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AUSTRALIAN CAPITAL TERRITORY

LEGISLATIVE ASSEMBLY

**MAGISTRATES COURT (ENFORCEMENT OF JUDGMENTS)
BILL 1994**

EXPLANATORY MEMORANDUM

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INDEX TO THE BILL AND EXPLANATORY MEMORANDUM

[To assist readers this index provides a page reference to the
Explanatory Memorandum (EM) and to the Bill.]

1. PROVISIONS RELATING TO ENFORCEMENT OF JUDGMENT DEBTS. [Proposed amendments to the Magistrates Court (Civil Jurisdiction) Act 1982 and the Magistrates Court (Civil Jurisdiction) Regulations.]

DESCRIPTION	EM PAGE NO.	BILL PAGE NO.
Background to the provisions	5	
Provisions applying throughout Part XVIIIA		
<i>Definitions</i>	6	9-10
<i>Costs</i>	6	11
<i>Judiciary (Stay of Proceedings) Act 1933</i>	6	11
<i>Court may exercise powers of Registrar</i>	6	11
ORDERS AT THE TIME OF JUDGMENT		
Court to ascertain property and financial circumstances of judgment debtor	7	11
Types of orders	7&8	11&12
EXAMINATION PROCEDURES		
Registrar to ascertain property and financial circumstances of judgment debtor	9	11
Notice requiring financial information	9	13
Examination summons	9&10	13
Examinations (general)	10	14
Orders following examination	11&12	14&15
Subsequent examinations	12	15&16
Failure to attend an examination	12&13	16
Warrants	13&14	17
Refusal to be examined	14	18

INSTALMENT ORDERS		
Court or Registrar to ascertain property and financial circumstances of judgment debtor	15	11
Instalment orders on the application of the judgment debtor	15&16	19-21
Instalment orders by agreement	16	20
Payment of an instalment order	17	8&24
Variation or revocation of an instalment order		
<i>By agreement</i>	17	20
<i>On the application of the judgment debtor</i>	17&18	19
<i>On the application of the judgment creditor</i>	18	22
Non compliance with an instalment order	19	24
Stay of enforcement	19	23
GARNISHEE ORDERS		
Meaning of garnishee proceedings	20	
Types of garnishee orders	20	
Application for garnishee order	20	24
Nature of a garnishee order	20&21	25,26&30
Service of the garnishee order	21	26
Notice at time of service	21	25
<u>Garnishee order attaching earnings</u>		
<i>Earnings</i>	22	9&10
<i>Effect of Order</i>	22	26
<i>Earnings to be retained by the judgment debtor</i>	22&23	26
<i>Time for payment</i>	23	31
<i>Expenses of the garnishee</i>	23	36
<i>More than one garnishee order</i>	23&24	27
<i>Garnishee employer not to prejudice judgment debtor employee</i>	24	37
<i>Where the judgment debtor ceases to be employed by the garnishee</i>	24	36
<u>Garnishee order attaching a debt other than earnings</u>		
<i>Debts</i>	25	26
<i>Garnishee order can apply to an account in a deposit-taking institution</i>		
<i>Meaning or account</i>	25	9

<i>Meaning of withdrawable share account</i>	25	
<i>Meaning of deposit-taking institution</i>	25	9
<i>Where withdrawal is subject to condition</i>	26&27	27&28
<i>Membership of a building society or credit union</i>	27	28
<i>Effect of service of a garnishee order</i>	27&28	28
<i>Deemed notice is irrevocable</i>	28	28
<i>Time for payment</i>	28&29	31
<i>Expenses of garnishee</i>	29	36&60
<i>Statutory charge by Building Society or Credit Union</i>	29&30	28
<i>Protection of Garnishee against double payment</i>	30&31	28-30
<i>Direct crediting of judgment debtors veterans' pension</i>	31	30
<i>Effect of payments by a garnishee</i>	31	31
<i>Where payment by a garnishee exceeds the judgment debt</i>	32	35
<i>Where garnishee inadvertently fails to comply with the order</i>	32	35
<i>Affidavit by garnishee where there are no earnings or other debt to be attached</i>	32	34
<i>Failure by garnishee to comply with the order</i>	33	34
<i>Third party claims</i>	33	35
<i>Stay of enforcement of judgment</i>	33	38
<i>Application for instalment order or variation or revocation of garnishee order</i>		
<i>Instalment order</i>	34	32
<i>Variation or revocation of the garnishee order</i>	34	32
<i>Powers of the court</i>	34&35	
<i>Instalment orders and garnishee orders</i>	35&36	32
<i>Writs of execution</i>	36	33
EXECUTION AGAINST PERSONAL PROPERTY		
<i>Issue of a writ of execution</i>	38	38
<i>Separate writs of execution for money and costs</i>	38	51
<i>Where leave of the court is required before a writ can be issued</i>	38&39	39
<i>Form and duration of a writ of execution</i>	39	39

Priority of writs of execution	39&40	39
Property that is subject to a writ of execution	40	40
Power of bailiff to enter premises	41	41
Effect of seizure of property	41	42
Notice of rights of the judgment debtor	42	42
<i>Instalment order</i>	42&43	19&42
<i>Declaration</i>	43	42
<i>Indicate order of sale of property</i>	43&44	45
Payment by judgment debtor to prevent execution	44	43
Suspension of execution by direction of judgment creditor	44&45	43
Where judgment debtor becomes bankrupt	45	62
Deposit by judgment creditor to meet costs of execution	45	44
Costs and expenses of writ of execution to be part of judgment debt	45	49
Removal of property seized	45	42
Sale by public auction and private agreement		
<i>Public auction</i>	46	45
<i>Determining market value</i>	46&47	46&47
<i>Reserve price</i>	47	47
<i>Advertising</i>	47&48	47
<i>Employment of an auctioneer</i>	48	47
<i>Purchase by bailiffs or auctioneer prohibited</i>	48	49
<i>Sale to highest bidder</i>	48	47
<i>Sale by private agreement</i>	48	48
<i>Payment for property purchased</i>	49	48
Order for disposal	49	50
Proceeds of writ of execution	49&50	49,50&61
Liability of the bailiff	50	52
Return of the writ of execution	50	61
Bailiff to keep judgment creditor informed	51	62
General duties of the bailiff in respect of writs of execution and the service of other legal documents		
<i>Records to be kept by bailiff</i>	51	60
<i>Service and execution</i>	51	61

Bailiff not to act as agent of parties in court proceedings	52	62
Offences	52	51
TRANSITIONAL PROVISIONS		
Oral examinations	53	69
Instalment orders	53	69
Garnishee orders	54	70
Warrants of execution under Magistrates Court Act	54	70
Warrants of execution under Workers Compensation Rules	54&55	70
References to warrants of execution	55	71

2. OTHER PROVISIONS IN THE BILL. [Proposed amendments to the

- (a) Magistrates Court (Civil Jurisdiction) Act;
- (b) Magistrates Court Act 1930 and Magistrates Court Rules; and
- (c) Other enactments.]

DESCRIPTION	EM PAGE NO.	BILL PAGE NO.
Background to the provisions	56	
MAGISTRATES COURT (CIVIL JURISDICTION) ACT 1982		
Disputed debts	57	3
Extension of proceedings that can be instituted by way of a special claim	57	3
Executor or administrator may enforce order	57	4
Affidavits	55&58	4&5
Judgment in action relating to the detention of goods		
<i>Court orders</i>	58	5&6
<i>Where order requires goods be given to the judgment creditor</i>	59	5&6
<i>Writ of specific delivery</i>	59	5&6
<i>Order for the value of the goods</i>	59	6
Judgment or order requiring an act other than the payment of money	60	6&7
Interest on judgments	60	68
Deletion of provision relating to instalment order	60	7
Limitation period for enforcement proceedings	61	7
Payment of judgment debts	61	8
Forms	61&62	52
Right of appearance	62&63	53

Corporation may authorise an officer to act in court proceedings	63	2&53
MAGISTRATES COURT ACT 1930 AND MAGISTRATES COURT RULES		
Deletion of provisions	64&65	55- 58&62
Refusing or failing to give evidence	65&66	59
OTHER ENACTMENTS		
Workers' Compensation Rules	67	63
Attachment of Wages Limitation Act 1966	67	
<i>New definitions of earnings and Metal Trades Award</i>	68	64
<i>Assignment of wages</i>	68	65
Crown Proceedings Act 1992	68	65
Landlord and Tenant Act 1949	68	66
Magistrates Court (Civil Jurisdiction)(Solicitors' Costs) Regulations	69	66
Sale of Goods Act 1954	69	67
Small Claims Act 1974	69	67

OUTLINE

Purpose of the Bill

The Magistrates Court (Enforcement of Judgments) Bill 1994 provides for the insertion of new enforcement procedures into the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Magistrates Court (Civil Jurisdiction) Regulations*. These new enforcement procedures will replace existing inefficient and inadequate procedures.

The enforcement orders available to judgment creditors, namely, instalment orders, garnishee orders and writs of execution remain unchanged. The purpose of this Bill is to:

- (a) clearly set out the new procedures through which these orders may be obtained;
- (b) enable judgment creditors to effectively enforce judgment debts through use of the new enforcement procedures;
- (c) ensure that judgment debtors are adequately protected; and
- (d) provide the court and the Registrar with as much flexibility as possible in making enforcement orders.

The Bill draws heavily on the procedures operating in the New South Wales District Court and the recommendations of the Australian Law Reform Commission in their report titled 'Debt Recovery and Insolvency' (Report No 36).

Comparison of provisions in the Bill with existing procedures

The provisions in the Bill represent a significant reform to the existing enforcement procedures. This can easily be seen by comparing the existing procedures with those proposed in this Bill as set out below.

Orders at the time of judgment

At the time of giving judgment the court is presently only able to make an order that the judgment debt be paid by instalments. The Bill empowers the court to make (if appropriate) any of the following orders at the time of giving judgment:

- (a) an instalment order;
- (b) a garnishee order attaching earnings;
- (c) a garnishee order attaching a debt other than earnings;
- (d) a writ of execution; or
- (e) an examination summons.

The Bill also empowers the court, at the time of giving judgment, to delegate its power to make enforcement orders to the Registrar. In considering whether to make an instalment order or a garnishee order the court (or Registrar) must have regard to any preference indicated by the judgment debtor and to the likelihood of the judgment debtor complying with an instalment order. A writ of execution can only be issued where the court (or Registrar) is satisfied that it would be inappropriate to make an instalment order or a garnishee order having regard to the amount of the judgment debt and the interests of both the judgment creditor and the judgment debtor.

Orders following oral examination of the judgment debtor

At the present the Registrar has no power to make any orders following an oral examination of the judgment debtor. The Bill empowers the Registrar to make instalment orders, garnishee orders or issue a writ of execution following the examination of a judgment debtor. The Registrar, like the court when it is making an enforcement order at the time of giving judgment, must have regard to the matters set out in the preceding paragraph.

Instalment orders

Where there is an existing judgment debt a judgment debtor is presently only able to obtain an instalment order in the context of a court hearing. The Bill provides a simple and easy method for a judgment debtor to obtain an instalment order without the necessity of a court hearing.

Garnishee orders

A judgment creditor at present can obtain a garnishee order in relation to the earnings of the judgment debtor for only one pay period. The Bill provides for the continuous operation of a garnishee order until such time as the judgment debt is extinguished. The Bill also specifically provides that it will be an offence for an employer to prejudice an employee merely because the employee is subject to a garnishee order attaching earnings.

Writs of execution

At present where goods are sold under a warrant of execution (called writs of execution in the Bill) there is no legislative constraint on the actual price they can be sold for they merely have to be sold at auction to the highest bidder. The Bill provides that, subject to any court order, goods seized under a writ of execution are not to be sold for a price substantially below their market value (defined in the Bill to be 65% of their market value).

Most of the existing provisions providing for the enforcement of judgments are currently found in the *Magistrates Court Act 1930* and the *Magistrates Court Rules*. These provisions are being deleted in conjunction with the commencement of the new enforcement provisions in the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Magistrates Court (Civil Jurisdiction) Regulations*.

Other matters

In addition to the insertion of new enforcement procedures into the *Magistrates Court (Civil Jurisdiction) Act 1982*, the Bill also makes other minor miscellaneous amendments to that Act.

The remaining provisions of the Bill provide for minor consequential amendments to the following enactments: *Workers' Compensation Rules, Attachment of Wages Limitation Act 1966, Crown Proceedings Act 1992, Landlord and Tenant Act 1949, Magistrates Court (Civil Jurisdiction) (Solicitors' Costs) Regulations, Sale of Goods Act 1954* and the *Small Claims Act 1974*.

The *Magistrates Court (Civil Jurisdiction) Act 1982* as amended by this Bill will be renumbered (see clause 29 of the Bill). The new forms referred to in this Bill will be gazetted prior to the commencement of the relevant provisions.

The Bill contains a number of technical amendments including the insertion of references to the female gender where previously only the male gender was used and the substitution of the word 'writ' of execution for the word 'warrant' of execution.

Financial implications

It is unlikely that any of the proposed amendments will result in additional expenditure.

PROVISIONS RELATING TO THE ENFORCEMENT OF JUDGMENT DEBTS

Background

The bulk of the provisions in the Bill relate to the enforcement of judgment debts in the Magistrates Court. The majority of these new enforcement provisions will be located in a new Part XVIIIA of the *Magistrates Court (Civil Jurisdiction) Act 1982*. The remainder of the new enforcement provisions will be located in the *Magistrates Court (Civil Jurisdiction) Regulations*.

The enforcement orders available to judgment creditors are instalment orders, garnishee orders and writs of execution. New Part XVIIIA contains 3 separate Divisions which focus on these 3 different types of orders. These Divisions are called respectively, 'Division 4 - Instalment orders' (see page 15 of this explanatory memorandum), 'Division 5 - Garnishee orders' (see page 20) and 'Division 6 - Execution against personal property' (see page 38).

However, new Part XVIIIA will also enable the above orders to be made at the time the court determines that a judgment debt is payable (Division 2 - Orders at time of judgment, see page 7 of this explanatory memorandum) and following an examination of the judgment debtor as to her or his property and financial circumstances (Division 3 - Examination procedures, see page 9).

In order to ensure that there is a smooth transition from the old enforcement procedures to the new procedures the Bill also contains some transitional provisions (located in Part VIII of the Bill, see page 53 of this explanatory memorandum).

The new provisions relating to the enforcement of judgment debts in the Magistrates Court will all commence on a day fixed by the Minister by notice in the Gazette (clause 2 of the Bill). This will enable the Magistrates Court and other interested persons and organisations to become familiar with and prepare for the commencement of the provisions.

Provisions applying throughout Part XVIIIIA**[Division 1 of new Part XVIIIIA]**

Some provisions in the Bill have general application to the whole of new Part XVIIIIA. They are located in Division 1 of new Part XVIIIIA and are set out below.

Definitions

Terms used in new Part XVIIIIA are defined in new section 278A. This explanatory memorandum deals with these definitions under the relevant provisions to which they relate.

However at this stage it is important to note that a reference in the Bill to a 'judgment debt' means that there is in existence an order of the court that an amount of money be paid. A reference to the 'judgment debtor' means the person who has been ordered to pay the money. A reference to the 'judgment creditor' means the person to whom the money is owed.

Costs

Where a party has acted unreasonably in proceedings under new Part XVIIIIA the court or Registrar may order that party to pay the costs or expenses of the other party (new section 278C).

Judiciary (Stay of Proceedings) Act 1933

Section 4 of the *Judiciary (Stay of Proceedings) Act 1933* enables the court to stay enforcement proceedings. New section 278D precludes a person making an application under section 4 of the *Judiciary (Stay of Proceedings) Act 1933* where there are any enforcement orders in existence under new Part XVIIIIA. This is appropriate because Part XVIIIIA contains its own provisions in respect of the stay of enforcement proceedings.

Court may exercise powers of Registrar

The powers, duties or functions of the Registrar found in new Part XVIIIIA can be exercised or performed by the court (new section 278E).

ORDERS AT TIME OF JUDGMENT

[Division 2 of new Part XVIII]

Court to ascertain property and financial circumstances of judgment debtor

Before the court can make any orders under this Division it must endeavour to ascertain the property and financial circumstances of the judgment debtor (new section 278B(a)).

Where the court determines that a judgment debt should be paid through instalments, then in fixing the amount of the instalments to be paid the court is to take into account the other financial obligations of the judgment debtor (new section 278B(b)).

Types of orders

At the time of giving judgment the court is empowered to make any of the following enforcement orders:

- (a) an instalment order;
- (b) a garnishee order attaching earnings;
- (c) a garnishee order attaching a debt other than earnings;
- (d) a writ of execution; or
- (e) an examination summons.

[See new sections 278F(3) & 278G(1).]

In considering whether to make one or more of the orders listed in (a) - (c) the court is to have regard to:

- (a) the order preferred by the judgment debtor (if any);
- (b) the likelihood of the judgment debtor complying with an instalment order; and
- (c) any other information which is relevant and reliable.

[See new section 278F(4).]

If the court makes both an instalment order and a garnishee order attaching earnings the garnishee order is automatically stayed. Where the judgment debtor complies with the instalment order (resulting in the judgment debt being wholly paid) the Registrar will revoke the garnishee order (see section 278AG).

If the judgment debtor fails to comply with the instalment order then the judgment creditor can apply to have the stay removed (new section 278AB(2)). The garnishee order will come into force after it is served on the garnishee (new section 278AE(2)).

A writ of execution can only be issued where:

- (a) the court is satisfied that it would be inappropriate to make an instalment order or a garnishee order having regard to the amount of the judgment debt and the interests of both the judgment creditor and the judgment debtor; and
- (b) the judgment creditor consents to the issue of the writ of execution.

[See new section 278G(3).]

Court adjournment for hearing before the Registrar

At the time of giving judgment the court may instead of making an enforcement order adjourn the proceedings for a hearing before the Registrar (new section 278F(1)(b)). The Registrar is empowered at the resumed hearing to make the same enforcement orders as the court (see above). In doing so, the Registrar must consider the same factors that apply to the court when it is making an enforcement order (new sections 278F & 278G).

EXAMINATION PROCEDURES

[Division 3 of new Part XVIIIA]

Registrar to ascertain property and financial circumstances of judgment debtor

Before the Registrar can make any orders under this Division he or she must endeavour to ascertain the property and financial circumstances of the judgment debtor (new section 278B(a)).

Where the Registrar determines that a judgment debt should be paid through instalments, then in fixing the amount of the instalments to be paid the Registrar is to take into account the other financial obligations of the judgment debtor (new section 278B(b)).

Notice requiring financial information

Where a judgment debtor fails to pay a judgment debt the judgment creditor may serve on her or him a notice seeking financial information (new section 278H). The notice will:

- (a) set out the amount owed by the judgment debtor to the judgment creditor; and
- (b) require the judgment debtor within 21 days to answer written questions concerning her or his property and financial circumstances.

Upon the judgment creditor receiving the completed answers it is anticipated that the parties may be able to negotiate some agreement concerning payment of the judgment debt.

Examination summons

Where a judgment debtor fails to pay a judgment debt the judgment creditor will also be able to apply for the issue of an examination summons directed to the judgment debtor (new section 278I). The examination summons will require the judgment debtor to attend before the Registrar to be examined as to his or her property and financial circumstances (new sections 278IA(a) and 278J).

The examination summons may also require the judgment debtor to produce at the examination any document or other thing that may indicate his or her financial situation (new section 278IA(b)).

Where the judgment debtor is a corporation an examination summons may be directed to an officer or former officer of the corporation (new section 278I(3)). This will only occur where the Registrar is satisfied that the officer or former officer is likely to have:

- (a) sufficient knowledge of the property and financial circumstances of the corporation to answer questions at the examination; or
- (b) access to any document or other thing that may indicate the property and financial circumstances of the corporation.

Personal service of the examination summons is required. A person subject to an examination summons will have a minimum of 14 days notice to prepare for the examination (new section 278IB).

Examinations (general)

At the examination the judgment debtor will be examined by the Registrar and the judgment creditor (if present) as to:

- (a) her or his property and other means of satisfying the judgment debt; and
- (b) generally as to her or his financial affairs.

[See new sections 278J & 278Q(1).]

The Registrar is specifically authorised to adjourn an examination whenever this is appropriate (new section 278S).

Orders following an examination

The Registrar is empowered to make any of the following orders after an examination of the judgment debtor:

- (a) an instalment order;
- (b) a garnishee order attaching earnings;
- (c) a garnishee order attaching a debt other than earnings;
- (d) an order varying or revoking a pre-existing instalment order or garnishee order; or
- (e) issue a writ of execution.

[See new section 278K.]

In considering whether to make one or more of the orders listed in (a) - (d) the Registrar is to have regard to:

- (a) the order preferred by the judgment debtor (if any);
- (b) the likelihood of the judgment debtor complying with an instalment order; and
- (c) any other information which is relevant and reliable.

[See new section 278K(2).]

If the Registrar makes both an instalment order and a garnishee order attaching earnings the garnishee order is automatically stayed. Where the judgment debtor complies with the instalment order (resulting in the judgment debt being wholly paid) the Registrar will revoke the garnishee order (see section 278AG).

If the judgment debtor fails to comply with the instalment order then the judgment creditor can apply to have the stay removed (new section 278AB(2)). The garnishee order will come into force after it is served on the garnishee (new section 278AE(2)).

A writ of execution can only be issued where:

- (a) the Registrar is satisfied that it would be inappropriate to make an instalment order or a garnishee order (or to continue to enforce such an order) having regard to the amount of the judgment debt and the interests of both the judgment creditor and the judgment debtor;
- (b) the judgment creditor consents to the issue of the writ of execution; and
- (c) no instalment orders or garnishee orders are in force in relation to the judgment debt (where they are in force the Registrar is empowered to revoke them before issuing the writ of execution).

[See new section 278K(4).]

If the judgment creditor is not present at the examination the Registrar must inform the judgment creditor of the results of the examination and any orders made (new section 278L).

Subsequent examinations

A further examination summons cannot be issued in respect of a person who has previously been examined unless 3 months has elapsed or the Registrar is satisfied that:

- (a) there has been a change in the property or financial circumstances of the judgment debtor; or
- (b) other relevant information has become available.

[See new section 278M.]

Failure to attend an examination

The Registrar may at the request of the judgment creditor report to the court any failure by a judgment debtor to attend an examination (new section 278N).

On receiving the report from the Registrar the court may:

- (a) authorise the Registrar to issue a warrant for the arrest of the judgment debtor; or
- (b) give the judgment debtor a second opportunity to obey the examination summons (by adjourning the examination and ordering that the judgment debtor attend at a later date).

[See new section 278N(2).]

The judgment debtor will be advised of the action taken by the court. Where the court does authorise the issue of a warrant the Registrar is precluded from in fact issuing it until 14 days have elapsed (new section 278N(3)). During this 14 day period the judgment debtor will be given the opportunity of arranging with the Registrar to attend the court for an examination.

Any warrant issued under this new section can only be issued on the request of the judgment creditor and must be issued within 3 months of it being authorised by the court (new section 278N(4)). If the judgment creditor requests the issue of the warrant after the elapse of this period the court will direct the Registrar to issue the warrant only where the judgment creditor gives a satisfactory explanation for failing to seek its issue within the 3 month period allowed (new section 278N(5)).

Warrants

If a warrant is issued it will require the bailiff to bring the judgment debtor named in the warrant to the court to be examined by the Registrar (new section 278O). The bailiff will be able to obtain police assistance to execute the warrant (new section 278P)).

A warrant will continue in force until one of the following events occur:

- (a) the judgment debtor named in the warrant is examined (or the examination is adjourned or struck out);
- (b) the warrant is revoked by order of the court; or

- (c) 3 months elapses since the date of the issue of the warrant.

[See new section 278O(1)(e) & (2).]

Where the examination occurs after the court has authorised the issue of a warrant and the judgment creditor having been notified of the time and place of the examination does not attend the examination then the Registrar may:

- (a) conduct the examination; or
- (b) strike out the examination.

[See new section 278Q(2).]

Refusal to be examined

Where a judgment debtor at an examination refuses or fails, without a reasonable excuse, to take an oath, answer a question, produce a document (or other thing) or gives false information the Registrar may refer the matter to the court (new section 278R).
[For the action that the court can take after the matter has been referred to it by the Registrar see pages 65-66 of this explanatory memorandum.]

INSTALMENT ORDERS

[Division 4 of new Part XVIII]

Court or Registrar to ascertain property and financial circumstances of judgment debtor

Before the court or Registrar can make any orders under this Division it must endeavour to ascertain the property and financial circumstances of the judgment debtor (new section 278B(a)).

Where the court or Registrar determines that a judgment debt should be paid through instalments, then in fixing the amount of the instalments to be paid the court or Registrar is to take into account the other financial obligations of the judgment debtor (new section 278B(b)).

Instalment orders on the application of the judgment debtor

A judgment debtor may apply to the Registrar to pay a judgment debt by instalments. In doing so the judgment debtor will have to provide information concerning his or her property and financial circumstances (new section 278T(1)(a) & (2)(b)).

At this stage there will be no necessity for the judgment debtor to attend any court hearing. The judgment debtor is merely required to file certain forms. The judgment debtor must specify the amount he or she is willing to pay by regular instalments. Where a writ of execution is in force a judgment debtor is only entitled to make one application for an instalment order (new section 278T(5)).

In considering the application of the judgment debtor the Registrar may consult the judgment creditor (new section 278T(4)). The Registrar will either:

- (a) make the instalment order sought by the judgment debtor;
or
- (b) refuse to make the instalment order sought.

[See new section 278T(3)(a).]

Both the judgment debtor and the judgment creditor will be notified in writing of the outcome (new section 278X).

Where (b) occurs the Registrar will list the matter for a hearing before the court (new section 278W(1)). Where (a) occurs the judgment creditor may object to the making of the order within 14 days of having been notified of the order (new section 278V). If the judgment creditor does object then the Registrar will also list the matter for a hearing before the court (new section 278W(1)).

Where the Registrar refuses to make the instalment order and the judgment debtor has not previously applied under new section 278T for an instalment order then the judgment creditor is precluded from taking other enforcement measures until the court has heard the matter (new section 278Z).

The judgment debtor and the judgment creditor will be given an opportunity to attend the court hearing (new section 278W(1)(d)). At the hearing the court may make any of the following orders:

- (a) an instalment order (including confirming, varying or revoking an instalment order made by the Registrar); and
- (b) any of the other orders that can be made following an oral examination of the judgment debtor (see pages 11-12 of this explanatory memorandum).

[See new section 278W(2).]

However in making any of these enforcement orders the court will be constrained by the same matters that the Registrar must have regard to when making enforcement orders following an oral examination of the judgment debtor (new section 278W(3) & (4), also see pages 11-12 of this explanatory memorandum).

Instalment orders by agreement

As an alternative to the process outlined above the judgment creditor and judgment debtor may enter into an agreement for the judgment debt to be paid by instalments (new section 278U(1)(a)). For example, they may reach agreement after the judgment debtor provides written answers to the notice requiring financial information (see page 9 of this explanatory memorandum).

The signature of the parties to the agreement must be witnessed (new section 278U(2)). Upon filing such an agreement the Registrar will make an order in terms of the agreement (new section 278U(3)(a)).

Payment of an instalment order

The court or Registrar may order that instalments under an instalment order be paid to the Registrar (new section 229A). In which case the Registrar is required to pay the amount received to the judgment creditor (new section 278AA). However, where the instalment order does not require that instalments be made to the Registrar then the instalments are directly payable to the judgment creditor (new section 229A(3), see page 61 of this explanatory memorandum).

Variation or revocation of an instalment order

There are three ways in which an instalment order can be varied or revoked, they are as follows:

- (a) by agreement;
- (b) on the application of the judgment debtor; and
- (c) on the application of the judgment creditor.

By agreement

The judgment debtor and judgment creditor may enter into an agreement for an instalment order to be varied or revoked (new section 278U(1)(b)). Upon filing such an agreement the Registrar will make an order in terms of the agreement (new section 278U(3)(b)).

On the application of the judgment debtor

The judgment debtor may apply to the court for an order varying or revoking an instalment order (new section 278T(1)(b)). The procedures adopted in respect of such an application are the same as those applying when a judgment debtor makes an initial application for an instalment order (see page 15 of this explanatory memorandum).

The matter will be heard by the court where the Registrar refuses to make the order sought by the judgment debtor or where an order is made, the judgment creditor objects (new section 278W). At the hearing the court is empowered to make any of the following orders:

- (a) an order varying or revoking the instalment order; and
- (b) any of the other orders that can be made following an oral examination of the judgment debtor (see pages 11-12 of this explanatory memorandum).

[See new section 278W(2)]

However in making any of these enforcement orders the court will be constrained by the same matters that the Registrar must have regard to when making enforcement orders following an oral examination of the judgment debtor (new section 278W(3) & (4), also see pages 11-12 of this explanatory memorandum).

On the application of the judgment creditor

A judgment creditor may apply for an order varying or revoking an instalment order where there has been a substantial increase in the judgment debtor's property or means or where the instalment order was obtained through the provision of false or deceptive information (new section 278Y(1)).

The application will be listed for a hearing before the Registrar. A copy of the application will be given to the judgment debtor and he or she will have an opportunity together with the judgment creditor to attend the hearing (new section 278Y(3)). At the hearing the Registrar may make any of the following orders:

- (a) an order confirming, varying or revoking the instalment order; and
- (b) any of the other orders that can be made following an oral examination of the judgment debtor (see pages 11-12 of this explanatory memorandum).

[See new section 278Y(4).]

However in making any of these enforcement orders the Registrar will be constrained by the same matters that the Registrar must have regard to when making enforcement orders following an oral examination of the judgment debtor (new section 278Y(5) & (6), also see pages 11-12 of this explanatory memorandum).

Non-compliance with an instalment order

An instalment order automatically ceases to be in force where the judgment debtor fails to make a payment under an instalment order (by the due date) and the failure continues for 7 days (except where the court otherwise orders or an agreement between the judgment debtor and judgment creditor otherwise provides) (new section 278AB(1)). This means that the judgment creditor can proceed to take other more stringent measures to enforce the judgment debt (a garnishee order or a writ of execution).

Where a garnishee order attaching earnings has been stayed because of the existence of an instalment order and the instalment order ceases to be in force then the judgment creditor may apply to the Registrar to have the stay on the garnishee order removed (new section 278AB(2)). When this happens the garnishee order will come into force after it is served on the garnishee (new section 278AE(2)).

Stay of enforcement

Upon an instalment order being made the judgment creditor is precluded from taking further enforcement proceedings unless there is non-compliance with the order and it ceases to be in force (see above) or the court or Registrar otherwise orders (new section 278Z(1)).

GARNISHEE ORDERS

[Division 5 of new Part XVIII]

Meaning of garnishee proceedings

Garnishee proceedings permit a judgment creditor to obtain the amount of money due under the judgment debt from persons (called garnishees) who owe money to the judgment debtor.

Types of garnishee orders

There are two types of garnishee orders:

- (a) those that apply to the earnings of the judgment debtor (called a garnishee order attaching earnings); and
- (b) those that apply to a debt (other than earnings) payable to the judgment debtor (called a garnishee order attaching a debt other than earnings).

Application for garnishee order

In order to obtain a garnishee order the judgment creditor must file an application at the court (new section 278AC). The Registrar will consider the application and if appropriate make a garnishee order. There may be circumstances where it would not be appropriate for the Registrar to make a garnishee order, for example, because of the smallness of the judgment debt or the smallness of the earnings or other debt sought to be attached, in which case the order will not be made (new section 278AD).

Nature of a garnishee order

A garnishee order will:

- (a) specify the amount outstanding under the judgment debt;
- (b) include sufficient details to enable the garnishee to identify the earnings or other debt attached; and

- (c) require the garnishee to make payments under the order to the Registrar equal to the amount in (a). [The Registrar upon receipt of the payment is to forward the payment to the judgment creditor.]

[See new sections 278AE(1) & 278AM(1)(a).]

In relation (c) the garnishee may make the payment(s) direct to the judgment creditor provided the garnishee notifies the judgment debtor and the Registrar of his or her intention to do so prior to making the payment(s) (new section 278AM(1)(b)).

Service of the garnishee order

The judgment creditor is required to serve the garnishee order on the garnishee (new section 278AF(1)). The garnishee order comes into force as soon as it is served on the garnishee (new section 278AE(2)).

The judgment creditor is also required to serve the garnishee order on the judgment debtor within 5 days after the garnishee is served (new section 278AF(3)).

Where a garnishee order is stayed under new section 278AG the order is not to be served until the stay is lifted (new section 278AF(2)).

Notice at time of service

At the time of service of the garnishee order the garnishee and the judgment debtor are to be given a notice advising them that they can apply to the court for a variation or revocation of the order on the grounds of exceptional hardship (new section 278AE(1)(d) & (e)(ii)).

A judgment debtor is also to be advised of his or her entitlement to apply for an instalment order in respect of the judgment debt (new section 278AE(1)(e)(i)).

Garnishee order attaching earnings***Earnings***

Earnings are defined very broadly in new section 278A. Earnings include not only wages or salary but also payments made under personal accident, disability and sickness insurance policies, workers compensation, superannuation and private pension payments.

However, social welfare pensions, benefits or allowances payable under the Commonwealth *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* are not available for attachment.

Effect of order

A garnishee order attaching earnings (that is applying to the earnings of the judgment debtor) will be:

- (a) continuous in operation (this means, it will continue to operate until the judgment debt is entirely paid, see new section 278AE(2)(a)); and
- (b) limited to a certain amount of the judgment debtors earnings (see immediately below).

Earnings to be retained by the judgment debtor

A garnishee order attaching earnings will not apply to all the earnings of the judgment debtor. Instead the judgment debtor is entitled to retain an amount equal to:

- (a) where the judgment debtor has dependents - the minimum weekly wage (see below); or
- (b) where the judgment debtor does not have any dependents - three-quarters of the minimum weekly wage (see below).

[See new section 278AH.]

The minimum weekly wage referred to above is that established under the Metal Trades (Australian Capital Territory) Award 1982. The current minimum weekly wage is \$230.10.

Time for payment

Payments under a garnishee order attaching earnings are to be made within 14 days of the earning becoming due for payment to the judgment debtor (new section 278AN(1)).

Expenses of the garnishee

A garnishee will be entitled to deduct (from the amount payable under the garnishee order) an amount for the reasonable expenses incurred in complying with the garnishee order. The maximum deduction allowed will be 10% of each payment under the order (new section 278AY(2)).

Where the garnishee makes a deduction under new section 278AY(2) the garnishee must advise the judgment creditor of the amount deducted. The garnishee must also advise the judgment creditor of the total amount deducted from the judgment debtors earnings and the amount actually paid to the Registrar (new section 278AY(3)).

Where the garnishee makes a deduction for expenses the garnishee's liability to the judgment debtor is discharged to the extent of the amount actually paid under the garnishee order plus the amount of the deduction (new sections 278AM(2) & 278AY(4)). In effect the judgment creditor, rather than the judgment debtor, pays for the expenses of the garnishee in complying with the garnishee order.

More than one garnishee order

There can only be one garnishee order attaching earnings made in respect of a judgment debt (new section 278AJ). However where there is more than one judgment debt there may be more than one garnishee order attaching earnings. In such a situation the judgment debtor is still entitled to retain the full amount set out above under the heading *Earnings to be retained by the judgment debtor* (new section 278AJ).

Where there are competing garnishee order attaching earnings the garnishee will be required to satisfy the order made first in time. If after compliance with that order there are still earnings available then the garnishee is to satisfy (to the extent possible) the order made second in time (and so on until the available earnings are exhausted, see new section 278AJ(3)).

Garnishee employer not to prejudice judgment debtor employee

It will be an offence for an employer to dismiss an employee or in any other way prejudice that employee because the employee is subject to a garnishee order attaching earning. If an employee is dismissed or prejudiced within 6 months after a garnishee order is made the onus of proving that the dismissal or prejudice was not because of the garnishee order will be on the employer (new section 278BA).

Where the judgment debtor ceases to be employed by the garnishee

In the event of the judgment debtor ceasing to be employed by the garnishee both the judgment debtor and the garnishee are required to notify the court, within 21 days, that the employment has ceased and provide the date on which the employment ceased (new section 278AZ(1)(a) & (b)).

Where the judgment debtor has a new employer the judgment debtor must also specify in the notice the name and address of the new employer and the amount of earnings he or she receives from this new employer (new section 278AZ(1)(c) & (d)).

Where the court receives a notice under this section it is required to notify the judgment creditor of the contents in the notice. If the judgment debtor has a new employer the court may in the absence of any objection from the judgment creditor or judgment debtor make a new garnishee order attaching earnings directed to the judgment debtor's new employer (new section 278AZ(2)).

Garnishee order attaching a debt other than earnings***Debts***

A garnishee order attaching a debt other than earnings will operate to attach debts 'due or accruing' from the garnishee to the judgment debtor (new section 278AE(2)(b)). This means that the debt must be currently outstanding, ie 'due', or payable some time in the future, ie 'accruing'.

Garnishee orders can apply to an account in a deposit-taking institution***Meaning of account***

An account is defined in new section 278A(1) to include a deposit account, a withdrawable share account (or any subscription for withdrawable shares) and a loan account with a credit balance.

Meaning of withdrawable share account

A withdrawable share account arises when a member of a building society or credit union subscribes for withdrawable shares in that organisation. Such subscriptions become part of the organisation's withdrawable share capital.

Usually subscriptions for shares remain the property of the body in which the shares are held and the shareholder realises his or her investment by selling the shares to someone else. However members of a building society or credit union who hold withdrawable shares may recover their subscriptions in accordance with the rules of the organisation and thereby 'withdraw' their shares.

Meaning of deposit-taking institution

A deposit-taking institution is defined in new section 278A(1) to mean a bank, building society, credit union, investment fund or corporation.

Where withdrawal is subject to condition

At common law if there is some precondition to the payment of a debt, there is no debt due or accruing until the precondition is satisfied.

Consequently moneys held by banks and other financial institutions to the credit of judgment debtors, although frequently easily available to the judgment debtors themselves, generally are not at common law attachable by a garnishee order. This is because the withdrawal of moneys deposited with financial institutions is usually subject to some precondition to payment to the depositor, such as the presentation of a passbook or receipt or the giving of notice of withdrawal.

New section 278AK(1) makes it clear that for the purpose of determining whether an amount standing to the credit of a judgment debtor in an account is capable of attachment the following conditions are to be disregarded:

- (a) a condition requiring that:
 - (i) a demand be made (including the manner in which or the place at which a demand is to be made);
 - (ii) a passbook, receipt or other document or thing be produced; or
 - (iii) notice be given;

before any money or share is withdrawn;

- (b) a condition that moneys or shares are not to be withdrawn for a specified period;
- (c) a condition that any withdrawal is to be for a minimum amount; and
- (d) a condition that a minimum balance is to be retained in the account.

In relation to (a)(iii) and (b) above it is to be noted that an account to which a non-withdrawal period applies is not the same as a fixed-term account.

In the case of a fixed term account there is a debt which becomes due on expiry of the term subject to satisfaction of any precondition to payment, such as the presentation of a receipt. Where an account is subject to a non-withdrawal period there is no debt due or accruing until demand of payment is made at some indeterminate time after the non-withdrawal period expires and any other precondition to payment, including the expiration of any notice period is satisfied.

Membership of a building society or credit union

The relationship between a building society or credit union and a judgment debtor member will not be terminated by the operation of a garnishee order. New section 278AK(2) specifically provides that so much of the amount standing to the credit of a judgment debtor in a withdrawable share account in a building society or credit union as is the minimum amount that must be maintained in the account in order that the judgment debtor retains membership of the building society or credit union is not attachable.

Effect of service of a garnishee order

New section 278AK(3) equates service of a garnishee order with receipt by the garnishee of a notice of withdrawal or demand for payment from the judgment debtor.

In other words where an amount in an account is attached, service of the garnishee order has the contractual consequences which would have followed if the garnishee had received from the judgment debtor a notice of withdrawal or demand of payment either when the garnishee order was served or, if the judgment debtor was not then entitled to give notice of withdrawal or demand payment, immediately the judgment debtor was entitled to do so.

Therefore where moneys in an account are payable on demand and there is no non-withdrawal period or the non-withdrawal period has expired, the amount attached becomes due for payment under the contract on service of the garnishee order.

If the account is subject to an unexpired non-withdrawal period after which moneys in the account are payable on demand, the amount attached becomes due for payment under the contract when the non-withdrawal period expires.

If the account is subject to a notice condition and there is no non-withdrawal period or the non-withdrawal period has expired, the amount attached becomes due for payment under the contract on expiry of the notice period, commencing on the date of service of the garnishee order.

However, if the account is subject to an unexpired non-withdrawal period and a notice condition, the amount attached becomes due for payment under the contract on expiry of the notice period, commencing when the non-withdrawal period expires.

Deemed notice is irrevocable

While a garnishee order remains in force its effect of being a deemed notice of withdrawal or demand is irrevocable (new section 278AK(3)(b)). This ensures that since the garnishee order is the equivalent of a notice or demand, for the purposes of the contract between the garnishee and the judgment debtor, the judgment debtor cannot exercise any right under the contract to countermand the notice or demand to circumvent the effect of the garnishee order.

Time for payment

Payment under a garnishee order attaching a debt other than earnings must be made within 21 days after the order is served on the garnishee (new section 278AN(2)(a)). The one exception to this is where the debt attached is not due for payment to the judgment debtor within the 21 day period. In that case payment is to be made not later than the date on which the attached debt would be due for payment to the judgment debtor (new section 278AN(2)(b)).

Where the debt attached is not due for payment within 21 days of service the garnishee is to notify the judgment creditor of the date on which the attached debt is, or is likely to be, due for payment (new section 278AO(1)(a)). In such a case the garnishee is also to advise the judgment creditor of the amount of the attached debt if it is less than the amount of the judgment debt (as specified in the garnishee order, see new section 278AO(2)). It will be an offence for a garnishee to make a false or misleading statement in a notice (new section 278AO(2)).

Expenses of the garnishee

A garnishee will be entitled to deduct a prescribed amount for expenses incurred in complying with the garnishee order (new section 278AY(1)). To take advantage of this provision the garnishee must have complied with new section 278AN(2) and new section 278AO(1) (if applicable). New regulation 4 provides for a prescribed amount of \$19.

Where the garnishee is entitled to make the deduction the garnishee's liability to the judgment debtor is discharged to the extent of the amount actually paid under the garnishee order plus the prescribed amount for expenses (new sections 278AM(2) & 278AY(1)). In effect the judgment creditor, rather than the judgment debtor, pays for the expenses of the garnishee in complying with the garnishee order.

Statutory Charge by Building Society or Credit Union

Building Societies and credit unions have the benefit of a statutory charge over a member's shares in, and deposits with, the organisation to secure any debt which is due from the member to the organisation.

The usual operation of a charge is to charge the whole of the asset(s) securing a debt. There is no statutory obligation on a building society or credit union, once a charge arises, to exercise its rights to discharge the charge. Therefore it is not obligated to set-off or appropriate in the event of service of a garnishee order.

Accordingly in the absence of new section 278AK(4) & (5) a garnishee order would be ineffective to attach any amount in the account in excess of the debt due to the garnishee unless:

- (a) the garnishee exercises its discretionary power to set-off or appropriate and pays the excess in compliance with the order; or
- (b) in subsequent court proceedings, the court orders payment of the excess to the judgment creditor.

In effect new section 278AK(4) & (5) provide that any charge upon an amount standing to the credit of a judgment debtor in an account with a building society or credit union is to be disregarded for the purposes of a garnishee order, but the building society or credit union is to continue to have its right to set off or appropriate all or any part of that amount.

Protection of garnishee against double payment

New section 278AK(6)-(10) protect banks, building societies and credit unions against the possibility of double payment by complying with the garnishee order and then making an 'over-the-counter' payment on presentation of the judgment debtor's passbook.

Under these provisions a bank, building society or credit union may comply with a garnishee order on such a deposit account by paying the whole or any part of the attached debt to the Registrar and requesting the Registrar to retain the amount paid for a specified period. The specified period cannot exceed 14 days, commencing on the date of payment.

If the bank, building society or credit union acts with reasonable diligence to give effect to the order but during the specified period a current passbook is produced and as a consequence the organisation pays the whole or any part of the attached debt to the judgment debtor the organisation may apply for a court order that the Registrar repay to the organisation an amount equal to the amount paid out by the organisation.

The Registrar cannot pay the judgment creditor the moneys paid into court by the bank, building society or credit union until the period specified by the organisation has expired unless, in the meantime, the Registrar is satisfied that the branch of the organisation at which the judgment debtor keeps the account has recovered the passbook.

However, if an application by the bank, building society or credit union for repayment of moneys paid to or on behalf of the judgment debtor is pending when the moneys paid into court would be payable to the judgment creditor, the Registrar is to withhold payment until the application is finalised. If the organisation's application for repayment is successful, the judgment creditor will then receive the balance (if any) of the moneys held by the Registrar.

Direct crediting of judgment debtors veterans' pension

Special protection is provided where a judgment debtor receives a pension, benefit or allowance under the Commonwealth *Veterans' Entitlement Act 1986* which is directly paid into an account with a deposit-taking institution. In this situation a garnishee order attaching a debt other than earnings will only attach so much of the credit amount in the account which exceeds the 'saved amount'.

The 'saved amount' is the difference between the amount of the pension, benefit or allowance paid into the account in the 4 week period preceding the garnishee order coming into force and the total amount withdrawn from the account during the same 4 week period (new section 278AL(1) & (2))). This protection applies irrespective of whether the judgment debtor maintains the account alone, jointly or in common with another person (new section 278AL(3)).

It can be noted that similar protection's apply in relation to pensions benefits and allowances paid under the Commonwealth *Social Security Act 1991*, through the operation of that Act.

Effect of payments by a garnishee

Amounts paid by a garnishee will have the effect of discharging or satisfying the judgment debt (as between the judgment creditor and the judgment debtor) to the extent of the amount paid (new section 278AM(2)). The earnings or other debt owed to the judgment debtor by the garnishee will, by this process, be automatically discharged (to the extent of the amount paid).

Where payment by garnishee exceeds the judgment debt

In the event that a judgment creditor receives an amount under a garnishee order which is greater than that required to satisfy the judgment debt the judgment creditor must inform the garnishee and the judgment debtor (new section 278AW(1)(a)). The judgment creditor is to pay the excess amount to the judgment debtor or the garnishee (new section 278AW(1)(b)). Failure to comply with this provision will be an offence. The overpayment will be treated as a debt payable by the judgment creditor to the garnishee or the judgment debtor (new section 278AW(2)).

Where garnishee inadvertently fails to comply with the order

Where a garnishee acts with reasonable diligence to give effect to a garnishee order but nevertheless pays all or part of the monies attached under the garnishee order to the judgment debtor the garnishee may obtain a court order to reduce the monies attached by the amount of the payment (new section 278AX).

Affidavit by garnishee where there are no earnings or other debt to be attached

New section 278AT provides a procedure to minimise the inconvenience and expense which garnishees and judgment creditors might incur. It covers the situation where garnishee orders are ineffective because there are no earnings or other debts to be attached. Where a garnishee believes that there was no debt due or accruing to the judgment debtor when the order was served, the garnishee is able to serve on the judgment creditor an affidavit to that effect.

The affidavit procedure may involve disclosure to the court and the judgment creditor of information concerning the affairs of the judgment debtor and/or third parties which the garnishee may be under a duty to keep confidential. To protect the garnishee new section 278AT(2) provides that the garnishee who serves an affidavit will be relieved of all liability in respect of any disclosure of information in the affidavit if the disclosure was reasonable for the purposes of the affidavit.

Failure by garnishee to comply with the order

If a judgment creditor is satisfied that the garnishee order has not been complied with, she or he may take out a summons requiring the garnishee to appear before the court to be examined regarding the non-compliance (new section 278AU(1) & (2)).

If the garnishee fails to appear in answer to the summons, or appears but does not satisfy the court that she or he should not have to comply with the order, the court may give judgment in favour of the judgment creditor against the garnishee for the amount of the attached earnings or other debts or the unpaid balance of the judgment debt, whichever is the lesser (new section 278AU(3)). The judgment creditor can then proceed to enforce the judgment debt against the garnishee.

The court can only give judgment in the absence of the garnishee if it is satisfied that the garnishee was aware of the date and time of the hearing (see new section 278AU(4)).

The court has a discretionary power to refuse to give judgment against the garnishee if for some reason, such as the smallness of the judgment debt or the smallness of the earnings or other debts sought to be attached, the court considers that the judgment should not be given (new section 278AU(5)).

Third party claims

The court is also empowered to hear and determine third party claims in respect of the garnishee order (new section 278AV). This will occur where it appears to the court that a third party is, or claims to be, entitled to moneys paid or payable under the garnishee order or to a charge, lien or other interest in respect of the attached earnings or other debts.

Stay of enforcement of the judgement

A garnishee order will operate as a stay of enforcement of the judgment in respect of which it is made unless the court or Registrar otherwise orders (new section 278BB).

Application for instalment order or variation or revocation of garnishee order***Instalment order***

Where the garnishee order is a garnishee order attaching earnings the judgment debtor is entitled to apply for an instalment order (new section 278AQ). Such an application can be made at any time after the order comes into force.

Variation or revocation of the garnishee order

Both the judgment debtor or garnishee are entitled to apply for an order varying or revoking a garnishee order attaching earnings or a garnishee order attaching a debt other than earnings (new section 278AP). The only ground for such an application by the judgment debtor is that the order imposes exceptional hardship on the judgment debtor or a member of his or her family. Similarly, the only ground for such an application by the garnishee is that the order imposes exceptional hardship on the garnishee or a member of his or her family. Such applications can be made at any time after the garnishee order comes into force.

Powers of the court

Any application for an instalment order under new section 278AQ or for the variation or revocation of a garnishee order under new section 278AP will be set down for hearing by the court. All the relevant parties (judgment debtor, judgment creditor and garnishee) will be given an opportunity to participate in the court hearing (new section 278AR(1)).

The court will be empowered to make one or more of the following orders:

- (a) an instalment order;
- (b) an order varying or revoking the existing garnishee order;
- (c) a garnishee order attaching a debt other than earnings (this applies where the application was made in relation to a garnishee order attaching earnings, irrespective of whether that garnishee order attaching earnings is varied or revoked);
- (d) a garnishee order attaching earnings (this applies where the application was made in relation to a garnishee order attaching a debt other than earnings, irrespective of whether that garnishee order attaching a debt other than earnings is varied or revoked);
- (e) issue a writ of execution.

[See new sections 278AR(2) & 278AS(1).]

Instalment orders and garnishee orders

In considering whether to make one or more of the orders listed in

(a) - (d) the court is to have regard to:

- (a) the order preferred by the judgment debtor (if any);
- (b) the likelihood of the judgment debtor complying with an instalment order;
- (c) the property and financial circumstances of the judgment debtor; and
- (d) any other information which is relevant and reliable.

[See new section 278AR(3).]

Where the court makes a garnishee order attaching earnings the judgment debtor will be entitled to retain an amount equal to or greater than:

- (a) where the judgment debtor has dependents - the minimum weekly wage; or
- (b) where the judgment debtor does not have any dependents - three-quarters of the minimum weekly wage.

[See new section 278AH.]

The minimum weekly wage referred to above is that established under the Metal Trades (Australian Capital Territory) Award 1982. The current minimum weekly wage is \$230.10.

Where the court makes both an instalment order and a garnishee order attaching earnings the garnishee order is automatically stayed (new section 278AG). When the judgment debt is wholly paid (through instalments under the instalments order) the Registrar will revoke the garnishee order.

If on the other hand, the judgment debtor fails to comply with the instalment order then the judgment creditor may apply to the Registrar to have the stay on the garnishee order removed (new section 278AB(2)). When this happens the garnishee order will come into force after it is served on the garnishee (new section 278AE(2)).

Writ of execution

A writ of execution can only be issued where:

- (a) the court is satisfied that it would be inappropriate to continue to enforce the existing garnishee order, vary the existing garnishee order, make an instalment order or a different garnishee order having regard to the amount of the judgment debt and the interests of both the judgment creditor and the judgment debtor;
- (b) the judgment creditor consents to the issue of the writ of execution; and

37.

- (c) no instalment orders or garnishee orders are in force in relation to the judgment debt (where they are in force the court is empowered to revoke them before issuing the writ of execution).

[See new section 278AS(2).]

EXECUTION AGAINST PERSONAL PROPERTY

[Division 6 of new Part XVIIIA]

Issue of a writ of execution

Where a judgment debt is unpaid (and there are no instalment orders or garnishee orders in force) the judgment creditor can apply to the Registrar for the issue of a writ of execution. The application will have to specify such matters as the amount and date of the initial judgment, any costs payable under the judgment, any amounts subsequently paid in reduction of the judgment debt, the current amount outstanding under the judgment (including any interest) and some indication of where the judgment debtor's personal property is located (new section 278BC).

Separate writs of execution for money and costs

A judgment creditor will not be issued with a second writ of execution in respect of the same judgment debtor until the first writ of execution is returned to the Registrar. There is one exception to this general rule, namely, where there is a judgment debt for the payment of money and costs and the money becomes payable under the judgment before the costs (for example where the costs are yet to be taxed). In this situation the judgment creditor may obtain two separate writs of execution to enforce payment of the money and costs (at the time that each becomes payable, see new section 278CK).

Where leave of the court is required before a writ can be issued

In 2 situations the Registrar cannot issue a writ of execution unless the leave of the court is first obtained by the applicant, namely:

- (i) if after the date of the judgment there is a change (for example, through death) in either the person entitled to enforce the judgment or the person against whom the judgment can be enforced; or

- (ii) where the initial judgment was against the assets of a deceased person coming into the hands of his or her executors or administrators after the date of the judgment and the writ sought is directed towards those assets.

[See new section 278BD(1).]

In seeking the leave of the court to the issue of a writ the applicant will have to provide information:

- (a) on the current amount outstanding under the judgment;
- (b) the reason for the delay in seeking execution if 12 years has elapsed since the date of the judgment;
- (c) the change that has taken place where (i) above applies;
- (d) indicating that a demand to satisfy the judgment has been made (unsuccessfully) where (ii) above applies;
- (e) on the entitlement of the applicant to proceed to execution; and
- (f) indicating that the person against whom the execution is sought is liable.

[See new section 278BD(2).]

Form and duration of a writ of execution

A writ of execution will be marked with the date of its issue and will be valid for a period of six months commencing on this date (new sections 278BE & 278BF(4)).

Priority of writs of execution

The bailiff must on receiving a writ of execution mark the time and date she or he received the writ on the back of the writ (new section 278BF(1)). Where a Bailiff has more than one writ to execute against a judgment debtor the bailiff is to execute the writs in the order in which she or he receives them (new section 278BF(2)).

Where writs are issued by both the Magistrates court and the Supreme court in respect of the same judgment debtor then the priority will be determined by examining the time of the delivery of the Supreme court writ to the Sheriff and the time of the delivery of the Magistrates court writ to the Bailiff. The writ which is delivered first (to the Bailiff or the Sheriff) will have priority over the other writ (new section 278BF(3)).

Property that is subject to a writ of execution

In executing a writ of execution the Bailiff is entitled to seize all the personal property of the judgment debtor with the exception of:

- (a) necessary clothing;
- (b) beds and bedding;
- (c) kitchen furniture including a stove, oven and refrigerator but not including a washing machine or automatic dishwasher;
- (d) ordinary tools of trade, plant and equipment, professional instruments and reference books to a maximum total value of \$1,000;
- (e) any right or interest in land.

[See new section 278BG(1).]

At common law money and securities could not be seized in execution. New section 278BH specifically enables money, banknotes, cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money to be seized. Money can be used immediately after seizure to pay the judgment debt (or part of the judgment debt where the money seized is less than the judgment debt). In respect of cheques, bills of exchange etc they can be used to pay the judgment debt as soon as they become due for payment.

If the judgment debtor has no property which can be seized and sold the bailiff is to advise the judgment creditor of this situation as soon as possible (new regulation 11).

Power of bailiff to enter premises

A bailiff must have the consent of the judgment debtor to enter premises (for the purpose of seizing personal property). If consent is withheld, or if no contact can be made with the judgment debtor, the bailiff is entitled to seek an order of the court allowing forced entry (new section 278BI).

Such an order can only be made where there is clear evidence that the debtor resides in the particular premises or has property in those premises.

Where the judgment debtor has withheld consent the bailiff will also have to satisfy the court that he or she has made reasonable attempts to inform the judgment debtor of the procedure involved in execution of the writ (new section 278BI(2)(a)).

Where there has been no contact with the judgment debtor the bailiff will have to satisfy the court that reasonable attempts were made to contact the judgment debtor (new section 278BI(2)(b)).

If the court makes an order allowing forced entry the bailiff in complying with the order may call on the police for assistance (new section 278P).

Effect of seizure

When items of personal property are seized the bailiff is under a duty to retain possession of them pending their sale. However, there is no requirement that the bailiff either take the goods away or remain to guard them.

Instead after seizing the property the bailiff may give to the judgment debtor (or any other person who possesses any of the property of the judgment debtor) a notice indicating that he or she is responsible for the safekeeping of the property seized (new sections 278BG(2) & 278BJ)).

New section 278BK specifically provides that the bailiff after seizing property may leave the premises where the property was found and may re-enter at all reasonable times without being deemed to have abandoned possession of the property.

Notice of rights of the judgment debtor

The Bailiff at the time of seizing personal property under a writ must give to the judgment debtor a notice setting out the judgment debtors' rights (new section 278BM). The notice will also indicate the total amount owing in respect of the judgment debt.

The judgment debtor will have the following rights:

- (a) to apply for an instalment order;
- (b) to apply for a declaration that additional personal property (to that listed in new section 278BG) be exempt from execution;
- (c) where relevant, to indicate the order in which personal property is to be sold; and
- (d) to apply for a determination by the Registrar of the market value of the property (see pages 46-47 of this explanatory memorandum).

Instalment order

The application for an instalment order would be made under new section 278T (see page 15 of this explanatory memorandum). The effect of an application is to prevent the Bailiff selling any of the property of the judgment debtor at least until the application has been considered by the Registrar (new section 278BO(1)). Only one application under new section 278T can be made after a writ of execution has been issued (new section 278T(5)).

Where the Registrar makes an instalment order under new section 278T(3) the effect of new section 278Z(1) is to prevent any further enforcement of the judgment debt through the writ of execution. The execution would only proceed if the judgment debtor failed to comply with the instalment order.

In the event that the judgment creditor objected to the making of the instalment order (under new section 278V) then the matter would be heard by the court. The court has the power to make any of the orders set out in new section 278W(2).

If the court confirms or varies the instalment order and/or makes a garnishee order then the effect of new section 278Z(1) is to stay any further enforcement of the judgment debt through the writ of execution. The execution would only proceed if the judgment debtor failed to comply with the instalment order and/or the garnishee order was revoked.

Where the Registrar refuses to make an instalment order then:

- (a) if the judgment debtor has not previously applied under new section 278T(1) for an instalment order - the effect of new section 278Z(2) is to stay any further enforcement of the judgment debt through the writ of execution at least until the court makes an order under new section 278W(2);
- (b) if the judgment debtor has previously applied under new section 278T(1) for an instalment order - the Registrar has a discretion under new section 278BO(2) to stay any further enforcement of the judgment debt through the writ of execution until the court makes an order under new section 278W(2);

Declaration

The judgment debtor may apply to the Registrar for a declaration that personal property additional to that listed in new section 278BG be exempt from execution. A declaration can only be made where the judgment debtor or a member of his or her family is likely to suffer exceptional hardship (if the declaration was not made, see new section 278BN).

Indicate order of sale of property

Where the property seized under a writ of execution appears to the Bailiff to be more than sufficient to satisfy the judgment debt then the judgment debtor may nominate the order in which items of property be sold (new section 278BT(1)).

However, the Bailiff in deciding what order to offer property for sale must give precedence to the requirement that the execution be achieved without delay and without unwarranted expense. If the nomination by the judgment debtor of the order in which items of property are to be sold is consistent with these requirements then the Bailiff is to sell the property in the order nominated by the judgment debtor (new section 278BT(2)).

Subject to the requirements to avoid delay and expense and sell property in the order nominated by the judgment debtor the Bailiff is to sell the property in the order which gives rise to the least amount of hardship to the judgment debtor or any other person (new section 278BT(2)(c)).

Payment by judgment debtor to prevent execution

The bailiff will not proceed with execution of a writ where the judgment debtor pays the amount for which the writ was issued and the bailiff's costs and expenses (if any) incurred in executing the writ (new section 278BP).

Suspension of execution by direction of judgment creditor

Where property has not been seized under a writ of execution the judgment creditor may in writing direct the bailiff to suspend execution of the writ. Where execution has been suspended under this provision the judgment creditor may in writing at a later date direct the bailiff to resume the execution (new section 278BQ).

Where property has been seized under a writ of execution the judgment creditor may also direct the bailiff to suspend execution of the writ. The judgment creditor can give such a direction where he or she reaches an agreement (or arrangement) with the judgment debtor. The agreement must specifically provide for the bailiff suspending and resuming execution and the bailiff must be informed of the arrangement. The bailiff will only resume execution where the judgment creditor so directs in writing and the resumption is in accordance with the agreement between the judgment debtor and the judgment creditor (new section 278BR(1)).

Where there is no agreement (as outlined in the preceding paragraph) and the judgment creditor requests the bailiff to withdraw from possession of the property or suspend the execution the judgment creditor will be deemed to have lost the right to have the execution proceed. In these circumstances the Bailiff will withdraw from possession of the property and return the writ to the Registrar (new section 278BR(2)). There is one exception to this provision and that is where the judgment creditor makes the request in order to obtain a postponement of the sale of the property (new section 278BV(b)).

Where judgment debtor becomes bankrupt

Where property is seized under a writ of execution and the judgment debtor subsequently becomes bankrupt then the bailiff must deliver the seized property to the judgment debtor's trustee in bankruptcy and advise the judgment creditor accordingly (new regulation 11(a)).

Deposit by judgment creditor to meet costs of execution

The Registrar may require a judgment creditor to deposit an amount of money to meet the costs incurred or likely to be incurred in the bailiff executing a writ of execution. If the deposit is not paid then the Registrar may refuse to issue the writ or where the writ has already been issued the bailiff may discontinue execution under the writ and return the writ to the Registrar (new section 278BS).

Costs and expenses of writ of execution to be part of judgment debt

The costs of a writ of execution (including the cost and expenses of its execution by the bailiff) will be added to and form part of the judgment debt (new section 278CE).

Removal of property seized

The bailiff may remove property from the place where it is seized for the purpose of selling it or keeping the property safe prior to its sale. Where the bailiff does remove property he or she must leave an inventory of the property removed (new section 278BL).

Sale by public auction and private agreement

Public auction

Property seized under a writ of execution is to be offered for sale at a public auction within 10 weeks of the date of seizure (new section 278BU(1)). However property (excluding property of a perishable nature) is not to be sold, unless the judgment debtor agrees, within the first six days following the seizure (new section 278BU(2)(a) & (3)). Moreover the seized property is not to be sold until any application by the judgment debtor under new section 278BN(1) for a declaration that additional personal property be exempt from execution is determined (new section 278BU(2)(b)).

Subject to the constraints in the preceding paragraph the bailiff must offer the property for sale at a public auction as soon as possible having regard to the interests of the judgment debtor and the judgment creditor and the need to sell the property for a price not less than the reserve price (new section 278BT(4)). The bailiff is specifically authorised to postpone the sale to comply with a request by the judgment creditor or in order to satisfy the requirement of obtaining the reserve price (new section 278BV).

Determining market value

Prior to the auction the bailiff is to determine the market value of each item of property (new section 278BW(1)). The bailiff is empowered to make any inquiries that are reasonable for the purpose of determining market values. Where the judgment creditor has information concerning the market value of the property he or she may be required to provide that information to the bailiff. If the judgment creditor unreasonably fails to provide the information then the bailiff is to report the failure to the Registrar and may refuse to proceed further towards the sale of the property (new section 278BW(2) & (3)).

To assist in determining the market value of the property the bailiff in appropriate cases may engage the services of a suitable qualified and experienced person to provide an opinion as to the value of the property (new section 278BW(2)(b)).

The bailiff must advise the judgment debtor of the market values that he or she has determined for each item of property (new section 278BW(4)). The judgment debtor is entitled to apply to the Registrar to have any determination by the bailiff, as to the market value of an item of property, revoked and a higher market value determined (new section 278BWA(1)). Such an application must be made within 5 days of the judgment debtor being informed of the market values determined by the bailiff (new section 278BWA(2)).

The Registrar can only make a determination as to the market value of an item of property where he or she is satisfied, on the basis of evidence from a suitably qualified and experienced person, that the market value determined by the bailiff is substantially less than the true market value (new section 278BWA(3)). The bailiff is precluded from selling any of property seized until the Registrar has determined an application by the judgment debtor under new section 278BWA (new section 278BWA(4)).

Reserve price

There will be a reserve price in respect of each item offered for sale (either at the public auction or if unsold at the auction, by private agreement). The reserve price will be 65% of the market value of the item (new section 278BX(5)). No item of property is to be sold for a price less than the reserve price (new section 278BX(8)).

Prior to each auction the bailiff must prepare a list of the items of property to be offered for sale. The bailiff is required to record against each item its reserve price and how it was determined (new section 278BX(7)). When an item of property is sold (either at the public auction or if unsold at the auction by private agreement) the bailiff (or where relevant the auctioneer) is required to record the sale price on the same list (new section 278CA).

Advertising

The bailiff must advertise the proposed auction in The Canberra Times which is the principal daily newspaper circulating in the ACT (new section 278BX(3)).

The advertisement must appear at least 48 hours in advance of the auction being conducted. The advertisement must not disclose that the auction will be in respect of property seized as a result of the issue of a writ of execution (new section 278BX(4)).

Employment of an auctioneer

In appropriate cases the bailiff may engage an auctioneer, licensed under the *Auctioneers Act 1959*, to conduct the auction under the bailiff's direction (new section 278BX(2)(b)).

An auctioneer as soon as possible after receiving any money under a writ of execution is to pay that money, less his or her charges, to the bailiff. The bailiff can require the auctioneer to provide an account of his or her charges at any time (new section 278CC).

Purchase by bailiffs or auctioneer prohibited

All bailiffs, and where relevant any auctioneer engaged by a bailiff, are prohibited from bidding at an auction where the goods of a judgment debtor are offered for sale. Moreover all bailiffs (and any auctioneer engaged by the bailiff) are prohibited from purchasing any item of property at the auction or by private agreement (new section 278CB).

Sale to highest bidder

Provided the reserve price is reached the property offered for sale at the public auction is to be sold to the highest bidder (new section 278BX(1)).

Sale by private agreement

Where property is offered for sale at a public auction and is not sold (because for example, the reserve price is not reached) the bailiff (or auctioneer) may sell the property by private agreement (new section 278BY(1)). No item of property is to be sold by private agreement for a price less than the reserve price (new section 278BY(2)).

Payment for property purchased

The bailiff may require payment of the whole of the purchase price immediately after the sale (by public auction or private agreement, see new section 278BZ(1)(b))). Alternatively the bailiff may require the purchaser to pay 10% of the purchase price as a deposit immediately after the sale and the balance by a specified time (not being later than 2 working days after the day of the sale, see new section 278BZ(1)(a)).

The purchase price may be paid by cash or bank draft or where the bailiff allows by credit card (new section 278BZ(2)). In the event that a credit card is used any charge to the bailiff (or auctioneer) in respect of the payment is to be treated as an additional cost of execution (new section 278BZ(3)).

Order for disposal

Where property is offered for sale at a public auction and is not sold the judgment creditor may apply to the court for an order relating to the disposal of the property (new section 278CI). Any order of the court would allow the property to be disposed of in a manner different from that specifically provided for under Division 6.

The court in deciding whether to make an order for the disposal of the property must consider any hardship to the judgment creditor if the order was not made and any hardship to the judgment debtor if the order was made (new section 278CI(3)(b)). The court must also have regard to the amount of the judgment and costs which are unpaid (new section 278CI(3)(a)).

Any application by the judgment creditor under this provision must be made within 11 weeks of the property being seized (new section 278CI(2)). Where property is unsold and no application is made by the judgment creditor within the 11 week period then the property is to be returned to the judgment debtor (new section 278CJ).

Proceeds of writ of execution

The bailiff wherever possible must issue a receipt for any money that he or she receives under a writ of execution (new regulation 9).

Where the proceeds of the execution exceed the amount for which the writ was issued together with the costs and charges incurred in the execution the bailiff is to pay the surplus amount to the judgment debtor (new section 278CD).

The bailiff within 24 hours of receiving the proceeds of an execution must pay those proceeds to the Registrar (excluding any amount which is to paid to the judgment debtor) (new section 278CF).

Where the judgment debt arose out of proceedings involving a claim under the *Magistrates Court (Civil Jurisdiction) Act 1982* the Registrar is, subject to specified exemptions, to pay the proceeds to the judgment creditor (new section 278CG(1)). Where the judgment debt arose out of other proceedings the Registrar is to pay the proceeds in accordance with the law governing those proceeding or any order of the court (otherwise the Registrar is to pay the money into the Consolidated Revenue Fund) (new section 278CG(2)).

The judgment debtor, judgment creditor or any person who claims that his or her property has been sold by the bailiff may request the bailiff to provide information on the sale of the property including the bailiff's charges and costs in executing the writ, the money received under the writ (including the proceeds of sale) and how that money has been disbursed (new section 278CH).

Liability of the bailiff

Unless otherwise provided by the provisions of this legislation the bailiff will be liable to the parties in respect of the execution of a writ to the same extent as the Sheriff is liable to the parties in respect of a writ of execution issued out of the Supreme Court (called a writ of *fiери facias*) (new section 278CM).

Return of the writ of execution

The bailiff is required to return the writ of execution to the Registrar where execution is complete, the writ has expired or the judgment creditor requests this course of action (new regulation 10).

Bailiff to keep judgment creditor informed

The bailiff is required to inform the judgment creditor or her or his solicitor on request of any matters in relation to the execution or non-execution of the writ of execution (new regulation 11(2)).

General duties of the bailiff in respect of writs of execution and the service of other legal documents***Records to be kept by the bailiff***

Bailiff's will be required to keep records in respect of the documents they are required to serve or execute (new regulation 6(1)). In relation to writs of execution the bailiff must keep a record of the details of each writ, the action he or she has taken under the writ and in the event that property of the judgment debtor has not been seized within one month after the writ has been delivered to the bailiff the reasons for it not being seized (new regulation 6(2)).

Service and execution

The bailiff is required to serve legal documents and execute writs of execution as soon as it is practicable to do so (new regulation 7(1)). In the event that the person to be served (or the property of the judgment debtor) is at an address not shown in the legal documents then the bailiff is authorised to serve the documents or execute the writ at the new address (new regulation 7(2)).

The bailiff is required to complete an affidavit of service within 2 days of effecting service (unless the service was required by the Registrar) and send the affidavit to the person who required the service (new regulation 8(1)).

Where the bailiff is unable to serve the legal documents she or he must return the documents to the person requesting service together with a notice explaining why service of the documents was not possible (new regulation 8(2)).

Bailiff not to act as agent of parties in court proceedings

The bailiff is expressly preclude from acting as an agent for any party in respect of court proceedings (new regulation 12).

Offences

The following actions will be regarded as offences:

- (a) impersonating a bailiff;
- (b) assaulting, resisting, interrupting or obstructing a bailiff in the exercise of his or her duties.

[New section 278CL(1) & (2).]

Where a person is served with a notice under new section 278BJ or otherwise knows that property has been seized then it will be an offence for that person to remove, interfere with or dispose of the property without the consent of the court or the bailiff (new section 278CL(3)).

TRANSITIONAL PROVISIONS

Oral examinations (clause 91 of the Bill)

An application for the issue of a summons for the oral examination of a person under section 170(1) of the *Magistrates Court Act 1930* that was pending at the commencement of new Part XVIIIA will be treated as an application for an examination summons under new section 278I.

An oral examination being conducted under section 170(2) of the *Magistrates Court Act 1930* will upon commencement of new Part XVIIIA continue to be conducted under new section 278J.

Any proceedings being conducted under Division 5 of Part IX of the *Magistrates Court Act 1930* will upon commencement of new Part XVIIIA be discontinued.

Instalment orders (clause 92 of the Bill)

An application for an instalment order under section 229(1) of the *Magistrates Court (Civil Jurisdiction) Act 1982* or section 24C(1) of the *Small Claims Act 1974* that was pending at the commencement of new Part XVIIIA will be treated as an application for an instalment order under new section 278F (where the application was made at the time of the judgment) or new section 278T (where the application was made subsequent to the judgment).

An application to vary or rescind an instalment order under section 229(2) of the *Magistrates Court (Civil Jurisdiction) Act 1982* or section 24C(2) of the *Small Claims Act 1974* that was pending at the commencement of new Part XVIIIA will be treated as an application under new section 278T (where the application is made by the judgment debtor) or new section 278Y (where the application is made by the judgment creditor).

Upon commencement of new Part XVIIIA an instalment order in force under sections 43(4) or 229(1) *Magistrates Court (Civil Jurisdiction) Act 1982* or sections 24C(1) or 25A(4) of the *Small Claims Act 1974* will be treated as if it were an instalment order made under new section 278F(1).

Garnishee orders (clause 93 of the Bill)

An application for a garnishee order under section 171 of the *Magistrates Court Act 1930* that was pending at the commencement of new Part XVIII A will be treated as an application for a garnishee order under new section 278AC.

A proceeding under sections 171(2), 173, 174 or 175 of the *Magistrates Court Act 1930* (whereby the garnishee can be examined and dealt with for non-compliance with a garnishee order) that was pending at the commencement of new Part XVIII A will be treated as a proceeding under new section 278AU.

A proceeding under sections 176 & 177 of the *Magistrates Court Act 1930* (whereby the court determines third party claims in respect of the attached debt) that was pending at the commencement of new Part XVIII A will be treated as a proceeding under new section 278AV.

Upon commencement of new Part XVIII A a garnishee order in force under the *Magistrates Court Act 1930* will be treated as if it were a garnishee order made under new section 278AC(1).

Warrants of execution under Magistrates Court Act (clause 94 of the Bill)

An application for a warrant of execution under section 158 of the *Magistrates Court Act 1930* that was pending at the commencement of new Part XVIII A will be treated as an application for a writ of execution under new section 278BC.

Upon commencement of new Part XVIII A a warrant of execution in force under the *Magistrates Court Act 1930* will be treated as if it were a writ of execution issued under new section 278BC.

Warrants of execution under Workers Compensation rules (clause 95 of the Bill)

An application for leave to issue a warrant of execution that was pending at the commencement of new Part XVIII A will be treated as an application for a writ of execution under new section 278BC.

A warrant of execution in force under the *Workers' Compensation Rules* will upon commencement of new Part XVIII A be treated as if it were a writ of execution issued under new section 278BC.

References to warrants of execution (clause 96 of the Bill)

Upon commencement of new Part XVIII A any reference in a law of the ACT to a writ of execution is to be interpreted as including a reference to a warrant of execution in force prior to the commencement of Part XVIII A.

OTHER PROVISIONS IN THE DRAFT BILL

Background

The draft Bill also contains a number of clauses which:

- (a) amend the *Magistrates Court (Civil Jurisdiction) Act 1982* in relation to a number of disparate and miscellaneous matters (see page 57 of this explanatory memorandum);
- (b) amend the *Magistrates Court Act 1930* and *Magistrates Court Rules* (principally to repeal provisions which will be redundant upon the commencement of new enforcement procedures in Part XVIII A of the *Magistrates Court (Civil Jurisdiction) Act 1982*) (see pages 64-66 of this explanatory memorandum); and
- (c) amend a number of other enactments principally in order to reflect the insertion of new enforcement procedures into Part XVIII A of the *Magistrates Court (Civil Jurisdiction) Act 1982* (see pages 67-69 of this explanatory memorandum). The enactments so amended are:
 - (i) Workers' Compensation Rules;
 - (ii) Attachment of Wages Limitation Act 1966;
 - (iii) Crown Proceedings Act 1992;
 - (iv) Landlord and Tenant Act 1949;
 - (v) Magistrates Court (Civil Jurisdiction) (Solicitors' Costs) Regulations;
 - (vi) Sale of Goods Act 1954; and
 - (vii) Small Claims Act 1974.

The new provisions will all commence on a day fixed by the Minister by notice in the Gazette (clause 2 of the Bill).

The *Magistrates Court (Civil Jurisdiction) Act 1982* as amended by this Bill will be renumbered (see clause 29 of the Bill).

AMENDMENTS TO THE MAGISTRATES COURT (CIVIL JURISDICTION) ACT 1982

Disputed Debts (clause 6)

A person who is alleged to owe a debt and who denies the existence or extent of that alleged debt will be entitled to commence court proceedings for a declaration that the debt is not owing or that the amount of the debt is a set amount (new section 8A(1)).

Court proceedings can only be commenced for such a declaration in the situation where the person has received a written demand for payment of the debt and the alleged debt does not exceed \$50,000 (new section 8A(2) & (3)).

Extension of proceedings that can be instituted by way of a special claim (clause 7)

Court proceedings which can be commenced by a special claim are to be widened to include proceedings to recover damages where the amount claimed can be ascertained by reference to a receipt or a statement of account (new section 16(1A)). A special claim allows a default judgment to be entered in the absence of a defence being filed.

Where party entitled to enforce order dies executor or administrator may enforce order (clause 10)

Where there has been an order made for the recovery of money or costs (including costs to be paid on a conviction or ordered to be paid by an informant) and the person entitled to enforce the order dies then the executor or administrator of the deceased person may enforce the order (new section 151A). It should be noted that this provision replaces section 192 of the *Magistrates Court Act 1930* which is being deleted.

Affidavits (clauses 12 & 13)

An affidavit can only be used in proceedings for the enforcement of a judgment where it is filed at the court within 14 days of it being sworn (new section 202(2)).

An affidavit of service cannot without a reasonable excuse be used as evidence of the service of a document in the Territory if it is sworn more than 14 days after the date of service (new section 202(3)).

An affidavit for use in interlocutory proceedings will not be inadmissible on the grounds of hearsay, where it contains a statement of information and belief, provided the source of that information and the grounds of that belief are revealed in the affidavit (new section 207(2)).

Judgment in an action relating to the detention of goods (clause 14)

Section 216 of the *Magistrates Court (Civil Jurisdiction) Act 1982* which dealt with actions for the detention of goods has been deleted and replaced with a more comprehensive provision as set out below.

Court orders

Where the court in proceedings for the detention of goods gives judgment in favour of the plaintiff (the judgment creditor) the court may order that:

- (a) the goods be delivered (or given) to the judgment creditor within a specified period; or
- (b) the judgment creditor be paid the value of the goods (as assessed by the court).

[See new section 216(1) & (3).]

The plaintiff is to be given the opportunity of informing the court of the order he or she prefers (although the court is not bound to make that order, see new section 216(2)). In addition to either (a) or (b) above the court may order that the plaintiff be paid damages for the detention of the goods.

It will be an offence for a person to fail to comply with an order for the delivery of goods (new section 216(4)).

Where order requires goods be given to the judgment creditor

Where an order is made that the goods be given to the judgment creditor and the judgment debtor fails to deliver the goods within the specified period or delivers the wrong goods (and the judgment creditor refuses to accept the goods) then the judgment creditor can apply for:

- (a) a writ of specific delivery; or
- (b) an order that he or she be paid the value of the goods.

[See new section 216(5) & (7).]

Writ of specific delivery

Any application by the judgment creditor for a writ of specific delivery must be accompanied by an affidavit indicating whether any of the goods under the judgment have been returned to the judgment creditor. The affidavit must also provide details of the judgment and the address at which it is alleged the wanted goods are situated (new section 216(6)).

Order for the value of the goods

Where an order is made that the goods be given to the judgment creditor and the judgment debtor fails to deliver the goods within the specified period or delivers the wrong goods or the goods delivered are substantially damaged (and the judgment creditor refuses to accept the goods) then the judgment creditor can apply for an order that he or she be paid the value of the goods (new section 216(7)).

Where a writ of specific delivery is issued and the bailiff is unsuccessful in obtaining the goods then the judgment creditor can apply for an order that he or she be paid the value of the goods (new section 216(7)).

An order that the judgment creditor be paid the value of the goods and/or consequential damages can be enforced under new Part XVIII (new section 216(8)).

Judgment or order requiring an act other than the payment of money (clause 15)

Any judgment or order requiring a person to do an act, other than to pay money, must specify the time within which compliance is required (new section 217A(1) & (4)). The time specified in such a judgment or order may be varied by the court (new section 217A(2)). In the event that no time is specified in the initial judgment or order the court may subsequently specify a time for compliance (new section 217A(3)).

Interest on judgments (clause 17)

Section 228 of the *Magistrates Court (Civil Jurisdiction) Act 1982* is amended to change the rates of interest payable on judgment debts for any period of time after the commencement of new Part XVIII. The new rates of interest are identical to those applying to pre-judgment debts in the Magistrates court. Before this amendment the rates of interest payable on judgment debts were fixed by reference to the rates applicable to judgment debts entered in the Supreme court (these rates will remain applicable for any period of time prior to the commencement of Part XVIII).

Section 228(4) of the *Magistrates Court (Civil Jurisdiction) Act 1982* which provides that where the amount of a judgment debt or costs are paid within 21 days then no interest is payable is to be deleted to achieve consistency with the practice in the Supreme court. It should be noted that section 228(4) will continue to apply to any judgment that took effect and any costs that were ascertained prior to the commencement of the new provisions in the Bill (see the transitional provision in clause 89 of the Bill).

Deletion of provision relating to instalment orders (clause 18)

Section 229 of the *Magistrates Court (Civil Jurisdiction) Act 1982* which deals with instalment orders is to be deleted and replaced by more comprehensive provisions in new Part XVIII of the Act (clause 21 of the Bill).

Limitation period for enforcement proceedings (clause 18)

A judgment creditor is not entitled, except with the leave of the court, to make an application for an examination summons, a garnishee order or a writ of execution if 12 years have elapsed since the judgment was given or entered (new section 229).

Payment of judgment debts (clause 18)

A judgment debt is payable immediately. Where a judgment debt is payable in one sum the amount is payable to the Registrar (new section 229A(1) & (2)).

Where there is an order for the payment of a judgment debt by instalments and the order requires the instalments to be paid to the Registrar then the instalments must be paid to the Registrar (new section 229A(2)(b)). Where the order does not require payment to the Registrar the instalments are payable to the judgment creditor (or any other person nominated by the judgment creditor, see new section 229A(3)).

In the situation where a judgment debtor, notwithstanding new section 229A(2)(b) pays the judgment debt (in whole or in part) to the judgment creditor (or any other person nominated by the judgment creditor) and the judgment creditor accepts the payment then the judgment debt is reduced by the amount of the payment (new section 229A(4)).

Where there is in force an instalment order or a writ of execution then the judgment debtor is precluded from paying into court an amount less than that required to be paid under the order or writ (new section 229B(1)). In the situation where the Registrar inadvertently receives into court a lesser amount he or she must advise the judgment creditor and the judgment creditor may either accept the payment or request in writing that the payment be returned to the judgment debtor (new section 229B(2)).

Forms (clause 22)

New section 284(2) - (8) in conjunction with the insertion of a definition of 'approved form' into section 3 (see clause 4) provides for the gazettal of approved forms.

New section 284(3) provides that the Minister may, by notice published in the *Gazette*, approve a form for the purposes of *Magistrates Court (Civil Jurisdiction) Act 1982*. The notice must include the text of the form and may include a declaration by the Minister that the approved form supersedes a particular numbered form in the Schedule to the *Magistrates Court (Civil Jurisdiction) Act 1982* (new section 284(4)). The notice is a disallowable instrument (new section 284(7)).

An approved form is defined in section 3 to mean a form approved under new section 284(3), (clause 4(a)).

Where a form in the Schedule is superseded it ceases to have effect as if it had been repealed (new section 284(5)). Similarly, where a form in the Schedule is superseded by an approved form, the revocation of the approved form does not revive the form in the Schedule (new section 284(6)).

New sections 3(5) (see clause 4(b)), 284(2) & (8) replace, respectively, existing sections 3(5), 284(2) & (3). The new sections, in contrast to the existing sections, refer to both approved forms and forms in the Schedule.

Right of appearance (clause 24)

Existing section 179 sets out the rights a party has to be represented at the hearing of a proceeding. It will be repealed by clause 11 of the Bill and replaced by new section 295A.

New section 295A differs from section 179 in only three respects, namely it:

- (a) applies to all proceedings (it is not limited to the hearing of a proceeding);
- (b) applies to appearances before both the Registrar and the court (section 179 is limited to appearances before the court); and
- (c) does not include a definition of 'corporation' (a definition of 'corporation' will appear in section 3, see clause 4 of the Bill and page 63 of this explanatory memorandum).

**Corporation may authorise an officer to act in court proceedings
(clause 25)**

A corporation may authorise an officer of that corporation to sign any document or do any other thing in respect of court proceedings (new section 300A(1)).

A corporation is widely defined to include a body of persons that may sue or be sued (whether in its own name or in the name of an officer or other person, see new definition in section 3(1)). An officer of a corporation is defined to include a director and any person having powers of management, direction or control of the corporation (new definition in section 3(1)).

An authority given by the corporation to an officer must be under the seal of the corporation and lodged with the Registrar before it is can be used (new section 300A(3)). An authority may be limited to nominated court proceedings or it may be expressed to cover all court proceedings in which the corporation is involved or may become involved (new section 300A(5)). Where an officer acts under an authority those acts are deemed to have been done by the corporation (new section 300A(2)).

An authority remains in force until revoked by the secretary or other public officer of the corporation. To be effective the revocation must be lodged with the Registrar (new section 300A(6)).

AMENDMENTS TO THE MAGISTRATES COURT ACT 1930 AND MAGISTRATES COURT RULES

Deletion of provisions

Most of the existing provisions providing for the enforcement of judgments are currently found in the *Magistrates Court Act 1930* and the *Magistrates Court Rules*. These provisions are antiquated, ineffective and inadequate. They are being deleted in conjunction with the commencement of modern and efficient enforcement provisions in the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Magistrates Court (Civil Jurisdiction) Regulations*.

The sections being deleted from the *Magistrates Court Act 1930* are:

- (a) section 3 (a transitional provision no longer necessary);
- (b) section 65 (replaced by new sections 255AA & 255AB of the *Magistrates Court Act 1930*);
- (c) sections 158-166 (warrants of execution);
- (d) section 170 (examination procedures);
- (e) sections 171-180 (garnishee orders)
- (f) sections 181-187 (imprisonment of fraudulent debtors);
- (g) section 190 (replaced by new section 278CG of the *Magistrates Court (Civil Jurisdiction) Act 1982*);
- (h) section 192 (replaced by new section 151A of the *Magistrates Court (Civil Jurisdiction) Act 1982*); and
- (i) section 248 (garnishee orders).

[See clauses 31, 35, 40, 42 & 49 of the Bill.]

The rules being deleted from the *Magistrates Court Rules* are:

- (a) rules 9-12 and 82-92 (warrants of execution); and
- (b) rules 93-97 (examination procedures and imprisonment of fraudulent debtors).

[See clause 58 of the Bill.]

Refusing or failing to give evidence (clause 51)

New sections 255AA & 255AB of the *Magistrates Court Act 1930* deal with persons failing or refusing to give evidence. These new provisions replace section 65 of the *Magistrates Court Act 1930* and section 196 of the *Magistrates Court (Civil Jurisdiction) Act 1982*.

It will be an offence for a person who is subject to an examination under new section 278J of the *Magistrates Court (Civil Jurisdiction) Act 1982* or who appears as a witness in court proceedings to refuse or fail, without a reasonable excuse, to take an oath, answer a question or produce a document (in respect of which a summons or warrant has been issued) (new section 255AA(1) & (2)). It will also be an offence for such a person to give false information (new section 255AB(3)).

Where a person has contravened new section 255AA the court may adjourn the proceedings for a maximum period of 8 days and send the person to a gaol, lock-up or remand centre (new section 255AB(1)). The person will remain in the gaol, lock-up or remand centre until the adjourned date or the person consents to comply with new section 255AA (whichever occurs first).

Where a person has been sent to a gaol, lock-up or remand centre and is brought back before the court on the adjourned date and the person again refuses to comply with new section 255AA then the court may again adjourn the proceedings for a maximum period of 8 days and send the person back to a gaol, lock-up or remand centre (new section 255AB(2)). The person will remain in the gaol, lock-up or remand centre until the adjourned date or the person consents to comply with new section 255AA (whichever occurs first).

This process may be repeated again and again. However, the total maximum period that a person can be spend in a gaol, lock-up or remand centre under new section 255AB is 1 month (new section 255AB(3)).

Where the court imposes a penalty upon a person under new section 255AA it is precluded from also sending the person to a gaol, lock-up or remand centre (new section 255AB(4)).

OTHER ENACTMENTS WHICH ARE AMENDED

The Bill amends a number of other enactments principally in order to reflect the insertion of new enforcement procedures into new Part XVIII A of the *Magistrates Court (Civil Jurisdiction) Act 1982* (see pages 5-52 of this explanatory memorandum). The enactments so amended are:

- (a) Workers' Compensation Rules;
- (b) Attachment of Wages Limitation Act 1966;
- (c) Crown Proceedings Act 1992;
- (d) Landlord and Tenant Act 1949;
- (e) Magistrates Court (Civil Jurisdiction) (Solicitors' Costs) Regulations;
- (f) Sale of Goods Act 1954; and
- (g) Small Claims Act 1974.

Workers' Compensation Rules

Clauses 62 and 63 of the Bill delete rules 69 and 70 and amend rule 71. The effect of these changes is to enable a party entitled to compensation or costs under any award or memorandum to enforce payment by taking proceedings under new Part XVIII A of the *Magistrates Court (Civil Jurisdiction) Act 1982*.

Attachment of Wages Limitation Act 1966

Clause 69 of the Bill inserts two new definitions into this Act, namely, 'earnings' and 'Metal Trades Award'. New section 6 will preclude the assignment of wages.

New definitions of earnings and Metal Trades Award

The new definition of earnings is identical to that appearing in new Part XVIII A of the *Magistrates Court (Civil Jurisdiction) Act 1982* (see page 22 of this explanatory memorandum). This definition replaces the current definition of 'wages' in section 4 which is to be deleted.

In section 4 the definitions of 'Board' (Industrial Board) and 'Determination' have been replaced by a definition of 'Metal Trades Award'. This is necessary because the Metal Trades Award has superseded Determinations by the Industrial Board under the *Industrial Board Ordinance 1936*. In section 5 the reference to 'Determination' has been replaced by a reference to 'Metal Trades Award'.

Assignment of wages

New section 6 provides that an assignment of earnings will be unenforceable, irrespective of the type of legal document purporting to assign those earnings or the nature of the transaction which gave rise to the assignment.

To reflect the addition of this provision the short title of this Act is to be changed to '*Earnings (Assignment and Attachment) Act 1966*' (clause 68). The long title will be changed to 'An Act relating to the assignment and attachment of earnings' (clause 67).

Crown Proceedings Act 1992

Clause 73 inserts new section 5(3) to make it clear that the Crown may be made a garnishee.

Clause 74 of the Bill ensures that references in this Act to 'warrants of execution' are changed to 'writs of execution'.

Landlord and Tenant Act 1949

Clauses 76 and 77 of the Bill ensure that references in this Act to 'warrants of execution' are changed to 'writs of execution'.

**Magistrates Court (Civil Jurisdiction) (Solicitors' Costs)
Regulations**

Clause 79 of the Bill ensures that references in Schedule 2 to enforcement proceedings are changed to reflect the insertion of new Part XVIII A into the *Magistrates Court (Civil Jurisdiction) Act 1982* and the corresponding deletion of provisions in the *Magistrates Court Act 1930*.

Sale of Goods Act 1954

Clauses 81 and 82 of the Bill ensure that references in this Act to 'warrants of execution' are changed to 'writs of execution'.

Small Claims Act 1974

Clause 84 deletes section 22 and inserts a new section 22. Both provisions have the same effect, namely, to enable the enforcement of a judgment or order (made in the Small Claims Court) through the use of the procedures in the *Magistrates Court (Civil Jurisdiction) Act 1982*. New section 22 refers to that part of the *Magistrates Court (Civil Jurisdiction) Act 1982* that contains the enforcement procedures, namely new Part XVIII A.

Existing section 24C provides for the payment of a judgment debt by instalments. This section is no longer necessary because of the operation of new Part XVIII A of the *Magistrates Court (Civil Jurisdiction) Act 1982* and accordingly it is repealed by clause 85. To reflect the deletion of section 24C a consequential amendment is made by clause 86 to section 25A(5) to substitute a reference to section 278F of the *Magistrates Court (Civil Jurisdiction) Act 1982* for the existing reference to section 24C.