



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 67

**Writs and Warrants
of Execution**

REPORT

JUNE 2001

The Law Reform Commission of Western Australia

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To: **Jim McGinty MLA**
Attorney General

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commissioner's report on Writs and Warrants of Execution.

A handwritten signature in black ink, appearing to read 'WS Martin', written in a cursive style.

WS Martin QC
Chairman

June 2001

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Foreword

Thirty years ago a matter came before the Supreme Court which sparked this project. Five years later the Attorney General called for an examination of the law of writs and warrants of execution in Western Australia. Work began on this topic and continued sporadically over the years. This report is the culmination of a number of reviews, analyses and commentaries, all of which conclude that the state of the law in this field is archaic and unsatisfactory.

Inconsistencies in relation to execution of judgments against old system land are numerous. The four-month life of a writ or warrant of execution on land under section 133 of the *Transfer of Land Act 1893 (WA)* is unrealistically short. Priorities between competing writs and warrants of execution are not always clear. The writ of elegit is an anarchic remedy available in Western Australia which has apparently never been used.

This report identifies trouble spots and recommends reform. We are confident that our recommendations, if implemented, will refine and clarify practice in this highly technical area.

Due to the inherent complexity of the subject, the Commission did not issue a discussion paper seeking public comment on the issues before preparing a report. Instead, we wrote to the key stakeholders seeking preliminary comments on matters within the terms of reference. In addition, we distributed for comment a *Draft Final Report* to practitioners and others with expertise in the area. The names of those who commented on the draft appear in Appendix VII.

We thank the commentators for the very considerable benefit of their opinions and acknowledge Michael Boylson who produced the Commission's original *Draft Final Report* which we now publish as an attachment to this report entitled *Draft Report and Research Summary*.

The Commission received assistance during the course of the project from consultants, Jennie Chauvell and Margaret Jordan; law clerks, Brie Ayling and Sean Redden; and our Executive Officers who assisted with the development of this Final Report, Marion Brewer and Heather Kay. And, last but not least, the Commission thanks Cheryl MacFarlane for technical editing, design and presentation of this publication.

Wayne Martin QC, Chairman
Law Reform Commission
of Western Australia

Chapter 1

INTRODUCTION

Successful litigants enforce judgments by obtaining court orders to take the losing parties' property if judgment debts are not paid promptly and voluntarily. This process is called 'execution'. The property can be taken only after a court issues an order allowing judgment enforcement by taking or selling property.

Execution issued out of the Supreme and District Courts against land and other property is normally by writ of *fi fa*.¹ The Local Court equivalent is a warrant of execution. Usually writs of *fi fa* and warrants of execution are issued to recover money owing as a result of a civil judgment.

1.1 Background

A matter came before Hale J in the Supreme Court of Western Australia many years ago². A judgment creditor had registered a writ of *fi fa* against the land of the debtor. A third party claimed an unregistered pre-existing interest in the land. The Sheriff commenced interpleader proceedings to have the Supreme Court decide who was entitled to what. In the course of the interpleader Hale J found an issue between the judgment creditor and the third party which required a trial. Section 133 of the *Transfer of Land Act 1893 (WA)* makes a writ of *fi fa* binding on land for a period of four months without providing for an extension of the period. The problem was that the writ of *fi fa* was due to expire before the Supreme Court could schedule a trial and give a decision.

1.2 Remedy suggested

Hale J thought the simplest remedy would be to give the court issuing the writ of *fi fa* the power to extend the four month period. It also seemed appropriate to require registration of the order prior to the expiry of the initial four month period. These suggestions ultimately prompted a reference to the Law Reform Commission.³

1 Writ of *feri facias* means 'cause to be made'.

2 *Rathjen v Service Contractors Pty Ltd* (Unreported, Supreme Court of Western Australia, Hale J, 22 November 1971, No 2840/1971).

3 The suggestion of Hale J was referred to the Law Reform Committee, the predecessor of the Law Reform Commission of Western Australia. The (then) Commissioner of Titles, Assistant Commissioner of Titles, and Sheriff were consulted to help the Law Reform Committee formulate recommendations to overcome the problem. It became clear that other issues were involved requiring a broader examination of the law of writs and warrants of execution. Later, the (then) Attorney General referred the matter to the Law Reform Commission in 1975.

1.3 Our project report

The Commission prepared a draft final report which, after editing, is published here as a *Draft Report and Research Summary* ('Research Paper') and attached to this report. The Research Paper examined in detail an interlocking body of law, both statutory and non-statutory, dealing with writs and warrants of execution issued out of different courts and against different types of property. Its major focus is in two key topics:

- extension of the four-month period of a writ of *fi fa* referred to in section 133 of the *Transfer of Land Act 1893* (WA); and
- the question of priority among writs and warrants of execution.

We delayed final publication pending the completion of the *Review of the Criminal and Civil Justice System in Western Australia* (the "Review").⁴ The Review fully consumed the resources of the Commission for several years. We produced 447 recommendations for reform of the procedural aspects of the criminal and civil justice system. This project was set aside to be reconsidered in the light of the outcome of the Review. The Ministry of Justice also prepared a series of reports on this subject which also must be considered in the context of this report.⁵

1.4 Focus of this report

This report mainly concerns writs and warrants associated with execution of judgments but touches on other procedures for execution as well. We refer to a previous, as yet unimplemented, report of this Commission on *Enforcement of Judgments in the Local Courts*⁶ and its recommendations for reform. Attached as Appendix A are the recommendations produced by the Ministry of Justice.

We set out briefly the problems in the existing system for the execution of civil debts and make proposals for reform of the system. These proposals are consistent with current thinking that in the twenty first century, legal processes should be more accessible, efficient and less complex in order to reduce unnecessary delay and cost in court proceedings.

4 Law Reform Commission of Western Australia, Project 92 (1997-1999).

5 Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part I – Legislative Recommendations*, June 1997; Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part II - Administrative Recommendations*, September 1997; Ministry of Justice, *National Competition Policy Review of the Proposals to Consolidate the Parallel Civil Judgment Enforcement System in Western Australia into a Single System*, Consultants Report prepared by BSD Consultants Pty Ltd, October 1998; Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Amendments to: Part I - Legislative Recommendations and Part II - Administrative Recommendations Supplementary Report*, December 1999.

6 Law Reform Commission of Western Australia, Project No 16, Part II (1995).

1.5 What we do not consider in this report

This report, and the Research Paper, do not consider:

- the interests in land or other property against which execution may be effected, including a consideration of the definition of a wide range of property interests;
- the exemption of certain land or other property or of certain interests in land or other property from execution and limitations upon execution against certain assets such as the matrimonial home or property held by joint tenancy;
- the circumstances in which execution against land or other property should be permitted;
- possible restrictions on execution as, for example, by compulsory postponement of sale, the necessity for minimum sums of money to be involved or requirements that execution be exhausted first against some assets rather than others;
- the imposition of conditions or procedures for the sale or other disposition of land or other property against which execution is being levied;
- the duties and rights of sheriffs and other officers in effecting execution; and
- priority in the distribution of assets on a bankruptcy.

Chapter 2

FRAGMENTATION IN THE PRESENT SYSTEM

2.1 Scope of this report

Local Courts, the District Court and the Supreme Court⁷ are the main civil courts in Western Australia. They grant judgments and issue execution orders to permit the recovery of judgment debts. A Local Court is limited to claims with a maximum value of \$25 000. The District Court is limited to claims under \$250 000 but jurisdiction in personal injury matters is unlimited. Supreme Court jurisdiction is unlimited.

2.2 How many judgment enforcement proceedings are there?

In the Local Courts

	1996/97	1997/98	1998/99	1999/2000
Warrants of execution	12 323	12 240	12 100	9 847
Judgment summons	5 230	5 046	5 046	4 201
Orders for commitment	109	98	126	99
Total	17 662	17 384	17 272	14 147

In the District and Supreme Courts

	1996/97	1997/98	1998/99	1999/2000
Writs of <i>fi fa</i>	422	296	336	378

2.3 Local Courts

A judgment creditor seeking to enforce a judgment in a Local Court has the following options.⁸

⁷ See Research Paper paras 1.30-1.44 concerning discussion of enforcement provisions under the *Mining Act 1978* (WA), the *Industrial Relations Act 1979* (WA), the *Workers' Compensation and Rehabilitation Act 1981* (WA), the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA), the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA) and provisions relating to the High Court, the Federal Court and the Family Court of WA.

⁸ A full discussion of each of these procedures is set out in the Law Reform Commission of Western Australia report, above n 6.

- **Warrant of execution against land or goods⁹**

A command by the Local Court to the Bailiff to obtain the amount of the judgment debt by the seizure and sale of any of the debtor's land or goods.
- **Examination in aid of execution¹⁰**

A summons for the debtor to attend the Local Court to answer questions on oath and produce any documents relating to his or her financial affairs so that the creditor can understand the debtor's financial position to determine how to have the debt paid.
- **Judgment summons¹¹**

Similar to an examination in aid of execution, but at the conclusion of the hearing, the Local Court may order the debtor to pay the debt by fixed amount instalments. If the amount ordered is not paid, the creditor can summons the debtor back to the court. The court may then commit the debtor to prison¹² for up to six weeks for failure to pay. The period of imprisonment is fixed according to the amount not paid, but the period of imprisonment does not reduce the debt owing.
- **Attachment of debts (garnishee order)¹³**

The Local Court may order all debts owing or accruing from a third party to the debtor be attached in order to pay the judgment debt.
- **Appointment of receiver¹⁴**

This process does not itself take the debtor's property; instead the Court appoints a person to receive the debtor's interest when another more direct taking procedure (such attachment is not available).

2.4 District and Supreme Courts

A judgment creditor seeking to enforce a judgment in either the District or the Supreme Court has the following options.

- **Writ of *fi fa*¹⁵**

A procedure similar to the Local Courts' warrant of execution but exercised by the Sheriff or District Court Bailiff.

9 *Local Courts Act 1904 (WA)* ss 112 and 126; *Local Court Rules* O 25.

10 *Local Courts Act 1904 (WA)* s 144.

11 *Local Courts Act 1904 (WA)* s 130.

12 Order for Commitment under s 130 of the *Local Courts Act 1904 (WA)*.

13 *Local Courts Act 1904 (WA)* s 145.

14 While the *Local Courts Act 1904 (WA)* does not expressly empower appointment of a receiver, its s 33 allows this procedure as in the Supreme Court.

15 *Supreme Court Act 1935 (WA)* s 118.

- **Writ of *venditioni exponas***¹⁶

Similar to a writ of *fi fa*, but used where the goods or land can be sold for whatever price can be achieved rather than a fair price as required under a warrant of execution or writ of *fi fa*.

- **Charging Order**¹⁷

Where a judge orders the dividends, interest or produce from stocks, funds, annuities or shares held by a judgment debtor be paid to a judgment creditor. The order stops the debtor from dealing with those assets until the judgment debt is satisfied.

- **Appointment of Receiver**¹⁸

Appoints a person to receive the debtor's interest when that could not be done in another way (such as by attachment).

- **Writ of Sequestration**¹⁹

Where the debtor has disobeyed an order of the Court, the judgment may be enforced by persons other than the Sheriff taking possession of all of the real and personal property of the debtor and holding it until the contempt is cleared or the Court makes a further order.

- **Writ of attachment**²⁰

This approach commands the Sheriff to arrest and bring the debtor before the Court when in default of an order (similar to an order for commitment).

- **Writ of Possession**²¹

This procedure results in an order for seizure of real estate by the Sheriff and gives possession to another as ordered by the Court. It may include an order for payment of money to the creditor and, if so, is like a writ of *fi fa*.

- **Writ of Restitution**

A Writ of Restitution is used if a debtor re-takes possession of a property after eviction by a writ of possession; also if judgment for possession in favour of a party is later set aside by a Court.

16 Paras 1.16-1.23 of the Research Paper discuss the history of writs of execution including the antiquated writs available in the Supreme Court. This Commission recommended the repeal of the writ of *elegit* under 13 Edward 1 (St 1) chapter 18 (1285): see Law Reform Commission of Western Australia *Report on United Kingdom Statutes in Force in Western Australia* Project No 75 (1994) 21.

17 *Supreme Court Act 1935* (WA) ss 128-129.

18 *Supreme Court Rules* O 51.

19 *Supreme Court Act 1935* (WA) s 132.

20 *Supreme Court Act 1935* (WA) s 117.

21 *Supreme Court Act 1935* (WA) s 130; *Rules of the Supreme Court* O 46.

- **Writ of Delivery²²**

This process commands the Sheriff to deliver the debtor's goods as ordered by the Court and, if the particular goods are not available, to sell other goods of the same value to recover damages and costs.

- **Order of Committal²³**

Where the court is satisfied that a judgment debtor has had the means to pay the amount ordered but refused or neglected to pay, the court may order the debtor to prison for a period not exceeding 6 weeks. The period of imprisonment does not reduce the debt.

2.5 Other Differences in the Courts Processes

As noted above, the options available to judgment creditors are not the same in the Local Courts and the superior courts²⁴ nor are the mechanisms of recovery.

Paperwork

The forms to initiate post judgment proceedings and the processes required to enforce judgment differ between the Local Courts and the superior courts.

Processes

- In the Supreme Court, a judgment creditor presents two copies of the writ of execution at the Court's Central Office. After Court staff check the papers, one copy is available to be collected within 48 hours by the judgment creditor and delivered to the Sheriff's office.²⁵ A certified copy of the writ of *fi fa* must be lodged with the Registrar of Titles²⁶ if the writ is to bind land. This must be obtained from the Sheriff's office.
- The District Court has twelve registries located around the State. A writ of execution must be issued out of the registry which delivered judgment for the original action. As in the Supreme Court two copies of the writ must be lodged, collected and delivered. The time and date of application are endorsed on the writ by the registry officer. The judgment creditor has responsibility for delivering the writ to the Bailiff in Perth. If land is involved, a certified copy which is only obtainable from the District Court Bailiff's office in Perth must be lodged with the Registrar of Titles.

22 *Supreme Court Act 1935 (WA)* s 131.

23 *Supreme Court Act 1935 (WA)* s 117; *Debtors Act 1871 (WA)* s 3.

24 See sections 2.3-2.4 above.

25 See para 6.26 of the attached Research Paper.

26 The office of the Registrar of Titles is the Department of Land Administration

- In the Local Courts, the registry staff prepare the warrant, not the judgment creditor. The creditor files a “praecipe” asking the court to prepare and issue a warrant to the bailiff. The time and date are endorsed but not effective until the registry is satisfied that all details including fees are correct; then the warrant is issued and forwarded to the appropriate bailiff by the court. The processing of a Local Court warrant is more complicated and takes longer than the superior court procedure even though the volume of debt collection matters is greater and the jurisdictional amount lower.

Authority commences

There is also a difference as to when the authority to seize and sell begins. Because of the necessity to serve a copy of the writ or warrant on the Registrar of Titles²⁷ before land is bound by the writ or warrant, there are consequences as to which judgments take priority when there is more than one claimant and the value of goods or land available for sale is insufficient to satisfy all judgment debts.²⁸

Protected goods

Some debtors' goods are protected from seizure. The Local Court exempts from seizure clothing to the value of \$100 for each adult of the family and \$50 for each dependent child; household furniture and effects not exceeding \$300; tools of trade to the value of \$100; beds and bedding, family photographs and portraits.²⁹ Under the Supreme Court Act \$1,000 worth of clothing of the debtor, his wife and any dependents is protected. Additionally, furniture and effects worth \$2 000 and \$1 000 worth of tools of trade are protected from seizure.³⁰ Provisions under the *Commonwealth Bankruptcy Act 1966* (Cth) are far more generous.³¹

Execution of sale transfer

In the District and Supreme Courts the Sheriff executes the transfer of land to give effect to the sale, whereas the Magistrate has these powers in the Local Court.

²⁷ *Transfer of Land Act 1893* (WA) s 133.

²⁸ Priority is not given to the first document served on the Commissioner of Titles, but upon the time of the delivery of the writ to the Sheriff compared to the time of filing of the praecipe with the Local Court seeking the issue of a warrant under s 137 of the *Local Courts Act 1904* (WA). See discussion in Chapter 6 of the Research Paper.

²⁹ *Local Court Act 1904* (WA) s 126.

³⁰ *Supreme Court Act 1935* (WA); *Government Gazette* 30 August 1996, 4315.

³¹ Section 116(2) of the *Bankruptcy Act 1966* (Cth) allows household property that is reasonably necessary for the domestic use of the bankrupt and his household having regard to current social standards including TV, VCR, stereo equipment, fridge/freezer, washing machine/dryer, car to value of \$5 000 CPI adjusted, and cash of up to \$2 600 CPI adjusted.

2.6 Judgment recovery assistance

Local Court orders are executed by the bailiff of the region who is an independent contractor paid by the fees on each process filed.³²

Supreme Court and District Court orders are executed by the Sheriff who also holds the office of Bailiff of the District Court. In contrast to the Local Court, the Sheriff/Bailiff and his officers are public servants paid a salary. Fees received on District and Supreme Court matters are paid to revenue.

2.7 Why should courts manage enforcement differently?

We see no good reason for retaining the different execution systems of the different courts. It is anomalous and inequitable. The Ministry of Justice has also looked at this matter and identified inconsistencies and problems with interpretation as well as administrative fragmentation. The Ministry has concerns about the method of appointment, measurement of performance and consistency of practice in the bailiff system.³³ We share these concerns.

There should be one common enforcement system of judgment debts in all civil courts. As we said in our *Review of the Civil and Criminal Justice System*.³⁴

While maintaining the distinction between civil and criminal matters and in so far as possible, uniformity of rules for different courts and plain English should be implemented when revising or drafting new legislative and procedural provisions in response to recommendations in this Report and generally.

We reaffirm and reiterate this recommendation in this context.

Recommendation 1

There should be one unified civil debt recovery system for the Local, District and Supreme Courts.

This Recommendation is in keeping with the second Recommendation from our *Review of the Civil and Criminal Justice System* calling for "uniformity of rules for

32 The bailiff system is discussed extensively in the Ministry of Justice, Court Services Division, *Civil Judgment Recovery System, Part II - Administrative Recommendations Report*, above n 5, 20-37.

33 Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part I - Legislative Recommendations Report*, above n 5, 25.

34 Above n 4, *Final Report*, Recommendation 2 at 17, 341.

different courts". This recommendation[]adopts the Ministry of Justice's approach to "unified legislation for the civil judgment debt recovery system".³⁵

2.8 Project 16: Recommendations Concerning Enforcement in the Local Courts

In an earlier report on Local Court procedures this Commission recommended reform of the law in the area of execution of debts in the Local Court.³⁶ Our major recommendations were:

- Replacing two proceedings, the examination in aid of execution and the judgment summons, with a single proceeding, the enforcement hearing.
- Expanding the range of debts which could be attached to pay a judgment debt to include earnings such as wages and salaries where a judgment debtor defaults under an order for payment by instalments.
- Repealing imprisonment for debt but making a debtor liable for contempt of court where the debtor has the means to pay by instalments but willfully, persistently and without honest and reasonable excuse defaults in making payments.
- 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.
- 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 or her ability to earn an income is not unduly impaired.

To encourage implementation of our previous recommendations that were considered by the Ministry of Justice in their reports on the Civil Judgment Debt Recovery System³⁷ and in recognition of the work done by the Ministry, we recommend the following:

Recommendation 2

All Western Australian State courts should have simple common rules, forms and procedures in plain English for the recovery of civil judgment debts.

35 Law Reform Commission of Western Australia, above n 4, *Final Report*, 17.

36 Law Reform Commission of Western Australia, Project 16, above n 6, 138-68.

37 Ministry of Justice, above n 5.

This Recommendation can be implemented by enactment of an Enforcement of Civil Judgments Act similar to that proposed by the Ministry of Justice,³⁸ but with an emphasis on simplicity and modern, plain English that people can easily understand.

In this regard, we suggest a single simple standard form of application for judgment enforcement to be made available in a simple booklet that outlines the court's procedure. This is the essence of our Recommendations 18 and 160³⁹ from the Review but applied in the post-judgment context.

Recommendation 3

There should be a single, simple, standard form of Application for Judgment Enforcement available with a simple booklet that outlines the court's procedure.

In order to make the proposed Ministry of Justice legislation scheme truly consistent with the recommendations from our Review we propose further simplification and increased effort in the area of plain language. While the proposed elimination of the writs of *elegit* and others used in the higher courts helps to make the procedure more accessible and comprehensible, we believe still more can be done.

We envisage that the Application for Judgment Enforcement booklet and procedures it describes should:

- eliminate obscure terminology;
- maintain useful remedies but rename the procedures to be meaningful and easily understood; and
- provide simplicity, flexibility and truly economical enforcement mechanisms.

The needless complexity of the multiple remedies currently available can be eliminated by permitting multiple judgment enforcement orders to be made from the single Application for Judgment Enforcement.

We suggest the following modifications to the enforcement proposals retained by the proposed Ministry of Justice enforcement scheme.

1. Eliminate the use of the term “execution” and be consistent with the name of the new act proposed by the Ministry of Justice by using the word “enforcement”.

38 Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part 1 – Legislative Recommendations Report*, above n 5, 77 and Supplementary Report, December 1999, 2-6.

39 Law Reform Commission of Western Australia, above n 4, *Final Report*, 69, 141.

2. Eliminate archaic terms which are not meaningful to people without special training in this narrow area of the law. In this regard, the court should issue “orders” not “warrants”. Garnishment, sequestration and charging order terminology should be replaced with simple, meaningful descriptions of the outcomes sought from the use of these processes. Appropriate Judgment Enforcement Orders should be able to effect seizure of land as would a Warrant of Execution on a writ of *fi fa* but without the use of obscure terminology.

Accordingly in lieu of Recommendations 9 and 10 in the Ministry of Justice’s report on *Civil Judgment Debt Recovery System*⁴⁰ we propose the following, which also incorporates the essence of the Ministry of Justice’s Recommendations 12, 14 and others.

Recommendation 4

- 4.1 Through a single Application to Enforce Judgment, a judgment creditor should be able to seek, and the Court should have the power to order, a judgment debtor or a non-party or any third party to deliver information, custody or control over assets of any kind in the course of an investigation of the judgment debtor.**
- 4.2 The Court should be able to make orders concerning:**
- (a) debts owed to debtors (formerly garnishment proceedings and to include wage and salaries owed);**
 - (b) securities and monetary assets of debtors (formerly charging and stop orders and notices);**
 - (c) instalment payments;**
 - (d) contempt (formerly committal and attachment);**
 - (e) injunction relief (formerly sequestration);**
 - (f) delivery or possession;**
 - (g) appointment of a receiver;**
 - (h) the sale of land or goods (replacing the existing range of writs of execution available in the Supreme and District Courts, including a writ of *fi fa* as well as the warrant of execution against goods and/or land which is currently issued by the Local Courts); or**
 - (i) any other appropriate enforcement mechanism.**
- 4.3 Rescind, vary or suspend any previous order or make no order in aid of enforcement in response to the application of any party.**

Assuming that our Review Recommendation 156⁴¹ concerning the Local Court powers to grant both primary and ancillary equitable relief has been adopted, there

40 Above n 5, Part I - *Legislative Recommendations*, 82-82; *Supplementary Report*, 2-3.

41 Law Reform Commission of Western Australia, above n 4, *Final Report*, 140.

should be no difficulty in implementing this recommendation in all Western Australian courts.

We further suggest that the case statements mechanism we proposed in the Review Recommendations 165,⁴² 164,⁴³ 26,⁴⁴ 27,⁴⁵ and 28⁴⁶ be adopted and modified as appropriate for the post-judgment context.

Recommendation 5

The application to enforce judgment should be on one form clearly identifying:

- **the judgment debtor;**
- **the judgment creditor;**
- **the judgment sought to be enforced;**
- **the type(s) of enforcement order(s) sought;**
- **the facts upon which the application is based;**
- **any land or goods sought to be seized for sale;**
- **any creditor of the judgment debtor or other third party against whom an order is sought;**
- **any previous orders made to enforce the judgment; and**
- **the outcome of any previous orders.**

The Ministry of Justice also recommends that the Sheriff of Western Australia be responsible for the execution of process under the Enforcement of Judgments Act as an officer of the Local, District and Supreme Courts. We agree. As an appointed public servant, the Sheriff is able to delegate functions to bailiffs under his control. We agree generally with the recommendations⁴⁷ related to this function. However, we have concerns about Ministry of Justice Recommendation 80 as follows:

That debt collectors may apply to be appointed as bailiffs, and that bailiffs be allowed to be licensed as debt collectors.

We see the potential for a conflict of interest or the perception of one in this situation. We do not adopt this recommendation.

42 Ibid, 142.

43 Ibid, 142.

44 Ibid, 74.

45 Ibid, 75.

46 Ibid, 75.

47 See Appendix A, below pp 41-46.

Chapter 3

BINDING EFFECT OF AN ORDER FOR JUDGMENT ENFORCEMENT BY SALE (CURRENTLY WRIT OF *FI FA* OR WARRANT OF EXECUTION)

3.1 Old system land

Most land in Western Australia is registered under the Torrens land system. This is a system whereby the ownership and any dealings affecting the land may be registered on the title for all to see. Torrens system land is regulated by the *Transfer of Land Act 1893* (WA).

However, there is still some land in Western Australia that has not been brought under the *Transfer of Land Act 1893* (WA). Western Australia comprises 2 500 000 km² of land of which only 7% is freehold. The balance is Crown Land held in reserves and leasehold. Of the 7%, 0.1% is old system land, ie 175 km². There is no one title that can be searched to ascertain clearly what the position is with regard to ownership and interests affecting the title of what is called "old system" land.

Any dealings with land not under the *Transfer of Land Act* (WA) must be registered under the *Registration of Deeds Act 1856* (WA) to protect the claimed interest. The commonly held view is that registration under the *Registration of Deeds Act 1856* (WA) is only necessary for old system land. However there is an argument that it is necessary to register a judgment under this Act to comply with s 133 of the *Transfer of Land Act 1893* (WA).⁴⁸

A search of deeds needs to be undertaken to ascertain ownership and any encumbrances relating to old system land. Until all land in Western Australia is regulated by the *Transfer of Land Act 1893* (WA) we continue to rely upon antiquated laws inherited from England to determine interests in such land. The law in this area is not clear and is described as "a truly fearsome picture calculated to deter the stoutest heart from analysis".⁴⁹

48 See paragraph 2.42 of the Research Paper.

49 El Sykes & S Walker, *The Law of Securities* (5th ed, 1993) 431 quoted in paragraph 2.31 of the Research Paper. Paragraphs 2.15-34 of the Research Paper sets out the basis for this confusion.

3.2 Priority Point

In taking possession of land or goods of a judgment debtor by an order for judgment enforcement by sale, the Sheriff or his delegate must be aware of the timing of the "priority point". The sale can only transfer the interest in property that the judgment debtor owned at that point in time.

The judgment debtor's interest can be changed by the debtor entering into a contract for the sale or mortgage of the asset. There must be a point which crystallises the interest of the judgment debtor. The judgment debtor's interest at that point is what the Sheriff may sell to pay the judgment creditor thus stopping the judgment debtor from being able to deal with the asset and defeat the judgment creditor.

This point in time is referred to as "the priority point". We discuss in Chapter 2 of the Research Paper how the priority point was originally fixed and then changed over the centuries by statutes relating to goods and land.⁵⁰

The goods or land are said to be "bound" from the priority point. After the goods or land have been bound, the judgment debtor cannot pass his or her interest to anyone although the judgment debtor remains the owner until sold. If the judgment debtor transfers an interest in the goods or land after bound, then the person takes the property subject to the interest claimed by the judgment creditor. Depending upon when the priority point is fixed, it is possible that the goods or land may be bound before the debtor learns of this fact.⁵¹

The priority point is important also when there is more than one judgment creditor seeking to enforce judgment against the same asset. The priority point also determines the order in which judgment creditors benefit from the sale of the goods or land.

A further problem is that a writ of *fi fa* or warrant of execution does not have an indefinite life. A writ of *fi fa* or warrant expires at the end of one year, but may be renewed. Confusion may result when registered against a certificate of title of land because the effectiveness of the writ of *fi fa* or the warrant expires at the conclusion of a four month period.⁵² The four-month period may be renewed, however, once expired the first judgment creditor's priority may be lost and replaced by another creditor.⁵³

50 Paragraphs 2.4-2.40 of the Research Paper.

51 The effect of this is discussed in the Research Paper at paragraphs 2.12-4 with regard to goods, 2.32-4 in relation to old system land and 2.39-43 in relation to land under the *Transfer of Land Act 1893 (WA)*.

52 *Transfer of Land Act 1893 (WA)* s 133.

53 This issue is discussed at paragraphs 2.41-3 of the Research Paper.

In Chapters 2 and 3 of the Research Paper we discuss the history of the law inherited from England and how other Australian states have dealt with these issues. Much of the law relating to these issues is antiquated and in desperate need of reform. By our *Report on United Kingdom Statutes in Force in Western Australia*⁵⁴ we recommend significant reforms which would also help clarify this area of the law. However, in this specific area we recommend the following:

Recommendation 6

Provisions from the Imperial Judgments Acts of 1838, 1839, 1840 and 1855 as adopted by the *Imperial Acts Adopting Ordinance 1867 (WA)* should be repealed. These Acts require a memorandum containing particulars of the judgment to be left with the Master of the Supreme Court for registration at the Supreme Court. This seems to be unnecessary. The specific provisions which would be repealed are: sections 13 and 19 of the *Judgments Act 1838*; sections 1 to 6 of the *Judgments Act 1839*; section 2 of the *Judgments Act 1840* and sections 4, 5, 6, 7 and 8 of the *Judgments Act 1855*. In addition a consequential amendment would have to be made to section 11 of the *Judgments Act 1855*.

Recommendation 7

The *Registration of Deeds Act 1856 (WA)* should be amended so that it no longer applies to judgments. This requires amendment of the long title and to sections 2, 3, 4, 8, 9, 10, 11, 12, 16 and 22 of the *Registration of Deeds Act 1856 (WA)*.

Recommendation 8

The *Property Law Act 1969 (WA)* should be amended to provide that:

- (i) A judgment, decree or order of a court should not bind or affect any land until and unless an order for judgment enforcement by sale is issued.**

- (ii) An order for judgment enforcement by sale of land should not bind or affect purchasers, mortgagees, or creditors who acquire an interest in the land, (notwithstanding notice of the order) until the Sheriff (or his delegate) receives an order for sale and distribution of the proceeds containing –

 - (a) the name and the usual or last known residence of the person whose estate or interest in the land is intended to be affected,
 - (b) the court and title of the cause of matter in which such judgment, decree or order has been made, and
 - (c) the date of the delivery to the sheriff (or his delegate),
 - (d) particulars of the land intended to be affected by the order for judgment enforcement by sale, and
 - (e) notice indicating that a copy of the order, and signed as required under the *Registration of Deeds Act 1856 (WA)*, has been delivered to the Registrar of Deeds and Transfers.
- (iii) Notice of the Order is to be registered under the *Registration of Deeds Act 1856 (WA)* by the Registrar of Deeds and Transfers as soon after receipt as practicable in the manner in which memorials are registered under that Act.
- (iv) Registration of notice of the Order by the Registrar of Deeds and Transfers should also constitute registration of the order for judgment enforcement by sale under the *Registration of Deeds Act 1856 (WA)*.
- (v) Neither registration of the notice nor registration of the order for sale is to affect priority as to the proceeds of sale where there are competing orders for judgment enforcement, writs of execution or warrants of execution.
- (vi) Neither the delivery of the notice of the Order to the Registrar of Deeds and Transfers nor its registration under the *Registration of Deeds Act 1856 (WA)* should operate to extend the time for which the order for judgment enforcement would remain in force if not so registered.
- (vii) Upon receipt by the Registrar of Deeds and Transfers of a certificate of satisfaction:

- (a) specifying the name of the person whose estate or interest was intended to be affected by the order,
- (b) specifying the title of the court from which the order was issued,
- (c) specifying the memorial number allocated to the order for judgment enforcement by sale at the time of its registration,
- (d) particularising the land which was intended to be affected by the order for sale; and
- (e) certifying:
 - (i) that the whole of the money owing under the order for sale has been paid or otherwise satisfied, and
 - (ii) the date on which the order was finally paid out or otherwise was satisfied.
 - (iii) The Registrar of Deeds and Transfers should:
 - (a) endorse on the certificate the date when the certificate was received by him;
 - (b) register the certificate under the *Registration of Deeds Act 1856 (WA)* in the same manner as a memorial;
 - (c) index it as though it were a memorial; and
 - (d) safely keep the certificate in his office for future reference when required in the same way as a memorial is kept.
 - (iv) The certificate of satisfaction should be signed under oath by the judgment creditor, but if the judgment creditor is a corporation it may affix its common seal or comply as provided by section 127 of the Corporations Law.
- (viii) For the purposes of the amendments, 'court' should be defined as any court constituted under the law of Western Australia or any federal court constituted under the law of the Commonwealth of Australia.
- (ix) For the purposes of the amendments, 'land' should include any estate or interest in land.
- (x) Amendments (i) to (ix) should be subject to section 133 of the *Transfer of Land Act 1893 (WA)*.
- (xi) The amendments should not affect the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)*.

Chapter 4

EXTENDING THE DURATION OF ORDERS FOR JUDGMENT ENFORCEMENT BY SALE (CURRENTLY WRITS AND WARRANTS OF EXECUTION) UNDER THE TRANSFER OF LAND ACT

4.1 Four months to complete the sale of land

Section 133 of the *Transfer of Land Act 1893* (WA) provides the procedure for the sale of land to pay the proceeds to a judgment creditor. It confines the period within which such a sale may take place to four months after appropriate registration of the order for sale.

Our research into and examination of the submissions we received prior to preparing this report indicated we need to consider extending the four-month period because:

- sometimes it can take the Sheriff more than four months to ascertain what is owing to other encumbrance holders, advertise the land for auction and, if sold, finalise the sale;
- the commencement of the procedure may be delayed whilst the parties negotiate the payment of the judgment debt without proceeding to sale;
- the land may not be sold at auction on the first occasion and must be readvertised and put up for sale again;
- another party (other than the judgment debtor or creditor) may obtain an interim injunction restraining the sale of the land.

In Chapter 4 of the accompanying Research Paper, we discussed whether the original court should have the power to extend the initial period and, if so, the appropriate period and circumstances that should allow an extension.⁵⁵ Having taken advice from those who have spent many years dealing with the problems of the present system and researched how other Australian states have dealt with this issue we recommend the following:

Recommendation 9

Section 133 of the *Transfer of Land Act 1893* (WA) should be amended as follows:

- (a) An order for judgment enforcement by sale (currently a writ or warrant of execution) should cease to bind the specified land, lease, mortgage or charge unless a transfer upon a sale under the order is left for entry upon the register within:
 - (i) eight months (and not four months as at present) from the day on which the copy of the order was served on the Registrar of Titles; or**
 - (ii) any extended time as the court which issued the original judgment enforcement may order, provided that a certified copy of the order of extension, or other evidence of the making of the order as might be prescribed by regulation is lodged with the Registrar of Titles before the expiration of the statutory period (or the extended period if a previous extension has been granted).****
- (b) The court should be empowered to make the order extending the eight month period, or the extended period if a previous extension has been granted, on the application of the judgment creditor.**
- (c) The application should be served on the judgment debtor, and on any other person directed by the court.**
- (d) Without in any other way affecting the discretion of the court, an order for extension under section 133 should not be made unless special circumstances are shown.**
- (e) It should not be possible to serve a further copy of the order on the Registrar of Titles in respect of the specified property or part of it.**
- (f) A transfer upon a sale under an order for sale should not be able to be presented for registration unless -
 - (i) presented for registration within the statutory period or extended period; or**
 - (ii) presented later with a certificate from the sheriff confirming that the sale took place within the statutory period or extended period.****

- (g) A transfer presented for registration after the expiry of the statutory period or extended period should be subject to all interests notified on the register at the time of the presentation of the transfer.**
- (h) Notwithstanding (a), except in the case of a warrant of execution issued under the *Fines, Penalties and Enforcement Act 1994 (WA)*, an order for judgment enforcement by sale, a copy of which has been served on the Registrar of Titles, should be incapable of binding the land, lease, mortgage or charge after one year from the date of issue or last renewal in the court from which it issued unless notice of its renewal by the original issuing court is lodged with the Registrar of Titles before the expiration of one year from the date of issue or from the date of the last renewal, as the case may be.**
- (i) Section 133 should not affect the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)*.**
- (j) Section 133 of the *Transfer of Land Act 1893 (WA)* should be subject to the provisions of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)*.**

If this period of four months is amended to eight months with provision for further extension, then it is appropriate to appeal to section 90 of the *Transfer of Land Act 1893 (WA)*.

Recommendation 10

Subject to the implementation of Recommendation 9(e) we recommend that section 90 of the *Transfer of Land Act 1893 (WA)* be repealed.

As discussed above and in more detail in Chapter 4 of the Research Paper at paragraphs 4.40-4.44, section 133 of the *Transfer of Land Act 1893 (WA)* applies to existing writs of *fi fa* and warrants of execution (to be called orders for judgment enforcement by sale) and also warrants of execution issued out of a Warden's Court under the *Mining Act 1978 (WA)*, but not orders from the High Court of Australia or the Federal Court. To ensure that all orders are covered we propose the following amendment.

Recommendation 11

Section 133 of the *Transfer of Land Act 1893 (WA)* should be amended to apply to orders for enforcement of judgment by sale, writs of *fi fa* and warrants of execution issued out of any court constituted under the law of Western Australia or any federal court constituted under the Commonwealth of Australia, under which the Sheriff or his delegate may sell any of the following: land, a lease, a mortgage or a charge of which the judgment debtor is the registered proprietor, for the purpose of satisfying a judgment debt.

We do not propose that enforcement proceedings issued out of courts of other states be included in this scheme. There are other provisions in the *Service and Execution of Process Act 1992 (WA)* and the *Foreign Judgments Act 1991 (WA)* which permit registration of foreign judgments in Western Australian courts and thus allow enforcement in this State.

4.2 Questioning the validity of a prior caveat

A caveat is a notice recorded on the title register of land under the Torrens land system to protect an interest that is not registered or not registrable. There is no appropriate mechanism by which a judgment creditor can question the validity of a prior caveat.

Currently, where someone believes an interest claimed against land has ceased to exist, the Commissioner of Titles may serve on the caveator a 14 day notice requiring the caveat be withdrawn or within that 14-day period proceedings be commenced in the Supreme Court to substantiate the claimed caveat.

Additionally the proprietor of land over which a caveat has been lodged can apply to have a notice served on the caveator who must obtain an order from the Supreme Court within 21 days to continue the caveat or it will lapse.

However, as the judgment creditor is not the proprietor of the land, these remedies do not assist. To remedy this situation, which is discussed in more detail in paragraphs 4.45-54 in the Research Paper we make the following recommendation.

Recommendation 12**With respect to caveats:**

- (a) Where a copy of an order for judgment enforcement by sale, a writ of *fi fa* or a warrant of execution has been served on the Registrar of Titles, the judgment creditor should be able to summon any caveator to attend before the Supreme Court to show cause why the caveat should not be removed;**
- (b) On proof that the caveator has been summoned, the Supreme Court should be empowered to order, either *ex parte* or otherwise as necessary, removal of the caveat and to determine who is to bear the costs of, and incidental to, the summons and the proceedings on the summons; and**
- (c) If the Supreme Court has ordered that the caveat be removed the Registrar of Titles should remove the caveat upon being served with a copy of the order.**

Further, where a party claiming ownership of land or a lease, mortgage or charge, has lodged a caveat and the court has subsequently rejected the claim, the Registrar of Titles should remove the caveat upon an order of the Supreme Court.

Recommendation 13

In interpleader proceedings where a claim to ownership of land or a lease, mortgage or charge has been rejected, the Supreme Court should be empowered to:

- (i) order the removal of any caveat which the claimant in the interpleader proceedings had lodged at the Titles Office; and**
- (ii) determine who should bear the costs of, and incidental to, obtaining the order, and the entry and/or removal of the caveat.**

If the Supreme Court has ordered that the caveat be removed, the Registrar of Titles should remove the caveat when a copy of the order has been served on him.

Recommendation 14

Where a caveat has been removed or withdrawn after an order of the Supreme Court made under the powers (see Recommendations 12 and 13) requiring its removal, the caveator may not lodge a further caveat on the same, or substantially the same, grounds unless the judgment creditor's consent to do so is endorsed on the further caveat or the Supreme Court has made an order giving leave for the lodgment of the further caveat and a copy of that order has been served on the Registrar of Titles.

4.3 Removing writs and warrants from the register where the statutory period has expired

Currently, a warrant or writ of *fi fa* will be removed from the certificate of title of land only where the judgment creditor provides evidence that the judgment has been satisfied either before sale of the land or following sale. Unless removed, the writ or warrant remains endorsed on the title even after the expiry of the four month period when it no longer binds the land. A mechanism is required for cancelling the writ, warrant or order for judgment enforcement by sale. In paragraphs 4.55-73 of the Research Paper we discuss the various problems with the existing situation.

Recommendation 15

The *Transfer of Land Act 1893 (WA)* should be amended to provide that where the statutory period or extended period under section 133 has expired, the Registrar of Titles shall cancel the registration of an order for judgment enforcement by sale, writ of *fi fa* or warrant of execution upon application being made supported by satisfactory evidence of the expiry of the order for judgment enforcement, writ or warrant.

Our recommendations are not intended to affect the existing provisions in the *Transfer of Land Act 1893 (WA)* dealing with the removal of a writ of *fi fa* or warrant of execution from the register and these would remain except for the change of terminology to reflect Recommendation 4.

Chapter 5

IF MORE THAN ONE ORDER FOR JUDGMENT ENFORCEMENT BY SALE, WHICH TAKES PRIORITY?

5.1 Priority of writs, warrants and orders for judgment enforcement for sale

Sometimes the Sheriff has more than one judgment debt to satisfy from the sale of land or goods. How does he decide the priority to be given to the judgment creditors claims?

In Western Australia, the general practice is for the Sheriff or bailiff to attempt to seize and sell goods first. The sale of a judgment debtor's land is ordinarily a last resort when there are insufficient goods to satisfy the amount owing to the judgment creditor.

5.2 Priority of writs or warrants issued out of the same court: present position

At common law, priority between different judgment creditors is determined by the precise time of delivery of the writ or warrant to the Sheriff. The maxim "He who is first in time has the strongest claim in law" is the guide.⁵⁶ In other words, the Sheriff is to apply the proceeds of sale according to the priority, set by the time of delivery to him. If the proceeds are more than sufficient to satisfy the first writ, the Sheriff applies the surplus to the second and so on.

Section 136 of the *Local Courts Act 1904* (WA) varies the common law by providing that the bailiff determines the priority by looking at the time when the application for the warrant was made to the clerk of the Local Court.

However, section 133 of the *Transfer of Land Act 1893* (WA) provides that writs and warrants must be served on the Registrar of Titles before they bind a judgment debtor's land. Where two judgment creditors have had writs of *fi fa* issued against the same land, does the order in which they are paid depend on the order in which the writs were handed to the Sheriff, or the order in which the copies of the writs were lodged at the Titles Office?

⁵⁶ Paragraphs 6.3-6.10 of the Research Paper discuss how the common law has been changed by English and Western Australian legislation and case law.

A warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* by the Registrar has priority over any writ or warrant of execution against the property of the offender by virtue of section 95. Our recommendations are not intended to affect that provision.

5.3 Priority of writs or warrants of execution issued out of different courts: present position

Sections 86A of the *District Court Act of Western Australia 1969* and section 137 of the *Local Courts Act 1904 (WA)* set out the priority of application of proceeds of sale to judgment debtors with orders from the Supreme Court, the District Court and the Local Court.

Where there is a judgment debt from all three courts, the priority is determined by the first in time of:

- (i) delivery of the Supreme Court writ of *fi fa* to the Sheriff,
- (ii) application to the Registrar of the District Court or the Clerk of the Local Court for the issue of a writ or warrant.

*In re Emms*⁵⁷ held that section 86A of the *District Court Act 1969 (WA)* applies even though a copy of the later competing document has been served on the Registrar of Titles under section 133 of the *Transfer of Land Act 1893 (WA)*.

5.4 Priority of writs – Sheriff's practice

Western Australian courts follow the rules set out in paragraph 5.3 in determining the priority for payment of the proceeds of the sale of goods and land, even where payment is made voluntarily by the debtor to the Sheriff or bailiff without a sale. This is the case even though the costs of sale may have been paid by the first creditor to register the writ or warrant who may not be first in line for the proceeds of sale. A later registration of an earlier warrant or writ must be made before the distribution of the proceeds of sale to receive priority.

Where goods are seized and sold to satisfy a judgment debt, only goods sufficient to discharge the debt can be seized. Under these circumstances, it is unlikely that sufficient monies would be raised from the forced sale of goods to cover more than one judgment debt. It is possible that the judgment creditor who has paid the costs of sale may not recover those costs upon payment of the proceeds to the judgment debtor with priority.

⁵⁷ Unreported, Supreme court of Western Australia, Wallace J, 13 September 1972, Library No 1081, discussed in paragraph 6.8 of the Research Paper.

Presently upon receipt of a writ of *fi fa* both the District Court Bailiff and the Sheriff write to the bailiff of the district in which the judgment debtor is located to advise of the receipt of the writ and identify the judgment debtor to learn if there are any outstanding warrants that may affect priority.

5.5 The Ministry of Justice *Report on the Civil Judgment Debt Recovery System*⁵⁸

In June 1997, the Court Services Division of the Ministry of Justice issued a report on legislative recommendations for a unified recovery of civil judgment debts under an enactment to be entitled the Enforcement of Judgments Act.⁵⁹ It recommended:

- the Sheriff of Western Australia be responsible for the execution of judgment debts from the Supreme, District and Local Courts and be an officer of each of these courts;
- the Sheriff be empowered to delegate functions to persons who would be titled 'bailiff';
- the statutory provisions of the *Supreme Court Act 1935 (WA)*, the *District Court Act 1969 (WA)* and the *Local Courts Act 1904 (WA)* relating to the appointment of Sheriff's officers, the appointment of the District Court Bailiff and relating to bailiffs in the Local Courts be repealed; and
- all existing Local Court bailiffs' appointments be terminated.

The Ministry of Justice report does not contemplate that Local Court warrants of execution (or orders for judgment enforcement as we would call them) be forwarded to the Sheriff. Rather the Ministry saw warrants being forwarded direct to bailiffs to whom the Sheriff would delegate his powers of enforcement. We do not agree with this proposal. In our view all writs, warrants and the orders for judgment enforcement by sale should be lodged with the Sheriff, who may then delegate to the bailiff for the area.

As set out above in Recommendations 1, 2, 4 and 5 above, we propose one form and procedure be used to enforce judgment debts in all courts.

58 Above n 5.

59 See above Chapter 2, Recommendations 1 and 2.

Recommendation 16

All orders for judgment enforcement by sale made by the Supreme, District and Local courts shall be lodged with the office of the Sheriff of Western Australia who may delegate the carrying out of the order to a bailiff located in the region the goods or land to be seized are located.

5.6 Historical and locational differences

As we have seen in section 5.3 where there are competing writs and warrants, section 86A of the *District Court Act 1969 (WA)* creates different priority points in the Supreme Court on the one hand and in the District Court and Local Courts on the other hand. We consider the lack of uniformity between the courts on the point of priority is unnecessary and anomalous.

We acknowledge the historical and locational differences between the courts and acknowledge current procedures as noted in paragraphs 6.20-62 of the Research Paper. We do not endorse the proposals to maintain the lack of uniformity set out in the Research Paper. In providing a unified system of judgment debt enforcement it is necessary to have one procedure apply to all courts and one priority point which is the same for judgment debts from all courts.

The Ministry of Justice report⁶⁰ recommendation 31 proposed that the priority point for writs and warrants issued from all courts should be the time of delivery of the warrant to the Sheriff.

We applaud the unified approach in this recommendation. However, we suggest the priority point should be the time of filing the application for an order for judgment enforcement by sale. We make this recommendation because of the inherent problems of distance in a state the size of Western Australia. We acknowledge this means that a judgment creditor in a country town may be disadvantaged by the time it takes to lodge an application for judgment enforcement by sale at the one registry of the Supreme Court in Perth, rather than in the nearby Local Court or the regional District Court where judgment may have been entered. However, it remains more likely that a creditor in a Supreme Court action will be represented by a solicitor whose address is near the Supreme Court in Perth rather than the reverse. Once the order has been obtained, we recommend it be lodged with the Sheriff in Perth and then registered with the Registrar of Titles if land is to be sold.⁶¹

⁶⁰ Above n 5, *Civil Judgment Debt Recovery System, Part I – Legislative Recommendations*, chapter 2, 92 (refer Appendix A, below pp 41-46).

⁶¹ *Transfer of Land Act 1893 (WA)* s 133.

5.7 Change in priority point

This change in priority point will also change the time at which the judgment debtor's asset is bound as discussed in Chapter 3. We accept that this earlier binding of the asset will occur before the judgment debtor has been informed of the order for sale. This occurs now, with notice of the writ of *fi fa* or the warrant of execution being served on the judgment debtor after delivery to the Sheriff or bailiff. A purchaser of goods for value without notice of the order prior to seizure by the Sheriff takes good title to those goods.⁶² Although as discussed in the Research Paper, this position is by no means clear.

Our proposal extends the period between the date when an application is made for judgment enforcement by sale and when the goods or land are seized by the Sheriff or bailiff. In the case of land, any contract to sell land would state whether the land is purchased subject to any encumbrance. Should the land not be as represented in the contract, the purchaser would have a remedy against a judgment debtor vendor. In the case of goods, the *Sale of Goods Act 1895* (WA) states a purchaser takes good title under these circumstances. A judgment creditor caught out by the sale or encumbrance of an asset would be able to pursue the judgment debtor for the proceeds of sale, mortgage, lease or charge under the simplified judgment enforcement proceedings we propose.

To give effect to these proposals, we make the following recommendations.

Recommendation 17

- (1) Subject to Recommendation 19, section 136 of the *Local Courts Act 1904* (WA), by which when more than one order for judgment enforcement by sale (presently warrants of execution) is delivered to a bailiff to be executed against the same person, he is to execute the orders in the priority of the times when application for such orders were made to the clerk of the Local Court, should be retained save for changes in terminology implicit in Recommendations 1, 2 and 4.**
- (2) Subject to Recommendation 21, the priority point under section 86A of the *District Court Act 1969* (WA) in the case of an order for judgment enforcement by sale (presently called a warrant of execution or writ of *fi fa*) should remain as the time of the application to the clerk of the Local Court or the District Court.**

62 Section 26 of the *Sale of Goods Act 1895* (WA) discussed in paragraph 2.7-2.14 of the Research Paper.

- (3) Subject to Recommendation 21, the priority point under section 86A of the *District Court Act 1969 (WA)* in the case of an order for judgment enforcement by sale (presently called a writ of *fi fa*) should be changed to be at the time of the application to the Supreme Court for its issue.

Recommendation 18

Where more than one order for judgment enforcement by sale of land or goods has issued out of:

- (a) only one of the Supreme Court, the District Court or a Local Court; or
(b) two or more of the Supreme Court, the District Court or a Local Court, and the expenses of sale or attempted sale have been borne by a judgment creditor who is not first in priority and another judgment creditor is first in priority, then the proceeds of sale should be applied: firstly in repaying the judgment creditor who paid the expenses of sale; and secondly then in order of priority. The proposed provision should be enacted as a separate section in the *District Court Act 1969 (WA)*.

Recommendation 17 must be subject to Recommendation 19. To do otherwise would reward a judgment creditor who has obtained an order for judgment enforcement by sale and obtained priority, but not progressed the matter by registering the order against the land. Permitting this action would create administrative difficulties for the Sheriff or bailiff in determining priorities.

Recommendation 19

Where a judgment debtor is the registered proprietor under the *Transfer of Land Act 1893 (WA)* of land, a lease, a mortgage or a charge and there is a sale of that interest under an order for judgment enforcement by sale, a judgment creditor whose order is binding the land, lease, mortgage or charge under section 133 of the *Transfer of Land Act 1893 (WA)* at the time of the sale should have priority to the proceeds of sale over a judgment creditor whose order is in force in respect of but not binding the land, lease, mortgage or charge under section 133. If more than one judgment creditor's order for judgment enforcement by sale is binding, priority between them should be determined by the time of service of the order for judgment enforcement by sale on the Registrar of Titles. The necessary legislative amendment should appear in the *Transfer of Land Act 1893 (WA)* and be subject to the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* and the *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)*.

Chapter 6

OTHER ISSUES

6.1 Sheriff's difficulty ascertaining amounts owing to encumbrance holders

The Sheriff has a duty to act fairly in selling land under a court order. The Sheriff must obtain a fair price and may be liable for damages for failing to exercise due care. The land being sold is subject to the mortgages registered on the title and any other outstanding statutory charges for rates and land tax.

However, without the judgment debtor's consent, the Sheriff is unable to allow potential purchasers to inspect the land and buildings on it. The Sheriff needs to know amounts owing in relation to the land so that prospective purchasers can be informed and be in a position to make a reasonable bid at auction. Although a title search will clarify to whom monies are owed in relation to the land, it will not provide information as to how much is owing.

There is no legal requirement on the judgment debtor to provide this information and entities to whom monies are owed are generally prohibited from providing this information under the *Privacy Act 1988* (Cth).

Recommendation 58 of the Ministry of Justice report on the *Civil Judgment Debt Recovery System*⁶³ provides that encumbrance holders and rating authorities must provide the Sheriff with any information in their possession required in respect of the duty to in sell land. We agree and make the following recommendation.

Recommendation 20

The *Property Law Act 1969* (WA) should be amended so that where an order for judgment enforcement by sale against land has issued out of a court in Western Australia, the holder of an encumbrance over the land or any part of the land should, on request by the Sheriff or his delegate, provide information in the possession of the encumbrance holder as to:

⁶³ Above n 5, *Civil Judgment Debt Recovery System, Part I – Legislative Recommendations*, chapter 2, 107 (refer Appendix A, below pp 41-46).

- (i) the maximum amount secured by the encumbrance,
- (ii) the present amount outstanding under the encumbrance,
- (iii) the mode and amount of interest accruing, and
- (iv) any other information requested by the Sheriff or his delegate to assist in carrying out his duties under the order for judgment enforcement for sale.

A request by the Sheriff or his delegate may be made at any time after the Sheriff has received the order for judgment enforcement for sale while it is still in force. The Sheriff or his delegate should be able to make the request after receipt of the order but only whilst it is in force.

Recommendation 21

The *Property Law Act 1969 (WA)* should be amended to make any failure or refusal by the encumbrance holder of land to provide information referred to in Recommendation 20 an offence punishable by a fine.

Recommendation 22

The *Property Law Act 1969 (WA)* should be amended to provide that any authority levying or assessing rates, service charges, or land tax in respect of the land or any part of the land should, on request by the Sheriff or his delegate to whom the order for judgment enforcement by sale has been directed, advise the amounts outstanding for rates, service charges and taxes in respect of the land.

6.2 Priority conflict between warrants of execution under the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* and the *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)*.

Section 121 of the *Metropolitan Water Supply, Drainage and Sewerage Act 1909 (WA)* gives a warrant for sale of land under that Act priority over other orders issued against the land. However, section 95 of the *Fines, Penalties and Infringement Notices Enforcement Act* enacted in 1994 also provides that a warrant issued under that Act has priority. In our view the later Act would have priority.

Recommendation 23

The *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)* should be amended to provide that despite section 86A of the *District Court Act 1969 (WA)*, a warrant of execution issued under the *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)* has priority over any other writ or warrant against the property of the debtor except for a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)*.

Recommendation 24

Section 121 of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)* should be amended so that the amount owed under a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* will be paid out of the proceeds of sale before payment of the costs of the prescribed notices, the warrant and the sale and the money due to the Water Corporation.

6.3 Warrants of Execution under the *Mining Act 1978 (WA)*

The *Mining Act 1978 (WA)* provides for regulations to be made concerning the keeping of a register of mining tenements. This register records dealings affecting a mining tenement and all dealings must be registered. A mining tenement may be sold, encumbered, transmitted or seized under a warrant or writ of execution.

The regulations provide for an interest in a mining tenement to be seized under a writ of *fi fa* or a warrant issued out of the warden's court or any other court. Notice of a writ or warrant, attaching the document, must be given to the mining registrar. There is no equivalent of section 133 of the *Transfer of Land Act 1893 (WA)* to bind a mining tenement.

We refer to the discussion in both Chapter 3 of the Research Paper and chapter 7 at paragraphs 3.25-6 and 7.19-22 in which we discussed that land (other than land under the *Transfer of Land Act*) should not be bound until the registration of a memorial concerning the process of orders for sale under the *Registration of Deeds Act 1856 (WA)*.

Recommendation 25

We recommend that the amendments contained in Recommendation 8 be adopted in respect of the *Mining Act 1978 (WA)* subject to the following:

- (i) References to the *Mining Act 1978 (WA)* should be substituted for references to the *Property Law Act 1969 (WA)*.**
- (ii) Registration should be in the register established under Regulation 106(1)(f) of the *Mining Regulations 1981* rather than the *Registration of Deeds Act 1856 (WA)*.**

Chapter 7

SUMMARY OF RECOMMENDATIONS

1. There should be one unified civil debt recovery system for the Local, District and Supreme Courts.
2. All Western Australian State courts should have simple common rules, forms and procedures in plain English for the recovery of civil judgment debts.
3. There should be a single, simple, standard form of Application for Judgment Enforcement available with a simple booklet that outlines the court's procedure.
- 4.1 Through a single Application to Enforce Judgment, a judgment creditor should be able to seek, and the Court should have the power to order, a judgment debtor or a non-party or any third party to deliver information, custody or control over assets of any kind in the course of an investigation of the judgment debtor.
- 4.2 The Court should be able to make orders concerning:
 - (a) debts owed to debtors (formerly garnishment proceedings and to include wage and salaries owed);
 - (b) securities and monetary assets of debtors (formerly charging and stop orders and notices);
 - (c) instalment payments;
 - (d) contempt (formerly committal and attachment);
 - (e) injunction relief (formerly sequestration);
 - (f) delivery or possession;
 - (g) appointment of a receiver;
 - (h) the sale of land or goods (replacing the existing range of writs of execution available in the Supreme and District Courts, including a writ of *fi fa* as well as the warrant of execution against goods and/or land which is currently issued by the Local Courts); or
 - (i) any other appropriate enforcement mechanism.
- 4.3 Rescind, vary or suspend any previous order or make no order in aid of enforcement in response to the application of any party.
5. The application to enforce judgment should be on one form clearly identifying:
 - the judgment debtor;
 - the judgment creditor;
 - the judgment sought to be enforced;
 - the type(s) of enforcement order sought;
 - the facts upon which the application is based;
 - any land or goods sought to be seized for sale;
 - any creditor of the judgment debtor or other third party against whom an order is sought;
 - any previous orders made to enforce the judgment; and
 - the outcome of any previous orders.
6. Provisions from the Imperial Judgments Acts of 1838, 1839, 1840 and 1855 as adopted by the *Imperial Acts Adopting Ordinance 1867 (WA)* should be repealed. These Acts require a memorandum containing particulars of the judgment to be left with the Master of the Supreme Court for registration at the Supreme Court. This seems to be unnecessary. The specific provisions which would be repealed are: sections 13 and 19 of the *Judgments Act 1838*; sections 1 to 6 of the *Judgments Act 1839*; section 2 of the *Judgments Act 1840* and sections 4, 5, 6, 7 and 8 of the *Judgments Act 1855*. In addition a consequential amendment would have to be made to section 11 of the *Judgments Act 1855*.

7. The *Registration of Deeds Act 1856* (WA) should be amended so that it no longer applies to judgments. This requires amendment of the long title and to sections 2, 3, 4, 8, 9, 10, 11, 12, 16 and 22 of the *Registration of Deeds Act 1856* (WA).
8. The *Property Law Act 1969* (WA) should be amended to provide that:
 - (i) A judgment, decree or order of a court should not bind or affect any land until and unless an order for judgment enforcement by sale is issued.
 - (ii) An order for judgment enforcement by sale of land should not bind or affect purchasers, mortgagees, or creditors who acquire an interest in the land, (notwithstanding notice of the order) until the Sheriff (or his delegate) receives an order for sale and distribution of the proceeds containing –
 - (a) the name and the usual or last known residence of the person whose estate or interest in the land is intended to be affected,
 - (b) the court and title of the cause of matter in which such judgment, decree or order has been made, and
 - (c) the date of the delivery to the sheriff (or his delegate),
 - (d) particulars of the land intended to be affected by the order for judgment enforcement by sale, and
 - (e) notice indicating that a copy of the order, and signed as required under the *Registration of Deeds Act 1856* (WA), has been delivered to the Registrar of Deeds and Transfers.
 - (iii) Notice of the Order is to be registered under the *Registration of Deeds Act 1856* (WA) by the Registrar of Deeds and Transfers as soon after receipt as practicable in the manner in which memorials are registered under that Act.
 - (iv) Registration of notice of the Order by the Registrar of Deeds and Transfers should also constitute registration of the order for judgment enforcement by sale under the *Registration of Deeds Act 1856* (WA).
 - (v) Neither registration of the notice nor registration of the order for sale is to affect priority as to the proceeds of sale where there are competing orders for judgment enforcement, writs of execution or warrants of execution.
 - (vi) Neither the delivery of the notice of the Order to the Registrar of Deeds and Transfers nor its registration under the *Registration of Deeds Act 1856* (WA) should operate to extend the time for which the order for judgment enforcement would remain in force if not so registered.
 - (vii) Upon receipt by the Registrar of Deeds and Transfers of a certificate of satisfaction:
 - (a) specifying the name of the person whose estate or interest was intended to be affected by the order,
 - (b) specifying the title of the court from which the order was issued,
 - (c) specifying the memorial number allocated to the order for judgment enforcement by sale at the time of its registration,
 - (d) particularising the land which was intended to be affected by the order for sale; and
 - (e) certifying:
 - (i) that the whole of the money owing under the order for sale has been paid or otherwise satisfied, and
 - (ii) the date on which the order was finally paid out or otherwise was satisfied.
 - (iii) The Registrar of Deeds and Transfers should:
 - (a) endorse on the certificate the date when the certificate was received by him;
 - (b) register the certificate under the *Registration of Deeds Act 1856* (WA) in the same manner as a memorial;

- (c) index it as though it were a memorial; and
 - (d) safely keep the certificate in his office for future reference when required in the same way as a memorial is kept.
 - (iv) The certificate of satisfaction should be signed under oath by the judgment creditor, but if the judgment creditor is a corporation it may affix its common seal or comply as provided by section 127 of the Corporations Law.
 - (viii) For the purposes of the amendments, 'court' should be defined as any court constituted under the law of Western Australia or any federal court constituted under the law of the Commonwealth of Australia.
 - (ix) For the purposes of the amendments, 'land' should include any estate or interest in land.
 - (x) Amendments (i) to (ix) should be subject to section 133 of the *Transfer of Land Act 1893* (WA).
 - (xi) The amendments should not affect the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).
9. Section 133 of the *Transfer of Land Act 1893* (WA) should be amended as follows:
- (a) An order for judgment enforcement by sale (currently a writ or warrant of execution) should cease to bind the specified land, lease, mortgage or charge unless a transfer upon a sale under the order is left for entry upon the register within:
 - (i) eight months (and not four months as at present) from the day on which the copy of the order was served on the Registrar of Titles; or
 - (ii) any extended time as the court which issued the original judgment enforcement may order, provided that a certified copy of the order of extension, or other evidence of the making of the order as might be prescribed by regulation is lodged with the Registrar of Titles before the expiration of the statutory period (or the extended period if a previous extension has been granted).
 - (b) The court should be empowered to make the order extending the eight month period, or the extended period if a previous extension has been granted, on the application of the judgment creditor.
 - (c) The application should be served on the judgment debtor, and on any other person directed by the court.
 - (d) Without in any other way affecting the discretion of the court, an order for extension under section 133 should not be made unless special circumstances are shown.
 - (e) It should not be possible to serve a further copy of the order on the Registrar of Titles in respect of the specified property or part of it.
 - (f) A transfer upon a sale under an order for sale should not be able to be presented for registration unless -
 - (i) presented for registration within the statutory period or extended period; or
 - (ii) presented later with a certificate from the sheriff confirming that the sale took place within the statutory period or extended period.
 - (g) A transfer presented for registration after the expiry of the statutory period or extended period should be subject to all interests notified on the register at the time of the presentation of the transfer.
 - (h) Notwithstanding (a), except in the case of a warrant of execution issued under the *Fines, Penalties and Enforcement Act 1994* (WA), an order for judgment enforcement by sale, a copy of which has been served on the Registrar of Titles, should be incapable of binding the land, lease, mortgage or charge after one year from the date of issue or last renewal in the court from which it issued unless notice of its renewal by the original issuing court is

lodged with the Registrar of Titles before the expiration of one year from the date of issue or from the date of the last renewal, as the case may be.

- (i) Section 133 should not affect the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).
 - (j) Section 133 of the *Transfer of Land Act 1893* (WA) should be subject to the provisions of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA).
10. Subject to the implementation of Recommendation 9(e) we recommend that section 90 of the *Transfer of Land Act 1893* (WA) be repealed.
11. Section 133 of the *Transfer of Land Act 1893* (WA) should be amended to apply to orders for enforcement of judgment by sale, writs of *fi fa* and warrants of execution issued out of any court constituted under the law of Western Australia or any federal court constituted under the Commonwealth of Australia, under which the Sheriff or his delegate may sell any of the following: land, a lease, a mortgage or a charge of which the judgment debtor is the registered proprietor, for the purpose of satisfying a judgment debt.
12. With respect to caveats:
 - (a) Where a copy of an order for judgment enforcement by sale, a writ of *fi fa* or a warrant of execution has been served on the Registrar of Titles, the judgment creditor should be able to summon any caveator to attend before the Supreme Court to show cause why the caveat should not be removed;
 - (b) On proof that the caveator has been summoned, the Supreme Court should be empowered to order, either *ex parte* or otherwise as necessary, removal of the caveat and to determine who is to bear the costs of, and incidental to, the summons and the proceedings on the summons; and
 - (c) If the Supreme Court has ordered that the caveat be removed the Registrar of Titles should remove the caveat upon being served with a copy of the order.
13. In interpleader proceedings where a claim to ownership of land or a lease, mortgage or charge has been rejected, the Supreme Court should be empowered to:
 - (i) order the removal of any caveat which the claimant in the interpleader proceedings had lodged at the Titles Office; and
 - (ii) determine who should bear the costs of, and incidental to, obtaining the order, and the entry and/or removal of the caveat.
14. Where a caveat has been removed or withdrawn after an order of the Supreme Court made under the powers (see Recommendations 12 and 13) requiring its removal, the caveator may not lodge a further caveat on the same, or substantially the same, grounds unless the judgment creditor's consent to do so is endorsed on the further caveat or the Supreme Court has made an order giving leave for the lodgment of the further caveat and a copy of that order has been served on the Registrar of Titles.
15. The *Transfer of Land Act 1893* (WA) should be amended to provide that where the statutory period or extended period under section 133 has expired, the Registrar of Titles shall cancel the registration of an order for judgment enforcement by sale, writ of *fi fa* or warrant of execution upon application being made supported by satisfactory evidence of the expiry of the order for judgment enforcement, writ or warrant.
16. All orders for judgment enforcement by sale made by the Supreme, District and Local courts shall be lodged with the office of the Sheriff of Western Australia who may delegate the carrying out of the order to a bailiff located in the region the goods or land to be seized are located.

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17. (1) Subject to Recommendation 19, section 136 of the *Local Courts Act 1904* (WA), by which when more than one order for judgment enforcement by sale (presently warrants of execution) is delivered to a bailiff to be executed against the same person, he is to execute the orders in the priority of the times when application for such orders were made to the clerk of the Local Court, should be retained save for changes in terminology implicit in Recommendations 1, 2 and 4.
- (2) Subject to Recommendation 21, the priority point under section 86A of the *District Court Act 1969* (WA) in the case of an order for judgment enforcement by sale (presently called a warrant of execution or writ of *fi fa*) should remain as the time of the application to the clerk of the Local Court or the District Court.
- (3) Subject to Recommendation 21, the priority point under section 86A of the *District Court Act 1969* (WA) in the case of an order for judgment enforcement by sale (presently called a writ of *fi fa*) should be changed to be at the time of the application to the Supreme Court for its issue.
18. Where more than one order for judgment enforcement by sale of land or goods has issued out of:
- (a) only one of the Supreme Court, the District Court or a Local Court; or
- (b) two or more of the Supreme Court, the District Court or a Local Court,
- and the expenses of sale or attempted sale have been borne by a judgment creditor who is not first in priority and another judgment creditor is first in priority, then the proceeds of sale should be applied: firstly in repaying the judgment creditor who paid the expenses of sale; and secondly then in order of priority. The proposed provision should be enacted as a separate section in the *District Court Act 1969* (WA).
19. Where a judgment debtor is the registered proprietor under the *Transfer of Land Act 1893* (WA) of land, a lease, a mortgage or a charge and there is a sale of that interest under an order for judgment enforcement by sale, a judgment creditor whose order is binding the land, lease, mortgage or charge under section 133 of the *Transfer of Land Act 1893* (WA) at the time of the sale should have priority to the proceeds of sale over a judgment creditor whose order is in force in respect of but not binding the land, lease, mortgage or charge under section 133. If more than one judgment creditor's order for judgment enforcement by sale is binding, priority between them should be determined by the time of service of the order for judgment enforcement by sale on the Registrar of Titles. The necessary legislative amendment should appear in the *Transfer of Land Act 1893* (WA) and be subject to the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) and the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA).
20. The *Property Law Act 1969* (WA) should be amended so that where an order for judgment enforcement by sale against land has issued out of a court in Western Australia, the holder of an encumbrance over the land or any part of the land should, on request by the Sheriff or his delegate, provide information in the possession of the encumbrance holder as to:
- (i) the maximum amount secured by the encumbrance,
- (ii) the present amount outstanding under the encumbrance,
- (iii) the mode and amount of interest accruing, and
- (iv) any other information requested by the Sheriff or his delegate to assist in carrying out his duties under the order for judgment enforcement for sale.
- A request by the Sheriff or his delegate may be made at any time after the Sheriff has received the order for judgment enforcement for sale while it is still in force. The Sheriff or his delegate should be able to make the request after receipt of the order but only whilst it is in force.
21. The *Property Law Act 1969* (WA) should be amended to make any failure or refusal by the encumbrance holder of land to provide information referred to in Recommendation 20 an offence punishable by a fine.

22. The *Property Law Act 1969* (WA) should be amended to provide that any authority levying or assessing rates, service charges, or land tax in respect of the land or any part of the land should, on request by the Sheriff or his delegate to whom the order for judgment enforcement by sale has been directed, advise the amounts outstanding for rates, service charges and taxes in respect of the land.
23. The *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA) should be amended to provide that despite section 86A of the *District Court Act 1969* (WA), a warrant of execution issued under the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA) has priority over any other writ or warrant against the property of the debtor except for a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).
24. Section 121 of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA) should be amended so that the amount owed under a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) will be paid out of the proceeds of sale before payment of the costs of the prescribed notices, the warrant and the sale and the money due to the Water Corporation.
25. We recommend that the amendments contained in Recommendation 8 be adopted in respect of the *Mining Act 1978* (WA) subject to the following:
 - (i) References to the *Mining Act 1978* (WA) should be substituted for references to the *Property Law Act 1969* (WA).
 - (ii) Registration should be in the register established under Regulation 106(1)(f) of the *Mining Regulations 1981* rather than the *Registration of Deeds Act 1856* (WA).

Appendix A

CIVIL JUDGMENT DEBT RECOVERY SYSTEM RECOMMENDATIONS*

Legislative Recommendations (June 1997)

1. An act to administer unified legislation for the civil judgment debt recovery system should be entitled the Enforcement of Judgments Act ('EJA').

Amended (1999):

That the title of an Act to administer unified legislation for the civil judgment debt recovery system should be the Enforcement of Civil Judgments Act.

2. The Sheriff of Western Australia should be responsible for the execution of process under the EJA.
3. The EJA should provide that the Sheriff is an officer of the Local, District and Supreme Courts.
4. The EJA should provide that the Sheriff, in writing may delegate to any person any function of the Sheriff, except the power to delegate.
5. An advisory Board should be set up under the EJA to provide government with advice on debt recovery policy. Board should have stakeholder representation.
6. Provisions granting the Sheriff and delegates of the Sheriff immunity from civil liability similar to Section 12 of the *Sheriffs Act 1978* (SA) should be included in the EJA.

Amended (1999):

A provision that the Sheriff, and those police officers performing bailiff duties, be indemnified from civil liability similar to section 12 of the *Sheriffs Act 1978* (SA) should be included in the Enforcement of Civil Judgments Act.

7. Provisions creating an offence of hindering the Sheriff and delegates of the Sheriff similar to section 11 of the *Sheriff's Act 1978* (SA) should be included in the EJA.
8. The EJA should provide that it is an offence under the Act to impersonate the Sheriff, a Deputy Sheriff or a delegate of the Sheriff.
9. The EJA should provide that the creditor can elect from the following enforcement options.
 - Investigation Summons
 - Warrant of Executive or Possession
 - Garnishee Proceedings
 - Appointment of Receiver
 - Charging Order

Amended (1999):

The EJA should provide that the creditor can elect from the following enforcement options

- Investigation summons
- Warrant of execution or Possession
- Garnishee proceedings
- Appointment of a Receiver
- Charging Order
- Sequestration

* Recommendations from Court Services Division, WA Ministry of Justice, *Civil Judgment Debt Recovery System: Part I – Legislative Recommendations* (Perth: Ministry of Justice, June 1997).

10. The EJA should provide for an investigation hearing, combining the current judgment summons and examination in aid hearings, modelled on Sections 4 and 5 of the EJA of South Australia.
11. At the hearing of an investigation summons the Court should be able to order, on the application of the judgment creditor:
 - Garnishee Proceedings
 - Appointment of a Receiver
 - Charging Order
 - Payment in Full
 - Instalment Orders
 - No Order
 - Rescinding, variation or suspension of any order.

Amended (1999):

That at the hearing of an investigation summons the Court should be able to order, on the application of the judgment creditor:

- Garnishee Proceedings-
 - Appointment of a Receiver
 - Charging Orders
 - Sequestration orders
 - Payment in full
 - Instalment orders
 - No order
 - Rescission, variation or suspension of any order.
12. Either party should be able to apply to rescind, vary or suspend any order of the Court.
 13. All orders of the Court for payment should be framed so that they do not impose unreasonable conditions upon a judgment debtor.
 14. If a debtor fails to comply with orders to pay in full or by instalments there should be provision for an examination hearing modelled on sections 5(5) and 5(6) of the EJA of SA.
 15. At an examination hearing a judgement 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.
 16. Punishment for contempt should not extinguish the judgment debt.
 17. The EJA should provide for a Warrant of Execution with provisions similar to section 118(1) SCA.
 18. The EJA should provide for seizure of land under a Warrant of Execution with provisions similar to sections 119, 120, 121, and 122 SCA.
 19. The EJA should include a provision protecting the debtors and the debtors dependents clothing, necessary household property, tools and implements of trade and necessary medical aids from seizure.
 20. Land should only be sold by public auction subject to any contrary direction of the court.
 21. Personal property should be sold by public auction through the Sheriff should exercise a discretion to allow sale other than by public auction.
 22. The EJA should provide of the Sheriff to have power of entry upon land similar to the provisions of Section 91 of the FPINEA.
 23. The judgment debtor should be able to sell or mortgage land under seizure, at the discretion of the Sheriff, and pay the proceeds towards satisfaction of the judgment debt.
 24. There should be provision in the EJA that goods should be sold in preference to land similar to section 88(2) FPINEA.

25. The Sheriff should only sell sufficient property under seizure modelled on sec. 83 FPINEA.
26. The Sheriff shall advertise the sale of personal property in such manner he thinks fit.
27. The place of sale shall be at the place of seizure or at any other place, as the Sheriff thinks fit.
28. The Sheriff should take reasonable steps to determine a reasonable price for land or goods prior to sale or auction, except in the case of property of a perishable nature modelled on sec.81 FPINEA.
29. There should be provision, in the case of unsuccessful auctions where the Sheriff is unable to sell for a reasonable price, for either the Sheriff or the Creditor to apply to the Court to allow the sale by private treaty at a price not substantially below a reasonable price.
30. There should be provision to issue a notice to a party owing a debt to a debtor as is currently provided for by sec.123 SCA.
31. Right to proceeds shall be determined by priority according to the time of receipt of the Warrant by the Sheriff.
32. The Warrant of Execution should bind goods of the debtor as is currently provided for by sec.125 SCA.
33. The Sheriff should be protected whilst selling goods under execution without notice of claim by a third party as is currently provided for by section 159 SCA.
34. It should be expressly provided that the Sheriff 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 Sheriff should retain the ability to employ an auctioneer.
35. There should be provision to order a party to do or abstain from doing an act punishable by contempt for contravention.
36. A power to order the execution of instruments should be provided for in the EJA.
37. Provision should be included in the EJA providing for enforcement against partnerships and unincorporated associations.
38. Provision for the sale of joint property should be modelled on section 82 of FPINEA.
39. There should be provision for a stay of execution.
40. There should be provision that rules of court may allow delegation of any of the courts powers under the Act to its officers modelled on Section 18 of the EJA of SA.
41. All debts, whether present, future, joint or State Crown debts should be attachable.
42. Wages and earnings other than wages should be attachable.
43. An attachment of earnings or wages 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.
44. 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.
45. A garnishee should be entitled to retain out of a debt a prescribed amount for his work in making a payment into court. That sum should be at the expense of the judgment debtor.
46. 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.
47. 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.

48. 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.
49. There should be provision for a charging order extending to all property modelled on Section 8 of the EJA of SA.
50. There should be provision for appointment of a receiver modelled on section 9 of the EJA of SA.
51. There should be provision to arrest a debtor who fails to appear as required by the court summons and to have the debtor brought before the court for examination.
52. The warrant to arrest the judgment debtor should issue when the Court makes its order that it issue and the Court should only make the order on the application of the judgment creditor.
53. There should be a combined possession of land/delivery of goods procedure modelled on section 11 of the EJA of SA including provision for powers of entry and contempt and also permitting the recovery of any monies owing.
54. There should be provision for the enforcement of judgments by proceedings in contempt modelled on sec.12 of the EJA of SA.
55. Provisions similar to sec.160 SCA giving the Sheriff discretion in whether or not to remove chattels should be included in the EJA.
56. 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 issued out of a Local Court in Western Australia.
57. The existing remedies of the Writ of Venditioni Exponas, Writ of Restitution and Writ of Sequestration be abolished.

Amended (1999):
That the existing remedies of the Writ of Venditioni Exponas, Writ of Restitution and Writ of Elegit be abolished.
58. The EJA should provide that encumbrance holders and rating authorities must provide the Sheriff with any information in their possession which is required by the Sheriff in respect of his duties in selling land under a Warrant of Execution.
59. It should be an offence for an encumbrance holder to refuse or fail to provide information to the Sheriff with the penalty being a fine.
60. The EJA should provide for interest on judgment debts modelled on Sec.142 SCA.
61. There should be provision for facsimile warrants modelled on sec.105 FPINEA.
62. Power to make rules under the EJA should be extended to the Supreme Court, the District Court and the Local Court modelled on Section 19 of the EJA of SA.
63. There should be provision in the EJA requiring the Sheriff to serve and execute all processes or warrants issued to the Sheriff by a Court.
64. Any summons issued under the provisions of the EJA must be served personally.
65. Any warrant or summons issued under this Act may be executed or served on a Sunday as on any other day of the week.
66. The provisions of Sec.157 SCA relating to the appointment of Sheriff's Officers be repealed.
67. All provisions in the DCA relating to the Bailiff of the District Court of Western Australia should be repealed.

68. All provisions in the LCA relating to Bailiffs of Local Courts should be repealed and the EJA should also provide that in the coming into operation of the EJA all existing appointments of Bailiffs of Local Courts are terminated.
69. Persons to who the Sheriff delegates his powers should be formally titled "Bailiff".
70. eventy Assuming the passage of appropriate legislation dealing with Court Security the obligations to attend sittings of the court upon bailiffs found in Sec.18 LCA and Sec.30 DCA be repealed and that there be no obligation upon the Sheriff under the EJA to attend sittings of a court.
71. The Sheriff should adopt the role of service regulator and co-ordinator and the role of service provider should be outsourced.
72. Public servants should only be employed in the role of service provider when there is no suitable alternative provider.
73. The Ministry of Justice should adopt a policy of minimising police involvement in bailiff duties.
74. The Ministry of Justice should consider the employment of civilian bailiffs in country towns on a part time basis as assistants to existing bailiffs or as separate bailiwicks.
75. In remote and country areas of the State the use of police officers as delegates of the Sheriff should be maintained as an extraneous duty of police where the Sheriff is unable to attract alternative service providers.
76. Police officer delegates should be entitled to retain all service fees for their personal use.
77. There should be transitional provisions recognising currently appointed private bailiffs in that their current appointments should be terminated and replaced with 5 year contracts with an option, exercisable by the Ministry of Justice, for a further 5 years.

Amended (1999):

That there should be transitional provisions recognising existing bailiffs, including:-

- the termination of the appointment of all Local Court bailiffs,
- the re-appointment of police officers providing bailiff services based on the existing selection procedure, and
- the re-appointment, by contract, of existing private bailiffs for a period of two years after the commencement of the Enforcement of Civil Judgments Act.

78. The Sheriff should outsource the role of service provider to private enterprise by a process of Expression of Interest whilst espousing competitive tendering principles.
79. Future contracts for outsourcing of civil services in respect of metropolitan and major country centres should be for a maximum term of 5 years with an option exercisable by the Sheriff to extend for a further maximum term of 5 years.

Amended (1999):

That future contracts for outsourcing of civil bailiff services in respect of metropolitan and major country centres should be for a maximum of five years.

80. The administrative policy of not allowing bailiff's to engage in debt collection or repossession work should be maintained.

Amended (1999):

That debt collectors may apply to be appointed as bailiffs to be allowed to be licensed as debt collectors.

81. The Sheriff should outsource services on the basis of defined contract areas.
82. Contract areas should be designed so that the volume of work is supportive of small business and is evenly distributed.
83. The Sheriff is to provide future potential contractors with reliable workload data for each contract area.
84. Bailiff's contracts should provide that a bailiff may serve or execute a process in an adjoining bailiwick provided that the creditor is not financially disadvantaged.

85. New contracts will include a provision that appointees will have an incentive to provide customer focused services.
86. The contract should provide for the contractors to engage assistants modelled on existing contracts under the FPINEA.
87. The contract should provide for induction and annual refresher training.
88. The contract for service should contain key performance indicators and benchmarks and be developed by the Sheriff in consultation with current appointees and industry representatives.
89. A Code of Conduct should be developed, for inclusion in the contract, by the Sheriff in consultation with current appointees and industry representatives.
90. Contracts with bailiff's under the EJA should have an appropriate confidentiality clause modelled on the current Fines Enforcement contracts.
91. Where the Ministry provides accommodation and that accommodation is also used by the bailiff for private activities which generate income, proportional rent [or equivalent] should be reimbursed by the bailiff to the Ministry.
92. The provision of retainers to country civilian bailiffs should be discontinued.
93. The Ministry should only entertain subsidising any contractor on a merit basis.
94. Local Courts are to direct processes to the appropriate bailiffs under an EJA.
95. Country private bailiffs at Albany, Bunbury, Geraldton and Kalgoorlie should adopt a regional role.
96. Country Bailiffs with a regional role should be paid a Regional Responsibility Allowance in the same sum as the current retainer.
97. Land sale management should be centralised/regionalised for police bailiffs.
98. The Sheriffs Office should be restructured to reflect its new role of a service coordinator and regulator.
99. To ensure that appropriate public records are maintained throughout the life of bailiff contracts, the contract should specify the information that the bailiff is required to record and the manner in which that information is to be maintained. At the conclusion of the contract the contractor will be required to hand all public records back to the Sheriff.
100. Registry and Sheriff fees should be prescribed by regulation under authority of the EJA.
101. Poundage should be retained under an EJA but the rates should be subject to review by the Sheriff in conjunction with a review of the totality of the fee structure.
102. Fees set under the EJA should constitute a financial arrangement reflecting the role of both government and private enterprise in the recovery of civil judgment debts.
103. There should be a unified scale of Sheriff's fees under the EJA encompassing both service and execution activities which should be developed by the Sheriff in consultation with interested parties.

Writs and Warrants of Execution

PROJECT 67

**Draft Report
and
Research Summary**

May 2001

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CHAPTER 1

Writs and warrants of execution in general

Meaning of ‘execution’

1.1 ‘Execution’ describes those steps by which a party that has won a judgment as a result of a civil action may obtain satisfaction from the unsuccessful party, if the judgment has not been met.¹ Execution may be by:

- legal means through a common law writ of execution,
- equitable, as by the appointment of a receiver, or
- statutory.²

Definition of ‘writs of execution’

1.2 Order 47 rule 1 of the *Rules of the Supreme Court 1971* (WA) (*‘Supreme Court Rules’*) lists the writs of execution as including:

- a writ of *fiery facias*,
- a writ of possession,
- a writ of delivery,
- a writ of sequestration,
- a writ of attachment, and
- any further writ in aid of any of those writs’.³

¹ Committee on Supreme Court Practice and Procedure *Final Report*, Cmd 8878 (1953) para 374 which states: ‘it is left to the judgment creditor to decide which of many alternative steps he will take, and to take those steps at his own expense except insofar as he may later be able to recover such expense from the judgment debtor.’

² Section 117 of the *Supreme Court Act 1935* (WA) details a number of means by which a judgment may be enforced in the Supreme Court. Section 117 is set out in Appendix V to this paper.

³ Order 47 r 1. The expression ‘writ of execution’ is defined along the same lines as in O 47 r 1 in the rules of the Supreme Courts of some other jurisdictions in Australia: for example, *Rules of the Supreme Court of Queensland* O 47 r 9. Order 47 r 1 of the *Rules of the Supreme Court 1971* (WA) does not apply to the appointment of a receiver: *Norburn v Norburn* [1894] 1 QB 448.

In the rules of court of other Supreme Courts in Australia the term 'warrant of execution' is similar to a 'writ of execution' in Order 47 rule 1.⁴ Under the *Local Courts Act 1904* (WA) 'warrant of execution' is used as meaning the equivalent in Local Courts of a writ of *feri facias*.

Writs of execution in Order 47 rule 1 of the Supreme Court Rules

(i) Writ of fieri facias

1.3 The most common writ of execution used in the Supreme and District Courts in Western Australia is the writ of *feri facias* (*fi fa*). Its statutory equivalent in the Local Courts is the warrant of execution. Generally the writ of *fi fa* is used to enforce a judgment or order for payment of a sum of money. It is in the form of a royal command, requiring the Sheriff, to seize sufficient of the debtor's property so that, when sold, it will satisfy the amount owed which includes the judgment debt, interest and the costs of execution.

Common law origins

1.4 The writ of *fi fa* was developed in England by the courts of common law. Originally it directed the Sheriff to 'cause to be made of the goods and chattels' of the defendant the sum or debt recovered.⁵ It permitted the Sheriff to seize only tangible personal property. This writ could not extend to securities for money, book debts and future wages, and other choses in action. Nor could it bind equitable interests. At common law the Sheriff could not obtain better title to the property than the debtor himself had.

Statutory changes

1.5 The English *Judgments Act 1838* ('the 1838 Act')⁶ extended the ambit of the writ of *fi fa* to allow seizure of money, banknotes, cheques, bills of exchange, promissory notes, bonds, specialities and securities for money. With the adoption of the 1838 Act in Western Australia in 1867⁷ the extended ambit of the writ of *fi fa* passed to Western Australia.

Land not within the scope

English law and practice adopted by WA

1.6 Under English common law, land was not (and still is not) subject to the writ of *fi fa*. Creditors used the writs of *levari facias* and *elegit*, against debtors' land. Upon settlement of Western Australia in 1829, the law and practice of England became the law of the colony. The first act passed in the colony established a Court of Civil Judicature in 1832 ('the 1832 Act')⁸ It provided that all process of execution issued out of the new Civil Court was to be directed, not against the person, but against property only.

⁴ For example, *Northern Territory Supreme Court Rules* r 68.01.

⁵ EH Burn, *Cheshire's Modern Law of Real Property* (12th ed, 1976) 804.

When a writ of *fi fa* has been issued and the Sheriff 'returns' or advises the court that he has taken goods, but that they remain in his hands for want of buyers, a writ of *venditioni exponas* may be issued to compel the sale of goods for any price they may fetch. *Venditioni exponas* means 'that you may expose for sale'.

⁶ 1 and 2 Vic c 110 (*Judgments Act 1838*), s 12.

⁷ By 31 Vict No 8. The relevant section of the Act has since been repealed. The corresponding provisions are now found in s 122 of the *Supreme Court Act 1935* (WA) and s 127 of the *Local Courts Act 1904* (WA).

⁸ 2 Wm IV No 1.

**Western Australia
adopts the writ of *fi fa***

1.7 In 1836, an Act⁹ ('the amending Act') amending the 1832 Act made it clear that recourse under process of execution could be had against the real property of the debtor, as well as against the debtor's personal property.¹⁰ Section 11 of the amending Act allowed land to be transferred to a purchaser where the Sheriff had sold it under process of execution. All that was needed was a Court Commissioner's signature on a form in the schedule of the amending Act. Thus, almost from the colony's foundation, land in Western Australia was seized and sold under the writ of *fi fa*.¹¹

***Fi fa* principle affirmed
by Supreme Court
Ordinance of 1861**

1.8 The principle of seizing and selling land under writs of *fi fa* was affirmed in *Supreme Court Ordinance 1861* (WA) ('the 1861 Ordinance') establishing a Supreme Court of Western Australia.¹² By section 24 of the 1861 Ordinance a process of execution issued on a judgment of the Court authorised the Sheriff to seize and sell the defendant's real and personal property.

***Fi fa* principle
preserved in Supreme
Court Act 1935 (WA)**

1.9 The 1861 Ordinance was repealed by the *Supreme Court Act 1935* (WA) ('*Supreme Court Act*').¹³ The corresponding provision to section 24 of the 1861 Ordinance is contained in section 118 of the *Supreme Court Act* which reads:

Under a writ of *feri facias* or other like process of execution, the Sheriff or other officer having the execution of the writ, may seize and sell all the real, chattel real and personal estate and property in Western Australia and its dependencies of the defendant or other person ordered or directed to pay the money, or such part of such estate and property as may prove sufficient to realise a sum sufficient to satisfy the judgment or order under which the writ of *feri facias* was issued, and the costs, fees and expenses of seizure and sale.

**Remedy of *fi fa* in
Recovery of Debts
Ordinance (WA) 1861**

1.10 Furthermore, the effect of section 1 of the *Recovery of Debts Ordinance 1861* (WA) was that the remedy of *fi fa* was to apply as a means of execution against realty and that real estate should be subject to the same remedies and process in the Supreme Court for seizing and selling in the same way as personal estates were seized and sold for the satisfaction of debts. Section 119 of the *Supreme Court Act* is in similar terms.¹⁴

⁹ 6 Wm IV No 1.

¹⁰ Sections 11-12.

¹¹ See Enid Russell, *A History of the Law of Western Australia and Its Development from 1829 to 1979* (1980) 115. This book was written in 1950 by the late Enid Russell and edited and completed in 1979 by FM Robinson and PW Nichols.

¹² The *Supreme Court Ordinance 1861* (WA) repealed the Act for establishing a Court of Civil Judicature 1832 (2 Wm IV No 1).

¹³ Section 3. In the meantime the *Supreme Court Act 1880* (WA) (which was also repealed by the *Supreme Court Act 1935* (WA)) had effected substantial modifications to the Ordinance.

¹⁴ Section 119 appears in the *Supreme Court Act 1935* (WA) under the heading 'Writ of *feri facias*'. By s 119 of the *Supreme Court Act 1935* (WA), all equitable estates and interests in land are liable to the process of execution under a writ of *fi fa*: EI Sykes & S Walker *The Law of Securities* (5th ed, 1993) 423 and 442. Hereinafter referred to as 'Sykes & Walker'.

- (ii) Writ of possession** **1.11** A judgment or order for giving possession of land is enforceable by a writ of possession.¹⁵ The writ may not be issued without leave of the Court.¹⁶ The Sheriff, on delivery of the writ, must proceed at once to deliver possession of land to the plaintiff, evicting any person by force, if necessary.¹⁷
- (iii) Writ of delivery** **1.12** A judgment or order for the recovery of goods is enforceable by a writ of delivery. The writ may only be issued with leave of the Court.¹⁸ The writ may require the Sheriff to cause goods to be delivered to the plaintiff or to seize sufficient of the defendant's property so that, when sold, it will satisfy the assessed value of the property.¹⁹
- (iv) Writ of sequestration** **1.13** Where a person has been ordered by the Court to do an act within a limited time²⁰ but refuses or neglects to do so after being served with the order, the person in whose favour the order was made may, with leave of the Court, issue a writ of sequestration against the defaulting person. The writ is a contempt process. It is addressed to not less than four commissioners nominated by the person issuing the writ, who act as sequestrators. At common law, a writ of sequestration binds property other than choses in action,²¹ from the date of its issue. However, the sequestrators' right to follow and seize property passing to other persons after that date is not available against a purchaser for value without notice of the writ.
- 1.14** Sequestration does not give the person issuing the writ any charge over the property seized,²² but an order may be made creating such a charge.²³ Generally it is the duty of the sequestrators immediately on receiving the writ to enter the defaulting person's property and take possession of all his or her real and personal property.²⁴ The sequestrators detain and hold the property and any rents and profits of the property, not for the benefit of the person enforcing the order, but until the person in default clears his or her contempt and the Court makes a further order.²⁵

¹⁵ *Supreme Court Act 1935* (WA) s 130; *Rules of the Supreme Court 1971* (WA) O 46 r 3A. A writ of possession may include provision for enforcing the payment of any money under the judgment or order which is to be enforced by the writ: O 46 r 3A(4). Thus the writ of possession can go on to require the Sheriff to seize sufficient of the defendant's property so that, when sold, it will satisfy that amount of money: see *Rules of the Supreme Court 1971* (WA) 2nd schedule form 48. A judgment for possession may also be enforced by sequestration, attachment or committal, or by a writ of restitution. See O 46 r 3A(1).

¹⁶ *Rules of the Supreme Court 1971* (WA) O 46 r 3A. However, leave is not required where the judgment or order was made or given in a mortgage action to which O 62A applies.

¹⁷ *Upton and Wells Case* (1589) 1 Leon 145; although if the person in possession attorns to the plaintiff this would appear to be sufficient: *Calvert v Horsfall* (1803) 4 Esp 167; *Hoskins v Lewis* [1931] 2 KB 1.

¹⁸ *Supreme Court Act 1935* (WA) s 131(2) and (5).

¹⁹ *Supreme Court Act 1935* (WA) s 131.

²⁰ Including the payment of money to a person within a limited time: *Supreme Court Act 1935* (WA) s 132(1). As to the warnings to be endorsed on the copy of the order served: *Rules of the Supreme Court 1971* (WA) O 46 r 4(4). An order against a corporation which is wilfully disobeyed may be enforced by sequestration against the corporate property or by a writ of sequestration against the property of the directors: *Supreme Court Act 1935* (WA) s 137.

²¹ *Halsbury's Laws of England* (4th ed, 1976) vol 1, para 508.

²² *Ibid.* A person claiming the property under a fraudulent conveyance executed for the purpose of evading the sequestration, or having notice of the writ at the time of the conveyance to him, must deliver the property to the sequestrators.

²³ *Halsbury's Laws of England*, above n 21, para 508.

²⁴ *Ibid.*, para 509.

²⁵ *Ibid.*, paras 515 and 516 and see *Rules of the Supreme Court 1971* (WA) 2nd schedule form 52. No property sequestered can be sold without leave of the Court, and no land, except possibly leaseholds, can be ordered to be sold: at para 515.

- (v) **Writ of attachment** **1.15** Where a person has been ordered by the Court to do an act within a time limited by a judgment or order, or to abstain from doing anything and, after being served with the judgment or order, fails to comply, the judgment or order may be enforced by a writ of attachment.²⁶ Like the writ of sequestration, the writ of attachment is a contempt process. However, a judgment or order for the payment of money may not be enforced by a writ of attachment except in the circumstances described in section 117 (1)(g) of the *Supreme Court Act*.²⁷ A writ of attachment may not be issued without leave of the Court on notice to the other person.²⁸ The Sheriff executes the process by taking the defaulting person into custody.
- (vi) **Writs in aid of execution** **1.16** We have noted that writs of execution in Order 47 of the *Supreme Court Rules* include any further writ in aid of the five writs referred to above. The writs in aid are common law writs which assist in a supplementary manner in obtaining satisfaction of a judgment where satisfaction cannot be obtained by the ordinary writs of execution.²⁹ They may not issue without leave of the Court.³⁰ These writs in aid have a variety of obscure and inaccessible names: *venditioni exponas*, *distringas nuper vicecomitem*, assistance and restitution.³¹
- (vii) **Writ of elegit — relic of the past** **1.17** The writ of *elegit* is part of the law of Western Australia, without ever, apparently, having been used here.³² The explanation for this anomaly lies in the historical development of the law in England.
- 1.18** The writ was introduced in England in 1285 by the *Statute of Westminster the Second*.³³ Under the Statute a judgment creditor seeking to satisfy a judgment debt could elect between, on the one hand a writ of *fi fa* and, on the other, a writ of *elegit*. This latter writ required the Sheriff to deliver to the judgment creditor the chattels of the debtor (except oxen and beasts of his plough) and one half of his lands.³⁴ The chattels were taken at an appraised price and rents and profits could be taken of the land delivered. The appraised price of the chattels and the rents and profits of the land went towards satisfaction

²⁶ *Supreme Court Act 1935 (WA)* s 135 (1). As to the warnings to be endorsed on the copy of the judgment or order served: *Rules of the Supreme Court 1971 (WA)* O 46 r 4(4).

²⁷ Namely, where the judgment or order is for the payment of money within a time limited by the judgment or order, the judgment or order after being duly served may be enforced by a writ of attachment in the case of: (a) default in payment of a penalty, or sum in the nature of a penalty; or (b) default by a trustee or a person acting in a fiduciary capacity, and ordered by the Court or a Judge to pay any sum in his possession or under his control.

²⁸ *Supreme Court Act 1935 (WA)* s 134.

²⁹ *Halsbury's Laws of England*, above n 21, paras 517-522; and see Bernard C Cairns, *Australian Civil Procedure* (3rd ed, 1992) 537.

³⁰ *Rules of the Supreme Court 1971 (WA)* O 47 r 2.

³¹ *Halsbury's Laws of England*, above n 21 paras 518, 519, 521 and 522. If the Sheriff sells property under a writ of *fi fa* alone it must be sold for a reasonable price, not at an under value. When the Sheriff is unable, on this account, to sell the goods, the court may then issue a writ of *venditioni exponas*, directing the Sheriff to sell at the best price which can be got: see *Rules of the Supreme Court 1971 (WA)* 2nd schedule form 47; and see Cairns, above n 29, 547. Where the Sheriff has returned that goods remain in his hands for want of buyers and then has gone out of office, a remedy against him is by writ of *distringas nuper vicecomitem*. The writ is directed to the Sheriff in office to distrain on his predecessor, so that he sells the goods retained by him for the best price obtainable: at para 519.

³² In Russell, above n 11, 115, it is stated that it seems in Western Australia the writ of *elegit* was not used; at least, a fairly extensive search of the Civil Court Record and files has not disclosed the use of a writ of *elegit*.

³³ 13 Edw I c 1 (*De donis*).

³⁴ 13 Ewd I c 1 (*De donis*), s 18.

of the debt. When the debt was satisfied, the debtor was entitled to resume possession of the land.

1.19 Half only of the land could be taken under the writ of *elegit* because feudal law required that whatever difficulties a tenant faced, he should have enough land to enable him to perform services due to his lord. The half only rule endured until the passing of the 1838 Act,³⁵ section 11 of which allowed the judgment creditor to take all the debtor's land under a writ of *elegit*.

1.20 The 1838 Act was later adopted in Western Australia³⁶ but section 11 of the 1838 Act was subsequently repealed by section 3 of Western Australia's *Supreme Court Act* and never re-enacted. The English *Judgments Act 1864* ('the 1864 Act'), which was not adopted in Western Australia, enabled the creditor to obtain a court order for sale of the judgment debtor's land delivered under a writ of *elegit*.³⁷ Section 130(1) of the *Bankruptcy Act 1892* (WA) provided that a writ of *elegit* should not extend to goods.³⁸

1.21 The writ of *elegit* has always been regarded as irrelevant in Western Australia. Almost from the foundation of the colony the preferred means of execution against land was the writ of *fi fa*. The Western Australian legislature's failure to adopt the 1864 Act and the repeal of section 11 of the 1838 Act seem to confirm the writ's irrelevance as a remedy in the execution process.

Writ of eligit is obsolete

1.22 The writ of *elegit* is obsolete in all other Australian jurisdictions.³⁹ Procedure under the writ is cumbersome, expensive and antiquated. The reason the writ still applies in Western Australia is that the ancient *Statute of Westminster the Second* which introduced the writ, and which like all English law was adopted at the inception of the colony, has not yet been repealed here. Abolition of the writ of *elegit* could be effected by a simple amendment to the *Supreme Court Act*.

1.23 We note that in our report *United Kingdom Statutes in Force in Western Australia*⁴⁰ we recommended the repeal of the *Statute of Westminster the Second*.

³⁵ 1 and 2 Vic c 110 (*Judgments Act 1838*).

³⁶ In 1867 by 31 Vict No 8.

³⁷ 27 & 28 Vict c 112 *Judgments Act 1864* s 4.

³⁸ Section 130 of the *Bankruptcy Act 1892* (WA) was repealed by s 3 of the *Supreme Court Act 1935* (WA).

³⁹ Sykes & Walker, 24. However, Victoria seems to be the only State where its use is impossible: at 422.

⁴⁰ Project No 75 (1994).

Duration and renewal of writ of execution under Supreme Court Rules

Writ of execution in force for one year

1.24 Order 47 rule 10 (1) of the *Supreme Court Rules* provides that a writ of execution, if unexecuted, remains in force for one year only from its date of issue. However, under the rule the writ may be renewed, by leave of the Court, at any time before its expiry for one year from the date of the renewal and so on during the continuance of the renewed writ. The rule provides that a writ of execution has effect and is entitled to priority according to the time of its original delivery to the Sheriff.⁴¹

Writs and warrants in other Western Australian State courts

District Court

1.25 By section 56 of the *District Court of Western Australia Act 1969* ('*District Court Act*') a judgment of the District Court may be enforced in the same way as if it were a judgment of the Supreme Court. By section 87 of the *District Court Act* the practice and procedure of the District Court are governed by the rules of that Court and until provision is made, and where no special provision is made in the rules of court, the *Supreme Court Rules* apply to the District Court. As there is no special provision in the *District Court Rules* for enforcement of judgments, the *Supreme Court Rules* apply.

Local Courts

1.26 The Local Courts' statutory equivalent of the writ of *fi fa* is the warrant of execution.⁴² It is in the form of a command to the bailiff of the Local Court where it is issued, to obtain the amount of the judgment debt by the seizure and sale of any of the debtor's lands and goods.

1.27 The Local Court statutory equivalent of the writ of possession is the warrant of possession.⁴³

⁴¹ In *First Federal Building Society v Sesson* (Unreported, Supreme Court of WA, Master Seaman, 29 July 1987, Library No 6808), Seaman M noted that in the English *Supreme Court Practice* (1985 edition) in relation to the analogous English O 46 r 8 it was said that it was not the usual practice to extend the validity of a writ of execution except in cases when priority of date was important and that after the year has expired the ordinary course is to issue a new writ. He said that *Walker v Buksh* [1981] VR 1061, *General Credits Ltd v Beattie* [1982] VR 551, and *TL & PA Finnigan (Timber) Pty Ltd v Beechey* [1983] 2 VR 215 held that the preferable course was for a plaintiff to issue a second writ of execution and that the court will not direct renewal unless priority problems are involved. Seaman M added that, if in any given case, there was evidence of priority problems then the application, initially to be made *ex parte*, might require notice to persons affected by it. See also P Seaman *Civil Procedure in Western Australia* Vol 1 (1990) para 47.10.1.

The English *Supreme Court Practice* (1988 edition) speaking of the analogous English O 46 r 8 says in para 46/8/2 that: 'On an application for renewal of a writ of execution the Court should be informed as to whether there are any other judgment creditors who have delivered writs of execution to the sheriff, and the next subsequent judgment creditor or creditors ought to be heard and if necessary he or they ought to be allowed to intervene for this purpose on the question whether he or they will suffer any, and if so what prejudice if the writ of execution is renewed, which would deprive him or them of priority in the execution process'. If a plaintiff issues a second writ of *fi fa* it is, of course, not entitled to priority according to the time of delivery of the first writ of *fi fa* to the Sheriff.

⁴² *Local Courts Act 1904* (WA) ss 121-129 and 135-141, which are supplemented by O 25 of the *Local Court Rules 1961* (WA).

⁴³ *Local Courts Act 1904* (WA) ss 99, 100, 103 and 105; *Local Court Rules 1961* (WA) O 27 r 4. Orders for possession of premises made by magistrates sitting in the Small Disputes Division of a Local Court may be enforced by the issue of a warrant as if they were orders for possession of the land made by that court under Part VI of the *Local Courts Act 1904* (WA): *Residential Tenancies Act 1987* (WA) s 16(2)(b).

An order made by the Small Claims Tribunal for the payment of money may be enforced in the Local Court. The person to

1.28 The Local Court equivalent of the writ of delivery is a warrant of delivery.⁴⁴

1.29 There is no equivalent in the Local Court of the writs of sequestration and attachment and the writs in aid of execution.⁴⁵

Wardens' Courts

1.30 An order made by a warden's court for the payment of money by a person may be enforced by a warrant of execution issued out of the warden's court.⁴⁶ The warrant may be issued against any property of the person in default, including a mining tenement.⁴⁷

Western Australian Industrial Appeal Court

1.31 Under the *Industrial Relations Act 1979 (WA)* ('*Industrial Relations Act*'), a judgment, order or direction of the Western Australian Industrial Appeal Court may be enforced by a warrant of execution against both goods and land issued out of the Court.⁴⁸ A writ or warrant of execution issued under the *Industrial Relations Act* has the same effect against property, including land under the *Transfer of Land Act 1893 (WA)* ('*Transfer of Land Act*'), as a writ of *fi fa* issued out of the Supreme Court.

Industrial Magistrates' Courts

1.32 Certain judgments, orders, directions or decisions of an industrial magistrate are enforceable by a writ or warrant of execution issued under the *Industrial Relations Act*.⁴⁹ A writ or warrant of execution so issued has the same effect against property including land under the *Transfer of Land Act* as a writ of *fi fa* issued out of the Supreme Court.⁵⁰

Compensation Magistrate's Court

1.33 Under section 84ZZ of the *Workers' Compensation and Rehabilitation Act 1981 (WA)* ('*Workers' Compensation and Rehabilitation Act*'), an order or direction of a Compensation Magistrate's Court may be enforced in accordance with regulations made under the *Workers' Compensation and Rehabilitation Act*. As yet, no such regulations have been made. Under the *Workers' Compensation and Rehabilitation Act*.

- Property belonging to an individual or body bound by an order or direction of a Compensation Magistrate's Court, including property held by trustees for such a body, is to be available for the satisfaction of the order or direction.⁵¹

whom payment is to be made files a copy of the order and a supporting affidavit in the Local Court. Thereupon the order is deemed to be a judgment that requires payment of money duly made by a Local Court and may be enforced accordingly: *Small Claims Tribunal Act 1974 (WA)* s 22.

⁴⁴ *Local Courts Act 1904 (WA)* s 91A, *Local Court Rules 1961 (WA)* O 27 rr 5-10.

⁴⁵ However, under s 155 of the *Local Courts Act 1904 (WA)* a penalty may be imposed on a person who disobeys an order made by a magistrate for the doing of an act (other than the payment of money).

⁴⁶ *Mining Act 1978 (WA)* s 140(1) and *Mining Regulations 1981 (WA)* reg 130.

⁴⁷ *Mining Act 1978 (WA)* ss 119(1) and 140 and *Mining Regulations 1981 (WA)* regs 130, 132 and 135. Also where a person disobeys an order made in proceedings in the warden's court, the warden may impose a monetary penalty on that person which is recoverable by a warrant of execution issued by the warden or mining registrar against the property of that person: s 140(2)-(6).

⁴⁸ *Industrial Relations Act 1979 (WA)* ss 88-89 and *Industrial Arbitration Act (Western Australian Industrial Appeal Court) Regulations 1980 (WA)* reg 18.

⁴⁹ Section 81CA and *Industrial Relations (Industrial Magistrates Courts) Regulations 1980 (WA)* reg 10.

⁵⁰ *Industrial Relations (Industrial Magistrates Courts) Regulations (WA)* reg 10(10).

⁵¹ Section 84ZZA(1).

- The Compensation Magistrate's Court can issue a warrant of execution.⁵²

Any writ or warrant of execution may be declared, by regulations, to have effect against any property, including land under the *Transfer of Land Act*, as a writ of *fi fa*.⁵³ Again, no such regulations have been made.

Warrants of Execution under State Acts

Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)

1.34 Fines imposed by justices under the *Justices Act 1902* (WA) are now enforced under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ('*Fines, Penalties and Infringement Notices Enforcement Act*').⁵⁴ The amount of any compensation or other sum of money other than a fine, ordered by justices to be paid by a person, may now be recovered as a debt in a court of competent jurisdiction.

1.35 The *Fines, Penalties and Infringement Notices Enforcement Act* established a Fines Enforcement Registry as part of the Court of Petty Sessions at Perth.⁵⁵ The primary method of enforcing a fine is by suspending the offender's motor driver's or motor vehicle licence.⁵⁶ However, under certain conditions⁵⁷ the Registrar may issue a warrant of execution or may cancel the licence suspension and issue a warrant of execution.

1.36 The warrant of execution is directed to the Sheriff of Western Australia who may seize and sell personal property or land of the offender to recover the amount owed under the warrant.⁵⁸ The Sheriff must apply the proceeds of sale according to section 96 of the *Fines, Penalties and Infringement Notices Enforcement Act*⁵⁹ as follows:

- first, the proceeds are to be applied in payment of the expenses of the sale;
- secondly, subject to the rights and entitlements of a person, other than the offender, having an interest in the property sold, if that interest was registered under the *Bills of Sale Act 1899* (WA), the *Chattel Securities Act 1987* (WA), the *Transfer of Land Act*, the

⁵² Section 84ZZB.

⁵³ Section 84ZZB(4).

⁵⁴ *Justices Act 1902* (WA) s 155 as substituted by the *Acts Amendment (Fines, Penalties and Infringement Notices) 1994* (WA) s 18.

⁵⁵ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 6.

⁵⁶ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 40-44.

⁵⁷ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 44-45.

⁵⁸ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 73 and 88(1). Under s 57 of the *Sentencing Act 1995* (WA) a fine imposed by a court must be paid, and may be enforced, under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA). Exceptions are contained in ss 58 and 59 of the *Sentencing Act* in which imprisonment is the sanction for non-payment of a fine.

⁵⁹ Section 96 is set out in full in Appendix II to this paper.

Registration of Deeds Act 1856 (WA), or the *Corporations Law*, in respect of the property before it was seized by the Sheriff, the proceeds are to be applied in payment of the enforcement fees;⁶⁰

- thirdly, the proceeds are to be applied in payment of the amount owed under the warrant; and
- fourthly, the proceeds are to be applied in payment of any surplus to the offender.

Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)

1.37 Under the *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)*, if money for water charges is unpaid for five years, the Water Corporation can send a certificate of the total amount in arrears to the clerk of the Local Court nearest the land concerned. The clerk serves a copy of a prescribed notice on those appearing to have an estate or interest in the land and publishes the notice in the Government Gazette and a newspaper. If the money has not been paid after three months, the clerk is to issue a warrant of execution against the land.⁶¹ The warrant, which must be in the form prescribed by the *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)*, only covers a debtor who is the registered proprietor of land under the *Transfer of Land Act*. The warrant directs the bailiff to execute against the land, regardless of any change of ownership of the land in the meantime, in the same way warrants of execution against land are executed under the laws in force relating to Local Courts.⁶²

1.38 By section 121 of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)* proceeds from the sale of the land are to be applied 'in priority to every mortgage, encumbrance, lien, caveat, judgment, writ, warrant or other charge, agreement or process registered or in any way affecting the land'. Costs are paid firstly regarding the warrant and sale, secondly to the Corporation and finally with respect to the expense in conferring clear title on the purchaser.

1.39 After the prescribed payments have been made, any residue belongs to the person who, if no sale had taken place, would have been entitled to receive the rents and profits of the land.⁶³

1.40 After the sale, the clerk of the Local Court executes a transfer or conveyance of the land to the purchaser who is then entitled to be registered for an estate in fee simple in the land or for the entire estate or interest of the owner or occupier in default, free of any encumbrance except any tax, rate or charge imposed by any other act.

⁶⁰ For the purposes of this provision, 'registered' includes protected by means of caveat lodged under the *Transfer of Land Act 1893* s 96(7).

⁶¹ *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)* ss 118 and 119.

⁶² *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)* s 119. Sales for arrears of land tax under the *Land Tax Assessment Act 1976 (WA)* and for arrears of rates under the *Local Government Act 1995 (WA)*, the *Country Towns Sewerage Act 1948 (WA)*, the *Country Areas Water Supply Act 1947 (WA)*, the *Water Boards Act 1904 (WA)* and the *Land Drainage Act 1925 (WA)* are not made under writs of *fi fa* or warrants of execution.

⁶³ *Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)* s 122.

Upon production of a transfer of land subject to the *Transfer of Land Act 1893* (WA), the Registrar of Titles is to register the transfer.⁶⁴

Writs of execution in other courts

High Court of Australia 1.41 The High Court of Australia can issue writs of execution.⁶⁵ Section 77M of the *Judiciary Act 1903* (Cth) provides that a person in whose favour a judgment of the High Court is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory, by execution or otherwise, against the person or his or her property against whom judgment is given, as are allowed in similar cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given. There are no specific execution provisions in the *High Court Rules*.

Federal Court of Australia 1.42 The *Federal Court of Australia Act 1976* (Cth) has a provision in the same terms as section 77M of the *Judiciary Act 1903* (Cth), applying to judgments of the Federal Court.⁶⁶ The *Federal Court Rules* (Cth) allow the Federal Court, in order to enforce a judgment or order, to make any order, issue any writ or take any step that could be made, issued or taken by the Supreme Court of the State or Territory in which the judgment or order is to be enforced.⁶⁷ As far as practicable, the procedures and forms of process of that Supreme Court are to be available and followed for the enforcement of the Federal Court's orders.⁶⁸ Also the Sheriff, when executing orders of the Federal Court, is authorised to act in the same manner and to the same extent as the Sheriff of the Supreme Court of the State or Territory in which the order is being executed is entitled to act.⁶⁹

Family Court of Western Australia 1.43 The *Family Law Act 1975* (Cth) gives the Family Court of Western Australia a wide-ranging jurisdiction in matrimonial proceedings arising under the *Family Law Act 1975* (Cth), *Family Court Rules 1998* (WA).⁷⁰ Consequently, maintenance orders and approved or registered maintenance agreements, for example, can be enforced in the Court by methods comparable to the writ of *fi fa* or writ

⁶⁴ *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA) s 124.

In November 1997, we spoke to an officer of the Water Corporation about the frequency of issue of warrants of execution under the Act. He said warrants issued more frequently 10 or 12 years ago but the Corporation stopped issuing them. However, the Corporation had recently issued a warrant and he thought it would issue more of them in future. In 1972, a new and separate provision (s 124A) was introduced into the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA) to protect the Water Corporation. Section 124A allows the Corporation to lodge a memorial for registration with the Registrar of Titles or the Registrar of Deeds and Transfers. The memorial is registered on the certificate of title or, in the case of old system land, in the Deeds Office. While it remains registered neither the Registrar of Titles nor the Registrar of Deeds and Transfers may accept for registration an instrument affecting the land without the consent of the Corporation.

⁶⁵ The officer of the High Court of Australia charged with the execution of a writ of *fi fa* issued out of that Court is the Marshall of the Court: *High Court of Australia Act 1979* (Cth) s 27.

⁶⁶ *Federal Court of Australia Act 1976* (Cth) s 53.

⁶⁷ *Federal Court Rules* O 37 r 7(1).

⁶⁸ *Federal Court Rules* O 37 r 7(2).

⁶⁹ *Federal Court Rules* O 37 r 7(3).

⁷⁰ The Family Court of Western Australia was established under the *Family Court Act 1975* (Cth) and is continued under the *Family Court Act 1997* (WA).

of sequestration. Where the Court finds a person has refused or failed to comply with a maintenance order or agreement, it can order the seizure and sale of the person's personal property, the sale of his or her interest in real property, or the sequestration of the person's estate or part of it.⁷¹

1.44 In the case of personal property, the Court nominates an officer of the Court or other person to seize and realise the property.⁷² In the case of real property, the Court appoints a person as trustee for the sale and may order the property to be transferred to the trustee for that purpose.⁷³ A sequestration order has the same effect as a writ of sequestration.⁷⁴ The effect of a sequestration order is to put a sequestrator temporarily in possession of the property the subject of the order.⁷⁵

⁷¹ *Family Court Rules* O 33 R 3(9). These order could also be made by a magistrate exercising jurisdiction under the *Family Law Act 1997* (WA) s 39(6) and (7); *Family Court (Orders and Registrars) Act 1997* (WA) s 38.

⁷² *Family Court Rules* O 33 r 5(5).

⁷³ *Family Court Rules* O 33 r 7.

⁷⁴ *Madden v Madden* [1979] FLC para 90-710 per Evatt CJ, Wood and Simpson SJJ. The method of enforcement by writ of sequestration is explained in para 1.14-1.15 above.

⁷⁵ The sequestrator receives the rents and profits. Also by going into possession of the property other occupants may be excluded from it (as in the case of *Madden v Madden*, above n 74).

CHAPTER 2

Binding effect of a writ of execution

Significance of the priority point

2.1 If a judgment creditor pursues one of the processes of execution, the creditor eventually will be able to have an asset belonging to the judgment debtor seized and sold. As Sykes and Walker point out, the general rule is that the judgment creditor takes only the interest the judgment debtor had. Obviously it would be unjust to allow a judgment debtor to go on creating interests by way of transfer or mortgage (prevailing over the rights of the execution creditor) right up to the time when execution was completed.¹ Most legal systems have therefore selected some point in the execution process when the debtor ceases to be able to give a clear title to persons dealing with him or her so that these persons take only subject to the rights of the execution creditor.² From that point, referred to as the 'priority point', assuming that the creditor follows through with the execution process, the interest the judgment creditor ultimately transmits has precedence over any dealings by the debtor in the meantime.³

2.2 In England and Australia, the goods or land concerned are said to be 'bound' or 'affected' from the priority point. Both words have the same meaning in this context.

2.3 At common law, the purchaser at a Sheriff's sale buys precisely the interest the judgment debtor had at the priority point. However, this position has been changed by statute in some circumstances.

¹ Sykes and Walker, 33.

² Ibid.

³ Ibid 33-34.

Priority point for execution

(i) Against goods

At common law priority point was time of issue of writ

2.4 At common law, the priority point in relation to the judgment debtor's goods was the time a writ of *fi fa* issued. The goods were bound from that time. If the judgment debtor sold his or her goods after the writ issued, the execution creditor was entitled to seize them, even if they had passed to a bona fide purchaser for value without notice of the writ.

Statutory change — goods not bound until delivery of writ to Sheriff

2.5 In England, the *Statute of Frauds 1677* significantly changed the common law priority point by providing that a writ of *fi fa* or other writ of execution should not bind the property of the execution debtor's goods until the writ was delivered to the Sheriff to be executed.

2.6 The law was further amended in England by section 1 of the *Mercantile Law Amendment Act 1856*⁴ (*'Mercantile Law Amendment Act'*) which provided that no writ of *fi fa* or other writ of execution was to prejudice the title of any person to goods acquired from an execution debtor in good faith, for valuable consideration and without notice before seizure of the goods under the writ.

Writ not to prejudice title to goods of bona fide purchaser without notice of delivery

2.7 The provisions in the *Statute of Frauds* and the *Mercantile Law Amendment Act* were repealed by the *Sale of Goods Act 1893* (Eng) and replaced in the latter Act by a section which is in identical terms to section 26 of the *Sale of Goods 1895* (WA) (*'Sale of Goods Act'*):

- (1) A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ, to indorse upon the back thereof the hour, day, month and year when he received the same: Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff.
- (2) In this section the term 'sheriff' includes any officer charged with the enforcement of a writ of execution.

2.8 Thus, goods are bound by a writ of *fi fa* or other writ of execution from the date of delivery of the writ to the Sheriff or other officer charged with the enforcement of the writ of execution. The writ does not prejudice the title to the goods by a person in good faith and for value after delivery of the writ to the Sheriff or other officer where the person acquired the title without notice of the delivery.⁵

⁴ The *Mercantile Law Amendment Act 1856* (Imp) was adopted by Western Australia by 31 Vict No 8.

⁵ This extends to a mortgagee as well as a purchaser: Sykes and Walker, 823. A provision along the same lines as s 26 *Sale of Goods Act 1895*(WA) is s 125 of the *Supreme Court Act 1935*(WA).

2.9 Section 26 of the *Sale of Goods Act* applies to writs of *fi fa* and other writs of execution issued out of the District Court⁶ as well as the Supreme Court, and apparently to warrants of execution issued out of the Local Court.⁷ In the case of the Local Court probably the goods are bound (for the purposes of the first part of section 26 (1)) from the time of the application by the judgment creditor for the issue of the warrant.⁸ However, where the clerk of the court forwards the warrant to the clerk of another Local Court because it is closer to where the judgment debtor's goods are situated, then probably the goods are bound from the time the warrant is issued by the clerk of the other court to the bailiff of that court.⁹

2.10 In the case of a writ of execution issued out of the District Court against goods, it is not clear whether the goods are bound from the time of delivery of the writ to the District Court bailiff or from the time of application by the judgment creditor for the issue of the writ.¹⁰

2.11 The meaning of the word 'binds' in the *Sale of Goods Act* and the effect of the proviso were explained by Edmund Davies J in *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd*¹¹ as follows:

When by the opening words of the section it is provided that 'A writ of fieri facias ... shall *bind* the property in the goods of the execution debtor....' this simply means that on delivery of the writ the sheriff acquires a legal right to seize sufficient of the debtor's goods to satisfy the amount specified in the writ [*Samuel v Duke* (1838) 3 MdW 622]. The proviso, accordingly, does no more than protect a purchaser of the goods against that right of seizure if the stated conditions are fulfilled. It has no scope for operation where an actual seizure of the debtor's goods has already been effected; and where this has occurred

⁶ *District Court of Western Australia Act 1969* (WA) s 56 and *Sale of Goods Act 1895*(WA) s 26(2).

⁷ *Murgatroyd v Wright* [1907] 2 KB 333. This case was an appeal from a county court under the *County Courts Act 1888* (Eng). Delivering the Court's judgment, Phillimore J (at 335) speaking of s 26 of the *Sale of Goods Act 1893* (Eng) (which is identical in its wording to s 16 of the *Sale of Goods Act 1895* (WA)) said that 'inasmuch as writs of execution in county courts have become a very important factor, there is an additional provision in that section to meet the case of executions by other officers than sheriffs'. Phillimore J's reference to a writ of execution is actually a reference to a warrant of execution. Section 146 of the *County Courts Act 1888* (Eng) provided for the issue by the registrar of a 'warrant of execution in the nature of a writ of *fi fa*' to the high bailiff of the county court.

⁸ In a Local Court in Western Australia, a warrant of execution is not taken by the judgment creditor to the bailiff but is delivered to the bailiff by the clerk of the Local Court. This was also the case under the *County Courts Act 1888* (Eng). In England, in *Murgatroyd v Wright*, above n 7, it was held that s 26 of the *Sale of Goods Act 1893* (Eng), as applied to execution in county courts under the *County Courts Act 1888* (Eng), had to be construed as providing that the time from which a warrant of execution (in a county court where the registrar was also bailiff) bound the property in the goods of the execution debtor, was the time at which application was made for the warrant. Phillimore J (at 338) said that where the registrar is not the bailiff, the registrar is communicating directly with the bailiff and 'probably the rule of law is the same'. The current *County Courts Act 1984* (Eng) contains an express provision (s 99) dealing with the question as from when goods are bound by a warrant of execution issued out of a county court.

⁹ *Birstall Candle Company v Daniels* [1908] 2 KB 254.

¹⁰ The point made in *Murgatroyd v Wright*, above n 7, about the registrar communicating directly with the bailiff does not apply in the District Court of Western Australia as a writ of *fi fa*, for example, issued out of the District Court is delivered to the District Court bailiff by the judgment creditor. However, we have been informed that the District Court registry writes the precise time and date of the application on the writ and that the District Court bailiff does not upon receipt of the writ 'endorse upon the back thereof the hour, day, month and year when he received the same'. This may occur because of s 86A of the *District Court of Western Australia Act 1969* (WA). By s 86A where there are competing processes of the Supreme Court and of the District Court and a Local Court or either of those courts against the land or goods of the same person, the right to the property seized is determined by the priority of the time of delivery of the writ to the Sheriff or the time of the application to a District Court registrar or the clerk of the Local Court for the issue of the writ or warrant of execution, whichever is the earlier or earliest: see below paras 6.11 and 6.13.

¹¹ [1964] 2 All ER 732.

it is immaterial whether or not the purchaser from the debtor had notice of the seizure or even of the writ.¹²

Judgment debtor cannot give good title after Sheriff has seized the goods

2.12 A debtor whose goods have been seized by the Sheriff under a writ of *fi fa* is still able to sell them and pass title to them at any time until they have been sold by the Sheriff.¹³ The important point for the buyer is not so much whether he obtains title but whether he does so free from the Sheriff's right of seizure.¹⁴ Section 26 of the *Sale of Goods Act* ensures that a purchaser for value in good faith and without notice does obtain the goods free from the right of seizure, provided that title is acquired before the writ is executed. In this context, the writ is executed when the goods are seized by the Sheriff.¹⁵ After seizure the judgment debtor cannot give good title to anyone seeking to buy the goods from him although ownership of general property remains in the judgment debtor until sale by the Sheriff.

2.13 It should be noted that the statutory provisions in section 26 of the *Sale of Goods Act* are not for the protection of the judgment debtor himself, or his personal representatives or donees. In their cases, it seems the binding power of the writ of *fi fa* still operates from the time of issuing the writ.¹⁶

2.14 The *Sale of Goods Act* defines 'goods' to include all chattels personal other than things in action and money.¹⁷ Thus, money, bills of exchange, promissory notes, bonds, specialities and other securities for money, or choses in action, are not bound until actual seizure or taking by the Sheriff.¹⁸

(ii) Against old system land

2.15 At common law, the judgment creditor following through the process of execution, cannot take more than the estate and interest which the judgment debtor himself or herself had in old system land at the time of the judgment. The judgment creditor takes subject to at least all interests, common law or equitable, which had accrued or had been created at that date, even though he or she had no notice of the interests.¹⁹

2.16 What, then, if the judgment debtor created further interests after the judgment and up to the time execution is completed? To overcome the potential injustice to the judgment creditor, the law found it necessary to step in to determine a priority point after which anyone dealing with the debtor took subject to the rights of the execution creditor.

¹² Ibid 740.

¹³ *Ruby Wells NL v The Bailiff of the District Court and Wentworth Motors (1977) Pty Ltd* [1989] 2 WAR 448.; PS Atiyah *Sale of Goods* (4th ed, 1974) 211. Under s 150 of the *Criminal Code* (WA) where property has been seized under process of a court 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.

¹⁴ Atiyah, above n 13, 211.

¹⁵ *Lloyds & Scottish Finance Ltd v Modern Cars & Caravans*, above n 11, 732.

¹⁶ *Halsbury's Laws of England* vol 17 (4th ed, 1976), para 469. See *Horton v Ruesby* (1686) Comb 33; *Rawlinson v Oriol* (1688) Comb 144; *Anon* (1690) 2 Vent 218; *Needham's Case* (1691) 12 Mod Rep 5; *Boucher v Wiseman* (1595) Cro Eliz 440; *Finch v Earl of Winchelsea* (1719) 3 P Wms 399n; *Waghorne v Langmead* (1796) 1 Bos & P 571.

¹⁷ Section 60. Goods are so defined for the purposes of s 125 of the *Supreme Court Act 1935* (WA) s 125(2).

¹⁸ *Johnson v Pickering* [1980] 1 KB 1.

¹⁹ Sykes & Walker, 423.

Development of the law of execution in England

2.17 The first enactment to give a creditor a remedy against lands of the judgment debtor was the *Statute of Westminster the Second*²⁰ introducing the writ of *elegit*. In England, under the interpretation placed on the *Statute of Westminster the Second*, the land of the debtor was affected by the judgment from the date of its entry, assuming that the creditor issued a writ of *elegit*.²¹

2.18 Sykes and Walker submit that where there is no further enactment regulating the time the land was affected, the judgment would affect the land from its entry in the court records. This point of time would apply, they submit, even in the case of an execution under a writ of *fi fa* in Australia, provided the judgment creditor issued the writ.²²

Need for purchasers and mortgagees to investigate

2.19 In both England and Australia further legislation has however been enacted. The result of the interpretation placed on the Statute was that the right of the judgment creditor to take one part of the land under a writ of *elegit* was exercisable against purchasers or mortgagees who took their interests after the date of entry of judgment, even though before the date of the issue of the writ.²³ It thus became important for all intending purchasers of land to investigate as to whether those from whom they were purchasing land had any judgments against them.

Search system established

2.20 To assist purchasers and others searching for judgments, an alphabetical docket or index was established by an Act passed in 1692 ('the 1692 Act').²⁴ Under the 1692 Act, the docket was to be kept in each Court and be open to public inspection and search. The system continued until 1839 when the dockets were closed.²⁵

2.21 The position was altered in England by the 1838 Act²⁶ ('the 1838 Act') and later amended by —

- (i) an Act for the Better Protection of Purchasers against Judgments, Crown Debts, Lis Pendens and Fiats in Bankruptcy 1839²⁷ ('the 1839 Act') which closed the dockets;

²⁰ See above, paras 1.18–1.19.

²¹ Sykes & Walker, 424.

²² Ibid 426.

²³ Ibid 424; J Williams *Principles of the Law of Real Property* (12 ed, 1877) 85. Originally equitable estates and interests in land could not be taken under a writ of *elegit*: Sykes and Walker, 422. However, by s 10 of the *Statute of Frauds 1677* the legislature empowered the Sheriff to deliver land held in trust for the debtor: Sykes & Walker, 422. Under s 10, such equitable interests in land as could be taken under a writ of *elegit* were not bound until execution issued: Sykes & Walker, 424.

²⁴ 4 & 5 Will & Mary c 20 (docket of judgments).

²⁵ By statute 2 & 3 Vict c 11 (judgments) ss 1-2.

²⁶ 1 & 2 Vict c 110. See above, para 1.5.

²⁷ 2 & 3 Vict c 11 (judgments).

- (ii) the *Judgments Act 1840* ('the 1840 Act'),²⁸
- (iii) the *Judgments Act 1855* ('the 1855 Act'),²⁹
- (iv) the *Law of Property Act 1860* ('the *Law of Property Act*');³⁰ and
- (v) the *Judgments Act 1864* ('the 1864 Act').³¹

Scope of writ of *elegit* enlarged

2.22 As noted in paragraph 1.20, section 11 of the 1838 Act enlarged the scope of the writ of *elegit* by allowing the creditor to obtain delivery of the whole of the judgment debtor's land³² instead of just a part. Section 13 of the 1838 Act gave a judgment of a superior court the effect of a specific charge.³³ In addition, the 1838 Act provided that no judgment should, by virtue of the Act, affect any land as to purchasers, mortgagees or creditors unless a memorandum containing particulars of the judgment was left with the Senior Master of the Court of Common Pleas, who was to enter the particulars in a register.³⁴ Later, an amendment to the 1838 Act by section 4 of the 1855 Act extended the protection given to purchasers, mortgagees and creditors under the 1838 Act to all remedies of a judgment creditor.³⁵

Re-registration after five years required

2.23 The 1839 Act introduced a requirement that judgments be re-registered after five years.³⁶ If the judgment was not registered or re-registered, a purchaser, mortgagee or creditor was not affected by it, even though he may have had express notice of its existence.³⁷ A judgment did not bind or affect any land against a purchaser or mortgagee without notice 'further or otherwise, or more extensively in any respect', although duly registered, than a judgment would have bound the purchaser or mortgagee before the 1838 Act had it been duly docketed according to the law then in force.³⁸

Execution to be put in force within 3 months

2.24 The *Law of Property Act*, by section 1, provided that no judgment entered after 23 July 1860 should affect any land as to a bona fide purchaser for valuable consideration or a mortgagee

²⁸ 3 & 4 Vict c 82 (judgments).

²⁹ 18 & 19 Vict c 15 (purchaser's protection).

³⁰ 23 & 24 Vict c 38 (amending Lord St Leonard's Act).

³¹ 27 & 28 Vict c 112 (judgments). The next change in the law in England occurred with the enactment of the *Land Charges Act 1888* (Eng). However, as that Act and subsequent reforms superseded the enactment by Western Australia of the *Imperial Acts Adopting Ordinance 1867* which adopted the *Judgments Act 1838* (Eng) and most of the legislation referred to in (a) to (e) above (see below para 2.30), it is unnecessary to refer to these later developments.

³² This was land of which the judgment debtor was seized or possessed of at the time of entering up of the judgment or at any time afterwards: *Judgments Act 1838* (Eng) s 11.

³³ See below para 3.1.

³⁴ *Judgments Act 1838* (Eng) s 19.

³⁵ *Judgments Act 1855* (Eng) s 4.

³⁶ Thus no intending purchaser or mortgagee, or creditor, would need to search for more than five years. Without this time limit a search would have occasioned 'great and almost insuperable difficulties': *Beavan v The Earl of Oxford* 6 De G M&G 492, 499; 43 ER 1325, 1328. The purchaser or mortgagee was bound if the judgment was registered within five years before the execution of the conveyance or mortgage, although more than five years had elapsed since the previous registration: *Judgments Act 1855* (Eng) s 6.

³⁷ *Judgments Act 1840* (Eng) s 2; *Judgments Act 1855* (Eng) ss 4, 5. The word 'creditor' refers only to a creditor who has some interest in the land: *Simpson v Morley* 2 Kay & J 71.

³⁸ *Judgments Act 1839* (Eng) s 5; In *Lane v Jackson* (1855) 20 Beav 535, the plaintiff had a judgment against one Brewer. Some time after the judgment had been entered and registered, Brewer sold his estate in land, which was an equity of redemption, to the defendant who was a purchaser for valuable consideration without notice of the judgment. A solicitor acting for both vendor (Brewer) and purchaser (the defendant) did not search the registry of judgments in accordance with his usual practice of not doing a search and because he did not consider a search to be necessary. It was held that the equity of redemption was not bound by the judgment.

(whether or not the purchaser or mortgagee had notice of the judgment), unless a writ or other due process of execution of judgment had been issued and registered before execution of the conveyance or mortgage and payment of the purchase or mortgage money. Section 2 of the *Law of Property Act* preserved the registration requirements of the 1838 Act except that the register is specified as being for writs of execution. Furthermore, neither the judgment nor a writ of execution or other process on the judgment was to affect any land as to a bona fide purchaser or mortgagee, although execution or other process had issued on the judgment and been duly registered, unless the execution or other process had been executed and put in force within three months from the time when it was registered.³⁹

Judgments not to affect land until land delivered in execution under a writ of elegit

2.25 The law was altered again by section 1 of the 1864 Act. No future judgment was to affect any land of whatever tenure until the land had been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority under the judgment. ‘Judgment’ included registered decrees, orders of courts of equity and bankruptcy, and other orders operating as judgments. The effect of the provision was to deprive future judgments of their ‘lien’ on real estates.⁴⁰ By section 3 of the 1864 Act, every writ by which land had been actually delivered in execution was to be registered in the same way as under the *Law of Property Act*, but in the name of the judgment debtor against whom the writ or process was issued rather than in the name of the judgment creditor. No other registration of the judgment was, or was to be deemed, necessary for any purpose. By section 4 of the 1864 Act every judgment creditor to whom any land of the judgment debtor had been actually delivered in execution under a judgment and whose writ had been registered, could obtain an order for sale of the debtor’s interest in the land from the Chancery Division of the High Court.

Effect of Registration of Deeds Act

Land bound from time of registration of judgment or instrument

2.26 In 1856 Western Australia enacted the *Registration of Deeds Act 1856* (WA) (*‘Registration of Deeds Act’*) which provided for the registration of conveyances, deeds, wills, devises, other instruments in writing and judgments by which land is or may be affected. At the time of enactment all land alienated by the Crown was still held under old system title. By section 3 of the *Registration of Deeds Act* all such judgments, deeds, conveyances or instruments in writing registered under the *Registration of Deeds Act* have priority according to their date of registration. Any such judgment, deed, conveyance, devise or instrument in writing not registered under the *Registration of Deeds Act* or some former Act is void against any subsequent bona fide purchaser or mortgagee of the same land for valuable consideration. Section 3 does not extend to bona fide leases at rack rent for any term not exceeding 14 years.

³⁹ *Law of Property Act 1860* (Eng) s 1.

⁴⁰ Williams, above n 23, 88.

2.27 By section 4 of the *Registration of Deeds Act*, all judgments, conveyances or instruments in writing registered within specific times are entitled to priority and take effect according to the date of the judgment or instrument.

2.28 The effect of the *Registration of Deeds Act* is that land is bound against persons dealing with the judgment debtor so far as the judgment creditor's execution rights are concerned, from the time of registration of the judgment or instrument.⁴¹

English Acts adopted in Western Australia

2.29 By the *Imperial Acts Adopting Ordinance 1867* ('the 1867 Ordinance') Western Australia adopted the following English acts:

- (i) the provisions and enactments concerning judgments and their registration contained in the *Judgments Act 1838* (Imp) and the amending *Judgments Act 1840* (Imp);
- (ii) the *Judgments Act 1839*;
- (iii) the *Judgments Act 1855*; and
- (iv) the *Law of Property Act 1860* ('the adopted Judgments Acts').⁴²

2.30 It appears that the adopted Judgments Acts (apart from provisions in the *Law of Property Act* which have been repealed⁴³) apply to old system land.⁴⁴ They were adopted many years after the procedure of seizing and selling land under writs of *fi fa* had been established in Western Australia.⁴⁵ Moreover, the registration requirements of the adopted Judgments Acts are applied to all methods of execution, as noted above at paragraph 2.22.

Two overlapping systems of registration after 1867

2.31 Sykes and Walker comment that the complicated effect of the adopted Acts in Western Australia 'which are dependent upon a certain historical development in England, not all of which is reproduced in Western Australia, when superimposed upon a Deeds Registration structure which itself has certain peculiar features in this State, presents a truly fearsome picture calculated to deter the stoutest heart from analysis'.⁴⁶ The relationship between judgments, and dispositions such as sales and mortgages by the judgment debtor, and the effect of the dual system of registration on this, is analysed by Sykes and Walker as follows:

It seems that if the judgment comes first, then the requirements of both sets of legislation have to be satisfied in order to preserve priority against later dispositions by the debtor. The judgment, if not registered in the Deeds Register, would be void *always* as against a person dealing with the debtor who registered her or his instrument therein even if not taking for

⁴¹ But if the judgment creditor did not register the judgment his rights would be defeated by a subsequent bona fide purchaser or mortgagee of the land. Also, on registration of the judgment the land would be bound as against transactions effected by the judgment debtor prior to the registration of the judgment but not registered on the register even where the transaction was effected before the judgment: see Sykes & Walker, 432 and 433.

⁴² See above para 2.21. Note that the *Judgments Act 1864* (Eng) was not adopted in Western Australia.

⁴³ By s 2 of the *Trustees Act 1900* (WA).

⁴⁴ As to whether they are applicable to land under the *Transfer of Land Act 1893* (WA), see below, para 3.2.

⁴⁵ Above, paras 1.8-1.10.

⁴⁶ Sykes & Walker, 431.

value or *bona fide* and would be void even if the latter did *not* register provided that he or she was a *bona fide* purchaser or mortgagee for value. Even if the judgment was so registered the judgment creditor would not be protected unless registration (and re-registration after five years) was effected under the adopted English Acts. Moreover, registration under the English Acts was never treated as equivalent to notice, but whether a purchaser without notice of a registered judgment was bound thereby depended on certain earlier links in the English legislative chain, and it is virtually impossible to say what the position would be in the Western Australian context.

If the competing instrument executed by the debtor preceded the giving of the judgment, then, nevertheless, in accord with the scheme of the *Deeds Registration Ordinance*, prior registration of the judgment would give priority, as in South Australia and Tasmania. It does not seem that a further registration under the adopted English Acts would be necessary to produce this result. Those Acts were never intended to speak to a state of things where the judgment could take priority over conveyances, etc executed *before* date of judgment.⁴⁷

2.32 Sykes' and Walker's comments assume that section 4 of the 1855 Act is operative in Western Australia,⁴⁸ under which a judgment does not affect land of the judgment debtor as to purchasers and mortgagees unless the judgment has been registered.

2.33 A contrary view is that section 4 of the 1855 Act does not apply. The fact that the 1867 Ordinance was not enacted by Western Australia until 1867 raises the question whether section 4 of the 1855 Act was impliedly repealed by section 1 of the 1864 Act, under which a judgment was not to affect land until the land had been delivered in execution. The latter Act was not adopted in Western Australia, but was enacted in England before Western Australia's 1867 Ordinance.^{49,50}

⁴⁷ Sykes and Walker, 432. As the question of a purchaser without notice of a registered judgment referred to in the first paragraph of this quotation, see above para 2.23.

⁴⁸ See above para 2.29.

⁴⁹ A similar type of question arose in *Barter Enterprises Pty Ltd v Registrar of Titles* (Unreported, Supreme Court of Western Australia, 30 May 1991, Library No 8893). In this case, Nicholson J held that a caveat lodged at the Titles Office on the basis of a judgment for specific performance which had been obtained in the District Court did not claim an estate or interest in the land as the judgment was not a judgment which operated as a charge on the land due to the fact that s 13 of the *Judgments Act 1838* (Eng) (see below, para 3.1) was not applicable to a judgment for specific performance. In his judgment, his Honour said that the *Imperial Acts Adopting Ordinance* was not enacted until 1867. He quoted ss 1 and 2 of the *Judgments Act 1864* (explained above in para 2.25) and said it was the *Judgments Act 1864* (Eng) which determined what judgments were capable of being entered up against a person in the Superior Courts at Westminster within s 13 of the Act at the time of its application in Western Australia by the *Imperial Acts Adopting Ordinance 1867*. Earlier in his judgment Nicholson J said that the word 'judgment' in s 13 was applicable to judgments against debtors and a judgment for specific performance of a lease was not such a judgment.

⁵⁰ Under the *Interpretation Act 1984* (WA) a reference in a Western Australian act to an Imperial Act or to a provision of an Imperial Act is to be construed to include a reference to the Act or provision as from time to time amended. The provision does not apply to acts adopted by the *Imperial Acts Adopting Ordinance 1867* because there is more than a reference to those acts in the 1867 legislation. The acts would have been adopted in the form they took at the time of the enacting of the *Imperial Acts Adopting Ordinance 1867* but subject to any modifications made by that Act. As the *Judgments Act 1864* (Eng) was adopted in Western Australia, section 1 of that Act under which a judgment was not to affect land until it had been delivered in execution could not have become part of the law of Western Australia. But that leaves the question whether s 1 impliedly repealed the provision in s 4 of the *Judgments Act 1855* (Eng) which provided that a judgment did not affect land of the judgment debtor as to purchasers, mortgagees or creditors unless the judgment had been registered under the *Judgments Acts*, as the two provisions may be consistent.

2.34 The 1867 Ordinance clearly intended the provisions in the adopted Judgments Acts respecting registration of judgments to operate. Section 2 of the 1867 Ordinance stated that all ‘the provisions and enactments respecting Judgments, Decrees and Orders, *and the registering thereof*’ in the 1838 Act and the amending 1840 Act were to be applied together with the provisions in the 1839 Act as amended by the 1855 Act to judgments, decrees and orders of the Supreme Court and the Court for Divorce and Matrimonial Causes in Western Australia. The main reason for registration of judgments was to protect purchasers, mortgagees and creditors against the rule still applying in Western Australia that the land of the judgment debtor was affected by the judgment from the date of its entry should the judgment creditor issue a writ of execution.⁵¹ The argument that section 2 of the 1867 Ordinance shows an intention that section 4 of the 1855 Act be adopted is supported by the fact that the only provision regarding registration of judgments in the 1840 Act is one confirming the earlier 1838 Act provision that a judgment should not ‘by virtue of the Act’ affect any land as to purchasers, mortgagees or creditors unless a memorandum containing the prescribed particulars is left with the Court,⁵² before adding prior ‘notice of the judgment to any purchaser, mortgagee or creditor notwithstanding’.

(iii) Priority point for land under the Transfer of Land Act

2.35 The general concept in the case of land under the *Transfer of Land Act* is that none of the entry of judgment, or the issue of a writ of execution, or the delivery of the writ to the Sheriff represents the priority point at which land is affected against purchasers or mortgagees.⁵³ By reason of section 133 of the *Transfer of Land Act* (which is set out in full in Appendix I of this paper) the writ of execution has binding effect but is operative only from service of a copy writ on the Registrar of Titles.⁵⁴

2.36 Section 133 of the *Transfer of Land Act* also provides that, except as provided in the section, ‘no execution’ is to bind, charge or affect the judgment debtor’s land.⁵⁵ The prohibition has been held to include ‘any lease, mortgage or charge’.⁵⁶

2.37 Only a registered estate or interest can be bound by service on the Registrar of Titles of a copy writ of *fi fa*.⁵⁷ Section 133 of the *Transfer of Land Act* applies to sales under warrants of execution issued under section 125 of the *Local Courts Act*, to sales under a writ

⁵¹ Above, paras 2.18-2.19. Thus, the purchaser for example would only be bound if the judgment was registered within five years before the execution of the conveyance. The old docket system established by the Act of 1693 (4 & 5 W & M c20) which had been providing the equivalent facility was closed by one of the adopted Acts, the *Judgments Act 1839* (Eng): above para 2.20.

⁵² Above, para 2.21.

⁵³ Sykes & Walker, 511.

⁵⁴ Ibid.

⁵⁵ *Transfer of Land Act 1893* (WA) s 133. If the writ of *fi fa* is not registered at all, the Sheriff’s transfer cannot be registered. However, the Sheriff is not deprived of the Sheriff’s general authority, derived from the general law, to sell, but the transfer would be non-registrable so that the title of the transferee would remain equitable only.

⁵⁶ *Findlay v Trevor and Halse, the Liquidators of Nut Farms of Australia Pty Ltd (in liquidation)* (Unreported, Supreme Court of Western Australia, 30 April 1993, Library No 930229) was a case in which the Sheriff had sold a mortgage under a writ of *fi fa*.

⁵⁷ EA Francis *Torrens Title in Australasia*, Vol 2 (1973) 214.

or warrant of execution under the *Industrial Relations Act 1979*,⁵⁸ to warrants of execution issued out of or orders of execution made by a Warden's Court under section 140 of the *Mining Act 1978* (WA). The registration provisions in section 133 also extend to decrees or orders of the Supreme or District Courts under which a sale may be effected. The effect of entering such an order or decree in the register is not spelled out in the *Transfer of Land Act*, but once registered the order or decree would, of course constitute an encumbrance on the certificate of title.

2.38 Registration of a writ of *fi fa* under section 133 of the *Transfer of Land Act* does not confer any specific proprietary interest on the judgment creditor;⁵⁹ the section controls no more than the effect which judgments and executions under the general law had in fettering the ability of the judgment debtor owner to give clear title.⁶⁰

2.39 Section 133 of the *Transfer of Land Act* embodies the general law principle that the purchaser from the Sheriff buys subject to prior equities — in this context, prior to the service of the writ on the Registrar of Titles — but the section varies the principle by requiring equitable claims to be notified by caveat to preserve their priority. To protect the claim, the caveat must be lodged prior to service on the Registrar of Titles of the copy of the writ of *fi fa*.⁶¹ In the absence of a caveat the estate and interest of the unregistered purchaser, transferee, mortgagee or any other person claiming through or under the judgment debtor is extinguished and passes to the purchaser from the Sheriff by virtue of the transfer from the Sheriff.⁶²

⁵⁸ *Industrial Relations Act 1979* (WA) ss 81CA and 89(3); *Industrial Arbitration Act (Western Australian Industrial Appeal Court) Regulations 1980* (WA) reg 18(8); *Industrial Relations (Industrial Magistrates Courts) Regulations 1980* (WA) reg 10(10).

⁵⁹ *Faskel v The Registrar of Titles and others* (Unreported, Supreme Court of Western Australia, 19 October 1989), Library No 7900.

⁶⁰ Sykes & Walker, 513. Thus the fact that the writ of *fi fa* is registered under s 133 does not prevent the judgment debtor dealing with the land himself during the four month period but a sale of the land by the Sheriff takes priority over any dealing by the judgment debtor subsequent to the service of the copy of the writ of *fi fa* on the Registrar of Titles provided the sale takes place within the four month period: see Sykes & Walker, 512-513. To avoid the possibility of the acts of the judgment debtor prevailing against the interest of the purchaser from the Sheriff, the transfer needs to be lodged before the expiration of the four month period: see below, para 4.29.

It seems to be the dominant view that the Registrar of Titles should not register any dealing purporting to be from the registered proprietor during the period for which the binding effect is operative: Sykes & Walker, 514. Though the *Transfer of Land Act 1979* (WA) does not say so, the effect is that registration of the writ operates as a limited caveat. The position, however, is different in Queensland. There a transfer or mortgage, for example, by the registered proprietor lodged while the writ of *fi fa* or warrant of execution is binding the land will be registered. The *Land Title Practice Manual (Queensland)* at para 12-2010 says that to refuse registration would be contrary to s 30 of the *Land Titles Act 1994* (Qld) which clearly states that the Registrar must register any instrument lodged that complies with the requirements of the *Land Titles Act 1994* (Qld) for registration. If the transfer by the Sheriff or bailiff is executed during the binding period, but lodged subsequent to the transfer or mortgage executed by the registered proprietor, the land will be registered in the name of the purchaser from the Sheriff or bailiff: Sykes & Walker, 514. The interests of the purchaser or mortgagee lodged after the writ of *fi fa* or warrant of execution and subject to it will be cancelled on registration in the name of the purchaser from the Sheriff or bailiff: Sykes & Walker, 514. (Thus it is possible, for example, for a judgment debtor in Queensland to have a mortgage registered on his title while the land is bound by a writ of *fi fa* in order to raise the money to pay out the judgment debt. In Western Australia, the writ of *fi fa* would always have to be withdrawn by the judgment creditor before the mortgage could be registered and thus the judgment debtor has to be able to make an arrangement with the judgment creditor for the withdrawal of the writ.)

⁶¹ This stipulation applies not only to the judgment debtor's land but to any 'lease sub-lease mortgage annuity or other charge': s 133 *Transfer of Land Act 1893* (WA).

⁶² See s 133 of the *Transfer of Land Act 1893* (WA) in Appendix I to this paper.

2.40 In *Clarke v Røe and Falkner*⁶³ the Full Court of the Supreme Court of Western Australia, considering the operation of section 133 of the *Transfer of Land Act*, held that it was restricted to cases where a sale had actually occurred, and in the words of Hensman J ‘until that has happened this Court has full power to restrain the sheriff from dealing with land which does not belong to the judgment debtor’.⁶⁴ Once the Sheriff’s transfer is registered, the ordinary principle of the conclusiveness of the register applies.

Renewing the binding effect of the writ of *fi fa*

2.41 Within the 12 months’ life of the writ of *fi fa* or any extension of it, a further copy of the writ of *fi fa* may be served on the Registrar of Titles during (or after the expiry of) any previous four month period.⁶⁵ Service of a further copy of the writ of *fi fa* renews the binding effect but it does not seem to create a continuous period of priority. If the latest four month period has expired, a further copy of the writ of *fi fa* must be lodged before any transfer can be registered.⁶⁶

2.42 Where the judgment debtor has a registered estate under the *Transfer of Land Act*, by virtue of section 133 the binding effect of a writ of *fi fa* cannot operate on the judgment debtor’s estate at any earlier point than the time of service of the copy writ on the Registrar of Titles. Sykes and Walker question whether failure to register the judgment in the Deeds Registry is failure to comply with an additional and not inconsistent requirement and prevents the binding effect from vesting, even though a copy of the writ has been served on the Registrar of Titles. Their reasoning is that the additional registration of the judgment in the Deeds Registry is not necessary:

Section 133 of the *Transfer of Land Act* refers to the binding effect of a writ of execution and does not purport to touch the binding effect of a judgment as such; registration under the Registration of Deeds Ordinance and under the adopted English [Judgments] Acts is registration of judgments, not of writs. Although, however, this is so and although we speak of the binding effect ‘of judgments’ such effect is operative, save insofar as the judgment operates as a specific charge, only through the medium of the writ of execution. Unless the writ is executed, the binding effect of the judgment in this sense never comes into play. It is therefore suggested that the topic is still one as to the binding effect of execution, and one must therefore still look to s 133 as representing the statement of the law on this topic. Yet s 133 is nothing in the nature of an exclusive code on the subject. It assumes the binding effect

⁶³ [1899] 1 WALR 123.

⁶⁴ *Ibid*, 129. In this case, the registered proprietor of the land was the Official Receiver of a bankrupt estate, but in his individual name, the words ‘Official Receiver’ being used in the register as only a description of him. The register did not show that he held the land as the Official Receiver of an estate in bankruptcy. The Official Receiver did not enter a caveat before the service of the copy of the writ on the Registrar of Titles, but, when the Sheriff was proceeding to sell the land, obtained an interim injunction restraining the Sheriff. His application to extend the injunction was granted on appeal to the Full Court.

Clarke v Røe and Falkner was followed in *McDonald v McNally* [1990] WAR 365 and in *Faskel v Registrar of Titles*, above n 59. It was approved by the Full Court in *The Sheriff of Western Australia v Monadelphous Engineering Associates (NZ) Limited (in liquidation)* (Unreported, Supreme Court of Western Australia, 23 August 1992, Library No 920446). In this case, the Full Court said that ‘Until there has been a sale by the Sheriff under a writ of *fi fa* a prior equitable interest can be set up and will not be postponed or affected whether notified by caveat or not’. It added that it would be protected by injunction in an appropriate case. See also *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd* [1984] 2 Qd R 507.

⁶⁵ *Pirpiris v Iovanella* [1975] VR 129; *Registrar of Titles v Paterson* (1876) 2 App Cas 110.

⁶⁶ *Transfer of Land Act 1893* (WA) s 90. Under s 90, a transfer from the Sheriff is not to be registered unless within the preceding four months a copy of the writ of *fi fa* has been served on the Registrar of Titles.

derived from the older law. May it not then be argued that although the binding effect of the writ cannot operate at any earlier point than the entry of the writ in the Torrens register, yet failure to register in the Deeds Registry is failure to comply with an additional and not inconsistent requirement and prevents the binding effect from vesting even though the writ be entered? This seems to be arguable both ways, but it is submitted shortly that s 133 will not silently require compliance with conditions attached which operated through the writ but dated back to the judgment and drew their ultimate inspiration from the latter.⁶⁷

2.43 What is the position, however, if the judgment debtor's estate is not a registrable one, but is equitable, or belonging to the category of unregistrable legal interests, assuming such interests are capable of existence? Sykes and Walker say that in such cases it seems the writ of execution is not registrable in the Torrens register⁶⁸ pursuant to the procedures set out in section 133 of the *Transfer of Land Act*. They argue that such a fact would not of itself deprive the execution creditor of priority over a person purchasing the equitable interest of the judgment debtor after delivery of the writ, though he or she would have no standing against a person taking a later registered title, in the absence of fraud. In this context, they say, it seems that in Western Australia, registration under the *Registration of Deeds Act* is necessary to give priority over a purchaser of the equitable estate of the judgment debtor and that the *Registration of Deeds Act* would determine the date of priority.⁶⁹

Fines, Penalties and Infringement Notices Enforcement Act — binding effect of a warrant of execution

(i) On old system land

2.44 Provisions in the *Fines, Penalties and Infringement Notices Enforcement Act* relate to the binding effect of a warrant of execution issued against old system land out of the Fines Enforcement Registry to recover a fine.⁷⁰ Under the *Fines, Penalties and Infringement Notices Enforcement Act*, actual seizure of old system land is not necessary for a warrant of execution to have a binding effect on the land. Seizure is effected by the Sheriff lodging with the Registrar of Deeds and Transfers under the *Registration of Deeds Act* a memorial describing the land and setting out the amount owed under the warrant and the enforcement fees owed, together with a copy of the warrant. Once the Registrar of Deeds and Transfers registers the memorial, any instrument affecting the land and lodged for registration after the memorial has been registered and before it has been cancelled is of no effect.

2.45 A memorial which has been registered has effect until it is cancelled. By section 90 of the *Fines, Penalties and Infringement Notices Enforcement Act*, the Sheriff may cancel the memorial either for good reason or if the warrant ceases to be in force, by lodging a

⁶⁷ Sykes & Walker, 519. See also below, para 3.35.

⁶⁸ Sykes and Walker, 519.

⁶⁹ Ibid, 520. The topic of the binding of equitable estates and interests is considered below in para 3.33 and ch 5.

⁷⁰ *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* s 89.

withdrawal of memorial with the Registrar of Deeds and Transfers. Subject to the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act*, a warrant affects land as if it were a writ of *fi fa* and the offender were a judgment debtor. If the land is sold under the warrant, a deed of conveyance of the land signed by the Sheriff gives the purchaser as good an estate in or title to the land as the offender had.⁷¹ A warrant of execution issued out of the Fines Enforcement Registry is of indefinite duration.⁷²

(ii) On land under the Transfer of Land Act

2.46 The provisions in the *Fines, Penalties and Infringement Notices Enforcement Act* relating to the binding effect of a warrant of execution against *Transfer of Land Act* land are identical to those relating to old system land except that in the case of land under the *Transfer of Land Act*, the Sheriff lodges the appropriate documents with the Registrar of Titles, not the Registrar of Deeds.⁷³

Land Act 1933 (WA)

2.47 A large proportion of Western Australia remains unalienated land vested in the Crown. Substantial tracts of Crown land have been the subject of grants of leasehold interests under the *Land Act* which provided for the Crown granting a range of pastoral and agricultural leaseholds and other leaseholds. Section 159(1) of the *Land Act* provided that the provisions of the *Transfer of Land Act* relating to executions against land were incorporated into the *Land Act* and were to apply to land held under it and not registered under the *Transfer of Land Act*.⁷⁴

2.48 The *Land Act* was repealed by the *Land Administration Act 1997*.⁷⁵ At the same time, the *Acts Amendment (Land Administration) Act 1997* came into operation,⁷⁶ amending the *Transfer of Land Act* so that it applied to Crown land in the same way as it applies to freehold land.⁷⁷

⁷¹ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 92(2).

⁷² *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 65.

⁷³ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 89.

⁷⁴ Section 159 of the *Land Act 1933* (WA) is set out in Appendix IV.

⁷⁵ *Land Administration Act 1997* (WA) ss 2 and 281.

⁷⁶ *Acts Amendment (Land Administration) Act 1997* (WA) s 2. The Act was proclaimed to operate from 30 March 1998: *Government Gazette* 27 March 1998, 1765. There are transitional provisions regarding the continuation of existing leaseholds, for example, s 143. See also s 281.

⁷⁷ Section 90 of the *Acts Amendment (Land Administration) Act 1997* (WA) which inserts a new section, s 4A, into the *Transfer of Land Act 1893* (WA).

CHAPTER 3

Judgments Acts and Registration of Deeds Act — Clearing out the deadwood

Section 13 of the Judgments Act 1838

Judgment as a charge on land

3.1 By section 13 of the English *Judgments Act 1838* ('the 1838 Act') which was adopted in Western Australia in 1867,¹ a judgment entered in a superior court operates as a charge on the land of the judgment debtor. The judgment creditor is not entitled to enforce the charge until a year has elapsed since the date judgment was entered. The section preserves the equitable doctrine of protection to purchasers for consideration without notice.

3.2 The procedure for registration of a judgment under the 1838 Act is discussed in paragraph 2.22. The Court must make an order before the land can be sold under the charge. One practical advantage of a charge, from the judgment creditor's point of view, is that a purchaser of the land might insist on the charge being paid out at the time of settlement of the sale. It has been held that the charge imposed by section 13 of the 1838 Act does not apply to land under the *Transfer of Land Act*.²

¹ 1 and 2 Vic c 110. Above para 2.29.

² *Connell v Bank of Western Australia* (1996) 16 WAR 483. In this case Owen J said: 'In my opinion the existence of an equitable charge arising under a judgment which, by virtue of registration at the court (being a register outside the scheme of the *Transfer of Land Act 1893* (WA) and one not within the search provisions of the *Transfer of Land Act 1893*) could have priority implications for purchasers and mortgagees, is repugnant to the scheme for execution introduced by the *Transfer of Land Act 1893* (WA) and recognised in s 133': at 494. It therefore could not stand, as s 3 of the *Transfer of Land Act 1893* (WA) provided that all laws and statutes which were inconsistent with the *Transfer of Land Act 1893* (WA) should not apply to land whether freehold or leasehold under its operation.

By the *Crown Debts Act 1541-1542* (UK) (33 Henry VIII c 39) debts of record and certain other debts, due to the Crown, are binding on the debtor's estate when sold or devised by will or suffered to descend to the heir at law. By s 8 of the *Judgments Act 1839* (WA) (s 8 2&3 Vict c11) which was adopted in Western Australia such liabilities do not affect any land as to purchasers or mortgagees unless duly registered in the index of Crown Debtors and accountants to be established

3.3 Almost since the founding of the colony in Western Australia, the recognised means of executing against old system land has been to issue a writ of *fi fa*³ or warrant of execution.⁴ The cumbersome and protracted alternative provided by section 13 of the 1838 Act is surplus to Western Australia's requirements. We consider the retention of section 13 of the 1838 Act is not justified and we propose that it be repealed.

Registration of judgment provisions

Complications of a dual system of registration

3.4 In Chapter 2 we saw that relatively shortly after Western Australia introduced its own system of registration of judgments and other instruments under the *Registration of Deeds Act*⁵ a further system of registration was introduced from England with the passing of the *Imperial Acts Adopting Ordinance 1867*.⁶

3.5 The result is that a dual system of registration exists, complicating the relationship in the case of old system land⁷ between judgments on the one hand and dispositions such as sales and mortgages effected by the judgment debtor on the other. Thus, if a judgment comes first, the requirements of both sets of legislation have to be satisfied to preserve priority against later dispositions by the debtor. However, if the competing instrument executed by the debtor precedes the giving of judgment, then nevertheless, in accordance with the scheme of the *Registration of Deeds Act*, prior registration of the judgment would give priority. However, it does not seem that a further registration under the Judgments Acts would be necessary to produce this result.⁸

3.6 Sykes and Walker say it was regrettable the Western Australian legislature did not take the opportunity to sweep away the deadwood when enacting the *Property Law Act 1969* (WA). They say it would only have required —

- (i) A simple repeal of the *Imperial Acts Adopting Ordinance 1867*, the Act which adopted the Judgments Acts; and
- (ii) An exclusion of judgments from the scope of the

by the Master of the Supreme Court. We are not aware of any decision on the question of whether these provisions in the *Crown Debts Act 1541-1542* (UK) apply in Western Australia, although they were considered in *Deputy Commissioner of Taxation v Corwest Management Pty Ltd* [1978] WAR 129. We regard the *Crown Debts Act 1541-1542* (UK) as being outside the terms of reference of this project. Our proposals are not intended to affect the *Crown Debts Act 1541-1542* (UK) or s 8 of the *Judgments Act 1839* (Eng), which is not among the sections in that Act which we propose should be repealed (see below para 3.14).

³ Now issued under *Supreme Court Act 1935* (WA) ss 119-120.

⁴ *Local Courts Act 1904* (WA) s 122; *Local Court Rules* O 25 r 6.

⁵ See above, para 2.26–2.28.

⁶ See above, para 2.29. The *Law of Property Act 1860* (Eng), one of the Acts listed above in para 2.29 as being adopted by the *Imperial Acts Adopting Ordinance 1867* was repealed by the Parliament of Western Australia by s 2 of the *Trustees Act 1900* (WA).

⁷ The registration provisions of the adopted *Judgments Acts* do not apply to land under the *Transfer of Land Act 1893* (WA). See Sykes & Walker, 333; see also *Connell v Bank of Western Australia*, above n 2.

⁸ See above, para 2.31.

Registration of Deeds Act, except for one provision for a registration similar to that in section 209 of the *Property Law Act 1958* (Vic) that would also, as in Victoria, refer to the delivery of the writ to the Sheriff.⁹

The Victorian model

3.7 Section 209 of the *Property Law Act 1958* (Vic) ('the Victorian Act') provides that —

- (1) a judgment, decree or order of a court already made or to be made is not to bind or affect any freehold land or chattel real,¹⁰ until and unless a process of execution is issued thereon;
- (2) the process of execution is not to affect at law or in equity any such land or chattel real as to purchasers, mortgagees or execution creditors (notwithstanding that they have notice of the execution) unless and until -
 - (a) the same is delivered to the sheriff or other officer for execution, and
 - (b) a memorandum containing -
 - (i) the name and the usual or last known place of abode and the trade or profession of the person whose estate is intended to be affected thereby,
 - (ii) the court and title of the cause or matter in which such judgment, decree or order has been made,
 - (iii) the date of the judgment, decree or order, and
 - (iv) the date of the delivery to the sheriff or other officer for execution of the process and the amount of the moneys thereby ordered to be made,
 is left with the Registrar General;
- (3) the Registrar General is to forthwith enter these particulars in a book in alphabetical order by the name of the person whose estate is intended to be affected by the execution;
- (4) the Registrar General is to insert in the book, the date when the memorandum is left with him;
- (5) a prescribed fee is to be paid for each entry in the book; and
- (6) any person can search the book on payment of the prescribed fee.

3.8 By section 210 of the Victorian Act, after the expiration of five years from their registration, registered executions are void against freehold land and chattels real as to purchasers, mortgagees and execution creditors, unless the execution is re-registered within five years before the execution of the instrument transferring the legal or equitable estate or interest to the purchaser or mortgagee or as to creditors within five years before the right of such creditors accrued.

⁹ Sykes & Walker, 431.

¹⁰ Chattel real is land held on leasehold tenure: *Sander v Twigg* (1887) 13 VLR 765, 792 (Holroyd J). Writs and warrants of execution are processes of execution. Strictly speaking when a judgment creditor obtains the appointment of a receiver, he is not effecting a process of execution but obtaining equitable relief on the ground that there is a hindrance to obtaining execution at law: *Re Shephard, Atkins v Shephard* (1889) 43 Ch D 131, 136. However, an order for the appointment of a receiver is probably a 'process of execution' within the meaning of s209: see *Re Pope* (1886) 17 QBD 743, 754.

3.9 By section 211 of the Victorian Act, it is sufficient compliance with re-registration requirement if it is effected within five years before the execution of the competing instrument or within five years before the right of the creditor accrues though more than five years may have elapsed since the last previous registration. The register is different to that maintained under the registration of deeds legislation in Victoria.¹¹ Registration of the judgment and the writ of execution under the registration of deeds legislation, even if possible, has no significance.¹² By section 212 of the Victorian Act, the provisions do not affect the execution as between the parties to it or those deriving as volunteers under them.

3.10 The words ‘freehold land’ are not defined in the Victorian Act for the purposes of section 209. However, under the Victorian *Interpretation of Legislation Act 1984*, unless a contrary intention appears in an act, the word ‘land’ includes an estate or interest in the land.

3.11 The Victorian provisions outlined above have no relevance where the judgment debtor has a registered estate under the Torrens system legislation in that State, namely the *Transfer of Land Act 1958*.¹³ Under section 52 of the Victorian *Transfer of Land Act*, which is equivalent to section 133 of Western Australia’s *Transfer of Land Act*, except as provided in section 52, no execution is to bind or affect any land under the operation of the Act.¹⁴

The New South Wales model

3.12 New South Wales takes a different approach to Victoria. By virtue of section 13(1) of the *Judgment Creditors’ Remedies Act 1901* (NSW), no judgment recovered ‘in any action at law shall bind or affect or be deemed to have bound or affected any land’. However, section 13(2) provides that every writ of execution on any judgment against the land of the person against whom judgment is obtained, when delivered to the Sheriff, ‘shall affect and be deemed to have bound such land from the time of such delivery in like manner as a writ of execution against property binds goods and chattels’.¹⁵

3.13 There is provision for registration under the *Conveyancing Act 1919* (WA), under which a writ or order affecting land issued or made by any court for the purpose of enforcing a judgment (including an

¹¹ *Property Law Act 1958* (Vic) Part I ss 4-17.

¹² Sykes & Walker, 426.

¹³ See Sykes & Walker, 519-520. See also *Sander v Twigg* (1887) above n 10, 792. It seems that where the land is under the Torrens system, but the judgment debtor only has an equitable interest in it or his estate belongs to the category of unregistrable legal interests, and assuming that such are capable of existence, registration under s 209 of the *Property Law Act 1958* (Vic) would be necessary to give priority over a purchaser of the equitable estate of the judgment debtor: see Sykes and Walker 519-520 who wrote that the case of *Sander v Twigg* supports this. In this case, the Full Court of the Supreme Court of Victoria considered a similarly worded section to s 209 in the *Real Property Statute 1864* (Vic) (which has since been repealed). See also ch 5, para 5.6 below.

¹⁴ This is similar to the opening passage of s 133 of the *Transfer of Land Act 1893* (WA): See Appendix I of this paper.

¹⁵ As far as we have been able to ascertain from our research, the proviso in the terms of s 26(1) of the *Sale of Goods Act 1895* (WA) by which the writ of *fi fa* or other writ of execution was not to prejudice the title of any person to goods acquired from an execution debtor in good faith, for valuable consideration and without notice before seizure of the goods did not apply in New South Wales when the *Judgment Creditors’ Remedies Act* was enacted in 1901 and did not apply in that State until the enactment of the *Sale of Goods Act 1923* (NSW). Because of this, it seems that under s 13(2) of the *Judgment Creditors’ Remedies Act 1901* (NSW), the purchaser of an equitable interest in land under the Torrens system would be bound even in the absence of notice once the writ is delivered to the Sheriff.

order appointing a receiver or sequestrator of land) may be registered in the General Register of Deeds established under the *Conveyancing Act*.¹⁶ Re-registration of the writ or order after five years is required to bind purchasers.¹⁷ By section 188(1) of the *Conveyancing Act* every such writ issued or renewed and every such order is void against a person who becomes a purchaser of the land without notice of the writ or order unless the same was currently registered in the General Register of Deeds.¹⁸ By section 188(2), a purchaser is not affected with notice of any such writ or order by reason of failing to make any inquiry or search other than a search in the General Register of Deeds. Section 188 does not apply to land under the Torrens system.¹⁹

Problems with the dual system in Western Australia

3.14 The present dual system in Western Australia creates complexity and uncertainty. We propose that those provisions of the adopted *Judgment Acts* under which judgments do not affect land as to purchasers, mortgagees or creditors until the memorandum of particulars is left with the Master for registration at the Supreme Court should be repealed. The sections of the adopted *Judgments Acts* which should be repealed are —

- (a) sections 13 and 19 of the *Judgments Act 1838*;
- (b) sections 1 to 6 of the *Judgments Act 1839*;
- (c) section 2 of the *Judgments Act 1840*; and
- (d) sections 4, 5, 6, 7 and 8 of the *Judgments Act 1855*, and a consequential amendment to section 11.

3.15 At the same time, the *Registration of Deeds Act 1856* should be amended so that it no longer applies to judgments. This will require the repeal of sections 2, 3, 4, 8, 9, 10, 11, 12, 16 and 22 of the *Registration of Deeds Act*.

3.16 A statutory provision is needed to replace the old registration requirements in order that the common law effect of a process of execution in relation to old system land be limited. In the case of goods the common law effect is limited by section 26 of the *Sale of Goods Act*. We agree with the approach suggested by Sykes and Walker at paragraph 3.6.

3.17 We propose that a statutory provision similar to section 209 of the Victorian Act be inserted in the *Property Law Act 1969* (WA) making provision for a memorial similar to that required by section 209 of the *Property Law Act 1958* (Vic), to be registered by the Registrar of

¹⁶ *Conveyancing Act 1919* (NSW) ss 184C, 186(1).

¹⁷ *Conveyancing Act 1919* (NSW) ss 186(2), 188.

¹⁸ The term 'purchaser' means a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in the land: *Conveyancing Act 1919* (NSW) s 7.

¹⁹ *Conveyancing Act 1919* (NSW) s 188(3). Speaking of old system land, Sykes and Walker say that the general effect of the two Acts (the *Judgment Creditors' Remedies Act 1901* (NSW) and the *Conveyancing Act 1919* (NSW)) seems to be as follows: 'If the purchaser takes with notice of the writ, then the *Conveyancing Act 1919* (NSW) does not apply and he or she is bound if but only if at the time of purchase the writ of execution had been delivered to the sheriff. If, however, the purchaser takes without notice then he or she is bound only if, at the time of taking her or his interest, the writ was registered. In general, notice means actual notice. Under s 188(2) of the *Conveyancing Act 1919* (NSW), however, failure to search in the register of causes, writs and orders would amount to constructive notice of a writ there registered, but it would seem that if the writ was so registered the purchaser would be bound even without this statutory reference provided it was properly indexed': Sykes & Walker, 427.

Deeds and Transfers under the *Registration of Deeds Act*.²⁰ The memorial should (i) particularise the land intended to be affected by the process of execution and set out the address of the property; and (ii) contain a copy of the process of execution.

3.18 We consider that the *Property Law Act 1969* (WA) should stipulate that a judgment, decree or order of a court should not bind or affect any land until a process of execution is issued.

3.19 Section 209 of the *Property Law Act 1958* (Vic) provides that the process of execution is not to affect the land as to purchasers, mortgagees or execution creditors until the process is delivered to the sheriff or other officer and a memorandum is left with the Registrar General.²¹ We consider any corresponding section in the Western Australian *Property Law Act 1969* (WA) should relate to purchasers or mortgagees, or to creditors who acquire an interest in land.²² We find the reference to ‘execution creditors’ in section 209 to be unclear.²³ The wording ‘purchasers, mortgagees or execution creditors, which appears in section 209 was adapted from one of the English Judgment Acts, where the words used are ‘purchasers, mortgagees or creditors.’ It was held in England that in its context the word ‘creditors’ meant creditors who acquire an interest in the land.²⁴ We favour the English position. To give the English position effect in the provision we propose it would be necessary to refer to creditors who acquire an interest in the land.²⁵

3.20 Our proposal means that as far as purchasers, mortgagees and creditors who acquire an interest in the land are concerned, the binding effect can no longer be related back prior to the issue of the process of execution by reference to the registration of the judgment. Instead, the process would have to be delivered to the Sheriff or other officer — a feature consistent with procedure under section 26 of the *Sale of Goods Act* — and prescribed particulars of the process set out in a memorial delivered to the Registrar of Deeds and Transfers for registration under the *Registration of Deeds Act*. We consider the requirement for registration is necessary in the case of land, so that any intending purchaser, for example, can discover the existence of the writ by searching the register before dealing with the judgment debtor and can ensure its removal before the land is conveyed to him or her. The purchaser or mortgagee or the creditor who acquires an interest in the land should not be affected unless registration has been

²⁰ Among other things this will avoid the establishment of a separate register: there is a separate register in Victoria. Furthermore, where a warrant of execution is issued against old system land under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA), the memorial concerning the warrant is registered under the *Registration of Deeds Act 1856* (WA). See s 89 and above, para 2.44.

²¹ See s 209 in above para 3.7.

²² There is a definition of both ‘purchaser’ and ‘mortgagee’ in s 7 of the *Property Law Act 1969* (WA). There is also a definition of ‘land’ (although not of freehold land) in s 7 and by s 5 of the *Interpretation Act 1984* (WA), ‘land’ includes any estate or interest in land.

²³ It is not clear to us whether the words were intended to alter the common law that as between different execution creditors priority is determined by the precise time of delivery of the writ of execution to the Sheriff: the rule is referred to below in para 6.3.

²⁴ *Simpson v Morley* (1855) 2 K&J 75; 69 ER 698.

²⁵ In *Simpson v Morley* *ibid*, Wood VC was assisted in reaching his conclusion on the meaning of ‘creditors’ in the English equivalent of ss 209–211 of the *Property Law Act 1958* (Vic) by the context in which the words were used in the equivalent of s 210. We are not incorporating s 210 (referred to above in para 3.8) in our proposals.

completed, even if he or she has notice of the issue of the writ or its delivery to the Sheriff. Basically, the establishment of title under the old system is by reference to documents. It would be unsatisfactory for title to depend, as it does when a writ against goods has been delivered to the Sheriff, on whether the purchaser or mortgagee had notice of the writ.²⁶

3.21 We do not propose that the scheme in the Victorian Act²⁷ for registration after five years be adopted in Western Australia. The reason for the re-registration requirement in the *English Judgments Act* was explained in *Beavan v the Earl of Oxford* as follows:

If a judgment once registered were to bind a subsequent purchaser after any lapse of time the search must be indefinite, and must necessarily occasion great and almost insuperable difficulties. To obviate this the statute provides that no intended purchaser, mortgagee or creditor need search for more than five years, requiring at the end of that time re-registry in order to affect purchasers, mortgagees or creditors.²⁸

3.22 Under our recommendations, a judgment cannot bind land until a process of execution is issued on it and the process of execution cannot affect the land as to purchasers, mortgagees or creditors until the memorial has been delivered to the Registrar of Deeds and Transfers. Any difficulty previously associated with the binding effect of the process of execution relating back to the time of registration of the judgment would no longer apply. Furthermore, at least in the Supreme, District and Local Courts, a writ of execution or warrant of execution remains in force for only one year from its issue, although it may, before it expires, by leave of the Court, be renewed by the person issuing it for one year from the date of renewal and so on from time to time during the continuance of the renewed writ.²⁹ It has already been noted that an order of the Court appointing a receiver by way of equitable execution could be in force for more than a year.³⁰

Registration of memorial to constitute registration of execution process also

3.23 We suggest the adoption of section 209 (with qualifications) of the Victorian Act. The stipulation in section 209 that a judgment, decree or order of the court does not bind or affect any land until a process of execution is issued on it would, of course, be subject to the provisions regarding the binding of land as to purchasers, mortgagees and execution creditors.³¹ However, that stipulation would presumably mean that the position of the judgment debtor himself or herself, his or her personal representatives and donees would correspond with their position in the case of goods, which is that the binding power of the writ attaches from the time of issuing the writ of *fi fa*.³² However, it is possible that even after delivery to the Registrar of Deeds and Transfers of a memorial as we have proposed, the judgment debtor could defeat the binding power of the writ by registering a conveyance

²⁶ Above paras 2.4–2.8.

²⁷ Sections 210-211: above para 3.8.

²⁸ 6 De G M & G 492, 499; 43 ER 1325, 1328.

²⁹ *Rules of the Supreme Court 1971* (WA) O 47 r 10; *Local Court Rules 1961* (WA) O 25 (Div 1) r 5.

³⁰ Such an order would probably be a process of execution: see above n 10.

³¹ Above para 3.7.

³² Above para 2.13.

to a donee, the donee being neither a purchaser, mortgagee or creditor. Such a risk must be avoided.³³ We therefore recommend that registration of the memorial by the Registrar of Deeds and Transfers should also constitute registration of the process of execution under the *Registration of Deeds Act*.

3.24 Once the process of execution is registered under the *Registration of Deeds Act* it would clearly have priority over any conveyance to a donee.³⁴

3.25 It is not clear whether registration of a process of execution under the *Registration of Deeds Act* can determine priority as to the proceeds of execution where there are competing writs of execution or warrants of execution in respect of the same land.³⁵ We are of the view that priority should be determined without regard to registration under the *Registration of Deeds Act*. We recommend it be made clear in the proposed amendments that neither registration of the memorial nor registration of the process of execution should affect priority as to the proceeds of execution where there are competing writs of execution or warrants of execution.

3.26 We consider it should be made clear in the amendments to the *Property Law Act 1969 (WA)* that neither delivery of the memorial to the Registrar of Deeds and Transfers nor its registration under the *Registration of Deeds Act* should operate to extend the time for which process of execution would remain in force if not so registered. Thus, if the process of execution expires, it would no longer affect the land as to purchasers, mortgagees or creditors although the memorial had been delivered and registered. If a writ or warrant of execution was renewed by leave of the court, it would be necessary to register the court's order under the *Registration of Deeds Act* to protect the priority of the writ or warrant of execution.³⁶

Need for certificate of satisfaction

3.27 The Victorian Act does not contain a provision for registering a certificate of satisfaction of a process of execution. Such a provision would be useful, particularly to potential purchasers or mortgagees searching the register who, on finding such a certificate registered, would be assured the process of execution was paid out while it was in force and the land was no longer bound.

3.28 The certificate should –

- (a) specify the name of the person whose estate was intended to be affected by the process,
- (b) specify the title of the court from which the process issued,
- (c) specify the memorial number allocated to the process of execution at the time of its registration

³³ See above para 2.31. Of course, a voluntary conveyance with intent to defraud creditors is *voidable* at the instance of any person thereby prejudiced (*Property Law Act 1969 (WA)* s 89); but the gift may not have been made with that intention.

³⁴ We have proposed that the memorial should contain a copy of the process of execution: above para 3.17. By a rule of practice promulgated by the Registrar in 1903 a memorial of a document is required to contain a true copy of the original document.

³⁵ This issue is discussed further below para 6.5.

³⁶ As to renewal, see above para 3.21.

- (d) particularise the land intended to be affected by the process of execution, and
- (e) certify –
 - (i) that the whole of the money owing under the process of execution has been paid or otherwise satisfied, and
 - (ii) the date on which the process was finally paid out or otherwise satisfied.

3.29 The certificate of satisfaction should be signed by the judgment creditor and attested. If the judgment creditor is a corporation it may affix its common seal or otherwise comply with section 127 of the Corporations Law. On receipt of a certificate of satisfaction of a process of execution, the Registrar of Deeds and Transfers should endorse on the certificate the date when the certificate was received and register the certificate under the *Registration of Deeds Act* in the same way as a memorial and index it as though it were a memorial.³⁷ The registrar should keep the certificate for future reference the same way a memorial is kept.³⁸ We recommend there be provision for registration of a certificate of satisfaction of a process of execution in proposed amendments to the *Property Law Act 1969* (WA).

‘Court’ to mean any court, State or federal

3.30 Section 209 of the Victorian Act applies in respect of ‘any court’. We consider, for the purposes of the amendments proposed, ‘court’ should be defined as any court constituted under the law of Western Australia or any federal court constituted under the law of the Commonwealth of Australia.³⁹

‘Land’ to include any estate or interest in land

3.31 For the purposes of the amendments, the word ‘land’ should include any estate or interest in land, thereby making it unnecessary to refer to ‘chattel real’.

3.32 If our proposals are implemented, the legislation should expressly provide that the new provisions are subject to section 133 of the *Transfer of Land Act*, so it is clear the new provisions do not apply where the judgment debtor is the registered proprietor of land, a lease, a mortgage or charge under the *Transfer of Land Act*.

3.33 Exceptionally, land under the *Transfer of Land Act* in which the judgment debtor only has an equitable interest or his or her estate belongs to a category of unregistrable interests (if such interests are capable of existence) is not, apparently, within the ambit of section 133 of the *Transfer of Land Act*. In such cases, the new provisions would apply.⁴⁰

³⁷ We consider that the registration of the certificate as distinct from a memorial is justified as the process of execution would not be among the documents of title held by the judgment debtor. The registration of the process of execution would have been effected by the judgment creditor.

³⁸ A procedure with some similarities to that proposed is contained in ss 18-21 of the *Registration of Deeds Act 1935* (Tas) in respect of judgments. There is a cumbersome procedure for a certificate of satisfaction in relation to a judgment in ss 11 and 12 of the *Registration of Deeds Act 1856* (WA). It is one of the provisions we have recommended should be amended.

³⁹ We make a corresponding recommendation in relation to s 133 of the *Transfer of Land Act 1893* (WA): below para 4.42.

⁴⁰ See below paras 5.3–5.4.

Fines, Penalties and Infringement Notices Enforcement Act

3.34 The procedure for seizing old system land under a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act* has been discussed fully in paragraphs 2.44–2.45. Similar provisions in the *Fines, Penalties and Infringement Notices Enforcement Act* applying to land under the *Transfer of Land Act* would extend to equitable interests in land. The amendments we propose to the *Property Law Act 1969* (WA) should not affect the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act*.

Registration of judgment under the Registration of Deeds Act — Is it relevant to section 133 of the Transfer of Land Act?

3.35 At paragraph 2.42, the question arises whether failure to register a judgment in the Deeds Registry negates its binding effect, even though a copy of the writ of *fi fa* has been served on the Registrar of Titles under section 133 of the *Transfer of Land Act*.⁴¹ We propose that the *Registration of Deeds Act* be amended so that it no longer applies to judgments,⁴² and thus the question would no longer arise. It would be clear that such failure would not negate the binding effect of registration of the judgment.

⁴¹ As noted there, Sykes & Walker submit that the failure does not prevent the binding effect from vesting.

⁴² See above para 3.15.

CHAPTER 4

Extending the duration of writs and warrants of execution under the Transfer of Land Act

4.1 Our research into and examination of the submissions we received prior to preparing this paper have indicated that we need to consider the following issues in relation to section 133 of the *Transfer of Land Act*:

- Whether the four month duration of a writ of *fi fa* under section 133 of the *Transfer of Land Act* should be longer and, if so, what should the new period be.
- Whether the court out of which the writ of *fi fa* or warrant of execution issues should be given power to extend the initial statutory period.
- What the position should be where the sale under the writ of *fi fa* or warrant of execution takes place within the period but the transfer is lodged for registration at the Titles Office after the expiration of the period.
- Whether section 133 of the *Transfer of Land Act* should be extended to any further courts.
- Whether a mechanism should be established, by amending the *Transfer of Land Act*, to enable a judgment creditor or a transferee from the Sheriff or bailiff to question the validity of a prior caveat.
- Whether there should be provision for the removal of writs of *fi fa* and warrants of execution from the register where the statutory period has expired.

Time limitation under section 133

Land bound by writ or warrant for 4 months

4.2 The judgment debtor's land is only bound from the time of service of the copy of the writ of *fi fa* on the Registrar of Titles. The writ ceases to bind the land unless a transfer on a sale under the writ is lodged with the Registrar for registration within four months of the service of the copy writ.

4.3 A further copy of the writ of *fi fa* may be lodged with the Registrar of Titles. In *Registrar of Titles v Paterson*,¹ which concerned section 106 of the Victorian *Transfer of Lands Statute 1866* ('*Transfer of Lands Statute*'), the wording of which was similar to section 133 of the *Transfer of Land Act*, the Privy Council had to decide whether service of an alias writ of *fi fa* on the Registrar of Titles before the expiry of the initial statutory period (which was three months under the *Transfer of Lands Statute*) created a continuous period of priority.² During the initial period, the judgment debtor had lodged a transfer to a third party for registration. The Registrar held the transfer in abeyance until the three month period expired and then immediately registered it. Two months later a sheriff's transfer upon a sale under the writ of *fi fa* was lodged for registration but the Registrar refused to accept it. The Privy Council upheld the Registrar's decision. In its judgment, the Privy Council said:

The policy of the Legislature in framing this section was obviously to prevent titles from being affected by the operation beyond a limited time of unexecuted writs of execution as charges on the land; and to reconcile the rights of a judgment creditor with those of a purchaser for value, whether with or without notice. Both objects are effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby.³

The Privy Council held that although the word 'writ' included an alias writ, an alias writ could not be used after service of the copy of the original writ for the purpose of enlarging this limited time. It said that such an enlargement would be 'contrary to the plain policy of the Statute'.⁴

Service of further copy of writ does not create continuous period of priority

4.4 There is no reported decision of the Supreme Court of Western Australia on the question of whether the service of a fresh copy of the writ of *fi fa* creates a continuous period of priority and as far as we have been able to ascertain there is no unreported decision either. Section 133 of the *Transfer of Land Act* does not say that the time limit of four months can be enlarged. There is no apparent difference in the section of the *Transfer of Lands Statute* to distinguish the decision in *Registrar of Titles v Paterson* in a

¹ *Registrar of Titles v Paterson*(1876) 2 App Cas 110.

² 'Where a writ of execution has been issued and returned and the judgment or order is still unsatisfied, another of the same kind may be issued into the same county. This is called an alias writ': 14 *Halsbury's Laws of England* (1st ed, 1910) 25-26.

³ *Registrar of Titles v Paterson*, above n 1.

⁴ *Ibid.*

consideration of whether a continuous period of priority can be created under section 133 by the service of a further copy of the writ of *fi fa*. In *Registrar of Titles v Paterson* it was an alias writ, not a copy of the original writ, which was served on the Registrar of Titles before expiry of the initial statutory period. However, it has since been held in the Supreme Court of Victoria that a second copy of the original writ lodged before the expiration of the initial statutory period is not effective against an instrument lodged during the initial statutory period and before the lodgment of the second copy.⁵ If the matter did arise for decision in Western Australia it seems very likely that the Supreme Court would hold that a continuous period of priority cannot be created by the service of a further copy of the writ of *fi fa*.

4.5 If a transfer on a sale by the Sheriff under a writ of *fi fa* is not lodged for registration with the Registrar of Titles within four months of the date of service of the copy writ on the Registrar, then all that is removed is the special binding effect against third parties. The Registrar of Titles is now under the duty to register instruments in the order in which they are presented.⁶ Because of section 90 of the *Transfer of Land Act*, a further copy of the writ of *fi fa* must be served on the Registrar before the out of time Sheriff's transfer can be registered.⁷

Is four months long enough?

4.6 In considering whether the statutory period of four months in section 133 is long enough, it has to be remembered that steps in the execution process take up a significant part of the four months.

4.7 After the writ of *fi fa* is delivered to the Sheriff, he issues a copy to the judgment creditor to be served on the Registrar of Titles.⁸ The judgment creditor serves the copy on the Registrar of Titles and thereby activates the four-month binding period. The Sheriff will not know about this event until the judgment creditor delivers a certified copy of the certificate of title to him showing that the writ has been entered on the title. Only then can the Sheriff begin preparations for a sale of this interest in land. The Sheriff must obtain a reasonable price for what he sells.⁹ Broadly speaking, the Sheriff can only sell the judgment debtor's interest in the land.¹⁰

Sheriff's enquiries

4.8 Before any sale can take place the Sheriff has to carry out enquiries to ascertain the amount owing to encumbrance holders (and the daily rate of interest) as well as the amount outstanding for rates and taxes which are statutory charges on the land, so that he

⁵ *Hoy v AAA Homes Pty Ltd* [1985] VR 21.

⁶ Sykes & Walker 516; and see *Re Deane's Transfer* (1899) 9 QLJ 106; *In re Dallen* (1930) 32 WALR 122. Sykes and Walker point out that this may well result in the 'out of time' Sheriff's transfer being entitled to registration over an instrument later lodged even though such instrument originated in a prior transaction: *ibid*. However, they submit that this will not be so if the prior transaction took place before the registration of the writ, though such matter would have to be settled by the Court, not by the Registrar.

⁷ *Transfer of Land Act 1893* (WA) s 90 is set out in Appendix I to this report.

⁸ By practice this is a certified copy: Department of Land Administration *Land Titles Registration Practice* (4th ed, 1997) para 4.300.

⁹ That is 'reasonable having regard to what is offered, namely, a debtor's right title and interest, if any, and the circumstances of the sale': *Anderson v Liddell* (1968) 117 CLR 36, 45 (Barwick CJ).

¹⁰ Above paras 2.39-2.40.

can decide whether the judgment debtor has a saleable interest in the land. If the Sheriff proceeds to auction, he must decide whether the highest bid at the auction for the debtor's interest is one he will be entitled to accept. He also has to investigate any caveats lodged against the title. Under section 120(1a)(a) of the *Supreme Court Act*, the sale of the land must be by auction. At least seven days' notice of the auction, and the time when and the place where it is to be held must be published in a newspaper circulating in the neighbourhood where the land is situated. Order 82 rule 1(1) of the *Supreme Court Rules* elaborates on the Sheriff's duty to advertise and provides that, subject to the *Supreme Court Act*, where the Sheriff intends to put up for sale any property taken in execution:

[H]e 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.

4.9 Often the conditions of sale provide for the payment of a deposit on the fall of the hammer with the balance of the price to be paid to the Sheriff within a period of say 21 days. After the payment of the full purchase price, a transfer has to be signed and lodged for registration with the Registrar of Titles. The Sheriff has a common law duty to act reasonably with due regard to the interests of both sides. He can be liable in damages if he fails to exercise reasonable care.¹¹

Common delays in executing the writ of *fi fa*

4.10 Delays can arise in the execution of a writ of *fi fa* resulting in a sale not taking place within the statutory period, for example —

- (i) A third party makes a claim to the land which is not admitted by the judgment creditor and the Sheriff issues an interpleader summons and decides to await the decision of the Court before proceeding further.¹²
- (ii) A third party obtains an interim injunction restraining the Sheriff from selling the land.
- (iii) An encumbrance holder is a corporation and is a 'credit provider' under the *Privacy Act 1988* (Cth). Section 18N(1) of the *Privacy Act* prohibits the encumbrance holder disclosing the amount owing without the judgment debtor's consent. If consent is withheld, the execution process is delayed while an examination in aid of execution is held to ascertain the amount owing.

¹¹ *Owen v Daly* [1955] VLR 442, 446. Similar procedures operate in the case of sale of land by a local court bailiff under a warrant of execution: see Law Reform Commission of WA, *Enforcement of Judgment of Local Courts* (Project No 16 Part II, 1995) paras 7.23-7.76.

¹² This occurred in the matter which came before Justice Hale which led to him making a suggestion for reform: *Rathjeen v Service Contractors Pty Ltd*, (Unreported, Supreme Court of WA, Hale J, 22 November 1971, 2840/1971). In this matter, the judgment creditor had issued a writ of *fi fa* and on 13 August 1971 had caused a copy to be registered against the land under s 133 of the *Transfer of Land Act 1893* (WA). On 2 September 1971, a caveat was lodged on the basis of an unregistered transfer dated 28 June 1971. The Sheriff interpleaded but the parties appeared (before Hale J in Chambers). It was apparent that an issue would have to be tried between the judgment creditor and the claimant, that there would have to be some kind of pleadings and that oral evidence would be required. There was no hope of a decision within the five weeks remaining before the four month period expired on 13 December 1971. Meanwhile the Sheriff understandably was not taking any steps to sell the land.

- (iv) The judgment creditor asks the Sheriff to temporarily defer action under the writ of *fi fa* pending the outcome of negotiations between the judgment creditor and the judgment debtor.
- (v) An auction has been held by the Sheriff but the land is not sold and must be put up for sale by auction a second time.¹³

Statutory periods for writs binding the land in other jurisdictions

4.11 The comparable provisions in South Australia and the Northern Territory allow for a statutory period of six months from the date of service of the copy writ on the Registrar.¹⁴

4.12 In the other Australian states namely New South Wales, Victoria and Tasmania and in the Australian Capital Territory, the period is three months.¹⁵

4.13 In Queensland, the period had been three months until the enactment of the *Land Title Act 1994*.¹⁶ The period was enlarged from three to six months following a recommendation of the Queensland Law Reform Commission in its report *Consolidation of Real Property Acts*.¹⁷ In its report, the Queensland Commission said critics asserted that the three month period was too short.¹⁸

4.14 The Law Reform Commission of Victoria in its report *Mortgagee Sales and Judgment Debts*¹⁹ recommended that the period in Victoria should be increased from three to six months. The Commission said a three month period was unacceptably short and hampered efforts to ensure the land was sold at its market value.

Opinion on statutory period in Western Australia

4.15 In his preliminary comments to us, the Hon David K Malcolm AC, Chief Justice of Western Australia, said that there was a case for extending the period to six months. The former Sheriff of Western Australia, Mr Colin Macphail in his preliminary comments expressed the view that the section should be amended to provide for a six month period. The Deputy Commissioner of Titles, Mr John Gladstone, in his preliminary comments, indicated that a proposal for a six month period appeared to have merit. Mr Richard Foster, Executive Director, Court Services, Ministry of Justice, in a response to our Draft Report on writs and warrants of execution, pointed out that, without taking into account the delays referred to above and assuming constant action on behalf of all parties, four months is the minimum time to effect a transfer of land bound under section 133 of the *Transfer of Land Act*. Mr Foster was of the view that the time a warrant of execution is on the Register should be extended from four to six months. Ms Ilse Petersen, commenting on the Draft Report on behalf of the Western Australian Crown

¹³ With the written consent of the judgment creditor, the Sheriff may offer the land for sale by public auction on a second occasion where it has not sold at the first auction: *Rules of the Supreme Court 1971* O 82 r 3(3).

¹⁴ *Real Property Act 1886* (SA) s 110; *Real Property Act* (NT) s 110.

¹⁵ *Real Property Act 1900* (NSW) s 105A(6); *Transfer of Land Act 1958* (Vic) s 52(3); *Land Titles Act 1980* (Tas) s 61 (2); *Land Titles Act 1925* (ACT) s 170(6).

¹⁶ *Land Title Act 1994* (Qld) s 117.

¹⁷ Report No 40 (1991) 36.

¹⁸ Ibid 35.

¹⁹ Report No 8 (1987).

Solicitor's Office, expressed the view that the Draft Report did not sufficiently justify the extension of the period beyond six months. However she noted that additional costs to the judgment creditor in applying for extensions may strengthen the argument for an eight-month period.

4.16 We agree with the existing legislative policy that titles to land should not be affected by the operation beyond a limited time of unexecuted writs of *fi fa*. However, the existing statutory period of four months is too short taking into account the time the Sheriff requires to carry out all the steps in the process of execution and the potential for delay not the fault of the judgment creditor. Furthermore, although later in this paper we propose that the court out of which the writ of *fi fa* issues should have power to extend the statutory period,²⁰ an application to the court for an extension would normally involve significant costs and inconvenience. A longer initial period should mean that the number of times an application for an extension will be made should be fewer than if the initial period was four months. For these reasons, having regard to the comments referred to above, we consider that, on balance, the statutory period should be increased from four months to eight months.²¹

Extending the initial statutory period

4.17 In paragraph 4.10 above we noted some of the instances causing delay in the execution process leaving the Sheriff or bailiff unable to sell land and lodge the transfer for registration within the four month period as required by section 133 of the *Transfer of Land Act*. Often the protection afforded to the judgment creditor against dealings by the judgment debtor during the four month period can be lost for reasons not due to any default on the judgment creditor's part. In these circumstances, should the court out of which the writ of *fi fa* or warrant of execution issued be given power to extend the initial statutory period?

Court's power to extend the period during which the writ binds the land — how other jurisdictions operate

4.18 Legislation comparable to section 133 of the *Transfer of Land Act* in South Australia, the Northern Territory and Queensland empowers the court to extend the period during which the writ of *fi fa* binds the land. In South Australia and the Northern Territory the writ ceases to bind the land unless a transfer on a sale under the

²⁰ See below para 4.23.

²¹ The longer period of eight months might sometimes give the judgment debtor a better chance of selling the land himself. The fact that the writ of *fi fa* is registered at the Titles Office does not prevent the judgment debtor selling the land. However, section 133 of the *Transfer of Land Act 1893* (WA) gives paramountcy to a sale by the Sheriff and the registering of the Sheriff's transfer. The judgment debtor can sell the land on a free of encumbrance basis whereas the Sheriff can only sell the judgment debtor's interest. The former is generally more attractive to purchasers. The judgment debtor, of course, would need to reach agreement with the judgment creditor for the withdrawal of the writ from the title in exchange for an agreed part of the proceeds of sale before the transfer to the purchaser from the debtor could be registered.

Other disadvantages of a sale of land by the Sheriff under a writ of *fi fa* include the following: it is a forced sale by a person other than the owner and that without the consent of the judgment debtor, the Sheriff 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 sheriff is unable to guarantee possession to the purchaser. Also if after the sale it becomes necessary to apply for an order for possession, it is the purchaser's task to seek the order.

The Law Reform Commission of Victoria recommended that the Sheriff should be able to sell the property itself, instead of only the debtor's interest in it. Registered mortgages and charges and unregistered mortgages and interests which were protected by a caveat should be discharged out of the proceeds of sale. Then interests in the land which were created before the entry of the warrant of execution on the title and which were known to the Sheriff before registration of the transfer should be paid and after them the judgment creditor's claim should be paid: see Law Reform Commission of Victoria, above n 19, paras 30-32.

writ is presented for registration within six months from the day on which the copy of the writ was served on the Registrar of Titles 'or within such extended time as the Court shall order'.²² In Queensland, a writ of execution binds the land if it is executed and put in force within —

- (i) six months of its lodgment at the Titles Office; or
- (ii) the extended time allowed by the court, where the writ of execution is filed, and notified to the Registrar of Titles.²³

In South Australia applications for extension to be supported by affidavit

4.19 The Master of the Supreme Court of South Australia informed us that applications for extension of the six month period are dealt with in chambers on summons under the general provisions of South Australia's *Supreme Court Rules*. The summons, which may be *ex parte*, is supported by affidavit explaining the delay and the relevant matters. The Master said that so far as he was aware, the provision had presented no difficulty although the question of possible third party interests was always carefully considered. Under the South Australian provision, the registration of the writ on the relevant title operates as a caveat for six months from the date of lodgment. The Registrar General in South Australia told us that to maintain the effect of the writ as a caveat any extension granted by the court must be registered. He said that the operation of the South Australian provision had caused no administrative difficulties. He was not aware of any concerns about the procedure within the conveyancing profession.

In Queensland applications for extensions at Court's discretion

4.20 Before preparing its report, *Consolidation of Real Property Acts*, the Queensland Law Reform Commission issued a working paper²⁴ in which it proposed that, in exercising power to extend time, the Court should consider:

- (i) whether good reason has been shown by the judgment creditor as to why the writ was not executed within the period of six months;
- (ii) whether the judgment debtor or any other person will suffer prejudice if an order is made extending the time; and
- (iii) such other matters as to the Court may seem meet.

In its final report,²⁵ however, the Commission did not recommend that the legislation should list particular matters the Court should consider when deciding whether to exercise its power to grant an extension and this is also the approach taken in the *Land Title Act*.

²² *Real Property Act 1886 (SA)* s 110. In this context, 'Court' in s 110 of the *Real Property Act 1886 (SA)* appears to mean the Supreme Court, the Court of Insolvency or other Court of competent jurisdiction out of which the writ or warrant of execution issued: ss 105 and 110. 'Court' in s 110 of the *Real Property Act (NT)* appears to mean a court out of which the warrant of execution issued: ss 105 and 110.

²³ *Land Title Act 1994 (Qld)* s 117. The Act does not define 'court'. The Act defines 'writ of execution' as meaning 'a writ of execution after judgment in any court': s 4.

²⁴ Working Paper on a Bill to amend the *Real Property Acts* with respect to those provisions relating to writs of execution, bills of encumbrance and bills of mortgage, and caveats: see Queensland Law Reform Commission, (Working Paper No 25, 1991).

²⁵ See Queensland Law Reform Commission, above n 17.

4.21 The Chief Justice of Western Australia, in his preliminary comments to us said that he would have to be persuaded of the need for a general power to extend time. He said the difficulty with such a general power would be that in order to exercise it a court would need to be satisfied that an extension would not prejudice any other person's rights acquired in the meantime. The Sheriff of Western Australia expressed the view that it would be an advantage if the original period were to be extended because this would have the effect of not disturbing the Sheriff's seizure of the land and preventing the registration of any other interest. The Western Australian Deputy Commissioner of Titles said that a proposal to extend the period to six months and to give power to the court to grant an extension on application would have merit. This process, he said, would place an onus on a creditor seeking an extension to justify the extension. The suggestion of Justice Hale was that 'possibly the simplest remedy would be to give to the court out of which the *fi fa* issued power to extend the four month period, and perhaps to require the registration of such an order prior to the expiration of the initial four months'.²⁶

4.22 In 1972, Mr J E Shillington, the (then) Commissioner of Titles and Mr GT Staples, the (then) Sheriff of Western Australia, submitted a proposal to the Law Reform Committee for dealing with problems which we address in this project. In the context of the statutory period and the extension of it, they proposed that —

- (i) the statutory period should be extended from four to six months;
- (ii) the court out of which the execution issued should be able, on the application of the judgment creditor, to extend the statutory period for such further period as it thought fit but that the order should be ineffective unless a copy of it was lodged with the Registrar of Titles before the expiration of the statutory period, or the extended period if a previous extension had been granted;
- (iii) notwithstanding (i) and (ii), a writ lodged with the Registrar of Titles should be incapable of binding the land after 12 months from the date of issue or last renewal in the court from which it issued unless notice of its renewal is lodged with the Registrar of Titles before the expiration of the relevant 12 month period;
- (iv) transfers presented pursuant to a writ were not to be deemed to be produced for registration unless —
 - (a) presented within the statutory period or extended period, or

²⁶

Rathjeen v Service Contractors, above n 12. In comments in his memorandum leading up to this suggestion, Hale J said: 'I was told by counsel that it is the practice of the Land Titles Office to accept fresh notices under the original *fi fa* and to treat them as continuing the efficacy of the original registration for further periods. In many cases, e.g. if the parties are negotiating a settlement, this seems an eminently desirable practice, but it might well fall down if challenged, and in general if a judgment creditor desires to execute against land it is probably well that he should have to proceed with some expedition. But in the present type of case it is I think desirable that the court dealing with the interpleader should have clear authority to freeze the position until the trial of an issue can be had'. A continuous period of priority it appears is not created by serving a further copy of the writ of *fi fa* on the Registrar of Titles, although the Registrar of Titles will not register any dealing purporting to be from the registered proprietor during the period for which the binding effect of the further copy of the writ of *fi fa* is operative.

- (b) accompanied by a copy of the writ together with the certificate of the Sheriff, District Court bailiff or magistrate as the case may be that the sale took place within the period or extended period;
- (v) except for the purpose of (iv)(b), lodging a further copy of the writ should be prevented;
- (vi) the judgment creditor's application for an extension should be served on the judgment debtor and on any other person directed by the court;
- (vii) an order should not be made unless special circumstances were shown.²⁷

4.23 In our view, there should be a provision giving the court power on the application of the judgment creditor to extend the period, because the delay may have been due to reasons not the fault of the judgment creditor. The application should be served on the judgment debtor to give him the opportunity to explain how he will be prejudiced by an extension, if that is the case, or to oppose the application for some other reason.

4.24 There should also be a requirement that the summons be served on any person, apart from the judgment debtor, directed by the Court. The interest of third parties, whether arising before or after the original registration of the writ of *fi fa* or warrant of execution, should be considered by the court. In our view, an express requirement that the court consider the question of third party interests before making an order is not needed²⁸ because this is something which the court should consider in exercising its discretion as to whether to make an order.

4.25 The position is similar in the case of an application for the renewal of a writ of execution, before the expiration of the year for which it remains in force, under Order 47 rule 10(1) of the *Supreme Court Rules*.²⁹

Order for extension only if special circumstances are shown

4.26 Issues concerning the rights of a third party being prejudiced by an extension arises on such applications. However, we consider section 133 of the *Transfer of Land Act* should provide that, without in any other way affecting the discretion of the court, an order for extension under that section should not be made unless special circumstances are shown. It should be possible to make an order for extension more than once because it could, for example, take longer for the court to give a decision on an interpleader summons than originally anticipated.

²⁷ The full proposal of Mr Shillington and Mr Staples is set out in Appendix VII to this paper.

²⁸ The Queensland Law Reform Commission's working paper proposed such a requirement for Queensland but it was not adopted in the Queensland Commission's report: above n 17. See also above para 4.20.

²⁹ See above para 1.24.

4.27 The extension order should only be effective to extend the period during which the land is bound if a certified copy of the order or such other evidence of the making of the order as might be prescribed by regulation is lodged with the Registrar of Titles before the expiration of the statutory period, or the extended period if a previous extension has been granted. Such a lodgment would be consistent with the existing provision in section 133 of the *Transfer of Land Act* that the writ binds the land from the time of service of a copy of it on the Registrar of Titles and it would also give notice of the extension.

**Keeping land bound
offends policy underlying
section 133 of the Transfer
of Land Act**

4.28 As stated earlier, it is possible for further copies of the writ of *fi fa* or warrant of execution to be lodged with the Registrar of Titles, although apparently this does not create a continuous period of priority.³⁰ Often judgment creditors are under the impression that lodging a further copy before the expiration of the statutory period creates a continuous period of priority when this is not the case. The practice enables creditors to use section 133 as if it had a similar effect to a caveat. The writ or warrant continues to bind the land for an indefinite time as long as it is renewed by the court and certified copies are lodged with the Registrar before the expiration of the previous four month period. The judgment creditor may not intend to have the land sold by the Sheriff or bailiff but he or she gets a degree of protection because if the judgment debtor sells, the judgment creditor has to be paid out before the writ or warrant is removed. The practice of keeping the land bound is not in accordance with the policy underlying the section.³¹ Moreover, if our proposal is implemented for extending the period for writs binding the land, it would be confusing for the practice to remain.³² We consider it should not be possible to lodge a further copy of the writ of *fi fa* against the land.

4.29 Sometimes the sale of land under a writ of *fi fa* or warrant of execution takes place within the statutory period under the *Transfer of Land Act* (at present four months) but the transfer to the purchaser is not registered within that period.³³ At present the transfer can be registered after the expiration of the statutory period but a further copy of the writ of *fi fa* or warrant of execution must first be served on the Registrar of Titles.³⁴ The delay could cause prejudice to the purchaser from the Sheriff or bailiff. For example, if a transfer by the judgment debtor to a third party who took in the absence of fraud was registered between the expiry of the statutory period and the time of the serving of a further copy of the writ of *fi fa* or warrant of execution, the title of the purchaser from the Sheriff or

³⁰ Above para 4.4.

³¹ Above para 4.3.

³² The Deputy Commissioner of Titles in his preliminary comments to us raised the possibility of enacting a provision which would formally recognise the practice of using successive copies of a writ of *fi fa* to have a similar effect as a caveat by authorising lodgment of a caveat either without creating an interest in land or by deeming the first registration of the writ under s 133 of the *Transfer of Land Act 1893* (WA) as creating an interest in land that also enables the lodgment of a caveat.

³³ An example occurred in *In re Dallen*, above n 6. Under clause 7 of the prescribed form of particulars and conditions of sale of land under a warrant of execution in the *Local Court Rules 1961*(WA) (form 108), the transfer to the purchaser is to be prepared at the expense of the purchaser and registration of the transfer is to be effected by the purchaser. The responsibility of preparing and registering the transfer is on the purchaser and he may fail to do this within the four months.

³⁴ *Transfer of Land Act 1893* (WA) s 90.

bailiff would be defeated and the transfer could not be registered.

4.30 Mr Shillington and Mr Staples, in their proposal, submitted that the issue of prejudice to the purchaser from the Sheriff be dealt with by providing that transfers presented pursuant to a writ of *fi fa* or warrant of execution should not be deemed to be produced for registration unless —

- (i) presented within the statutory period or extended period; or
- (ii) accompanied by a copy of the writ together with a certificate of the Sheriff, District Court bailiff, or magistrate as the case might be that the sale took place within the period or extended period.

4.31 Mr Shillington and Mr Staples also submitted that transfers produced for registration after the expiry of the period or extended period should be subject to all interests notified on the register at the time of the presentation of the transfer.³⁵ We agree in principle with their approach. However we propose to adapt it taking into account of the fact that: (i) we consider it should not be possible in any circumstances to serve a further copy of the writ of *fi fa* or warrant of execution; and (ii) we do not recommend the application of section 133 of the *Transfer of Land Act* be confined to writs of *fi fa* and warrants of execution issued out of the Supreme, District and Local Courts.³⁶ Furthermore, in the case of Local Courts, we consider it to be more convenient for the certificate referred to in paragraph 4.27 above to be signed by the same class of persons that would sign such a certificate issued out of the District or Supreme Courts, namely, the Sheriff, bailiff or other officer to whom the writ of *fi fa* or warrant of execution was directed, rather than a magistrate.

4.32 We agree with the proposal of Mr Shillington and Mr Staples that transfers produced for registration after the expiration of the statutory period or extended period should be subject to all interests notified on the register at the time of the presentation of the transfer. Interests notified on the register include not only registered interests but also equitable interests which have been protected by a caveat.³⁷

4.33 As mentioned earlier, a writ of execution issued out of the Supreme Court remains in force for one year only from its date of issue. The writ may, however, at any time before its expiry be renewed, by leave of the Court, by the party who issued it, for one year from the date of renewal and so on from time to time during the continuance of the renewed writ.³⁸ The same principle applies:

- (i) in the case of writs of *fi fa* or warrants of execution issued out of the District Court and a Warden's Court which, with writs of *fi fa* issued out of the Supreme Court, are expressly referred to

³⁵ Their proposal is set out in full in Appendix VII.

³⁶ We recommend that the section apply to a wider range of courts: below para 4.42.

³⁷ It would not, of course, alter the position where there has been fraud.

³⁸ *Rules of the Supreme Court* O 47 r10; above, para 2.17.

- in section 133 of the *Transfer of Land Act*,³⁹
- (ii) to warrants of execution issued under the *Local Courts Act*⁴⁰ (by virtue of section 125, section 133 of the *Transfer of Land Act* applies to these warrants⁴¹); and
 - (iii) (in our opinion), to writs of *fi fa* or warrants of execution issued out of the Western Australian Industrial Appeal Court or an Industrial Magistrate's Court⁴² which are the only other writs of *fi fa* or warrants of execution to which, according to our research, section 133 of the *Transfer of Land Act* has been expressly applied.⁴³

4.34 Mr Shillington and Mr Staples also submitted that a writ of *fi fa* or warrant of execution, a copy of which has been served on the Registrar of Titles, should be incapable of binding the land after one year from the date of issue or last renewal in the court from which it issued unless notice of its renewal in that court is lodged with the Registrar of Titles before the expiration of the relevant annual period.⁴⁴ Their proposal was in respect of writs of *fi fa* and warrants of execution issued out of the Supreme Court, the District Court and Local Courts.⁴⁵ Later in this paper we propose that section 133 of the *Transfer of Land Act* should apply in respect of writs of *fi fa* and warrants of execution issued out of any court constituted under the law of Western Australia or any federal court constituted under the law of the Commonwealth of Australia.⁴⁶ We agree in principle with the proposal by Mr Shillington and Mr Staples even in respect of the extended range of writs of *fi fa* and warrants of execution we propose.⁴⁷

³⁹ *District Court Act 1969* (WA) ss 56 and 87; *Mining Act 1978* (WA) s 140; *Mining Regulations 1981* (WA) reg 130.

⁴⁰ *Local Court Rules 1961* (WA) Order 25 (Div 1) r 5.

⁴¹ See above, para 2.37.

⁴² The issue of the application of the principles is not expressly dealt with in legislation in the case of a writ or warrant of execution issued out of either of these courts. However, a writ or warrant of execution issued out of the Industrial Appeal Court has effect against any property (including land under the *Transfer of Land Act 1893* (WA)) as a writ of *fi fa*; *Industrial Relations Act 1979* (WA) s 89(3); *Industrial Relations (Western Australian Industrial Appeal Court) Regulations 1980* (WA) reg 18(8)(a). A writ or warrant of execution issued out of an Industrial Magistrate's Court has the same effect against any property (including land under the *Transfer of Land Act 1893*) as a writ of *fi fa* issued out of the Supreme Court: *Industrial Relations Act 1979* (WA) s 81CA; *Industrial Relations (Industrial Magistrates Courts) Regulations 1980* (WA) reg 10(10). Although it is not clear, in our opinion by virtue of these provisions the writ or warrant of execution would only remain in force for one year but could be renewed by leave of the court for one year from the date of renewal. No procedure relating to renewal is set out in the regulations. However, if this is a difficulty, the *Industrial Relations (Western Australian Industrial Appeal Court) Regulations 1980* provide that where no procedure has been prescribed by the Act or under the regulations, a person concerned may make application *ex parte* to any judge of the Court for directions. In an Industrial Magistrate's Court, the practice and procedure operating in Local Courts would be observed: *Industrial Relations Act 1979* (WA) s 81CA(2).

⁴³ *Industrial Relations (Western Australian Industrial Appeal Court) Regulations 1980* (WA) reg 18(8)(b); *Industrial Relations (Industrial Magistrates Courts) Regulations 1980* (WA) reg 10(11). Section 133 of the *Transfer of Land Act 1893* (WA) has not been expressly applied to warrants of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) or under the *Metropolitan Water Supply, Sewerage, and Drainage Act 1909* (WA).

⁴⁴ See Appendix VII to this report.

⁴⁵ At the time they made their proposal, these were the only writs of *fi fa* and warrants of execution to which s 133 of the *Transfer of Land Act 1893* (WA) applied.

⁴⁶ Below para 4.42.

⁴⁷ A writ of *fi fa* issued out of the Supreme Court, for example, against goods would be incapable of binding them after one year, unless renewed. This may also be the case for land, even though the four months under s 133 of the *Transfer of Land Act 1893* (WA) has not expired.

⁴⁸ It is not clear whether at present a warrant of execution under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) can be entered in the register under s 133 of the *Transfer of Land Act 1893* (WA). In para 4.37 below we

4.35 An exception should be made of a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act*.⁴⁸ The exception would be consistent with the fact that a warrant of execution under the *Fines, Penalties and Infringement Notices Enforcement Act* has an indefinite life.⁴⁹

4.36 Apart from that exception, we consider that a writ of *fi fa* or warrant of execution, a copy of which has been served on the Registrar of Titles, should be incapable of binding the land after one year from the date of issue or last renewal in the court from which it issued, unless notice of its renewal in that court is lodged with the Registrar of Titles before the expiration of one year from the date of issue or from the last renewal, as the case may be.⁵⁰

4.37 Under the *Fines, Penalties and Infringement Notices Enforcement Act* the Sheriff can seize the land and the Registrar of Titles is prohibited from accepting for registration any instrument affecting any estate or interest in the land without the consent of the Sheriff once a memorial is registered.⁵¹ Probably, if he wished, the Sheriff could have the warrant entered in the register under section 133 of the *Transfer of Land Act*.⁵² However, section 133 and the amendments which we propose should not affect the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act*. Thus the Sheriff would have protection against dealings with the land by the offender provided by the *Fines, Penalties and Infringement Notices Enforcement Act* without being obliged to have the warrant registered under section 133 of the *Transfer of Land Act* — a position consistent with the policy underlying the relevant provisions in the *Fines, Penalties and Infringement Notices Enforcement Act*. We therefore consider that section 133 of the

express the view that probably, if he wished, the Sheriff could have the warrant entered in the register. However, under our proposals the warrant of execution under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) entered in the register would cease to bind the land by virtue of s 133 *Transfer of Land Act 1893* (WA) (but without affecting s 89 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) after eight months unless the time was extended: above para 4.23 and below para 4.67).

49 Section 65.

50 This proposal would apply to writs of *fi fa* and warrants of execution issued out of the Supreme Court, the District Court, a Warden's Court, a Local Court (including a warrant of execution issued under the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA)), the Western Australian Industrial Appeal Court, an Industrial Magistrate's Court, the High Court of Australia (above para 1.41) and the Federal Court of Australia (above para 1.42). According to our research these are the only writs of *fi fa* or warrants of execution, apart from a warrant of execution under the *Fines, Penalties and Infringement Notices Act 1994* (WA), which can be issued against land in Western Australia. The list, of course, would extend if more courts were given power to issue writs of *fi fa* or warrants of execution against land.

The Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA) does not set out the period for which a warrant of execution issued under that Act remains in force. The Act, however, states that the bailiff is to execute the warrant 'in the same manner as warrants of execution against land are executed under the laws in force for the time being relating to local courts': s 119(2). Although this might possibly mean that the warrant is not of indefinite duration but remains in force for a year, as in the case of a warrant of execution issued under the *Local Courts Act 1904* (WA), probably the warrant is not renewable. The Water Corporation would presumably only have a warrant of execution issued if it intended to have the land sold within two or three months, as normally it would have lodged a memorial to prevent registrations on the title a considerable time before. We consider that a Water Corporation warrant of execution is justified.

51 Above para 2.46.

52 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 92(1) provides that subject to Division 4 of Part 7 of the Act (Division 4 is headed 'Seizure and Sale of Land'), a warrant has effect in respect of land of the offender as if the warrant were a writ of *fi fa* and the offender were a judgment debtor. As a writ of *fi fa* issued out of the Supreme Court can be entered on the register under s 133 of the *Transfer of Land Act 1893* (WA), probably a warrant of execution under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) could be entered. It is of interest that it is stated in Department of Land Administration above n 8, para 11.185 that a warrant issued under the *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA) has effect in respect of land of the offender as if the warrant were a writ of *fi fa* and the offender was a judgment debtor as provided for under s 133 of the *Transfer of Land Act 1893* (WA).

Transfer of Land Act (including the amendments we propose) should not affect the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act*.

4.38 We have already noted provisions in the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* requiring the clerk of the Local Court to issue a warrant of execution in the form prescribed in the Act where money due for water charges is unpaid for five years.⁵³ It is not clear that these warrants are registrable under section 133 of the *Transfer of Land Act*.⁵⁴ However, sections 121 and 123 of the *Metropolitan Water Supply, Sewerage and Drainage Act* appear to indicate that a purchaser from the bailiff under the Water Corporation's warrant gets a title free of encumbrances with the mortgagee being paid out of the proceeds of sale.⁵⁵ In the case of a warrant of execution issued in an action under the *Local Courts Act*, the transfer from the bailiff is subject to any mortgage over the land and section 133 of the *Transfer of Land Act* allows for this. Under the proposals made below, section 133 would clearly extend to a Water Corporation's warrant because it is issued out of a Local Court. However, because it may be that the purchaser from the bailiff under the Water Corporation's warrant gets a title free of encumbrances, we consider it should be provided that section 133 of the *Transfer of Land Act* is subject to the provisions of the *Metropolitan Water Supply, Sewerage and Drainage Act*.

4.39 Section 90 of the *Transfer of Land Act* provides that on a transfer from a Sheriff or magistrate of a Local Court being presented for registration, the transfer may not be registered unless previously and within four months preceding its presentation, a copy of the writ of *fi fa* or warrant of execution in pursuance of which the transfer purports to have been made has been served on the Registrar of Titles for entry in the register in accordance with section 133 of the *Transfer of Land Act*. If section 133 is amended to provide for one lodgment only of a copy of the writ of *fi fa* or warrant of execution, section 90 of the *Transfer of Land Act* should be repealed. It would be unnecessary and confusing for section 90 to refer to the service of a copy on the Registrar of Titles in terms suggesting that service of a further copy is permissible.

Extending the application of section 133 to other courts

⁵³ See above para 1.37.

⁵⁴ By s 125 of the *Local Courts Act 1904* (WA), s 133 of the *Transfer of Land Act 1893* (WA) applies to 'a sale under a warrant of execution issued under this Act'. Probably the Water Corporation warrant is issued under the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA), and not under the *Local Courts Act 1904* (WA). However, under s 119(2) of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA), the bailiff is to execute the warrant 'in the same manner as warrants of execution against land are executed under the laws in force for the time being relating to local courts'. A bailiff cannot take any land under a warrant of execution issued under the *Local Courts Act 1904* (WA) until he has received a certified copy of the certificate of title showing the date of service of the warrant of execution on the Registrar of Titles under section 133 of the *Transfer of Land Act 1893* (WA): *Local Court Rules 1961* (WA) O 25 (Div 1) r18(1). Therefore it may be that s 119(2) of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA) just referred to authorises the registration of the warrant of execution under s 133 of the *Transfer of Land Act 1893* (WA).

⁵⁵ See s 123 of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA).

4.40 As already mentioned, section 133 of the *Transfer of Land Act* applies to —

- (a) writs of *fi fa* issued out of the Supreme Court and District Court;
- (b) warrants of execution issued out of a Warden's Court under the *Mining Act 1978*; and
- (c) warrants of execution issued under the *Local Courts Act*.⁵⁶

4.41 The registration provisions in section 133 of the *Transfer of Land Act* also extend to decrees or orders of the Supreme Court or the District Court under which a sale may be effected.⁵⁷ Although the decree or order can be entered in the register, the effect of doing so is not specified in the Act. In our opinion a registered decree or order would constitute an encumbrance on the certificate of title.⁵⁸

4.42 The High Court of Australia and the Federal Court of Australia both have the power to issue writs of *fi fa*.⁵⁹ However, section 133 of the *Transfer of Land Act* has not been applied to those writs. Provisions comparable to section 133 in other Australian states enable the registration of writs and warrants of execution issued out of a wider range of courts than in Western Australia.⁶⁰

4.43 Our proposal would not include writs of *fi fa* and warrants of execution issued out of the courts of other states. There is provision in the Commonwealth's *Service and Execution of Process Act 1992* for judgments of courts in other states to be registered in an appropriate court in Western Australia and for a writ of *fi fa* or warrant of execution to be issued out of that Western Australian court.⁶¹ A similar system operates in relation to judgments of foreign countries to which the Commonwealth's *Foreign Judgments Act 1991* has been extended.⁶²

4.44 We noted that the registration provisions in section 133 of the *Transfer of Land Act* extend to decrees or orders of the Supreme Court or the District Court under which a sale may be effected.⁶³ Most Australian jurisdictions have comparable provisions except that their provisions apply in a wider range of courts than in Western Australia.⁶⁴ There is no reason why Western Australia's registration provisions

⁵⁶ Above para 2.37.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ By s 77M of the *Judiciary Act 1903* (Cth), a person in whose favour a judgment of the High Court of Australia is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory as are allowed in like cases by the laws of that State or Territory to those in whose favour a judgment of the Supreme Court of that State or Territory is given. See also above para 1.42. A provision in the same terms as s 77M of the *Judiciary Act 1903* (Cth) but applying in respect of judgments of the Federal Court of Australia is contained in s 53 of the *Federal Court of Australia Act 1976* (Cth). See also above para 1.43.

⁶⁰ For example, in Queensland, the writ of execution may be issued 'in any court' (*Land Title Act 1994* (Qld) ss 4 and 116); in New South Wales, the writ may be issued 'out of a court of competent jurisdiction' (*Real Property Act 1900* (NSW) ss 3(1)(a) and 105) and in South Australia, the courts concerned are stated to include the Supreme Court and any other court or tribunal constituted under the law of the State or the Commonwealth (*Real Property Act 1886* (SA) ss 3 and 105, 108 and 110).

⁶¹ *Service and Execution of Process Act 1992* (Cth) ss 104-109.

⁶² See also *Foreign Judgments Act 1963* (WA).

⁶³ See above para 2.37.

⁶⁴ For example, in South Australia, it is the Supreme Court, any Court of Insolvency or other Court of competent jurisdiction: *Real Property Act 1886* (SA) s 105; in Tasmania, it is the High Court of Australia, the Supreme Court, the Family Court of Australia, or any court of competent jurisdiction: *Land Titles Act 1980* (Tas) s 61(1)(c) and in the Northern Territory the extension applies to a decree or order issued out of or made by 'a court'.

regarding decrees and orders should be restricted to those issuing out of the Supreme and District Courts.

Challenging the validity of a prior caveat

4.45 In his preliminary comments to us, the Deputy Commissioner of Titles raised concern that there was no appropriate mechanism by which a judgment creditor could question the validity of a prior caveat. The point had come to his attention when a judgment creditor who had had a writ of *fi fa* registered against the debtor's interest in land requested that a prior caveat lodged against the land be removed by the Commissioner of Titles or alternatively that he serve notice on the caveators pursuant to section 141A of the *Transfer of Land Act*.

4.46 Under section 141A where it appears to the Commissioner that the estate or interest claimed by the caveator has ceased to exist, he may, either of his own motion or on the application of any person claiming any interest in the land, send notice to the caveator requiring him or her within 14 days, to withdraw the caveat or within that time commence proceedings in the Supreme Court to substantiate his or her claim. If the caveator fails to comply with the notice, the Commissioner can direct the Registrar of Titles to remove the caveat. The caveators in this instance had lodged a caveat on the basis that they were equitable mortgagees of the land under an oral agreement between the judgment debtor and his or her co-owner on the one hand and the caveators on the other hand. The judgment creditor argued that the interest of the caveators was unenforceable by reason of section 34 of the *Property Law Act* and that the caveators had no caveatable interest. The Commissioner of Titles was unable to act on the judgment creditor's request because section 141A only related to caveats in respect of which an estate or interest had ceased to exist, not where an interest had never existed. The Registrar of Titles had no power to remove the caveat on the basis that it should not have been lodged.

4.47 Since the Deputy Commissioner made these preliminary comments, the *Transfer of Land Act* has been amended so that, except for certain caveats specified in the amendment, the proprietor of land over which a caveat has been lodged can apply for the Registrar of Titles to serve the caveator with a notice to the effect that unless within 21 days the caveator obtains an order from the Supreme Court extending the operation of the caveat and lodges a copy of the order with the Registrar, the caveat will lapse. If the order is not obtained and a copy lodged within the 21 days, the caveat lapses.⁶⁵

Judgment creditor powerless to apply for removal of caveat

4.48 However, the amendment is still of no assistance to a judgment creditor because the application can only be made by the proprietor of the land. A judgment creditor who has had a writ of *fi fa* registered

⁶⁵ Sections 138A-138D, inserted into the *Transfer of Land Act 1893 (WA)* by s 84 of the *Transfer of Land Amendment Act 1979 (WA)*. Under similar provisions in Victoria the applicant need only have an interest in the land: *Transfer of Land Act 1958 (Vic)* s 89A.

against land is not the proprietor of the land nor does he or she have any interest in the land.⁶⁶

4.49 The question of removing a caveat where the interest claimed has ceased to exist or has never existed can, of course, confront a judgment creditor in other situations apart from the example referred to above. It may be that the Supreme Court can order the caveator to withdraw a caveat if the Court makes a declaration that the estate or interest claimed in the caveat has ceased to exist or never existed and later enforce that order. A more satisfactory practice, however, particularly considering the time constraint in section 133 of the *Transfer of Land Act*, would be for the Registrar of Titles to be required to remove the caveat on receipt of a copy of the Court's order.

***Tasmanian model:
any person claiming an
estate or interest in land
can summon caveator to
show cause***

4.50 Under section 135 of *Land Titles Act 1980* (Tas) any person who claims an estate or interest in land affected by a caveat can summon the caveator before the Supreme Court to show cause why the caveat should not be removed. On proof that the caveator has been summoned, the Court can make such order, either *ex parte* or otherwise, as it considers necessary and can determine who is to bear the costs of, and incidental to, the summons and the proceedings on the summons, and the entering and removal of the caveat.⁶⁷ The provision would apply whether the estate or interest claimed by the caveator has ceased to exist or never existed.

4.51 We consider that there should be an express provision in the *Transfer of Land Act* allowing the judgment creditor to apply to have a caveat, lodged prior to the writ of *fi fa* or warrant of execution, removed. An example of a situation where such a provision would be effective is where the caveat was lodged on the strength of an agreement by the judgment debtor to dispose of the land to a third party which is void as a transaction to defraud creditors.

4.52 In our opinion a provision, under which the Registrar of Titles either may or must remove the caveat if the judgment creditor does not commence proceedings within a specified time to substantiate his or her claim, is not justified where the applicant is the judgment creditor. The onus should not be placed on the caveator to commence proceedings in the Supreme Court where the applicant is a judgment creditor. It is a different case where the applicant is the registered proprietor: the caveator would usually still have remedies against the registered proprietor — arising, for example, under the contract between them. No privity of contract exists, however, between the judgment creditor and the caveator. The onus of commencing proceedings should be on the judgment creditor.

4.53 One situation where the Registrar of Titles could be required to remove a caveat is where a third party has made a claim to the ownership of the land, lease, mortgage or charge and lodged a caveat

⁶⁶ See above para 2.38.

⁶⁷ A similar provision to s 135 applies in South Australia: *Real Property Act 1886* (SA) s 191(IV) and *Real Property Act* (NT) s 191 IV. Section 135 of the *Land Titles Act 1980* (Tas) was followed in the Land Titles Bill introduced into Western Australia's Parliament in 1985. The Bill was given a first reading but to date has not proceeded further.

against the land, and the court has subsequently rejected the claim in interpleader proceedings.

4.54 In Queensland, where a caveat has been removed under an order of the Supreme Court, the caveator is prohibited from lodging another caveat against the land on the same or substantially the same grounds except with the leave of the Supreme Court.⁶⁸ Without such a prohibition the object of the Court's order could be frustrated.

Removing writs and warrants from the register where the statutory period has expired

4.55 When a copy of a writ of *fi fa* or warrant of execution is registered at the Titles Office, the memorandum endorsed on the original certificate of title does not indicate that the writ will bind the land for only four months.

4.56 The *Transfer of Land Act* contains two provisions dealing with the removal of a writ of *fi fa* or warrant of execution from the register. One of these, section 133 of the *Transfer of Land Act*, provides that upon production to the Commissioner of Titles of sufficient evidence that a writ of *fi fa* has been satisfied, the Commissioner is to direct an entry to be made in the register of a memorandum to that effect. Once the entry is made, the writ is deemed to be satisfied. The same practice applies to warrants of execution issued out of the Local Court.⁶⁹

4.57 By Titles Office practice, the judgment creditor makes application for the removal of the writ of *fi fa* or warrant of execution as an encumbrance. Where the writ or warrant is being withdrawn from the whole of the land and the form states that the writ or warrant has been fully paid and satisfied the application may be signed by the solicitor acting for the judgment creditor. Where the application is to withdraw the writ or warrant from part only of the land the application must be signed by the judgment creditor.⁷⁰

⁶⁸ See *Land Title Act 1994* (Qld) s 129. See also *Real Property Act 1900* (NSW) s 74 O.

⁶⁹ *Local Courts Act 1904* (WA) s 125.

⁷⁰ Department of Land Administration, above n 8, para 4.330.

⁷¹ Titles Office practice requires the application to be supported by a statutory declaration annexing or introducing proof of satisfaction. *Ibid* para 4.340.

⁷² *Ibid*.

4.58 The other provision in the *Transfer of Land Act* dealing with removal of writs of *fi fa* and warrants of execution is section 185, which provides that on proof to the Commissioner that the judgment has been satisfied before the period for which the entry of a copy writ of *fi fa* or warrant of execution is operative has elapsed, the Commissioner may write the word 'satisfied' on or below the entry of the copy writ or warrant in the register. The writ or warrant then ceases to affect the land.⁷¹ The application is usually, but not necessarily always, made by the registered proprietor.⁷²

4.59 A writ of *fi fa* or warrant of execution is also removed as an encumbrance on the registration of the transfer after a sale by the Sheriff or bailiff under the writ or warrant.⁷³

Stale writ or warrant remains on register if not cancelled

4.60 Unless the writ of *fi fa* or warrant of execution has been removed under one of the methods described above, it will remain on the register at the expiring of the four month period, even if it no longer binds the land. The fact that the memorandum remains uncanceled on the title does not assist the efficiency of the Department of Land Administration. Also it is unreasonable from the point of view of the judgment debtor that a stale writ or warrant should remain forever uncanceled on his or her title.

4.61 A mechanism for cancelling the registration of the writ or warrant is required. The question is:

- (i) whether or not the Registrar of Titles should be empowered to cancel the registration of the writ or warrant on application; or
- (ii) whether or not he should be empowered to cancel the registration without any application having been made to him.

4.62 If application could be made to the Registrar for cancellation of the registration of the writ or warrant, the Registrar could require the applicant to support the application with evidence such as whether or not the writ or warrant is still in force and whether or not there has been a sale under it. On the other hand, if the Registrar was empowered to cancel the registration without application, presumably, in the interests of efficiency in its operations, the Titles Office would wish to be able to have the registration cancelled without having itself to make enquiries about such questions.

4.63 We note that the position in Queensland differs to that in Western Australia. In Queensland, the registration of a writ of execution may be cancelled if —

- (i) a request to cancel it is lodged; and
- (ii) the Registrar of Titles is satisfied that the time, or extended time, for executing and putting the writ in force has ended.⁷⁴

4.64 Also, in Queensland a certificate is required from the Sheriff or registrar of the court that the writ of execution has not been executed, that is, that a sale has not been effected under the writ of execution.⁷⁵

⁷³ Ibid para 4.390. Where a mortgagee exercises his or her power of sale under a mortgage and transfers the land to a purchaser, any writ of *fi fa* or warrant of execution lodged subsequent to the mortgage is removed as an encumbrance: at para 4.370.

⁷⁴ *Land Title Act 1994* (Qld) s 118.

⁷⁵ *Land Title Practice Manual (Queensland)* para 12-2080.

The reason for requiring the certificate is section 117 of the *Land Title Act 1994* (Qld). Under this section, for purchasers, lessees, mortgagees and creditors, a writ of execution binds or affects registered land if the writ is executed and put in force within six months of its lodgment or the extended time allowed by the court. The words 'executed and put in force' signify only the sale of the land by the Sheriff within this time and do not require that a transfer of the land by the Sheriff should be produced for registration within the time.⁷⁶ Unlike the position in Western Australia, the land will still be bound if the transfer is presented after the expiration of this time. The Registrar of Titles in Queensland has told us that this is the reason why the certificate is required from the Sheriff or registrar certifying that the writ of execution has not been executed.⁷⁷

4.65 In Western Australia and a number of the other states non-performance of the condition that a transfer on a sale under the writ be left for entry on the register during the statutory period merely means, according to Sykes and Walker, that the special binding and freezing effect imposed by the *Transfer of Land Act* is removed. On non-performance of the condition, the Registrar is under a duty to register instruments in the order in which they are presented. The Registrar is referred back to the general principles on which the Torrens system operates.⁷⁸ In our view, in this situation, the purchaser in the sale by the Sheriff under the writ of *fi fa* would have acquired an equitable interest in the land at the time of the sale but would have no standing against a transferee from the judgment debtor who in the absence of fraud has become the registered proprietor of the land.

4.66 Where the transfer upon a Sheriff's or bailiff's sale is not presented for registration within the statutory period, the purchaser under that sale will have no standing against a transferee from the judgment debtor who in the absence of fraud has become the registered proprietor of the land. However the purchaser from the judgment debtor might not be able to register the transfer. The purchaser from the Sheriff or bailiff could register his transfer first or protect his equitable interest by a caveat.

⁷⁶ *In Re Real Property Acts* (1891) 4 QJLJ 70.

⁷⁷ Phone conversation with Mr L Leader, the Registrar of Titles, in October 1997.

⁷⁸ Sykes & Walker, 516. In *In re Dallen* above n 6, a copy of a warrant of execution which had been issued out of the Local Court at Perth on 26 April 1922 was on 1 June 1922 served on the Registrar of Titles for entry in the register. Although a sale was effected by the bailiff and a proper transfer duly executed within four months of such lodgment, the transfer was not tendered for registration until April 1930. Dwyer J held that the transfer should be accepted for registration and registered. In the course of his judgment, Dwyer J said:

In my view the statutory proviso is intended to terminate only the binding effect of the writ of execution, and leaves the land itself as an asset of the judgment debtor still liable to be dealt with under the writ. After the expiry of the statutable period, the entry of the writ on the register would not hamper *bona fide* dealings with the debtor, and a purchaser acquiring the land from the debtor for value would be entitled to have his transfer registered, or other entry made in the register, to protect his interest, but the proviso should not be construed for the benefit of a judgment debtor so as to prevent an effective sale of property of which he still continues to be registered proprietor, or to prevent registration of the consequential transfer when a sale has been effected.

In this case there are no purchasers, mortgagees, or persons in similar positions affected, no intervening interests have arisen, and the land still stands registered in the name of the judgment debtor; the judgment creditor was entitled to have the debtor's land made available to satisfy the judgment, and he did so avail himself; and I think therefore that the transfer to John Dallen which has been presented should be registered.

Because of s 90 of the *Transfer of Land Act 1893* (WA), it would have been necessary to have served on the Registrar a further copy of the warrant of execution, in pursuance of which the transfer was made, within four months preceding the presentation of the transfer. The headnote to the report indicates that this was done.

⁷⁹ See above para 4.16.

4.67 We have proposed that a transfer upon a sale under a writ of *fi fa* or warrant of execution should not be able to be presented for registration or registered unless presented within the statutory period or extended period, or presented after the statutory period or extended period with a certificate that the sale took place within the statutory period or extended period.⁷⁹

4.68 A transfer so presented for registration after the expiry of the statutory period or extended period was to be subject to all interests notified on the register at the time of the presentation of the transfer.⁸⁰ Circumstances may, therefore, permit the transfer under a Sheriff's or bailiff's sale which took place within the statutory period or extended period to be registered after the expiry of the period. However, where a sale by the Sheriff or bailiff takes place after the expiration of the statutory period or extended period, a transfer upon that sale could not be registered with the Registrar of Titles. The title of the purchaser would remain equitable only.

4.69 Service of the writ or warrant on the Registrar of Titles is, of course, a necessary part of the system under which a sale of the land by the Sheriff or bailiff during the four month statutory period will certainly take priority over any subsequent dealing by the judgment debtor, provided the sale and the presentation of the transfer for registration take place within the four month period. However, it can be argued that once the period has expired the purchaser in a sale by the Sheriff or a bailiff is in a similar position to a purchaser from the judgment debtor himself. A purchaser from the judgment debtor should not expect any notice indicating the possibility of a prior sale additional to that which a purchaser might normally have. In the circumstances it would seem logical to allow the Registrar to cancel the registration of the writ or warrant as soon as it has ceased to bind the land.⁸¹

4.70 We have also proposed that in a situation where the land has been sold during the statutory period but the transfer is not presented for registration until after that period has expired, the transfer should be subject to all interests notified on the register at the time of the presentation of the transfer.⁸² This would protect a person dealing with the judgment debtor who has had his interest notified on the register. It would include a purchaser from the judgment debtor who has had his equitable interest under an agreement for sale protected by a caveat. The recommendation does not extend to the situation where the land is sold by the Sheriff or bailiff after the statutory period has expired.⁸³

4.71 On the other hand, it can be argued that because the Sheriff or bailiff may have sold the land under the writ or warrant during the statutory period but the transfer may not have been registered and

⁸⁰ Ibid

⁸¹ In Western Australia, the land is not bound beyond the statutory period where a sale under the writ or warrant is effected within that period but the transfer is presented for registration after the expiration of the period. In Queensland the reason for a certificate from the Sheriff or registrar that a sale has not been effected under the writ of execution (above paras 4.63-4.64) does not exist in Western Australia.

⁸² See above para 4.32.

⁸³ In this case, a transfer upon the sale could not be registered on the Titles Office register: see above para 4.29. The title of the purchaser would remain equitable only.

because the Sheriff or bailiff may have sold the land after the expiration of the statutory period, the Registrar of Titles should not cancel the registration of the writ of *fi fa* or warrant of execution unless he has evidence that the writ or warrant is no longer in force and that there was no sale under it. The fact that a writ or warrant has been registered on the certificate of title is relevant to a person who is proposing to deal with the registered proprietor and is investigating the soundness of the title of the registered proprietor, even though the writ or warrant is no longer binding the land. If a search of the title revealed that a writ or warrant had been registered, an intending purchaser, for instance, could satisfy himself that there had not been and was not going to be a sale under the writ or warrant, or could otherwise protect himself, for example, by paying the whole of the purchase price at settlement.

4.72 We consider that the Registrar of Titles should be empowered to cancel the registration of a writ or warrant where the statutory period or extended period under section 133 of the *Transfer of Land Act* has expired and application is made to him.⁸⁴ The Registrar should be able to require the application to be supported by such evidence as he requires.

4.73 We are of the view that the Registrar should be given a discretion to cancel the registration of a writ or warrant where the statutory period or extended period has expired, although no application to cancel the registration has been made. For example, at least in some circumstances, where a transfer of the land from the judgment debtor to a third party has been registered, the Registrar might decide to cancel the registration of the writ or warrant. The power would be one to exercise at the Registrar's own administrative convenience.

⁸⁴ The reference to 'extended period' assumes the implementation of our suggestion: see above para 4.23.

CHAPTER 5

Equitable estates and interests in land under the Transfer of Land Act 1893 (WA)

5.1 By section 133 of the *Transfer of Land Act*, no execution is to bind any land or any lease, mortgage or charge. However, the section then provides that any land, lease, mortgage or charge will be bound for four months upon service of a copy of a writ of *fi fa* issued out of the Supreme Court or the District Court upon the Registrar of Titles accompanied by a statement specifying the land, lease, mortgage or charge sought to be affected.¹ The *Local Courts Act* applies the provision to sales under warrants of execution under that Act.²

5.2 It appears that if the statement accompanying the copy of the writ served on the Registrar specifies land to be affected by the writ, the judgment debtor must be the registered proprietor of some estate in the land. If the statement specifies a lease, mortgage or charge, the judgment debtor must be the registered proprietor of the lease, mortgage or charge.³

5.3 Sykes and Walker consider the position where the judgment debtor does not have a registered estate under the Torrens legislation

¹ Discussed above, paras 2.36-2.39.

² Above, para 2.37.

³ Section 133 was modelled on s 106 of the *Transfer of Lands Statute 1866* (Vic). In *Sander v Twigg* (1887) 13 VLR 765, Holroyd J (at 788) said that the forms of transfer under a writ of *fi fa* which appeared in the 15th Schedule to the *Transfer of Lands Statute*:

... show that the defendant in the action in which the writ was issued, if the statement accompanying the copy served specified land as sought to be affected by the writ, must have been the registered proprietor of some estate in the land specified as sought to be affected thereby; and if the statement specified a lease, mortgage or charge as sought to be affected thereby, must have been the registered proprietor of such lease, mortgage or charge.

These forms have been removed from the 17th schedule to the *Transfer of Land Act 1893* (WA). The forms have been redrafted in the approved forms (forms T7 and T8) which have taken their place. However, the new forms indicate that the judgment debtor must be the registered proprietor of an estate in the land or the registered proprietor of a lease, mortgage or charge.

Holroyd J also pointed to the fact that s 106 provided (as does *Transfer of Land Act 1893* (WA) s 133) that the transfer was to have the same effect as if made by the proprietor, that is, the registered proprietor and on entry of the transfer in the register, the purchaser became the transferee and was deemed the proprietor of the land, lease, mortgage or charge: at 788-789.

(in Western Australia the *Transfer of Land Act*). The estate may be equitable or it may belong to the category of unregistrable legal interests assuming that such are capable of existence.⁴ It seems, according to Sykes and Walker, that in such a case the writ of execution is not registrable in the Torrens register under the procedures set out in section 133 of the *Transfer of Land Act*.⁵ Such a fact would not of itself, they say, deprive the execution creditor of priority over any person purchasing the equitable interest of the judgment debtor after delivery of the writ, though he or she would have no standing as against persons taking a later registered title, in the absence of fraud.⁶ They say that it would seem reasonable to hold that the relevant sections in the Torrens legislation — in the case of Western Australia, section 133 of the *Transfer of Land Act* — which deny binding effect to a writ of execution not registered, do not apply to land or interests in land in respect of which it is impossible to register a writ. In the Western Australian context they say it seems registration under the *Registration of Deeds Act* would be necessary to give priority over a purchaser of the equitable estate of the judgment debtor and that the date of priority would be determined by the *Registration of Deeds Act*.⁷

5.4 It would therefore seem that our proposals in paragraph 3.20, under which a process of execution would not bind land as to purchasers, mortgagees or execution creditors until delivery of the process to the Sheriff or bailiff and registration under the *Registration of Deeds Act* of a memorial concerning the process of execution, would also apply where the land is under the *Transfer of Land Act* but the judgment debtor only has an equitable interest in it, or his or her estate belongs to the category of unregistrable legal interests assuming that such are capable of existence. It has been suggested to

⁴ Sykes and Walker, 519.

The question of whether unregistrable legal interests are capable of existence in the case of land under the Torrens system is discussed by AJ Bradbrook, SV MacCallum and AP Moore *Australian Real Property Law* (2nd ed, 1997) para 4.15 as follows:

It is important to note, however, that the registered or legal interest under the Torrens system differs from the legal interest under the general law.... Although the term registered interest may be used more often, the terms 'registered' and 'legal' interest may generally be used interchangeably. It is arguable that they cannot *always* be so used because some interests may be 'legal' in character although not registered. An example of such an interest may be the short-term tenancy. In Victoria, for example, only a lease for a term exceeding three years may be registered. Despite the lack of registration, a lease for three years or less may be, however, 'legal' rather than 'equitable' in nature. The contention is that if there is a means provided in the Torrens legislation by which an interest can be registered pursuant to a registrable instrument, the interest can only be, at best, an equitable interest if it is not registered. However, where there is no means of registering, such as in the case of the short-term tenancy in Victoria, it is suggested that the interest is of the same type as it would have been under the general law. Alternatively, the view may be taken that all unregistered interests, whether registrable or not, are equitable in character. In most instances, the nature of unregistrable interests would be equitable under the general law.

(In Western Australia, as in Victoria, only a lease for a term exceeding three years may be registered: *Transfer of Land Act 1893* (WA) s 91).

⁵ Sykes & Walker (at 519-520) cite *Watson v Royal Permanent Building Society* (1888) 14 VLR 283 as the authority. In this case, a mortgage transaction had been effected by way of absolute transfer of the land to the mortgagee with a separate deed of defeasance. It was held that the interest of the mortgagor could not be in any way affected by service of the writ on the Registrar.

⁶ However, we consider that the purchaser from the Sheriff could protect the equitable interest acquired by lodging a caveat. Also, depending on the circumstances, the purchaser could eventually be placed on the register as proprietor by legal proceedings taken in the Supreme Court to establish title.

⁷ Sykes & Walker (at 520) write that in Victoria, the case of *Sander v Twigg* (above n 3) supports the view that in order to retain the 'equitable binding effect' of the writ in such cases, registration under s 209 of the *Property Law Act 1958* (Vic) would be necessary. Section 209 is set out in above para 3.7. Instances where a Sheriff or bailiff wishes to sell under a writ of *fi fa* or warrant of execution an equitable estate in land under the *Transfer of Land Act 1893* (WA) are extremely rare in Western Australia.

us during the preparation of this paper that the proposal concerning delivery of the process to the Sheriff or bailiff and the registration of the memorial under the *Registration of Deeds Act* should have no application where the land is under the *Transfer of Land Act*. It should apply only to old system land. Supporting this view is the argument that anyone proposing to deal with the holder of an equitable interest in land under the *Transfer of Land Act* would be unlikely to search the register under the *Registration of Deeds Act* for the memorial. The general public belief (shared possibly by many solicitors) is that the *Registration of Deeds Act* has nothing to do with land under the *Transfer of Land Act* and is only relevant to old system land. A search of the register under the *Registration of Deeds Act* would involve some inconvenience for the person doing it. If the search was done by a solicitor significant costs would be involved.⁸

5.5 We considered various options as to how an equitable interest should be bound. One possibility was for a writ of execution or warrant of execution issued against an equitable interest in land under the *Transfer of Land Act* to bind the equitable interest the same way a writ or warrant would bind goods. However, to bind the interest against a bona fide purchaser without notice of the writ or warrant, the Sheriff or bailiff would have to effect seizure of the equitable interest,⁹ which is a problem, because it is not clear how an equitable interest is seized.¹⁰ Another disadvantage of this option is that a person proposing to purchase the judgment debtor's equitable interest would not have a public register to search to ascertain whether the interest was bound by the writ or warrant. A person would have to make his or her own enquiries, for example, from the Sheriff or bailiff, to verify that the equitable interest was not bound by a writ or warrant of execution. An alternative option would be to empower the judgment creditor to lodge a caveat on the relevant certificate of title on the basis of the writ or warrant and provide that priority be determined by the date of lodgment. However, this option transgresses the principle that only a person claiming an estate or interest in the land may lodge a caveat;¹¹ issuing a writ of *fi fa* or warrant of execution does not give a judgment creditor any interest in the land.

5.6 It may be that registration under the *Registration of Deeds Act* can already affect the question of priorities in relation to an equitable interest in land under the *Transfer of Land Act*. Sykes and Walker say that probably the *Registration of Deeds Act* applies to documents affecting Torrens title land but which are unregistrable in the Torrens

⁸ The register under the *Registration of Deeds Act 1856 (WA)*, indexes, and memorials of any documents which have been registered are all kept in an office at the Department of Land Administration's building at Midland, 14 kilometres from Perth. Searches are conducted manually and involve travelling to the office at Midland.

There could be no reason to search the register under the *Registration of Deeds Act* if the judgment debtor is the registered proprietor under the *Transfer of Land Act 1893 (WA)* of land, a lease, mortgage or charge. In these cases, if the writ of *fi fa* or warrant of execution was not registered on the *Transfer of Land Act* certificate of title, it would not bind the land: *Transfer of Land Act 1893 (WA)* s133.

⁹ See above, para 2.11. Cf *Judgment Creditors' Remedies Act 1901 (NSW)* s 13(2): see above para 3.12. Once property has been seized, it is an offence for the judgment debtor knowingly, and with intention to hinder or defeat the process of execution, to dispose of the property: *Criminal Code (WA)* s 150.

¹⁰ Under the *Local Courts Act 1904 (WA)* s 123, compliance with the advertising requirements in that section in relation to the proposed sale would be the equivalent of 'an actual levy' on the equitable interest and this probably operates as a seizure. However, the provision does not apply in the Supreme Court.

¹¹ *Transfer of Land Act 1893 (WA)* s137.

register, such as a contract of sale of Torrens land.¹² In the circumstances, it would be appropriate for an equitable interest in land under the *Transfer of Land Act* to be bound as to purchasers, mortgagees and creditors by a process of execution from the time of registration under the *Registration of Deeds Act* of a memorial relating to the execution process. It may be that registration under the *Registration of Deeds Act* determines the priority of equitable interests in land under the operation of the *Transfer of Land Act* arising under documents unregistrable under the latter act. If registration under the *Registration of Deeds Act* does determine that priority, then for example, when the purchaser under a contract of sale of land is negotiating with a third party to assign his equitable interest as purchaser of the land to a third party, then in order to verify whether there are any registered encumbrances over or prior assignments of the equitable interest, the third party would need to search the register under the *Registration of Deeds Act*. The search would also reveal whether a memorial relating to a process of execution had been registered. Furthermore, a requirement to lodge a memorial under the *Registration of Deeds Act* provides a potential purchaser with the certainty of a public register.

¹² See Sykes & Walker: 755-756.

CHAPTER 6

Priority of writs and warrants of execution

6.1 Sometimes the Sheriff or other officer must execute against the same judgment debtor on behalf of two or more judgment creditors. How does he determine the priority to be given to the judgment creditors' claims? A similar but distinct question arises when the Sheriff receives a Supreme Court writ at about the same time as a Local Court warrant of execution is received by a Local Court bailiff against the same judgment debtor.

6.2 The priority question involves writs and warrants of execution issued against all types of property, whether personal or real property. In Western Australia, the general practice is for the Sheriff and bailiffs to attempt to seize and sell goods first. Execution against a judgment debtor's land is only a last resort, where there are insufficient goods to satisfy the amount due under the writ of *fi fa* or warrant of execution.

Priority of writs or warrants of execution issued out of the same court: present position

Common law rule on priority of execution creditors

6.3 At common law, the rule is that as between different execution creditors priority is determined by the precise time of delivery of the writ of execution to the Sheriff. The rule was enunciated by Ashurst J in 1787 in *Hutchinson v Johnston*¹ where he said:

The general principle of law . . . is that the person whose writ is first delivered to the Sheriff is entitled to be a priority.

The Sheriff must execute all the writs of execution and the maxim 'He who is first in time has the strongest claim in law' must be his guide. In

¹ (1787) 1 Term Rep 729; 99 ER 1346.

other words, he is to execute the writs and apply the proceeds according to their priority, which as to writs of *fi fa*, is according to the time of their delivery to him.² If the proceeds are more than sufficient to satisfy the first writ, the Sheriff must apply the surplus to the second, then to the third, and so on.³ An exception at common law to this rule is where execution has been suspended on the earlier writ.⁴

6.4 Where more than one warrant of execution is delivered to a Local Court by a bailiff to be executed against the same person, section 136 of the *Local Courts Act 1904* (WA) varies the common law by providing that the bailiff is to execute the warrants of execution in the order of the times when application for the warrants was made to the clerk of the Local Court.⁵

6.5 Under section 3 of the *Registration of Deeds Act 1856* (WA), instruments in writing registered under the Act, by which land is or may be affected, have priority one over the other according to the priority of their respective dates of registration.⁶ Less certain is the priority between two writs of *fi fa* against old system land issued out of the Supreme Court at the instance of different creditors and in the possession of the Sheriff. Would the judgment creditor who first registered his or her judgment under the *Registration of Deeds Act 1856* (WA) have priority in the distribution of the proceeds of sale over the judgment creditor who first delivered his writ of *fi fa* to the Sheriff?⁷ We have been unable to find any Western Australian decision on this question, however, English practice may offer some guide as to how such a priority issue would be resolved in Western Australia.

6.6 England had a number of registration acts, for example the *Yorkshire Registries Act 1884*, similar to Western Australia's *Registration of Deeds Act 1856* (WA). Where several writs of *elegit* (in England the writ of *fi fa* never operated against freehold land) were delivered to the Sheriff against the same debtor, he had to execute the one first delivered to him.⁸ The others could not be executed until the debt under the first writ was executed.⁹ Halsbury states that because of the *Yorkshire Registries Act 1884* the judgment had to be registered to obtain priority for execution of judgment by way of writ of *elegit*, at

² RE Melsheimer *Atkinson's Sheriff Law* (6th ed, 1878) 188-189. Where several judgment creditors have delivered writs of *fi fa* against the same debtor for execution, each of those writs binds the goods from the date and time of its delivery, and each judgment creditor is entitled, as against the others, to the benefit of such priority: 31 Halsbury's *Laws of England* (4th ed, 1976) para 464.

It is not material whether the Sheriff seizes the goods under the first or under the last writ; for when seized, they are, in contemplation of law, in his custody under all the writs he has; and when he sells, he sells under them all. But he must apply the proceeds according to the priority of the writs: Melsheimer, 189.

³ *Drewe v Lainson* 11 A & E 529; *Aldred v Constable* 6 QB 370; Melsheimer, above n 2, 189.

⁴ *Hunt v Hooper* (1844) 12 M & W 664, 672; 152 ER 1365, 1368 (Parke B). However, if execution on a writ is suspended because the judgment pursuant to which it has been issued is set aside the priority of the original writ is not lost if the judgment is subsequently reinstated: *Bankers Trust Co v Galadari* [1987] 1 QB 222; P Young & PTaylor (eds) *Ritchie's Supreme Court Procedure New South Wales*, (4th ed, 1984) Vol 1, para 44.7.5.

⁵ To execute the warrants in the order of the time when application was made for them to the clerk does not mean that the bailiff has to sell some goods and make a return to the clerk of the court before he can proceed to sell under the warrant of execution next in priority.

⁶ Above, para 2.26.

⁷ The same comment applies where the land is under the *Transfer of Land Act 1893* (WA) but the judgment debtor only has an equitable interest in it: see ch 5, para 5.3 above.

⁸ *Guest v Cowbridge Rail Co* (1868) LR 6 Eq 619.

⁹ *Carter v Hughes* (1858) 2 H&N 714.

any rate as against a purchaser.¹⁰ However, Halsbury does not say that registration of the judgment under the *Yorkshire Registries Act 1884* creates an exception to the principle that where several writs of *elegit* are delivered to the Sheriff against the same debtor, he must execute the first one delivered to him.¹¹ This suggests that the same principle could operate in Western Australia: that is, a judgment creditor who first registered his or her judgment under the *Registration of Deeds Act 1856* (WA) would not have priority in the distribution of the proceeds of sale.¹²

6.7 There is also the question of whether the common law rule, that writs of *fi fa* issued out of the Supreme Court rank for priority according to the order in which they are delivered to the Sheriff, is affected by section 133 of the *Transfer of Land Act*. Under that section writs of *fi fa* must be served on the Registrar of Titles before they bind a judgment debtor's land. Where two judgment creditors have had writs of *fi fa* issued against the same land, does priority between them depend on the order in which the writs of *fi fa* are handed to the Sheriff for execution, or on the order in which copies of the writs are lodged at the Titles Office? In 1882, the Full Court of Victoria in *Beath v Anderson*,¹³ where the Sheriff had sold under two writs of *fi fa* registered at the Titles Office, held that the judgment creditors were entitled to the proceeds of the sale in the order in which their writs had been delivered to the Sheriff. However, in 1890, the Full Court of Queensland in *Peace v Sheriff of Queensland*¹⁴ reached the opposite conclusion. It held that priority between two judgment creditors whose writs of *fi fa* had been registered at the Titles Office prior to the Sheriff's sale depended on the order in which the copies of the writs had been lodged at the Titles Office.¹⁵

6.8 In 1972 in *In re Emms*,¹⁶ a single judge of the Supreme Court of Western Australia, Wallace J, approved *Beath v Anderson* and said that *Peace v Sheriff of Queensland* seemed to be confined to the statutory provisions of the *Real Property Act 1861* (Qld). In this case, a copy of a writ of *fi fa* out of the District Court of Western Australia was lodged at the Titles Office against the debtor's land on 10 December 1971. A copy of a warrant of execution from the Perth Local Court was lodged against the same land on 21 December 1971. On 3 May 1972, the bailiff of the Perth Local Court sold the land under the warrant of execution. By then more than four months had elapsed since the copy of the writ of *fi fa* had been lodged with the Registrar of

¹⁰ Halsbury's *Laws of England* (2nd ed, 1934) Vol 14, 83.

¹¹ *Ibid* 76, 30.

¹² The *Judgments Acts* would appear not to affect priority as to the proceeds of sale between competing judgment creditors. In *Benham v Keane* 3 DeG F & J 318, 334 Turner LJ said the *Judgments Act 1838* did not go so far as to make one judgment binding as against another judgment.

¹³ (1882) 9 VLR (Law) 41.

¹⁴ (1890) 4 QLJ 33.

¹⁵ The view taken in *Beath v Anderson*, above n 13, was supported in JE Hogg *Australian Torrens System* (1905) 988. Also BC Cairns *Australian Civil Procedure* (4th ed, 1996) 694 submits that the priority prescribed by the Torrens system is directed to quite a different situation than where the Sheriff distributes proceeds of sale to execution creditors. The view taken in *Peace v Sheriff of Queensland*, *ibid*, is supported in Kerr *Principles of Australian Land Titles (Torrens) Systems* (1927) 316.

¹⁶ (Unreported, Supreme Court of Western Australia, Wallace J, 13 September 1972, Library No 1081.)

¹⁷ The section is set out below para 6.11.

¹⁸ *In re Emms*, above n 16.

Titles. Wallace J held that priority was determined by section 86A of the *District Court Act 1975* (WA) which regulates priority where competing writs or warrants have issued from different courts.¹⁷ Under section 86A, it is the date of delivery of the writ of *fi fa* to the Sheriff, the time of the application to a District Court registrar and the time of application for issue of a warrant of execution to the clerk of the Local Court, as the case might be, which is the criterion for establishing priority between the competing judgment creditors. Wallace J said that section 86A had simply codified the law which pre-existed in *Beath v Anderson*. ‘What is in point’ his Honour said ‘is the date of delivery of the writ to the sheriff, clerk or registrar as the case may be, as the criterion for establishing priority of creditors’.¹⁸

6.9 The position where, for example, two writs of *fi fa* have issued out of the same court, but the earlier writ has been registered at the Titles Office after the second-issued writ, was not the issue in *In re Emms*. However because Wallace J approved *Beath v Anderson* his judgment is persuasive authority for the proposition that in this situation in Western Australia the judgment creditors are entitled to the proceeds of the sale in the order in which their writs were delivered to the Sheriff.

Priority of writ of execution under Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)

6.10 A warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) by the Registrar of the Fines Enforcement Registry has priority over any writ or warrant of execution against the property of the offender by virtue of section 95.¹⁹ Because the *Fines, Penalties and Infringement Notices Enforcement Act* has comparatively recently been enacted by Parliament following extensive consideration by the Government, we do not consider it appropriate to give section 95 further consideration. Our recommendations are not intended to affect that provision.

Priority of writs or warrants of execution issued out of different courts

6.11 Statutory provision governs priority between writs and warrants of execution in the case of the Supreme Court, the District Court and a Local Court. Section 86A of the *District Court of Western Australia Act 1969* (WA) provides:

(1) When a writ of execution against the land or goods of any person has issued out of the Supreme Court, and a writ or warrant of execution against the land or goods of the same person has issued out of the [District] Court and out of a Local Court, or has issued out of either of those Courts, the right to the property seized shall be determined by the priority of the time of the delivery of the writ so issued out of the Supreme Court to the Sheriff to be executed, or the time of the application to the Registrar or the Clerk for the issue from the [District] Court or the Local Court, of the writ or warrant of execution, whichever is the earlier or earliest, as the case may be.

¹⁹ The section also provides that if there are two or more warrants of execution issued in respect of an offender, they have priority according to the time of receipt by the Sheriff. Section 95 is set out in Appendix II to this report.

(2) For the purpose of determining the priority referred to in subsection (1), the Sheriff, the Principal Registrar and the Clerk of the Local Court shall, on request the one to the other, give information to the one requesting it, as to the precise time of the delivery of the writ so issued out of the Supreme Court or the precise time of the application to the Registrar or the Clerk for the issue from the [District] Court or the Local Court of the writ or warrant of execution, as the case may be.

6.12 Similarly section 137 of the *Local Courts Act 1904* (WA) provides:

When a writ of execution against the lands or goods of a party to an action or other proceeding has been issued out of the Supreme Court, and a warrant of execution has been issued out of a Local Court, the right to the property seized shall be determined by the priority of the time of the delivery of the writ so issued out of the Supreme Court to the sheriff to be executed, or the time of the application to the clerk for the issue from the Local Court of the warrant of execution, whichever is the earlier.

The sheriff shall, on demand, inform the clerk of the precise time of the delivery of the writ so issued out of the Supreme Court and the clerk shall, on demand, inform the sheriff, or a sheriff's officer, of the precise time of the application to the clerk for the issue from the Local Court of the warrant of execution.

6.13 *In re Emms* held that the criterion set out in section 86A of the *District Court Act 1969* (WA) for establishing priority applies even though a copy of the competing writ and warrant has been served on the Registrar of Titles under section 133 of the *Transfer of Land Act*.²⁰ The judgment creditor who first registers his writ or warrant of execution under section 133 does not get priority to the sale proceeds unless he is entitled to priority on the above basis.

6.14 We have not found any authority on the position when there is a writ or warrant issued by one of the courts referred to in section 86A of the *District Court Act 1969* (WA) and a court not referred to in the section such as the Federal Court of Australia.

Priority of writs — Sheriff's practice

6.15 In Western Australia, the same officer is Sheriff of the Supreme Court and bailiff of the District Court. The practice of the Sheriff's office in relation to the priority of writs and warrants of execution is:

- (i) where two or more writs of *fi fa* have issued out of the Supreme Court against the same debtor, priority between the execution creditors is determined by the time of the delivery of the writs to the Sheriff;
- (ii) where two or more writs of *fi fa* have issued out of the District Court against the same debtor, priority between the execution creditors is determined by the time of the application to a registrar of the District Court;

²⁰ *In re Emms*, above n 16. The case is discussed above paras 6.8-6.9.

- (iii) where writs of *fi fa* and warrants of execution have issued out of two or more of the Supreme Court, the District Court and a Local Court against the same debtor, priority between the execution creditors is determined by the earlier or earliest in time of:
 - (a) the delivery to the Sheriff of the writ of *fi fa* issued out of the Supreme Court;
 - (b) the application to a registrar for the issue of the writ of *fi fa* out of the District Court; or
 - (c) the application to the clerk of the Local Court for the issue of the warrant of execution.
- (iv) the principles outlined in (i), (ii) and (iii) apply whether the proceeds of the writs of *fi fa* or warrants of execution arise from voluntary payment by the debtor to the Sheriff or bailiff or whether from a sale of goods or land;
- (v) where the proceeds arise from the sale of land, the judgment creditor who first registers his or her writ of *fi fa* or warrant of execution does not get priority unless he or she is entitled to priority under the principles outlined in (i), (ii) or (iii), even though he or she may have paid the costs of sale. A judgment creditor can be entitled under these principles to the proceeds of sale or to share in the proceeds of sale even though he or she has not registered his or her writ of *fi fa* or warrant of execution at the Titles Office;
- (vi) the point of time up to which a writ of *fi fa* or warrant of execution can be delivered or applied for, and still be entitled to the proceeds of another writ or warrant or to share in those proceeds is the time of the disbursement of money received by the Sheriff or the bailiff. (The Sheriff and the District Court bailiff disburse direct to the judgment creditor or judgment creditors, whereas a Local Court bailiff disburses to the clerk of the Court.)

6.16 In relation to (iii) above, it is unlikely that the Sheriff, if he sells the goods of the judgment debtor under a writ of *fi fa*, would have a significant surplus to pay to a Local Court bailiff who held a warrant of execution of lower priority. The Sheriff is only entitled to seize goods that would be reasonably sufficient, if sold, to pay the sum endorsed on the writ.²¹ However, if he only became aware of a warrant of execution of higher priority after the sale but before disbursement, he would be obliged to pay the bailiff the proceeds or sufficient of them to pay out the warrant of execution.

6.17 Where a Local Court warrant of execution is involved the Sheriff cannot comply with the priority principles unless he has knowledge of that warrant. For this reason, after the Sheriff receives a writ of *fi fa*, he writes to the Local Court bailiff in whose bailiwick the address of the judgment debtor is and inquires about any unsatisfied warrants held by the bailiff in respect of the debtor. The Sheriff's letter notifies the priority date of the writ of *fi fa* (that is the date it was delivered to him), the debtor's name, the debtor's address and the amount of the debt.

²¹ *Gawler v Chaplin* 2 Exch D 459. However, if the Sheriff was aware of the warrant of execution of lower priority, he would ask the bailiff to join in the sale.

The District Court bailiff does exactly the same when he receives a writ of *fi fa*.

The Court Services Division report on the civil judgment debt recovery system

6.18 In June 1997, the Court Services Division of the Ministry of Justice issued Part I of its report *Civil Judgment Debt Recovery System*. Part I entitled 'Legislative Recommendations' recommended a unified legislation for the recovery of civil judgment debts under an enactment to be entitled the Enforcement of Judgments Act. It recommended that the Enforcement of Judgments Act should provide that:

- the Sheriff of Western Australia should be responsible for the execution of process;
- the Sheriff is an officer of the Local, District and Supreme Courts; and
- the Sheriff, in writing, could delegate any function and that persons to whom he delegated his powers should be formally titled 'bailiff'.

The report recommended that the following statutory provisions be repealed —

- section 157 of the *Supreme Court Act 1935* (WA) relating to the appointment of the Sheriff's officers;
- the provisions in the *District Court Act 1969* (WA) relating to the bailiff of the District Court;
- the provisions in the *Local Courts Act 1904* (WA) relating to bailiffs of Local Courts.

6.19 The report recommended that with the coming into operation of the *Enforcement of Judgments Act* all existing appointments of bailiffs of Local Courts should be terminated.²² The report does not contemplate that Local Court warrants of execution, when issued, will be forwarded to the Sheriff. They will be forwarded direct to bailiffs to whom the Sheriff has delegated his powers of enforcement and executed by the bailiffs. The bailiffs would make their returns to the clerk of the Local Court concerned.

²² Part II of the report contains a recommendation that there be transitional provisions recognising currently appointed private bailiffs in that their current appointments should be terminated and replaced with five-year contracts with an option, exercisable by the Ministry of Justice, for a further five years: Court Services Division, Ministry of Justice *Civil Judgment Debt Recovery System* (1997) Part II, para 20.4.

Early proposals for reform

Civil Judgment Debt Recovery System recommends priority to proceeds according to time of receipt of warrant by Sheriff

6.20 Section 86A of the *District Court Act 1969* (WA) creates different priority points in the Supreme Court on the one hand and in the District Court and Local Courts on the other hand. We consider the lack of uniformity between the courts on the point of priority is unnecessary and anomalous. In his preliminary comments to us, the Sheriff indicated that priority and right to the proceeds of a writ or other enforcement process should commence from the time of its delivery to the Sheriff or other officer responsible for enforcement of the process. The *Civil Judgment Debt Recovery System* Report proposed that the process under which property can be seized and sold in order to satisfy a judgment debt should be known as a warrant of execution²³ and that the right to proceeds should be determined by priority according to the time of receipt of the warrant by the Sheriff.²⁴ Mr Shillington and Mr Staples in their proposal²⁵ submitted that priority of execution against land should be determined by the date of registration against the land of the writ of *fi fa* or warrant of execution.²⁶ They noted that Supreme Court and District Court executions were governed by the same rules and statutory provisions and the same person held the positions of Sheriff of Western Australia and bailiff of the District Court. It would therefore be convenient, they said, if section 86A of the *District Court Act 1969* (WA) were also amended to provide that, for the purpose of determining the priority of Supreme Court and District Court executions against goods, the relevant times are the times when the writs are delivered to the Sheriff and District Court bailiff for execution. No amendment was necessary for Local Court executions.

The law in other jurisdictions

6.21 Section 137 of the *Local Courts Act 1904* (WA) was taken from section 152 of England's *County Courts Act 1888* on which the *Local Courts Act 1904* (WA) is based. The drafter of section 137 extended the scope of the section to include land, whereas the English provision was limited to goods.²⁷ In England, the present position is that where a writ against a person's goods has issued out of the High Court and a warrant has issued from a County Court against the same person, the priority to the goods is determined by the priority of the time of the delivery of the writ to the Sheriff to be executed or of the application to the registrar of the County Court for the warrant.²⁸ However, if the goods are outside the jurisdiction of that County Court, the time of the delivery of the writ to the Sheriff or the time when the warrant was received by the registrar of the court in whose jurisdiction the goods

²³ See Court Services Division, Ministry of Justice *Civil Judgment Debt Recovery System* (1997) Part I, recommendation 17.

²⁴ *Ibid*, recommendation 31.

²⁵ Referred to above, para 4.22 and set out in full in Appendix VII.

²⁶ Paras 1 and 5 of their proposal: See Appendix VII.

²⁷ In England a writ of *fi fa* or warrant of execution could not be issued against land.

²⁸ See *Supreme Court Act 1981* (Eng) s 138; *County Courts Act 1984* (Eng) s 99; and *Supreme Court Practice 1997* para 45/1/9.

are situated, from the registrar of the Court in which the warrant was issued, determines priority to the goods seized.²⁹

6.22 The drafter of section 86A of the *District Court Act 1969* (WA) seems to have followed section 137 of the *Local Courts Act 1904* (WA) but added a priority time for writs of execution issued out of the District Court. Section 152 of England's *County Courts Act* has been followed in a number of the Australian states. For example, in New South Wales, section 17 of the *Judgment Creditors' Remedies Act 1901* and in Queensland rule 313 of the *District Court Rules 1966*, both of which deal with the priority between competing writs of execution against land or goods, have followed section 152 of the *County Courts Act*. By contrast under section 346(3) of the Australian Capital Territory's *Magistrates Court (Civil Jurisdiction) Act 1982*, where there is a competing writ of *fi fa* issued out of the Supreme Court and a warrant of execution issued out of the Magistrates Court, the right to the property when seized is determined by the priority of the time of delivery of the writ of *fi fa* to the Sheriff or the time of receipt of the writ of execution by the bailiff.³⁰

Accounting for variations in priority points between courts

6.23 The lack of uniformity of priority points between the courts creates uncertainty and can make execution of judgment unnecessarily complex. We are concerned to examine the reasons for the differences to see if greater uniformity can be achieved.

Rationale of section 137 of the Local Courts Act 1904 (WA)

6.24 *Murgatroyd v Wright*³¹ was an appeal from a County Court judge in England and involved the question of when a warrant of execution issued out of a County Court bound the judgment debtor's goods. In this particular County Court the registrar was also the Court's high bailiff. The following passage in the judgment of Phillimore J in the appeal court is relevant in the present context:

The procedure as between the High Court and the Sheriff is more archaic. It contemplates a time when there were few officials, and when the suitor had to be busy and bestir himself to get things done. The process is this. The suitor goes to the office of the High Court, delivers his praecipe, and he receives, or ought to receive, the writ of execution in a few minutes. Then he can put it in his pocket, and very often he does so. He afterwards lodges it with the Sheriff, or he can go to the Sheriff with it at once. The carriage of the writ from the office of the High Court of Justice to the Sheriff entirely depends upon the suitor, and, therefore, for this purpose, it is not material to inquire the time of the application for the writ of *fi fa*. The moment to inquire about is when the suitor lodged the writ of *fi fa* with the Sheriff. From that moment the law supposes the Sheriff will act with instantaneous promptitude.... As soon as the suitor has done his part, from that moment he is not to be

²⁹ See *Supreme Court Act 1981* (Eng) s 138, *County Courts Act 1984* (Eng) s 103 and *Supreme Court Practice 1997* para 45/1/9.

³⁰ Section 346. Under the *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT), a writ of execution may only be issued against personal property.

³¹ See above, n 7.

prejudiced by official delays. Now in the county court there is no carriage by the suitor of the warrant of execution from the registry to the high bailiff, still less from one part of the registrar's office to another. That is intended to be done by the officials themselves, and ought to be done with instantaneous promptitude, and any official delay should not prejudice the suitor. And so it would be according to the spirit of the *Sale of Goods Act 1895 (WA)* that the material date should be the date when the suitor set the law in motion by his last act, which would be in this case when he applied for the warrant at 2.45 on the 13th.

6.25 The rationale of section 152 of the English *County Courts Act* seems to be that as soon as the judgment creditor has completed his part, he is not to be prejudiced by official delays. In the case of a writ of *fi fa* the judgment creditor has completed his part when he delivers the writ of *fi fa* to the Sheriff and, in the case of a warrant of execution, when he lodges his praecipe for a warrant of execution at the County Court. The same rationale applied to section 137 of the *Local Courts Act 1904 (WA)* when it was enacted.

Procedure in the Supreme Court

6.26 In the Supreme Court of Western Australia, the judgment creditor prepares the writ of execution and lodges two copies at the Court's Central Office.³² The two copies are placed on the court file and on the following day the file is taken to the Court Orders Co-ordinator at the Court. He checks that the judgment has been drawn up and entered³³ and that the amounts and interest rate shown in the writ are correct. This process usually takes 5 to 10 minutes. He then returns the file to the Central Office where one copy of the writ is sealed by an authorised officer. It is then placed in the pigeon hole for the judgment creditor's solicitor in the Central Office to be collected. The second copy goes on the Court file. The sealed writ is normally ready to be picked up 48 hours after being lodged although it could be a further 24 hours later if the Court Orders Co-ordinator has a rush of work. If the issue of the writ is urgent, court staff will have the writ ready to be picked up the same day it is lodged.³⁴ It is left to the judgment creditor to deliver the writ to the Sheriff whose office is at 30 St George's Terrace Perth. There is no time limit within which the delivery must take place.³⁵ The certified copy of the writ of *fi fa*, which must be lodged at the Titles Office if the writ is to bind land of the judgment debtor, is obtainable from the Sheriff's office.

Procedure in the Perth Local Court

6.27 In a Local Court in Western Australia, the Court (not the judgment creditor) prepares the warrant of execution based on a praecipe (a type of application form) for a warrant of execution completed by the judgment creditor and handed to a counter clerk at the Court's main office.³⁶ In the Perth Local Court the practice is for the counter clerk to obtain the file for the action and do a general check of the praecipe, although he does not check the correctness of the figures in it. If the counter clerk is satisfied that the praecipe can be

³² *Rules of the Supreme Court 1971 (WA)* O 47 r 6(3).

³³ *Rules of the Supreme Court 1971 (WA)* O 47 r 6(4).

³⁴ The information in this paragraph was supplied to our research officer by the Court Orders Co-ordinator during an interview in September 1997.

³⁵ Although, of course, the writ is only valid for a year unless first renewed: above, para 1.24.

³⁶ Praecipies can also be lodged by post.

lodged he makes a notation at the foot of the praecipe setting out the precise time of the application. The file then goes to an officer in a different part of the Court building who does a detailed check of the praecipe. If the officer is satisfied with the praecipe, it passes to a typist who enters the details from it onto a template in a computer system and the completed forms, the form 103 notice accompanying all warrants of execution against goods and land and the form 104 warrant of execution against goods and land of execution debtor, are then printed out. However, if there is a significant error such as an undercharging of court fees,³⁷ a payment in reduction of a debt which has apparently not been credited or no proof of service of the summons when the praecipe has been accompanied by an application for default judgment, the praecipe is not passed to the typist and the Court asks in writing for the problem to be rectified or clarified.³⁸ Printed forms 103 and 104 then go to a warrant checker who makes sure the typist has keyed in all the information from the praecipe. The warrant checker enters details from the warrant including the date of application in the Court's record and minute book. Afterwards the file goes to an assistant clerk of the Perth Local Court or the clerk of the Court who signs the warrant. The clerk inserts the date on which he or she signed the warrant. He or she also writes this date, which constitutes the date of issue, in the Court's record and minute book. If the warrant of execution is to be sent to the clerk of another Local Court so that that clerk can issue it to the bailiff of his Court to be executed,³⁹ the warrant is placed in a pigeon hole allocated to that other Local Court in the main office of the Perth Local Court. Later, another officer envelopes the papers in this pigeon hole and takes the envelope to another part of the Court from where they are posted. Warrants to be executed by the bailiff of the Perth Local Court are placed in a pigeon hole in another part of the main office and he calls each day to collect these and other papers. He signs a receipt book for each document.

6.28 If the warrant of execution is to be against land as well as goods, the judgment creditor will have completed a statement addressed to the Registrar of Titles on the back of the praecipe describing the land sought to be affected by the warrant, the name of the person in whose name the land stands in the register at the Department of Land Administration, the name of the person whose interest in the land is sought to be affected and where the land is situated. The Court photocopies the memorandum and attaches a photocopy to the back of forms 103 and 104 after they have been printed out.⁴⁰ The Court automatically issues a certified copy of the warrant of execution to the judgment creditor if the statement addressed to the Registrar of Titles has been completed.

³⁷ This can happen when the praecipe has been posted in.

³⁸ This holds up the issue of the warrant but the number of instances when it occurs was described by the Acting Manager of the Perth Local Court Registry in an interview with a research officer of the Commission as being 'fairly low.'

³⁹ Under s 135 of the *Local Courts Act 1904* (WA), when a warrant of execution has been issued, the clerk of the court may send the warrant to the clerk of the local court held nearest to the place where the person against whom it is issued, or any of his property, then is, requiring execution of the warrant. The clerk of the court to which the warrant is sent is to seal and stamp it with the seal of the court, and issue it to the bailiff of his court.

⁴⁰ The memorandum addressed to the Registrar of Titles attached to the certified copy will later be signed by the judgment creditor and constitute the statement under section 133 of the *Transfer of Land Act 1893* (WA): See Appendix 1.

6.29 The Perth Local Court's target is to have warrants of execution available to be picked up by its bailiff or to be posted to other clerks, as the case might be, five working days after application for the warrant is made to the Court. It could take less than five days if the number of applications falls off for a time. On the other hand it could take an additional five working days if there is a rush of applications or the team dealing with applications for warrants of executions is temporarily reduced in number for any reason.

6.30 Where a warrant of execution has been issued out of another Local Court and is sent to the clerk of the Perth Local Court so that it can be issued to the bailiff of the Perth Local Court,⁴¹ details of the warrant are entered in a register book at the Perth Local Court. It is placed in the Perth Local Court bailiff's pigeon hole. The bailiff picks it up from here and signs the register book as an acknowledgment of his receipt of the warrant.⁴²

Procedure in the District Court

6.31 The District Court has 12 registries in Western Australia. A writ of execution is issued out of the registry for the action concerned.⁴³ As in the Supreme Court, the judgment creditor prepares the writ and lodges two copies at the registry. An officer of the Court at the registry concerned checks that the judgment has been drawn up and entered and that the amounts and interest rate shown in the writ are correct. He or she then seals the writ and completes and signs a statement on the writ setting out the precise time and date the application was made for the writ for the purposes of section 86A of the *District Court Act 1969 (WA)*.⁴⁴ The sealed copy of the writ is then placed in the pigeon hole for the judgment creditor's solicitor at the registry to be collected by the solicitor. The second copy goes on the court file.⁴⁵

6.32 The senior registry officer at the Court's Perth registry who is responsible for the checking and sealing of writs of execution has told our research officer that the registry's target is to issue a writ of execution within two days of it being handed in at the counter. Sometimes pressure of other work means that the writ will not issue until three days or four at the outside after it is handed in at the counter. The registry tries to accommodate a request that a writ issue quickly because it is urgent. It is left to the judgment creditor to deliver the writ to the District Court bailiff. The bailiff's address is 30 St George's Terrace Perth. There is no time limit within which the judgment creditor must get the writ to the bailiff. If the writ has issued from a country registry, the bailiff retains the writ in Perth but signs a warrant, directed to the assistant bailiff nearest to the address of the judgment debtor shown on the writ of execution, requiring him to execute the writ of *fi fa*. The certified copy of a District Court writ of *fi*

⁴¹ See above n 39.

⁴² The information on Local Court procedure was supplied to our research officer by the Acting Manager of the Perth Local Court Registry in September 1997.

⁴³ As to the place for the commencement of an action in the District Court, see ss 69 and 70 of the *District Court Act 1969 (WA)*. The locations of the registries of the Court are set out below n 58.

⁴⁴ See above para 6.11.

⁴⁵ Thus with the exception of the completion of the statement setting out the precise time of the application for the writ of *fi fa* the procedure is the same as in the Supreme Court: see *District Court Act 1969 (WA)* ss 56 and 87. The Supreme Court, however, has only one registry, which is in Perth.

fa, which must be lodged with the Registrar of Titles if the writ is to bind the land, is obtainable from the office of the District Court bailiff in Perth.

High volume of Local Court warrants compared with Supreme and District Court writs of execution

6.33 In considering whether the priority between competing writs and warrants of execution which is set out in section 86A of the *District Court Act 1969* (WA) should be retained or altered, it is relevant to look at the numbers of writs and warrants issued from the various courts. In 1999, 13,754 warrants of execution were issued out of Western Australia's Local Courts. Of these 8,835 were issued out of the Perth Local Court.⁴⁶ The Sheriff's office has informed us that in the same annual period, it received 369 writs for execution, nearly all from the Supreme and District Courts. The reason for the high number of Local Court warrants of execution issued out of the Court is not because the Perth Local Court is the closest Local Court to where the judgment debtors reside, but because many solicitors, mercantile agents and plaintiffs acting in person find Perth Local Court the most convenient to commence actions.⁴⁷

6.34 The large number of warrants of execution issuing out of Local Courts in Western Australia suggests it would be not uncommon when a writ of *fi fa* issues out of the Supreme Court or the District Court for there to be a competing warrant of execution issued at about the same time out of a Local Court. Our enquiries show that at least in the case of the Perth Local Court the time between application for the warrant of execution and receipt of the warrant by the bailiff will be longer than the time in which a judgment creditor could have a writ of *fi fa* issued out of the Supreme Court or District Court and delivered to the Sheriff or the bailiff of the District Court. The time difference could prejudice a judgment creditor if the priority point in the case of a warrant of execution was changed to the time of receipt of the warrant by the bailiff of the Local Court where a competing writ of *fi fa* is issued from the Supreme Court or the District Court. Even when the Perth Local Court meets its target of issuing the warrant in five days, if the warrant is to be sent to the clerk of another Local Court closest to where the judgment debtor resides, the warrant will not reach the bailiff until after it has been received through the mail by that other clerk and issued by him to the bailiff of his Court. It seems that part of the delay in the Perth Local Court could be avoided if the judgment creditor prepared the warrant of execution and the accompanying notice rather than the court, but entitlement to issue the warrant and the details including all amounts would still have to be checked. Because of the sheer volume of warrants of execution and the fluctuations in the workload in respect of warrants of execution, it is unrealistic to expect the Perth Local Court consistently to issue its warrants as quickly as the Supreme and District Courts can. As noted above, it can take up to 10 working days to issue a warrant of execution.⁴⁸

6.35 We do not agree with the Australian Capital Territory position where the priority point in the case of a warrant of execution is the time

⁴⁶ These figures were supplied to us by the Magistrates' Courts Management Group of the Ministry of Justice.

⁴⁷ In the metropolitan area alone there are five other Local Courts: namely Armadale, Fremantle, Joondalup, Midland and Rockingham. These five courts issued a total of only 2,752 warrants of execution in the year 1999.

⁴⁸ Above, para 6.29.

of its receipt by the bailiff,⁴⁹ mainly because warrants of execution in the civil jurisdiction of the Territory's Magistrate's Court are normally issued quicker than in the Perth Local Court, the number issued is a lot fewer and there is only one Magistrate's Court in the Territory and it has only one registry.⁵⁰ Instead, we propose that the priority point under section 86A of the *District Court Act 1969 (WA)* in the case of a warrant of execution issued out of a Local Court should remain as the time of the application to the clerk of the Local Court for the issue of a warrant of execution.

Judgment creditor not to be prejudiced by variations in times taken to process application for warrant of execution

6.36 By section 136 of the *Local Courts Act 1904 (WA)*, where more warrants of execution than one are delivered to a Local Court bailiff to be executed against the same person, he is to execute the warrants in the order of the times when application for the warrants was made to the clerk of the Local Court.⁵¹ If the rule was changed so that the bailiff should execute them in the order in which they are delivered to him, the judgment creditor who made application for the issue of a warrant of execution in a Court which takes several days to issue the warrant could be prejudiced. For example, if a judgment creditor applies for the issue of a warrant of execution in a Local Court which is able to issue it within two working days and the warrant is sent by the clerk of that Court to the clerk of the Perth Local Court because that is closest to the judgment creditor's residence, then it may be issued and received by the bailiff of the Perth Local Court before the bailiff receives a warrant of execution against the same debtor which had been applied for in the Perth Local Court at a time earlier than the application for the warrant of execution in the 'foreign' Local Court. Similarly in the reverse situation, a warrant of execution applied for in the Perth Local Court but sent to another Local Court could lose priority to a warrant issued out of that Court but applied for at a time later than the application in the Perth Local Court. In our view a judgment creditor should not be prejudiced because one Local Court takes longer to issue a warrant of execution than another. In these circumstances we propose that the present position that the Local Court bailiff is to execute the warrants in the order of the times when application for the warrants were made to the clerk of the Local Court should be retained.

Prejudice where judgment creditor delays delivery of writ to District Court bailiff

6.37 The fact that the priority point in the case of a writ of execution issued out of the District Court, where there is a competing Supreme Court writ and Local Court warrant of execution is the time of the application to the District Court for the writ, could at present operate in an unsatisfactory way. It is left to the judgment creditor to forward the writ to the District Court bailiff in Perth⁵² but the judgment creditor might, for one reason or another, delay delivery. The District Court bailiff will be unaware of the writ until he receives it and can do nothing about executing it until then. However, the judgment creditor has already secured a priority date, the date of application, against the competing writ of execution from the Supreme Court and the warrant of

⁴⁹ Above para 6.22.

⁵⁰ In September 1997, a Deputy Registrar of the Magistrates' Court in the Australian Capital Territory told our research officer that normally it is two to three working days between the application and when the warrant is ready to be taken by court staff to the bailiff (who is in the same building as the court), although it could be five days.

⁵¹ Above para 6.4.

⁵² Above para 6.32.

execution from a Local Court. Thus the judgment creditor under a writ of *fi fa* issued out of the Supreme Court could have paid the costs of a sale under the writ believing he or she was entitled to the proceeds only to find that a writ of *fi fa* issued out of the District Court and having priority over the Supreme Court writ is belatedly delivered to the District Court bailiff. Furthermore, if the writ of execution issued out of the District Court has priority over the Local Court warrant of execution but is only delivered by the judgment creditor to the District Court bailiff just before a distribution following a sale by the local court bailiff under the warrant of execution, the District Court bailiff's notification to the Local Court bailiff of his receipt of the writ⁵³ might reach the Local Court bailiff after a distribution has been made in ignorance of the District Court writ. However, an advantage of the present priority date is that the judgment creditor who has issued a writ of execution in a country registry cannot be prejudiced by the fact that time is taken up while the writ is in transit, with Australia Post or another carrier, to the District Court bailiff's office at 30 St Georges Terrace Perth.

6.38 Altering the District Court procedure so that a writ of execution is not returned to the judgment creditor after it is sealed but sent direct by the District Court registrar to the District Court bailiff would help mitigate the difficulties noted above.⁵⁴ In New South Wales where priority between competing writs of execution issued out of the Supreme Court and the District Court is the same as under section 86A of the *District Court Act 1969* (WA),⁵⁵ the District Court writ of execution is prepared by the Court's registrar and forwarded to the Sheriff's officer or bailiff without being returned to the judgment creditor.⁵⁶

6.39 In Western Australia, a District Court writ of execution can be the bailiff's authority to recover a very large amount of money or valuable property.⁵⁷ The District Court has 12 registries, 11 outside the metropolitan area of Perth.⁵⁸ There is always the possibility that a writ of execution dispatched by the registrar of a country registry with the intention of being delivered to the District Court bailiff could go astray. The burden of locating it falls on the District Court registry. We consider the responsibility of transmitting the writ of execution from the registry to the District Court bailiff should fall on the judgment creditor applying for the issue of the writ. In support of the more diligent claimant, we consider the point of priority in the case of a District Court writ of execution should be altered to the time of the delivery of the writ to the bailiff of the District Court. This would also have the effect of

⁵³ Above para 6.17.

⁵⁴ A separate provision could be enacted in the *Sale of Goods Act 1895* (WA) dealing with the question of when goods are bound by a warrant of execution issued out of a District Court: see above, para 2.9.

⁵⁵ *Judgment Creditors' Remedies Act 1901* (NSW) s 17.

⁵⁶ *District Court Rules* (NSW) Pt 34 r 5.

⁵⁷ The Court, for example, has jurisdiction in personal actions when the amount, value or damages sought to be recovered is not more than \$250,000 and in an action of ejectment to recover possession of land where the rent (exclusive of ground rent) does not exceed \$125,000 a year: *District Court Act 1969* (WA) s 50(1)(a) and (d). The Court has jurisdiction in all personal actions, without any limit on the amount sought to be recovered, making a claim for damages in respect of death or bodily injury: s 50(2).

⁵⁸ The 12 registries are at Perth (Central Law Courts Building 30 St George's Terrace), Albany, Broome, Bunbury, Carnarvon, Derby, Esperance, Geraldton, Kalgoorlie, Karratha, Kununurra and Port Hedland.

⁵⁹ *Hutchinson v. Johnston*, above n 1.

⁶⁰ Above, para 2.9.

clarifying whether, when the only competing processes are two District Court writs of execution, priority should be determined by the time of the application to the registrar or the time of the delivery of the writ to the District Court bailiff. As *Hutchinson v Johnston*⁵⁹ indicated, the relevant point in time is upon delivery of the writ to the District Court bailiff. This would bring priority in the District Court into line with that in the Supreme Court. It would also resolve the question as to whether, by virtue of section 26 of the *Sale of Goods Act 1895* (WA), goods are bound from the time of the delivery of the writ to the District Court bailiff or the time of the application by the judgment creditor for the issue of the writ.⁶⁰ It would be obvious that the former is the position. We propose to change the priority point in the case of a District Court writ of execution from the time of the application to a registrar for the issue of the writ to the time of the delivery of the writ to the bailiff of the Court.

Priority point for Supreme Court to remain as time of delivery of writ to Sheriff

6.40 The priority point for a writ of execution issued out of the Supreme Court, where there is a competing District Court writ and Local Court warrant of execution, is the time of the delivery of the writ to the Sheriff. The position is consistent with the common law principle that as between different execution creditors priority is determined by the precise time of delivery of the writ of execution to the Sheriff.⁶¹ It is also consistent with the stipulation in section 26 of the *Sale of Goods Act 1895* (WA) that a writ of execution binds the property in the goods of the execution debtor from the time when the writ is delivered to the Sheriff to be executed. The present position in the Supreme Court supports the more diligent claimant. We propose it should be maintained. Unlike the District Court, the Supreme Court has only the one registry. It is within walking distance of the Sheriff's office at 30 St. George's Terrace Perth.

Section 86A of the District Court Act 1969 (WA) and competing processes out of the District Court and a Local Court.

6.41 If the words in section 86A(1) of the *District Court Act 1969* (WA) are interpreted according to their grammatical meaning they do not cover the situation where the only competing processes are a writ of execution issued out of the District Court and a warrant of execution issued out of a Local Court.⁶² *In re Emms* decided that a competing writ of *fi fa* and warrant of execution issued out of the District Court and a local court respectively ranked for priority according to the dates of application. Although the case clearly states the law, we consider it should be made express in section 86A.

6.42 Later in this chapter, we propose that where the judgment debtor is the registered proprietor under the *Transfer of Land Act* of land, a lease, a mortgage or charge sold under a writ of *fi fa* or warrant of execution, a judgment creditor whose writ of *fi fa* or warrant of execution is binding should have priority to the proceeds of sale over a

⁶¹ Above para 6.3.

⁶² Section 86A is set out in full above para 6.11. The section was introduced into the *District Court Act 1969* (WA) by the *District Court of Western Australia Act Amendment Act 1970* (No 14 of 1970). Speaking of the clause which became s 86A, the Minister in his second reading speech said: 'It has been considered desirable to include a provision to determine priority of Supreme Court, District Court and Local Court actions. The *Local Courts Act* already includes provisions in regard to Supreme Court and Local Court matters': Western Australian Parliament *Parliamentary Debates* (1970) Vol 185, 304. The provisions of s 137 of the *Local Courts Act 1904* (WA) are included in s 86A of the *District Court Act 1969* (WA) and s 137 could be repealed. Section 137 deals with priority of execution issuing out of the Supreme Court and a Local Court.

judgment creditor whose writ of *fi fa* or warrant of execution is not binding at the time of the sale. If more than one judgment creditor's writ of *fi fa* or warrant of execution was so binding, priority should be determined by the time of the service of the writ of *fi fa* or warrant of execution on the Registrar of Titles.

Where writ or warrant cannot be registered under section 133 of the Transfer of Land Act 1893 (WA)

6.43 The question also arises as to how priority should be determined where the land is old system land or where the land is under the *Transfer of Land Act* but the judgment debtor only has an equitable interest in it. In paragraph 6.6 above, we referred to passages in Halsbury's *Laws of England* which suggested that where there are competing writs of *fi fa* in the Sheriff's possession, it would be the time of delivery of the writs to the Sheriff and not the time of registration of the judgment under the *Registration of Deeds Act 1856 (WA)* which would determine priority between them. We proposed that the *Registration of Deeds Act* be amended so that it no longer applies to judgments.⁶³ We also proposed that in the case of old system land a process of execution should not affect any land as to purchasers, mortgagees or execution creditors unless the process was delivered to the Sheriff or other officer for execution and a memorial containing prescribed particulars had been left with the Registrar of Deeds and Transfers who was to enter the particulars in a book.⁶⁴

6.44 We considered whether priority between writs or warrants of execution issued out of the same or different courts should be determined by the time of leaving the memorial with the Registrar of Deeds and Transfers, but decided against this approach. Because it is so rare for a process of execution to be issued against old system land, we considered that a departure from the general rules would not be justified. To clarify the position, we proposed that neither registration of the memorial nor of the process of execution under the *Registration of Deeds Act 1856 (WA)* was to affect priority as to the proceeds of execution where there are competing writs of execution or warrants of execution.

6.45 We made the above proposals with the intention that the general rules should apply. Thus, for example, where different execution creditors issue writs of *fi fa* against old system land out of the Supreme Court, priority between them will be determined by the date and time of delivery of the writ to the Sheriff.⁶⁵ Where the competing processes of execution are a writ of *fi fa* issued out of the Supreme Court and a warrant of execution issued out of a Local Court priority would be determined by reference to the criterion set out in section 86A of the *District Court Act 1969 (WA)*.⁶⁶

6.46 These general rules should also apply where the land is under the *Transfer of Land Act* or is land to which that Act applies, but the judgment debtor only has an equitable estate or interest in it.⁶⁷

⁶³ See above para 3.15.

⁶⁴ See above para 3.20.

⁶⁵ *Beath v Anderson*, above n 13; *Hutchinson v Johnston*, above n 1; *Drewe v Lainson*, above n 3.

⁶⁶ Above para 6.11.

⁶⁷ Above, para 3.33 and Ch 5.

Where writ or warrant can be registered under section 133 of the Transfer of Land Act 1893 (WA)

Date of registration as a possible solution

6.47 We have noted that where the judgment debtor is the registered proprietor under the *Transfer of Land Act* of land, a lease, a mortgage or charge, the point at which such interests are bound by a writ of *fi fa* or warrant of execution is when the Registrar of Titles is served with a copy of the writ or warrant of execution accompanied by a statement specifying the land, lease, mortgage or charge sought to be affected.⁶⁸ The writ or warrant ceases to bind the land, lease, mortgage or charge concerned unless a transfer on a sale under the writ is left for entry upon the register within four months of the service of the copy writ or warrant of execution.⁶⁹ In Western Australia, nearly all writs of *fi fa* and warrants of execution issued in relation to land can be registered under section 133 of the *Transfer of Land Act*. Where competing writs of *fi fa* or warrants of execution have been issued out of different courts (the Supreme Court, District Court and a Local Court), then according to *In re Emms*,⁷⁰ section 86A of the *District Court Act 1969 (WA)* determines their priority by the time of the delivery of the writ of *fi fa* to the Sheriff, the time of the application for the issue of the writ of *fi fa* to the District Court registrar and the time of application to the clerk of the Local Court for the issue of the warrant of execution and not by the time of service of copies of the writs or warrants on the Registrar of Titles.⁷¹

6.48 Shortly after the decision in *In re Emms*, Mr Staples, the then Sheriff of Western Australia, expressed concern to the Law Reform Committee about the effect of the decision. He believed that reckoning priorities between writs of execution over land by the times when writs were lodged with the Sheriff and applied for to the District Court registrar or the clerk of the Local Court, and not by the order of registration at the Titles Office, could lead to serious risks of sales and distributions taking place in ignorance of the existence of some other writ or warrant of higher priority. There would be no register for the Sheriff or bailiff to rely on to ensure distribution was to those entitled.⁷²

6.49 We understand that the risk of a distribution in ignorance of a writ or warrant of higher priority, where the land is outside the metropolitan area, is very low. In the country Local Court bailiffs are also Sheriff's officers and assistant District Court bailiffs and are normally aware of any competing writs or warrants of execution in their bailiwick.⁷³ However, the bailiffs for the six Local Courts in the Perth metropolitan area are not Sheriff's officers or assistant District Court bailiffs and there is a risk that they could be unaware of a competing writ of *fi fa* issued out of the Supreme Court or District Court.

⁶⁸ Above, para 2.35. The writ of *fi fa* or the warrant of execution must be issued out of one of the courts or under one of the Acts referred to above, para 4.40.

⁶⁹ Above, para 2.41.

⁷⁰ Above n 16.

⁷¹ Above para 6.8.

⁷² A judgment debtor's goods are usually located at or near his place of residence or business and must be seized by the Sheriff or bailiff before they can be sold under a writ of *fi fa* or warrant of execution. A judgment debtor's land may be located far from his residence or place of business and a physical seizure by the Sheriff or bailiff is not necessary. These are factors which increase the possibility of the Sheriff or bailiff being unaware of a competing warrant of execution or writ of *fi fa* in the case of land as compared with goods.

⁷³ There is, for example, the possibility that a District Court writ of *fi fa* might not be sent to the District Court bailiff for some months after it has been applied for (see above para 6.37) and this could lead to an incorrect distribution.

⁷⁴ Para 1 of their proposal which is reproduced in Appendix VII.

6.50 In their proposal Mr Shillington and Mr Staples submitted that, to avoid incorrect distribution through ignorance of a writ or warrant of higher priority, the priority of executions against land, whether the executions issued out of the same court or different courts, should be determined by the date of registration against the land of the writ of *fi fa* or warrant of execution.⁷⁴ Any writ of *fi fa* or warrant of execution of higher priority would appear on the certified copy of the certificate of title in the Sheriff's or bailiff's possession before sale. The following further arguments support the proposal —

- (i) At present, if the judgment creditor who registers his or her writ of *fi fa* or warrant of execution with the Registrar of Titles pays for the costs of a sale under the writ or warrant, he or she might not get costs back if another writ or warrant was first delivered to the Sheriff or applied for at the Local Court even though that writ or warrant was registered second with the Registrar of Titles. The second writ or warrant to be registered would have priority to the sale proceeds⁷⁵ and there may not be enough left over to pay the costs of sale.
- (ii) Under section 133 of the *Transfer of Land Act*, a writ of *fi fa* only binds the land when a copy of the writ is served on the Registrar of Titles.⁷⁶ Until this occurs, the ability of the judgment debtor to give clear title to a purchaser is not fettered by the writ.⁷⁷ If two writs of *fi fa* are issued out of the Supreme Court against the same land and the second of the writs to be delivered to the Sheriff is the first to be served on the Registrar of Titles, that service binds the land. If the land is sold by the Sheriff the judgment creditor under the writ which was first delivered to the Sheriff has the right to the proceeds. This is anomalous because if the judgment creditor under the second of the two writs delivered to the Sheriff had not served a copy of the writ on the Registrar, the land could have been transferred in the meantime by the judgment debtor and ceased to be an asset which could be sold under the writ.
- (iii) A transfer to the purchaser from the Sheriff or bailiff cannot be registered unless the writ of *fi fa* or warrant of execution is registered with the Registrar of Titles. The Sheriff or bailiff would not sell the land, lease, mortgage or charge until the writ or warrant is registered with the Registrar of Titles. The judgment creditor who first put the Sheriff or bailiff in a position where he can sell should get priority to the proceeds of sale. The more diligent creditor should have the advantage.
- (iv) If the time of delivery of the writ to the Sheriff or the time of application to the District Court or Local Court bailiff is the criterion of priority, judgment creditors searching the title might be misled. For example, if only one warrant of execution is registered, a judgment creditor might decide it is worthwhile registering a warrant of execution, although he or she would have decided otherwise had it been known that an unregistered

⁷⁵ Probably, this is also the case, even if the first writ to be delivered to the Sheriff was unregistered.

⁷⁶ Above, para 2.35.

⁷⁷ Above, para 2.36.

warrant of execution would have priority over his or her warrant of execution.

6.51 There would, however, be a problem with the suggestion made by Mr Shillington and Mr Staples where the second of two competing judgment creditors to deliver a writ of *fi fa* to the Sheriff was the first to serve a copy of the writ on the Registrar of Titles and the judgment debtor pays out the writ in full to the Sheriff before sale of the land. Although it would be possible to provide that the judgment creditor whose writ was paid should have priority, the money paid may have exceeded the proceeds of the sale of the land had it been sold by the Sheriff. It would be anomalous if that person was entitled to the excess in the light of the fact that he or she did not deliver the writ first to the Sheriff. There would be no satisfactory way of determining what this excess was. We think Mr Shillington's and Mr Staples' suggestion can only operate satisfactorily where the land, lease, mortgage or charge has been sold by the Sheriff under the writ of *fi fa* or warrant of execution.

6.52 The Chief Justice in his preliminary comments to us supported the concept that priority determined by the date of registration of the writ of *fi fa* or warrant of execution as being more consistent with the scheme of the *Transfer of Land Act*. In a working paper distributed in 1982, the Queensland Law Reform Commission considered the issue and took a similar view, concluding on balance that it was more consistent with the Torrens system of registration to make priority depend on the dates at which the writs are produced to the Registrar of Titles for registration.⁷⁸

6.53 However, the former Sheriff of Western Australia in his preliminary comments to us asserted that priority and right to the proceeds of a writ or other enforcement process should commence from the time of its delivery to the Sheriff or other officer responsible for enforcement of the process. The Court Services Division report *Civil Judgment Debt Recovery System* proposed that the process under which property can be seized and sold in order to satisfy a judgment debt should be known as a warrant of execution⁷⁹ and that the right to proceeds should be determined by priority according to the time of receipt of the warrant by the Sheriff.⁸⁰ That view was also expressed by Mr Richard Foster in his comments on the our Draft Report. We take the view that if the Civil Judgments Recovery System is implemented our primary concerns, with a priority system based on time of receipt by the Sheriff, will no longer exist. Hence we propose a contingency for the event that either the Sheriff does not become responsible for the execution of process under the proposed Enforcement of Judgments Act.

⁷⁸ Queensland Law Reform Commission, *Consolidation Real Property Acts*, (Working Paper No 25, 1991) 7 with respect to those Provisions relating to Writs of Execution, Bills of Encumbrance and Bills of Mortgage, and Caveats. As this was already the law in Queensland by virtue of the decision in *Peace v The Sheriff of Queensland*, above n 14, which was not followed in the Western Australian case of *In re Emms* (see above para 6.8), no reform was considered necessary by the Queensland Commission.

⁷⁹ Queensland Law Reform Commission, *ibid*, recommendation 17.

⁸⁰ *Ibid*, recommendation 31. The report recommended that the Sheriff should be responsible for the execution of process under a proposed Enforcement of Judgments Act and that that Act should provide that the Sheriff is an officer of the Local, District and Supreme Courts.

6.54 The practice of the Sheriff and District Court bailiff, after receiving a writ of *fi fa*, is to write to the Local Court bailiff in whose bailiwick the address of the judgment debtor as shown in the writ of *fi fa* is situated and ask for advice as to any unsatisfied warrants held by the bailiff in respect of the debtor. This commendable practice may not actually stop an incorrect distribution. For example, a writ of *fi fa* issued out of the District Court could have priority under section 86A as interpreted in *In re Emms* over a Local Court warrant of execution but only be delivered by the judgment creditor to the District Court bailiff just before a distribution on sale by the Local Court bailiff under the warrant of execution. Because of the short time available, the District Court bailiff's notice to the Local Court bailiff of his receipt of the writ might arrive after a distribution has been made in ignorance of the District Court writ. Furthermore, the land against which the Local Court warrant of execution has issued may be in a different bailiwick to that in which the debtor lives, in which case the warrant will be sent to the clerk of the court nearest to the land who will issue it to the bailiff of that court.⁸¹

Effect of implementing Court Services Division report

6.55 Part I of the Court Services Division report *Civil Judgment Debt Recovery System* recommended that the Sheriff of Western Australia should be responsible for the execution of process under a proposed Enforcement of Judgments Act. The Sheriff would be an officer of the Local, District and Supreme Courts with power to delegate his powers to others titled bailiffs. A bailiff within his bailiwick would execute the process of the Supreme Court, the District Court and the Local Court. Thus the risk of an incorrect distribution of the proceeds of an execution should be substantially reduced.

Costs of sale

6.56 At present, if the judgment creditor who registers his writ of *fi fa* or warrant of execution with the Registrar of Titles pays for the costs of the sale, he might not get those costs back if another writ or warrant of execution was the first delivered to the Sheriff or applied for at the Local Court.⁸² The same problem can also arise on a sale of goods under a writ of *fi fa* or warrant of execution. It is an unfair situation and should be remedied by legislation. We propose that where more than one writ or warrant against the land or goods of any person has issued out of only one of the Supreme Court, the District Court or a Local Court, and the expenses of sale have been borne by the judgment creditor in one of those writs or warrants who is not first in priority, then the proceeds of execution should be applied firstly in repaying the expenses of sale and secondly in accordance with their priority.

If Court Services Division report or the recommendation as to costs of sale are not implemented

6.57 Provided the proposals referred to above, namely, the Sheriff being responsible for the execution of process under the proposed Enforcement of Judgments Act and the recommendation regarding the costs of sale, are implemented, we consider the present system of determining priority between competing writs and warrants of execution should be retained.⁸³ If not, an alternative would be where a judgment debtor is the registered proprietor under the *Transfer or Land Act* of

⁸¹ See *Local Courts Act 1904* (WA) s 135. In any event, the writ of *fi fa* might not specify the situation of the land sought to be affected by the writ (as distinct from its Titles Office description).

⁸² See above para 6.52.

⁸³ With the exception that the point of priority in the District Court should be the time of delivery to the bailiff.

land, a lease, a mortgage or a charge and there is a sale under a writ of *fi fa* or a warrant of execution of that interest, a judgment creditor whose writ or warrant is binding the land, lease, mortgage or charge under section 133 at the time of the sale should have priority to the proceeds of sale over a judgment creditor whose writ or warrant is in force in respect of, but not binding the land, lease, mortgage or charge under section 133 at the time of the sale. If more than one judgment creditor's writ or warrant was so binding, priority between them should be determined by the time of service of the writ or warrant on the Registrar of Titles.

6.58 The above proposal would diminish the risk of an incorrect distribution by the Sheriff or a bailiff because a registered writ of *fi fa* or warrant of execution would have priority over an unregistered writ of *fi fa* or warrant of execution. Under the proposal unregistered writs of *fi fa* or warrants of execution would not be excluded from the distribution but they would not have priority over a registered writ or warrant. They could only share in the proceeds of the sale if those proceeds were more than enough to pay out the registered writs of *fi fa* or warrants of execution. Bearing in mind the cost of getting a writ of *fi fa* or warrant of execution registered at the Titles Office,⁸⁴ we conclude that complete exclusion of unregistered writs of *fi fa* or warrants of execution is not justified.

6.59 The proposal would mean that priority between competing writs of *fi fa* and warrants of execution would be determined by different times in respect of the proceeds of the sale of goods and the proceeds of the sale of land. For example, where the Sheriff executes against both goods and land under a writ of *fi fa* issued out of the Supreme Court, the proceeds of the sale of the goods would be distributed according to the order in which the writs were delivered to the Sheriff but in the distribution of the proceeds of the sale of the land the Sheriff would give priority to the judgment creditor who first served a copy of his or her writ on the Registrar of Titles.

6.60 At first sight this appears to create a difficulty where it is desirable, in order to obtain a higher price, to sell an asset combining realty and personalty, for example, a dairy farm or a business. The Sheriff could be forced to apportion the global proceeds between realty and personalty, possibly giving rise to challenges from the competing judgment creditors. However, the problem is only a theoretical one because in Western Australia, the Sheriff and bailiffs always attempt to seize goods first and only resort to selling a judgment debtor's land where the goods are insufficient to satisfy the amount due on the writ of *fi fa* or warrant of execution.⁸⁵ In practice goods and land are not sold together in one lot either by the Sheriff or bailiffs.

⁸⁴ The fee for registering a writ of *fi fa* or warrant of execution at the Titles Office is \$70 as of 1 July 2000.

⁸⁵ It seems that the reason for this approach lies in the fact that a Sheriff or 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. The financial loss to the judgment debtor will normally be greater if, for example, his house is disposed of at a Sheriff's or bailiff's auction than if goods are sold, particularly if the value of the house exceeds the amount of the encumbrances and the judgment debt. The Sheriff or bailiff is only entitled to seize goods that would be reasonably sufficient, if sold, to pay the amount due under the writ or warrant: *Gawler v Chaplin*, above n 21. If the house is sold when a sale of goods would have satisfied

6.61 We have already recommended that section 133 of the *Transfer of Land Act 1893* apply to writs of *fi fa* and warrants of execution, issued out of any court constituted under the law of Western Australia or any federal court constituted under the law of the Commonwealth of Australia.⁸⁶ To avoid the uncertainties which would otherwise exist we propose that the same approach should be taken in respect of our proposal that priority should be determined by the date of registration of the writ of *fi fa* or warrant of execution.

6.62 Section 95 of the *Fines, Penalties and Infringement Notices Enforcement Act* provides that, despite section 86A of the *District Court Act* and section 137 of the *Local Courts Act*, a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act* has priority over any other writ or warrant of execution against the property of the offender.⁸⁷ Earlier we stated that our recommendations were not intended to affect section 95.⁸⁸ We take the same position with regard to section 96 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* governing the application of the proceeds of a sale under a warrant of execution issued under that Act.⁸⁹ If the amendment to the *Transfer of Land Act* as proposed above is effected, it should be expressed to be subject to the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act*. This would mean that where the sale is under a writ of *fi fa* or warrant of execution (other than a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act*), the amount owed under the warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act* would be paid first from the proceeds and the surplus would be dealt with in accordance with the proposal. It would also mean that, if the Sheriff sold under the warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act*, the proceeds would be applied as indicated in section 96 of that Act and only the surplus would be dealt with in accordance with the above proposal.

the debt, the judgment debtor might claim that the sheriff or bailiff has failed to exercise reasonable care and is liable to him in damages.

⁸⁶ See above para 4.42.

⁸⁷ In above n 65, we said that the provisions of s 137 of the *Local Courts Act 1904* (WA) are included in s 86A of the *District Court Act 1969* (WA) and that s 137 could be repealed.

⁸⁸ Above para 6.10.

⁸⁹ These are summarised above, para 1.35.

CHAPTER 7

Other issues

Sheriff's difficulty ascertaining amounts owing to encumbrance holders

Sheriff has a duty to act reasonably on behalf of both judgment creditor and judgment debtor

7.1 At common law, the Sheriff or bailiff in selling land under a writ of *fi fa* or warrant of execution has a duty to act reasonably in the interests of the judgment creditor and judgment debtor to obtain a fair price.¹ The price need not necessarily be the market value of the land being sold.² One factor which usually operates to adversely affect the price is that it is only the judgment debtor's interest in the land which is being sold. For example, the sale will be subject to mortgages registered on the certificate of title³ and to statutory charges for outstanding rates, service charges and land tax.⁴ Another factor often adversely affecting the price on sale is that without the consent of the judgment debtor, the Sheriff or bailiff is unable to allow potential purchasers to inspect the land and the buildings on it.⁵ However, a Sheriff or bailiff has a duty to act reasonably with due regard to the interests of both sides. He can be liable in damages if he fails to exercise reasonable care.⁶

¹ *Owen v Daly*[1955] VLR 442.

² *Ibid*, 446.

³ *Transfer of Land Act 1893* (WA) 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 writ of *fi fa* or warrant of execution is served on the Registrar of Titles: *Transfer of Land Act 1893* (WA) s 133; above, para 2.39.

⁴ *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 Water Corporation no longer levies annual rates but annual service charges. They are a statutory charge on the land. Under the *Local Government Act 1995* (WA), a local government may impose a service charge on the owner or occupier of land to meet the cost of providing a prescribed service in relation to land: s 6.38. A service charge is a charge on the land except where it is imposed on an occupier of land who is not the owner: ss 6.42 – 6.43.

⁵ A right of entry has been given in the case of sale under a warrant of execution issued out of the Fines Enforcement Registry established under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA): s 91.

⁶ *Owen v Daly*, above n 1.

Sheriff has a duty to obtain a fair price

7.2 The extent of the duty to obtain a fair price was considered by Barwick CJ in *Anderson v Liddell*,⁷ an appeal to the High Court of Australia. 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 of the sale.⁸

Sheriff's knowledge of encumbrances is essential

7.3 The Sheriff or bailiff needs to know the amount owing to encumbrance holders and the amount outstanding for rates, service charges 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 at the auction for the debtor's interest is sufficiently high for him to be entitled to accept it. He must therefore make enquiries about these amounts.⁹ Furthermore, the Sheriff or bailiff is the person from whom prospective purchasers normally obtain information about the amount owing to encumbrance holders. Without this information, a potential purchaser could decide that the only sensible thing is either 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 boost 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.

Sheriff restricted by the Privacy Act 1988 (Cth)

7.4 There is, however, no legal requirement on a mortgagee, for example, to disclose to the bailiff the amount owing under the mortgage. Furthermore, where the encumbrance holder is a 'credit provider' under the *Privacy Act 1988* (Cth) ('*Privacy Act*') and the credit provider is a corporation,¹⁰ section 18N(1) of the *Privacy Act* prohibits the encumbrance holder disclosing the amount owing without the judgment debtor's consent which may not necessarily be given. The prohibition only applies to credit providers as defined under the *Privacy Act*, for example, banks, building societies and credit unions.¹¹ Where an encumbrance

⁷ *Anderson v Liddell*, above n 3

⁸ *Ibid*, 44-45.

⁹ Where liability under an encumbrance is not measured by a principal sum and interest but affects the price which could be obtained on sale of the land if the encumbrance did not exist, the Sheriff or bailiff will need to know the terms and details of the encumbrance.

¹⁰ Section 18N(10).

¹¹ *Privacy Act 1988* (Cth) s 11B.

holder will not provide the Sheriff or bailiff with the amount owing under an encumbrance, the Sheriff or bailiff may not be in a position to proceed further until the judgment creditor has the judgment debtor examined before the court and the relevant information is obtained under oath.

7.5 In their preliminary comments to us, both the Sheriff and the Deputy Commissioner of Titles referred to difficulties created by section 18N(1) of the *Privacy Act*. The Sheriff said he was frustrated by section 18N(1) in obtaining necessary details of money owed on registered interests particularly when the judgment debtor refused to authorise the credit provider to disclose information. The Sheriff suggested that when the writ of *fi fa* has been registered at the Titles Office, the credit provider should have to make the necessary information available at the Sheriff's request.

7.6 The Deputy Commissioner of Titles referred to the difficulty a judgment creditor can have in deciding whether to initiate a Sheriff's sale because of the *Privacy Act*. He said the amount to be paid to clear a mortgage is not a matter of public record. He cites one instance where a judgment creditor had been met with the response that due to the provisions of the *Privacy Act*, the mortgagee could not divulge the information.¹² The Deputy Commissioner of Titles suggested that once a writ of execution or a warrant of execution was registered at the Titles Office, the judgment creditor should be able to obtain advice as to the amount necessary to clear prior encumbrances.

7.7 The *Privacy Act* contains a number of exceptions to the prohibition imposed by section 18N(1). For example, section 18N(1)(g) makes an exception to the prohibition where:

- (g) disclosure of the report or information to that other person for the particular purpose is required or authorised by or under law.¹³

7.8 In Part 1 of the 1997 Report, *Civil Judgment Debt Recovery System*,¹⁴ the enactment of a law was proposed similar to section 18N(1)(g) to deal with non-disclosure. The Report recommended that the proposed Enforcement of Judgments Act¹⁵ should require encumbrance holders and rating authorities to provide the Sheriff with any information in their possession which the Sheriff required to carry out his duties to sell land under a warrant of execution.¹⁶ The Report also recommended that it should be an offence punishable by a fine

¹² The Deputy Commissioner of Titles said the same problem arises for a mortgagee who is not the holder of the first registered mortgage in reaching a decision on whether to exercise his power of sale.

¹³ Privacy Commissioner *Federal Privacy Handbook* (1992) para 7190, states:

Section 18N(1)(g) of the *Privacy Act* allows a credit provider to disclose consumer credit information if the disclosure is required or authorised by or under law. If a State land transfer act, for example, requires a credit provider to disclose consumer credit information in certain circumstances the credit provider could lawfully disclose in accordance with s 18N(1)(g) of the *Privacy Act*.

¹⁴ Court Services Division, Ministry of Justice *Civil Judgment Debt Recovery System* (1997).

¹⁵ Above para 6.18.

¹⁶ Above n 14, Part 1, recommendation 58.

for an encumbrance holder to refuse or fail to provide information to the Sheriff.¹⁷ We made a similar proposal based on disclosure allowed by section 18N(1)(g) in our Report, *Enforcement of Judgments of Local Courts*,¹⁸ but our recommendations were confined to warrants of execution issued out of Local Courts.¹⁹ As yet neither of the above recommendations has been implemented.

7.9 We propose that the existing difficulties be alleviated by the enactment of a law of the kind contemplated by section 18N(1)(g) of the *Privacy Act*. We consider the requirement to provide the information should not be dependent on a copy of the writ of *fi fa* or warrant of execution having been served on the Registrar of Titles under section 133 of the *Transfer of Land Act*. Such a stipulation would not cover situations where the judgment debtor only has an equitable estate in land under the *Transfer of Land Act*²⁰ or where his or her land is under the old system. We are of the view that the requirement should accommodate such situations. It would most appropriately be contained in the *Property Law Act 1969* (WA). The requirement could then be applied in respect of writs of *fi fa* or warrants of execution issued out of any court constituted under the law of the State of Western Australia.²¹

7.10 The Sheriff, bailiff or other officer should be able to make the request after he has received the writ or warrant but only while it is in force. It should be an offence punishable by a fine for the encumbrance holder to refuse or fail to provide the information to the Sheriff, bailiff or other officer.

7.11 The amendment we propose to the *Property Law Act 1969* (WA) would be a law similar to section 18N(1)(g) of the *Privacy Act*. In our view the requirement to disclose the information to the Sheriff, bailiff or other officer is justified.

7.12 For the purposes of the above discussion, 'land' should include any estate or interest in land.²²

¹⁷ Ibid, recommendation 59.

¹⁸ Law Reform Commission of Western Australia, Project No 16 Part II (1995).

¹⁹ We recommended that the *Local Courts Act 1904* (WA) should be amended to require encumbrance holders and rating authorities to provide the bailiff with any information in their possession needed to answer enquiries which the bailiff was required to make by the *Local Court Rules 1961* (WA) in carrying out his duties under a warrant of execution over land: recommendation 81. We recommended that it be an offence to refuse or fail to provide information to the bailiff with the penalty being a fine: recommendation 82. See also below n 22.

²⁰ See above, para 3.32 and ch 5.

²¹ See above, para 4.40. The proposed Enforcement of Judgments Act would apply to only the Supreme, District and Local Courts.

²² As explained above, para 7.3, it is important that potential purchasers know the amount owing to encumbrance holders and also the amount of outstanding rates, service charges and taxes. In our report, above n 18, we recommended that the *Local Court Rules 1961* (WA) be amended to require the bailiff to make certain enquiries including as to the present amount outstanding under any encumbrance shown on the certificate of title to the land and as to the daily amount of interest: recommendation 83. We recommend that the *Local Court Rules 1961* (WA) should require the bailiff on request from a prospective purchaser to disclose information which he had obtained and to disclose at the auction before calling for bids the information which he had obtained. We further recommended that the *Local Courts Act 1904* (WA) be amended to provide that no action should lie against a bailiff for any incorrect information furnished by him in good faith and after reasonable inquiry, pursuant to his obligations under the *Local Court Rules 1961* (WA) to disclose information obtained by him. We proposed that the obligation was only to enquire. Thus, if the enquiry was unsuccessful,

Priority conflict between warrants of execution under the Fines, Penalties and Infringement Notices Enforcement Act and the Metropolitan Water Supply, Sewerage and Drainage Act

7.13 Where there is a sale of land by the Local Court bailiff under a Water Corporation warrant, section 121 of the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA) (*Metropolitan Water Supply, Sewerage and Drainage Act*) gave the warrant priority over the proceeds of sale over any other writs of *fi fa* or warrants of execution issued against the land. Section 121 has remained in the *Metropolitan Water Supply, Sewerage and Drainage Act* since it was first enacted. The *Fines, Penalties and Infringement Notices Enforcement Act* provides in section 95 that a warrant of execution issued under that Act has priority over any other writ or warrant of execution against the property of the offender. There is an obvious conflict between the two Acts. In our opinion, because the *Fines, Penalties and Infringement Notices Enforcement Act* was enacted after the *Metropolitan Water Supply, Sewerage and Drainage Act*, when there is a sale under a warrant of execution issued under the *Metropolitan Water Supply, Sewerage and Drainage Act*, any warrant issued under the *Fines, Penalties and Infringement Notices Enforcement Act* must have priority over the proceeds of sale under a warrant issued under the *Metropolitan Water Supply, Sewerage and Drainage Act*.

7.14 However, there is nothing in the *Metropolitan Water Supply, Sewerage and Drainage Act* indicating the priority of a warrant of execution issued under that Act where a sale has taken place under a warrant of execution issued out of a Local Court under the *Local Courts Act 1904* (WA).²³ The *Metropolitan Water Supply, Sewerage and Drainage Act* could be amended so that the warrant issued under it ranks for priority in this situation according to the time of its issue. This would create something of an anomaly. On the one hand, if there was a sale under a Water Corporation warrant, then by virtue of section 121 of the *Metropolitan Water Supply, Sewerage and Drainage Act*, the Corporation's warrant would be entitled to priority over the other warrant. If the sale took place under that other warrant, priority would depend on whether the Water Corporation's warrant issued before application to the Court for the other warrant.

7.15 The *Metropolitan Water Supply, Sewerage and Drainage Act* should be amended to provide that despite section 86A of the *District Court Act 1969*, a warrant of execution issued under the *Metropolitan Water Supply, Sewerage and Drainage Act* has priority over any other writ or warrant against the property of the

the bailiff would have fulfilled his obligation to enquire and doubtless would not proceed further with the sale until the judgment creditor had had the judgment debtor examined before a magistrate.

²³ Where a writ of *fi fa* has issued out of the Supreme Court or the District Court in competition with the warrant of execution issued under the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA), it is not clear whether s 86A of the *District Court Act 1969* (WA) (set out above para 6.11) applies.

debtor except for a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act*.

7.16 We further propose that section 121 of the *Metropolitan Water Supply, Sewerage and Drainage Act* be amended so that the amount owed under a warrant of execution issued under the *Fines, Penalties and Infringement Notices Enforcement Act* will be paid out of the proceeds of sale before the costs in connection with the prescribed notices, the warrant and the sale and the money due to the Water Corporation are paid.

7.17 If the amendment to the *Transfer of Land Act* suggested in paragraph 6.58 above is effected, it should be expressed to be subject to the provisions of the *Metropolitan Water Supply, Sewerage and Drainage Act*.

7.18 A corresponding proposal has been made in the case of the *Fines, Penalties and Infringement Notices Enforcement Act*.²⁴

Warrants of execution under the Mining Act

7.19 Subject to the *Mining Act 1978* (WA) ('*Mining Act*'), a mining tenement may be sold, encumbered, transmitted, seized under a warrant or writ of execution, or otherwise disposed of.²⁵ The *Mining Act* provides for regulations to be made concerning the keeping of a register of mining tenements.²⁶ By regulation 106(1)(f) of the *Mining Regulations 1981*, a register is to be kept to record, among other things, a memorial of all dealings affecting a mining tenement. Dealings affecting a mining tenement must be registered.²⁷

7.20 Regulation 132 of the *Mining Regulations* makes specific provision for seizure of a mining tenement or an interest in the mining tenement under a writ of *fi fa* issued by the Supreme or District Court or a warrant issued out of the warden's court or any other court. In such cases, notice in a prescribed form must be given to the mining registrar and a copy of the writ or warrant must be attached to the notice. However there is no provision in the *Mining Act* equivalent to section 133 of the *Transfer of Land Act* on the binding effect of a writ or warrant on a mining tenement.

7.21 The question of when land was bound in the absence of an equivalent to section 133 of the *Transfer of Land Act* was considered in Chapter 3. Among them was a proposal that a process of execution should not bind land as to purchasers, mortgagees or execution creditors until delivery of the process to the Sheriff or bailiff and the registration of a memorial concerning the process of execution under the *Registration of Deeds Act* had

²⁴ See above 6.63.

²⁵ *Mining Act 1978*(WA) s 119(1).

²⁶ *Ibid*, s 162(2)(1).

²⁷ *Mining Regulations 1981* (WA) reg 110(1). It appears that the term 'dealings' is to be construed broadly. See M Hunt & M Lewis *Mining Law in Western Australia* (2nd ed, 1993) 195-196.

occurred. We consider that this proposal should be adapted to the circumstances of the *Mining Act*.

7.22 We propose that the amendments suggested in paragraph 3.20 be adopted in respect of the *Mining Act* subject to the following:

- (i) References to the *Mining Act* should be substituted for references to the *Property Law Act 1969* (WA);
- (ii) Registration should be in the register established under Regulation 106(1)(f) of the *Mining Regulations 1981* (WA) rather than the *Registration of Deeds Act*.

Abolishing the term ‘*feri facias*’

7.23 Except for the limited number of professionals who use the words ‘writ or *feri facias*’ or ‘writ of *fi fa*’ on a regular or daily basis, it is likely that most users of the justice system feel reluctant to try to master the pronunciation of these ancient Latin words. Others who try to pronounce the words and get them wrong may feel embarrassed over their error.

7.24 In paragraph 6.20 we refer to the Report, *Civil Judgment Debt Recovery System*, Recommendation 17 in Part 1 of which proposes that the process under which property can be seized and sold to satisfy a judgment debt should be known as a warrant of execution. We endorse that recommendation.

APPENDIX I

Relevant provisions of the Transfer of Land Act 1893

- s 53** (1) The Registrar shall register an instrument presented for registration in the order, and from the time, of its presentation.
- (2) Instruments purporting to affect the same estate or interest have priority as between each other according to the time of registration and not according to the date of the instrument, notwithstanding any actual or constructive notice.
- s 90** Notwithstanding section 53, on a transfer from a sheriff or magistrate of a local court being presented for registration it shall not be registered unless previously and within four months preceding the transfer being so presented a copy of the writ of fi. fa. or warrant of execution in pursuance of which such transfer purports to have been made shall have been duly served upon the Registrar for entry by him in the Register in accordance with section 133 of this Act.
- s 133** (1) No execution issued prior to or after the commencement of this Act shall bind charge or affect any land or any lease mortgage or charge; but the Registrar on being served with a copy of any writ of fieri facias issued out of the Supreme Court or out of The District Court of Western Australia or of any decree or order of such court accompanied by a statement signed by any party interested or his attorney solicitor or agent specifying the land lease mortgage or charge sought to be affected thereby shall after marking upon such copy the time of such service enter the same in the Register; and after any land lease mortgage or charge so specified shall have been sold under any such writ decree or order the Registrar shall on receiving a transfer thereof in an approved form (which transfer shall have the same effect as if made by the proprietor) enter such transfer in the Register; and on such entry being made the purchaser shall become the transferee and be deemed the proprietor of such land lease mortgage or charge. Provided always that until such service as aforesaid no sale or transfer under

any such writ shall be valid as against a purchaser for valuable consideration notwithstanding such writ was actually lodged for execution at the time of the purchase and notwithstanding the purchaser had actual or constructive notice of the lodgment of such writ. After the commencement of this Act no unregistered instrument document or writing and no equitable mortgage or charge by deposit or otherwise without writing affecting any land lease sub-lease mortgage annuity or other charge shall prevail against a sale by the sheriff under a writ of fieri facias unless a caveat in respect of such unregistered instrument document or writing or equitable mortgage or charge shall have been lodged with the Registrar in pursuance of the provisions of section 137 of this Act or the similar provisions of The Transfer of Land Act 1874, before the service of the copy of the said writ of fieri facias on the Registrar as aforesaid but in the absence of a caveat all the estate and interest in the land lease mortgage or charge as well as of the judgment debtor as of his unregistered purchaser transferee mortgagee or other person claiming through or under him shall be extinguished and shall pass to the purchaser by virtue of a transfer under this section. Upon production to the Commissioner of sufficient evidence of the satisfaction of any writ a copy whereof shall have been served as aforesaid he shall direct an entry to be made in the Register of a memorandum to that effect; and on such entry having been made such writ shall be deemed to be satisfied.

Every such writ shall cease to bind, charge, or affect any land lease mortgage or charge specified as aforesaid unless a transfer upon a sale under such writ shall be left for entry upon the Register within 4 months from the day on which the copy was served.

The Registrar may register a transfer under any writ or warrant of execution without requiring the production of the duplicate (if any) of the certificate of title or a Crown lease or any other instrument.

Provided that the Registrar shall give such notice of intention to register the transfer, at the cost of the transferee, and cause the same to be published, as in the case of the production of a duplicate certificate being dispensed with under section 74.

(2) This section as amended by the Transfer of Land Act Amendment Act, 1929, applies to transfers received by the Registrar before or after the commencement of that Act.

(3) This section applies to the sale, under a warrant of execution issued for the purposes of section 140 of the *Mining Act 1978* (WA) ("that section"), of land under the operation of this Act, as if -

- (a) a reference to a writ of *feri facias* issued out of the Supreme Court were a reference to a warrant of execution under that section;
- (b) a reference to a sale by the sheriff under a writ of *feri facias* were a reference to a sale under that section;
- (c) a reference to the sheriff were a reference to the person authorized under that section to sell property; and
- (d) a reference to a decree or order of the Supreme Court were a reference to an order of execution under that section.

APPENDIX II

Relevant provisions of the Fines, Penalties and Infringement Notices Enforcement Act 1994

PART 7 — WARRANTS OF EXECUTION

Division 1 — Preliminary

Interpretation	63.	In this Part - 'enforcement fees' means prescribed fees imposed in connection with proceedings under this Part; 'offender' , in relation to a warrant, means the offender in respect of whom the warrant has been issued; 'warrant' means a warrant of execution issued under Part 4 or Part 6; 'Sheriff' means the Sheriff of Western Australia.
Warrant has indefinite life	65.	Unless sooner cancelled, a warrant remains in force until it is executed or until the amount specified in the warrant and any enforcement fees are paid or, in the case of a warrant issued under Part 4, until an order to attend for work and development is served on the offender, whichever happens first.
Warrant of execution binds goods of offender	72. (1)	A warrant binds the property in the goods of the offender as from the time the warrant is received by the Sheriff. (2) A warrant does not prejudice the title to any goods of an offender acquired by another person in good faith and for valuable consideration, unless at the time that the person acquired title the person had notice that the warrant had been delivered to the Sheriff and was unexecuted.

- (3) In this section ‘goods’ includes all chattels personal other than things in action and money.

...

Division 3 — Seizure and sale of personal property

Interests of others **82.** If a person other than the offender has any proprietary interest in any seized personal property, that interest and that of the offender may be sold together if –

- (a) the Sheriff is of the opinion that such a course is desirable;
- (b) that person consents in writing; and
- (c) the Sheriff and that person agree in writing before the sale as to the division of the proceeds of the sale after payment of the expenses of and incidental to the sale and any attempted sale of the property.

...

Division 4 — Seizure and sale of land

Power to seize **88.** (1) Under a warrant the Sheriff may seize any land of the offender and may sell it to recover the amount owed under the warrant and the enforcement fees.

Seizure: how effected **89.** (1) Actual seizure of land before it is sold is not necessary.

- (2) Under a warrant, seizure of land is to be effected by the Sheriff lodging with the Registrar of Titles or the Registrar of Deeds and Transfers (as the case requires) —
 - (a) a memorial in the prescribed form describing the land and setting out the amount owed under the warrant and the enforcement fees owed; and
 - (b) a copy of the warrant.
- (3) The signature of the Sheriff on the memorial does not have to be attested.
- (4) In the case of land under the operation of the *Transfer of Land Act 1893* (WA), the Registrar of Titles, under that Act, must register or enter the memorial in the Register Book in respect of the land described.
- (5) In the case of land under the operation of the *Registration of Deeds Act 1856* (WA), the Registrar of Deeds and Transfers, under that Act, must register the memorial.
- (6) When a memorial is registered under subsection (4) or (5), the Registrar of Titles or the Registrar of Deeds and Transfers, as the case may be, must serve the offender with a copy of the memorial.
- (7) On the registration of a memorial under subsection (4) and until it is cancelled, the Registrar of Titles is prohibited from registering and from accepting for registration any instrument affecting any estate or interest in the land without the consent of the Sheriff.
- (8) On the registration of a memorial under subsection (5), any instrument affecting the land and lodged for registration after registration of the memorial and before cancellation of the memorial

is of no effect.

- (9) A memorial registered under this section has effect until it is cancelled under section 90.

- Cancelling memorials** 90. (1) The Sheriff -
- (a) may at any time cancel a memorial for good reason;
 - (b) if the warrant ceases to be in force, must cancel a memorial forthwith,
- by lodging a withdrawal of memorial in the prescribed form with the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires.
- (2) The Registrar of Titles and the Registrar of Deeds and Transfers must give effect to a withdrawal of memorial when it is lodged.
- Sale and transfer of land seized** 92. (1) Subject to this Division, a warrant has effect in respect of land of the offender as if the warrant were a writ of *feri facias* and the offender were a judgment debtor.
- (2) If land is sold under a warrant, a transfer or deed of conveyance of the land signed by the Sheriff shall, subject to the *Transfer of Land Act 1893*, give to the purchaser as good and sufficient an estate in or title to the land as the offender in respect of whom the warrant was issued has or can or may have in or to the land.

Division 5 — Interpleader

- Making a claim to property seized** 93. (1) A person ('the claimant'), other than the offender, who claims any property, or any interest in any property, seized under a warrant or any of the proceeds of the sale of the property, may give the Sheriff written notice of the claim.
- (2) The notice must describe the property claimed and set out the basis of the claim and must give an address for service for the claimant.
- Sheriff may admit or reject claim** 94. (1) The Sheriff may admit or dispute a claimant's claim.
- (2) If the Sheriff disputes a claim the Sheriff may apply for relief by way of interpleader -
- (a) if the property concerned is personal property (as defined in section 71), in the Local Court nearest to where the property claimed is situated; or
 - (b) if the property concerned is land, in the Supreme Court.
- (3) On an application under subsection (2)(a) a magistrate has the same powers as a Supreme Court Judge has on an application by the Sheriff in the case of property taken in execution under process issued by the Supreme Court.
- (4) Rules of court made under section 167 of the *Supreme Court Act 1935* or section 158 of the *Local Courts Act 1904* may deal with the practice and procedure relating to claims and applications for relief by way of interpleader.

Division 6 — Miscellaneous

Priority of warrant over writs etc.

95. (1) Despite section 86A of the *District Court of Western Australia Act 1969 (WA)* and section 137 of the *Local Courts Act 1904 (WA)*, a warrant (as defined in section 63) has priority over any other writ or warrant of execution against the property of the offender.
- (2) If there are 2 or more warrants (as defined in section 63) issued in respect of an offender, they have priority according to the time of receipt by the Sheriff.

How amounts recovered to be applied

96. (1) The Sheriff is to apply the money from the sale of property under a warrant ('the proceeds') in accordance with this section.
- (2) Firstly, the proceeds are to be applied in the payment of the expenses of, and incidental to, the sale and any attempted sale of the property.
- (3) Secondly, subject to —
- (a) any agreement made by the Sheriff with a person under section 82;
 - (b) any claim admitted by the Sheriff under section 94; and
 - (c) the rights or entitlements of a person, other than the offender, having an interest in the property sold, if that interest was registered under the *Bills of Sale Act 1899 (WA)*, the *Chattel Securities Act 1987 (WA)*, the *Transfer of Land Act 1893 (WA)*, the *Registration of Deeds Act 1856 (WA)*, or the Corporations Law, in respect of the property before it was seized by the Sheriff.

The proceeds are to be applied in the payment of the enforcement fees.

- (4) Thirdly, the proceeds are to be applied in the payment to the Registrar of the amount owed under the warrant.
- (5) Fourthly, the proceeds are to be applied in the payment of any surplus to the offender.
- (6) Enforcement fees recovered under a warrant are to be credited to the Consolidated Fund.
- (7) In subsection (3), 'registered' includes protected by means of a caveat lodged under the *Transfer of Land Act 1893 (WA)*.

Warrant may be satisfied at any time

97. (1) Despite any other provision in this Part, an offender may at any time before the sale of any property under a warrant, pay to the Sheriff the amount owed under the warrant and the enforcement fees owed.
- (2) When the amount owed under a warrant and the enforcement fees are paid, or recovered from the sale of property, the warrant ceases to be in force.

APPENDIX III

Relevant provisions of the Local Courts Act 1904

Magistrate to execute conveyance or transfer

- s 124 When the right, title and interests of a person of, to, or in any land is sold under a warrant of execution, the magistrate shall execute a proper conveyance, assignment, or transfer to the purchaser, which shall operate and be effectual as a conveyance of the estate, right, title, and interest of such person.

Application of section 133 of *Transfer of Land Act 1893*

- s 125 Subsections (1) and (2) of section 133 of the *Transfer of Land Act 1893*, shall apply to a sale under a warrant of execution issued under this Act, and those subsections and the schedules therein referred to shall, in relation to any such sale, be read as if the words 'warrant of execution issued out of a Local Court' were inserted in place of 'writ of *fiery facias* issued out of the Supreme Court', and as if the words 'bailiff of the Local Court' were inserted in place of the word 'sheriff'.

Time of applications for warrants to be entered

- s. 136 The precise time when an application is made to the clerk to issue a warrant of execution shall be entered by him in the execution book and on the warrant, and when more warrants than one are delivered to a bailiff to be executed against the same person he shall execute them in the order of the times so entered.

Priority of execution issuing out of Supreme Court and Local Court

- s 137 When a writ of execution against the lands or goods of a party to an action or other proceeding has been issued out of the Supreme Court, and a warrant of execution has been issued out of a Local Court, the right to the property seized shall be determined by

the priority of the time of the delivery of the writ so issued out of the Supreme Court to the sheriff to be executed, or the time of the application to the clerk for the issue from the Local Court of the warrant of execution, whichever is the earlier.

The sheriff shall, on demand, inform the clerk of the precise time of the delivery of the writ so issued out of the Supreme Court, and the clerk shall, on demand, inform the sheriff, or a sheriff's officer, of the precise time of the application to the clerk for the issue from the Local Court of the warrant of execution.

APPENDIX IV

Relevant Provisions of the Land Act 1933

Executions against land

- s 159** (1) The provisions of the *Transfer of Land Act 1893*, and its amendments, relating to executions against land are mutatis mutandis incorporated with this Act and shall apply to land held under this Act and not registered under the *Transfer of Land Act 1893*, or the *Transfer of Land Act Amendment Act 1909*, the words 'chief executive officer of the department' being read, in such provisions, in place of the words 'Registrar of Titles'.
- (2) On any transfer pursuant to a sale under a writ of fieri facias or warrant of execution, the lease or other instrument of title of the judgment debtor shall be called in by the chief executive officer of the Department; but, if not produced, its production may be dispensed with, and a duplicate thereof may be issued to the purchaser on payment of the prescribed fee.

APPENDIX V

Section 117 of the Supreme Court Act 1935 (WA)

Enforcement of judgments for recovery or payment of money

s 117 (1) Subject as hereinafter provided, and to the Rules of Court, a judgment for the recovery by or payment to any person of money may be enforced —

- (a) by a writ of *fiery facias* or other like process;
- (b) by attachment of debts due or accruing to the judgment debtor;
- (c) by an order charging stocks and shares;
- (d) by an equitable execution by means of a receiver or charging order supplemented, if deemed necessary, by an injunction restraining the judgment debtor or any other person from dealing with any property, or any interest therein;
- (e) by commitment under and subject to the *Debtors Act 1871* (WA);

and where the judgment or order is for payment to any person of money and the time for payment is limited by the judgment or order or by a subsequent order, such judgment or order after being duly served may also, by leave of the Court or a Judge, be enforced -

- (f) by writ of sequestration; or
- (g) by attachment in case of -
 - (i) default in payment of a penalty, or sum in the nature of a penalty;

- (ii) default by a trustee or a person acting in a fiduciary capacity, and ordered by the Court or a Judge to pay any sum in his possession or under his control:

Provided that in any case within this paragraph, the Court or a Judge may (subject to the next following proviso) grant or refuse, either absolutely or upon terms, any application for a writ of attachment, and any application to stay the operation of any such writ, or for discharge from arrest or imprisonment thereunder:

Provided also that no person shall be imprisoned in any case within this paragraph for a longer period than one year.

- (2) Subject to subsections (1)(e) and (g), all process of execution on a judgment or order of the Court for recovery by or payment to any person of money shall be directed against property real as well as personal and not against the person, except when otherwise provided by a law in force in this State.

APPENDIX VI

Commentators on the draft of this Report

Mr Richard Foster	Executive Director, Ministry of Justice
Mr Robert Lindsay	Acting Director, Legal Aid, Legal Aid Commission of Western Australia
Ms Ilse Petersen	Assistant Crown Solicitor, Crown Solicitor's Office
Mr Peter Smith	Midland Bailiff on behalf of the Metropolitan Bailiff's Association
Professor E I Sykes	Co-author of <i>The Law of Securities</i>
Mr Malcolm Whitely	Stipendiary Magistrate
The Director	Mineral Titles, Department of Minerals and Energy
Mr Douglas Soloman	Soloman Brothers, Barristers, Solicitors, Attorneys

APPENDIX VII

The proposal of Mr JE Shillington and Mr GT Staples

1. Provide that the priority of executions against land, whether the executions issued out of the same court or out of different courts shall be determined by the date of registration against the land of the writ of fieri facias or warrant of execution. Also provide that a writ that has ceased to bind the land can have no priority over any other writ. The amendments necessary to achieve this will include amendments to the *District Court of Western Australia Act 1969* (s 86A) and to the *Local Courts Act 1904* (s 137).

2. Incorporate in s 133 provisions by which -
 - (a) the period is extended to 6 months.
 - (b) an order may be made by the court out of which the execution issued extending the 6 months period for such further period as the court thinks fit, the order to be ineffective unless a copy is lodged with the Registrar of Titles **before** the expiration of the period (or extended period if a previous extension has been granted).
 - (c) notwithstanding (a) and (b), a writ that has been lodged with the Registrar of Titles is incapable of binding the land after 12 months from the date of issue or last renewal in the court from which it issued unless notice of its renewal in that court is lodged with the Registrar of Titles before the expiration of the relevant 12 month period.
 - (d) the lodging of further copies of the writ is prevented except for the purpose of (e) (ii) hereunder.

- (e) transfers presented pursuant to a writ are not deemed to be produced for registration unless -
 - (i) presented within the period or extended period or
 - (ii) accompanied by a copy of the writ together with the certificate of the Sheriff District Court Bailiff or Magistrate as the case may be that the sale took place within the period or extended period.
- (f) transfers produced for registration after the expiration of the period or extended period are subject to all interests notified on the Register Book at the time of presentation of the transfer.

3. Repeal section 90. The scheme is to provide for one lodgment only, except in the special circumstances of (e) (ii). It is unnecessary and confusing in a separate section of the Act to refer to the lodging of a copy in terms which suggest that further lodging is in order.

Such reference as is necessary to the fact that in certain circumstances transfers presented are deemed not to have been presented can better be incorporated in section 133 (see (e) above).

4. Provide that the judgment creditor is to be the applicant for any order under para 2(b) and that the application is to be served on the judgment debtor (registered proprietor) and also on any other person directed by the court. This would give any other judgment creditor the opportunity of making a similar application. Provide that an order shall not be made unless special circumstances are shown.

5. As mentioned above, these proposals require an amendment to s 86A of the *District Court of Western Australia Act 1969*. Supreme Court and District Court executions are governed by the same rules and statutory provisions (see sections 56, 87) and the same person now holds the positions of Sheriff of Western Australia and Bailiff of the District Court. For that reason, it would be convenient if s 86A were also amended to provide that, for the purpose of determining the priority of Supreme Court and District Court executions against **goods**, the relevant times are the times when the writs are delivered to the Sheriff and District Court Bailiff for execution. No amendment is necessary in relation to local court executions.

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