



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 61**

**Enforcement Of Judgment Debts**

**REPORT**

**APRIL 1977**

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

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## **PREFACE**

The report reproduced below was submitted to the Attorney General, the Hon. I.G. Medcalf, Q.C., M.L.C., on 18 April 1977.

On 6 March 1975, the then Minister for Justice, the Hon. N. McNeill, M.L.C., wrote to the Commission enclosing a working paper prepared by Mr. D. St L. Kelly (then of the University of Adelaide) for the Commonwealth Commission of Inquiry into Poverty, and asking the Commission to examine it and report in due course. Subsequently, the Commonwealth Commission of Inquiry into Poverty submitted a report on the area covered by the working paper, and the Commission decided it would be more helpful to submit comments on the report rather than on the working paper.

Because the reference merely called for comments on the report of the Commonwealth Commission, and not for an independent investigation of the subject, the issuing of a working paper was considered inappropriate. The report below summarises the main recommendations of the Commonwealth report, indicates those which are applicable to the situation in Western Australia and makes brief comments of a general nature upon them.



## INTRODUCTION

This project arose in 1975 from a request by the then Minister for Justice, the Hon. N. McNeill, to consider a preliminary draft Report prepared by Mr. D. St L. Kelly (who was then a lecturer in law at the University of Adelaide Law School) for the Commonwealth Commission of Enquiry into Poverty and entitled *Enforcement of Judgment Debts*. This draft was subsequently superseded by a final Report which has become the report of the Commission of Enquiry into Poverty and which is entitled *Debt Recovery in Australia*. It is on this final Report that the Law Reform Commission has made the comments in the present document.

The recommendations taken as a whole form a complete system, the central recommendation of which would appear to be that the appropriate enforcement remedy should be determined by the tribunal after an examination hearing. Adoption of this principle would deprive a judgment creditor of his existing right to select the means by which he enforces his judgment. The Report raises questions of policy relating to the striking of a balance between facilitating recovery of debts by creditors on the one hand and safeguarding debtors from undue hardship on the other.

The attached document consists of two parts. Part I sets out in broad terms the contents of the Report, which is a comprehensive document numbering 420 pages. In order to give an idea of the range and scope of the matters discussed in the Report the Commission has reproduced as an Appendix to this document the table of contents of this Report.

Part II is a summary of the Report's major specific proposals, together with the Commission's comments thereon.

## **PART I - SUMMARY OF THE REPORT**

Paragraphs 1 to 6.1 which immediately follow are a summary of the Report and are not necessarily the views of the Law Reform Commission of Western Australia.

### **1. General**

1.1 Laws governing the recovery of debts in Australia fall into three main groups -

- A. Systems established in each State for recovery of judgment debts.
- B. Federal law with respect to bankruptcy.
- C. Laws of each State regulating pre-judgment collection activities of creditors and their agents.

Each of these laws is in need of considerable reform.

### **2. State laws for recovery of judgment debts**

2.1 These laws were adopted from English nineteenth century models and are therefore of some antiquity. There were then two main English methods for recovery of judgment debts -

- (a) the seizure and forced sale of goods on a warrant of execution:
- (b) the imprisonment of the judgment debtor himself.

2.2 In a series of reforms during the nineteenth century, imprisonment for debt was abolished in England although it continued to exist in the guise of contempt of court. Warrants of execution also had certain limits placed on them. In addition, two new forms of judgment debt recovery were established in the garnishee or attachment of wages and the judgment summons. Various Australian States adopted different aspects of the English nineteenth century reforms in this area. There was serious doubt about the appropriateness and effectiveness of the general enforcement schemes adopted in Australian jurisdictions and even more doubt exists today.

2.3 The rapid increase in the availability and use of consumer credit, particularly in the last thirty years, has helped to create a society in which consumers are expected and encouraged to commit themselves to payment on credit for goods and property which they cannot purchase in cash. The greater variety of consumer goods, the stimulus of advertising, the growth in the purchasing power of wages since the beginning of the twentieth century, the lack of adequate education in the handling of money and the availability of credit have all contributed to a situation in which many consumers either misjudge their immediate ability to pay or assess their capability in this regard exclusively by reference to present conditions. Many consumers ignore altogether the possibility of supervening illness, accident or unemployment. Laws modelled on the apprehended needs of a society in which consumer credit was virtually unknown, and in which the material hopes and aspirations of the great majority of society were vastly different from today, are unlikely to prove apt, for the radically altered circumstances in which they now operate. What then may have seemed less than honest is now an accepted practice. What then seemed reprehensible prodigality now passes for approved behaviour.

### **3. Bankruptcy and insolvency laws**

3.1 Bankruptcy and insolvency laws are also based on English models and have undergone little radical change since the nineteenth century. Such laws are hardly well designed for dealing with consumer debtors, a class of persons for whom this type of relief is becoming increasingly important.

### **4. Laws as to pre-judgment collection**

4.1 The third area of concern, the pre-judgment collection activities of creditors and their agents, is relatively free from the incubus of laws and procedures developed in different times for different needs. Even recent amendments to the law offer little by way of active encouragement to debtors and creditors to make arrangements without prior recourse to legal action. In some cases the process of establishment of the debt seems designed to intimidate the debtor, rather than to inform him of his rights and encourage him to assert them.

4.2 Reform of the relevant State and Commonwealth legislation must be based on a clear appreciation of the policies and interests to be served by the law as well as upon a sound

appreciation of the multitude of reasons for indebtedness and default. It is clear enough that the State debt recovery laws, both pre and post judgment, should ensure an effective means for creditors to recover the money owed to them while protecting the debtor from harassment and undeserved hardship. They should encourage and assist not only in the repayment of debts but also in the rehabilitation of those who, through misfortune, mismanagement or a lack of planning, are unable to pay their debts. Unfortunately, the laws are defective when judged by the stated aims. In many instances, the remedies made available to, and used by, an individual creditor are such as to render inevitable further and more extensive default by the affected debtor. Moreover, the aim of debtor assistance and rehabilitation is one which at the present time is served only in an inadequate and haphazard manner.

4.3 Bankruptcy and insolvency laws are defective in their failure to provide either adequate incentives towards self-rehabilitation by the debtor or practical schemes for consumer debtors for the consolidation and composition of debts short of bankruptcy. They are also defective in their failure to provide adequate financial and budgetary advice for those whose misfortune or ineptitude has led them into financial trouble.

4.4 Notwithstanding historical antipathy towards debtors and suspicion concerning their standards of honesty, debt default generally connotes neither fraud nor reckless ineptitude. The law must certainly assist in the identification and punishment of fraudulent debtors but it should not be based on the premise that all, or even most debtors are of this type. Illness and unemployment, together with over-commitment for which the debtor is by no means always exclusively responsible, rather than presumption and ill-behaviour, were probably the main causes of debt default in Australia in 1974.

## **5. Reform of law**

5.1 If the law is to provide a realistic and fair means of accommodating the interests of debtors equally with those of creditors it must take account of the possibility of simple misfortune and of the inadequacy of debtors budgetary management or planning.

5.2 Of course, the inevitable tendency of much consumer protection legislation is towards an increase in the costs borne by creditors, costs which in many cases will ultimately be passed on to consumers in the form of higher prices or higher credit charges. This tendency is

a factor to be borne in mind in any revision of debt recovery laws because any diminution in the effectiveness of creditors' remedies must lead to an increase in bad debt losses or to the incurring of additional costs in recovering the sums owed.

5.3 There are several debt recovery rules and practices in the various Australian jurisdictions which constitute a clear denial of procedural justice, and these should be reformed notwithstanding the danger of increased costs. If amendments are carefully framed they may give encouragement to debtors to assume and maintain a more acute sense of responsibility in the management of their affairs and may achieve, albeit indirectly, an eventual lessening in the rate of recurrent debt default.

## **6. The Policy Bases of the Report**

6.1 The policy bases of the Report were summarized as follows:

*"A system dealing with the recovery of debts should be based on three main considerations:*

1. *The need to provide an effective means for creditors to recover money owing to them.*
2. *The need to protect debtors and their families from harassment by their creditors and from hardship resulting from the use by their creditors of the remedies available to them.*
3. *The need to maximise the rehabilitation of debtors and to provide them with financial and budgetary advice and counselling in appropriate cases."*

## **PART II - SUMMARY OF THE SPECIFIC PROPOSALS OF THE REPORT AND THE COMMISSION'S COMMENTS THEREON**

The Report's major proposals are set out in the following paragraphs, followed in each case by the Commission's comment.

### **A. EXAMINATION HEARING AND ORDER FOR PAYMENT BY INSTALMENTS**

1. *"The examination hearing, followed by an order for payment by instalments, should be regarded as the central means for the recovery of judgment debts owed by consumer debtors. An instalment order should be the preferred mode of recovery except where the creditor's interests would be seriously prejudiced. "*

#### **Position in Western Australia**

While an examination hearing plays an important role in Western Australia in the context of judgment summonses it could not be described as the "central means for the recovery of judgment debts". There is rarely an examination of the debtor before commencing execution measures though there is provision for an examination in aid of execution. "Payment by instalments" is only one possible means of execution. Often a creditor will issue a warrant of execution as the first attempt at enforcement and will only fall back on the judgment summons if the warrant fails.

#### **Commission's comment**

Traditionally the creditor has had the option of choosing the way a judgment is to be enforced. The Report suggests taking away this right and making all judgments enforceable by instalment order except where, the creditor's interests would be seriously prejudiced. It is arguable that this would add to the costs of debt collection, which would in the end have to be borne by the consumers in increased credit costs. It might also be suggested that it would give debtors more time to conceal assets. On the other hand, to lay emphasis on payment by instalments would perhaps be an easier obligation for the debtor to meet and would prevent the sort of hardship which could be caused by, say, a warrant of execution.

2. *"There should be no artificial limits placed on the orders which may be made at an examination hearing. The choice between the available modes of execution should be made by the debt recovery tribunal. "*

(The Report maintains that the debt recovery tribunal should be able to make any order that appears to be appropriate to the situation, and that only the tribunal should be able to select the enforcement remedy.)

### **Position in Western Australia**

In Western Australia the creditor chooses the enforcement proceedings and the only way a debtor can affect that is either by prior negotiation or by becoming bankrupt. The court has no role to play in the selection of the enforcement remedy. On a judgment summons hearing the only order that can be made is the grant or refusal of an instalments payment order, or in rare cases, that the full debt be paid at once if the debtor has the means to do so.

### **Commission's comment**

The suggestion that the appropriate enforcement remedy should be selected by the debt recovery tribunal rather than the creditor is a novel one. However, if the tribunal is to concern itself with protecting the debtor from hardship, then it is appropriate that the tribunal should choose the enforcement remedy.

3. *"Debtors, as well as creditors, should be permitted to apply for an examination hearing followed by an instalment order. The sole example of a debtor-instituted proceeding is in New South Wales. This procedure should be amended to allow the tribunal to make an order based on its own assessment rather than simply on the debtor's pre-conceived proposal."*

(In New South Wales the tribunal can only accept or reject the debtor's proposal. The Report proposes that the tribunal have additional power to exercise its own discretion.)

### **Position in Western Australia**

There is no procedure in Western Australia for a debtor to apply for examination.

### **Commission's comment**

In Western Australia debtors can make arrangements with creditors for a consent affidavit to be filed, after a judgment summons has been issued offering to pay so much per week: *Local Court Rules*: Order 26 Rule 13A. A magistrate may then make an instalment order for the debtor to pay so much per week. Whether formal procedure proposed by the Report is necessary is a matter of policy. There are practical ways a debtor can bring that situation about, but a formal remedy would improve his position.

It is arguable that the debtor should be able to initiate such a proceeding so as to be able to reorganize his financial affairs. It is of course at present possible for a debtor to apply for suspension or variation of an order made on a judgment summons under *Local Court Rules*: Order 26 Rule 26.

4. *"The examination hearing should be a full inquiry concerning the, debtor's means and ability to pay, covering his incomes his dependants and the household expenses to which he is subject, but also other debt obligations incumbent on him. The information obtained should be recorded for future use."*

(The Report maintains that in Victoria, New South Wales and South Australia, examinations are not always properly conducted to ascertain these facts.)

### **Position in Western Australia**

In Western Australia it is normal for most of these facts to be ascertained by examination.

The typical examination, while brief, does canvass the matters considered by the Report to be relevant. The magistrate notes the facts on the file. Such notes are not available to any other creditor to peruse, but it is unlikely that any other creditor would want to make use of them even if they were available. Any later creditor would be seeking an order on a judgment summons which would necessarily involve a re-examination.

**Commission's comment**

Reform would not appear to be desirable unless a much fuller and more comprehensive inquiry were contemplated than that which is now the practice. The adoption of a more detailed procedure would involve additional expense.

5. *"An order for instalments might be made in the debtor's absence if it appeared that the debtor had satisfactorily completed an appropriate questionnaire. This procedure should not be followed in the case of a debtor who has defaulted upon an instalment order."*

(The Report suggests that practical difficulties attending the examination of a debtor might be overcome if he filled in a comprehensive questionnaire as to his assets and financial commitments.)

**Position in Western Australia**

In practice, orders are not made in a debtor's absence, in Western Australia (apart from the consent affidavit procedure which is really another way of tackling the same difficulty: see *Local Courts Act*, s.130(1)). In practice the consent affidavit is prepared by the creditor's solicitor. The Report's proposal would therefore be an innovation in Western Australia.

**Commission's comment**

The proposal is interesting. If implemented, it might save expense, inconvenience: and delay by enabling orders to pay by instalments to be made on the basis of an attested questionnaire without the debtor having to attend, unless specially required for the purposes of cross-examination.

6. *"No order should be made imposing severe hardship on the debtor or his family, or necessarily resulting in default in respect of other of the examinee's debts. In such a case, the debtor should be referred to an appropriate body for consolidation or composition of his debts and for advice concerning the means available to him for dealing with his indebtedness."*

(The Report is concerned about debtors suffering hardship. It points out that if too large an amount were ordered to be paid off a particular debt the debtor might default on other debts. The Report suggests that other creditors should be protected against this possibility.)

### **Position in Western Australia**

The procedure in Western Australia for examination on a judgment summons theoretically provides adequate safeguards to ensure that no severe hardship is imposed on debtors: see *Local Courts Act*, s. 130(1) and Order 26. Theoretically, it should not be possible for an order to be set at such a level as would result in the debtor defaulting on other debts, because other debts would already have been taken into consideration in setting the amount. However, a debtor, when examined, may occasionally forget to mention a debt.

There is no ready means available to a debtor (apart from the procedures provided in the Commonwealth *Bankruptcy Act*) to consolidate or make a composition of his debts. There are, of course, ways in which a debtor can use the services of a finance company to consolidate his debts. In a suitable case a finance company will allow a debtor to borrow sufficient to payout all his debts and to repay the finance company over a period of time.

### **Commission's comment**

On the face of it the system in Western Australia does not appear to impose any specific hardship on debtors but the Commission has done no detailed research on this question in this State.

7. *"Examination hearings should be conducted at night as well as during the day to ensure that attendance does not conflict with employment obligations."*

### **Position in Western Australia**

There are no night hearings in Western Australia. Debtors must make arrangements with employers or alternatively sign a consent affidavit.

### **Commission's comment**

Night hearings would impose additional expense on the administration of the court and on litigants. These costs would eventually be passed on to tax-payers or consumers. It might also be argued that, if hearings were to be held at night, Saturday mornings should also be considered. Whether there is a real need for such a service is difficult to assess.

These matters will be raised for public discussion by the Commission when it issues its working paper on Project No. 63 (Small Debts Courts).

8. *"Examination hearings should be conducted at a venue as close as reasonably may be to the debtor's place of residence or, should he prefer it, place of employment, and **not** at a venue chosen on the basis of the convenience of the creditor or his agent."*

### **Position in Western Australia**

Under s.36 of the *Local Courts Act* action must be commenced either at the court nearest the defendant's residence, or where the defendant carries on business, or at the nearest court to where the cause of action arose. There is no provision for the defendant to opt for the court nearest to his place of employment.

### **Commission's comment**

In the eastern states where the population is more evenly distributed, the implementation of such a proposal could avoid serious inconvenience.

The same problems would not appear to arise in Western Australia, at least in the metropolitan area. It could be argued that the *Local Courts Act* already makes a fair provision as regards venue.

The Commission has a project dealing with a review of the *Local Courts Act* and Rules and this question will be considered in the course of that review.

9. *"The procedures for dealing with non-attendance at examination hearings should be amended. Orders for imprisonment or fine, made in the absence of the debtor, should*

*be abolished. The new procedure should be modelled on that contained in the District Court Act 1973 (NSW)."*

(The *District Court Act 1973 (NSW)* provides in s.92 that if a debtor fails to appear on a judgment summons he may be arrested and brought before the registrar for examination.)

### **Position in Western Australia**

No order for imprisonment or fine for non-attendance at an examination hearing is made in Western Australia in the absence of the debtor: see *Local Courts Act* s.130 and Order 26. If a debtor does not appear he is arrested and brought before the court for examination, in contrast to some of the eastern state jurisdictions where failure to appear can result in a prison sentence or a fine: see, for example, *Local and District Criminal Courts Act 1926-74 (SA)* s.179.

### **Commission's comment**

The comment is not relevant to Western Australia.

10. *"The punishment, by imprisonment, of debt related offences should not be a function of a debt enforcement tribunal, but should be reserved for the ordinary criminal courts."*

(In some eastern state jurisdictions, as already mentioned, debtors can be imprisoned for non-attendance on a judgment summons. Some jurisdictions also have the notion of fraudulent debtors and quasi criminal concepts of punishment.)

### **Position in Western Australia**

There is no imprisonment in Western Australia for debt-related offences (e.g. for non-attendance on a judgment summons) apart from proper criminal offences, either under the *Criminal Code* or the *Police Act*. The only way a debtor can be imprisoned in Western Australia is through failing to obey an order made on a judgment summons. This is really punishment for contempt of court and should not be confused with "imprisonment for debt" in the sense in which that phrase is normally used.

### **Commission's comment**

The proposal is, therefore, not relevant to Western Australia.

11. *"Debt-related offences should be limited to two: incurring a debt dishonestly and dishonestly refusing to pay a debt. The latter is not adequately covered in the present criminal law, and an appropriate new offence might be created to penalise those who refuse to pay notwithstanding the possession of funds ample for the purpose, taking into account prior obligations and other debts. "*

### **Position in Western Australia**

The scope of the relevant parts of the criminal law is fairly broad in Western Australia. There would appear to be adequate provisions covering such matters as obtaining credit by false pretences in the *Criminal Code* (see s.409) and the *Police Act* (see s.66). The question is whether these provisions go far enough.

### **Commission's comment**

The Commission sees no need for any further offences. Difficulties in this field appear to lie in the area of proof rather than in the substantive law.

12. *"Imprisonment for contempt of court in not attending on an examination summons should be abolished."*

### **Position in Western Australia**

As, already mentioned, if a debtor fails to attend on an examination hearing in Western Australia a bench warrant is issued for his arrest. When arrested, he will be immediately brought before a magistrate and examined. There is no provision for punishing a debtor by imprisonment or fine for non-attendance. If he is brought up on a warrant and refuses to cooperate then he is liable for contempt in the face of the court as is any other witness.

13. *"If imprisonment for debt related offences or for non-attendance on examination summons is retained as a sanction in the debt-recovery process, then -*
- (a) *the penalty should not be automatically waived by payment of the debt,*

- (b) *the suspension of a sentence of imprisonment for contempt of court in failing to comply with an order for instalment payments should not be lifted without inquiry as to the reasons for the failure to comply,*
- (c) *imprisonment for contempt of court in not attending on an examination summons or in failing to comply with a court order should not be imposed without inquiry as to the reasons for the failure to attend or to comply, as the case may be."*

### **Position in Western Australia**

In Western Australia there is no imprisonment for debt-related offences or for non-attendance on a judgment summons as such. A person can be imprisoned for failing to comply with an order made on an examination hearing. A typical form of order would be as follows:

"The debtor is ordered to pay the amount of \$X by instalments of \$Y per week commencing on the .....day of .....19..... In default 14 days in prison."

If an order for commitment issues, the defendant will be arrested and taken to prison. He may, however, pay the bailiff the amount due on the order and on such payment being made the bailiff must discharge the debtor: *Local Court Rules: Order 26 Rule 27.*

When a debtor fails to obey an order on a judgment summons there is no inquiry into why this has occurred. It could, for example, have occurred through illness or unemployment. The debtor can, however, apply to have the order set aside for any sufficient reason: *Local Court Rules: Order 26 Rule 26.*

### **Commission's comment**

By recommendation (a) it is implied that it is unfair that a person should be able to escape imprisonment merely by paying off the debt. The argument is that this discriminates between those who have money when the bailiff calls and those who do not. Thus recommendation (b) is really a corollary to (a). Recommendation (c) says that imprisonment should not be imposed in the circumstances mentioned without inquiry.

The concepts expressed by the Report are somewhat peculiar when viewed against the background philosophy of the present system. If the object of the system is to compel or persuade debtors to pay their debts then it would seem that the Report's suggestions are otiose.

## **B. EXECUTION UPON GOODS AND LAND**

1. *"A warrant for the sale and seizure of goods should only be issuable after a proper examination hearing and then only if an order for payment by instalments would seriously prejudice the creditors' interests."*

### **Position in Western Australia**

In Western Australia a creditor who has entered judgment has an option of issuing either a warrant of execution or a judgment summons (there are other enforcement remedies but their use would be the small debt collection context). If it suspected that a debtor may have sufficient available goods then naturally a warrant will be issued first. Only after that has failed or if it is suspected there are no available goods will a judgment summons issue.

The criticism is relevant to Western Australia if one accepts that the judgment summons ought to be the central means of enforcement.

### **Commission's comment**

There are two views one could take on the issue. The Report seems to show most concern for avoiding hardship to debtors while devising some appropriate means of enforcing the debt. The alternate view would be that the creditor who is seeking to recover money owing to him ought to have the right to choose the method he thinks most appropriate, not the tribunal which might overly protect the debtor.

Any additional hearing would add to the cost of debt collection.

2. *"The powers of bailiffs in respect of entry upon premises and seizure of goods should be drastically curtailed."*

## **Position in Western Australia**

Bailiffs in Western Australia have, in common with bailiffs in the eastern states, very considerable powers to enforce court processes: see *Local Courts Act*, ss.16 to 22.

### **Commission's comment**

In Western Australia, so far as the Commission is aware, complaints of bailiffs acting oppressively are rare. The most common complaint is that bailiffs will not take sufficiently rigorous action. The Report even cites the views of debtors that bailiffs are very tolerant in using their powers.

Bailiffs have wide powers to be used in exceptional circumstances: they may, for example, break open premises. It would seem that bailiffs need wide powers. Complaints would normally only arise if bailiffs used such powers in an oppressive or corrupt way.

One area of difficulty in relation to bailiffs' powers which has caused difficulties is the doctrine of apparent possession, under which a bailiff may seize chattels in the debtor's possession without having to inquire into their ownership.

3. *"The exemptions under each State's law should be altered to minimize hardship to the debtor and his family and to encourage rehabilitation. Specific exemptions, subject to appropriate money value limitations, should include clothing, reasonably necessary household furniture, including refrigerator, washing machine, heating and cooling appliances, library, television set and radio. Consideration should be given to a similar exemption in respect of a motor vehicle."*

## **Position in Western Australia**

Under the *Local Courts Act*, s.126, the following goods of a person are protected from seizure.

"Wearing apparel of such person to the value of one hundred dollars and of his wife to the value of one hundred dollars and of his family to the value of fifty dollars for each member thereof dependent on him; household furniture and effects to a value not exceeding in the aggregate three hundred dollars; implements of trade to the value of one hundred dollars; all beds and bedding; family photographs and portraits."

This section appears to have been last reviewed in 1958.

#### **Commission's comment**

Even making allowance only for inflation the section has become very outdated. The Report's suggested range of exempt property is larger than that specified in the Act.

Different views may be expressed as to the appropriate goods which should be exempt from seizure.

4. *"Money value limits should be indexed in a manner which will take account of inflation."*

(The comment applies only to the value of goods exempt from seizure.)

#### **Position in Western Australia**

The limits specified are not indexed to take account of inflation.

#### **Commission's comment**

The concern would appear to be justified. There are, however, practical difficulties in indexing these amounts. One means might be to keep the amounts under annual review and have them set by regulation. Another alternative would be to provide for regular amendments to the Act as and when required.

5. *"It should be possible to set a reserve price at any sale of goods on which execution has been levied."*

#### **Position in Western Australia**

In Western Australia goods or land seized by a bailiff are invariably sold at public auction. No reserve price is normally set by the bailiff. In relation to land, mortgages and other encumbrances have to be taken into consideration.

### **Commission's comment**

Selling small quantities of second-hand goods creates difficulties. It is probably true that they are sold below their real worth - but their real worth is difficult to assess. Domestic furniture and appliances are notorious for quickly depreciating in value. This effect must be compounded when damaged or soiled furniture or appliances which do not work properly are sold at auction. On many items it would be impossible to set a reserve. It is arguable that the true value is what the market will bring.

There would be formidable difficulties in having goods valued for the purpose of setting a reserve price. There might be an argument for having goods by private contract or even by tender, but this would also cause complaints and suspicion. It might also be thought that a sensible debtor would take action to sell something himself if he knew that a bailiff's sale would otherwise take place.

6. *"A warrant for the sale of land should normally only be issuable after a proper examination hearing and then only if an order for payment by instalments would seriously prejudice the creditor's interests."*

### **Position in Western Australia**

A warrant for the sale of land issues at the creditor's option without any examination hearing.

### **Commission's comment**

The recommendation is consistent with the basic position taken in the Report: see page 6 above.

7. *"The powers of a bailiff in respect of entry upon premises for valuation and sale should be increased."*

(The Report points out that a bailiff has power to enter premises only to levy execution. If bailiffs were to be required to fix reserve prices and so on, it would be reasonable that they should have additional powers of entry.)

### **Position in Western Australia**

In Western Australia it is the practice of bailiffs to enter premises and do a legal seizure of goods first but not at that stage to remove the goods. They then usually allow a period of five days for the debtor to money. (This practice probably arose because the goods could not be sold until five days had elapsed anyway: see *Local Court Rules: Order 25(1) Rule 17.*) At the end of the five days if the money has not been paid, debtors are usually allowed a further forty-eight hours to raise the money before actual seizure takes place.

The comment may be considered of relevance to Western Australia in the sense that bailiffs do not technically have power to enter premises for inspection - though in practice they do by making a legal seizure only.

### **Commission's comment**

The Western Australian practice whereby bailiffs first enter premises initially to make a legal seizure only makes it unnecessary for bailiffs to be given the additional power recommended by the Report.

8. *"Where the property is the home of the debtor's family, the family interest in that home should be protected, even when not legally formalised, to the extent of one-half the debtor's interest in the property."*

*"Consideration should be given to protecting the interest in his home of the debtor himself."*

### **Position in Western Australia**

The legal interest of the debtor in his home is not exempt from execution.

### **Commission's comment**

It is a difficult matter of policy to decide whether a debtor's home should be exempted in the manner suggested by the Report. It is a roof not only for himself but for his wife and children. The position taken by the Report could perhaps, be supported on social welfare grounds. On the other hand, as the home will probably be the debtor's principal asset it hardly seems fair to

creditors to shield it from them. If only one-half of the debtor's interest were seized such interest might well be unsaleable.

9. *"Valuation of the debtor's interest in the land to be sold should be mandatory, as also the setting of a reserve price. Only the debt recovery tribunal should be authorised to dispense with these requirements in a given case."*

### **Position in Western Australia**

In Western Australia upon sale under a warrant neither a proper valuation nor a reserve price is mandatory. However, as already mentioned, the land must be sold for a sufficient price to cover the mortgage. (Technically it would appear that land is usually sold subject to existing encumbrances.)

### **Commission's comment**

There have been a number of calls from the judiciary for statutory reform of the duties of bailiffs acting under a warrant of execution or writ of fi fa: see Dean J. in *Owen v Daly* [1955] VLR 442 at 449 and Barwick C.J. in *Anderson v Liddell* (1968) 117 CLR 36 at 43.

Burt J. dismissed a claim by a judgment debtor against a judgment creditor and the Local Court bailiff arising out of a sale pursuant to a warrant of execution under the *Local Court Act* (*Allen v Mann and Spencer* No. 5826 of 1975 unreported decision of Burt J. dated 19 January 1977). At p.6 of his reasons Burt J. supported the need for reform.

### **C. GARNISHEE OR ATTACHMENT OF WAGES**

*"Orders for the garnishee or attachment of wages should not be regarded as the prime mode of judgment debt recovery. No order should be made without a prior examination hearing and then only if an order, for payment by instalments would seriously prejudice the creditor's interests."*

*"Wage attachment should be restricted to those debtors who, wilfully or negligently or through incompetence in handling their affairs, have persistently failed to comply with reasonable court orders for payment by instalments."*

*"The periodical amount to be recovered by an order for wage garnishment should be assessed in the same way and, on the same bases as an order for payment by instalments by the debtor himself."*

*"To allow for variations in the debtor's income a protected sum should be set, below which the debtors wage-packet might in no event be reduced. Minimum limits should be statutorily defined, indexed to allow for inflation."*

#### **Position in Western Australia**

In Western Australia the *Local Courts Act* provides, in s.145, "that no order shall be made for the attachment of the wages of any servant, labourer or workman". This clause has received wide interpretation - at least as wide as "employee". There is a similar provision in the *Supreme Court Act*.

The concept of wage garnishment is therefore not relevant to Western Australia.

#### **D. BANKRUPTCY AND INSOLVENCY**

*"There should be provision for a scheme for debt consolidation and composition appropriate to the needs of consumer debtors."*

*"This scheme should be administered by the Official Receiver in each State and should be available to consumers free of charge."*

*"Consumer debtors should be provided with counselling concerning their financial and budgetary management, the repayment schemes advised for their circumstances and the availability and implications of the alternative of straight bankruptcy."*

*"The Official Receiver should have power to impose a repayment scheme on both secured and unsecured creditors. A dissatisfied creditor should be entitled to appeal against his decision."*

*"A consumer debtor should not be required to enter into a repayment scheme, but should be entitled to choose, after proper counselling, straight bankruptcy."*

*"The repayment schemes should not extend beyond a strictly limited period, say, three years. If the debtor fails to comply with his obligations under such a scheme, any creditor should be able to rely on that as an act of bankruptcy, notwithstanding the usual \$500 limit. An order for sequestration should not follow automatically, as when it appears that the failure to comply with the scheme was not due to dishonesty or misconduct."*

*"In the event of straight bankruptcy, a consumer debtor should not normally be required to make contributions from future property, including future income, but should continue to suffer loss of his non-exempt property."*

*"Discharge of bankrupts should normally occur within the shortest time administratively reasonable."*

*"The range of exempt property under the Bankruptcy Act should be extended."*

The Report deals with these matters, but they are outside the Commission's present terms of reference. Such matters are at present being studied by the Australian Law Reform Commission in its reference on Consumers in Debt.

## **E. PRE-JUDGMENT COLLECTION PROCEDURES**

### **1. "THE WITHDRAWAL OF GOODS AND SERVICES"**

*"The regulation of the repossession of goods should not depend on the form of the transaction whereunder that security was obtained."*

*"Powers to enter on private premises to repossess goods should be strictly limited."*

*"The duties of the reposessor with respect to repossessed goods should be clearly stated by legislation."*

*"A study should be undertaken to examine the problems arising from the existence of double remedies under secured transactions, and to determine whether secured creditors should be put to election."*

*"Repossession of goods should be limited to circumstances where the consumer's actions are such as to put the security in jeopardy, or indicate that he has no intention of complying with the basic terms of the agreement."*

*"Debtors in jeopardy of repossession should be entitled to apply for an order prohibiting repossession. Such an order might be made where the debtor has committed no act justifying repossession, or where the credit-provider's interests might be adequately protected in other ways."*

### **Position in Western Australia**

Under the *Hire Purchase Act* agreements for the purchase of goods on credit are now regulated by that statute whatever the particular form of transaction.

The provisions in the Act substantially reflect the criteria recommended by the Report.

2. *"Provision should be made by State Governments to ensure that welfare assistance funds are available in cases of hardship to pay the overdue accounts of debtors threatened with discontinuance of supply of gas or electricity."*

*"Suppliers of gas and electricity should establish close liaison with government and private welfare bodies in an attempt to minimise hardship through discontinuance of supply."*

*"Suppliers should closely monitor their records to ensure that disconnection of supply does not continue unexplained for a lengthy period, and to enable them to encourage the consumers concerned to seek welfare assistance."*

*"Debtors should be entitled to make an application for an order for payment of gas and electricity accounts by instalments. In rare cases, no order should be made other than an order for reconnection of supply."*

*"Suppliers should be encouraged to alter their two-monthly or three-monthly billing cycle for debtors who have experienced difficulty in paying their accounts and who choose a more regular billing method. An extension of the practice of estimating accounts might be required."*

The above considerations relate to social welfare matters, rather than legal matters, and the Commission offers no comment.

## **F. THE RESTRICTION AND EXTENSION OF CREDIT**

*"Legislation should provide for the disclosure to consumers of information on credit files and of reports made to credit providers. This legislation should extend to all persons who give credit reports, whether for monetary consideration or on a co-operative basis. "*

*"An inquiry should be held to determine the procedures followed by credit reporting agencies in recording and amending information concerning debt default."*

*"The results of examination summonses or of other recovery procedures should not be published or recorded in the absence of reliable means of identification of the debtor concerned."*

*"Consideration should be given to the possibility of requiring debt enforcement tribunals to provide debt information of this type and of restricting payment of all judgment debts to payment through these debt enforcement tribunals."*

### **Position in Western Australia**

These matters are being considered by this Commission as well as by the Australian Law Reform Commission in the context of Privacy references.

## **G. THE REGULATION OF DEBT COLLECTION**

1. *"The control and supervision of debt collection agencies should be extended to cover 'house' collection agencies."*

### **Position in Western Australia**

The *Debt Collectors Licensing Act* (WA) does not cover "house" collection agencies.

### **Commission's comment**

The Commission is not aware of any evidence showing that "house" collection agencies have abused their position in Western Australia.

The adequacy of existing legislation is another of the matters subject to the Privacy reference.

2. *"The present legislation prohibiting the harassment of debtors by collection agents should be amended by the express inclusion of specific types of conduct which constitute harassment."*

*"Legislation prohibiting harassment should cover not only debt collection agents but also the creditor and his employees."*

### **Position in Western Australia**

The *Debt Collectors Licensing Act* does not prohibit any particular conduct by debt collectors although regulations made under that Act do prohibit the use by a debt collector of any vehicle on which it is exhibited that he is a debt collector. Debt collectors therefore are in much the same position as private persons. They are equally subject to the criminal law relating, for example, to extortion and assault.

### **Commission's comment**

It is difficult to define "harassment". The Report uses it to cover a wide range of pressures which judgment creditors could put on debtors. These matters will be further examined by the Commission in its Privacy reference.

3. *"Legislation should be enacted prohibiting certain types of deception not covered by the present law. In particular, it should be an offence -*
- (i) to misrepresent the enforcement procedures which are available*
  - (ii) to issue or deliver a form of demand which has the appearance of being an official document or which might reasonably mislead the addressee in this regard*
  - (iii) to use a form of demand which misrepresents the source from which that demand emanates*
  - (iv) to claim from a debtor fees and costs not legally recoverable by the creditor or by the collection agent on his behalf."*

(The Report is concerned that certain debt collectors are indulging in various unfair techniques. Prominent among these is the use of forms which give the appearance of having emanated from a court and which may frighten or trick a debtor into paying his debts.)

### **Position in Western Australia**

The *Trade Practices Act 1974* (Cwth) provides in s.52 that a corporation shall not in trade or commerce engage in conduct that is misleading or deceptive. Section 60 of the Act prohibits the use of coercion or undue harassment in connection with "...payment for goods and services by a consumer".

There do not appear to have been any significant public complaints in Western Australia of the sort that the Report refers to.

### **Commission's comment**

The Commission has insufficient evidence to recommend wholesale reform in this field in Western Australia. Private documents should certainly not be allowed to masquerade as court documents and an appropriate amendment to the law might be desirable to prevent this situation from arising.

4. *"General, forms of demand and related notices used by debt collecting agencies should be subject to prior approval by the licensing authority in each State. That body should also have power authoritatively to forbid the further use of particular misleading or offensive forms of demand issued by individual creditors and brought to that body's attention."*

### **Position in Western Australia**

There is no body in Western Australia which vets forms or notices of demand used by debt collecting agencies. The regulations made under the *Debt Collectors Licensing Act* do not at present regulate the form of notice or demand.

5. *"Legislation should be enacted to clarify the circumstances in which reasonable collection costs and fees may be recovered from the debtor."*

*"Legislation should be enacted to establish a civil remedy for abusive or unfair collection practices. The remedy should not be granted in trivial cases, but should be available where the debtor has suffered economic loss or other harm of a serious nature."*

### **Position in Western Australia**

In Western Australia debt collection charges are controlled by regulations made under the *Debt Collectors Licensing Act*.

By Regulation 13 it is provided that a debt collector may charge, recover or receive from any debtor, in connection with the collection of a debt, where the debt is paid by instalments a sum of fifty cents or a sum not exceeding two and one-half per centum of the amount of the debt whichever is the greater amount.

The need for a civil remedy for abusive or unfair collection practices might be obviated if the licensing authority were empowered to take these matters into consideration on the grantor renewal of licenses. The Commission will consider in its Privacy reference the impact of debt collectors' activities on the privacy of individuals.

## **H. THE INITIATION OF LEGAL PROCESS**

1. *"Service of summonses initiating process should be effected only by personal delivery to the addressees. Alternatively summonses should be served by registered or certified mail."*  
*"Personal service of summonses in respect of consumer claims should not be effected by the creditor or his agent, but only by officially employed bailiffs or process servers."*

(In the eastern states there have apparently been complaints about non-service of summonses.)

### **Position in Western Australia**

Section 42 of the *Local Courts Act* provides that every summons shall be served personally except in cases where a different method of service is prescribed. While there are a number of ways service may be effected, the usual way is to serve the summons personally, or leave it at the address for service with a person apparently over the age of sixteen years.

Service can be effected by the bailiff, the plaintiff or by the plaintiff's solicitor or agent.

### **Commission's comment**

Although the Commission is not aware of many complaints of false affidavits of service being filed, two recent cases have been brought to the Commission's notice where bailiffs had slipped the summons under the defendant's door and sworn that they had served it personally. The alternative of serving summonses by registered or certified mail might not be as effective as the Report implies. However, if a creditor wishes to serve by certified mail in Western Australia he may apply to a magistrate or clerk under s.42(2) of the *Local Courts Act* to do so. Alternatively, the creditor may serve the summons personally.

There would not appear to be difficulties involved in plaintiff service which would warrant a restriction of service to bailiffs or process servers only.

2. *"Official bailiffs or process servers should have the duty of providing information and assistance to consumers in respect of their debt problems, either at the stage of initiation of process or at the time of service of examination summonses."*

### **Position in Western Australia**

There is no obligation in Western Australia for bailiffs or process servers to provide information and assistance to consumers. Presumably in many cases very simple advice is given to consumers such as "see a solicitor", "go to legal advice bureau" and so on. The Legal Advice Bureau provides quick legal advice for people particularly consumers and others not having ready access to solicitors. Legal aid is available for those who cannot afford to pay for legal advice.

It is possible that the Australian Law Reform Commission may recommend the setting up of debt counselling services in its reference on Consumers in Debt.

3. *"Summons forms should be available in translation. Summons forms should be expressed in simple language, designed to be intelligible to those with minimum educational achievements, and should not be couched in terms which appear to prejudge the issues between the parties."*

### **Position in Western Australia**

There is no law in Western Australia relevant to this matter.

### **Commission's comment**

In Western Australia there are translation services available to cope with these needs. These include banks, Immigration Department officials and the telephone interpreter service which translates free of charge.

4. *"Either upon the summons forms, or in a separate booklet delivered at the same time, information should be provided to defendants not only with respect to the legal procedures to be followed, but also in relation to the availability of legal aid and debt counselling."*

### **Position in Western Australia**

In Western Australia summonses advise defendants how to defend the action, how to make a set-off or counter-claim, how to object to the jurisdiction of the court and how to admit the claim. Whether any additional information is desirable will be considered by the Commission in its *Local Courts Act* reference.

5. *"Venue in an action should not be determined on the basis of an election by the creditor subject to an application for transfer by the debtor. Rather, the court itself should ensure compliance with appropriate venue rules."*

*"Venue should not be dependent on the technical concept of the place where the cause of action arose. Nor should it be based on a prior agreement between the parties to a consumer transaction."*

**Position in Western Australia**

In Western Australia the *Local Courts Act* in s. 36 provides that every action shall be commenced in the court -

- (a) nearest to the place where the defendant carries on business; or
  - (b) the place nearest to where the defendant resides;
- or
- (c) nearest to the place where the cause of action arose

Section 36A provides that a person may commence action in any local court and in the absence of any objection to the jurisdiction he shall be deemed to have selected a proper court.

If the defendant claims that the wrong court has been selected he can apply for it to be changed.

In certain agreements between the parties to a consumer transaction there is a stipulation as to the court in which action is to be taken in event of a dispute.

It would appear that in the eastern states there is considerable difficulty with venue, possibly because of the larger and more evenly distributed population.

**Commission's comment**

The criticism does not appear to be justified in Western Australia. The current provisions as to venue are arguably fair and adequate and the Commission is not aware of any substantial criticism of them in this State. This is probably because debt collection actions mostly arise quite close to where the parties live or have their business i.e. in the metropolitan area or in the same country town. Unlike the eastern states the bulk of our population is concentrated in a fairly small city with adequate transport. The Commission's comment on proposal No. 8, page 11 is relevant here.

The Commission will further consider the question of venue in its reference on the *Local Courts Act*.

## **I. GOVERNMENT PREFERENCE**

1. *"Government creditors should generally be limited debt recovery efforts in the same way, and to the extent, as other creditors."*

### **Position in Western Australia**

Those Government departments in Western Australia which are likely to have debtors are often the monopoly suppliers of their particular services, e.g. water, gas and electricity. As well as the usual method of recovery, such departments can enforce payment by cutting off the service. This results, in effect, in these suppliers obtaining priority of payment over other creditors which is suggested in the Report to be unfair. Some debts to Government departments operate as statutory charges on the debtor's property, and this may confer further advantage on those departments.

### **Commission's comment**

Whether the state is justified in giving itself the sort of advantages outlined above is a matter of policy. Where there are insufficient funds and the debtor is going to default on some of his obligations, he may have a choice of defaulting on his other creditors or on the State (which is really the tax-payer). It might be thought that the State had a greater capacity to bear the loss and, for that reason should not be given any advantages. On the other hand, some Government departments have a huge number of debtors and need some simple non-legal means of enforcing payment: to cut off the service is one such simple means which also prevents the system from becoming a drain on the taxpayer.

2. *"Liability for rates and taxes in respect of property should be imposed on either owner or occupier to the exclusion of the other. In the case of residential premises, liability should be placed on the owner of these premises."*

(In some of the eastern states, the occupier is primarily liable for the rates. This results in action being taken against tenants by the rating authority when by the tenancy agreement the landlord is charged with payment of rates. This, combined with the power to levy distress for

non-payment of rates, leads to hardship in some cases. The Report suggests that in the case of residential premises liability should be placed on the owner.)

### **Position in Western Australia**

In Western Australia the owner is liable for the rates and there is no distress for non-payment. The tenant could be prejudiced, however, if the owner were sued for the rates and execution were subsequently levied against the property. In this situation, though, the prior unregistered interest of a tenant in possession pursuant to a lease not exceeding five years is protected by s.68 of the *Transfer of Land Act*. This would not, however, protect the landlord's chattels in possession of the tenant from being seized.

3. *"Pre-judgment distress in respect of unpaid local government rates in South Australia should be abolished."*

### **Position in Western Australia**

This is not relevant to Western Australia where there is no right of distress in respect of unpaid local government rates.

4. *"The order of priorities in the distribution of a bankrupt's estate should be amended. The Commonwealth's claim to income taxes should, at best, rank equally with the claims of ordinary creditors."*

(The Report maintains that Governments are better able to stand losses than other creditors and should rank no higher than them. It considers that, for this reason, they should probably rank last.)

### **Commission's comment**

This matter is currently under examination by the Australian Law Reform Commission.

5. *"The practice of seeking to recover road taxes and charges by the imposition of criminal penalties for non-culpable non-payment of those taxes and charges is inequitable and should be discontinued."*

This matter is one of policy on which the Commission offers no comment.

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