institute has pointed out that a right to set-off accruing after attachment would provide an opportunity for garnishees and judgment debtors to collude to the prejudice of judgment creditors.<sup>67</sup> To provide an appropriate balance it recommended that a set-off arising after attachment should be available but 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."<sup>68</sup>

The Commission agrees with the recommendation and **recommends** that a provision along these lines be adopted in Western Australia.<sup>69</sup>

(x) *Lien or claim of third party on debt*

5.25 In some cases a person other than the judgment debtor, including a joint owner of a debt, may claim to be entitled to money paid under an attachment order. In order to allow such claims to be determined, the Commission **recommends** that the Court should have power to order that notice of the proceedings be given to the other person. It should hear and determine the claim and give such judgment or make such orders in respect of the claim as the Court thinks just.<sup>70</sup>

(xi) *Procedure*

5.26 One commentator on the Discussion Paper<sup>71</sup> suggested that there is a need to simplify the procedure for the attachment of debts. The existing procedure is somewhat indirect. Under section 145 of the LCA,<sup>72</sup> 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 be attached in payment of the judgment debt.<sup>73</sup> By the same or a subsequent order, the

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<sup>66</sup> Para 2.18 above.

<sup>67</sup> ALRI Report Vol 1 217.

<sup>68</sup> Id 217-218.

<sup>69</sup> This approach was supported by the three commentators on this matter, which included the Australian Finance Conference and the Law Society of Western Australia.

<sup>70</sup> Including an order barring the claim and an order for payment into court by the judgment creditor of money received under the garnishee order. See *Magistrates Court (Civil Jurisdiction) Act 1982 (ACT)* s 336.

<sup>71</sup> Mr I G Martin SM.

<sup>72</sup> There is a similar procedure in s 126 of the SCA and O 49 of the SCR.

<sup>73</sup> 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

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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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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.

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.

<sup>74</sup> 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.

<sup>75</sup> LCA s 147. The magistrate may direct that the payment be made by instalments: *ibid*.

<sup>76</sup> *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.

<sup>77</sup> *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. The provision made by O 28 r 10 should be retained.

5.27 The Commission **recommends** that the procedure set out in the following paragraphs, which is more direct, be adopted. It is based on that in the Australian Capital Territory, the most recent jurisdiction to review this area of law. The Court, on the application of a judgment creditor made under the enforcement hearing procedure,<sup>78</sup> should be empowered to make an order in respect of the judgment debt attaching debts.<sup>79</sup> The attachment order should-

- \* specify the unpaid amount of the judgment debt;
- \* require the garnishee to pay to the clerk the debts attached or so much thereof as may be sufficient to satisfy the unpaid amount;
- \* include such particulars of the debts to be attached as are known to the judgment creditor and necessary to enable the garnishee to identify the debts;
- \* contain a statement to the effect that the garnishee may apply for the variation or revocation of the order on the ground of exceptional hardship;<sup>80</sup>  
and
- \* contain a statement to the effect that the judgment debtor may apply for execution to be suspended or stayed under section 139 of the LCA.

5.28 An attachment order should come into force as soon as it is served on the garnishee and operate to attach all debts that at the time of service are owing or accruing from the garnishee to the judgment debtor, whether they were owing or accruing at the time the order was made or not.<sup>81</sup> The judgment creditor should serve a copy of the attachment order on the garnishee and the judgment debtor. In the case of the judgment debtor it should be served within five days after the day on which it is served on the garnishee.<sup>82</sup>

5.29 Payment under an attachment order should be made to the clerk for payment to the judgment creditor<sup>83</sup>. However, the garnishee should be able to make payment direct to the judgment creditor if, before doing so, he notifies the judgment debtor and the clerk that he proposes to do so.<sup>84</sup> An amount paid by a garnishee should have the effect of satisfying the judgment debt and be a valid discharge to the garnishee as against the judgment debtor to the

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<sup>78</sup> Paras 3.13-3.14 above.

<sup>79</sup> See *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 317(1).

<sup>80</sup> Id s 319(1). As to the application see s 330.

<sup>81</sup> See *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 319(2)(b).

<sup>82</sup> Id s 320(1) and (3).

<sup>83</sup> Id s 327(1)(a).

<sup>84</sup> Id s 327(1)(b).

extent of the amount paid, notwithstanding that the judgment may be set aside or the garnishee order may be set aside, varied or revoked.<sup>85</sup>

5.30 Payment by a garnishee should be made within 21 days after the day on which the order is served on the garnishee or, where the debt attached is due for payment to the judgment debtor after the expiration of that period, not later than the date on which the debt is due for payment.<sup>86</sup> If the attached debt is one that is due or becomes due for payment after the expiration of the period of 21 days after the day on which the order is served on the garnishee, the garnishee should, before the expiration of that period, serve on the judgment creditor a notice specifying -

- \* the date on which the debt is, or is likely to be, due for payment to the judgment debtor; and
- \* if the amount of the debt is less than the unpaid amount of the judgment debt specified in the attachment order, the amount of the debt.<sup>87</sup>

5.31 Where a garnishee reasonably believes that there were no debts due or accruing from the garnishee to the judgment debtor, the garnishee should be able to serve on the judgment creditor and the clerk an affidavit to that effect containing a summary of the grounds on which that belief is based.<sup>88</sup>

5.32 If an attachment order has not been complied with, the judgment creditor should be able to apply to the clerk for the issue of a summons requiring the garnishee to attend before the Court to show cause why he should not comply with the order.<sup>89</sup> On the return date of the summons, the Court should hear and determine any question in dispute concerning the liability of the garnishee to pay the debts sought to be attached and give judgment for the amount of those debts or the unpaid amount of the judgment debt (whichever is the lesser) in favour of the judgment creditor against the garnishee or vary or revoke the attachment order.<sup>90</sup>

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<sup>85</sup> Id s 327(2).

<sup>86</sup> Id s 328(2).

<sup>87</sup> Id s 329(1). It is an offence to make a false statement in a notice: id s 329(2).

If the garnishee complies with s 329(1) and pays within the time specified in s 328(2), he is entitled to retain for his own use an amount not exceeding the prescribed amount: id s 339(1).

<sup>88</sup> Id s 334(1). There is protection for disclosing information if it was reasonable to have made the disclosure: id s 334(2).

<sup>89</sup> Id s 335(1) and (2).

<sup>90</sup> Id s 335(3).

## 2. ATTACHMENT OF EARNINGS

### (a) Existing position in Local Courts

5.33 Future wages cannot be attached because they are not a debt owing or accruing to the employee.<sup>91</sup> Furthermore, section 145 of the LCA prohibits the attachment of the wages of "any servant, labourer or workman".<sup>92</sup> No other Australian jurisdiction has such a restriction. 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.

### (b) Existing position in the Supreme Court

5.34 In the Supreme Court there is no provision for the attachment of future wages. Furthermore, the exemptions from attachment are wider than those in Local Courts. In the Supreme Court, the exemption applies not only to the wages of any servant, labourer or workman but also to those of "any seaman or apprentice to the sea service".<sup>93</sup> In addition, in the Supreme Court, an order of attachment may not be made of any weekly payment under the *Worker's Compensation and Rehabilitation Act 1981* or a sum payable in redemption of the weekly payments.<sup>94</sup> The SCA also provides that the provisions of section 6 of the *Workmen's Wages Act 1898* are not to be affected.<sup>95</sup>

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Procedural provisions additional to those outlined in paras 5.27-5.32 above will be required if the scope of attachment is to be extended to future debts as recommended by the Commission in paras 5.12-5.15 above.

<sup>91</sup> Para 5.1 above.

<sup>92</sup> In the case of the SCA, the same prohibition is contained in s 126 of that Act. S 126 also extends to weekly payments under the *Workers' Compensation and Rehabilitation Act 1981* and a sum payable in redemption of those payments.

<sup>93</sup> *Supreme Court Act 1935* s 126(1).

<sup>94</sup> *Ibid.* The *Worker's Compensation and Rehabilitation Act 1981* was formerly named the *Worker's Compensation and Assistance Act 1981* and is still referred to by its old name in the SCA.

<sup>95</sup> 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.

**(c) The provision of continuous schemes elsewhere**

5.35 Other jurisdictions provide continuous schemes for the attachment of wages. 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.

5.36 There is statutory provision for wage and salary attachment in all Australian States except Western Australia and South Australia. An outline of the provisions which apply in magistrates' courts in New South Wales and Victoria was set out in the Discussion Paper.<sup>96</sup>

**(d) Recommendations**

*(i) Attachment of wages*

5.37 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 cooperating, would most likely pay the debt."<sup>97</sup> 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.

5.38 The arguments for introducing attachment of wages are -

1. 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."<sup>98</sup>

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<sup>96</sup> Discussion Paper paras 5.30-5.35. Since the Discussion Paper was published attachment of earnings has been introduced in the ACT: *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) Division 5 of Part XVIII.

<sup>97</sup> ALRI Report Vol I, 226.

<sup>98</sup> ALRC Report para 129.

2. The threat of attachment of wages would significantly reduce the need to rely on imprisonment as a sanction.
3. 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 The arguments against introducing attachment of wages are -

1. Wages, in the case of most individual judgment debtors, represent the sole, or at least the main, source of income and wage attachment could cause many judgment debtors to default on other obligations. It would deprive them and their dependants of the means to meet immediate basic needs. This argument can be met to a large extent by requiring that the amount to be deducted from the judgment debtor's wages 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.<sup>99</sup>
2. The attachment of wages involves an invasion of privacy when the debt information is disclosed to the employer, who has no independent interest in it. More important, however, is the risk to the debtor's employment security by dismissal, by discrimination or by voluntary termination. The risk of dismissal of judgment debtors from their employment where a wages attachment 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 inconvenience and expense to the employer which are involved in the wage attachment process.<sup>100</sup> The Commission is of the view that appropriate legislative protection for employees whose earnings are subject to wage attachment orders will reduce the incidence of employers dismissing or damaging the employment of judgment debtors because of garnishee wage orders.<sup>101</sup>

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<sup>99</sup> See paras 5.49-5.52 below.

<sup>100</sup> Kelly Report 82.

<sup>101</sup> Paras 5.62-5.64 below.

3. When debt information comes to the knowledge of the debtor's fellow employees this may cause embarrassment.

5.40 Having considered these matters, the Commission is satisfied that the arguments for introducing the attachment of wages outweigh those against it and accordingly **recommends** that the LCA and the LCR should be amended to provide for attachment of wages as a method of enforcing judgments provided provisions are put in place which will provide a satisfactory degree of protection for the financial security of the debtor and his dependants.<sup>102</sup>

(ii) *Attachment of earnings other than wages*

5.41 Having recommended that wages should be liable to be attached, the question arises whether other earnings akin to wages should also be liable to be attached. In the Australian Capital Territory, for example, "earnings", and not simply wages, may be attached. Earnings are defined to mean any amounts payable to the judgment debtor -

- (a) by way of wages or salary, including any fee, bonus, commission, overtime pay or other emolument payable in addition to wages or salary; or
- (b) by way of pension, including -
  - (i) an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity;
  - (ii) periodic payments in respect of compensation for the loss, abolition or relinquishment, or any diminution in the emoluments, of any office or employment; and
  - (iii) periodic payments in respect of compensation for the loss of wages or salary because of illness or injury.<sup>103</sup>

The definition concludes by providing that earnings do not include pensions, benefits or allowances payable to the judgment debtor under the *Commonwealth Social Security Act 1991* and *Veterans' Entitlement Act 1986*. The Commission **recommends** that the amounts

<sup>102</sup> See paras 5.51-5.52 and 5.63-5.64 below.

<sup>103</sup> *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 287(1). The provision in Victoria is a little narrower: *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.01.

described in (a) and (b) should be liable to attachment because the attachment of earnings other than wages will increase the effectiveness and efficiency of the system for the enforcement of judgments.<sup>104</sup> There are provisions in the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* which exempt pensions, benefits and allowances under those Acts from attachment.<sup>105</sup> The exemptions in the Commonwealth legislation will necessarily prevail over inconsistent State law, but for the sake of clarity the Commission **recommends** that they should be excluded expressly in Western Australia.

5.42 The ALRC recommended that a court should be able to order the attachment of workers' compensation periodical payments, but that such an order should only be made after full inquiry as to the debtor's circumstances.<sup>106</sup> 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.<sup>107</sup> To that extent, attachment legislation 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.<sup>108</sup> The Commission considers that workers' compensation payments, periodical payments under personal accident, disability and sickness insurance policies and superannuation and private pension payments should all be liable to be attached. However, it considers that it is not necessary for it to recommend a full enquiry as to the debtor's circumstances because of its recommendations relating to a protected earnings rate.<sup>109</sup>

5.43 Under existing law, future maintenance payments ordered to be paid by a court to a spouse are exempt from attachment on the grounds of public policy.<sup>110</sup> Maintenance payments may be made under either a court order or an agreement between the parties. Where a court order is made it is based on the need of the applicant, balanced with the ability

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<sup>104</sup> The five commentators who referred to the matter were of the view that the attachment scheme should provide for attachment of earnings and not simply attachment of wages.

<sup>105</sup> *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.

<sup>106</sup> ALRC Report para 234.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Paras 5.51-5.52 below.

<sup>110</sup> *Re Robinson* (1884) 27 Ch D 160; *Watkins v Watkins* [1896] P 222.

of the respondent to pay. It is calculated by weighing up the respective needs of each party to live at a reasonable standard of living. Unless the respondent is a high income earner, the applicant is unlikely to receive a large maintenance payment. In most cases the maintenance payments would not be sufficient to make an application for a garnishee order worthwhile. Although the *Commonwealth Family Law Act 1975* does not protect maintenance payments from attachment, another difficulty is that a maintenance payment to a spouse may be registered under the *Commonwealth Child Support (Registration and Collection) Act 1988*.<sup>111</sup> If so, the maintenance is collected by the Child Support Registrar. One effect of registration is that amounts payable under a registerable maintenance liability are debts due by the payer to the Commonwealth and the payee is not entitled to and may not enforce payment of the amounts.<sup>112</sup> The debt would therefore not be liable to be attached by a judgment debtor. Furthermore, the courts exercising jurisdiction under the *Commonwealth Family Law Act 1975* have power to vary maintenance orders. Such variations could create complications if attachment of maintenance payments were permitted. For these reasons, the Commission considers that it is impracticable to make maintenance payments liable to attachment and **recommends** that they should not be liable to attachment.<sup>113</sup> However, where an application is made to attach other earnings of the judgment debtor, maintenance payments could be brought into account in specifying the judgment debtor's "protected earnings rate"<sup>114</sup> making it more likely that any other income of the judgment debtor would be attachable.

(iii) *When the remedy may be used*

5.44 An attachment of earnings order could be made in a number of circumstances -<sup>115</sup>

1. It could be made even though no other method of enforcement had been utilised.<sup>116</sup> This would make attachment of earnings a primary mode of judgment debt recovery.

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<sup>111</sup> S 18.

<sup>112</sup> *Child Support (Registration and Collection) Act 1988* s 30.

<sup>113</sup> Those who commented on the Discussion Paper were evenly divided on whether or not maintenance payments should be attachable.

<sup>114</sup> Paras 5.51-5.52 below.

<sup>115</sup> Three commentators on the Discussion Paper favoured the first approach. One commentator favoured the second approach. Four commentators were opposed to the second approach. Two of those who favoured the first approach were also in favour the third approach.

<sup>116</sup> In both Victoria and New South Wales, 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. There are important exceptions. For example, under Victoria's *Judgment Debt Recovery Act 1984* after judgment, either party may apply to have the judgment debt paid by instalments, or apply for a variation of those instalments.

2. It could be made where a judgment debtor has failed to comply with an instalment order.
3. It could be made but suspended as long as the debtor paid the judgment debt by the instalments and at the times set out in the order.<sup>117</sup>

5.45 The Commission is of the view that an attachment of earnings order should not be a primary mode of recovery. The burden of complying with an attachment of earnings order should not be placed on an employer if other methods of enforcement may be effective. The Commission does not favour the second approach because it requires that a second hearing be held where a judgment debtor has failed to comply with an instalment order. The Commission therefore favours the third approach and **recommends** that it be adopted. It has 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 earnings. Where a judgment debtor does not wish his employer to know of his debt it provides an incentive to comply with the instalment order. If there were a considerable time between the making of the order of attachment of earnings and its execution, there might have been variations in the debtor's earnings or in the debtor's needs. The judgment debtor would, however, have the advantage of the protection provided by the protected earnings rate, which the Commission recommends be adopted,<sup>118</sup> in the event of the wages dropping. With a protected earnings rate an employer is only required to pay whatever excess there is above the protected earnings rate. In any case, either

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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. 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, before 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.

<sup>117</sup> Suspended attachment of earnings orders are made in Northern Ireland: ALRI *Remedies of Unsecured Creditors* (Report for Discussion No 3 1986) 204.

<sup>118</sup> Paras 5.51-5.52 below.

the judgment debtor or the judgment creditor could apply for a variation of the attachment order.<sup>119</sup>

(iv) *Duration and scope 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.<sup>120</sup> 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 is not justified. To avoid this problem, the Commission **recommends** that there should be no time limit 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.<sup>121</sup>

5.47 As the Commission has recommended that an attachment of earnings order should only operate where a judgment debtor has failed to comply with an order to pay by instalments,<sup>122</sup> an option 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 commitment under section 130.<sup>123</sup> 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, the Commission **recommends** that the operation of the order should not be confined to the elimination of arrears. The Court should, however, be empowered to specify otherwise.<sup>124</sup>

(v) *Judgment debtors who change employment*

5.48 One problem with an attachment of earnings order is that it might cease to apply if the judgment debtor changes his employment while it is in operation. In the Australian Capital

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<sup>119</sup> See, for example, r 27.21 of the *Magistrates' Court Civil Procedure Rules 1989* (Vic).

<sup>120</sup> See *Local Courts (Civil Claims) Act 1970* (NSW) ss 47 and 48.

<sup>121</sup> This is the position under the Victorian *Magistrates' Court Civil Procedure Rules 1989*: rr 27.13, 27.20 and 27.21.

<sup>122</sup> Para 5.45 above.

<sup>123</sup> Paras 2.14-2.15 above.

<sup>124</sup> A similar recommendation was made by the ALRC: ALRC Report para 229.

Territory, where a garnishee order attaching earnings is in force and the judgment debtor ceases to be employed by the garnishee, the judgment debtor and the garnishee must each notify the registrar in writing of that fact.<sup>125</sup> If the judgment debtor has a new employer, he must state the name and address of the new employer, the place of the new employment and the amount of his earnings from the new employer.<sup>126</sup> When the Registrar receives such a notice, he is to notify the judgment creditor in writing of the contents of the notice. If no written objection is received from the judgment creditor or the judgment debtor within a reasonable time, the Registrar can of his own motion revoke the attachment of earnings order and make a further attachment of earnings order directed to the new employer attaching the judgment debtor's earnings.<sup>127</sup> The Commission **recommends** that there be similar provision in this State.

(vi) *Exempt income*

5.49 In those Australian jurisdictions where attachment of earnings legislation operates, there are provisions exempting part of the debtor's wages or earnings. 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.

5.50 Under the New South Wales *Local Courts (Civil Claims) Act 1970*, 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*.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup>

<sup>125</sup> *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 340(1).

<sup>126</sup> *Ibid.*

<sup>127</sup> *Id* s 340 (2).

<sup>128</sup> *Local Courts (Civil Claims) Act 1970* (NSW) s 49.

<sup>129</sup> See Kelly Report 86.

<sup>130</sup> *The Wages Attachment Act 1936* (Qld) s 3. The recently enacted s 322 of the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) (the section commenced operation in 1995) is a variation of the Queensland approach.

In its comments on the Discussion Paper, the Law Society said that the amount exempt from an attachment of earnings order should be determined in the manner either of New South Wales (that is, 80% of the maximum weekly payment of compensation under the *Workers' Compensation Act*) or Queensland (that is, the minimum wage). Australian Finance Conference said it would prefer a legislative formula similar to that used under the *Local Courts (Civil Claims) Act 1970* (NSW) as the threshold test for the exemption with its benefits of certainty and minimisation of delays, in preference to the Victorian

5.51 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.<sup>131</sup> Under the Victorian Magistrates Court Civil Procedure Rules 1989 the Court is required to set both a "normal deduction rate" and "a protected earnings rate". The aim of the requirement is to mould the order to the circumstances of the debtor. 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".<sup>132</sup> 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."<sup>133</sup>

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.<sup>134</sup>

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approach of a "protected earnings rate". It then went on to say that perhaps a combination of the two could be adopted: the detail of this suggestion is set out in footnote 137 below in this Ch.

Under s 322 of the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) (enacted in 1994 and operative in 1995) the exemption for a debtor who -

(a) has dependants is the amount of the minimum wage under the Metal Trades (ACT) Award 1982,

(b) has no dependants is three quarters of that minimum wage,

but if in either case, the Registrar specifies a greater amount, then it is the greater amount.

<sup>131</sup> The Law Society did not favour the Victorian approach ". . . which necessitates a Court hearing on each occasion."

<sup>132</sup> *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.18(1). This sub-rule 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."

<sup>133</sup> *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.18(3).

<sup>134</sup> *Id* r 27.16.

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.<sup>135</sup> 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 judgment creditor the excess over the protected earnings rate up to a maximum of the normal deduction.<sup>136</sup>

5.52 The Commission considers 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 or other earnings 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 dependants' basic living needs. Of the methods used in Local Courts in New South Wales and in the Magistrates' Court in Victoria, it is the Victorian scheme which better caters for this objective and the Commission **recommends** that it be adopted in Western Australia.<sup>137</sup>

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<sup>135</sup> Id 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 judgment debtor's employer to the judgment creditor 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).

<sup>136</sup> *Magistrates' Court Civil Procedure Rules* (Vic) 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 creditor 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.

<sup>137</sup> This approach was supported by the Institute of Mercantile Agents Ltd in its comments on the Discussion Paper. The Law Society said that the amount exempt from an attachment of earnings order should be determined in the manner either of New South Wales or Queensland: footnote 130 above in this Ch. Australian Finance Conference said that it preferred a legislative formula similar to that used under the *Local Courts (Civil Claims) Act 1970* (NSW). It then went on to say that perhaps a combination of the two could be adopted: the Victorian approach being used for judgment debtors who have provided financial information at examination or by statement, and the New South Wales approach for the Court to use when it does not have the benefit of such information from the debtor.

*(vii) Costs of complying with the order*

5.53 Where an attachment of earnings order is made the garnishee will have to expend money and time in complying with it. The Commission considers that the garnishee should be reimbursed for this loss. This is fair to the garnishee and where the garnishee is the judgment debtor's employer may minimise the risk of the employer acting to the prejudice of the employee when an attachment of earnings order is served.

5.54 The question arises, however, as to how much should be paid to garnishees and who should carry the burden of the payment. 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 the amount specified by the Court in the attachment of earnings order,<sup>138</sup> usually \$1.50 in respect of each payment, although sometimes an amount of \$1 or \$2 is specified.<sup>139</sup> The amount set will be the same for both the initial and subsequent payments.

5.55 In New South Wales 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.<sup>140</sup> In the case of a small payment, compensation to the employer would be inadequate.

5.56 The Kelly Report said that reimbursement to the employer should be set at a realistic level. The Report 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.<sup>141</sup>

5.57 The ALRC said that payments made to employers in those Australian jurisdictions which had wage attachment legislation were quite inadequate to cover employers' costs in

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<sup>138</sup> *Magistrates' Court Civil Procedure Rules 1989* (Vic) r 27.18(4).

<sup>139</sup> The Melbourne Magistrates Court supplied these amounts to the Commission in 1994 when it was preparing the Discussion Paper. The Commission was also told that the amount ordered to be attached from judgment debtors' wages ("the normal deduction rate") on each payday varies. Amounts of \$20 or \$30 a week were common, although the normal deduction rate could be a much higher figure. It all depends on the circumstances. In addition, the employer retains from the wages an amount also specified by the Court, for his clerical and administrative costs, which is referred to in para 5.54.

<sup>140</sup> *Local Courts (Civil Claims) Act 1970* (NSW) s 50. Under the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT), the employer may deduct up to 10 per cent of each payment for the reasonable expenses incurred by him in complying with the order: s 339.

<sup>141</sup> Kelly Report 88.

collecting and paying the relevant moneys.<sup>142</sup> The ALRC adopted a different approach from 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."<sup>143</sup>

5.58 The Commission does not believe that providing compensation on a percentage basis as is the case in New South Wales is the fairest means because it is not related to the work required to process the payment of the sum attached. A fairer approach is that recommended by the ALRC and the Commission **recommends** that it be adopted in Western Australia.<sup>144</sup> It prefers this approach to that in Victoria where the sum is set by the Court because garnishees or groups representing their interest can make representations to the Government on what is a reasonable sum to prescribe by regulations.

5.59 Another question which arises is whether the judgment creditor or the judgment debtor should bear the cost of processing the payment of the sum attached. In other relevant Australian jurisdictions generally it is the judgment debtor who carries the burden of the compensation paid to the employer.<sup>145</sup> The Commission **recommends** 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<sup>146</sup> because this is consistent with the existing position under the LCR that generally the prescribed fees and costs associated with the enforcement of a judgment are recoverable by the judgment creditor from the judgment debtor. The money retained by the garnishee for his expenses in

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<sup>142</sup> ALRC Report para 235.

<sup>143</sup> 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.*

<sup>144</sup> Under the Victorian system the compensation for the employer is not deducted from the attached amount but deducted separately from the earnings: para 5.54 above. The Commission supports the prescribed sum being deducted separately from the earnings, and not from the amount attached, in line with its general endorsement of the Victorian scheme relating to exempt income.

Two commentators on the matter favoured the recommended approach. A third commentator favoured the Victorian approach.

<sup>145</sup> *Magistrates' Court Civil Procedure Rules 1989* (Vic) rr 27.18(1), 27.18(4), 27.20 and Form 27M; *Magistrates' Courts Rules 1960* (Qld) r 261B(3); *Local Courts (Civil Claims) Act 1970* (NSW) s 50(1) and (3).

<sup>146</sup> The three commentators who referred to the matter favoured the approach recommended by the Commission.

complying with an attachment of earnings order 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.

(viii) *Stay on other enforcement measures*

5.60 Where a Court makes an attachment of earnings order the question arises whether or not there should be a stay of other enforcement measures. In Victoria, the *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.<sup>147</sup>

If there were no such stay, money coming in under other process would create a difficulty with the attachment order under which the Court has ordered the garnishee to deduct instalments from the judgment debtor's earnings 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.

5.61 The Commission considers that the Victorian provision should be adopted. It therefore **recommends** that unless the Court otherwise orders, where an attachment of earnings order (including a suspended 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.

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<sup>147</sup> R27.13(2).

Three of the four commentators on this matter favoured the Victorian approach. One added that the Court should also be required to make an order prohibiting the debtor from applying for more credit.

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

5.62 A potential disadvantage of an attachment of earnings system is the risk it poses to the judgment debtor's employment security.<sup>148</sup> Because of this, legislation is necessary to protect the employee against dismissal or other prejudice in his employment because of the attachment order.

5.63 Such a provision is contained in section 111(10) of Victoria's *Magistrates' Court Act 1989* which 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 an attachment of earnings order.<sup>149</sup> 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.<sup>150</sup>

5.64 The Ontario Law Reform Commission 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 taken against him, the court should be empowered to order that the employee be reinstated and to award him compensation for loss of wages and other benefits.<sup>151</sup> These types of remedies are already available in this State. Under the Commonwealth *Industrial Relations Act 1988* an employer must not terminate an employee's employment unless there is a valid reason connected with his capacity or conduct or based on the operational requirements of the undertaking, establishment or service.<sup>152</sup> A reason is not valid if the termination is harsh, unjust or unreasonable. A person may apply to the Australian Industrial Relations Court for a remedy in respect of termination of his employment.<sup>153</sup> The Court may make such order as it

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<sup>148</sup> Paras 5.39 above.

<sup>149</sup> 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.

<sup>150</sup> There is a provision similar to s 111(10) in the *Enforcement of Judgments Act 1991* (SA) and in s 341 of the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT).

<sup>151</sup> OLRC Report Part II 170-171.

<sup>152</sup> *Industrial Relations Act 1988* (Cth) s 170DE(1).

<sup>153</sup> Id s 170EA.

thinks appropriate in order to put the employee in the same position as nearly as can be done as if the employment had not been terminated<sup>154</sup> including an order requiring the employer to reinstate the employee or to pay compensation to the employee.<sup>155</sup> In Western Australia a person who has been dismissed harshly, oppressively or unfairly from his employment may apply to the Western Australian Industrial Relations Commission for an order that he be reinstated or re-employed and for the payment of any amount to which he is entitled.<sup>156</sup> If an employee has an unblemished record but is given notice with no reason for his dismissal, the dismissal will frequently be held to be unfair.<sup>157</sup> If the employer fails to comply with an order to reinstate or re-employ the person, the Commission may make an order for the payment of compensation for loss or injury caused by the dismissal.<sup>158</sup> While these provisions provide protection in relation to dismissal they do not provide protection from other forms of prejudice such as prejudice to promotion. In order to provide adequate protection, the Commission **recommends** that an offence similar to that in Victoria be created in Western Australia.<sup>159</sup>

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

5.65 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

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<sup>154</sup> Id s 170EE(1).

<sup>155</sup> Id s 170EE(2).

<sup>156</sup> *Industrial Relations Act 1979* s 23A(1).

<sup>157</sup> *Halsbury's Laws of Australia* para 165-905.

<sup>158</sup> *Industrial Relations Act 1979* s 23A(3). The amount ordered to be paid must not exceed 6 months' remuneration: id s 23A(4).

<sup>159</sup> This approach was supported by the four commentators who referred to the matter.

- (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.<sup>160</sup>

5.66 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 may still be a surplus which can be applied in payment or towards payment of the normal deduction rate under the second order.<sup>161</sup> Where the surplus is sufficient to pay only part of the normal deduction rate under the second order, it may be 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.<sup>162</sup>

5.67 The Victorian approach is in line with the first come first served approach which normally determines who is entitled to the proceeds of an enforcement process.<sup>163</sup> 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

<sup>160</sup> See also s 324 of the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT).

<sup>161</sup> 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 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.

Note that:

- (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.

<sup>162</sup> And see the provision in r 27.20 set out in footnote 136 above in this Ch.

<sup>163</sup> See, for example, para 2.11 above.

division of the amount attached and to minimise the risk of overpayment, the employer should be required to pay the relevant money into court.<sup>164</sup>

5.68 The Commission prefers the approach in Victoria to the ALRC proposal and **recommends** that it be adopted in Western Australia.<sup>165</sup> It does so because -

- \* The ALRC proposal would add an additional step to the enforcement process, that is, payment to the court for distribution to the judgment creditors, which might not be necessary in all cases.
- \* 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.<sup>166</sup>
- \* 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.<sup>167</sup>

(xi) *Procedure*

5.69 The Commission has recommended that only the judgment creditor should be able to apply for an attachment of earnings order<sup>168</sup> and that he should only be able to apply under the

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<sup>164</sup> 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).

<sup>165</sup> Three of the four commentators on this matter favoured a system which recognised the interest of all judgment creditors. The Law Society of Western Australia favoured the Victorian approach.

<sup>166</sup> 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.

<sup>167</sup> 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 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*.

<sup>168</sup> Paras 3.9-3.11 above.

enforcement hearing procedure.<sup>169</sup> The judgment debtor would be required to complete a prescribed statement of financial affairs.<sup>170</sup>

5.70 The Commission concluded that only the judgment creditor should be able to apply for an attachment of earnings order for the following reasons:

- (1) The scheme is one which is designed in the judgment creditor's interests.
- (2) Because information about the debt has to be disclosed to the employer and because the employer will have the right to deduct a specified amount from the debtor's earnings to reimburse himself for his money and time in complying with the order,<sup>171</sup> it is unlikely that a judgment debtor would wish to apply for an attachment of earnings order.
- (3) An attachment of earnings order would also result in a stay of enforcement.<sup>172</sup> The stay might well result in recovery of the judgment debt taking longer to complete than would have been the case if, for example, a warrant of execution could have been issued against the judgment debtor's property.

(xii) *Discharge, suspension or variation*

5.71 The Commission **recommends** that either the judgment creditor or the judgment debtor should be able to apply under the enforcement hearing procedure<sup>173</sup> for the discharge, suspension or variation of an attachment of earnings order. Where the judgment debtor applies the summons should be accompanied by a statement of his financial affairs in the prescribed form.<sup>174</sup>

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<sup>169</sup> See paras 3.9 and 3.12 above. It would be open to a judgment debtor to invite a judgment creditor to seek such an order and then consent to it.

<sup>170</sup> The same form of statement of financial affairs as prescribed to be annexed to an enforcement hearing summons when served on the judgment debtor should be used: para 3.15 above.

<sup>171</sup> Paras 5.57-5.58 above.

<sup>172</sup> Para 5.61 above.

<sup>173</sup> Ch 3 above.

<sup>174</sup> The same form of statement of financial affairs as prescribed to be annexed to an enforcement hearing summons when served on a judgment debtor (para 3.15 above) should be used. When the judgment creditor applies the judgment debtor would also in this case be required to complete a statement of financial affairs: para 3.15 above.

Where it is the judgment debtor who has required the summons to issue, the Commission has recommended that it should be served on the judgment creditor at least 5 days before the date of the hearing: para 4.11 above **and** footnote 20 to that para.

## Chapter 6

### IMPRISONMENT FOR DEBT

#### 1. IMPRISONMENT OF DEBTORS

##### (a) Present position under the LCA

6.1 Section 130 of the LCA empowers a magistrate to make an order committing a 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.<sup>1</sup> Section 130 of the LCA is closely based on section 3 of the *Debtors Act 1871*.<sup>2</sup>

6.2 Section 130 is designed to deal with those debtors who wilfully<sup>3</sup> or through neglect<sup>4</sup> fail to pay debts which they are able to pay and who flaunt their legal obligations to pay their debts.<sup>5</sup> 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

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<sup>1</sup> For a more detailed explanation of s 130, see paras 2.13-2.17 above.

<sup>2</sup> The first Act passed in the colony of Western Australia, an Act for establishing a Court of Civil Judicature 1832, provided in s 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. S 23 of the *Supreme Court Ordinance 1861* followed this approach. However, s 52 of the *Small Debts Ordinance 1863*, which was a forerunner to the LCA, permitted imprisonment by Local Courts in particular circumstances. Then by s 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. S 3 of the *Debtors Act 1871* does not apply to judgments or orders under the LCA: LCA s 134.

<sup>3</sup> *Stonor v Fowle* (1887) 13 AC 20, 24.

<sup>4</sup> *Ex parte Fryer: In re Fryer* (1886) 17 QBD 718, 724.

<sup>5</sup> 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.

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.<sup>6</sup> It is not possible to garnishee the debtor's wages<sup>7</sup> and there may not be debts which the creditor can garnishee.<sup>8</sup> Furthermore, the provision in the LCR for the filing of consent affidavits by debtors<sup>9</sup> 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,<sup>10</sup> the fact that ultimately an order for imprisonment might be made is an incentive for paying instalments on time and for making up any instalment which falls into arrears.<sup>11</sup> The judgment creditor's intention is to use the section in a coercive, not a punitive, manner.<sup>12</sup>

6.3 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 order of commitment has been issued,<sup>13</sup> many debtors will somehow find the money to pay the order out or make arrangements with the creditor in order to avoid going to gaol.<sup>14</sup> It is

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<sup>6</sup> 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 against which the judgment creditor later decides to issue a warrant of execution or a debt which he decides to garnishee.

<sup>7</sup> Para 5.33 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.

<sup>8</sup> Para 5.1 above.

<sup>9</sup> Para 2.16 above.

<sup>10</sup> See para 2.14 above.

<sup>11</sup> If the judgment debtor is eventually imprisoned, imprisonment will end if the judgment debt is paid before the term expires: LCA s 132.

<sup>12</sup> This fact underlies the following 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.

<sup>13</sup> 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. 92 were issued in 1992, 26 in 1993 and only 12 in 1994.

<sup>14</sup> Between 1 January 1989 and 31 December 1994 645 orders of commitment were issued by the Perth Local Court to the Perth bailiff. 265 of the orders could not be executed because the judgment debtor could not be found. Of the rest (380), only 39 (10% of the 380) led to the debtor being arrested by the bailiff and conveyed to the East Perth lock up for non-payment of the judgment debt. 93 (24%) paid the debt in full. 15 (4%) were bankrupt. In 13 cases (4%) the order was either varied by the court or expired while in the hands of the bailiff. In the rest of the cases (220, 58%) the order was returned to court at the

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, 95 persons were imprisoned for "debt" in Western Australia pursuant to Local Court orders during the seven year period 1 July 1988 to 30 June 1995. 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:<sup>15</sup>

<b>Financial Year</b>	<b>Males</b>	<b>Females</b>	<b>Total</b>
1988/1989	12	3	15
1989/1990	13	2	15
1990/1991	15	3	18
1991/1992	19	3	22
1992/1993	9	3	12
1993/1994	5	2	7
1994/1995	<u>6</u>	<u>0</u>	<u>6</u>
Totals :	<u>79</u>	<u>16</u>	<u>95</u>

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 -

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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 6.3 concerning the numbers of debtors held at the East Perth police lock up as a result of warrants of commitment executed by him

<sup>15</sup> 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.

In the table in para 6.3 above, the statistics for the period 1 July 1988 to 30 June 1994 are slightly different to those set out in para 6.4 of the Discussion Paper for two reasons. First, the figures in the Discussion Paper did not include imprisonments for debt where the three major offences for which the prisoner was admitted were classed as more serious than "Debt". The figures shown in para 6.3 above were compiled by the Ministry without this limitation. Secondly, there have been improvements in the Ministry's data extraction processes.

<b>Year</b>	<b>Held in Lockup</b>
1989	9
1990	8
1991	12
1992	4
1993	4
1994	<u>2</u>
Total:	<u>39</u>

6.4 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."<sup>16</sup> 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 of the need to provide for his own basic needs and those of his family.<sup>17</sup> 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.

**(b) Recommendation**

6.5 The Commission **recommends** that section 130 be repealed<sup>18</sup> for the following reasons -

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<sup>16</sup> S 130(1); paras 2.13-2.15 above.

<sup>17</sup> 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.

<sup>18</sup> The repeal of s 130 would require 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.

1. Imprisonment, because of its punitive nature, is not appropriate for dealing with civil disputes.<sup>19</sup>
2. Where the judgment debtor has the capacity to pay the amount of the judgment or an instalment but wilfully refuses to do so, the appropriate remedy, as the Commission recommends below,<sup>20</sup> is to punish him for contempt of court or for conduct akin to contempt of court.
3. The sole purpose of imprisonment is to coerce a debtor to pay his debts. Other changes to the enforcement process recommended in this report will make the process more efficient and provide an adequate substitute for imprisonment. In order of importance these changes are -
  - \* Providing for the attachment of earnings on default in payment by instalments.<sup>21</sup>
  - \* Extending the scope of debts (other than wages) that can be attached by a judgment creditor.<sup>22</sup>

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

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12 commentators expressed a view on whether s 130 should be repealed. Eight favoured its repeal including the Aboriginal Legal Service, the Australian Finance Conference, the Consumer Credit Legal Service and the Law Society of Western Australia. The other four, including the Metropolitan and Country Bailiffs' Association, did not favour its repeal.

<sup>19</sup> 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.

The provisions of an international convention do not become a part of Australian domestic law until specifically so incorporated by domestic legislation, even though Australia has ratified the convention. Ratification of a treaty does, however, create a legitimate expectation that administrative decision-making of the Executive Government of Australia will act in conformity with the convention: see *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353. 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.

<sup>20</sup> See paras 6.12-6.13 below.

<sup>21</sup> Paras 5.40 and 5.45 above.

<sup>22</sup> Paras 5.7, 5.9, 5.11-5.17 and 5.19 above.

4. It is incongruous for imprisonment to continue to have a role in the civil law of debt recovery when laws have recently been enacted the purpose of which is to reduce significantly the use of imprisonment as a means of enforcement of the payment of fines for criminal and "regulatory" offences.<sup>23</sup> Under the new system, imprisonment is used as a last resort and then only as a means of enforcing compliance with work and development orders. Imprisonment should not continue to be used as a means of enforcing the payment of judgment debts when its use as a means of enforcing the payment of a criminal sanction has been so severely restricted.
5. Other jurisdictions have abolished or severely curtailed the use of imprisonment as a method of enforcing payment of judgment debts. There is no equivalent provision to section 130 of the LCA and no other sanction in New South Wales, Queensland, the Australian Capital Territory and the Northern Territory.<sup>24</sup> 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*.<sup>25</sup> This change in Victoria has had the effect of almost abolishing imprisonment in practice.<sup>26</sup> There are also more restricted provisions in New Zealand<sup>27</sup> and England.<sup>28</sup> Within Australia, an equivalent provision to section 130 remains only in Tasmania<sup>29</sup> and South Australia.<sup>30</sup>
6. 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

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<sup>23</sup> *Fines, Penalties and Infringement Notices Enforcement Act 1994 and Acts Amendment (Fines, Penalties and Infringement Notices) Act 1994.*

<sup>24</sup> 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.

<sup>25</sup> Para 6.10 below.

<sup>26</sup> Kercher 154.

<sup>27</sup> Para 6.9 below.

<sup>28</sup> *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.

<sup>29</sup> *Debtors Act 1888* (Tas) s 4.

<sup>30</sup> *Enforcement of Judgments Act 1991* (SA) s 5(7).

self defeating from the point of view of the creditor, particularly as the Commission has recommended that garnishment of wages be introduced.

7. Imprisonment is socially disruptive. If the judgment 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.
8. The cost to the Government of keeping debtors in custody is high. In Western Australia, the cost of imprisonment per person in prison per day is about \$120.<sup>31</sup>

## **2. PUNISHMENT FOR CONTEMPT**

### **(a) Introduction**

6.6 At present a magistrate has power under the LCA to impose a penalty on a person who disobeys an order of the Court.<sup>32</sup> 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.<sup>33</sup> 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 section 130 of the LCA is repealed and there is default in payment of an instalment, the judgment creditor could proceed with a warrant of execution, garnishment of a debt owing to the judgment debtor or, if it is introduced, attachment of earnings.<sup>34</sup>

6.7 There may, however, be cases where none of these modes of enforcement is likely to succeed. For example, the judgment debtor might have access to funds recourse to which is not possible, for example, cash the whereabouts of which cannot be located by the judgment

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<sup>31</sup> The *Report on Government Service Provision* (1995) by the Steering Committee for the Review of Commonwealth/State Service Provision said that the daily cost per prisoner in Western Australia for the financial year ending 30 June 1995 was \$121: report 485.

<sup>32</sup> LCA s 155.

<sup>33</sup> Ibid.

<sup>34</sup> Para 5.45 above.

creditor (or the bailiff).<sup>35</sup> The judgment debtor might be able to maintain a lifestyle of comfort while ignoring the order of the court.

**(b) Reforms and proposal for reform elsewhere**

*(i) ALRC Report*

6.8 The ALRC concluded that this problem should be dealt with by giving the court 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.<sup>36</sup>

*(ii) New Zealand*

6.9 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 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

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<sup>35</sup> The Commission is not speaking here of property recourse to which 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.

<sup>36</sup> ALRC Report para 243, and para 43 of the Summary of Recommendations in the report.

- (ii) All other methods of enforcing the judgment have been considered or tried and are inappropriate or unsuccessful".<sup>37</sup>

Detention under this provision does not operate to extinguish or affect the liability of the judgment debtor to pay the judgment debt.<sup>38</sup>

(iii) *Victoria*

6.10 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 provisions<sup>39</sup> which had the same effect as section 130 of the LCA. The change led to a drop in Magistrates' Court commitment orders from 1600 in 1984 under the old law to only one in the first full year of operation under section 19.<sup>40</sup>

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

- \* 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

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<sup>37</sup> *District Courts Act 1947* (NZ) s 84O(1)(b).

<sup>38</sup> Id s 84O(9).

<sup>39</sup> In the *Imprisonment of Fraudulent Debtors Act 1958* (Vic).

<sup>40</sup> Kercher 160.

proposal, although presumably in practice the court would call the judgment debtor before it before convicting the judgment debtor of contempt of court.<sup>41</sup>

- \* 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.<sup>42</sup> The civil standard of proof applies.<sup>43</sup>

### (c) Recommendations

6.12 The Commission considers that the problem caused by those who wilfully default in payment of judgment debts should be dealt with by providing Local Courts with appropriate contempt powers.<sup>44</sup> The Commission **recommends** that a provision along the lines of section 19 of the Victorian *Judgment Debt Recovery Act 1984* should be adopted. The restrictions on its use will prevent it being used as a means of punishing those unable to pay their debts but provide a sanction against those who deliberately flout the Court's authority. It may also create an incentive for those persons to pay their debts. It provides a possible sanction 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, for example, where the debtor has transferred funds out of the country. By providing a sanction - admittedly only where the debtor's conduct is tantamount to dishonesty - it would also assist to preserve the standing of the courts in the community and public confidence in them.

6.13 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

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<sup>41</sup> 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 desirable.

<sup>42</sup> *Jendell Australia Pty Ltd v Kesby* [1983] 1 NSWLR 127, 134.

<sup>43</sup> Id 136.

<sup>44</sup> Six commentators referred to this issue. Four, including the Australian Finance Conference, the Consumer Credit Legal Services (WA) Inc and the Law Society of Western Australia, did not favour a contempt power. The other two commentators, one being the Institute of Mercantile Agents Ltd, favoured it.

undesirable consequences of imprisonment referred to above, the Commission **recommends** that the Court's powers should not be confined to imprisonment but should extend to imposing a fine. If a fine is imposed and the judgment debtor does not pay the fine, payment of the fine can be enforced by suspending the judgment debtor's driver's licence.<sup>45</sup> If the fine is still not paid an order may also be made for the defaulter to attend for work and development.<sup>46</sup>

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<sup>45</sup> *Fines, Penalties and Infringement Notices Enforcement Act 1994* s 43.

<sup>46</sup> Id s 47. Under the Act a warrant of execution must be issued before a work and development order may be issued. If a fine is imposed under the Commission's recommendation, it should not be necessary for a warrant of execution to have been issued before a work and development order is issued because a warrant of execution may have already been issued and found to be ineffective.

## Chapter 7

### SEIZURE AND SALE UNDER WARRANTS OF EXECUTION

#### 1. INTRODUCTION

7.1 A warrant of execution is presently 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.<sup>1</sup>

#### 2. EXEMPTIONS FROM SEIZURE AND SALE

##### (a) Present position

7.2 All major common law jurisdictions set limits on the exigibility of property in enforcement proceedings.<sup>2</sup> 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 report 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 dignified existence.<sup>3</sup> Another aim of exemption provisions is to ensure that the debtor's ability to earn income is not unduly impaired.<sup>4</sup>

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:

". . . the following goods shall be protected from seizure :-

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<sup>1</sup> Paras 2.1 and 2.4 above.

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 considered in this chapter relate to this topic.

<sup>2</sup> 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.

<sup>3</sup> See ALRC Report para 214.

<sup>4</sup> Ibid.

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."<sup>5</sup>

The extent of exemptions provided in the LCA was last considered by Parliament in 1958 when the current amounts were set.<sup>6</sup>

7.4 Section 126 of the LCA envisages that the debtor is a married man and is the sole breadwinner in the family and as 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. This does not reflect the situation in a large percentage of families 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, sometimes storage and usually auctioneer's commission. In the case of clothing and furniture, prices obtained on sale will normally be low. Accordingly, a seizure of goods will usually not take place where the debtor has no goods other than clothes and basic furniture.

7.6 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 V. 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

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<sup>5</sup> The corresponding section in the SCA is s 118 which is on the same lines but with slightly higher exemption values. In December 1995 a Bill, under which the exemption values in s 118 would be the amounts for the time being declared by proclamation, was before the Legislative Council having passed the Legislative Assembly: Supreme Court Amendment Bill 1995.

The exemptions in Local Courts in New South Wales and the Northern Territory and the Magistrates' Court in Victoria were explained in para 7.8 of the Discussion Paper. As to the Magistrates Court in the Australian Capital Territory, see *Magistrates Court (Civil Jurisdiction) Act 1982 (ACT)* s 347.

<sup>6</sup> *Local Courts Act Amendment Act 1958* s 4.

the bankrupt (including any sewing machine used for domestic purposes)"<sup>7</sup> 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"<sup>8</sup> which is now \$2,000.<sup>9</sup> 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.

**(b) Clothing and household property**

7.7 The Commission **recommends** that necessary wearing apparel for the judgment debtor and any dependant of the judgment debtor and necessary household property, as prescribed in the LCR, for the judgment debtor and any dependant of the judgment debtor should be exempt from seizure and sale by a bailiff under a warrant of execution.

7.8 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 is to the disadvantage of other creditors. So far as clothing and household property is concerned, this recommendation, if implemented, would avoid this problem in the case of clothing and household property.

7.9 Furthermore, in the Commission's view an exemption of necessary wearing apparel and necessary household furniture and effects would be consistent with the aim of ensuring that a debtor is not deprived of property necessary for a frugal but dignified existence.<sup>10</sup> The extent of the exemption could not be eroded by inflation.

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<sup>7</sup> 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".

<sup>8</sup> 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".

<sup>9</sup> *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 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.

<sup>10</sup> Para 7.2 above.

7.10 The proposed exemption would be along the lines of that applying in respect of clothing and household property in the case of a sequestration under the Commonwealth *Bankruptcy Act 1966*.<sup>11</sup> This would decrease the incentive which at present exists for judgment debtors to petition in bankruptcy in order to protect basic household goods from seizure under warrants of execution.<sup>12</sup>

7.11 A limitation of the exemptions in relation to household property by reference to what is "necessary" would mean that the exemptions would not be easy to apply in practice.<sup>13</sup> A bailiff would face more difficulty than the Official Receiver in bankruptcy 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 Commission considers that the problem can be resolved by making rules which would specify what was to be regarded as necessary household property for this purpose.<sup>14</sup>

### (c) Tools and implements of trade

7.12 The Commission **recommends** that ordinary tools of trade, plant and equipment, professional instruments and reference books of the judgment debtor whose aggregate value does not exceed an amount prescribed by the LCR should be exempt from seizure and sale by

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<sup>11</sup> Para 7.6 above. Most of those who commented on the question of the extent of the exemption for wearing apparel and household property in response to the Discussion Paper supported exemptions similar to that applying under the *Bankruptcy Act* (Cth). Some commentators, including the Law Society, supported specifying in the LCR the household property which should be regarded as necessary. The exemption for wearing apparel and household property in the Victorian Magistrates' Court is in line with that applying under the *Bankruptcy Act* (Cth) except that the provision that creditors can resolve to enlarge the household property which is to be exempt (footnote 7 above in this Ch) does not apply: *Supreme Court Act 1986* (Vic) s 42, applied to Magistrates' Courts by r 27.09(6) of the *Magistrates' Court Civil Procedure Rules 1989* (Vic).

Earlier this year, Western Australia's *Fines, Penalties and Infringement Notices Enforcement Act 1994* came into operation. The Act set out personal property of the offender which could not be seized by the sheriff when a warrant of execution is issued to enforce payment of a fine. The exempt property includes "items of clothing, and household items, necessary for the offender and any dependant of the offender": s 75(1).

<sup>12</sup> This was a point made by the Financial Counsellors Resource Project and Consumer Credit Legal Service (WA) Inc who were among those who commented on this issue in response to the Discussion Paper. The Financial Counsellors Resource Project said that financial counsellors maintained that the threat by a bailiff to seize household goods, tools of trade or a vehicle was the second most common reason for debtors petitioning in bankruptcy.

<sup>13</sup> As the ALRC Report pointed out: para 214.

<sup>14</sup> The ALRC recommended that the problem be resolved by making regulations which would specify what is to be regarded as necessary. It said that the regulations should be detailed and should take account of differences between the circumstances, particularly the family circumstances, of individual debtors: *ibid*.

a bailiff under a warrant of execution. At the date of the signing of this report, the sum of \$2,000 would be a satisfactory figure to prescribe. The rules should be amended periodically so that the money value limit is kept abreast of the Consumer Price Index.

7.13 One of the aims of exemption provisions is to ensure that the debtor's ability to earn income is not unduly impaired and the Commission's recommendation is consistent with this objective. Implementation of the recommendation would mean that the range of items exempted to further this object would be the same as the range of items exempted under section 116(2)(c) of the *Bankruptcy Act 1966* in a sequestration under that Act.<sup>15</sup> The figure of \$2,000 is the amount presently prescribed under that section.<sup>16</sup> The Commission's recommendation would help reduce the existing incentive to the debtor to petition in bankruptcy.

**(d) Medical and dental equipment**

7.14 The Commission **recommends** that necessary medical and dental aids and equipment for the judgment debtor and any dependant of the judgment debtor should be exempt from seizure and sale by a bailiff under a warrant of execution. An electric wheelchair for example, would not at present be exempt under the LCA nor would it fall within the categories of goods which would be exempted under the recommendations made in paragraphs 7.7 and 7.12 above. An exemption for medical and dental aids and equipment necessary for the debtor and for the debtor's dependants has been recommended in the

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<sup>15</sup> Para 7.6 above. This is already the position in the (Vic) Magistrates' Court: *Supreme Court Act 1986* (Vic) s 42, applied to Magistrates' Court by r 27.09(6) of *Magistrates Court Civil Procedure Rules 1989* (Vic).

The same range of goods as is set out in s 116(2)(c) of the *Bankruptcy Act* (Cth) is exempt from seizure and sale under a warrant of execution issued out of a Local Court in New South Wales except that the limit is \$500, not \$2,000 as prescribed under s 116(2)(c): *Local Courts (Civil Claims) Act 1970* (NSW) s 59. The range of goods is the same in the Magistrates' Court in the Australian Capital Territory but the limit there is \$1000: *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 347 and *Magistrates Court (Civil Jurisdiction) Regulations* (ACT) reg 5.

In the Magistrates' Court in the Northern Territory "all personal property necessary for adequate living and continuation of work" is exempt from seizure and there is no limitation on value: *Local Court Rules 1990* (NT) r 29.09(2).

Under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) "ordinary tools of trade, professional instruments and reference books" the aggregate value of which does not exceed \$1000 are exempt from seizure where a warrant of execution is issued to enforce payment of a fine: s 75(1) and *Government Gazette* 30 December 1994, 7233.

Most of those who commented on the issue when it was raised in the Discussion Paper were in favour of adopting the exemption in s 116(2)(c) of the *Bankruptcy Act*, although the Metropolitan and Country Bailiffs' Association considered that the prescribed limit should be \$500.

<sup>16</sup> *Bankruptcy Rules* r 40B.

Canadian provinces of Alberta and Ontario.<sup>17</sup> These items are often of critical importance to the persons concerned. The Commission considers that the seizure and sale of necessary medical or dental aids and equipment for the judgment debtor or any dependant of his cannot be justified.

(e) **Hardship**

7.15 Section 139 of the LCA gives a magistrate power to suspend or stay any judgment given or execution issued to enforce the judgment. Under the section, if it appears to the magistrate that the judgment debtor is unable from sickness or other sufficient cause to pay the judgment debt or any instalment of it, the magistrate may suspend or stay the judgment or execution 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.<sup>18</sup> Section 139 is intended to protect judgment debtors but usually they are unaware of its existence. To alleviate this position, the Commission **recommends** that the form 103 notice which the bailiff delivers or leaves for the judgment debtor when he seizes any goods of the debtor<sup>19</sup> should briefly explain this section.

7.16 Section 139 contemplates that any stay of execution will be temporary<sup>20</sup> and in the case of a warrant of execution the stay will be in respect of all the property which the bailiff has or may seize. There is no provision in the LCA under which the Court can permanently exempt a particular item of property from execution. Some judgment debtors are more susceptible than others to the loss of particular property. The problem is a general one but is probably most noticeable in the case of motor vehicles. For one judgment debtor, the loss of a

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<sup>17</sup> ALRI Report Vol 1, 277-278 and OLCRC Report Part II 297.

<sup>18</sup> It is important to note that whether a suspension or stay is granted is in the discretion of the magistrate even where the judgment debtor is unable from sickness or other sufficient cause to pay the judgment debt or the instalment of it.

O 25 (Div 1) r 12 of the LCR sets out the procedure in the case of an application to stay a warrant of execution which has been issued. Under that rule the judgment debtor applies to the magistrate in chambers to stay the warrant by lodging an application setting out the grounds on which the application is made together with an affidavit verifying the particulars set out in the application. The magistrate may make an interim order. Upon the making of the interim order, the clerk must issue a chamber summons in duplicate and cause a copy to be served on the bailiff who must thereupon comply with the interim order. The judgment debtor must serve a copy of the summons on the judgment creditor. On the return day, the magistrate after hearing the parties may further extend the interim order or make such further order as he deems just.

<sup>19</sup> LCR O 25 (Div 1) r 13.

<sup>20</sup> There is doubt as to whether the magistrate can stay a warrant of execution permanently under s 139. 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...". It appears, however, from s 139 that the magistrate can continue the stay of execution from time to time until the cause of inability has ceased.

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. The ability of the court, on the application of the judgment debtor, to make an order exempting particular property from execution is a means by which relief could be provided to the judgment debtor in such cases of exceptional hardship.<sup>21</sup>

7.17 The Commission **recommends** that -

- (a) The LCR should contain provisions by which the magistrate, on the application of the judgment debtor, may make an order exempting particular goods from execution.
- (b) The application should be by way of summons supported by affidavit. The summons should describe the item or items of goods concerned.
- (c) The magistrate should only be able to make an order exempting the particular goods from execution if he is satisfied that if the order were not made the judgment debtor or a member of his family would be likely to suffer exceptional hardship.
- (d) A summons may not issue after the expiry of seven days from the date on which the Form 103 notice, which the bailiff delivers or leaves for the judgment debtor when he seizes any goods of the debtor, is delivered to or left for the judgment debtor.
- (e) The form 103 notice should contain a notice briefly explaining the judgment debtor's right to apply for an order exempting any goods specified in his application from execution and the prerequisite which must be satisfied before the Court may make an order.

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<sup>21</sup> The Commission has recommended that the judgment debtor should be able to apply to the Court for an instalment order: para 3.10 above. If an order is made a stay of execution in respect of the warrant of execution will come into operation: para 4.22 above. However, the judgment debtor may not be entitled to an instalment order but might own property the loss of which would be likely to cause exceptional hardship to the judgment debtor or a member of his family.

- (f) The magistrate, on the application of the judgment creditor, should be empowered to revoke or vary the exemption order.
- (g) Except as varied by the Commission's recommendations, the provisions in the LCR relating to proceedings in chambers should apply to an application.
- (h) The magistrate should be able to delegate to the clerk the jurisdiction and powers conferred on him in relation to an application for an exemption order or an application for the revocation or variation of an exemption order.
- (i) If the above recommendations are implemented, the minimum period which must elapse before a sale of goods may take place should be extended from six days to 21 days.

7.18 Under these recommendations, the Court should not make an order declaring that the specified goods are exempt from execution unless satisfied that, if the order were not made, the judgment debtor or a member of his family would be likely to suffer exceptional hardship. Unless an exemption order has been made the bailiff could sell the goods concerned. He would not have to await the result of an application made but not determined. There is a provision under which an exemption order in respect of specified goods can be made in the Magistrates Court in the Australian Capital Territory but the order can only be made if the Registrar of the Court is satisfied that this same prerequisite as to exceptional hardship exists.<sup>22</sup> The proposed provisions would be intended to protect the judgment debtor and for this reason the Commission considers that the form 103 notice delivered or left by the bailiff when he seizes goods should contain a notice briefly explaining the judgment debtor's right to apply for an order exempting any goods specified on his application from execution and the

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<sup>22</sup> *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 354 inserted in 1994. This is the only provision in Australia empowering a local court to exempt particular property from execution. However, the ALRC recommended in 1987 that a Court should be able to exempt particular property (including land) from execution where the same prerequisite exists: ALRC Report 216 and the Report's summary of recommendations para 22. Most of those who commented on the issue when it was raised in the Discussion Paper were in favour of the ALRC's proposal.

Under the Australian Capital Territory provision, the Court may make the exemption order even though a warrant of execution has not yet issued. This is also intended by the Commission under its recommendation. It is unlikely that the debtor will apply until the bailiff makes a seizure.

The Commission has confined its recommendation to goods. S 126 of the LCA only protects certain specified goods from seizure: para 7.3 above. The policy of protecting certain specified goods but not land from seizure is common to all local court jurisdictions in Australia. It would be a departure from this policy to allow the Court to exempt land from execution.

prerequisite which must be satisfied before the Court may make an order. To reduce the delay in the hearing of the exemption order application, the Commission has recommended that the magistrate should be able to delegate the jurisdiction and powers conferred on him in relation to an exemption order application to the clerk. In order to reduce the chances of advertising a sale which will be cancelled, it would be necessary to increase the minimum period which must expire before the bailiff can sell the goods. At present the day appointed for the sale of goods must not be earlier than the sixth day from the day of seizure and the Commission proposes that the period be extended to 21 days.<sup>23</sup>

**(f) Judgment debtor's motor vehicle**

7.19 For some people such as taxi drivers, 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.<sup>24</sup> 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.<sup>25</sup> However, apart from these provisions, motor vehicles are not exempt from seizure in Local Courts in Australia.<sup>26</sup>

7.20 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:

"property used by the bankrupt primarily as a means of transport, being property whose aggregate value does not exceed the prescribed amount".<sup>27</sup>

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<sup>23</sup> The Commission has already made this recommendation when dealing with instalment orders: para 4.23 above.

<sup>24</sup> Except in Victoria where the monetary limit to the exemption is \$2,000: see paras 7.8 and 7.7 of the Discussion Paper.

<sup>25</sup> 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: see para 7.8 of the Discussion Paper.

<sup>26</sup> The Kelly 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: Kelly Report 75. The report said that in Canada, motor vehicles necessary to the debtor's employment were exempted in several provinces.

<sup>27</sup> The creditors can by resolution determine a greater amount than the prescribed amount: s 116(2)(ca).

The prescribed amount is \$2,500.<sup>28</sup> 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.<sup>29</sup>

7.21 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 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.<sup>30</sup>

7.22 The Commission has given consideration to the question of whether a judgment debtor's motor vehicle should ever be exempt from execution under a warrant of execution. It has concluded that there should not be a separate provision in the LCA or the LCR under which the judgment debtor's motor vehicle might be exempt from execution. It considers that the issue is appropriately dealt with by the recommendations in paragraph 7.17 above. Thus, the Court on the application of the judgment debtor could make an order exempting the vehicle from execution, irrespective of its value, if the Court was satisfied that if the order were not made the judgment debtor or a member of his family would be likely to suffer exceptional hardship.<sup>31</sup>

### **3. SEIZURE AND SALE**

#### **(a) A duty to act reasonably**

7.23 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. At common law, the

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<sup>28</sup> *Bankruptcy Act 1966* (Cth) ss 116(2)(ca) and 116(2A)(b).

<sup>29</sup> The Australia Finance Conference in its comments on the Discussion Paper submitted that where the motor vehicle was used by the judgment debtor primarily as a means of transport or for employment, and no form of public transport is reasonably available to the debtor, an exemption from seizure was appropriate. However, a minimum restriction should be placed on the aggregate value of the motor vehicle for this exemption to apply. It said that a figure of \$2,500 might be appropriate.

<sup>30</sup> See para 7.2 above.

<sup>31</sup> This approach was supported by a number of those who responded to the Discussion Paper including the Law Society.

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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

7.24 In the case of a sale of land under a warrant of execution, a number of factors, apart from the forced sale, 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.<sup>35</sup> The sale will, for example, be subject to mortgages registered on the certificate of title and to statutory charges for outstanding rates and land tax.<sup>36</sup> 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.

7.25 The extent of the duty to obtain a fair price in the case of a sheriff was considered by Barwick CJ in *Anderson v Liddell*,<sup>37</sup> an appeal to the High Court of Australia. In giving his judgment for the majority of the Court, the Chief Justice said:

"The next attack on the sale is that the sheriff, being under an obligation to get a fair price, failed to do so . . . . There was no evidence in this case upon which it could be concluded that the price obtained was other than a fair price for what was sold in the circumstances in which it was sold . . . [H]e [the sheriff] is not required to refuse to accept a bid which is less than the market value of the land . . . . It seems to me that the sheriff is entitled to accept at the auction any bid which is genuinely made and which bears a fair relationship to what is being sold . . . [I]t is rightly said in my opinion that he must obtain a reasonable price for what he sells. . . . It is to be reasonable having regard to what is offered, namely, a debtor's right title and interest, if any, and the circumstances<sup>37</sup> of the sale."<sup>38</sup>

<sup>32</sup> *Owen v Daly* [1955] VLR 442.

<sup>33</sup> *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 7.24 below.

<sup>34</sup> *Owen v Daly* [1955] VLR 442, 446.

<sup>35</sup> *Anderson v Liddell* (1968) 117 CLR 36, 50.

<sup>36</sup> Para 7.29 below.

<sup>37</sup> (1968) 117 CLR 36.

<sup>38</sup> *Anderson v Liddell* (1968) 117 CLR 36, 44-45.

The duty would be the same for a bailiff of a Local Court in Western Australia.<sup>39</sup>

7.26 One commentator on the Discussion Paper submitted that a statutory duty should be imposed on the bailiff to obtain the best price. The Commission considers that this would impose too high a duty on bailiffs given the limited resources at their command. However, an express duty should be imposed by the LCR on bailiffs to act reasonably in selling goods or land with due regard to the interests of both the judgment creditor and the judgment debtor and not to sell at less than a fair price. In the Commission's opinion the obligation not to sell at less than a fair price can be best enacted by adopting the words used by Barwick CJ in *Anderson v Liddell*. The enactment of an express duty in the LCR will make it easier for the creditor and debtor to ascertain what the bailiff's duty is.

7.27 The Commission **recommends** that the LCR should provide that in selling land or goods under a warrant of execution the bailiff should act reasonably with due regard to the interests of both the judgment creditor and the judgment debtor and should not sell at less than a reasonable price. It **recommends** that "a reasonable price" should be defined in the LCR as a price which is reasonable having regard to what is offered, namely the judgment debtor's right title and interest in the land or goods, and the circumstances of the sale.

**(b) Seizure of land not required**

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".<sup>40</sup> In practice, bailiffs in Western Australia do not make an actual seizure of the land and instead always proceed under section 123.<sup>41</sup> The provision is not suitable if the Court authorises the sale of land by public tender or private contract, as the Commission proposes it should be able to do,<sup>42</sup> as advertising may not be necessary in the case of a sale by private contract. Section 120(1) of the SCA provides that:

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<sup>39</sup> Some of the circumstances of the sale which may affect a price are referred to in paragraphs 7.23 and 7.24 above.

<sup>40</sup> As to the prescribed manner of advertising see para 7.41 below.

<sup>41</sup> In the case of goods, a seizure is always necessary: LCA s 126.

<sup>42</sup> Para 7.70 below.

"It shall not be necessary for the sheriff or other officer having the execution of a writ of *fieri 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."<sup>43</sup>

The Commission **recommends** that a similar provision to section 120(1) of the SCA should be adopted in the LCA. It should, however, remain necessary for the bailiff to advertise where he intends to put land up for sale by public auction under a warrant of execution. The Commission's recommendations in this regard are made later in this chapter.<sup>44</sup>

(c) **Issues arising from the principle that only the debtor's interest is sold**

(i) *Introduction*

7.29 It is only the judgment debtor's interest in the property concerned which is sold by the bailiff under a warrant of execution.<sup>45</sup> The principle is particularly pertinent when land is sold, as the sale will, for example, be subject to mortgages registered on the certificate of title<sup>46</sup> and to statutory charges for outstanding rates and land tax.<sup>47</sup> There is at present no express obligation imposed on the bailiff by either the LCA or the LCR to make the enquiries about the amount owing to encumbrance holders over the land and the amount of outstanding rates and taxes or to disclose the information obtained to potential purchasers on request and at the auction.

(ii) *Amounts owing to encumbrance holders*

7.30 The bailiff needs to know the amount owing to encumbrance holders and the amount outstanding for rates and taxes so that he can decide whether the judgment debtor has a saleable interest in the land and, if the matter proceeds to auction, whether the highest bid

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<sup>43</sup> A writ of *fieri facias* is the Supreme Court equivalent of a warrant of execution in a Local Court.

<sup>44</sup> Para 7.42 below.

<sup>45</sup> *Anderson v Liddell* (1968) 117 CLR 36, 50.

<sup>46</sup> *Transfer of Land Act 1893* s 133; *Anderson v Liddell* (1968) 117 CLR 36.

If a 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*.

<sup>47</sup> *The South-Eastern Drainage Board (South Australia) v The Savings Bank of South Australia* (1939) 62 CLR 603. These charges, of course, will not be noted on the certificate of title. The reference to "rates" in this report is intended to include charges imposed by the Water Authority. They are a statutory charge on the land. The authority no longer levies annual rates but annual service charges.

made at the auction for the debtor's interest is one which he will be entitled to accept.<sup>48</sup> He should therefore make enquiries about these amounts. Furthermore, the bailiff is the person from whom prospective purchasers normally obtain information about the amount owing to encumbrance holders and the amount outstanding for rates and taxes. Without this information, a potential purchaser could be in a position where because of uncertainty the only sensible thing is for him not to make a bid or to make a very low bid. If potential purchasers have the information, they can bid with more confidence and this will improve the price at the auction. 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. The Metropolitan and Country Bailiffs' Association<sup>49</sup> in its comments on the Discussion Paper indicated that the enquiries to which the Commission has referred are already carried out by bailiffs to establish if there is a saleable interest in the land. The present practice, the Association said, was to make the information obtained available on a "for what it is worth" basis and with no guarantee of its correctness.

7.31 There is, however, no legal requirement on a mortgagee, for example, to disclose the amount owing under the mortgage to the bailiff. Furthermore, where the encumbrance holder is a "credit provider" under the Commonwealth *Privacy Act 1988*, section 18N(1) of that Act prohibits the encumbrance holder disclosing the amount owing without the judgment debtor's consent. The consent may not be forthcoming. 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.<sup>50</sup> Where an encumbrance holder will not provide the bailiff with the amount owing under an encumbrance, 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.<sup>51</sup>

7.32 The Commission **recommends** that the LCA should be amended to require encumbrance holders and rating authorities to provide the bailiff with any information in their

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<sup>48</sup> Para 7.25 above. Speaking of the sheriff, Barwick CJ 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.

<sup>49</sup> The Association comprises the bailiffs of the Local Courts in the metropolitan area and of the Local Courts at Bunbury, Kalgoorlie, Geraldton and Albany. Police officers who are Local Court bailiffs are not members.

<sup>50</sup> *Privacy Act 1988* (Cth) s 11B.

<sup>51</sup> As to examinations in aid of execution, see paras 3.2-3.4 above.

Once the bailiff has obtained the information concerned, the *Privacy Act 1988* (Cth) does not prohibit him disclosing it to potential purchasers.

possession which is necessary to answer enquiries which the bailiff is required to make by the LCR in carrying out his duties under a warrant of execution over land. It further **recommends** that the LCA should provide that it should be an offence to refuse or fail to provide the information to the bailiff with the penalty being a fine. The requirement in the LCA would extend to information held by a credit provider within the meaning of the Commonwealth *Privacy Act 1988*. The Commonwealth Act allows for disclosure in these circumstances, as section 18N(1)(g) of that Act states that an exception to the prohibition imposed by section 18N(1) to disclose to another person arises where -

- "(g) disclosure of the report or information to that other person for the particular purpose is required or authorised by or under law".

The amendment to the LCA which the Commission proposes would be such a law of the kind contemplated by the *Privacy Act 1988*.

7.33 The Commission also **recommends** that -

- (a) The LCR should be amended to require the bailiff, a reasonable time before advertising land for sale under a warrant of execution, to make enquiries -
  - (i) as to the maximum amount secured by any encumbrance shown on the certificate of title to the land;
  - (ii) as to the present amount outstanding under any such encumbrance;
  - (iii) as to the daily amount of interest;
  - (iv) where liability under an encumbrance shown on the certificate of title is not measured by a principal sum and interest then as to the terms and details of the encumbrance, and
  - (v) of any authority levying or assessing rates or land tax in respect of the land to ascertain any rates or taxes outstanding in respect of the land.

- (b) The LCR should require the bailiff on request from a prospective purchaser to disclose information which he has obtained and to disclose at the auction before calling for bids the information which he has obtained.
- (c) The LCA should be amended to provide that no action should lie against a bailiff for any incorrect information furnished by him in good faith and after making reasonable inquiry, pursuant to his obligations under the LCR to disclose information obtained by him.

7.34 The Commission considers that the need for the bailiff to make the enquiries concerned and to disclose the information which he obtains to potential purchasers is of such importance that the LCR should impose express obligations on him in this regard.<sup>52</sup> The Commission is only imposing an obligation to *enquire*. Thus, if the enquiry is unsuccessful, the bailiff will have fulfilled his obligation to enquire and doubtless will not proceed further with the sale until the judgment creditor has had the judgment debtor examined before a magistrate.

7.35 There is the possibility that the information supplied by the bailiff to a potential purchaser might not be correct. The Commission considers that the LCA should protect him from liability where information has been supplied by him in good faith and after making reasonable enquiry.

(iii) *Indicating in the advertisement that only the debtor's interest in the land is being sold*

7.36 In sales of land by bailiffs under warrants of execution, the advertisements always refer to the fact that it is the "debtor's interest" in the land described in the advertisement

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<sup>52</sup> The Commission has noted that the Sheriff's Office *Bailiff's Manual* indicates that the bailiff should make all the enquiries recommended by the Commission: paras 23.10.1-23.10.7.

There are no express obligations along the lines of those proposed by the Commission imposed on bailiffs by the legislation governing local courts elsewhere in Australia. However, in a number of jurisdictions, for example New South Wales, the bailiff before proceeding to the sale of land under a warrant of execution must fix so far as he can by the exercise of reasonable diligence the approximate market value of the interest in the land to be sold: *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 30A r 6(1). To ascertain the value of the interest being sold, the bailiff would need to ascertain the information referred to in the Commission's recommendation.

The Metropolitan and Country Bailiffs' Association was opposed to the suggestion which the Commission had made in the Discussion Paper that the LCA or the LCR should impose on the bailiff an express obligation to make the enquiries and disclose the information obtained. The Australian Finance Conference, Consumer Credit legal Service (WA) Inc and the Law Society all supported the suggestion.

which is being sold. There is no requirement in the LCA or the LCR 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. 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 as to what the registered encumbrances are and the amounts owing under them. A few might make their own enquiries. 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.

7.37 The Commission **recommends** that the LCR should provide that an advertisement for the sale of land under a warrant of execution should state that only the judgment debtor's interest in the land will be sold, briefly explain the effect of this in general terms and state that further information is available from the bailiff. The wording of the explanation and statements to be used should be prescribed in the LCR. Mention should be included of the fact that any outstanding rates or land tax are a charge on the land.<sup>53</sup>

7.38 There was some support among respondents to the Discussion Paper for the adoption in Local Courts in Western Australia of rule 69.06(3) of the Victorian *General Rules of Procedure in Civil Proceedings 1986*. The rule, which is applied to warrants of execution in Victorian Magistrates' Courts,<sup>54</sup> requires the bailiff to include in the advertisement 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". The Commission has decided not to recommend the adoption of this rule because it would still be left to potential purchasers to find out the amounts owing under the mortgages.

7.39 The Commission considers that its recommendation offers a practical solution. The object of the recommendation is twofold. The first is to make it clear to potential purchasers through the advertisement that only the judgment debtor's interest in the land is being sold and

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<sup>53</sup> In their comments on the Discussion Paper, the Law Society and the Metropolitan and Country Bailiffs' Association both supported a proposal set out in the paper which was along the lines of these recommendations.

<sup>54</sup> By r 27.09(6) of the *Magistrates' Court Civil Procedure Rules 1989* (Vic).

what the effect of that is. The second is to advise potential purchasers that further information relevant to the judgment debtor's interest is available from the bailiff.

**(d) Advertising**

7.40 The provisions in the LCA and the LCR relating to advertising of sales in execution are 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".<sup>55</sup> The day appointed for the sale must not be earlier than the sixth day from the day of levying<sup>56</sup> and notice of the sale must be advertised at least four days before the day appointed for the sale.<sup>57</sup> These requirements do not apply to land of which an actual seizure has not been made.<sup>58</sup>

7.41 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.<sup>59</sup> The advertisement must appear first at least 14 days before the day appointed for the sale.<sup>60</sup> The publication of the notice is the equivalent of an actual levy by the bailiff on the land.<sup>61</sup> In practice, bailiffs in Western Australia do not make an actual seizure of the land and instead always proceed under section 123.<sup>62</sup> In Local Courts, because of section 123, advertising in the case of land is associated with the seizure of land.<sup>63</sup>

7.42 The Commission **recommends** -

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<sup>55</sup> 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*.

<sup>56</sup> *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.

<sup>57</sup> LCR O 25 (Div 1) r 17(1).

<sup>58</sup> *Ibid*.

<sup>59</sup> LCR O 25 (Div 1) r 22.

<sup>60</sup> *Ibid*.

<sup>61</sup> LCA s 123.

<sup>62</sup> In the case of goods, a seizure is always necessary: *id* s 126.

<sup>63</sup> The position on this point is different in the Supreme Court: s 120(1) of the SCA provides that it is not necessary for the sheriff or other officer having the execution of a writ of fieri facias to make any actual seizure of the land under the writ before selling it, any law to the contrary notwithstanding. In para 7.28 above, the Commission recommended that a similar provision to s 120(1) should be adopted in the LCA.

- (a) The LCR should provide that where the bailiff intends to put up any goods or land for sale by public auction under a warrant of execution he should cause notice of the warrant, the time and place of the auction and particulars of the property to be given in such manner as appears to him best calculated to give due publicity to the sale.<sup>64</sup>
  
- (b) In any event,
  - (i) In the case of goods, the bailiff should advertise notice of the warrant, the time and place of the auction and particulars of the goods at least once in a newspaper circulating in the town or district in which the goods are to be sold.<sup>65</sup> This advertisement should appear at least four days before the day appointed for the sale.
  
  - (ii) In the case of land, the bailiff should advertise notice of the warrant, the time and place of the auction and particulars of the property concerned at least twice in a newspaper circulating in the neighbourhood of the property and the advertisement should appear first at least 14 days before the day appointed for the sale.

7.43 Both the judgment debtor and the judgment creditor will benefit from appropriate advertising of the goods or land proposed to be sold under a warrant of execution. However, the extent and type of advertising which is appropriate when it is intended to sell property varies according to circumstances such as the value and nature of what is being sold. The recommendation, if implemented, 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

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<sup>64</sup> There would be an exception to the requirement to advertise in the case of goods where the total value of the goods seized is less than \$1000: paras 7.45-7.46 below.

<sup>65</sup> There would be the exception referred to in previous footnote.

publication of or inclusion in advertising brochures.<sup>66</sup> A similar approach to that proposed by the Commission is taken in the RSC.<sup>67</sup>

7.44 The Commission considers that one advertisement should be a statutory minimum in the case of a sale of goods under a Local Court warrant of execution and two advertisements should be the minimum in the case of a sale of land. The number of bidders at real estate auctions in this State is normally small and whether the auction produces a satisfactory result will very often depend on having at least two genuine bidders. The need to attract bidders justifies a minimum requirement of two advertisements recommended by the Commission. If the bailiff is of the opinion that further or other advertising is necessary to give due publicity to the sale, he should carry that out as well.

**(e) Sale of goods by auction without advertising**

7.45 By rule 17(1) of Order 25 (Division 1) of the LCR notice of the sale of goods must be advertised at least four days before the day appointed for the sale.<sup>68</sup> However by rule 17(2) of the same Order, if in the opinion of the bailiff the value of any goods seized by him under a warrant of execution is less than \$100, he may sell the goods by public auction in any public auction room approved by the magistrate without advertising.<sup>69</sup> The magistrate is to notify the bailiff in writing of his approval of any public auction room, and the written notification is

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<sup>66</sup> In their comments on the Discussion Paper, the Law Society and Australian Finance Conference both favoured a solution along the lines recommended by the Commission. The Law Society, for example, said that it was undesirable to over regulate what a bailiff must include in the advertising for the proposed sale of goods or land. The Society considered it preferable to set out the requirements in general terms, namely to do so in such a manner as appears to the bailiff best calculated to give due publicity to the sale. The Metropolitan and Country Bailiffs' Association, however, said that the current provisions regulating advertising where a bailiff wished to put goods or land up for sale under a warrant of execution should be retained.

<sup>67</sup> O 82 r 1. This provides that subject to the SCA, 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."

By s 120 (1a)(a) of the SCA in the case of a proposed sale of land under a writ of fieri facias at least seven days' notice of an auction of land and of the time when and the place where it is to be held must be published in a newspaper circulating in the neighbourhood of the land.

Pt 30 r 14 of the *Local Court (Civil Claims) Rules* (NSW) also has similarities to the course recommended by the Commission. Under that rule the bailiff is to cause notice of an 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, four 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 to give due publicity to the sale.

<sup>68</sup> LCR O 25 (Div 1) r 17 (1) : see para 7.40 above.

<sup>69</sup> LCR O 25 (Div 1) r 17(2)(a).

sufficient authority for the bailiff to sell goods in the auction room so approved.<sup>70</sup> Rule 17(1) also provides that 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.

7.46 The Commission **recommends** that, if in the opinion of the bailiff, the total value of goods seized by him under a warrant of execution is less than \$1,000, he may sell the goods by public auction in any public auction room without advertising. The Metropolitan and Country Bailiffs' Association in its preliminary submission to the Commission said that with the increased costs of 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. An effect of this is that the limited power to sell in a public auction room without advertising is not used. Auctions held at recognised auction rooms normally attract potential bidders irrespective of whether the items they are interested in buying are advertised. This is particularly the case where the auction rooms auction goods commencing at a particular time on particular days in each week. The Commission considers that an increase in the sum of \$100 to \$1000 is justified.<sup>71</sup> It should not continue to be necessary to obtain the approval of the magistrate to a sale in the public auction room. This could add to costs and other provisions such as the requirement that the bailiff must not sell for less than a reasonable price would remain.<sup>72</sup> The recommendation, if implemented, would not require the bailiff to proceed without advertising if he wishes to sell the goods at a public auction in a public auction room. The provision under which goods may be sold immediately without notice of sale, or may be sold earlier than 4 days after notice of the sale, where the goods are of a perishable nature or where the judgment debtor requests should be retained.

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<sup>70</sup> Id r 17(2)(b).

<sup>71</sup> The Metropolitan and Country Bailiffs' Association in response to the Discussion Paper said that the sum should be increased to \$1,000. The Law Society thought that the sum should be increased to \$500 and that an increase of up to \$1,000 might be justified. Mr D C Spencer (a former Perth bailiff) pointed out in his comments to the Commission that an advantage of advertising is that it gives finance companies holding a bill of sale or hire purchase agreement over goods or a person who had lent the goods to the judgment debtor the opportunity to learn of the auction and make a claim to the goods before the sale takes place. Mr K G Steer, the present Perth bailiff, told the Commission that he has found it to be rare for someone to make a claim on goods because he had seen the advertisement. In his 20 years' experience, first in the Sheriff's office and then as the Perth bailiff, only on two occasions had a finance company made a claim because it had seen the advertisement. In addition, he remembered a case where someone after seeing the advertisement for the sale of a car claimed he had lent the car to the judgment debtor.

<sup>72</sup> Para 7.25 above. See also para 7.48 below.

**(f) Venue and time of sale**

7.47 Rule 17(1) of Order 25 (Div 1) of the LCR provides that except where the magistrate otherwise orders all land or goods shall be sold at the place where the same were levied upon or at such other place as the bailiff or his deputy considers is more suitable or convenient for the sale thereof. The provision only applies to land where the bailiff has made an actual seizure of the land. Normally the bailiff proceeds under section 123 of the LCA in which case he does not make an actual seizure of the land.<sup>73</sup>

7.48 The Commission **recommends** that except where the magistrate otherwise orders, where land or goods are to be sold by a bailiff by public auction, he should sell them at the place and time which he considers to be most advantageous to the judgment debtor and the judgment creditor.<sup>74</sup> The bailiff should inform himself as to where and when it is most advantageous to the parties to hold the auction of the land or goods and hold the auction at that place and time. The importance of the bailiff choosing the place and time for the auction which is most advantageous to the parties is not recognised by the LCR. However, by common law the bailiff has a duty to act reasonably with due regard to the interests of both the judgment debtor and the judgment creditor.<sup>75</sup>

**(g) Notice to debtor of intended sale of goods or land**

7.49 The LCR require the bailiff on making a levy to deliver to the judgment debtor a notice complying with form 103 in the Appendix to the LCR or to leave the form at the place where the execution is levied.<sup>76</sup> 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,

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<sup>73</sup> Para 7.41 above.

<sup>74</sup> This recommendation is intended to apply whether the bailiff makes an actual seizure of land or proceeds under s 123 of the LCA.

The Commission decided not to adopt a submission which had been made to it that the bailiff should seek the directions of the magistrate as to the place of sale in every case.

<sup>75</sup> Para 7.23 above.

<sup>76</sup> LCR O 25 (Div 1) r 13.

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 that 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.

7.50 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.<sup>77</sup>

The inventory and notice are to be -

- (a) given to the judgment debtor personally;
- (b) sent to him by post to his place of residence, if known; or
- (c) if that residence is not known, 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. A notice sent by post 24 hours before the time fixed for the sale might not reach the judgment debtor before the sale takes place. The Commission **recommends** that the written notice of the time and place where the goods will be sold should be given or posted to the judgment debtor at least three days before the day appointed for the sale.

7.51 There is, however, no 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

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<sup>77</sup> LCR O 25 (Div 1) r 19.

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.<sup>78</sup>

7.52 The Commission **recommends** that the LCR require the bailiff prior to advertising to post a notice to the judgment debtor of the time and place for the sale of land. 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 warrant<sup>79</sup> or he might, on application to the magistrate, be entitled to a stay of execution.<sup>80</sup>

7.53 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.<sup>81</sup> The letter is sent to the judgment debtor by mail. In Victoria, notice must be given to the judgment debtor of the time and place of the sale of land.<sup>82</sup>

#### **(h) Title to goods: section 159 of the SCA**

7.54 In the case of a sale of goods under a warrant of execution, the purchaser at common law acquires only the interest which the judgment debtor possessed in the goods, subject to all charges and encumbrances to which they were subject in the hands of the debtor.<sup>83</sup> Also at common law no warranty of title is implied in a sale by a bailiff.<sup>84</sup> This is an unsatisfactory situation from the purchaser's aspect. The purchaser can later be confronted with a claim, for

<sup>78</sup> 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 35 to Ch 8 below), the Titles Office does not now notify the judgment debtor of the registration of the warrant.

<sup>79</sup> The notice might in fact prompt the debtor into making arrangements to pay out the debt.

<sup>80</sup> Para 2.30 above.

All commentators who commented on this issue in response to the Discussion Paper (including the Metropolitan and Country Bailiffs' Association) considered that the judgment debtor should be given notice of the time and place of the proposed sale of his land.

<sup>81</sup> 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 fieri facias and is either served personally or sent to the debtor through the mail.

<sup>82</sup> R 69.06(4) of the *General Rules of Procedure in Civil Proceedings 1986* (Vic) applied to the Magistrates' Court by R 27.09(6) of the *Magistrates' Court Civil Procedure Rules 1989* (Vic).

<sup>83</sup> 14 Halsbury *Laws of England* (1st ed 1910) 57.

<sup>84</sup> *Ibid.*

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*,<sup>85</sup> 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.<sup>86</sup>

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. 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". 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. It appears that section 159 does not apply in Local Courts.<sup>87</sup>

7.56 The Commission **recommends** that a provision along the lines of section 159 of the SCA be included in the LCA.

7.57 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

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<sup>85</sup> [1905] 2 KB 460.

<sup>86</sup> 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 which 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".

<sup>87</sup> The Commission set out its reasons for this conclusion in paras 7.57 and 7.58 of the Discussion Paper.

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.<sup>88</sup>

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.<sup>89</sup> 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 debtor, and that remedy is not affected by the section. The third party, of course, can make a claim to the seized goods under the procedure which can lead to an interpleader. In this way the question of the ownership of the property can be resolved.<sup>90</sup>

7.58 The Commission considers that the inclusion of a provision in the LCA along the lines of section 159 is justified. The provision would protect the purchaser at a bailiff's sale and in the Commission's opinion it is reasonable that the bailiff should have the degree of protection which would be offered to him by the provision.

7.59 One of the commentators on the Discussion Paper,<sup>91</sup> submitted that there needed to be an obligation on the bailiff to make proper enquiries as to the ownership of goods and that the interest of other family members and flatmates needed to be protected in cases where it might not be easy clearly to establish title. However, it is to be noted that under a provision along the lines of section 159 of the SCA, the bailiff will not escape liability when he could by making reasonable enquiry before the sale have ascertained that the goods were not the property of the judgment debtor. The owner of the goods could also make a claim to the goods under the interpleader procedure.<sup>92</sup>

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<sup>88</sup> [1954] 1 All ER 847, 850.

<sup>89</sup> The Australian Finance Conference, which agreed that a provision along the lines of s 159 of the SCA had merit, believed that the protection which it afforded to innocent third parties should be increased.

<sup>90</sup> The topic of interpleader is considered in paras 8.3-8.11 below.

<sup>91</sup> Consumer Credit Legal Service (WA) Inc.

<sup>92</sup> Para 8.4 below.

The adoption of a provision along the lines of s 159 of the SCA was supported by the Metropolitan and Country Bailiffs' Association and the Law Society. They were the only commentators on the Discussion Paper to comment on this topic apart from the Australian Finance Conference (footnote 89 above in this Ch) and Consumer Credit Legal Service (WA) Inc.

**(i) The sale***(i) Principal present provisions*

7.60 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.<sup>93</sup> 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.<sup>94</sup>

7.61 Under rule 18 of the same Order the sale of land is to be made subject to such conditions as the bailiff deems suitable. The conditions may be according to form 108 to the appendix to the LCR with such modifications as the circumstances of the case may require. The magistrate on the application of the judgment creditor can settle the conditions of sale.

*(ii) Determination of a reasonable price*

7.62 It has already been pointed out that by virtue of the common law, the bailiff must obtain a reasonable price for what he sells.<sup>95</sup> The Commission, in fact, has recommended that the LCR should provide that in selling land or goods under a warrant of execution the bailiff should not sell at less than a reasonable price.<sup>96</sup> The bailiff will need to be in a position to be able to decide whether the price offered is a reasonable one. The Commission **recommends** that before selling any land or goods by public auction, public tender or private contract the bailiff should take reasonable steps to determine a reasonable price for the land or goods. It also **recommends** that for the purposes of determining a reasonable price for the land or goods, the bailiff should be able to -

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<sup>93</sup> Para 7.41 above.

<sup>94</sup> 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.

<sup>95</sup> Para 7.25 above.

<sup>96</sup> Para 7.27 above.

- (a) request the judgment debtor to provide the bailiff with such information relevant to the value of the land or goods as is known to the judgment debtor or is reasonably capable of being ascertained by the judgment debtor;
- (b) if the nature and apparent value of the land or goods is such that it is reasonable to do so, engage a suitably qualified and experienced person to give the bailiff an opinion about the value of the property.

The *Fines, Penalties and Infringement Notices Enforcement Act 1994* imposes a similar obligation on, and grants similar powers to, the Sheriff before selling any personal property under a warrant of execution issued under that Act.<sup>97</sup>

(iii) *Bailiff can accept highest bid*

7.63 The Commission **recommends** that the LCR should provide that at the public auction the bailiff should be entitled to accept the highest bid provided it is not less than "a reasonable price". This recommendation reflects the law as explained by Barwick CJ in *Anderson v Liddell*.<sup>98</sup> Provided the highest bid is not less than a reasonable price, the mere acceptance of that bid could not amount to a failure to exercise reasonable care. The Commission further **recommends** that the LCR provide that where the bailiff offers land or goods for sale by public tender or private contract he should be entitled to accept any offer which is not less than a reasonable price.

(iv) *Unsold property may be auctioned again*

7.64 If at the auction, there is no bid or no bid of an amount which is reasonable, the 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. There is no provision in the LCA or the LCR for holding a second auction of the same property under the same warrant of execution.

7.65 The Commission **recommends** that the LCR should be amended to provide that where the property, whether land or goods, offered for sale by a bailiff by public auction was not

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<sup>97</sup> S 81. It is "a fair value" which is to be determined by the Sheriff under s 81. Bailiff's costs in ascertaining the worth of land or goods can already be allowed under item 15 of the Scale of Bailiff Fees in the appendix to the LCR.

<sup>98</sup> Para 7.25 above.

sold at the first auction, the bailiff may, with the written consent of the judgment creditor, offer the property for sale by public auction on a second occasion.

7.66 It can be argued that there should not be provision for a second auction because much of the expense associated with the first auction will be incurred again. On the other hand, the question of what is a reasonable price could be re-examined by the bailiff in the light of the response to the first auction. It may be that he now considers it to be a lesser amount than he had thought when he put the property up for auction the first time. The result may be that the bailiff is able to accept at the second auction a highest bid which he would have been unable to accept at the first auction. The three commentators who referred to the issue in their comments on the Discussion Paper supported this proposal, which copies an amendment made to the RSC in 1993.<sup>99</sup> The three commentators included the Metropolitan and Country Bailiffs' Association.

(v) *Generally sales to be by auction*

7.67 It has already been noted that except where the magistrate otherwise orders, property sold under a warrant of execution is to be sold by public auction.<sup>100</sup> 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 in respect of land.<sup>101</sup>

7.68 The Commission **recommends** that as a general principle sales by bailiffs should always be by public auction. Among those who responded to the Discussion Paper there was some support for giving bailiffs a discretion to sell property by private contract, instead of by public auction.<sup>102</sup> However, the Commission has concluded that the general rule should require sale by public auction for the following reasons -

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<sup>99</sup> The new provision is O 82 r 3(3).

<sup>100</sup> Para 7.60 above.

<sup>101</sup> Ibid. The position in the Supreme Court is clear. By s 120(1a)(a) of the SCA, the sale of any land under a writ of fieri facias must be by public auction. By s 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 s 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.

<sup>102</sup> The Australian Finance Conference supported the granting of such a discretion. It said that such an approach recognised the fact that the state of the market fluctuates. Whether an auction is a desirable method of disposing of property can depend on the state of the market. It also said that the uniqueness of land or a development may mean that it is not appropriate for it to be sold by auction and that a private contract would be more appropriate. The Consumer Credit Legal Service (WA) Inc said that if there was

1. 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.
2. While bailiffs often obtain appraisals of property they are required to sell to assist them in assessing what is a reasonable price, since they may not accept an offer below that price, they are not valuers and should not be expected to nominate a price at which the property can be purchased by private contract.
3. The bailiff would be vulnerable to allegations of neglect of duty or favouritism.
4. A duly advertised auction offers a degree of protection against the possibility of sale at an unfair price.

(vi) *Application to magistrate to sell by private contract*

7.69 At present the magistrate may order that property to be sold under a warrant of execution be sold by private contract, instead of public auction.<sup>103</sup> Probably, the magistrate is not empowered to make such an order in the case of land when the bailiff proceeds under section 123 which is the usual practice.<sup>104</sup>

7.70 The Commission **recommends** that the magistrate, on the application of the judgment creditor or the judgment debtor made by summons supported by affidavit, should be empowered to order that goods or land may be sold by the bailiff by public tender or private

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a method by which land could be sold privately to improve the price while maintaining the integrity of the process, it should be allowed. Deputy Chief Magistrate Martin said he liked the idea of bailiffs being able to negotiate sales by private contract. However, the concept raised issues which would need examination. The Metropolitan and Country Bailiffs' Association and the Law Society were both opposed to a discretion being granted to bailiffs to sell property by private contract instead of by public auction.

It is of interest to note that in Local Courts in New South Wales goods and land sold under a writ of execution are to be sold by public auction: *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 30 r 15 and Pt 30A r 1(2). In the Magistrates' Court in Victoria, however, where only goods can be seized, the sheriff may as he thinks fit sell the goods either by private contract or public auction: *Magistrates' Court Civil Procedure Rules 1989* (Vic) 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.

<sup>103</sup>

Para 7.60 above.

<sup>104</sup>

Ibid.

contract. It should be possible for the order to be made on such terms as the magistrate thinks fit.

7.71 The Commission has concluded that an extension to land of the power to order that goods be sold by private contract is desirable because it might appear that an auction of land would be unsuccessful but there are reasonable prospects of obtaining a reasonable price by public tender or private contract. The judgment debtor would have the opportunity to appear at the hearing of the summons.<sup>105</sup> Under the Commission's recommendation, only the judgment creditor or the judgment debtor would be able to apply for an order. The Commission considers that it would place too great a burden on bailiffs to have to make a decision each time an item of property is seized whether the most advantageous course is to apply to the magistrate for an order for sale by private contract.

(vii) *Property unsold at auction*

7.72 If at the auction, there is no bid or no bid of an amount which is reasonable, there is no provision in the LCA or the LCR for holding a second auction of the same property under the same warrant of execution. Nor does there appear to be any provision in the LCA or the LCR under which land could be sold for less than a reasonable price.<sup>106</sup> The Commission has already recommended that where property, whether land or goods, is not sold at the auction the bailiff should be able, with the written consent of the judgment creditor, to offer the property for sale by public auction on a second occasion.<sup>107</sup> A second auction, of course, might not be successful.

7.73 The Commission **recommends** that where the bailiff has offered property for sale by public auction on two occasions but the property remains unsold after the second auction, the bailiff may, with the written consent of the judgment creditor, within 28 days of the second

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<sup>105</sup> The extension to land was supported by those commentators on the Discussion Paper who referred to this matter. They included the Metropolitan and Country Bailiffs' Association. The majority of these commentators (including that Association) thought the judgment debtor as well as the judgment creditor should be able to apply for the order. Only the Law Society thought the bailiff should be able to apply for an order.

<sup>106</sup> As to a "reasonable price", see para 7.25 and 7.27 above.  
In the case of goods, where there has been no bid or no bid which is reasonable at the auction, it seems that application could still be made for an order by the magistrate that the goods be sold by private contract. 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 7.60 above.

<sup>107</sup> Para 7.65 above.

auction sell the property by public tender or private contract at a price which is not substantially below the reasonable price which the bailiff had determined for the purposes of the second auction. Before selling the property, the bailiff should give the judgment debtor notice that he is endeavouring to sell the property under this provision. Where the sheriff of the Supreme Court has been unable to obtain a reasonable price for goods or land at an auction under a writ of fieri facias, the Supreme Court may grant leave for the issue of a writ of venditioni exponas and also make an order that the goods or land be sold otherwise than by auction.<sup>108</sup> A writ of venditioni exponas directs the sheriff to sell the property for the best price which can be got.<sup>109</sup> Pursuant to a writ of venditioni exponas, property could be sold at a price substantially below what is the reasonable price for it. The Commission does not consider that provision for a statutory form of a writ of venditioni exponas would be justified in Local Courts, particularly as most claims in Local Courts are at the lower end of their monetary jurisdiction.<sup>110</sup> However, the Commission considers that a provision giving the bailiff power to sell by private contract when there have been two auctions which have both failed would be justified provided the bailiff is required to sell at a price which is not substantially below a reasonable price. In so selling, the bailiff would still have to exercise reasonable care.<sup>111</sup> Furthermore, having conducted the two unsuccessful auctions, the bailiff might be in a good position to effect a private sale. In Local Courts in New South Wales, there is provision for property to be sold by private contract for less than a reasonable price where it has remained unsold at auction.<sup>112</sup>

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<sup>108</sup> The leave of the Court is necessary for the issue of a writ of venditioni exponas: RSC O 47 r 2.

<sup>109</sup> SCA s 125(3); RSC O 47 r 5 and second schedule form no 47.

<sup>110</sup> The Perth Local Court has informed the Commission that for the year following 1 March 1993 when the jurisdiction of Local Courts was increased from \$10,000 to \$25,000, there were 34,226 actions commenced in that Court where the amount claimed was under \$10,000 and only 2,282 where the amount claimed was over \$10,000.

<sup>111</sup> Para 7.23 above.

<sup>112</sup> *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 30A r 13 and Pt 30A r 18. In the case of land, the sheriff's officer must first determine "a fair value" of the land and not sell the land at a price "substantially below" that fair value: Pt 30A r 13. In the case of goods, the sheriff's officer must have the approval of the sheriff to sell the goods by private contract after the unsuccessful auction. It is the sheriff, not the sheriff's officer, who determines a fair value of the goods and the sheriff may not approve a sale of the goods by private contract at a price substantially below that fair value: Pt 30 r 18.

The only commentators on the Discussion Paper who referred to the question of whether there should be a provision in the LCA or the LCR under which the bailiff could sell property by public tender or private contract when it remained unsold at the auction were the Australian Finance Conference, Consumer Credit Legal Service (WA) Inc, the Law Society and the Metropolitan and Country Bailiffs' Association. Except for the Bailiffs' Association, these commentators were in favour of such a provision. Consumer Credit Legal Service (WA) Inc only referred to goods when making its comment. It said that it would be a sensible solution provided there was protection to ensure that the goods could not be sold for less than a reasonable price. The Law Society said it should first be necessary to obtain an order of the magistrate and that the magistrate should fix a minimum price save in exceptional circumstances. The Bailiffs' Association said that if the suggestion, which it opposed, were adopted it should be necessary that an order be obtained and the magistrate set the price.

(viii) *Terms as to payment for land*

7.74 By rule 17(1) of Order 25 (Division 1) of the LCR, except where the magistrate otherwise orders, goods or land sold under a warrant of execution are to be sold publicly for "ready money". The requirement as to ready money is interpreted by bailiffs to mean cash or bank cheque. Rule 17(1) provides 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 of the LCA (which is the practice) and so avoids the need to make an actual seizure.<sup>113</sup> In the opinion of the Commission, when the bailiff has proceeded under section 123, he is not necessarily required to sell land for ready money. The conditions of sale for land which are set out in form 108 in the appendix to the LCR require the whole price to be paid on the fall of the hammer. However, rule 18(2) of Order 25 (Division 1) of the LCR states that the sale of land should be made subject to such conditions as the bailiff deems suitable and then provides that the conditions may be according to form 108. If the bailiff considers that a condition requiring the payment of a deposit on the fall of the hammer and the balance within say 21 days is a suitable condition then in the view of the Commission he is entitled to word the condition in this way.

7.75 It is desirable that the conditions of sale of land should be able to include provision for payment of a deposit or part payment on the fall of the hammer with the balance to be paid within a stated period. It is inconvenient to bidders to have to bring to the auction enough in bank cheques and cash to be able to pay the purchase price in full if they are the successful bidder. A period of 14 or 21 days in which to pay the balance of the purchase price could often result in a higher sale price than if the whole price had to be paid on the fall of the hammer. In the Supreme Court, there is no doubt that the sheriff may permit the payment of a deposit or part payment with the balance being paid within a stated period.

7.76 In some auctions by bailiffs, a period of say 21 days is allowed for payment of the balance but in others the full price must be paid on the fall of the hammer. This probably reflects the lack of clarity in the LCR. The position should be made clear and the Commission **recommends** that the LCR should be amended to provide that the conditions of sale of land may include provision that the purchaser shall pay the whole of the price on the

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<sup>113</sup> Para 7.41 above.

fall of the hammer or alternatively a deposit or part payment of an amount specified in those conditions and shall pay the balance of the purchase price within the period specified in the conditions (which may not be more than 21 days after the auction).

(ix) *Sale or mortgage by judgment debtor of land affected by warrant*

7.77 As already explained, in the case of sale of land under a warrant of execution, it is only the judgment debtor's interest in the land which is being sold. Unless the judgment debtor cooperates, the bailiff cannot erect an advertising sign on the land, allow the land and buildings to be inspected or conduct an auction on the land. He is unable to guarantee possession to the purchaser. A better financial result can be obtained if the land can be sold by the judgment debtor himself on a free of encumbrances basis. Even though the warrant is registered at the Titles Office, the judgment debtor may still sell the land by himself. However, in the event of inconsistent sales by the bailiff and the judgment debtor, paramountcy is given to the sale by the bailiff and the registering of the bailiff's transfer: see section 125 of the *Local Courts Act 1904* and section 133 of the *Transfer of Land Act 1893*.

7.78 However, in New South Wales, section 112 of the *District Court Act 1973* facilitates a sale of the land by the judgment creditor on a free of encumbrances basis, or a mortgage of the land. The judgment creditor will be paid out from the proceeds of sale or the loan raised from the mortgage. By that section, where the warrant of execution has been registered at the Titles Office and -

- (a) the judgment creditor consents by notice in writing to the sale or mortgage of the land by the judgment debtor;
- (b) the judgment creditor stipulates in the notice of consent the minimum amount that should be paid to the registrar out of the proceeds of sale or the money advanced in respect of the mortgage;
- (c) the notice of consent is filed with the registrar; and
- (d) the registrar, after due inquiry, endorses the notice of consent with a certificate to the effect that the land has not been sold under the warrant,

then the endorsement of the notice with that certificate operates to prohibit the sale of the land under the warrant of execution during the prescribed period. If during the prescribed period, the judgment debtor sells or mortgages the land and an amount which is not less than the minimum amount set out in the notice of consent is paid to the registrar out of the proceeds of the sale or the money advanced in respect of the mortgage, the registrar on production to him of the document evidencing the sale or mortgage will endorse on that document his consent to the sale or mortgage. The interest of the purchaser or mortgagee evidenced in that document will then not be affected by anything done, whether before or after the endorsement of the consent, under the warrant of execution. The amount paid to the registrar is to be paid by him to the judgment creditor and will be in reduction of the judgment debt.

7.79 The obtaining of higher net proceeds of sale by utilising this section is in the interests of both the judgment debtor and the judgment creditor. The Commission **recommends** that a provision along the lines of section 112 of the *New South Wales District Court Act 1973* under which a judgment creditor may consent to a stay of execution in relation to land to enable the judgment debtor to sell or mortgage the land should be adopted in the LCA. The ALRC recommended the adoption of section 112 in its report,<sup>114</sup> as did the Law Reform Commission of Victoria.<sup>115</sup>

**(j) Priority for arrears of rents**

7.80 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 -

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<sup>114</sup> ALRC Report para 220. The ALRC recommended that the consent of the bailiff should suffice equally with that of the creditor: *ibid.*

<sup>115</sup> *Mortgage Sales and Judgment Debts* (Report No 8, 1987) para 35. The Victorian Commission recommended that the judgment debtor should be able to sell or mortgage the land at the discretion of the sheriff.

- (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*.

7.81 The priority given to the landlord by section 129 of the LCA in respect of arrears of rent 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. As the landlord's right to distrain for arrears of rent has been abolished in Western Australia,<sup>116</sup> there is no reason why landlords should be given priority.<sup>117</sup>

7.82 The Commission **recommends** that section 129 of the LCA under which a landlord of premises in which goods are seized may obtain payment of certain arrears of rent from the proceeds of sale should be repealed. It should be expressly provided that the relevant provisions in the United Kingdom's *Landlord and Tenant Act 1709* from which section 129 was copied 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**

7.83 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. The Discussion Paper raised the question of whether there should be provision in the LCR for the payment of a deposit by the judgment creditor to meet bailiff fees and, if so, what that provision should provide. Responses varied.<sup>118</sup>

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<sup>116</sup> *Distress for Rent Abolition Act 1936*.

<sup>117</sup> 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. Most of the commentators on the Discussion Paper who referred to this question favoured the repeal of section 129.

<sup>118</sup> One commentator said that although it believed there should not be such a provision, if it were introduced it should be limited to the case of warrants of execution. Another considered it should be confined to expenses, as distinct from fees. The Consumer Credit Legal Service (WA) Inc maintained that as bailiffs'

7.84 The fees and costs concerned are quite significant. Thus a requirement under which the judgment creditor could be required to pay a deposit on account of the bailiff's fees and costs is reasonable. Rule 11 of Order 82 of the RSC provides that 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.<sup>119</sup> 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.

7.85 The Commission considers that a similar approach should be taken in Local Courts. It **recommends** that on request being made for the execution or service of any process or document, or for any work for which fees or expenses are chargeable by the bailiff, the bailiff should be able to require a deposit of money to meet those fees and expenses except for poundage. The bailiff should also be able to 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 expenses which might become payable beyond the amount deposited. If the deposit requested is not paid or the undertaking not given, the bailiff should be entitled to report the matter to the Court and to refrain from ongoing execution until he is put in receipt of the deposit or undertaking.

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expenses and fees were recoverable by them before any amount was paid to the judgment creditor, there was no clear case for the requirement of a deposit. For ordinary creditors, the requirement of a deposit might be a barrier to recovering a debt. The Metropolitan and Country Bailiffs' Association said that a deposit should be paid on request by the bailiff following inspection of the goods. It said that the RSC provisions could be considered. The Law Society thought that the provisions of rule 11 of Order 82 of the RSC should be followed.

<sup>119</sup> See also s 163(2) of the SCA.

## Chapter 8

### OTHER ISSUES

#### 1. AUCTIONS BY BAILIFFS - EXEMPTION FROM LICENSING REQUIREMENTS

##### (a) The present position

8.1 At present bailiffs' sales of land by auction are conducted either by the bailiff himself or by a licensed auctioneer employed to conduct the auction. The LCA empowers the bailiff to sell the goods and land of the judgment debtor<sup>1</sup> and section 19 of the LCA makes it clear that the power to sell should include power for the bailiff to sell by auction.<sup>2</sup> However, clause 13 of the schedule to the *Real Estate and Business Agents Act 1978* provides that no person can lawfully conduct an auction sale without holding a licence under that Act.<sup>3</sup> The *Real Estate and Business Agents Act 1978* exempts certain categories of persons from the application of its provisions.<sup>4</sup> Although these do not include bailiffs, it may well be that a court would find that clause 13 of the schedule to the *Real Estate and Business Agents Act*

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<sup>1</sup> Ss 122 and 126.

<sup>2</sup> 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."

The wording of s 19 has never been altered since the LCA was enacted in 1904.

<sup>3</sup> 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 -

- (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*.

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.

<sup>4</sup> 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)).

1978 does not apply to a bailiff when selling land by auction under a warrant of execution.<sup>5</sup> However, the legal position is not completely clear.

**(b) Recommendation**

8.2 The Commission **recommends** that it should be expressly provided that a Local Court bailiff may sell land or goods without being the holder of a licence under the *Real Estate and Business Agents Act 1978* or any other Act, but the bailiff should retain the ability to employ an auctioneer.<sup>6</sup> It does so for the following reasons -

1. In order for a bailiff to conduct an auction it is not necessary that the bailiff should meet the criteria which a person must meet to be granted a licence under the *Real Estate and Business Agents Act 1978*. These criteria are:

- "(a) he is of or over the age of 18 years;
- (b) he is a person of good character and repute and a fit and proper<sup>7</sup> person to hold a licence;
- (c) he has sufficient material and financial resources available to him to enable him to comply with the requirements of this Act; and
- (d) he understands fully the duties and obligations imposed by this Act on agents."<sup>8</sup>

Apart from criterion (a), the emphasis of these criteria is on ensuring that licensees are capable of carrying on or conducting the business of an agent, not an auctioneer, by fulfilling the duties of an agent, such as maintaining a trust account and by meeting the liabilities of an agent. In any case, the manner in which a bailiff must dispose of goods and land seized under a warrant of execution is governed by detailed provisions in the LCA and the LCR and by the common law.<sup>9</sup>

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<sup>5</sup> See Discussion Paper paras 8.1-8.5.

<sup>6</sup> Three of the four commentators on this issue favoured the approach adopted by the Commission. The fourth, the Law Society of Western Australia, was opposed to it.

<sup>7</sup> This includes being qualified in accordance with the Schedule to the Act: *Real Estate and Business Agents Act 1978* s 27(2).

<sup>8</sup> Id s 27(1).

<sup>9</sup> See generally Ch 7 above.

2. The bailiff in the District Court is expressly exempt from the requirements of clause 13 of the schedule to the *Real Estate and Business Agents Act 1978* under section 31 of the *District Court of Western Australia Act 1969* which 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*.<sup>10</sup>

3. 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.

4. The use of the services of an auctioneer who is licensed under the the *Real Estate and Business Agents Act 1978* could be more costly, because the maximum fee under the *Real Estate and Business Agents Act 1978* is higher than poundage<sup>11</sup> where an auctioneer is not instructed.<sup>12</sup>

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<sup>10</sup> *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*.

<sup>11</sup> "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 8.12-8.16 below.

<sup>12</sup> The maximum amount upon which poundage is to be calculated is the amount of the judgment debt, notwithstanding that 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

## 2. INTERPLEADER

### (a) Goods

#### (i) *Present position*

8.3 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.<sup>13</sup> 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 other than the judgment debtor.<sup>14</sup> 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.

8.4 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.<sup>15</sup> The bailiff is required to send notice of the claim to the judgment creditor immediately.<sup>16</sup> 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.<sup>17</sup> 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 summons<sup>18</sup> which the clerk may issue by virtue of the LCA.<sup>19</sup> 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

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\$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* as amended. Admittedly, the bailiff might be able to negotiate a figure less than the maximum, particularly where the only work which the auctioneer does is to attend at the venue of the auction and conduct the auction.

<sup>13</sup> 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: footnote 35 in Ch 2 above.

<sup>14</sup> Para 7.54 above.

<sup>15</sup> 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.

<sup>16</sup> LCR O 30 r 1 and Form 144 in Part I of the Appendix to the LCR.

<sup>17</sup> 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".

<sup>18</sup> LCR O 30 r 4.

<sup>19</sup> S 143.

the magistrate can decide the dispute as to the ownership of the goods.<sup>20</sup> 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.<sup>21</sup>

(ii) *Recommendations*

8.5 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.<sup>22</sup> 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 major defects, the Commission does not recommend any substantial revision of the interpleader procedure in Local Courts. However, in the following paragraphs, it makes three recommendations for minor changes.

8.6 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.<sup>23</sup> 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.<sup>24</sup> For the sake of consistency, the Commission **recommends** that the period now be extended to 14 days.<sup>25</sup>

8.7 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 **recommends** that they should be supplied with the claim

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<sup>20</sup> Ibid and see forms 149 and 150 in the appendix to the LCR. 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.

<sup>21</sup> LCR O 30 r 6.

<sup>22</sup> As to costs, see LCA s 143.

<sup>23</sup> Part I Report para 15.36.

<sup>24</sup> RSC O 17 r 12(2).

<sup>25</sup> The four commentators on this issue favoured the approach adopted by the Commission.

because it would be of assistance to the judgment creditor in deciding whether to admit the claim.<sup>26</sup>

8.8 At present there is no provision for a form to be used by a third party in making a claim in respect of goods. The Commission **recommends** that such a form should be provided and that it should also explain the procedures involved in an interpleader from the point of view of the claimant. Copies of the form should be available from Local Court registries and from bailiffs.

**(b) Land**

*(i) Present position*

8.9 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 question<sup>27</sup> 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.

8.10 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.<sup>28</sup> It therefore does not apply to a bailiff of a Local Court.

*(ii) Recommendation*

8.11 It is clearly unsatisfactory that there is no provision for Local Court bailiff's interpleader in relation to land. As Local Courts do not have jurisdiction to determine an action in which the title to land is in question, the Commission considers that the best way of overcoming the existing lacuna is to provide that the bailiff should also be able to utilise the

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<sup>26</sup> The three commentators on this issue favoured the approach adopted by the Commission.

<sup>27</sup> LCA s 30(2)(b).

<sup>28</sup> RSC O 17 r 1(b).

Supreme Court procedure to obtain relief by way of interpleader.<sup>29</sup> The Commission **recommends** accordingly.

### 3. POUNDAGE FEES

#### (a) Present position

8.12 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 in general calculated on the amount paid but where there has been a sale may not exceed the amount of the judgment debt.<sup>30</sup> As 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*,<sup>31</sup> 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 is the judgment creditor who serves the warrant on the Registrar of Titles.

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<sup>29</sup> The three commentators on this issue favoured the approach adopted by the Commission. 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.

<sup>30</sup> 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.

<sup>31</sup> 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."

8.13 At common law the bailiff is only entitled to poundage when he has seized the goods of the judgment debtor.<sup>32</sup> 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 eventually to 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.<sup>33</sup> 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.<sup>34</sup> This occurs before the advertising is carried out.<sup>35</sup> The common law position in relation to the seizure of goods has not been altered by the LCA or the LCR.

8.14 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*<sup>36</sup> 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."<sup>37</sup>

The comments would be equally applicable to a Local Court bailiff.

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<sup>32</sup> *Bissicks v Bath Colliery Company Ltd* (1878) 3 Ex D 174.

<sup>33</sup> Para 7.41 above.

<sup>34</sup> Para 8.12 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.

<sup>35</sup> 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*.

<sup>36</sup> (1889) 3 CPD 216.

<sup>37</sup> Id 219.

**(b) Recommendation**

8.15 The Commission considers that the payment of full poundage cannot be justified if little or no service has been rendered by the bailiff.<sup>38</sup> For example, 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 the LCA, for which he is in any case entitled to a fee.<sup>39</sup> 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.<sup>40</sup> The Commission **recommends** that except where goods or land have been sold under a warrant of execution the bailiff should be entitled to a fixed fee<sup>41</sup> based on the actual service provided. There could be a scale with graduations in it dependent on the work which the bailiff had done when the money was paid. The bailiff should, however, continue to be entitled to poundage where there has been a sale of goods or land under a warrant of execution.

8.16 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 may have to be addressed.

#### **4. ENFORCEMENT IN LOCAL COURTS OF JUDGMENTS OR ORDERS OF COURTS OTHER THAN LOCAL COURTS**

**(a) Present position**

8.17 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.<sup>42</sup>

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<sup>38</sup> Three of the four commentators on this issue agreed with the Commission. The Metropolitan and Country Bailiffs' Association did not do so, arguing that the act of seizure entitled a bailiff to poundage.

<sup>39</sup> LCR Appendix Part II Bailiff Fees item 4 provides a fee of \$40 for implementation of an advertising programme.

<sup>40</sup> Para 8.12 above.

<sup>41</sup> 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).

<sup>42</sup> 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.

Where this is done, the clerk is required to issue a judgment summons.<sup>43</sup> 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.<sup>44</sup>

**(b) Recommendation**

8.18 Adoption of the Commission's recommendations in Chapter 3 for an enforcement hearing would result in the abolition of the judgment summons procedure. The Commission has also recommended in Chapter 6 that commitment should be abolished. Nevertheless, as 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 **recommends** 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 where the sum due does not exceed \$25,000, the monetary limit of the jurisdiction of Local Courts.<sup>45</sup>

**5. APPOINTMENT OF A RECEIVER**

8.19 There is authority to the effect that a Local Court has power to enforce a judgment in a money claim by equitable execution by means of a receiver.<sup>46</sup> 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. To clarify the matter, the Commission **recommends** that it be expressly provided in the LCA that a judgment in a money claim may be enforced by an equitable execution by means of a receiver supplemented, if deemed necessary, by an injunction restraining the judgment debtor or any other person from dealing with any property, or any interest therein.<sup>47</sup>

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<sup>43</sup> 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*.

<sup>44</sup> 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.

<sup>45</sup> The four commentators on this issue favoured the approach adopted by the Commission at least so long as the sum due does not exceed \$25,000.

<sup>46</sup> Para 2.21.

<sup>47</sup> See SCA s 117(1)(d).

8.20 The LCR do not provide for the means by which an application must be made for the appointment of a receiver by way of equitable execution. The Commission understands that on occasions applications are made *ex parte* so that a judgment debtor is not given warning of the application so that he can dispose of assets before the receiver is appointed. There should be express procedural provisions relating to the appointment of a receiver.

8.21 In the Supreme Court an application for the appointment of a receiver may be made by summons or motion.<sup>48</sup> This application may be joined with an application for an injunction ancillary or incidental to an order appointing a receiver.<sup>49</sup> In special circumstances the application for such an injunction may be made *ex parte* on affidavit<sup>50</sup> and on hearing the application the Court may grant an injunction restraining the person beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of a receiver, and may direct that such summons be issued, returnable on a date fixed by the Court.<sup>51</sup> The Commission considers that a similar procedure and power should be provided in Local Courts. Otherwise a judgment debtor may be able to frustrate the recovery of a debt by means of the appointment of a receiver. To make the application, the judgment creditor should have to utilise the enforcement hearing procedure.<sup>52</sup> However, the adoption of the Supreme Court approach would mean that the application for an injunction ancillary or incidental to an order appointing a receiver could only be made *ex parte* on affidavit in special circumstances. The Commission **recommends** accordingly.

## 6. CHARGING ORDER

8.22 For the same reasons that a Local Court has power to appoint a receiver,<sup>53</sup> a Local Court may have power to enforce a judgment by equitable execution by means of a charging order over a fund in court or in the hands of a third party.<sup>54</sup> In view of the Commission's recommendation that the scope of attachment should be expanded to permit a judgment

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<sup>48</sup> RSC O 51 r 1(1).

<sup>49</sup> Id O 51 r 1(2).

<sup>50</sup> Id O 51 r 1(3).

<sup>51</sup> Id O 51 r 1(4).

<sup>52</sup> Paras 3.12-3.13 above.

<sup>53</sup> Para 2.21 above. The Supreme Court has such a power under s 117(1)(d) of the SCA.

<sup>54</sup> *Brereton v Edwards* (1888) 21 QBD 488 was a case in which a judge made a charging order against money in court standing to the credit of a judgment debtor.

A charging order can apply, for example, to money held by a trustee to which the judgment debtor is beneficially entitled: *Re Ward, Hammond & Son v Official Receiver* [1942] Ch 294.

creditor to attach future debts of the judgment debtor,<sup>55</sup> the Commission **recommends** that the power to enforce a judgment by equitable execution by means of a charging order over a fund in court or in the hands of a third party should not be retained in Local Courts.<sup>56</sup>

## 7. JUDGMENT DEBTOR FAILING TO APPEAR ON HIS OWN APPLICATION

8.23 In Local Courts, there are a number of applications which the judgment debtor can make to the Court when a judgment is being or is expected to be enforced against him. An example is an application under section 139 of the LCA for a stay of execution.<sup>57</sup> The Commission's recommendations would add to these applications. It would, for example, be possible for the judgment debtor to apply for an enforcement hearing<sup>58</sup> or for an order exempting particular goods from execution.<sup>59</sup> The possibility will exist that the judgment debtor having made the application, will not appear at the hearing in the hope of delaying the enforcement of the judgment against him. To counter any such tactic, the Commission **recommends** that where the judgment debtor has made an application to the court but does not appear at the hearing, the Court should be able to adjourn, strike out or dismiss the application.

## 8. COSTS

8.24 The Commission **recommends** that the costs of applications to the Court which are associated with the enforcement of a judgment should be in the discretion of the magistrate or the clerk delegate. If it were to be otherwise, applications might be made which have no realistic likelihood of being successful.

8.25 By the time a judgment is being enforced, the costs of the action to the time of judgment will normally have been taxed and it is inconvenient and costly to have to tax the costs arising from an application made after judgment. However, the magistrate's power to fix the costs at the application is limited. Under Order 37 rule 7 of the LCR, the costs may not be fixed unless -

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<sup>55</sup> Paras 5.12-5.13 above.

<sup>56</sup> The Commission has suggested the retention of O 28 r 10 of the LCR under which the judgment creditor may apply for an order that money paid into court in an action by the judgment debtor against a third party be paid to the judgment creditor: footnote 77 in Ch 5 above.

<sup>57</sup> See para 2.30 above.

<sup>58</sup> Para 3.10 above.

<sup>59</sup> Para 7.17 above.

1. application is made by the party awarded costs; and
2. the opposing party consents to the order being made.<sup>60</sup>

The Commission **recommends** that where the magistrate or clerk delegate has ordered that one party pay the other party's costs of an application associated with the enforcement of a judgment, the magistrate or clerk delegate should have the power to fix those costs.<sup>61</sup>

## 9. RULE MAKING POWER

8.26 The Commission has recommended that many of the recommendations made by it should be implemented by amending the LCR and not the LCA. It **recommends** that, where necessary, amendments should be made to the rule making power in the LCA so that all the amendments made to the LCR in implementing recommendations of the Commission would be valid.

## 10. DRAFTING STYLE

8.27 Amendments to the LCA and the LCR implementing the Commission's recommendations should be so drafted that they are comprehensible to members of the public. The new Court forms which would be required should be simple in style and expressed in plain English so as to be readily understood by the public.<sup>62</sup>

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<sup>60</sup> Theoretically the costs of the examination could be taxed on the day on which of the examination is heard. LCR O 37 r 10. But this would not normally be a practical solution.

<sup>61</sup> Where the order has been made against the judgment debtor, the costs so fixed should be added to the judgment debt. Similarly, if the costs of the application are taxed.

<sup>62</sup> In the Part I Report, the Commission recommended that a review should be conducted of all forms used in Local Courts with the object of making them as helpful to the parties as possible: report para 20.3.

## Chapter 9

### SUMMARY OF RECOMMENDATIONS

9.1 The Commission recommends that -

#### **ENFORCEMENT HEARING**

##### **An enforcement hearing**

1. The examination in aid procedure and the judgment summons procedure should be replaced with a single procedure involving an enforcement hearing at which various orders can be made.

*Paragraph 3.8*

##### **Orders which may be made at the hearing**

2. Where an enforcement hearing is held, the Court, on the application of the judgment creditor, should have the power to order -
  - \* payment by instalments;
  - \* the variation or cancellation of an instalment order;
  - \* attachment of earnings;
  - \* the discharge, suspension or variation of an attachment of earnings order;
  - \* attachment of debts (other than earnings); or
  - \* the appointment of a receiver by way of equitable execution and an injunction ancillary or incidental to an order appointing a receiver.<sup>1</sup>

*Paragraphs 3.9 and 3.11*

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<sup>1</sup> The Commission has not included an order for the issue of a warrant of execution in its recommendation because it considers that the decision to have a warrant of execution issued administratively should remain with the judgment creditor: it should not be something which requires the leave of the Court: para 3.9 above.

3. At an enforcement hearing, the Court, on the application of the judgment debtor, should be able to order -

- \* payment by instalments;
- \* the variation or cancellation of an instalment order; or
- \* the discharge, suspension or variation of an attachment of earnings order.

*Paragraph 3.10-3.11*

4. The Court of its own motion should not be able to make at the enforcement hearing any of the orders listed in recommendations 2 and 3 above.

*Paragraph 3.11*

5. Except where an instalment order is made at judgment or there is an instalment agreement after judgment or an agreement as to the variation or cancellation of an instalment order, the enforcement hearing procedure should be the only means by which the judgment creditor should be able to obtain an order for -

- \* payment by instalments;
- \* the variation or cancellation of an instalment order;
- \* attachment of earnings;
- \* the discharge, suspension or variation of an attachment of earnings order;
- \* attachment of debts (other than earnings);
- \* the appointment of a receiver by way of equitable execution and an injunction ancillary or incidental to an order appointing a receiver.

*Paragraph 3.12*

### **Initiating the procedure**

6. The enforcement hearing procedure should be initiated by an enforcement hearing summons and either the judgment creditor or the judgment debtor should be able to require the issue of the summons. However, where the judgment creditor seeks an order for either -

- (a) attachment of debts (other than earnings); or

- (b) the appointment of a receiver by way of equitable execution with or without an injunction ancillary or incidental to the order,

instead of requiring a summons to be issued, he should be able to apply ex parte on affidavit for an enforcement hearing and for the order which he seeks.

*Paragraphs 3.13-3.14*

- 7. Where an enforcement hearing has been initiated by an enforcement hearing summons

- (a) the judgment creditor should be able to apply at the hearing for any of the orders listed in recommendation 2 above whether or not he was the party who required the summons to issue, and

- (b) the judgment debtor should be able to apply at the hearing for any of the orders listed in recommendation 3 above whether or not he was the party who required the summons to issue.

*Paragraph 3.13*

- 8. A prescribed form of statement of financial affairs should be annexed to the copy of the summons to attend the enforcement hearing which is served on the judgment debtor and he should be required to complete the form and bring it to the enforcement hearing. The judgment creditor should be provided with a copy of the statement at the enforcement hearing. The Court should be able to make an enforcement order notwithstanding that the judgment debtor has not returned a completed statement of financial affairs or without an oral examination of the judgment debtor.

*Paragraph 3.15*

- 9. A notice should be included in the prescribed form of summons to attend an enforcement hearing informing the person to whom it is addressed that he should seek advice before the hearing date if he is unsure of the procedures relating to the examination hearing.

*Paragraph 3.16*

### **Judgment debtor to produce documents at enforcement hearing**

10. (a) The prescribed form of summons to the judgment debtor to appear at an enforcement hearing should continue to require the judgment debtor to produce at the enforcement hearing all books, deeds, papers and writings of whatsoever nature in the judgment debtor's possession or power in any way relating to his financial affairs. The form should go on to say that the documents to be produced by the judgment debtor are to include -
1. passbooks and statements for all bank/building society/credit union accounts;
  2. pay slips;
  3. mortgage statements;
  4. documents relating to the title of any land owned by the debtor; and
  5. copies of tax returns for the two years prior to the judgment.

There should also be a space in the form where the judgment creditor can fill in the details of further documents he particularly wants produced.

- (b) The judgment creditor should be able if he wishes to delete from the prescribed form any of the documents covered by it or delete entirely the requirement to produce documents.

*Paragraph 3.17-3.18*

11. Where it is the judgment debtor who required the enforcement hearing summons to issue, he should be required to produce at the enforcement hearing all books, deeds, papers and writings of whatsoever nature in the judgment debtor's possession or power in any way relating to his financial affairs including those listed in items 1 to 5 of recommendation 10(a) above. The form of summons for use by the judgment debtor should inform him of the requirement.

*Paragraph 3.19*

### **Summons to a person other than the judgment debtor**

12. The clerk, on the application of the judgment creditor or the judgment debtor, should be empowered to issue a summons calling on other persons to give evidence or produce documents or to give evidence and produce documents at the enforcement hearing.

*Paragraph 3.20*

### **Failure of judgment debtor to attend the enforcement hearing in response to a summons to him**

13. The magistrate should continue to have power to order the apprehension of a judgment debtor who fails to comply with the summons to attend an enforcement hearing.<sup>2</sup>

*Paragraphs 3.21 and 3.23*

14. (a) The warrant to apprehend the judgment debtor should issue when the Court makes its order that it issue.
- (b) The Court should only make the order on the application of the judgment creditor.

*Paragraph 3.24*

15. A warrant to apprehend a judgment debtor who fails to attend an enforcement hearing should only continue in force for 12 months from the date on which the magistrate ordered the warrant to issue. A magistrate should be able, on application, to order that the time be extended for a further period not exceeding 12 months or for successive periods not exceeding 12 months but the time should not be extended for any period unless the application is made within the currency of the last preceding period.

*Paragraph 3.26*

### **Magistrate may delegate jurisdiction and powers to clerk**

16. The magistrate should be able to delegate the jurisdiction and powers conferred on him in relation to an enforcement hearing to the clerk.

*Paragraph 3.27*

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<sup>2</sup> Service of the summons should be personal unless the magistrate otherwise orders: footnote 38 in Ch 3 above.

17. Where the judgment creditor applies for the appointment of a receiver with or without an injunction ancillary or incidental to the order, and it appears to the clerk delegate that it would be proper for the magistrate instead of himself to determine the application, then he should refer the application to the magistrate who should determine it.

*Paragraph 3.28*

## **ORDERS FOR PAYMENT BY INSTALMENTS**

### **Retention of instalment orders**

18. Provision for instalment orders should be retained.

*Paragraph 4.8*

### **Instalment orders on the application of the judgment creditor**

19. Where it is a judgment creditor who wishes to apply to the Court for an instalment order, he should be able to apply to the Court either at the time of judgment, or after judgment under the enforcement hearing procedure.

*Paragraph 4.9*

### **Instalment orders on the application of the judgment debtor**

20. (a) The judgment debtor should also be able to apply for an instalment order, either at judgment or after judgment under the enforcement hearing procedure, but the Court's power to make an instalment order on the application of the judgment debtor should be restricted as set out in recommendation 20(b), except where the judgment creditor consents to the order sought.
- (b) In deciding the application, the Court should apply the principle that if the judgment debtor has assets against which the judgment debt could be enforced, the judgment creditor should prima facie be entitled to have the judgment enforced against those assets and an instalment order should not be made.

*Paragraph 4.10*

21. Where the judgment debtor applies for an instalment order in an enforcement hearing summons, the summons should be served on the judgment creditor by the judgment debtor at least five days before the date of the hearing.<sup>3</sup>

*Paragraph 4.11*

22. It should be possible to make an instalment order at judgment or under the enforcement hearing procedure on the application of the judgment debtor where the judgment creditor consents to the order sought. Where the judgment debtor applies for an instalment order in an enforcement hearing summons and the summons sets out the instalment order sought by the judgment debtor, the judgment creditor should be able to consent to the proposed order by endorsing his consent on the copy of the summons served on him and returning it to the Court. The Court should be empowered to make an order in the terms sought in the summons either before or at the enforcement hearing.

*Paragraph 4.12*

#### **Provision of a statement of financial affairs of the judgment debtor**

23. Where the judgment debtor applies for an instalment order in an enforcement hearing summons, the summons should be accompanied by a statement of his financial affairs and a copy of it should be served on the judgment creditor with the summons.

*Paragraph 4.14*

24. The summons issued to the defendant at the commencement of proceedings should contain information about the methods by which judgments may be enforced and in particular should advise the defendant that an application for an instalment order can be made either at or after judgment and of the principle (recommendation 20(b) above) which must be applied in deciding the application. The Court should have a discretion to adjourn an application for an instalment order made at judgment if no statement of financial affairs has been provided or there is insufficient information to make a determination but there should be no stay of enforcement.

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<sup>3</sup> This should also be the case, where the judgment debtor applies in an enforcement hearing summons for the variation or cancellation of an instalment order or the discharge, suspension or variation of an attachment of earnings order: footnote 20 in Ch 4 above.

*Paragraph 4.15*

### **Instalment agreements**

25. It should be possible to file with the clerk at any time after judgment an instalment agreement in the prescribed form and made between the judgment debtor and the judgment creditor. On receiving the agreement the clerk should be required to make an order that the judgment debt be paid by the instalments and at the times specified in the agreement.

*Paragraph 4.16*

26. It should also be possible to file with the clerk an agreement in a prescribed form and made between the judgment debtor and the judgment creditor as to the variation or cancellation of an instalment order. On receiving the agreement the clerk should be required to make an order varying or cancelling the instalment order as specified in the agreement.

*Paragraph 4.17*

### **Stay of enforcement**

27. A stay of enforcement should come into effect on the making of an instalment order by either the clerk or the magistrate whether the application is made by the judgment debtor or the judgment creditor. This should also be the case where there is an instalment order following an instalment agreement.

*Paragraph 4.22*

28. In order to give enough time for an application by a judgment debtor for an instalment order to be dealt with before goods seized by the bailiff under a warrant of execution are sold, goods seized under a warrant should not be sold until after the expiration of 21 days from the date of seizure.

*Paragraph 4.23*

29. If the judgment debtor files a notice of objection to the clerk's refusal to make an instalment order, a stay of enforcement should only come into effect on the magistrate

upholding the objection. However, both the clerk and the magistrate should have a discretion on the ex parte application of the judgment debtor supported by affidavit to make an interim order staying enforcement of the judgment. The order should stay enforcement of the judgment until the date of the hearing.

*Paragraph 4.24*

### **Effect of default in payment**

30. Where an order for payment by instalments is in force together with an attachment of earnings order which has been suspended and default is made in payment of any instalment payable under the order and the default continues for seven days after the day on which the payment was due, then the instalment order should cease to be in force and the attachment of earnings order should come into force.

*Paragraph 4.25*

31. Where no attachment of earnings order has been made, the stay of enforcement should cease when default is made in payment of any instalment payable under the order and the default continues for seven days after the day on which the payment was due.

*Paragraph 4.25*

32. As an exception to the principle that, when the stay of enforcement ceases because of default in payment under an instalment order, the judgment creditor may enforce the judgment debt for the whole of the balance owing, the magistrate should be empowered to order at any time that execution may issue for only a portion of the judgment debt. This power should be exercisable only by the magistrate and not by the clerk.

*Paragraph 4.29*

### **Variation or cancellation of instalment orders**

33. (a) Either the judgment creditor or the judgment debtor should be able to apply under the enforcement hearing procedure for the variation or cancellation of an instalment order.

- (b) Where the judgment debtor applies for the variation or cancellation, the summons should be accompanied by a statement of his financial affairs in the prescribed form.
- (c) An order for variation or cancellation should only be made on the application of the judgment creditor where there has been a substantial increase in the property or means of the judgment debtor or because information given in support of the application for an instalment order was inaccurate.
- (d) Where the judgment creditor applies for a cancellation of the instalment order, in deciding the application the Court should apply the principle that if the judgment debtor has assets against which the judgment debt could be enforced, the judgment creditor should prima facie be entitled to have the judgment enforced against those assets and the instalment order should be cancelled.

*Paragraphs 4.31 and 4.32*

### **Review of decisions**

- 34. Where a decision in relation to an instalment order has been made by a clerk an objection procedure similar to that in Victoria should be provided.

*Paragraphs 4.33 and 4.34*

### **Counterclaims or third party claims**

- 35. The above recommendations relating to instalment orders should apply to all judgments and not only those in which judgment was given in favour of the plaintiff.

*Paragraph 4.35*

### **Successive applications by judgment debtor**

- 36. Where a judgment debtor has applied for an instalment order after judgment and the clerk or the magistrate (as the case might be) has refused to make the instalment order, the judgment debtor should not be able to make another application within three months after that refusal.

*Paragraph 4.36*

### **Costs where decision is reviewed**

37. (a) Where a notice of objection to a decision by a clerk in relation to an instalment order has been filed, the costs of the hearing before the magistrate (and the costs of any application for an interim order staying execution) should be in the discretion of the magistrate and the magistrate should have power to fix the costs at the hearing.
- (b) The magistrate should have the power to confirm, vary or cancel any order for costs made by the clerk in respect of the initial application and to fix or refix the amount of those costs.

*Paragraph 4.37*

### **Provisions to be in the LCR**

38. Except where otherwise indicated, the provisions governing instalment orders should appear in the LCR and not the LCA.

*Paragraph 4.38*

## **ATTACHMENT OF ORDINARY DEBTS**

### **Accounts with banks and similar institutions**

39. Any sum standing to the credit of a judgment debtor with any deposit-taking institution, that is, an institution such as a bank, building society, credit union, or investment fund or corporation, should be attachable as a debt owing or accruing to the judgment debtor notwithstanding that a depositor may be required to -

- \* make a demand or give notice before any money or share is withdrawn;
- \* make a personal application before any money or share is withdrawn;
- \* make a demand in a particular manner or at a particular place;

- \* produce a passbook, receipt or other document before any money or share is withdrawn;
- \* keep the money or share in the account for a specified period;
- \* withdraw a minimum amount in respect of any withdrawal from the account;  
or
- \* maintain a minimum balance in the account.

In the case of a condition requiring notice or a demand, service of the attachment order should have the consequence 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. It should be provided that the deemed notice of withdrawal or demand is irrevocable while the garnishee order remains in force.

Any amount in a withdrawable share account required to be maintained in the account to allow the judgment debtor to retain membership of the institution concerned should not be attachable.

*Paragraphs 5.7 and 5.9*

### **Judicial discretion regarding conditions**

40. The Court should have authority to require the garnishee to ignore a contractual precondition to the payment of a debt or to order some alternative method of satisfying the condition. However, no such order should have the effect of requiring the garnishee to make payment into court pursuant to an attachment order before the earliest time that he could have been required to make payment pursuant to the terms of his relationship with the judgment debtor.

*Paragraph 5.11*

## **Future debts**

41. Subject to the following limitations, the scope of attachment should be expanded to permit a judgment creditor to attach future debts of the judgment debtor -
- (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 the attachment order is made.
  - (b) The attachment should expire one year after the date on which the attachment order is served on the garnishee unless the order is renewed and served before the end of the year.<sup>4</sup>

*Paragraphs 5.12-5.13*

42. Subject to existing rights of third parties, the judgment creditor should have an overriding right to payment at the time a future debt becomes due and owing. Dealings with an investment or contingent right which would defeat the judgment creditor's interest should be prohibited and rendered void except in favour of a purchaser in good faith for value without notice.

*Paragraph 5.12*

43. Subject to recommendation 41(b) above, the attachment remedy in respect of future debts arising from the same legal obligation should have a continuous effect, that is the attachment process should attach any debt that becomes due until the attachment expires or the judgment debt is satisfied.

*Paragraph 5.14*

44. The Court should have power to exempt a portion of the attached debt to ensure that expenses associated with the production of the attached debt are paid or to meet the basic living needs of the judgment debtor and his family. The Court should have a discretion to

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<sup>4</sup> Payments in the form of salary and wages, pensions and periodical payments by way of workers' and accident compensation are the subject of separate recommendations: recommendations 54-68 below. They should be excluded from ordinary attachment of debts.

impose such terms as are appropriate to ensure that the exempted portion of the obligation is used for the purpose for which it is required.

*Paragraph 5.15*

### **Joint debts**

45. It should be possible to attach a judgment debtor's interest in a joint debt. If necessary, the enforcement hearing should be used to conduct an inquiry to determine the judgment debtor's interest in the joint debt. There should be a presumption that joint owners have an equal interest so that the judgment creditor would be entitled to that amount. The judgment creditor, the judgment debtor or a joint owner other than the judgment debtor should be able to rebut the presumption.

*Paragraph 5.16-5.17*

46. Section 28 of the *Partnership Act 1895* should be made expressly applicable to a debt recovered in a Local Court.

*Paragraph 5.18*

### **Crown debts**

47. State Crown debts should be attachable.

*Paragraph 5.19*

### **Costs of compliance**

48. 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. That sum should be at the expense of the judgment debtor.

*Paragraph 5.21*

**Debts not due at date of order**

49. Where a debt is not due at the time the garnishee order is made or is a future debt, the garnishee should be required to pay the money into court or to the judgment creditor on the date on which the debt is due for payment to the judgment debtor less any prescribed amount that he is entitled to retain for his work in making the payment into court. If the judgment debt has been satisfied in the meantime, the judgment debtor should be able to apply for the attachment order to be discharged in whole or part.

*Paragraph 5.22*

50. Where the garnishee is insured with respect to an attached debt, the judgment creditor should be able to serve the attachment order on the garnishee's insurer and to attach so much of the insurance proceeds that might become payable to the judgment debtor as are necessary to discharge the judgment debt. Where an insurer has been served with an attachment order and fails to comply with it, but pays the insurance to the judgment debtor, the garnishee should be discharged from his obligation. Instead the judgment creditor should have a claim against the insurer for failure to comply with the attachment order.

*Paragraph 5.23*

**Effect on set-off**

51. Where a right of set-off arises between the date of the attachment and the payment into court or to the judgment creditor, the set-off should be available but only if the garnishee establishes:
- (a) that the set-off arose pursuant to a binding commitment entered into before service of the attachment order, or
  - (b) that it would be inequitable to deny the set-off.

*Paragraph 5.24*

### **Lien or claim of third party on debt**

52. The Court should have power to order that notice of the proceedings be given to any person other than the judgment debtor (including a joint owner of a debt) who claims to be entitled to money paid under an attachment order. The Court should hear and determine the claim and give such judgment or make such orders in respect of the claim as the Court thinks just.

Paragraph 5.25

### **Procedure**

53. A new procedure for the attachment of debts should be introduced.<sup>5</sup>

*Paragraphs 5.26-5.32*

### **ATTACHMENT OF EARNINGS**

#### **Attachment of wages**

54. The LCA and the LCR should be amended to provide for attachment of wages as a method of enforcing judgments provided provisions are put in place which will provide a satisfactory degree of protection for the financial security of the debtor and his dependants.<sup>6</sup>

*Paragraph 5.40*

#### **Attachment of earnings other than wages**

55. Earnings, that is amounts payable to the judgment debtor -
- (a) by way of wages or salary, including any fee, bonus, commission, overtime pay or other emolument payable in addition to wages or salary; or

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<sup>5</sup> However, the provision in O 28 r 10 of the LCR governing the situation where money has been paid into court in an action by the judgment debtor against a third party and the judgment creditor seeks to have the sum paid to him, should be retained: footnote 77 in Ch 5 above.

<sup>6</sup> Recommendations 62 and 66 below.

- (b) by way of pension, including -
  - (i) an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity;
  - (ii) periodical payments in respect of compensation for the loss, abolition or relinquishment, or any diminution in the emoluments, of any office or employment; and
  - (iii) periodic payments in respect of compensation for the loss of wages or salary because of illness or injury,

should be liable to attachment.

*Paragraph 5.41*

56. Pensions, benefits and allowances payable to the judgment debtor under the Commonwealth *Social Security Act 1991* and the *Veterans' Entitlement Act 1986* should be expressly excluded.

*Paragraph 5.41*

57. Maintenance payments ordered to be paid by a court to a spouse or former spouse or under an agreement between the parties should not be liable to attachment.

*Paragraph 5.43*

### **When the remedy may be used**

58. An attachment of earnings order should be made but suspended as long as the debtor pays the judgment debt by the instalments and at the times set out in the order.

*Paragraphs 5.44-5.45*

### **Duration and scope of the order**

59. There should be no time limit on an attachment of earnings order and it 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.

*Paragraph 5.46*

60. An attachment of earnings order should not be confined to the elimination of arrears. The Court should be empowered, however, to specify otherwise.

*Paragraph 5.47*

### **Judgment debtors who change employment**

61. Where an attachment of earnings order is in force and the judgment debtor ceases to be employed by the garnishee, the judgment debtor and the garnishee should each notify the clerk in writing of that fact. If the judgment debtor has a new employer, he should state the name and address of the new employer, the place of the new employment and the amount of his earnings from the new employer. When the clerk receives such a notice, he should notify the judgment creditor in writing of the contents of the notice. If no written objection is received from the judgment creditor or the judgment debtor within a reasonable time, the clerk should of his own motion revoke the attachment of earnings order and make a further attachment of earnings order directed to the new employer attaching the judgment debtor's earnings.

*Paragraph 5.48*

### **Exempt income**

62. The scheme which applies in the Magistrates' Court in Victoria relating to exempt income should be adopted in the proposed attachment of earnings provisions.

*Paragraphs 5.51-5.52*

### **Costs of complying with the order**

63. An employer should be entitled to be reimbursed for his money and time in complying with an attachment of earnings order. This should be done by entitling him to deduct a prescribed sum. 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.

*Paragraphs 5.53 and 5.57-5.58*

64. 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 of earnings order. The money retained by the garnishee for his expenses in complying with the attachment of earnings order 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.

*Paragraph 5.59*

#### **Stay on other enforcement measures**

65. Unless the Court otherwise orders, where an attachment of earnings order (including a suspended 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.

*Paragraph 5.61*

#### **Protection of the employee's employment**

66. It should be an offence to -
- (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 an attachment of earnings order.

*Paragraphs 5.63-5.64*

### **The problem of more than one attachment order**

67. Where there are in force two or more attachment of earnings orders in respect of the earnings of the same judgment debtor, the person to whom the orders are directed should comply with those orders in the manner set out in rule 27.23(1) of the Victorian *Magistrates' Court Civil Procedure Rules 1989*.

*Paragraph 5.65 and 5.68*

### **Discharge, suspension or variation of an attachment of earnings order**

68. Either the judgment creditor or the judgment debtor should be able to apply under the enforcement hearing procedure for the discharge, suspension or variation of an attachment of earnings order. Where the judgment debtor applies the summons should be accompanied by a statement of his financial affairs in the prescribed form.

*Paragraph 5.71*

### **IMPRISONMENT FOR DEBT**

69. 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) should be repealed.

*Paragraph 6.5*

70. A judgment debtor should be liable to be imprisoned by order of the court for not more than 40 days for default in payment of an instalment under an instalment order if-

- (a) the debtor is before the court;
- (b) the debtor has the means to pay the instalment; and
- (c) the default is 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 or instalments which are in default, the judgment debtor should be discharged from custody.

*Paragraph 6.12*

71. The Court's powers should not be confined to imprisonment but should extend to imposing a fine.

*Paragraph 6.13*

## **SEIZURE AND SALE UNDER WARRANTS OF EXECUTION**

### **Exemptions from seizure and sale**

#### *Clothing and household property*

72. Necessary wearing apparel for the judgment debtor and any dependant of the judgment debtor and necessary household property, as prescribed in the LCR, for the judgment debtor and any dependant of the judgment debtor should be exempt from seizure and sale by a bailiff under a warrant of execution.

*Paragraph 7.7*

#### *Tools and implements of trade*

73. Ordinary tools of trade, plant and equipment, professional instruments and reference books of the judgment debtor whose aggregate value does not exceed an amount prescribed by the LCR should be exempt from seizure and sale by a bailiff under a warrant of execution. At the date of the signing of this report, the sum of \$2,000 would be a satisfactory figure to prescribe. The rules should be amended periodically so that the money value limit is kept abreast of the Consumer Price Index.

*Paragraph 7.12*

*Medical and dental equipment*

74. Necessary medical and dental aids and equipment for the judgment debtor and any dependant of the judgment debtor should be exempt from seizure and sale by a bailiff under a warrant of execution.

*Paragraph 7.14*

*Hardship*

75. The form 103 notice which the bailiff delivers or leaves for the judgment debtor when he seizes any goods of the debtor should briefly explain section 139 of the LCA. (Under this section, the magistrate may stay execution, where the judgment debtor is unable from sickness or other sufficient cause to pay the judgment debt, for such time until it appears that the inability has ceased).

*Paragraph 7.15*

76. In relation to hardship -

- (a) The LCR should contain provisions by which the magistrate, on the application of the judgment debtor, may make an order exempting particular goods from execution.
- (b) The application should be by way of summons supported by affidavit. The summons should describe the item or items of goods concerned.
- (c) The magistrate should only be able to make an order exempting the particular goods from execution if he is satisfied that if the order were not made the judgment debtor or a member of his family would be likely to suffer exceptional hardship.
- (d) A summons may not issue after the expiry of seven days from the date on which the form 103 notice, which the bailiff delivers or leaves for the judgment debtor when he seizes any goods of the debtor, is delivered to or left for the judgment debtor.

- (e) The form 103 notice should contain a notice briefly explaining the judgment debtor's right to apply for an order exempting any goods specified in his application from execution and the prerequisite which must be satisfied before the Court may make an order.
- (f) The magistrate, on the application of the judgment creditor, should be empowered to revoke or vary the exemption order.
- (g) Except as varied by the Commission's recommendations, the provisions in the LCR relating to proceedings in chambers should apply to an application.
- (h) The magistrate should be able to delegate to the clerk the jurisdiction and powers conferred on him in relation to an application for an exemption order or an application for the revocation or variation of an exemption order.
- (i) If the above recommendations are implemented, the minimum period which must elapse before a sale of goods may take place should be extended from six days to 14 days.

*Paragraph 7.17*

#### *Judgment debtor's motor vehicle*

77. There should not be a separate provision in the LCA or the LCR under which the judgment debtor's motor vehicle might be exempt from execution.

*Paragraphs 7.22*

#### **A duty to act reasonably**

78. The LCR should provide that in selling land or goods under a warrant of execution the bailiff should act reasonably with due regard to the interests of both the judgment creditor and the judgment debtor and should not sell at less than a reasonable price.

*Paragraph 7.27*

79. "A reasonable price" should be defined in the LCR as a price which is reasonable having regard to what is offered, namely the judgment debtor's right title and interest in the land or goods, and the circumstances of the sale.

*Paragraph 7.27*

### **Seizure of land not required**

80. A provision similar to section 120(1) of the SCA should be adopted in the LCA.

*Paragraph 7.28*

### **Issues arising from the principle that only the debtor's interest is sold**

#### *Amounts owing to encumbrance holders*

81. The LCA should be amended to require encumbrance holders and rating authorities to provide the bailiff with any information in their possession which is necessary to answer enquiries which the bailiff is required to make by the LCR in carrying out his duties under a warrant of execution over land.

*Paragraph 7.32*

82. It should be an offence to refuse or fail to provide the information to the bailiff with the penalty being a fine.

*Paragraph 7.32*

83. (a) The LCR should be amended to require the bailiff, a reasonable time before advertising land for sale under a warrant of execution, to make enquiries -

(i) as to the maximum amount secured by any encumbrance shown on the certificate of title to the land;

(ii) as to the present amount outstanding under any such encumbrance;

(iii) as to the daily amount of interest;

- (iv) where liability under an encumbrance shown on the certificate of title is not measured by a principal sum and interest then as to the terms and details of the encumbrance, and
  - (v) of any authority levying or assessing rates or land tax in respect of the land to ascertain any rates or taxes outstanding in respect of the land.
- (b) The LCR should require the bailiff on request from a prospective purchaser to disclose information which he has obtained and to disclose at the auction before calling for bids the information which he has obtained.
- (c) The LCA should be amended to provide that no action should lie against a bailiff for any incorrect information furnished by him in good faith and after making reasonable inquiry, pursuant to his obligations under the LCR to disclose information obtained by him.

*Paragraph 7.33*

*Indicating in the advertisement that only the debtor's interest in the land is being sold*

84. The LCR should provide that an advertisement for the sale of land under a warrant of execution should state that only the judgment debtor's interest in the land will be sold, briefly explain the effect of this in general terms and state that further information is available from the bailiff. The wording of the explanation and statements to be used should be prescribed in the LCR. Mention should be included of the fact that any outstanding rates or land tax are a charge on the land.

*Paragraph 7.37*

### **Advertising**

85. (a) Where the bailiff intends to put up any goods or land for sale by public auction under a warrant of execution he should cause notice of the warrant, the time and place of the auction 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) In any event,
  - (i) In the case of goods, the bailiff should advertise notice of the warrant, the time and place of the auction and particulars of the goods at least once in a newspaper circulating in the town or district in which the goods are to be sold. This advertisement should appear at least four days before the day appointed for the sale.
  - (ii) In the case of land, the bailiff should advertise notice of the warrant, the time and place of the auction and particulars of the property concerned at least twice in a newspaper circulating in the neighbourhood of the property and the advertisement should appear first at least 14 days before the day appointed for the sale.

*Paragraph 7.42*

### **Sale of goods by auction without advertising**

- 86. If in the opinion of the bailiff, the total value of goods seized by him under a warrant of execution is less than \$1,000, he may sell the goods by public auction in any public auction room without advertising.
- 87. The provision under which goods may be sold immediately without notice of sale, or may be sold earlier than 4 days after notice of the sale, where the goods are of a perishable nature or the judgment debtor so requests should be retained.

*Paragraph 7.46*

### **Venue and time of sale**

- 88. Except where magistrate otherwise orders, where land or goods are to be sold by a bailiff by public auction, he should sell them at the place and time which he considers to be most advantageous to the judgment debtor and the judgment creditor. The bailiff should inform himself as to where and when it is most advantageous to the parties to hold the auction of the land or goods and hold the auction at that place and time.

*Paragraph 7.48*

### **Notice to debtor of intended sale of goods and land**

89. Written notice of the time and place where the goods will be sold should be given or posted to the judgment debtor at least three days before the day appointed for the sale.

*Paragraph 7.50*

90. The LCR should require the bailiff prior to advertising to post a notice to the judgment debtor giving the time and place for the sale of land.

*Paragraphs 7.52*

### **Title to goods: section 159 of the SCA**

91. A provision along the lines of section 159 of the SCA should be included in the LCA.

*Paragraph 7.56*

### **The Sale**

#### *Determination of reasonable price*

92. Before selling any land or goods by public auction, public tender or private contract the bailiff should take reasonable steps to determine a reasonable price for the land or goods. For the purposes of determining a reasonable price for the land or goods, the bailiff should be able to -

- (a) request the judgment debtor to provide the bailiff with such information relevant to the value of the land or goods as is known to the judgment debtor or is reasonably capable of being ascertained by the judgment debtor;
- (b) if the nature and apparent value of the land or goods is such that it is reasonable to do so, engage a suitably qualified and experienced person to give the bailiff an opinion about the value of the property.

*Paragraph 7.62*

*Bailiff can accept highest bid*

93. (a) The LCR should provide that at the public auction the bailiff should be entitled to accept the highest bid provided it is not less than "a reasonable price".
- (b) The LCR should provide that where the bailiff offers land or goods for sale by public tender or private contract he should be entitled to accept any offer which is not less than a reasonable price.

*Paragraph 7.63*

*Unsold property may be auctioned again*

94. The LCR should be amended to provide that where the property, whether land or goods, offered for sale by a bailiff by public auction was not sold at the first auction, the bailiff may, with the written consent of the judgment creditor, offer the property for sale by public auction on a second occasion.

*Paragraph 7.65*

*Generally sales to be by auction*

95. As a general principle sales by bailiffs should always be by public auction.

*Paragraph 7.68*

*Application to magistrate to sell by private contract*

96. The magistrate, on the application of the judgment creditor or the judgment debtor made by summons supported by affidavit, should be empowered to order that goods or land may be sold by the bailiff by public tender or private contract. It should be possible for the order to be made on such terms as the magistrate thinks fit.

*Paragraph 7.70*

*Property unsold at auction*

97. Where the bailiff has offered property for sale by public auction on two occasions but the property remains unsold after the second auction, the bailiff may, with the written consent of the judgment creditor, within 28 days of the second auction sell the property by public tender or private contract at a price which is not substantially below the reasonable price which the bailiff had determined for the purposes of the second auction. Before selling the property, the bailiff should give the judgment debtor notice that he is endeavouring to sell the property under this provision.

*Paragraphs 7.73*

*Terms as to payment of land*

98. The LCR should be amended to provide that the conditions of sale of land may include provision that the purchaser shall pay the whole of the price on the fall of the hammer or alternatively a deposit or part payment of an amount specified in those conditions and shall pay the balance of the purchase price within the period specified in the conditions (which may not be more than 21 days after the auction).

*Paragraphs 7.76*

*Sale or mortgage by judgment debtor of land affected by warrant*

99. A provision along the lines of section 112 of the New South Wales *District Court Act 1973*, under which a judgment creditor may consent to a stay of execution in relation to land to enable the judgment debtor to sell or mortgage the land, should be adopted in the LCA.

*Paragraph 7.79*

**Priority for arrears of rents**

100. Section 129 of the LCA, under which a landlord of premises in which goods are seized may obtain payment of certain arrears of rent from the proceeds of sale should be repealed. It should be expressly provided that the relevant provisions in the United Kingdom's *Landlord and Tenant Act 1709* from which section 129 was copied do not

apply in respect of an execution under a warrant of execution issued out of a Local Court in Western Australia.

*Paragraphs 7.82*

### **Deposit to secure costs of execution**

101. On request being made for the execution or service of any process or document, or for any work for which fees or expenses are chargeable by the bailiff, the bailiff should be able to require a deposit of money to meet those fees and expenses except for poundage. The bailiff should also be able to 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 expenses which might become payable beyond the amount deposited.

*Paragraph 7.85*

102. If the deposit requested is not paid or the undertaking not given, the bailiff should be entitled to report the matter to Court and to refrain from ongoing execution until he is put in receipt of the deposit or undertaking.

*Paragraph 7.85*

## **OTHER ISSUES**

### **Auctions by bailiffs - exemption from licensing requirements**

103. It should be expressly provided that a Local Court bailiff may sell land or goods without being the holder of a licence under the *Real Estate and Business Agents Act 1978* or any other Act, but the bailiff should retain the ability to employ an auctioneer.

*Paragraph 8.2*

### **Interpleader**

104. 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 "return of post" to 14 days.

*Paragraph 8.6*

105. Where a claim in respect of goods is made, the grounds of the claim should be supplied with the claim.

*Paragraph 8.7*

106. A form should be provided to be used by a third party in making a claim in respect of goods. It should explain the procedures involved in an interpleader from the point of view of the claimant. Copies of the form should be available from Local Court registries and from bailiffs.

*Paragraph 8.8*

107. A bailiff should be able to utilise the Supreme Court procedure to obtain relief by way of interpleader in the case of land.

*Paragraph 8.11*

#### **Poundage fees**

108. Except where goods or land have been sold under a warrant of execution, the bailiff should be entitled to a fixed fee based on the actual service provided. He should, however, continue to be entitled to poundage where there has been a sale of goods or land under a warrant of execution.

*Paragraph 8.15*

#### **Enforcement in Local Courts of judgments or orders of courts other than Local Courts**

109. Express provision should 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 where the sum due does not exceed \$25,000, the monetary limit of the jurisdiction of Local Courts.

*Paragraph 8.18*

#### **Appointment of a receiver**

110. It should be expressly provided in the LCA that a judgment in a money claim may be enforced by an equitable execution by means of a receiver supplemented, if deemed

necessary, by an injunction restraining the judgment debtor or any other person from dealing with any property, or any interest therein.

*Paragraph 8.19*

111. It should be possible to join an application for the appointment of a receiver with an application for an injunction ancillary or incidental to an order appointing a receiver. In special circumstances it should be possible to make such an application ex parte on affidavit and on hearing the application the Court should be able to grant an injunction restraining the person beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of a receiver, and should be able to direct that such summons be issued, returnable on a date fixed by the Court.<sup>7</sup>

*Paragraph 8.21*

### **Equitable execution by a charging order**

112. The power to enforce a judgment by equitable execution by means of a charging order over a fund in court or in the hands of a third party should not be retained in Local Courts.

*Paragraph 8.22*

### **Judgment debtor failing to appear on his own application**

113. Where the judgment debtor has made application to the Court when a judgment is being or is expected to be enforced against him but does not appear at the hearing, the Court should be able to adjourn, strike out or dismiss the application.

*Paragraph 8.23*

### **Costs**

114. The costs of applications to the Court which are associated with the enforcement of a judgment should be in the discretion of the magistrate or the clerk delegate.

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<sup>7</sup> To make the application, the judgment creditor should have to utilise the enforcement hearing procedure: recommendations 2, 5 and 6 above.

*Paragraph 8.24*

115. Where the magistrate or clerk delegate has ordered that one party pay the other party's costs of an application associated with the enforcement of a judgment, the magistrate or clerk delegate should have the power to fix those costs.

*Paragraph 8.25*

**Rule making power**

116. Where necessary, amendments should be made to the rule making power in the LCA so that all the amendments made to the LCR in implementing recommendations of the Commission would be valid.

*Paragraph 8.26*

P G CREIGHTON, *Chairman*

C J McLURE, *Member*

P R HANDFORD, *Member*

22 December 1995

## **Appendix I**

### **LIST OF THOSE WHO COMMENTED ON THE DISCUSSION PAPER**

Aboriginal Legal Service of Western Australia (Inc)  
Australian Finance Conference  
BankWest  
Peter A Brindal & Co  
G Bruce, Acting Executive Officer Magistrates' Courts  
Consumer Credit Legal Service (WA) Inc  
G C Farr  
Financial Counsellors Resource Project  
Institute of Mercantile Agents Ltd  
Law Society of Western Australia  
I G Martin SM, Deputy Chief Magistrate  
Metropolitan and Country Bailiffs' Association  
S McCaskey  
C S Macphail, Sheriff  
A G Mitchell, Bunbury bailiff  
Hon M Nixon MLC  
G A Smith  
D C Spencer

**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*



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**

**FORM 80 UNDER THE AUSTRALIAN CAPITAL TERRITORY'S MAGISTRATES COURT (CIVIL JURISDICTION) ACT 1982**

**FORM 80**

MUST BE FILLED IN DUPLICATE

(Subsection 308(2) and 331(2))

**STATEMENT OF PROPERTY AND FINANCIAL CIRCUMSTANCES**

[The purpose of this form is to assist the Court to understand your financial circumstances]

I,.....  
.....  
(full name, address and occupation)

being duly sworn, \*make oath and say/\*affirm:

- 1. I am the judgment debtor.
- 2. A true statement of my property and financial circumstances is listed below.
- 3. Amount and Source of Weekly Income:

Occupation(s):.....  
Name(s) and address(es) of Employer(s).....  
.....

**Use nearest whole dollars only**

Gross Wage: [BEFORE Tax or other deductions]	\$.....
Maintenance received (Child/Spouse):	\$.....
Regular overtime (if any):	\$.....
Benefits received from employer (car, telephone, expense account, etc):	\$.....
Gross average earnings from self-employment or partnership for last 12 months:	\$.....
Are you expecting your income to be more or less in the next 12 months? Why?.....	
.....	
.....	

If unemployed:  
(i) state length of last employment, .....  
  
(ii) date when last employment ceased...../...../....., and

(iii) gross weekly amount earned when still employed \$.....

Pension or Benefit received or any other payment from the Department of Social Security such as Family Payments or from Department of Veterans Affairs: \$.....  
 Worker's compensation received: \$.....  
 Board or rent received: \$.....  
 Average weekly income from bank, building society shares etc: \$.....  
 Other (give details): \$.....  
 .....  
 .....  
 .....

Are you expecting a lump sum payment in the foreseeable future? YES/NO  
 if Yes please give details and expected date of receipt.  
 .....  
 .....

TOTAL GROSS WEEKLY INCOME: \$.....

**4. Property and Assets: Use nearest whole dollars only**

- A. Market value of place of residence owned: \$.....  
 Amount owing on mortgage: \$.....
- B. Market value of any other residence or land owned other than where you live: \$.....  
 Amount owing on mortgage: \$.....  
 Market value of motor vehicle(s):  
     Year: .....Make/model..... \$.....  
     Year: .....Make/model..... \$.....
- C. Cash that is readily available or can be made available: (eg deposits on call, deposits on short-term, credit in banks, building societies etc). \$.....

BANK/BUILDING SOCIETY	BRANCH	TYPE OF ACCOUNT	ACCOUNT NUMBER	AMOUNT HELD (nearest whole dollar only)
.....	.....	.....	.....	\$.....
.....	.....	.....	.....	\$.....
.....	.....	.....	.....	\$.....
.....	.....	.....	.....	\$.....

D. Other investments including shares, debentures, bonds: \$.....

E. Money owing to you:

	From:.....	\$.....
	[If insufficient room please attach a list]	
	TOTAL:	\$.....

F. Value of interest in partnership or business: \$.....

G. State approximate resale value of furniture and personal goods: \$.....

Amount owing on these: \$.....

H. Other assets (give details): \$.....

.....

.....

.....

TOTAL NET VALUE: \$.....

I. Life insurance policies: Specify, giving surrender value(s) \$.....

..... \$.....

..... \$.....

..... \$.....

..... \$.....

..... \$.....

TOTAL PROPERTY AND ASSETS: \$.....

5. Are any assets jointly owned: (Give details)

.....

.....

.....

.....

.....

**6. Debts, Liabilities and other financial Obligations : Use nearest whole dollars only**

(a) **Weekly** expenses:

	Income Tax (including Medicare Levy):	\$.....
	Superannuation	\$.....

Housing (mortgage, board, rent, hospital or institution)	\$.....
General Rates:	\$.....
Water and Sewerage Rates:	\$.....
Child care costs:	\$.....
Maintenance actually paid:	\$.....
Electricity and gas (fuel):	\$.....
Food/Supermarket purchases:	\$.....
Other general household expenses	\$.....
Vehicle expenses (registration, insurance, maintenance, fuel, parking, NRMA expenses):	\$.....
Fares:	\$.....
Telephone:	\$.....
Insurance policies:	\$.....
School fees and other schooling costs:	\$.....
Clothing and shoes:	\$.....
Medical, Dental, Optical and Chemist expenses:	\$.....
Entertainment and Recreational activities:	\$.....
Payments on court orders and fines:	\$.....
Union Fees:	\$.....
Ambulance Insurance:	\$.....
Haircuts:	\$.....
Gifts (Christmas, birthdays, etc):	\$.....
Pets/Vets:	\$.....
Other expenses (give details):	\$.....

.....  
 .....  
 .....  
 .....

TOTAL WEEKLY EXPENSES: \$.....

(b) Credit Debts outstanding (give details):  
 (Hire purchase (eg, household goods, tools of trade),  
 leases, credit cards, contract, personal loans,  
 store accounts, guarantees being paid off, etc).

DEBT PAYABLE TO	AMOUNT OF WEEKLY INSTALMENT	FULL AMOUNT OWING
.....	.....	\$.....
.....	.....	\$.....
.....	.....	\$.....
.....	.....	\$.....

(c) Other Debts (give details: eg, legal/accounting expenses,  
 trade people, utilities arrears, medical expenses, lay bys).

.....

.....  
.....  
.....  
.....

7. Have any of the debts listed in Question 6 been jointly incurred with any other persons? If Yes, give details YES/NO

.....  
.....  
.....  
.....

8. Give details of any other circumstances which affect you or your family's position (eg, number and age of dependants, health, etc.)

.....  
.....  
.....  
.....  
.....  
.....  
.....

Sworn (or affirmed) at Canberra in the  
Australian Capital Territory  
this            day of            19  
Before me:

.....  
Deponent

.....

**WARNING:**  
**ANY PERSON WHO MAKES A FALSE STATEMENT MAY HAVE THE**  
**INSTALMENT ORDER VARIED OR CANCELLED**

**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>Questions</i>	<i>Column 2</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**

### **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;
- (mc) amounts paid up to the bankrupt for re-establishment support under the Rural Adjustment Scheme within the meaning of the *Rural Adjustment Act 1992*;

- (md) amounts paid to the bankrupt by the Commonwealth as compensation in relation to the loss of:
  - (i) an amount described in paragraph (k), (m), (ma), (mb) or (mc);
  - (ii) property purchased or acquired wholly or partly with such an amount;
- (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 VI

### COMPARISON OF ENFORCEMENT POWERS IN THE SUPREME COURT AND LOCAL COURTS

#### SUPREME COURT

#### LOCAL COURTS

#### JUDGMENT FOR THE 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 receiver<sup>1</sup>

Commitment under the *Debtors Act 1871*

Committal under section 130 of the LCA

Writ of sequestration

*No equivalent*

Writ of attachment

*No equivalent*

#### JUDGEMENT FOR THE POSSESSION OF LAND

Writ of possession

Warrant 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*

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<sup>1</sup> See footnotes 44 and 45 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