

CIVIL JUDGMENTS ENFORCEMENT BILL 2003

EXPLANATORY MEMORANDUM

This Bill forms part of a legislative package that reforms the lower courts in this State and implements recommendations of the Law Reform Commission (LRC). Other Bills included in the package are the Magistrates Courts Bill 2003, Magistrates Courts (Civil Proceedings) Bill 2003, the Justices of the Peace Bill 2003, the Oaths, Affidavits and Statutory Declarations Bill 2003, the Courts Legislation Amendment and Repeal Bill 2003 and the Oaths, Affidavits and Statutory Declarations (Consequential Amendments) Bill 2003.

As a cross jurisdictional issue, the current system of enforcing judgments in the civil courts is seen to be inefficient and confusing to users, as legislatively there are separate Acts and rules governing the procedures in the superior courts and the lower courts. Not only are there inconsistencies between the rules, there are remedies available in one jurisdiction and not the other. Other provisions, whilst parallel, are not identical and remain open to varying interpretations. Some remedies are obsolete and the garnishee provisions in both jurisdictions are antiquated and ineffective.

The Sheriff, as an officer of the Supreme and District Courts, ensures consistency of practice in enforcement of superior court judgments. However, there are 35 Local Courts throughout the State issuing some 25,000 enforcement processes annually to 124 Local Court bailiffs. The independence of these Local Courts and bailiffs results in inconsistent interpretations and procedures.

The LRC of Western Australia has published two reports that effect civil judgment enforcement. In December 1995 it released the "*Report on Enforcement of judgments of Local Courts*", Project No 16 PART II, (the 1995 LRC Report). In June 2001 it released a report on "*Writs and warrants of execution*", Project No 67, (the 2001 LRC Report). Following the 1995 LRC Report the Court Services Division, Department of Justice also reviewed the civil judgment debt recovery system, and produced a report containing recommendations for legislative change, (the 1997 Court Services Report).

The 1995 LRC Report and the 1997 Court Services Report both recommended the introduction of legislation to create a unified civil judgment enforcement system together with a range of changes to improve efficiency, including a wider choice in enforcement options and an enhanced garnishee system.

The 2001 LRC Report recommends changes to the registration of warrants against land, competing priorities and removal of caveats from titles as well as abolishing antiquated provisions.

This Bill is the vehicle to implement the abovementioned recommendations and provide for a uniform system of enforcing the civil judgments of the Supreme, District and Magistrates Courts. The Bill also provides for the overarching role of the Sheriff and the appointment of bailiffs.

Part 1 - Preliminary

This Part contains the title of the Act, the relevant commencement provisions, definitions of terms used within the Bill and stipulates the courts to which the Bill applies.

Clause 1 Short Title

Citation of the Act.

Clause 2 Commencement

Clause 2 makes provision for the commencement of the Act to be by proclamation, as the various Acts in the reform package, together with subsidiary legislation, will need to come into effect simultaneously.

Clause 3 Interpretation

Clause 3 defines the terms in the Bill.

Clause 4 “Earnings,” definition of

This clause provides the definition of “earnings” for the purpose of the Bill.

This definition is based upon an employer/employee relationship, which was recommended in the 1995 LRC Report and makes it clear that it is only in respect of a natural person.

The definition is pivotal to proceedings taken under Part 4 Division 4 of the Bill which relate to the attachment of a debtor’s “Earnings”. This is described in current legislation as “Garnishee actions against Wages” but for the purpose of this Bill is referred to as “appropriation”.

The definition covers the normal wages or salary and includes fees, bonuses, overtime payments, leave loadings, payments in lieu of leave and extends to periodical payments of the nature of retirement pensions, severance pensions and workers compensation payments.

Payments received by a debtor that are of the nature of child maintenance payment are excluded from the definition as they are not for the benefit of the debtor. Pensions and benefits under the *Social Security Act 1991* (Cwlth) or *Veterans’ Entitlements Act 1986* (Cwlth) are excluded from the definition of earnings as they are non-attachable by virtue of provisions in those Acts.

Clause 5 Judgments to which this Act applies

This clause provides that the Bill applies to any judgment made in the civil jurisdiction of the Supreme, District or Magistrates Courts.

Consideration was given to extending the coverage to other tribunals and courts that exercise a civil jurisdiction such as the State Administrative Tribunal. It was preferred though that the current system should be maintained which allows for judgments of other courts to be registered for purposes of enforcement in any of the three courts mentioned in the clause and those judgments, for enforcement purposes, become judgments of the court in which they are registered.

Clause 6 Crown bound

This clause provides that the Bill is to bind the Crown.

This clause provides that if a judgment is obtained against the Crown, the Crown receives no special treatment above and beyond any citizen. The clause also treats the Crown, as it does any other citizen, for the purposes of recovering moneys owed in the capacity as a creditor.

Clause 7 Common law writs etc. and rules, application of

Subclause 1 abolishes certain common law writs. This is in keeping with recommendations in the 1995 LRC Report. Some writs have been abolished as they were antiquated and seldom, if ever, used. Others have been re-named to promote plain English and to reflect the enforcement processes included in this Bill.

Subclause 2 provides that common law rules, which are substantially similar to an order made under the Bill, continue to apply to the extent they are consistent with the Bill. This ensures that the rules that have been developed by courts and judges and embodied in the common law, as opposed to statute law, will continue to be relevant and applicable to the enforcement processes contained in the Bill.

Part 2 - Interest on judgment sums

Clause 8 Interest on judgment sums

Subclauses 1 and 2 provide that interest is to be paid on any unpaid amount of a judgment sum and the rate will be prescribed by regulations made under the Act unless the court sets a rate of interest

Subclauses 3 and 4 provide that a judgment creditor may waive the payment of interest though a creditor must inform the court of the waiver if proceeding to an enforcement process.

Subclause 5 provides that interest is not payable on the judgments of the courts of another State or Territory as the payment of post judgment interest is not countenanced by the *Service and Execution of Process Act 1992* (Cwlth). The subclause also prohibits the payment of interest upon interest.

The clause is similar to section 142 of the *Supreme Court Act 1935* (WA).

Part 3 - Provisions applying to all judgments

Division 1 – Procedural matters

This Division contains general provisions relating to applications to a court and costs of proceedings.

Clause 9 Applying to a court under this Act

Subclause 1 provides that any application to a court in relation to a judgment must be made to the court and the registry that gave the judgment.

This subclause recognises that the Bill encompasses the Supreme, District and Magistrates courts and persons wishing to take enforcement action must do so in the court that gave the judgment and, in the case of the District and Magistrates courts where there are multiple registries, at the particular registry. In other words, if the Kalgoorlie registry of the District Court gave the judgment all enforcement action must be taken at the Kalgoorlie Court. The clause also contemplates the transfer of the “File” between registries so application can be made at another registry under circumstances such as parties changing their addresses.

Subclauses 2 and 3 allow for regulations to prescribe certain applications that may be dealt with by an officer of the court, rather than the court itself.

This provision is necessary for the efficient functioning of the courts and recognises much of the court’s business is dealt with by registry staff.

In the event that a party is aggrieved by a decision of an officer made in respect to lodging applications, subclauses 4 to 8 make provision for an expedient method of dealing with internal appeals.

Clause 10 Costs of proceedings under this Act

This clause allows the court to make an order as to who is to pay the costs of proceedings.

This clause recognises the ability to award costs is an integral part of the courts jurisdiction.

Division 2 – General

This Division contains general provisions relating to the date judgments take effect, when leave is required, limitation and action against partnerships.

Clause 11 When judgments have effect

This clause provides that a judgment has effect on the date that it is given unless the court provides otherwise and the date of judgment is not affected by the commencement of an appeal.

This clause reflects the accepted common law position that even though a judgment may have to be rendered into a written form, it takes effect from the time it is orally pronounced or delivered in writing.

Clause 12 Limitation period for enforcement

This clause provides that enforcement action on a judgment cannot be taken if 12 years have elapsed since the date of judgment.

The purpose of this clause is to ensure that finality is brought to the judgment creditor’s rights to recover the judgment debt.

Clause 13 Court’s leave to enforce needed in some cases

Subclause 1 provides that in certain circumstances leave of the court must be obtained before an order can be made to enforce a judgment.

Subclause 2 provides that on an application for leave the court may either grant the leave or order the trial of any issue that needs to be decided on any terms that are just.

Subclause 3 allows for the court to conduct inquiries in an action between a partnership and an individual member of the partnership.

The purpose of the clause is to allow the court to exercise a degree of supervision in circumstances such as issuing an enforcement process after more than 6 years have elapsed since the judgment was obtained, or if property the Sheriff wishes to seize is subject to a prior order for receivership.

Clause 14 Partnerships, enforcement against

This clause provides the circumstances and manner in which a judgment may be enforced against a partnership.

Special provision is made for the enforcement of judgments against a partnership because of their unique legal nature and the need to differentiate between the assets of the partnership and those of its individual members. This clause replaces a similar clause currently contained in section 28 of the *Partnership Act 1895* (WA).

The clause also provides that if either real or personal property of a partnership is subject to an enforcement order that order must include liberty for the other partner or partners to purchase or redeem the property.

Division 3 - Suspending judgments

This Division contains two clauses that provides for suspension.

Clause 15 Suspension order

Subclause 1 allows a person to apply for an order suspending the enforcement of a judgment.

Subclause 2 provides for the court to grant such an order including making such an order ex parte if it is just to do so. This will accommodate the making of interim orders until the other party can be heard. .

Subclause 3 requires that if the application is in respect of a monetary judgment there must be a means inquiry held first.

Subclause 4 provides that in cases involving non-monetary judgments the court can only make a suspension order if there are special circumstances.

Subclauses 5 - 6 provide for the court to grant such orders for any period and on terms and to make any necessary consequential or ancillary orders.

Circumstances may arise where enforcement action has been commenced and it is just that the enforcement be suspended. An example is where judgment was obtained by default in that the defendant did not respond to a summons but there is an explanation for

the default such as hospitalisation. Another example could be where the debtor was impecunious.

Subclause 6 provides that if the court makes a suspension order in relation to a monetary judgment the court also has the power to adjourn a means inquiry, order that a means inquiry not be held for a certain period or that a person who has been imprisoned by virtue of an enforcement order under this Bill be released from prison. The subclause also allows the court to make an order that prohibits or restricts a debtor from disposing of property whilst the suspension order is in force. This would accommodate the situation, for example, where a creditor was precluded from applying for a property (seizure and sale) order whilst the suspension was in force and that creditor had reason to believe that the debtor may dispose of property during the suspension period.

Clause 16 Suspension order, effect of

This clause provides a suspension order has effect according to its contents and precludes the making of enforcement orders whilst the suspension order is in effect. Any pre-existing enforcement orders cease to have effect or are limited by the suspension order.

The need for this clause is a consequential outcome of the previous clause.

Part 4 - Enforcing monetary judgments

There are various types of judgments such as judgments to do or refrain from doing an act, judgments relating to the possession of property and judgment requiring the payment of money from one party to another. This Part deals with monetary judgments.

The enforcement processes proposed by this Bill are as defined in clause 17 and their nature and purpose is identical with processes currently available in all Australian jurisdictions.

Division 1 - General

This Division contains an interpretation clause and provisions that are common to any enforcement of a monetary judgment.

Clause 17 Interpretation

This clause provides the definition of “enforcement order” for the purpose of the Bill.

Enforcement orders include orders for the payment of money by instalments or in a lump sum, appropriation of earnings or debts, seizure and sale of property and the appointment of a receiver.

Clause 18 Enforcement orders, applicability of.

This clause provides that with the exception of an earnings appropriation order, all other enforcement orders can be made against any person whether a natural person, a partnership or a corporation.

Because of the underlying employer/employee nexus an earnings appropriation order can only be made against a natural person

Clause 19 Enforcement orders, application for etc.

Subclause 1 provides that a judgment creditor may apply to the court for an enforcement order to satisfy a judgment debt.

Subclause 2 provides that in respect of an order seeking the payment of money by instalments or in a lump sum or the appropriation of earnings it is necessary that a means inquiry be first held as is provided for by clause 21.

Subclause 3 provides that in respect of attachment of debts, orders for seizure and sale of property and the appointment of a receiver it is not necessary to give the debtor prior notification of the enforcement order. Historically this has always been the case as if debtors had prior knowledge of a warrant against their goods they would have an opportunity to hide their assets.

Clause 20 Enforcement and other orders, making of.

Subclause 1 enshrines the self-help principle of enforcement, as enforcement action has to be initiated by the judgment creditor and not the court.

Subclauses 2 and 3 provide that the court can make an enforcement order, on terms together with any necessary ancillary or consequential orders.

Clause 21 Certain orders only available at or after a means inquiry

Subclause 1 provides that a time for payment order, an instalment order or an earnings appropriation order can only be made against a judgment debtor at a means inquiry or if there has not been a material change in the debtor's means since a means inquiry.

As these orders have greater potential to cause hardship to a debtor and, in the case of the time for payment order and the instalment order, a potential of imprisonment the court exercises a greater degree of supervision with respect to these orders and requires the examination of a debtor before the court prior to making any of these three orders.

Subclause 2 is pivotal as the court is to ensure that the order does not impose unreasonable obligations on the judgment debtor.

The purpose of this subclause is to provide a degree of protection to the debtor and is based upon a recommendation in the 1995 LRC Report.

Clause 22 Only one enforcement order at a time allowed in some cases

This clause provides that only one enforcement order can be in force at one time in relation to a single judgment debt unless the Act or regulations allow.

It would be oppressive if multiple orders could issue against a debtor in respect of the same debt.

Clause 23 Multiple enforcement orders, effect of

This clause provides for the priority that is to be given to judgment creditors where the judgment debtor has two or more judgment debts.

It is not an uncommon occurrence for debtors to have action taken against them for debts owing to more than one creditor or for multiple debts to the same creditor. It is therefore

necessary that there be a system to determine the priority and the right to proceeds between competing creditors.

Clause 24 Money recovered, judgment creditor's duties as to

Subclause 1 provides the manner in which a judgment creditor is to apply any money recovered which is firstly to the judgment sum, secondly to interest and lastly to enforcement costs that have been paid by the creditor.

The purpose of this clause is to first extinguish the judgment debt so interest no longer accrues and it is similar to Rule 124(2) of the SA Magistrates Court Civil Rules.

Subclause 2 allows the Sheriff or court registrar to request from the judgment creditor an accounting of the action and of all monies received from the debtor and how they were applied. The judgment creditor must provide an account within 7 days of the request or could be found guilty of a contempt of court.

The purpose of the subclause is to enable the court to exercise supervision in circumstances where it is required, such as when there is a disagreement between the parties as to the amount still owing.

Clause 25 Excess money recovered, consequences

This clause provides that if a judgment creditor receives an amount, which is more than the judgment debt, they hold such amount on trust for the judgment debtor.

Division 2 - Means Inquiry

The Means Inquiry is based upon two currently available enforcement processes. An examination in aid of execution is a process currently available in all three civil courts and comprises a comprehensive examination of a debtor to establish the nature of his or her assets. It is a process which is infrequently used. A judgment summons, which is only available in the Local Court, is a popular enforcement option and consists of an abbreviated hearing as to a debtor's ability to pay a judgment debt and has an outcome of an order for commitment to prison, which is generally suspended to enable the debtor to make periodic payments. The means inquiry replaces both these methods of enforcement and is seen as a major reform as it enables the creditor to choose from a range of enforcement processes depending upon the result of the examination of the debtor. For example, the inquiry may reveal that the debtor is the owner of unencumbered land; the creditor could then elect to proceed by way of an order for seizure and sale of property. Alternatively the inquiry could reveal that the debtor was in regular employment in which case the creditor might seek an earnings attachment order.

The concept of the Means Inquiry is based upon similar procedures contained in sections 4 and 5 of the *Enforcement of Judgments Act 1991* (SA)

Clause 26 Means inquiry, nature of

The clause describes the nature of a means inquiry and how a debtor's (who is a natural person) means to pay are determined by reference to income, necessary living expenses including dependants and liabilities. Noticeably the income of the family is taken into consideration so the court can establish to what extent a spouse or de facto partner contributes to the living expenses.

The inquiry also extends to determining the nature of property owned by the debtor that may be seized and sold by way of a property (seizure and sale) order.

This procedure ensures that a full inquiry is conducted and orders are tailored to meet the debtor's ability to pay.

Clause 27 Means inquiry, application for by judgment creditor

This clause allows a judgment creditor to request that an inquiry be conducted into the judgment debtor's means of satisfying a judgment debt, any earnings that may be appropriated and the existence of any property that may satisfy the judgment debt. It also provides that a request must include the names and addresses of persons who should be summoned to the inquiry including officers of a body corporate and partners of a partnership.

Clause 28 Means inquiry, application for by judgment debtor

This clause allows a judgment debtor to request that an inquiry be conducted into the judgment debtor's means of satisfying a judgment debt on the grounds that the judgment debtor is unable to pay. It also provides that when served with such an application the judgment creditor may request the court to summons other parties to the hearing.

Clause 29 Means inquiry, summons to attend

Subclauses 1 and 2 give the court the power to summons people to attend a means inquiry to give evidence or produce records, which is integral to the nature of a means inquiry. Persons other than the debtor may be summonsed, for example the officers of a company where they can provide information as to the financial circumstances of that company which is a judgment debtor.

Subclause 3 requires personal service of a means inquiry summons.

This means the summons to attend the means inquiry must be personally served upon the judgment debtor or other person as there is the potential that a warrant to arrest the person summoned could issue if the person fails to attend the means inquiry. Courts are loathe to issue arrest warrants unless they are satisfied that disobedience to their summons has actually occurred. The requirement of personal service eliminates any doubts as to whether or not the person was aware of their obligations to attend.

Subclause 4 provides that if a person does not attend, the court may issue a warrant to have the person arrested and brought before the court. This subclause mirrors existing provisions in all civil courts.

Subclause 5 provides that if a person does not attend, refuses to be sworn, answer any question or produce any document they commit a contempt of the court.

The powers to deal with contempt of court are provided for in the *Supreme Court Act 1935 (WA)*, *District Court of Western Australia Act 1969 (WA)* and the *Magistrates Court Bill 2003*.

Clause 30 Means inquiry, conduct of

Subclause 1 defines the term lawyer for the purpose of the section being a certificated practitioner within the meaning of the *Legal Practice Act 2003*.

Subclause 2 provides that the court is to determine the debtor's ability to pay and the extent of his assets and property.

Subclause 3 provides that if it is the debtor who is making the application on the grounds that he is unable to pay then the debtor must produce all relevant records and documents.

Subclause 4 provides, that in addition to the judgment creditor or a lawyer, an employee of the judgment creditor or the judgment's creditor's lawyer (someone who is not a qualified legal practitioner) may appear on behalf of the judgment creditor in a means inquiry conducted in the Magistrates Court.

The Magistrates Court deals with the enforcement of judgment of debts less than \$50,000, the vast majority of which will be for amounts less than \$2,000.

Currently the proviso to section 29 of the *Local Courts Act 1904* (WA), and section 76 of the *Legal Practitioners Act 1893* (WA) allow a judgment creditor to be represented by a solicitor's clerk or his own clerk at a "Judgment Summons" hearing. This type of hearing will be replaced by the means inquiry hearing and the default inquiry hearing proposed in Division 8 of this Part of the Bill. This clause continues the current practice.

Clause 31 Orders at or after a means inquiry

Subclause 1 provides that at a means inquiry the court may make an enforcement order which is defined at clause 17 of this Bill or a suspension order if the court is of the view that it is just to do so. Though the enforcement action is initiated by the judgment creditor it is the Court that makes the final determination as to what is the appropriate order to make against the judgment debtor.

This provides an additional safeguard as circumstances could arise where an order sought by a judgment creditor could be oppressive and the court could have a view that a different order was more appropriate.

Subclauses 2 to 4 provide that with respect to a time for payment order, an instalment order or an earnings appropriation order the court may make the order after a means inquiry has been conducted if the court is satisfied there has been no material change in the judgment debtor's means since the inquiry was held. If the judgment debtor does not attend in response to the court's summons the orders can be made in the absence of the debtor.

Division 3 - Orders for payment

This Division provides for two types of orders for payment.

Clause 32 Time for payment order

This clause allows the court to order that a judgment debt be paid immediately or before a set date.

Orders of this nature are frequently made by all courts especially Local Courts at a judgment summons hearing if the debtor is found to have the means to pay. This clause continues the current practice.

Clause 33 Instalment order

This clause allows the court to order that the judgment debt be paid by instalments.

This is the most common type of order made in Local Courts at a judgment summons hearing if the debtor is found to have the means to pay. This clause continues the current practice.

Division 4 - Appropriating a judgment debtor's earnings

Various provisions to recover a judgment debt by means of appropriating part of a judgment debtor's earnings are available in all Australian States and Territories other than Western Australia. Legislative reform to allow courts in Western Australia to utilise this enforcement option will significantly improve the ability to recover judgment debts and was a pivotal recommendation of both the 1995 LRC Report and the 1997 Court Services Report.

The provisions to appropriate a person's earnings are structured so as to give due protection of the debtor's privacy, employment rights and avoids placing unnecessary burdens on employers. Consideration has also been given to the level of the debtor's income that should be protected from appropriation orders.

As a prerequisite to making an order appropriating earnings it is necessary that an instalment order in respect of the judgment debt must previously have been made, disobeyed and cancelled. This caters for the preferred situation that a debtor should have the opportunity to make instalments voluntarily to avoid an earnings attachment order being made. As long as the debtor makes payments voluntarily he or she can avoid the earnings attachment order. This provision is based upon a recommendation in the 1995 LRC Report and has the effect of maintaining the debtor's privacy and only involving the employer as a last resort.

Clause 34 Interpretation

This clause defines "net earnings" and the term "third person" used in this Division.

"Net earnings" is essentially 'take home pay' being the total earnings less tax and deductions required by law. The term 'third person' is used in place of the term 'garnishee' as that term is considered outdated.

Clause 35 Earnings appropriation order

Subclauses 1 and 2 allow the court to order that a portion of the judgment debtor's earnings be paid to the judgment creditor.

Subclause 3 requires that as a prerequisite to making an order appropriating earnings it is necessary that an instalment order in respect of the judgment debt must previously have been made, disobeyed and cancelled.

Subclause 6 provides that the portion of the earnings is to be set by the court but it cannot exceed 10% of the judgment debtor's net earnings. Inquiries with other jurisdictions that use this enforcement process indicate that it is rare for an order of this nature to exceed 10% of the debtor's earnings. The clause therefore provide income protection to the

debtor as well as a degree of certainty that undue hardship will not be caused by the making of the order.

In the case where a judgment debtor has more than one employer (source of earnings) the 10% rule is capable of being applied as follows:

Earnings from employer A	= \$100 per week
Earnings from employer B	= \$ 50 per week
Net Earnings	= \$150 per week

In the above circumstances/example the court is able to make an order against either employer for the sum of \$15 per week. This is in the interest of all parties as only one third person will be incurring costs.

Subclause 7 provides that the order can also extend to a situation where the Crown is the employer. This gives effect to a recommendation of the 1995 LRC Report as the current law in Western Australia provides that debts owed by the Crown in the right of the State of Western Australia are not attachable. The Law Reform Commission was of a view that there was no cogent reason for maintaining the special position of the Crown in relation to garnishee proceedings.

Subclauses 4, 5 and 8 provide that only one earnings appropriation order can be in force against a debtor at the one time. This provides a further degree of protection to the judgment debtor

Clause 36 Earnings appropriation order, content and service of

This clause stipulates the content and relevant information that must be included by the court in an earnings appropriation order and requires service on the third party in accordance with the regulations.

The purpose of the clause is to ensure consistency prevails between courts and the orders made.

The clause also allows for different types of service to be prescribed depending on the status of the person to be served and differing situations.

Clause 37 Earnings appropriation order, effect of

Subclauses 1 - 2 provide that an earnings appropriation order takes effect according to its contents and when it is served on the person to whom it is directed.

Subclause 3 provides for the circumstances in which an earnings appropriation order ceases to have effect, being when the employer is notified by the court or the judgment creditor, when an objection that has been made under clause 41 is allowed, when the judgment debt is satisfied or when the court cancels the order.

Subclause 4 places an obligation upon the judgment creditor to notify the third person when the appropriation order ceases to have effect or when the judgment debt is satisfied and provides for a penalty of imprisonment for 12 months.

The purpose of the clause is to clearly inform the third person of their rights under the order, to inform the creditor of his obligations and to ensure consistency prevails between courts.

Clause 38 Third person's obligations

This clause requires a third person, who pays an amount to a judgment creditor under an earnings appropriation order or retains an amount for reasonable expenses, to give the judgment debtor written notice containing details of the amounts. A person who knowingly makes a false or misleading statement in the notice commits an offence and the clause provides for a penalty of imprisonment for 12 months

Apart from clearly defining the obligations upon the third person the purpose of the clause is to ensure that the judgment debtor is aware of the effect of and amounts deducted from his salary/wages with respect to the earnings appropriation order. In effect it is the debtor's receipt for payments made to diminish the judgment debt.

Clause 39 Third person entitled to expenses of obeying order

This clause provides that a third person who complies with an earnings appropriation order is entitled to the reasonable expenses of compliance and may retain these reasonable expenses from the judgment debtor's earnings.

This recognises the fact that the third person (employer) will have to expend some time and money in complying with the earnings appropriation order and it is only fair that the third person be reimbursed for this loss. It reflects a recommendation of the 1995 LRC Report.

Clause 40 Third person may object to appropriation order

This clause allows a third person who has been served with an earnings appropriation order to object to the order on the grounds that they are not liable, or ceased to be liable, to pay earnings to the judgment debtor. Notice of the objection must be served on the judgment creditor and the judgment debtor by the court.

This procedure is necessary to cater for those cases where the debtor ceased or ceases to be employed (or never was employed) by the employer to whom the order is directed.

Clause 41 Objection to appropriation order, consequences of

This clause provides the consequences of, and the mechanism for dealing with, a third party objection to an earnings appropriation order. The clause provides that a judgment creditor may allow a third person's objection. If the judgment creditor does not allow the objection within 7 days then the third person or the judgment debtor may apply to the court for an order that the objection be allowed.

Clause 42 Earnings appropriation order, failure to obey

This clause enables the judgment creditor to apply to the court for an enforcement order if a third person does not comply with an earnings appropriation order.

The purpose of the clause is to provide a sanction against third persons who ignore the court's order.

Clause 43 Earnings appropriation order, effect of obeying

This clause provides that any amount paid by a third person under an earnings appropriation order is not recoverable from the third person by the judgment debtor and the third person is released from the obligation to pay it to the judgment debtor. This applies even if the judgment that gave rise to the order is suspended, set aside or reversed.

This clause does nothing more than enshrine the common law principle with respect to garnishee proceedings, where payment of a debt (in this case “earnings”) is redirected by order of the court from the debtor to a creditor of the debtor, and such payment extinguished the liability of the garnishee (third person) to the debtor.

Clause 44 Employees, protection of

This clause provides protection to employees who are the subject of earnings appropriation orders. It stipulates that that if an employer treats an employee less favourably because an earnings appropriation order has been served then the employer commits an offence. This clause further provides that in certain circumstances the employer bears the onus of proving that their treatment of the employee has nothing to do with the earnings appropriation order.

A potential disadvantage of an earnings appropriation system is the risk it poses to a judgment debtor’s job security. Because of this it is necessary for the Bill to protect the employee against dismissal or other prejudice in his employment because of the appropriation order. The cause follows a recommendation of the 1995 LRC Report and is similar to provisions contained in the laws of other jurisdictions.

Division 5 - Appropriating debts owed to a judgment debtor

The 1995 LRC Report identified that a limitation to the effectiveness of existing garnishee proceedings in all three civil courts is that debts to be attachable must be of the nature of a “present” debt.

This Division implements a series of LRC recommendations in that the new provisions of this Bill allow for the appropriation of all debts whether present or arising in the future; debts in which the debtor has a joint interest, which is currently not attachable, and State Crown debts, which are also currently not attachable. This includes money held in banks and other financial institutions.

The procedure is similar to that used in respect of appropriation of earnings described in Division 4.

Clause 45 Interpretation

This clause defines the terms used in Division 5 and Schedule 1 of the Bill.

In respect of monies held in banks or similar institutions the definitions define the term “account” and use an all-encompassing definition of a “financial institution”.

As with clause 34 the term ‘third person’ is used in place of the term ‘garnishee’ as that term is considered outdated.

Clause 46 “Available debt”, definition of

This definition introduces the notion of an “available debt” which encompasses both present debts and debts that will arise in the future. Once an appropriation order has been made in respect of an “available debt” that debt then becomes an “appropriated debt”.

The definition excludes earnings, for which procedures under Division 4 are relevant, monies held by a court to the credit of a debtor and monies payable to the debtor as a trustee and in which the debtor does not have a beneficial interest, unless the judgment was given against the debtor in the capacity of that trustee.

Clause 47 *Workmen’s Wages Act 1898*, application of

This clause provides that Division 5 is subject to section 6 of the *Workmen’s Wages Act 1898* (WA).

Section 126 of the *Supreme Court Act 1935* (WA) currently protects workmen’s’ wages from attachment by reference to section 6 of the *Workmen’s Wages Act 1898* (WA) which provides a priority to workers wages over other debts and states:

“All moneys received by the contractor from the employer under or in, respect of the contract, work or undertaking shall not be liable to be attached or charged, except by the workmen as hereafter mentioned, until all wages due or to accrue due to the workmen have been fully paid and satisfied; and the contractor shall apply all such moneys in payment of the wages due and to accrue due to the workmen.”

Clause 48 Available debts, provisions about

This clause provides that Schedule One to this Bill has effect.

Clause 49 Debt appropriation order

Subclauses 1 - 3 allow the court to order, upon the application of the judgment creditor, that a person that owes an available debt to the judgment debtor pay the available debt or a portion of it to the judgment creditor instead.

Subclause 4 provides that the order can apply to more than one debt owed by the third person to the judgment debtor.

Subclause 5 provides that the order can also extend to a situation where the Crown is the third person. This gives effect to a recommendation of the 1995 LRC Report as the current law in Western Australia provides that debts owed by the Crown in the right of the State of Western Australia are not attachable. The Law Reform Commission was of a view that there was no cogent reason for maintaining the special position of the Crown in relation to garnishee proceedings.

Subclause 6 provides that the debt can only be subject to the one appropriation order.

Clause 50 Debt appropriation order, content and service of

This clause stipulates the content and relevant information that must be included by the court in a debt appropriation order and requires service on the third party in accordance with the regulations.

The clause also allows for different types of service to be prescribed depending on the status of the person to be served and differing situations.

The purpose of the clause is to ensure consistency prevails between courts and the orders made.

Clause 51 Debt appropriation order, effect of

Subclauses 1 – 2 provide that a debt appropriation order takes effect according to its contents and is also subject to Schedule 1 when it is served on the person or financial institution to whom it is directed.

Subclauses 3 and 4 set out the obligation of the third party, depending on whether the debt is existent or arising in the future, to pay within 7 days of service of the order or within 7 days of the debt becoming due and payable.

Subclause 5 provides that in the case of a financial institution, the debt appropriation order has the status of a demand for payment or withdrawal.

Subclause 6 provides for the circumstances in which a debt appropriation order ceases to have effect being when the third person is notified by the court or the judgment creditor, when an objection that has been made and allowed under clause 55, when the judgment debt is satisfied or when the court cancels the order.

Subclause 7 places an obligation upon the judgment creditor to notify the third person when the appropriation order ceases to have effect or when the judgment debt is satisfied and provides for a penalty of 12 months imprisonment.

The purpose of the clause is to clearly inform the third person of their rights under the order, to inform the creditor of his obligations and to ensure consistency prevails between courts.

Clause 52 Third person's obligations

This clause provides that if a third person is served with a debt appropriation order for a debt that is not due within 7 days or is not due until a condition is fulfilled then the third person is required to give written notice to the judgment creditor.

This clause also requires a third person, who pays an amount to a judgment creditor under a debt appropriation order or retains an amount for reasonable expenses, give the judgment debtor written notice containing details of the amounts. A person who knowingly makes a false or misleading statement in the notice commits an offence.

Apart from clearly defining the obligations upon the third person the purpose of the clause is to ensure that the judgment debtor is aware of the effect of and amounts deducted with respect to the debt appropriation order. In effect it is the debtor's receipt for payments made to diminish the judgment debt.

Clause 53 Third person entitled to expenses of obeying order

This clause provides that a third person who complies with the appropriation order is entitled to the reasonable expenses of compliance and may retain these reasonable expenses from the judgment debtor's earnings. The precise amount of expenses is to be contained in regulations.

This recognises the fact that the third person will have to expend some time and money in complying with the debt attachment order and it is only fair that the third person be reimbursed for this loss. It reflects a recommendation of the 1995 LRC Report.

The clause also provides a mechanism for the third person to recover expenses:

- If the whole of the debt is appropriated, the third person takes his expenses out of the whole of the debt and the judgment creditor gets a reduced amount (debt less expenses of third person).
- If only part of the debt is appropriated the judgment creditor gets the whole amount appropriated and the third person recovers his expenses from the unappropriated part of the debt.
- If the unappropriated balance of the debt is not sufficient to meet the third person's expenses then the third person takes the balance of his expenses from the appropriated amount and the judgment creditor receives a reduced amount.

Clause 54 Third person may object to appropriation order

This clause allows a third person who has been served with a debt appropriation order to object to the order on the grounds that another party has a prior claim, the debt does not exist and will not exist or the third person has an unsatisfied monetary judgment against the judgment creditor or judgment debtor. Notice of the objection must be served by the court on the judgment debtor, judgment creditor and any other person who has an interest in the appropriated debt.

This clause also stipulates that the third person is not liable to civil action for any information disclosed in the objection provided that the disclosure was reasonable in the circumstances.

Clause 55 Objection to appropriation order, consequences of

This clause provides the consequences of, and the mechanism for dealing with, a third person's objection to a debt appropriation order. The clause provides that a judgment creditor may allow a third person's objection. If the judgment creditor does not allow the objection within 7 days then the third person, the judgment debtor or any person who has a claim or an interest in the appropriated debt may apply to the court for an order that the objection be allowed.

Clause 56 Debt appropriation order, failure to obey

This clause enables the judgment creditor to apply to the court for an enforcement order if a third person does not comply with a debt appropriation order.

The purpose of the clause is to provide a sanction against third persons who ignore the court's order.

Clause 57 Debt appropriation order, effect of obeying

This clause provides that any amount paid by a third person under a debt appropriation order is not recoverable from the third person by the judgment debtor and the third person is released from the obligation to pay it to the judgment debtor. This applies even if the judgment that gave rise to the order is suspended, set aside or reversed.

This clause does nothing more than enshrine the common law principle with respect to garnishee proceedings, where payment of a debt is redirected by order of the court from the debtor to a creditor of the debtor, and such payment extinguished the liability of the garnishee (third person) to the debtor.

Clause 58 Money in court due to a judgment debtor, appropriation of

This clause provides a procedure for a judgment creditor to apply to a court where that court is holding monies to the credit of the judgment debtor and allows the court to make such an order.

The clause is necessary as it is not appropriate that a court itself should be subject to a debt appropriation order.

Division 6 - Seizing and selling a judgment debtor's property

This Division provides for the enforcement process known as a property (seizure and sale) order. This process replaces the warrant of execution that is provided for in Part VIII of the *Local Courts Act 1904* (WA) and the writ of fieri facias utilised in the superior courts and provided for in sections 118 to 125 of the *Supreme Court Act 1935* (WA).

The process has been renamed to better reflect its nature and this Division implements a range of recommendations proposed in the 1995 LRC Report and also in the 2001 LRC Report.

In most respects the new process is similar to the existing processes it replaces and directs the Sheriff to obtain the amount of the judgment debt by the seizure and sale of the debtor's land and goods.

Subdivision 1 - General

Clause 59 Property (seizure and sale) order

This clause provides that a judgment creditor may apply to the court for an order authorising the Sheriff to seize and sell as much as the judgment debtor's property as is necessary to satisfy the judgment debt.

Retention of this process in its new form is necessary as it is the most popular and effective of all enforcement options. There is no need to attend a means inquiry for the process to issue though this process could be the outcome of such an inquiry.

Clause 60 Property (seizure and sale) order, content and service of

This clause provides the content and relevant information that must be included by the court in a property (seizure and sale) order and requires service on the Sheriff in accordance with the regulations unless the court has given the order to the Sheriff.

The purpose of the clause is to ensure consistency between the courts and to also ensure that the Sheriff is provided with sufficient information to put the court's order into effect.

Clause 61 Receipt of order to be recorded by Sheriff

To facilitate the determination of competing priorities the Sheriff is required to record the date and time an order is received.

This requirement reflects current procedure.

Clause 62 Property (seizure and sale) order, duration of

Subclause 1 provides this order ceases to have effect upon satisfaction of the judgment debt, when 12 months have elapsed since the date of the order or if it is cancelled whichever is the earliest.

Under amendments proposed by the Courts Legislation Amendment and Repeal Bill 2003, section 133 of the *Transfer of Land Act 1893* is to be amended to provide that when a copy of an order is registered against the title to land, the Sheriff obtains a right of paramountcy to have any transfer he has effected from the sale of a debtor's interest in land registered in priority to any other transfer, providing the Sheriff's transfer is lodged within the "sale period". "Sale period" is a term defined in the *Transfer of Land Act 1893* being 6 months from the date on which the order was registered or any extension of that period.

Subclause 2 provides that if an order has been registered against the title to land to facilitate requirements under section 133 of the *Transfer of Land Act 1893* the duration of order will continue beyond its normal 12 month life up to the expiration of the sale period

This provision rectifies what was a confusing position when the sale period could be continuing though a warrant of execution could have expired. Creditors had to keep their eyes upon two possible differing expiries and this new provision simplifies the issue and effectively provides for an automatic extension of the order if it has been registered against land and would have expired during the sale period.

Subclause 3 provides for the return of property to the debtor or other party when the order ceases to have effect.

The purpose of the clause is to ensure consistency between the courts and is also necessary for the good administration of justice.

Clause 63 Determining a judgment debtor's interest in property

Unlike normal sales where a purchaser buys an entire asset or property and prior encumbrances are discharged at settlement, the Sheriff can only sell the interest that the debtor has in the property. In the case of real property, for example, the Sheriff estimates a value and deducts from that estimation the value of all other interests, which could be of the nature of claims in caveats and mortgages along with priority charges such as outstanding land tax and water rates. The debtor's interest, which the Sheriff actually offers for sale, is the estimated total property value less the value of other recognised interests and charges on the property having priority to the property (seizure and sale) order that has been registered against the title.

The following simple example provides an explanation:

Value of property under seizure (House and Land)	= \$250,000
Less encumbrances	Bank Mortgage = \$180,000
	Water rates = \$ 500
	Land tax = \$ 500 = <u>\$181,000</u>
Judgment Debtors interest	= \$ 69,000

In this example the Sheriff offers the judgment debtor's interest for sale and would expect bids in the vicinity of \$69,000. To obtain a clear title a successful purchaser would then have to pay out the encumbrances.

The above principle also holds for personal property.

Subclause 1 provides definitions of "interest" and "public authority" for the purpose of the section.

Subclauses 2 and 3 allow the Sheriff to request information relating to the interests of other persons in order that he may establish the value of their interests and thus determine the debtor's interest.

Subclause 4 provides that the Sheriff can request necessary information from a public authority.

Subclause 5 provides that it is a contempt of court for a person, other than a public authority, to refuse the Sheriff's request for information.

Apart from the obvious requirement to enable the Sheriff to determine a debtor's interest, the purpose of the clause is to legitimate the Sheriff's current practice of requesting necessary information from financial institutions and persons. The *Privacy Act 1988* (Cwlth) prevents disclosure of this necessary information unless expressly authorised by a law of a State.

Clause 64 Personal property to be sold in preference to real property

Subclause 1 provides that a debtor's land can only be sold if the Sheriff is of a view that there is insufficient personal property to satisfy the judgment debt

Subclause 2 states that the previous subclause does not prevent real and personal property being sold at the same time.

The purpose of the clause is to make the sale of land a "last resort" and the clause is similar to section 88 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 65 Only sufficient property to be sold

This clause places an obligation upon the Sheriff not to oversell.

The clause recognises existing practices and is similar to existing provisions contained in section 83 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 66 Seized property, Sheriff to determine fair value of

This clause complements the common law requirement for the Sheriff to sell for a fair and reasonable price by requiring the Sheriff to determine a fair value for the judgment debtor's saleable interest in the seized property irrespective of whether it is personal or real property. The clause also provides that the Sheriff may request information from the debtor to assist in reaching a determination or engage a valuer or the like.

The clause is similar to existing provisions contained in sections 81 and 86 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 67 Interest of others

This clause provides a procedure for the Sheriff to sell the interest of other persons when goods are seized that are jointly owned with another person or subject to an interest such as a right of lien. The clause also provides a procedure for the Sheriff to sell the interest of other persons when real property under seizure is jointly owned or owned in common with another person or subject to an interest.

The clause also provides for the consent of the interested party to be obtained and for prior agreement to be reached on how the proceeds of the sale are to be applied.

The clause recognises existing practices and is similar to existing provisions contained in section 82 of the *Fines Penalties and Infringement Notices Enforcement Act 1994* and in Order 82 Rule 3(2) of the Rules of the Supreme Court.

Clause 68 Sale to be advertised

Subclauses 1 and 2 provide that, with the exception of perishable property, there is an obligation on the Sheriff to advertise a sale of seized real and personal property. The subclauses also provide that with the exception of perishable property a sale of real or personal property must not be made within 7 days of the sale advertisement unless the judgment debtor consents.

The purpose of the subclauses is to allow the judgment debtor an opportunity to pay out the enforcement order and thus render the sale unnecessary. The provision is similar to one contained in section 120 of the *Supreme Court Act 1935* and Order 25 Rule 17 of the Local Court Rules 1961.

Subclause 3 provides that a sale of perishable goods does not require advertising and this allows the perishable goods to be taken to an auction house for the first available sale.

This subclause recognises existing practices and is similar to existing provisions contained in section 84 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 69 Place and manner of sale

Subclause 1 provides that a sale of seized personal property can be at the place of seizure or any place and the sale of real property can be on the property or any other place. All sales must be by public auction and the property is to be sold for a fair value.

Subclauses 2 – 4 provide an entitlement for the judgment debtor to be heard and for the court to make orders for alternative means of sale if a public auction is unsuccessful. The court may order:

- A sale by private agreement instead of public auction;
- A sale by public tender instead of public auction; and
- A sale for less than a fair price.

The subclauses also provide for the court to impose terms and to make any necessary ancillary or consequential orders.

Subclause 5 entertains the court setting a reserve price if it orders an alternative means of sale.

The clause is similar to existing provisions contained in sections 120 and 124 of the *Supreme Court Act 1935* (WA) and section 85 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 70 Transfers of property sold, Sheriff may sign.

There is a need for the Sheriff to be able to sign transfer documents when the Sheriff sells real property under seizure.

The clause recognises existing practices and is similar to existing provisions contained in section 121 of the *Supreme Court Act 1935*.

Clause 71 Purchasers of property sold, protection of

Subclause 1 defines the term “third party interest”.

Subclauses 2 and 3 provide that, with the exception of a saleable interest that is registered under the *Transfer of Land Act 1893*, when property is sold and notice has not been received by the enforcement officer of any third party interest to the property from anybody other than the judgment debtor the purchaser of the property receives good title to it. In addition the enforcement officer is not liable to any person for the sale unless the officer had notice or could have ascertained by making reasonable inquiries that the judgment debtor did not own the property or have an interest in it.

Subclause 2 excludes a saleable interest that is registered under the *Transfer of Land Act 1893* as section 133 of the *Transfer of Land Act 1893* sets up its own regime as to the recognition of third party interests.

Any sale by the Sheriff is always subject to third party interests, which were registered before the sale, admitted by a judgment creditor or upheld by a court in interpleader proceedings. Any sale by the Sheriff is also subject to the rights of a bona fide purchaser of property under seizure who had no knowledge that the Sheriff was in receipt of a property (seizure and sale) order.

Subclause 4 protects the rights of a claimant to take action against a person other than the enforcement officer or the purchaser.

This clause is similar to section 159 of the *Supreme Court Act 1935* (WA) and is modelled on section 16 of the *Enforcement of Judgments Act 1991* (SA). Its purpose is

to provide statutory protection to the Sheriff and also to the title of purchasers at Sheriff's sales.

Clause 72 Proceeds of sale, how to be applied

Subclauses 1 – 3 provide for sale proceeds to be firstly applied in satisfaction of expenses of the sale and then in payment of fees, costs and the Sheriffs charges and also includes the interest of other persons where that interest has also been sold.

These subclauses recognise existing practices and are similar to existing provisions contained in section 96 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*. With respect to sales of real property these provisions also implement a recommendation in the 2001 LRC Report to correct an anomaly where a debtor who was not in priority to right of proceeds paid for the sale expenses.

Currently there exist anomalies in determining the priority to the right of proceeds. Section 86A of the *District Court of Western Australia Act 1969* provides that the right to proceeds by competing creditors is governed purely by the priority given to the warrant of execution. That priority is determined, with respect to a process issued out of the Supreme Court, by its time of receipt by the Sheriff and, in respect of processes issued out of the District Court and the Local Court, by the time of application to the court.

Whether or not a creditor actually took the trouble of registering a warrant against land is irrelevant and monies realised from a land sale currently have to be apportioned in the priority order even if the priority creditor had taken no action against the land. This is an issue that was considered in the 2001 LRC Report and the provisions of subclause 4 are modelled on a LRC recommendation.

Subclauses 4 and 6 provide that in the case of a sale of personal property creditors are to be paid in order of priority, which is based on the time the Sheriff receives the orders. In the case of the sale of real property the right to proceeds between creditors is based on the time of registering the order against land (see subclause 7).

Subclause 5 provides for any surplus, after all creditors have been satisfied, to be paid to the judgment debtor.

Subclause 7 also implements a recommendation of the 2001 LRC Report by providing that priority to proceeds from the sale of land is to be governed by the time of registration of the order upon the title as opposed to a priority accorded by the time of receipt by the Sheriff. The subclause goes on to provide that any surplus remaining after satisfaction of the orders for the creditors who registered against land can then be applied to satisfy other warrants that the Sheriff is holding and that have not been registered against land.

Subclause 7 also provides that in the case of land that is not registered under the *Transfer of Land Act 1893* then the ordinary priority of first in time to lodge the order with the Sheriff applies. If registration is effected under the *Registration of Deeds Act 1856* priority is firstly to those creditors who have registered and secondly to the ordinary priority of first in time to lodge the order with the Sheriff.

Clause 73 Priority of orders, establishing

This clause provides for the priority that is to be given to judgment creditors where the judgment debtor has two or more judgment debts upon which enforcement orders are in the hands of the Sheriff.

It is not an uncommon occurrence for debtors to have action taken against them for debts owing to more than one creditor or for multiple debts to the same creditor. It is therefore necessary that there be a system to determine the priority and the right to proceeds between competing creditors and this clause provides for further methods of determining priority when other provisions of the Act cannot determine a priority.

Subdivision 2 – Seizing and selling personal property

This subdivision relates to the seizure and sale of personal property.

Clause 74 Property (seizure and sale) order, effect of

Subclause 1 defines the term “saleable interest” with respect to any legal or equitable interest that the debtor has in any personal property.

Subclause 2 sets out the Sheriff’s entitlements to seizure. This is necessary as it stipulates what actually can be seized and sold and reflects the current law that is found in sections 118 and 138 of the *Supreme Court Act 1935* (WA).

Subclause 3 provides that the Sheriff’s entitlement to seize applies irrespective of whether the interest is held jointly or in common with others.

Subclause 4 protects a bona-fide purchaser of property under seizure who had no knowledge that the Sheriff was in receipt of a property (seizure and sale) order. The subclause is modelled on similar provisions contained in section 125 of the *Supreme Court Act 1935* (WA).

Clause 75 Seizing personal property, powers enabling

It is an established common law principle that bailiffs, police and other officers of the state may only enter premises with the occupant's 'licence', or permission. We thus have a curious situation that bailiffs are entitled to enter, but only with the permission of the person least likely to give it. The root of this principle is the well known maxim- "an Englishman's home is his castle." This first appears in the landmark judgment on rights of entry- *Semayne's Case (1604)*, and subsequent decisions have continued to be justified by the fact that the "relative inviolability of the dwelling house" is a 'fundamental rule of common law'. These rights of course can defeat the rights of creditors seeking to recover debts due, but the courts have been prepared to countenance this inequitable treatment in order to preserve the peace and the security of the home. As it currently is, the common law provides that the Sheriff may not break to enter a dwelling house and furthermore cannot resist a debtor who bars entry to a dwelling house.

This clause reverses the common law situation and provides for the Sheriff to have a right of entry when enforcing a civil judgment. It is modelled on section 7 of the *Enforcement of Judgments Act 1991* (SA) and section 74 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Subclause 1 allows the Sheriff to use whatever force and assistance that is reasonably necessary when exercising the power of entry to locate the personal property of a debtor or a record of the title to property. The subclause allows the Sheriff to seize and remove such property or record if he finds it, print out or make copies of records, remove computers for no more than 7 days, operate a computer or require a person who has custody of the computer, record or property to provide copies or operate the computer. The subclause also requires the Sheriff to secure and safeguard the seized property or record.

Subclause 2 makes a differentiation between places that are a dwelling, which is a term defined in clause 3 of this Bill, and other places such as commercial properties, factories and garages. The subclause states that the powers of entry can only be exercised in respect of a non-dwelling at any time of the day and night and consent is not required. With a dwelling though the Sheriff must seek consent of the occupier or owner to enter the dwelling.

Subclause 3 overrides subclause 2 by providing that, with respect to a dwelling, if the owners consent is not given or the Sheriff cannot locate the occupier or owner that the Sheriff may utilise the powers of forcible entry detailed in subclause 1 without consent but can only do so between the hours of 9 a.m. and 5 p.m.

Subclause 4 provides a penalty of 12 months imprisonment for any person who has custody or control of a computer, record or property who disobeys a direction to print out or make a copy of a record or to operate a computer.

Clause 76 Property that cannot be seized and sold.

This clause stipulates that certain property, such as property held in trust, wearing apparel and household property of a kind and value prescribed by the regulations as well as property, not exceeding a value prescribed by the regulations, that is used by the judgment debtor to earn a living cannot be seized and sold.

The clause is necessary to ensure a degree of protection for the debtor and is similar to existing provisions contained in section 118 of the *Supreme Court Act 1935*, section 126 of the *Local Courts Act 1904* and section 75 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 77 Seizure notice to be issued.

Subclauses 1-2 provides that following a seizure of personal property the Sheriff must provide an inventory of the goods that have been seized to the debtor. The subclauses also specify the information that must be contained in the notice.

Subclause 3 provides that if the Sheriff releases any goods from seizure he must serve a notice of the release to any person who had been served with a notice of seizure.

The clause is necessary for the good management of the enforcement system, replicates existing procedures and is similar to a provision contained in Order 25 Rule 13 of the *Local Court Rules 1961*.

Clause 78 Custody of seized property

This clause requires the Sheriff to exercise custody as he sees fit. This could include removal to storage, appointing a “keeper” or some other form of security or allowing “walking possession” by leaving the goods with the debtor or another person and appointing that person as custodian.

Subclause 2 provides that providing the debtor consents, the Sheriff can exercise “walking possession” by leaving the seized goods with the debtor and in that case the inventory notice must also explain the obligations of custodian to the debtor. Those obligations include safekeeping, not moving the goods or giving custody to another person without the Sheriff’s prior consent.

The clause also provides that if the Sheriff appoints a custodian it is not to be taken that the Sheriff has abandoned the goods. The clause also requires that seized business records may only be retained by the Sheriff for no longer than 7 days and that stipulation does not apply to cheques and the like which have been seized.

The clause is necessary for the good management of the enforcement system, replicates existing procedures and is similar to existing provisions contained in section 79 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 79 Cheques etc., consequences of seizing

This clause provides a procedure to facilitate the Sheriff seizing cheques and demanding payment thereon.

The clause is similar to existing provisions contained in section 122 of the *Supreme Court Act 1935* (WA) and section 77 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Subdivision 3 – Seizing and selling real property

Clause 80 Property (seizure and sale) order, effect of

Subclause 1 defines the term “saleable interest”.

Subclause 2 provides that a property (seizure and sale) order extends to land, in which the debtor has a saleable interest, irrespective of whether it is registered or not under the *Transfer of Land Act 1893* and entitles the Sheriff to sell the debtors saleable interest in the land (refer to clause 63 of this Bill).

This provision reflects current practice and is similar to existing provisions contained in section 119 of the *Supreme Court Act 1935* (WA).

Subclause 3 provides that the Sheriff can seize or sell the debtor’s interest even if that interest is held jointly or in common with another or others.

This provision reflects current practice and is similar to existing provisions contained in section 138 of the *Supreme Court Act 1935* (WA).

Subclause 4 provides that it is not necessary for the Sheriff to actually seize or occupy the land before selling it. This provision reflects current practice and is similar to existing provisions contained in section 120 of the *Supreme Court Act 1935* (WA).

Subclause 5 reflects the common law position by stating that a monetary judgment does not create a charge over or interest in real property.

Subclause 6 complements the previous subclause by providing that the property (seizure and sale) order does not create a charge over or interest in real property.

Subclause 7 also reflects current practice and requires the registration of the order against the debtor's registered interest under the *Transfer of Land Act 1893* as a prerequisite to the Sheriff selling the debtors interest in land registered under that Act.

Subclause 8 protects a bona-fide purchaser of real property under seizure who had no knowledge that the Sheriff was in receipt of a property (seizure and sale) order and that, where the land is not under the operation of the *Transfer of Land Act 1893*, the order had not been registered under the *Registration of Deeds Act 1856*. The subclause is modelled on similar provisions contained in section 125 of the *Supreme Court Act 1935* (WA).

Subclause 9 complements the previous subclause by providing that subclause 8 does not apply to land that is under the operation of the *Transfer of Land Act 1893*.

Clause 81 Power of entry

It is an established common law principle that bailiffs, police and other officers of the state may only enter premises with the occupant's 'licence', or permission. We thus have a curious situation that bailiffs are entitled to enter, but only with the permission of the person least likely to give it. The root of this principle is the well known maxim- "an Englishman's home is his castle." This first appears in the landmark judgment on rights of entry- *Semayne's Case (1604)*, and subsequent decisions have continued to be justified by the fact that the "relative inviolability of the dwelling house" is a 'fundamental rule of common law'. These rights of course can defeat the rights of creditors seeking to recover debts due, but the courts have been prepared to countenance this inequitable treatment in order to preserve the peace and the security of the home. As it currently is, the common law provides that the Sheriff may not break to enter a dwelling house and furthermore cannot resist a debtor who bars entry to a dwelling house.

This clause reverses the common law situation and provides for the Sheriff to have a right of entry when enforcing a civil judgment. It is modelled on section 7 of the *Enforcement of Judgments Act 1991* (SA) and section 74 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Subclauses 1 and 2 allow the Sheriff to enter land subject to an order of the court for the purpose of performing his functions under the Act and to use whatever force is reasonably necessary. The Sheriff may also take prospective purchasers onto the property, conduct the sale on the property and remove personal property.

Subclause 3 makes a differentiation between places that are a dwelling, which is a term defined in clause 3 of this Bill, and other places such as commercial properties, factories and garages. The subclause states that the powers of entry can only be exercised in respect of a non-dwelling at any time of the day and night and consent is not required.

With a dwelling though the Sheriff must seek consent of the occupier or owner to enter the dwelling.

Subclause 4 overrides subclause 3 by providing that, with respect to a dwelling, if the owners consent is not given or the Sheriff cannot locate the owner or occupier that the Sheriff may utilise the powers of forcible entry detailed in subclauses 1 and 2 without consent but can only do so between the hours of 9 a.m. and 5 p.m.

Clause 82 Judgment debtor may be permitted to sell or mortgage real property.

Whilst the Sheriff is only empowered to sell the judgment debtor's interest in land, this clause provide, that with the Sheriff's approval, that the debtor may sell the land itself or mortgage the land and pay the proceeds towards satisfaction of the judgment debt.

Subclause 1 provides that if a property (seizure and sale) order has been registered against the land that the Sheriff may permit the debtor to sell or mortgage the land. The judgment creditor's consent is necessary.

Subclause 2 states the details and information that must be set out in the Sheriff's permit and subclause 3 allows the Sheriff to include conditions in the permit.

Subclause 4 precludes the Sheriff from selling the property whilst the permit is in force.

Subclause 5 provides a mechanism for the payment of deposits, sale proceeds or mortgage proceeds to the Sheriff. The subclause also provides that any deposits or monies paid to the Sheriff extinguishes any liability of the purchaser or mortgagee to pay those amounts to the judgment debtor. The Sheriff's consent is needed to register any mortgage or transfer arising from the mortgage or sale of the real property.

This clause implements a recommendation of the 1995 LRC Report and is similar to provisions contained in section 112 of the *New South Wales District Court Act 1973*.

Subdivision 4 – Interpleader

Currently there is provision for interpleader proceedings in all civil jurisdictions. The Sheriff seizes personal property that is in the apparent possession of the judgment debtor but circumstances can arise where those goods may belong solely to another party or another party may have an interest in them. It is not the role of the Sheriff to determine disputed ownership and if a party other than the debtor claims that seized goods are his or her property this subdivision provides a mechanism for the Sheriff to refer issues of disputed ownership to a court for resolution.

The interpleader procedure is also used to determine the interest of a party in circumstances such as where there may be a caveat on the title to land that has priority to the Sheriff's registration but which cannot be reduced to a monetary amount to enable determination of the judgment debtor's saleable interest. For example the caveat could be lodged to protect the interest of a spouse or de facto partner in proceedings pending before the Family Court.

Simply put the procedure is as follows:

- The Sheriff seizes property;
- Another party “the claimant” can claim the property;
- The Sheriff refers the claim to the judgment creditor;
- The judgment creditor may either admit the claim or dispute it;
- If the claim is admitted the Sheriff will release the property from seizure or withdraw;
- If the judgment creditor disputes the claim the Sheriff will refer the matter to a court for determination;
- If the court allows the claim the Sheriff will release the property from seizure or withdraw; and
- If the court dismisses the claim the Sheriff will continue with the enforcement action.

The following two clauses are similar to existing provisions contained in sections 93 and 94 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 83 Making a claim to property

Subclause 1 provides for a claimant to claim property that has been placed under seizure including property in respect of which the Sheriff has registered an order under the *Transfer of Land Act 1893*. The subclause also provides for a claim to be made on the proceeds of a sale.

Subclause 2 provides for the claim to be in writing and details the information that must be provided in a claim.

Subclause 3 provides for the claim to be referred to the judgment creditor.

Clause 84 Judgment creditor may admit or dispute claim.

Subclause 1 provides for a judgment creditor to admit or dispute a claim.

Subclause 2 provides for the Sheriff to apply to a court for determination and, in the case of real property provides that application may only be to the Supreme Court or the District Court as the Magistrates Court jurisdiction does not extend to determining issues of this nature with respect to the title to land.

Subclause 3 provides for the Magistrates Court and the District Court to exercise the same powers as the Supreme Court with respect to granting interpleader relief.

Division 7 – Receivers and special remedies

The appointment of a receiver is currently available in all courts in Western Australia. Receivership is the appointment of a person to receive the debtor’s interest when the ordinary process of law cannot reach that interest. It puts the receiver in the same position as the debtor to receive income or other money in respect to property, for example, a debtor’s rights to receive and collect rent. This Division will ensure uniformity of practice in the three civil court jurisdictions.

This division also includes a general set of powers modelled on recommendations of the Alberta Law Reform Institute and the Ontario Law Reform Commission and the approach

taken in Alberta's *Civil Enforcement Act 1994*. These powers allow courts to deal with enforcement against a judgment debtor's property where other methods of enforcement in this Bill will not or are unlikely to be successful.

The following clauses also reflect the recommendations of the 1995 LRC Report to appoint receivers in the Local Court.

Clause 85 Interpretation

This clause defines the terms "available asset" as used in this Division.

Clause 86 Appointing a receiver, injunctions etc

Subclause 1 provides that when an available asset cannot be appropriated or realised by other enforcement methods available in this Bill then the court may order the appointment of a receiver of the asset; order the judgment debtor or other person to deliver up the asset or do, not do or cease from doing any act that relates to the asset; prevent the disposal or any dealing with the asset and may also make any other order that facilitates the appropriation of the asset.

The court can determine the judgment debtor's interest in an asset or, in the case where a debtor is a partner, the judgment debtor's interest in partnership property or profits

Subclause 2 provides that any order of the court is subject to the following clause of this Part of the Bill.

Subclause 3 provides for orders under this Division to be made even if there is no other separate enforcement action taken.

Clause 87 Receiver, appointment of etc

Subclause 1 sets out the criteria the court must consider when deciding whether to appoint a receiver.

Subclause 2 provides that the receiver must be suitably qualified and agreeable to being appointed.

Subclause 3 provides that unless ordered otherwise by the court, the receiver may take custody and control of the available asset and subclauses 4 provides for the making of ancillary orders to facilitate the sale of the asset.

Subclause 5 provides for a range of ancillary orders that the court may make to facilitate the receivership and to provide for the receiver's fees.

Division 8 – Disobeying time for payment orders and instalment orders.

Provision for the imprisonment of debtors exists in the *Local Courts Act 1904* (WA). The current Local Court procedure is that a judgment summons will issue and the debtor will be examined as to their means to pay. If the Court is satisfied that the debtor had the means to pay, but refused or neglected to pay an imprisonment order may be issued for not more than 42 days. Provisions exist for the transfer of Supreme and District Court judgment debts to a Local Court to allow use of this procedure.

The 1995 LRC Report noted that the judgment summons process “*has become a procedure that is routinely used against any type of debtor where a warrant of execution would not likely be successful*” and that “*the judgment creditor’s intention is to use the section (process) in a coercive, not a punitive manner.*”

The 1995 LRC Report recommended changes to the criteria to be met before an imprisonment order could be made. This Division implements common law guidelines that an imprisonment order should not be made on the first examination, and follows LRC recommendations that the use of imprisonment in civil debt enforcement should be restricted to cases when debtors wilfully default in their payments.

The “wilful default” requirement is seen as somewhat nebulous and is perhaps not particularly helpful to a creditor or the courts as to what it actually means. To overcome this problem this Division adopts the provisions of section 5 of the *Enforcement of Judgments Act 1991* (SA) by requiring the debtor to be in arrears by two instalments before a creditor may apply for a default inquiry.

Currently there is a direct nexus between the judgment debt and imprisonment. This Division implements the recommendations of the 1995 LRC Report in that it ties the disobedience to pay to an order of the court, which constitutes a contempt.

Currently this type of enforcement action is only available against a judgment debtor who is a natural person. This Division now extends this enforcement procedure to partnerships and corporations.

Clause 88 Summons to default inquiry, request for

Subclause 1 provides that if a judgment debtor has disobeyed a time to pay order or an instalment order that has been made by a court, the judgment creditor may request that the judgment debtor be summoned to attend a default inquiry.

Subclause 2 requires the debtor to be in arrears by two instalments before a creditor may apply for a default inquiry.

Subclause 3 provides for the issue of a summons to attend a default inquiry and extends not only to a judgment debtor who is a natural person but also to judgment debtors who are partnerships or corporations.

Clause 89 Default inquiry, summons to attend

Subclause 1 provides for the court to issue a summons to either or both attend and give oral evidence or produce relevant documents.

Subclauses 2 and 3 provide for personal service of the summons and for the arrest of the debtor for disobedience of the summons and mirrors existing provisions in all civil courts.

Subclause 4 provides that a person, having been summonsed, who disobeys the summons or refuses to be sworn or answer questions, commits a contempt of court.

Clause 90 Default inquiry, nature of

Subclause 1 provides for the court to inquire into the reason for default of its previous order and provides the authority to reach a finding of contempt by the debtor if the debtor had the means to pay the debt but did not pay it and did not have a reasonable excuse for

not paying. In respect of an instalment order the court is required to find that the criteria applied to each of 2 or more instalments that were due.

Each partner of a partnership and each officer of a corporation is also guilty of contempt unless he or she satisfies the court that the disobedience to the court's order was without their consent or connivance and that he or she took all reasonable measures to ensure the partnership's or the corporation's compliance with the order.

Subclauses 2 and 3 provide that a natural person, partner, corporation or officer of a corporation who is found guilty of contempt may be punished for the contempt and, if a person, may be imprisoned until the debt is paid, but for no more than 40 days.

Subclause 4 allows the court to suspend any order for imprisonment and to make a further time to pay order or instalment order.

Subclause 5 provides a procedure for arrest for when a debtor does not comply with a further time to pay order made under subclause 4.

Subclause 6 provides that an order for imprisonment does not terminate an instalment order or extinguish the judgment

Clause 91 Imprisonment for default, judgment creditor's duties

The clause places an obligation upon a judgment creditor to advise the Sheriff of payments made since the order became effective and details of any part payments accepted.

The clause follows current practice and its purpose is to ensure that the Sheriff knows of all credits against the judgment debt to ensure that the judgment debtor, if imprisoned, is released when the whole debt is satisfied to minimise the risk of wrongful imprisonment.

Clause 92 Imprisonment for default, release from

Subclause 1 defines the terms "imprisonment order" and "superintendent".

Subclause 2 stipulates the circumstances in which an imprisoned debtor can be released from prison being:

- payment of the whole debt; or
- acceptance by the judgment creditor of part payment as full satisfaction; and
- when the judgment creditor requests release.

Subclauses 3 and 4 also create obligations to advise the Sheriff and the relevant Prison Superintendent of payments made and for the Sheriff to communicate with the Prison Superintendent to secure the release of the debtor.

Subclause 5 allows the court to order the release of a person from imprisonment because of illness or other good reason.

Subclause 6 provides that release is conditional upon there being no other order in existence requiring the person to be held in custody.

Division 9 - Miscellaneous

This Division contains a single clause dealing with judgments against objects.

Clause 93 Judgment against objects

A judgment may be pronounced on the status of some particular property or thing (as opposed to one pronounced on persons) and subclause 1 authorises its sale or seizure and also empowers the court to make any necessary ancillary or consequential orders.

As most actions against objects are actions against ships subclause 2 provides that subclause 2 does not limit the operation of the *Admiralty Act 1988* (Cwth).

The clause is necessary for the good administration of justice and is similar to provisions contained in section 10 of the *Enforcement of Judgments Act 1991* (SA).

Part 5 - Enforcing non-monetary judgments

Non-monetary judgments are of the nature of orders of the court requiring a party to do an act such as to deliver up property, or to cease doing an act or not to do an act. This part makes provision for enforcing judgments of this nature.

Division 1 – Judgments requiring property to be given up

Currently all three civil courts have an enforcement process of the nature of a warrant of delivery which requires a party to deliver up possession of property other than land, for example, a motor vehicle. The three courts also have a process of the nature of a warrant of possession that requires a party to deliver up possession of land that may or may not have a house or buildings upon it.

This Division reforms the current processes by combining the two into a new enforcement process known as a property (seizure and delivery) order. This is modelled on section 11 of the *Enforcement of Judgments Act 1991* (SA).

Clause 94 Application of this Division

The clause provides that the Division applies if the court requires a person to give possession of any real or personal property to another person.

Clause 95 Property (seizure and delivery) order

Subclauses 1 - 3 provide that in order to enforce a judgment a person may apply to the court for a property seizure order addressed to the Sheriff authorising the Sheriff to seize property and give it to them. The clause also provides that the court can make necessary ancillary or consequential orders.

Subclause 4 provides that the court can make any other necessary enforcement order for the purpose of enforcing costs associated with the property (seizure and sale) order and, in the event that the property cannot be located or seized, may make a determination of the property's value.

This clause follows current practice and is modelled on existing procedures contained in Order 27 Rule 11 of the Local Court Rules 1961.

Clause 96 Property (seizure and delivery) order, effect of

Subclause 1 allows the Sheriff to use any force and assistance reasonably necessary to carry out the property seizure order. If the property is real property the Sheriff is able to enter the property and eject any person who is not lawfully entitled to be there and remove personal property if he thinks fit. If the property is personal property the Sheriff may enter any place where the property is situated and seize it.

Subclause 2 provides that if the order relates to real property entry must take place between 9am and 5pm.

With respect to personal property subclause 3 makes a differentiation between places that are a dwelling, which is a term defined in clause 3 of this Bill, and other places such as commercial properties, factories and garages. The subclause states that the powers of entry can be exercised in respect of a non-dwelling at any time of the day and night and consent is not required. With a dwelling though the Sheriff must seek consent of the occupier to enter the dwelling.

Subclause 4 overrides subclause 3 by providing that, with respect to a dwelling, if the occupier's consent is not given or the Sheriff cannot locate the occupier or owner that the Sheriff may utilise the powers of forcible entry detailed in subclauses 1 and 2 without consent but can only do so between the hours of 9 a.m. and 5 p.m.

Further a person who unlawfully resumes possession of the property after it has been seized commits an offence.

These procedures are necessary for the efficient functioning of the Sheriffs Office, are modelled on existing common law provisions and the provision is similar to section 7 of the *Enforcement of Judgments Act 1991* (SA).

Division 2 – Other non-monetary judgments

This Division caters for the enforcement of orders of the court requiring an act to be done, such as repairing a garage door when ordered to do so in the Minor Cases Division of the Magistrates Court in a consumer /trader action. Currently section 155 of the *Local Courts Act 1904* (WA) and section 135 of the *Supreme Court Act 1935* (WA) provide for this procedure. The Division also caters for those circumstances where the court has ordered an act not to be done or to cease doing an act.

Clause 97 Application of this Division

The clause provides that the Division applies if the court requires a person to do an act, an act not to be done or to cease doing an act.

Clause 98 Disobeying judgment is a contempt of court

Subclause 1 provides that if a natural person disobeys a judgment they are guilty of a contempt of court.

Subclauses 2 and 3 provide that each partner of a partnership and each officer of a corporation and the corporation is also guilty of contempt unless he or she satisfies the court that the disobedience to the court's order was without their consent or connivance

and that he or she took all reasonable measures to ensure the partnership's or the corporation's compliance with the order.

Subclauses 4 provides for the court to deal with the contempt, which will be detailed in regulations to be made under this Act.

This procedure is necessary for the efficient functioning of the courts and the provision is similar to sections 135 and 137 of the *Supreme Court Act 1935* (WA) and section 12 of the *Enforcement of Judgments Act 1991* (SA).

Clause 99 Court may order act to be done at expense of obligated person

The clause provides that in order to enforce a judgment a person may apply to the court for an order authorising them, or a person appointed by the court, to do an act at the expense of the obligated person.

In the event that the person ordered to do the act (repair the garage door) fails to do so, the other party may apply for an order that allows them to repair the garage door at the expense of the defaulting party.

The clause also allows ancillary orders to be made and for an enforcement process to issue to recover costs.

The clause is necessary to ensure the court's orders are complied with.

Part 6 - Miscellaneous enforcement provisions

This part deals with miscellaneous provisions such as removal of property on land, applications for directions from the court, signing of documents, amending orders and duration of enforcement processes.

Clause 100 Personal property on land being seized, powers to deal with

The clause provides that when seizing real property the Sheriff may remove any personal property situated on the real property. The Sheriff can release the personal property back to the owner providing the costs of storage and removal are met but otherwise the Sheriff can apply for directions from the court.

This procedure is necessary for the efficient functioning of the Sheriffs Office and the provision is similar to section 160 of the *Supreme Court Act 1935* (WA).

Clause 101 Signing of documents, court may order

The clause provides that if a signature of a person is required on a document the court may order that person to sign the document or authorise an officer of the court to apply the court's seal instead.

This clause is necessary where for a variety of reasons, including incapacity, a person is unable to sign a document when required.

This is modelled on section 13 of the *Enforcement of Judgments Act 1991* (SA).

Clause 102 Duration and renewal of orders and warrants

The clause stipulates that a property (seizure and sale) order, a property (seizure and delivery) order and warrants to arrest a person issued under the Bill has effect for 12 months and makes provision for an order to be renewed for a further 12 month period.

This clause reflects existing provisions and its purpose is to allow the court to exercise supervision over its own processes and is similar to a provision contained in Order 47 Rule 10 of the Rules of the Supreme Court 1971.

Clause 103 Amending and cancelling orders etc.

The clause allows a person who has obtained an order under the Bill or is affected by an order to apply to the court to have it suspended, amended or cancelled and the court may make such an order on terms that are just. The clause addresses a variety of situations that may require intervention of an enforcement order, either temporarily or permanently. For example the order may be suspended when the defendant, by sickness or other sufficient cause, is unable to discharge the debt or order. A person affected by the order may apply to the court to cancel the order if that person is no longer capable of performance under the order, for example, applying for the cancellation of a property (seizure and delivery) order because the goods no longer exist.

Clause 104 Directions, court may give

Subclause 1 lists those persons who may apply to the court for directions in respect to matters arising from or in connection to carrying out an order. The sheriff is accommodated under this subclause as the sheriff is amongst the category of persons to whom the order is addressed.

Subclause 2 specifies that in respect to personal property the application must be made to the court that issued the order. In the case of real property only the District Court or the Supreme Court can give directions.

Subclause 3 provides that court can give directions and make orders as to costs that are appropriate.

This procedure is necessary for the efficient functioning of the Sheriffs Office and the enforcement process in general and the provision is similar to Order 47 Rule 12 of the *Rules of the Supreme Court 1971*.

Clause 105 Irregular enforcement, courts' powers as to

This clause provides that if the court issues an enforcement order and is satisfied that an irregularity has occurred with either the making of the order or its carrying out, the court can correct the irregularity including setting aside its previous order as well as ordering any necessary restitution of property, payment of money, compensation or damages.

Circumstances could arise such as seizing property at the wrong address, seizing property after the judgment debt has been satisfied or seizing in a manner that constitutes non-compliance with the rules of court or regulations made under the Act. The clause therefore allows the court to address irregularities and is necessary for the good administration of justice.

Part 7 - Administrative matters

Section 156 of the *Supreme Court Act 1935* (WA) provides for its processes to be executed by the Sheriff. Section 30 of the *District Court of Western Australia Act 1969* (WA) provides for its processes to be executed by the District Court Bailiff. The Sheriff, who is a public officer, combines both roles and the Sheriff 's Office is set up to provide the necessary administrative support. The Sheriff therefore ensures consistency of practice in enforcement of superior court judgments.

In contrast with the position of the superior courts there are 35 Local Courts throughout the State issuing some 25,000 enforcement processes annually to 124 Local Court bailiffs. These Local Courts and bailiffs are independent of each other which results in inconsistent interpretations and procedures.

A 1996 LRC Report and a 1997 Court Services Report both recommended the introduction of legislation to create a unified civil judgment enforcement where the Sheriff would assume responsibility for all courts.

Currently civilians are appointed Local Court bailiffs within the Perth Metropolitan Region and major country towns. Police officers perform the duties of bailiff in smaller and the more remote country centres. In respect of District and Supreme Court matters the Sheriff currently utilises the services of police and civilians in all regional and country centres by appointing them either Sheriffs Officers or Assistant District Court Bailiffs, as the case requires.

This Bill continues the existing system as the Sheriff will appoint persons who are civilian contractors (as well as police officers, who act in a private capacity as a bailiff and not as a police officer) as his bailiffs under the new system proposed by this Bill

Historically these functions have been successfully and efficiently performed by civilians and recognition of this fact was pivotal to recommendation 71 contained in the 1997 Court Services Report. Recommendation 71 was that under the unified system the Sheriff should adopt the role of service regulator and coordinator and the role of service provider should be outsourced. The WA bailiff system (which is essentially private) is rated as the most effective in Australia and the civilian bailiffs all meet the criteria to be classified as small businesses and therefore enjoy a level of Government support. There is no intention to change the current policy of these services being provided by civilian contractors.

Division 1 – Officers

Clause 106 Interpretation

This clause defines the terms “police officer” and “public servant”

Clause 107 Bailiffs, appointment of

The clause provides that the Sheriff may appoint fit and proper persons as bailiffs. The Sheriff may suspend or terminate a bailiff for good reason or for misconduct.

The clause also provides mechanisms for the Sheriff to appoint as bailiffs natural people who are:

This clause protects public servants and police officers performing these functions. It does not extend to private civilian bailiffs and their assistants, as the acceptance of liability will be part of their contract for services. This provision is similar to section 12 of the *Sheriff's Act 1978* (SA).

Division 2 – Provisions About the Sheriff

This Division contains general provisions necessary for the efficient functioning of the Sheriff's Office.

Clause 112 Sheriff unable to act, court's powers

The clause provides that if the Sheriff is unable to act for any reason, for example a conflict of interest, the court may appoint another person to perform the functions.

This clause is similar to section 164 of the *Supreme Court Act 1935* (WA).

Clause 113 Sheriff exempt from some fees

The clause provides that the Sheriff does not have to pay the fees arising under certain Acts where fees, such as search fees, may be payable.

Clause 114 Sheriff entitled to access to some official records

The clause allows the Sheriff to have access to the records kept under the *Road Traffic Act 1974* and *Western Australian Marine Act 1982* to the extent necessary to perform his duties.

The purpose of this clause is to allow the Sheriff to access licensing records to obtain addresses of judgment debtors.

Clause 115 Sheriff exempt from some licensing requirements

Subclause 1 provides that the Sheriff may sell property seized under the Bill without holding any licence that is required by the law

Subclause 2 provides that the Sheriff is not precluded from engaging an auctioneer or a real estate agent to sell property.

This clause primarily relates to an auctioneer's licence and is similar to section 162 of the *Supreme Court Act 1935* (WA).

Part 8 – Miscellaneous

This Part contains provisions relating to the obligations upon the Sheriff and bailiffs, the offence of impersonation and a provision for the making of regulations.

Clause 116 Sheriff and bailiffs to carry out orders

Subclause 1 requires the Sheriff and bailiffs to act upon orders expeditiously.

The subclause is necessary for the good administration of justice and is similar to provisions contained in section 21 of the *Local Courts Act 1904*.

Subclause 2 allows the Sheriff and bailiffs to take whatever reasonable action that is necessary or convenient for the purposes of performing their functions in enforcing an order.

The subclause is necessary for the good administration of justice and is similar to provisions contained in section 73 of the *Fines Penalties and Infringement Notices Enforcement Act 1994*.

Clause 117 Impersonating an officer, offence of

The clause provides that it is an offence for a person to falsely represent they are an enforcement officer and carries a penalty of twelve months imprisonment.

There has been a continuing concern about persons impersonating the Sheriff and his officers, which is shared by both the Sheriffs of this State and of South Australia where bailiffs are not uniformed. There have been incidents, admittedly few, where process servers have purported to represent the Sheriff's Office in this State.

This provision is similar to section 11 of the *Sheriff's Act 1978* (SA).

Clause 118 Regulations

The clause stipulates those matters upon which regulations may be made by the Governor and includes practice and procedure, costs, contempts of court and forms.

The clause also provides that regulations may be made empowering the court to issue summonses or warrants in connection with proceedings under this Act and in particular with contempt proceedings.

The clause also provides that regulations may be made with respect to the fees for services performed by the Sheriff in his capacity of Marshal in Admiralty under the *Admiralty Act 1988* (Cwlth).

Clause 119 Fees, regulations may prescribe

The clause stipulates those matters upon which regulations may be made by the Governor with respect to fees to be taken by the court or the Sheriff.

Clause 120 Rules of court

This clause provides that the Supreme Court, the District Court and the Magistrates Court may make rules of court for the purposes of the Act providing such rules are not inconsistent with the regulations.

Schedule 1 – Provision about available debts

Schedule 1 makes provision for a number of assumptions that are to be made and matters to be disregarded in determining whether money held for a person by a financial institution in the name of a particular person and whether that money can be taken by the Court and applied to pay a sum owing to another person. A "financial institution" includes, by definition, any approved deposit-taking institution including a bank, a society within the meaning of the *Housing Societies Act 1976* (WA) and an investment fund or corporation.

Item 1 – Financial institution accounts in name of judgment debtor

Subitem 1(1) provides that accounts may be excluded from the regime by regulation. Under subitem 1(2) conditions such as the need to make a demand before payment can be made or that a passbook needs to be produced are to be disregarded before determining whether moneys are available to satisfy a debt. Additionally, under subitem (3) charges created by the rules of the financial institution are to be disregarded for the purposes of making an order. although under subitem (4) the financial institution is entitled to set-off or appropriate the whole of the money in the relevant account.

Item 2 – Debts owed to judgment debtor and others jointly

Under subitem 2(1) it is presumed that if person has a joint account with another person that each of the joint owner has an equal interest. Pursuant to subitems (2) and (3) this presumption is rebuttable if evidence is provided to the Court that can decide the extent of the judgment debtors interest in the money.

Item 3 – Amenable debts, court may exempt certain portions

Under item 3 the Court may exempt certain portions of an account from the operation of any requirement to satisfy a debt. The matters to be exempted are amounts required to maintain a property owned by the judgment debtor and necessary living expenses.

Item 4 – Debts payable on conditions

Item 4(1) makes it clear that if an amount payable to a judgment debtor by a third party is subject to the judgment debtor fulfilling a condition the Court may order the third person to disregard the condition or specify some other means of fulfilling the condition, however, under subitem (2) any order cannot have the effect of requiring the third party pay the amount earlier than the due date.