

## Writs and Warrants of Execution

### Terms of Reference

In 1976, the Commission was asked to review the law relating to writs and warrants of execution as they relate to the *Transfer of Land Act 1893 (WA)* (“*Transfer of Land Act*”) and to review the priority of writs and warrants of execution generally, including warrants of execution under the *Justices Act 1902 (WA)*.

### Background of Reference

Section 133 of the *Transfer of Land Act* provides that a writ of *fiery facias* is binding on land for a non-extendable period of four months. In 1971, a case came before the Supreme Court where the binding period of such a writ was likely to expire before the Court could schedule a trial and reach a decision.<sup>1</sup> The presiding judge suggested that a court issuing a writ of *fiery facias* should be able to extend the four-month period. This prompted the Attorney-General to refer the issue to the Commission for consideration.

Work began on the reference immediately but progress was sporadic, primarily because of the prioritisation of resources<sup>2</sup> and a perceived overlap with Project Nos 16(II)<sup>3</sup> and 55(III).<sup>4</sup> The Commission considered that there was a need for increased uniformity of enforcement of judgments and orders across civil and criminal courts. The Commission, the Attorney-General and the Crown Law Department discussed the possibility of the Commission receiving a general reference on enforcement procedures that would encompass Project Nos 16(II), 55(III) and 67. After lengthy deliberation, it was decided that the procedures of the Supreme and District Courts should be considered separately. In 1991, the Attorney-General confirmed that the Commission would not receive a broader reference and that work should continue on the existing references.

### Nature and Extent of Consultation

After some initial general consultation, the Commission received detailed preliminary submissions on the subject from the Chief Justice, the Sheriff of Western Australia and the Deputy Commissioner of Titles. Additionally, the Commission considered a report by the Court Services Division of the Ministry of Justice that recommended the introduction of unified legislation for the civil judgment debt recovery system.<sup>5</sup>

Due to the technical nature of the report a discussion paper was considered untenable, however, in November 1998, a draft report was circulated for comment. The draft report included a research summary examining the relevant statutory and non-statutory law, identifying issues and suggesting possible solutions. In response to the draft report the Commission received eight detailed submissions from various parties including the Executive Director of the Ministry of Justice, the Acting Director of Legal Aid, the Assistant Crown Solicitor, the Metropolitan Bailiff’s Association and the Department of Minerals and Energy. A proposal was also received from Mr JE Shillington and Mr GT Staples.

Publication of the final report was temporarily delayed to await completion of the *Review of the Criminal and Civil Justice System in Western Australia* (“Project No 92”),<sup>6</sup> so that it could be reconsidered in light of that project’s recommendations. The Commission submitted its final report to the Attorney-General in June 2001.<sup>7</sup>

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

2 This project was not given high priority status until 1992.

3 Law Reform Commission of Western Australia, *Enforcement of Judgments of Local Courts*, Project No 16 (II) (1995).

4 Law Reform Commission of Western Australia, *Enforcement of Orders of Courts of Petty Sessions*, Project No 55 (III) (1994).

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

6 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).

7 Law Reform Commission of Western Australia, *Writs and Warrants of Execution*, Project No 67 (2001).

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### Recommendations

After extensive review of the law in comparable jurisdictions and detailed consideration of submissions, the Commission made a series of recommendations, summarised as follows:

- There should be one unified civil debt recovery system for the Local, District and Supreme Courts.
- All Western Australian state courts should have simple common rules, forms and procedures in plain English for the recovery of civil judgment debts.
- There should be a single, simple, standard form of Application for Judgment Enforcement available with a simple booklet that outlines the court's procedures. The form should clearly identify parties, the relevant judgment, orders sought and any relevant facts.
- A judgment creditor should be able to seek and courts 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 any investigation of the judgment debtor.
- Courts should be able to make various orders and be able to rescind, vary or suspend any previous orders in aid of enforcement in response to the application of any party.
- The duration of orders for judgment enforcement by sale under s 133 of the *Transfer of Land Act* should be extended to eight months with provision for the court to extend this time limit if necessary. This involves amending s 133 of the *Transfer of Land Act* and repealing s 90 of the *Transfer of Land Act*.
- The Supreme Court should be empowered to order the removal of caveats. A caveator may not lodge a further caveat on the same, or substantially the same, grounds unless the caveator has the judgment creditor's consent.
- Certain provisions from the Imperial Judgments Acts of 1838, 1839, 1849 and 1855 as adopted by the *Imperial Acts Adopting Ordinance 1867 (WA)* should be repealed and the *Registration of Deeds Act 1856 (WA)* and *Property Law Act 1969 (WA)* should be amended to clarify the binding effect of an order for judgment enforcement by sale<sup>8</sup> and the priority point.
- All orders for judgment enforcement by sale shall be lodged with the office of the Sheriff of Western Australia who may delegate the order to a bailiff located in the region in which the goods or land to be seized are located.
- Where a judgment creditor is a registered proprietor under the *Transfer of Land Act* and that interest is sold under a judgment enforcement by sale, a judgment creditor whose order is binding under s 133 of the *Transfer of Land Act* at the time of the sale shall have priority to the proceeds of sale over a judgment creditor whose order is in force but not binding over the interest under s 133 *Transfer of Land Act*. If more than one judgment creditor's order is binding, priority should be determined by the time of service of the order for judgment enforcement by sale on the Registrar of Titles.

A comprehensive outline of recommendations may be found at pages 35–40 of the Commission's final report.

### Legislative or Other Action Undertaken

There has been no action taken to implement the Commission's recommendations.

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<sup>8</sup> This is the equivalent of writs and warrants of execution.

### Currency of Recommendations

The Commission's recommendations remain both current and relevant. The proposed unified civil debt recovery system complements recommendations made by the Court Services Division of the Ministry of Justice in its 1997 report and supports the recommendations of previous reports of the Commission, including those made in Project No 92.

### Action Required

Implementation of the Commission's recommendations requires amendment to, and repeal of, certain legislative provisions as specified in the final report. In order to ensure successful practical implementation of the recommendations, it is suggested that a simple booklet outlining the refined court procedures also be produced.

### Priority – High

This assessment is based upon the desirability of improving the effectiveness and efficiency in which writs and warrants of execution are utilised in this state. The law as it currently stands is archaic and unsatisfactory. Implementation of the Commission's recommendations will assist in ensuring that the court system is just, efficient, accessible to the wider community and able to deliver justice in a fair and timely manner.