LAW REFORM COMMITTEE

Inquiry into warrant powers and procedures

Melbourne — 20 October 2004

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Mr R. White, chair, litigation section; and

Ms J. Richmond, research officer, Law Institute of Victoria.

The CHAIR — I welcome Rob White and Jade Richmond to this inquiry by the parliamentary Law Reform Committee into warrant powers and procedures. Our work as a committee is governed by the Parliamentary Committees Act, which means this public hearing and the evidence we take today is subject to parliamentary privilege. There is a presumption that the evidence will be given in public, but if you wish at any point to have your evidence given in camera you can indicate so and we will do that. You will be given a transcript of your evidence today, prepared by our Hansard reporters, and get an opportunity to correct it. After that we will place it on our web site. It becomes a public document and we take it into account in relation to our report and recommendations. Without any further ado, if you would give us an overview of your submission, Rob, and then we might ask some questions.

Mr WHITE — Thank you for the opportunity on behalf of the Law Institute of Victoria. I represent the litigation lawyers section, which is a section comprising some 2000-odd members of the law institute who have an interest in litigation. The only area of warrants which we have put a submission on and which is of interest to my section is in relation to the execution and enforcement of civil warrants. Your preliminary report, which is a very long document, in fact has only a very small section in relation to civil warrants. That is our only interest. We have some motherhood-type statements which we made in our submission, and I would like to refer to our submission if I may. Would you like me to read the whole submission? Is that the appropriate course of action?

The CHAIR — Not read it, but perhaps go to the key points.

Mr WHITE — Certainly. As sort of motherhood-type statements we would say that the powers of the Victorian sheriff when executing civil warrants should certainly be no less than the powers of his interstate equivalents in executing civil warrants. We would say that there should be, if it is possible, common forms and procedures throughout Australia — I guess uniform legislation. Wherever that is possible, from the legal profession's point of view, it tends to be of assistance, so certainly our members would welcome a reduction in different forms and procedures. We would say also as an overriding statement that the Sheriff's Office, when executing civil warrants, should be appropriately resourced and that there should not be excessive or long delays.

The position remains that for most judgment creditors the preferred form of enforcement of civil judgments is warrants. There are other forms of enforcement available, such as attaching earnings, bankruptcy of individuals, winding up of companies and the like, but warrants remain the preferred choice. From that point of view, we see it as a policy issue that from the point of judgment creditors that obtain the judgment of a court there should be a system that is not too difficult to be taken to enforce their judgments, and certainly there should not be delays brought about by under-resourcing.

In relation also to the forms of execution which are available we are concerned that if the procedures become cumbersome or become delayed judgment creditors may then turn to other forms or processes for enforcing judgments, such as bankruptcy, which ideally I think should be a last resort rather than a first resort. One of the issues in relation to civil warrants is to have established a regime which does not push judgment creditors to use bankruptcy as a first method of enforcing their judgments. Of course, at a worse extreme, possibly if people become frustrated by the system, they may use methods totally outside the system from that point of view.

The fourth motherhood type of statement we make is that if civil warrants are being executed by the same Sheriff's Office officers who are executing other forms of warrants such as PERIN warrants there should not be a diversion of resources to the execution of those warrants ahead of civil warrants, particularly as we understand the fees that our clients are paying have been calculated on a user-pays type of basis. They are the broad statements that we see as appropriate for civil warrants.

Our submission also includes some specific suggestions from our point of view that we believe could make improvements in the current system. The first one is in relation to the current position that a sheriff is able to enforce a judgment against real estate only if the judgment has been registered in the Supreme Court or is obtained in the County Court or the Supreme Court in the first place. In other words, if a judgment in the first instance is obtained in the Magistrates Court, the Magistrates' Court Act does not empower the sheriff to sell a judgment debtor's interest in real estate. There is a procedure available to obtain a certificate under the Magistrates' Court Act for registration in the Supreme Court, but we see that as being cumbersome and unnecessary. There may be a need for some safeguards so that judgment debtors' interests in real estate are not sold for trifling amounts. We would accept that as a policy reason for not allowing sheriff's sales of real estate over trifling amounts. But otherwise, with the increased monetary jurisdiction — particularly with the Magistrates Court jurisdiction very soon to be $100 000 — it seems to be an unnecessary impediment and an unnecessary cost. I have actually noted some of the costs. I can set out some of the costs and steps that are involved in that.

Mr LUPTON — It would be useful if you would set out the certification or registration process.

Mr WHITE — The way it works at the moment is that if a judgment is obtained in the first instance in the Supreme Court or the County Court the judgment creditor has the power to issue a warrant of seizure and sale. That warrant empowers the sheriff to sell any asset of the judgment debtor, real property or personal property. The rules say the sheriff should first attempt execution against personal property, unless the judgment debtor asks for the execution to proceed against real property, but no other procedure is required. There is in fact a complicated procedure to actually sell the interest in the real estate because there are procedures that call into play the provisions of the Transfer of Land Act, and the sheriff conducts auctions and the like. In fact we see those procedures as cumbersome as well, but that is perhaps another issue.

If one obtains a judgment in the Magistrates Court, if there is a desire to take action to enforce the judgment against a judgment debtor's interest in real estate it is first necessary to issue a Magistrates Court warrant to seize property. That incurs costs. The first is a filing fee of $15.40 in the Magistrates Court for that court to certify that the contents of the warrant accord with the judgment. A fee is then paid to the sheriff. So a judgment is obtained; a warrant is prepared and sent to the court; a fee is paid for the court to certify it; it is returned to the judgment creditor's solicitor or the judgment creditor; and the warrant is then sent to the sheriff with a cheque for the sheriff's fee of $165.70 — that is the current fee. There is an entitlement to claim professional costs on the preparation of the warrant, depending the amount involved, of between $36 and $165. The sheriff is then required to attempt to enforce the warrant against personal, non-real property.

If that is unsuccessful it is necessary for the warrant to then be formally returned to court. Once the warrant is returned to the court the judgment creditor can then seek a certificate under section 112 of the Magistrates' Court Act, and it involves the cost of $26.80 being paid to the court if the judgment creditor prepares it, or $42 if the court prepares the certificate. Once the certificate is obtained you can then prepare a warrant of seizure and sale from the Supreme Court and file the warrant there and pay a fee of $279.30. At that point you are at the same point as if you had obtained your judgment in the first place in the Supreme Court. It is that preceding set of steps, costs, fees and delays which our members see as being unnecessary — not unnecessary if it is a judgment of $150, but unnecessary if it is a judgment of any substance.

The CHAIR — What do those members of the Law Institute of Victoria who represent the debtors think of that?

Mr WHITE — I do not think there is anything controversial in the suggestion that is being made, in the sense that all it is doing is reducing costs. Ultimately the costs which are being incurred are in fact payable by the judgment debtor, so there is no real advantage at the end of the day to a judgment debtor that it is frustrating the creditor. I mean, interest is running under the

Penalty Interest Rates Act at 12 per cent the whole time; the costs are being added on, and at the end of the day no advantage is gained by the judgment debtor. Certainly parties acting for judgment debtors may have concerns about other areas of enforcement, but it is difficult to see why they would be troubled by this aspect of it. And they may be troubled also by the size. If there were to be a threshold at the bottom level; that may be relevant, but not the actual process, I do not think.

Mr LUPTON — Do you have any comment to make about an appropriate way of working out a safeguard threshold, for instance, whether the matter could have been brought in the County Court or the Supreme Court, and how that would work?

Mr WHITE — Our submission simply says that we believe such warrants perhaps should not be executed against real estate if the amount of the judgment is a trifling sum. But I think we have a range of views as to what would constitute a trifling sum.

Mr LUPTON — I presume reason for the inability to execute against real property out of the Magistrates Court was that the Magistrates Court historically dealt with modest monetary amounts?

Mr WHITE — In part. In our submission we refer to the previous act, which was the *Magistrates' (Summary Proceedings) Act, and when that was in force the monetary jurisdiction of the court was $600. When I started practice some time ago that is what it was. But now it is going to $100 000. So it has certainly had a substantial increase. But there are other historical reasons as well. In those days there were separate forms of sheriff for each court. There was a separate Magistrates Court sheriff, a separate County Court bailiff, and a separate Supreme Court sheriff. It was only in the late-1980s that the current Sheriff's Office took control of all the various other courts' forms of bailiffs.

So there was potentially, I suppose, an ability to distinguish the sorts of warrants they could execute and the powers they would have, but that seems difficult to now justify as it is the one Sheriff's Office and the same Sheriff's officer who is executing such a warrant. In our submission we make suggestions as to the legislation that would need to be looked at if the suggestions in our submission were to be taken up.

The second submission we have is in relation to section 27 of the Judgment Debt Recovery Act, which is reflected in section 42 of the Supreme Court Act. Those sections limit the property which a sheriff is able to seize in execution of a civil warrant. In the early days when the act was introduced there were some cases where the courts were asked to adjudicate on what was meant by 'household necessaries', because the act talks about household necessaries.

Since that time there have been regulations under the Bankruptcy Act, which are incorporated into this act. But the position as it stands now is that if a sheriff were to seize an item of property which a court ultimately considered should not have been seized, the process would be that the sheriff would be sued in trespass and a court would make an order accordingly. The submission of the Law Institute of Victoria is that that process is not the best way to determine what household property should or should not be available for seizure by a sheriff.

I have probably not expressed that very clearly, but I should point out that this submission is relevant from the point of view of both the judgment debtors and judgment creditors. At the moment the position is that if a sheriff were to seize, for example, a piano in a house, the judgment debtor might want to argue that it was an item of household property which is exempt from seizure. The only method available to the judgment debtor to challenge that would be to sue the sheriff in trespass, which was the situation in the case of *White v. Quartermain*, which is referred to in our submission, and which was judged in the County Court. The Magistrates Court or judge would have to determine whether or not it was an item of property which could have been seized.

Similarly the sheriff may decline to seize the piano and might report to the judgment creditor that the piano has not been seized because it is exempt, and the judgment creditor may want to argue that is not so and may want the court to determine whether in fact the act does extend to that item. Again there is no process for that.

Our submission is that there could be a process not dissimilar to an interpleader summons, where an aggrieved debtor or aggrieved creditor could bring an application for the court to determine whether the item of property should or should not be exempt from seizure. That is the second of our submissions.

The third of our submissions is in relation to the power of entry of a sheriff. The present common-law position is that a sheriff does not have the power to enter a person's home to execute a civil warrant unless they are rescuing previously seized goods. In other words, if entry has previously been granted and the sheriff is returning to remove it and is refused entry, he can then break down doors and the like; otherwise he cannot.

That is the position even if there are known to be assets within the house which a judgment creditor may consider should be available for seizure. While this is obviously an area which involves careful policy thought and consideration I do not think our submission is really any more than the following situation. The sort of situation we have in mind is if an art dealer were to sell a valuable painting to a person and not be paid and the painting was there hanging on the wall, it would be somewhat upsetting, I guess, to not be able to obtain an order from a court to allow the sheriff to enter the house if entry was otherwise refused to seize the painting.

We are not suggesting the sheriff should have the right to enter premises other than with the order of a court — and we do not have in mind that a court would lightly make such an order. We have in mind that there would be instances where the judgment creditor could point properly to property which the judgment creditor had in fact sold and property had passed and was located within the premises. That is the sort of situation we would have in mind.

The CHAIR — Are you saying with a warrant?

Mr WHITE — Yes. So would have in mind that if in the painting example the purchaser of the painting was sued and judgment was obtained for a monetary sum, if a warrant was issued and the sheriff attended the premises and was denied entry, then there would be an ability for the judgment creditor in that situation to make an application to the court and provide evidence as to why the sheriff should be allowed the right to enter the premises to locate a specific piece or item of property. That was the sort of situation we had in mind with that submission. And we think that might be unusual, I might say; it is not going to be happening every day of the week.

The fourth submission that we had was in relation to the priority in which warrants are executed. The current position is that warrants are executed upon the basis of the priority in which they are received by the Sheriff's Office. I said earlier, and I gave the example in the first submission in relation to the issuing of a warrant, where it is sent to the court, it is issued , it is sent back to the judgment creditor, the judgment creditor then sends it to the Sheriff's Office, which receipts the warrant. If two warrants are received on the same day, for example, then it is the first one that is stamped 'Received' which is executed in full before the next one. We do not have a difficulty with that in the sense that there has to be some form of priority and that itself is fine. But where we believe the priority rule should be amended is in a situation — it is set out in the submission — where a sheriff makes a seizure of property, a third party submits a claim of ownership, the sheriff invites the creditors to have him issue an interpleader summons and in that situation you could have a person with less priority wanting to have the interpleader proceeding proceed and incurring the cost and the risk of such a process. If the interpleader action finds that the third party has no claim and the items are then sold, the sale proceeds will go first to the first priority warrant holder who did not incur the risk or the cost in prosecuting the interpleader action. In that situation we think the priority rule should be changed.

There is an analogy we refer to in our submission which happens with trustees in bankruptcy and liquidators. If they are wanting to instigate action or recover property they will often go to the body of creditors and say, 'We want to sue somebody for whatever it may be. We have no funds. Are you prepared to indemnify us? If you are, then you will paid more from the recovery than those who do not agree to indemnify'. I guess we say that is an analogous situation to the one we are putting where the person who is funding and taking the risk in the interpleader proceeding should be able to have the benefit of the fruits of any successful outcome. They will be paying the costs if it is lost, and if it is won they should take priority over the warrant holder who would otherwise have had priority. They were the four submissions which we have included in our submission.

Mr LUPTON — Going back to the ability to register a judgment to obtain execution against real property, are there any requirements that have to be satisfied in order to obtain a certificate from the Supreme Court that may be applicable to the submission that you are making in that regard?

Mr WHITE — There is a requirement that the warrant be returned unsatisfied. That is the language which is used. In the old days it was the old nulla bona — no goods — which was the endorsement on the warrant. It just contemplates that the sheriff will have gone out and attempted to locate personal property and been unsuccessful.

Mr LUPTON — In those circumstances would the Supreme Court upon application issue a certificate without going into the matter in any more detail? Is it simply an administrative process to obtain that certificate from the Supreme Court to execute against real property?

Mr WHITE — The certificate is obtained in the Magistrates Court and then registered in the Supreme Court.

Mr LUPTON — I am interested in the Supreme Court. Is registering it in the Supreme Court purely an administrative process?

Mr WHITE — Yes.

Mr LUPTON — There is no inquiry?

Mr WHITE - No.

Mr LUPTON — So as things stand at the moment the certificate could be registered in the Supreme Court for a very modest sum in any event?

Mr WHITE — Yes, for any amount.

Mr LUPTON — Good. Thank you.

The CHAIR — A common complaint that is made in this area by creditors is that you go and you get a judgment in your favour. You go to the sheriff, or the sheriff goes in order to enforce the court order, and there seem to be quite a number of obstacles in the way where you have an obstinate debtor who really does not want to pay, and where there are small amounts of money involved there are an enormous number of hoops and hurdles that they can put you through which make the collection of the outstanding debt not worth pursuing. Do you have any views about how that could be expedited from the point of view of a creditor?

Mr WHITE — In relation to warrants?

The CHAIR — Yes.

Mr WHITE — Because there are other processes available other than warrants, such as attaching earnings. The fees in one sense are reasonably high, I think, for what is involved. The fees on warrants have gone up significantly over the years, and that has been on the basis, as I understood it, of it being a user pays-type process. Those fees are transferable to the judgment debtor. There is the flip side; you were right when you said that the judgment creditors always express such frustrations. I think some of the parties on the other side would say, 'You should not extend credit to people if they cannot afford to pay you'.

The CHAIR — Oh, for the perfect world!

Mr WHITE — The other side of it of course is that ultimately the fees are payable by the debtor. One of the areas which is not a good look, I guess, is to have a situation where a relatively small debt is overtaken by the amount of costs and interest which are added to it. If that can be avoided it would be desirable. Whilst people talk about the cost of the lawyers there are in fact a substantial amount of governmental-type costs which are added in the way of filing fees, court-processing fees and sheriff's fees and the like, so one way would be to reduce fees.

The CHAIR — Okay. Yes.

Mr WHITE — Certainly there is streamlining in time. One of the issues we have is the question of whether the Sheriff's Office is appropriately resourced or not. We have no evidence; our members will often have complaints, but whether that is rightly so — —

Certainly an expeditious process is to everybody's advantage, and if it means more resourcing then that would be something that we would certainly endorse.

The CHAIR — Is there anything else you would like to say before you conclude? Have you covered everything?

Mr WHITE — Only to thank you for giving me the opportunity to make a presentation.

The CHAIR — Thank you for giving us your time and expertise. We appreciate it.

Committee adjourned.