

1998

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**MAGISTRATES COURT (CIVIL JURISDICTION) (AMENDMENT) BILL
1998**

EXPLANATORY MEMORANDUM

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MAGISTRATES COURT (CIVIL JURISDICTION) (AMENDMENT) BILL 1998

BACKGROUND

Under section 349 of the *Magistrates Court (Civil Jurisdiction) Act 1982*, the Magistrates Court may, on application by a bailiff, make an order allowing the bailiff to forcibly enter the residential premises of a judgment debtor or premises in which the judgment debtor has property to search for and seize certain property in circumstances where the bailiff has been refused entry by the judgment debtor or the judgment debtor has been unable to be contacted. The Supreme Court (Amendment) Bill 1998 will amend the *Supreme Court Act 1933* to allow the Supreme Court to make an order for a forced entry in relation to the Sheriff. The Magistrates Court (Civil Jurisdiction) (Amendment) Bill 1998 will amend the *Magistrates Court (Civil Jurisdiction) Act* to ensure that the provisions in the two Acts will be as consistent as is appropriate.

OVERVIEW OF THE BILL

The key amendments which will be implemented by the substitution by the Bill of a new section 349 are:

- the continuing of the Magistrates Court's capacity, on application by a bailiff, to order a forced entry but for any purpose connected with executing a writ of execution in circumstances where the judgment debtor or other occupier has refused entry or is unable to be contacted;
- the insertion of a provision relating to the seeking of police assistance by a bailiff; and
- the provision of an immunity for a bailiff for acts done or omitted to be done in good faith in carrying out an order of the Court in relation to a forced entry.

FINANCIAL CONSIDERATIONS

The amendments to be made by the Bill are not expected to have any financial impact.

DETAILS OF THE BILL

TITLE

Clause 1 is a formal provision and will provide for the short title of the amending Act to be the *Magistrates Court (Civil Jurisdiction) (Amendment) Act 1998*.

COMMENCEMENT

Clause 2 will provide for commencement of the amending Act on gazettal.

PRINCIPAL ACT

Clause 3 will define the term 'Principal Act' as used in the Bill to mean the *Magistrates Court (Civil Jurisdiction) Act 1982*.

REPEAL AND SUBSTITUTION

Clause 4 will repeal section 349 and substitute a new section 349 as described below.

Entry, search and seizure - bailiff's powers

Section 349

Subsection 349(1) will set out the circumstances in which the section applies. The section will apply where a bailiff, in executing a writ of execution against a judgment debtor, is either:

- (a) refused entry to a judgment debtor's premises after informing or making reasonable attempts to inform the judgment debtor or any other occupier of the procedures in relation to execution and the intention to seek an order for a forced entry if entry is refused; or
- (b) unable to contact the judgment debtor or any other occupier to obtain consent after making reasonable attempts to do so.

Subsection 349(2) will allow the Magistrates Court to make an order on application by a bailiff authorising a forced entry once a circumstance contemplated by subsection 349(1) arises. The order will authorise a bailiff, for any purpose connected with the execution, to enter the premises with such force as is necessary and reasonable, including police assistance.

Subsection 349(3) will make it clear that an order under subsection 349(2) will authorise a bailiff, among other things, to:

- (a) search the premises for property that the bailiff is entitled to seize under subsection 347(1) or 348(1) of the Magistrates Court (Civil Jurisdiction) Act; and
- (b) seize and remove such property.

Subsection 347(1) restricts the bailiff in the property that may be seized and sold. For example, a bailiff may not seize property such as necessary items of clothing, beds and bedding, some kitchen furniture (for example, a stove and refrigerator) and ordinary tools of trade, plant and equipment, professional instruments and reference books up to a prescribed aggregate amount.

Subsection 348(1) entitles a bailiff to seize money, banknotes, cheques, bills of exchange, promissory notes, bonds, specialities and securities for money.

In specifying the authority to search premises, seize and remove property, subsection 349(3) will not limit what a bailiff is otherwise authorised to do under the order in relation to executing a writ.

Subsection 349(4) will restrict the Magistrates Court in its capacity to make an order. The Court will not be able to make an order unless satisfied that the judgment debtor resides at the premises or has property within the premises that a bailiff is entitled to seize under subsections 347(1) or 348(1).

Subsection 349(5) will provide a bailiff with an immunity against an action, suit or proceeding for any act done or omitted to be done in good faith in carrying out an order under subsection 349(2) to forcibly enter premises. Subsection 349(5), however, will

not relieve a bailiff of any other liability that the bailiff may otherwise be subject to under section 380 of the Magistrates Court (Civil Jurisdiction) Act. Section 380 establishes that a bailiff, in executing a writ of execution, is responsible to the parties to a proceeding in the same manner as the Sheriff is responsible in executing a writ of *fiery facias*.

Subsection 349(6) will define "judgment debtor's premises", for the purposes of the section, to mean premises occupied by the judgment debtor. It will not be necessary that a judgment debtor actually resides in the premises before an order can be made but that he or she merely occupies those premises. The present section 349 contemplates a forced entry only of premises to which the judgment debtor can refuse entry and the purpose of the definition is to retain this restriction.