NSW Law Reform Commission

REPORT 46 (1985) - COMMUNITY LAW REFORM PROGRAM: ATTACHMENT OF MONEYS DEPOSITED WITH BUILDING SOCIETIES AND CREDIT UNIONS

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New South Wales Law Reform Commission

To the Honourable T W Sheahan, BA, LLB. MP,

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

ATTACHMENT OF MONEYS DEPOSITED WITH BUILDING SOCIETIES AND CREDIT UNIONS

Dear Mr Attorney General

We make this Report under the reference from the late Honourable D P Landa, LLB, MP. Attorney General to this Commission dated 8 December 1983.

Keith Mason QC

(Chairman)

Deirdre O'Connor

(Commissioner)

Professor Colin Phegan

(Commissioner)

December 1985

Terms of Reference

To inquire into and report on:

1. Whether the law relating to the garnishment and attachment of debts may or should apply to money deposited with a building society or a credit union, and in particular without limiting the foregoing, whether proceedings by way of garnishment or attachment or both may or should apply to:

deposit accounts, and

withdrawable share capital, and withdrawable share accounts

with building societies and credit unions.

2. Any incidental matter.

D P Landa

Attorney General and

Minister of Justice

8 December 1983

New South Wales Law Reform Commission

The New South Wales Law Reform Commission is constituted by the Law Reform Commission Act 1967. The Commissioners are:

Chairman:

Mr Keith Mason QC

Deputy Chairman:

Mr Russell Scott

Full- time Commissioners:

Paul Byrne

Professor Colin Phegan

Part- time Commissioners:

Dr Susan Fleming

Greg James QC

Eva Learner

Her Honour Judge Jane Mathews

Ms Marcia Neave

The Honourable Justice Peter Nygh

Miss Deirdre O'Connor

The Honourable Mr Justice Adrian Roden

Ronald Sackville

Mr H D Sperling QC

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Mr William Tearle

Members of the research staff are:

Ms Heather Armstrong

Ms Fiona Curtis

Ms Ros Robertson

Ms Meredith Wilkie

This is the Seventh Report of the Commission under its Community Law Reform Program. Its short citation is LRC 46.

Participants in Reference

Commission Members:

For the purpose of the reference the former Chairman, Professor Ronald Sackville, in accordance with section 12A of the Law Reform Commission Act, 1967, created a Division comprising the following members of the Commission.

Professor Ronald Sackville (Chairman)

Mr Russell Scott (Deputy Chairman)

Miss Deirdre O'Connor

Professor Colin Phegan (in charge of this reference)

Professor Sackville's term expired on 31 December 1984 and all existing Divisions of the Commission were dissolved. Mr Keith Mason QC was appointed Chairman from 4 March 1985 and the Division for this reference was reconstituted comprising the following members.

Mr Keith Mason QC (Chairman)

Miss Deirdre O'Connor

Professor Colin Phegan (in charge of this reference)

Secretary

Mr Peter Lemon (until 31 May 1985)

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REPORT 46 (1985) - COMMUNITY LAW REFORM PROGRAM: ATTACHMENT OF MONEYS DEPOSITED WITH BUILDING SOCIETIES AND CREDIT UNIONS

1. The Community Law Reform Program and this Reference

I. INTRODUCTION

1.1 This is the Seventh Report in the Community Law Reform Program. The Program was established on 24 May 1982 by the Attorney General at that time, the Hon F J Walker QC. by letter addressed to the Chairman of the Commission The letter included the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s.10 of the Law reform Commission Act, 1967.

The background of the Community Law Reform Program is described in greater detail in the Commission's Annual Report of 1982.

1.2 Between March and August 1983 the Commission gave preliminary consideration to the subject matter of this Report at the request of the then Attorney General, the late Hon D P Landa QC. This request followed receipt of complaints by the Courts and by the Department of the Attorney General and Justice (now the Department of the Attorney General) that a judgment creditor is not able, in order to satisfy the judgment debt to attach moneys deposited by the judgment debtor with a building society or credit union By contrast a judgment creditor is able to attach moneys standing to the credit of the judgment debtor in a bank account. The Commission was asked to give preliminary consideration to the desirability and feasibility of legislative reform to remove the immunity which a judgment creditor enjoys where his or her savings are deposited with a building society or credit union rather than with a bank.

1.3 Discussions were held with Mr R Baker, the then Acting Registrar of Permanent Building Societies and the Registrar of Credit Unions. Mr H H Binns. Secretary of the United Permanent Building Society Ltd and Mr J Reid. Secretary of the Permanent Building Societies Association (NSW) Ltd. After due consideration a reference was sought by letter of 30 August 1983. The terms of the reference received are set out on page xii.

II. THE GARNISHMENT PROCESS

1.4 Civil litigation most commonly results in a judgment or order of the court that the unsuccessful litigant (the judgment debtor) shall pay a sum of money (the judgment debt) to the successful litigant (the judgment creditor).

Garnishment is one of several procedures which may be available to the judgment creditor to enforce payment by the judgment debtor. Other enforcement procedures include a writ of execution[1] against real or personal property of the judgment debtor[2] and a charging order over any asset of the judgment debtor which is amenable to a charging order, such as shares or an equitable interest in property[3] or an interest in a partnership.[4] In appropriate cases the judgment creditor may resort to bankruptcy or winding up proceedings.

1.5 The garnishment procedure enables a judgment creditor to obtain a court order under which *any debt due or accruing*[5] to the judgment debtor from a third party (the attached debt) becomes payable to the judgment creditor to the extent necessary to satisfy the judgment debt Garnishment is an unusual procedure in so far as the third party (the garnishee) is involuntarily, and usually unwillingly, involved in a matter of concern only to the judgment creditor and the judgment debtor. The adoption of a procedure involving a disinterested third party reflects the policy that such involvement is justified in order to facilitate the recovery of judgment debts. However, the interests of the garnishee must be taken into account and are of particular importance because the garnishee is an involuntary participant in the legal process.

1.6 The law relating to garnishee orders is considered in more detail in Chapter2 (paras 2.14-2.24). Since the practical effect of a garnishee order is to place the judgment creditor in the shoes of the judgment debtor in relation to the attached debt, the legal relationship between the judgment debtor and any potential garnishee determines whether there is any debt due or accruing to the judgment debtor from that person which may be attached. As a general proposition, if there is some precondition to the payment of a debt, there is no debt due or accruing at common law until the precondition is satisfied. Consequently moneys held by banks and other financial institutions to the credit of judgment debtors, although frequently readily available to the judgment debtors themselves, generally are not attachable. 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.

III. BACKGROUND TO THE REFERENCE

1.7 Historically banks have been the principal institutions with which the majority of the community has deposited money and the desirability of legislative reform of the common law limits on the attachment of moneys on deposit first became apparent in relation to moneys deposited with banks. In 1970 provisions were included in the Supreme Court Rules to enable the attachment of moneys standing to the credit of a judgment debtor in a bank account notwithstanding that conditions of certain kinds often imposed on the withdrawal of moneys from bank accounts had not been satisfied.[6] Similar provisions subsequently were incorporated in the District Court Act, 1973[7] and the Courts of Petty Session s(Civil Claims) Act, 1970(now renamed the Local Courts (Civil Claims) Act, 1970).[8] Additional provisions were later included in order to protect savings banks against the possibility that a bank might comply with a garnishee order and also pay the judgment debtor “over-the-counter” on presentation of his or her passbook.[9] The garnishment provisions applying to banks are considered in Chapter 2 (paras 2.22-2.24.)

1.8 The principal question raised by this reference is whether the bank account provisions should be extended to enable judgment creditors to attach moneys standing to the credit of a judgment debtor in a deposit account with a building society or credit union Building societies and credit unions are now used extensively as alternatives to banks for the purpose of placing money on deposit. As at 30 June 1984 building societies held deposits totalling $438,208,000 (paras 5.6, 5.8 and 5.25) and credit unions held deposits totalling $1,479,281,567 (para 5.34). Moreover deposits with building societies seem likely to comprise an increasing proportion of the funds invested

with these organisations (para 5.26). It is very difficult to justify the continued immunity of such funds from attachment.

1.9 The terms of reference also refer to “withdrawable share capital” and “withdrawable share accounts” in building societies and credit unions. A member of a building society or credit union may subscribe for withdrawable shares in the organisation and 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. At present building societies hold the bulk of the funds lodged by their members as withdrawable share capital rather than as deposits. To take permanent building societies alone, as at 30 June 1984 the ratio of the aggregate membership of these societies (4,076,014) to the aggregate share capital ($6,302,990,000) gave an average shareholding of $1,546.36 (para 5.25).[10] By contrast, credit unions hold the bulk of the funds lodged by their members as deposits. The shareholding of a member usually will be the minimum number of shares required for membership of the credit union and will be of little value. As at 30 June 1984 the ratio of the aggregate membership of active credit unions (801,090) to their aggregate share capital ($6,054,598) gave an average shareholding of only $7.55 (para 5.34). Consequently withdrawable share accounts in building societies are of greater practical significance to judgment creditors than comparable accounts in credit unions.

1.10 Usually an amount in a withdrawable share account cannot be attached by a garnishee order. The difficulty the judgment creditor faces is that there is no debt due or accruing to the judgment debtor capable of being attached until the judgment debtor is entitled to withdraw his or her shares and applies to do so in accordance with the rules governing withdrawal from the account The legal nature of a withdrawable share account is different to that of a deposit account. However, for the account- holder, there is little practical difference between putting money in a deposit account and putting money in a withdrawable share account. In both cases funds are more or less readily available once all preconditions to withdrawal from the account have been satisfied. Moreover the difficulty a judgment creditor faces in attaching a withdrawable share account is essentially the same difficulty he or she faces in attaching a deposit account in a building society or credit union. In both cases there is no debt due or accruing to the judgment debtor until all preconditions to withdrawal from the account have been satisfied. The question to be considered is whether, given the similarities between deposit accounts and withdrawable share accounts, the law should be reformed to permit a judgment creditor to attach an amount standing to the credit of a judgment debtor in a withdrawable share account.

IV. THIS REFERENCE AND THE ENFORCEMENT OF JUDGMENT DEBTS IN GENERAL

1.11 On 22 March 1973 the Commission received a reference from the then Attorney General which required the Commission:

> to review the procedures used and remedies available in the civil and criminal courts, *including the enforcement of judgments and orders:* in doing so, to have regard for the functions of the Rule Committee of the Supreme Court, other rule making authorities, and of the Criminal Law Committee: and to consider what reforms should be made for the more convenient and efficient disposal of legal matters which now come or might be brought before the courts.

Under this reference, which will be referred to in this Report as the *Procedure* reference, a Working Paper entitled “Draft Proposal Relating to the Enforcement of Money Judgments” was prepared and circulated for comment in 1975. The Working Paper incorporated a proposed Act, the Money Judgments Enforcement Act. The object of the proposals was to ensure efficient and effective enforcement of judgment debts after a full examination of the means and overall financial position of each individual judgment debtor. The methods of enforcement covered in the legislation proposed in the Working Paper included garnishment.

1.12 In May 1976 the Australian Law Reform Commission received a reference on reform of debt recovery procedures. The federal reference overlaps with our *Procedure* reference so far as it relates to the enforcement of judgment debts. The two Commissions have co-operated on research in this area and it was decided by this Commission that further work by it on this aspect of the *Procedure* reference should await the Australian Law Reform Commission’s report on a model judgment debt recovery system under its *Debt Recovery* reference, as the Australian Commission has suggested that its proposals might either be the basis for the adoption of uniform State laws or the subject of federal legislation under the Federal Government’s legislative power with respect to insolvency.

1.13 The reasons for non-payment of a judgment debt include both unwillingness and genuine inability to pay on the part of the judgment debtor. As to the latter, overzealous efforts to enforce the judgment may not only amount to harassment of the judgment debtor but may also be counterproductive for the judgment creditor. There are already laws and procedures in place which allow the judgment debtor to alleviate his or her immediate difficulties and provide the judgment creditor with improved prospects of recovery in the long term. The judgment debtor who cannot pay a judgment debt immediately may apply to pay it by instalments or, where the general state of his or her financial affairs warrant it, may even apply to be made bankrupt.

1.14 The law relating to the enforcement of judgment debts requires a compromise between the right of a judgment creditor to recover moneys which have been judged owing to him or her and the need to take a realistic and humane view of the capacity of the judgment debtor to pay. Such a compromise also raises questions of the interests of creditors of the same debtor as between each other, since the successful enforcement of one creditor’s rights may exclude any recovery by other creditors if the capacity of the debtor to pay is limited. How such difficult and important questions are resolved is entirely outside the scope of this reference, limited as it is to the removal of anomalies which have emerged in one particular form of judgment enforcement.

1.15 This reference has been undertaken within the Community Law Reform Program because of its discrete nature and because the elimination of anomalies of the kind at which the reference is directed (paras 1.7-1.10) will do nothing to pre-empt reform on the broader issues which are the subject of our *Procedure* reference and the Australian Law Reform Commission’s *Debt Recovery* reference (paras 1.11-1.12). We would hope that the improvements in the law, which would result from the adoption of the recommendations in this Report would be a positive contribution to the larger task involved in the *Procedure* and *Debt Recovery* references. The rapid growth of building societies and credit unions as deposit-taking institutions has created a problem in the law of garnishment which requires urgent attention and which justifies an immediate solution independently of the broader and necessarily more time-consuming review of the whole relationship of debtor and creditor which is currently underway.

1.16 There is one important policy issue which, although outside the scope of this reference, warrants special mention The extension of the garnishment procedure to include attachment of moneys in deposit and withdrawable share accounts with building societies and credit unions raises a particular problem in relation to judgment debtors who are financially dependent on social security payments. The Commonwealth Department of Social Security has recently altered its payment system so that social security entitlements are now directly

credited to an account with a bank, building society or credit union in all but exceptional cases. Under the Social Security Act 1947 (Cth), entitlements under that Act are inalienable by way of execution.[11] However it is doubtful that the relevant provision protects a social security payment from garnishment when it has been directly credited to the recipients account Since the inalienability of social security payments and other income benefits is essentially a matter of Commonwealth policy, we have drawn the matter to the attention of the Commonwealth Government and understand that income security payments by direct credit will be safeguarded in a manner consistent with the inalienability principles in the Social Security Act

V. OUTLINE OF THIS REPORT

1.17 Under our terms of reference, we are required to consider the following matters:

> Whether the present law of garnishment permits the attachment of moneys standing to the credit of a judgment debtor in a deposit account or withdrawable share account with a building society or credit union.
>
> Whether the law of garnishment in particular the provisions relating to accounts in banks, should be reformed to make moneys in deposit and withdrawable share accounts in building societies and credit unions liable to attachment.
>
> Any incidental matters.

1.18 The present law of garnishment both procedural and substantive, and the extent of its application to moneys lodged with building societies and credit unions are considered in Chapter 2. We have concluded that moneys in deposit and withdrawable share accounts with building societies and credit unions are not liable to attachment by garnishment in other than exceptional situations.

1.19 The question whether the law should be reformed calls for consideration of relevant reforms in other jurisdictions and these are discussed in Chapter 3. We have concluded that any reform should be effected within the general framework of the existing bank account provisions. The bank account provisions are discussed in Chapter 4 where we identify several deficiencies which should be remedied in order to improve their operation, irrespective of whether they are extended to accounts with building societies and credit unions. Our recommendations for reform of the bank account provisions are contained in Chapter 4.

1.20 Whether the law should be reformed to permit the attachment of moneys in accounts with building societies and credit unions is the subject of Chapters. In that Chapter we review the general nature of building societies and credit unions, the types of accounts which these organisations offer to their members and the contractual relations which can exist between a building society or credit union and a judgment debtor/member under the legislation and rules which regulate the activities of these organisations. We recommend that deposit and withdrawable share accounts in building societies (other than co- operative housing societies) and credit unions should be made liable to attachment by extension of the bank account provisions.

1.21 Some characteristics of building societies and credit unions and of their relationship with depositors/shareholders require more than an extension of the bank account provisions to these organisations, even if the existing bank account provisions are improved in the manner recommended in Chapter 4. In Chapter

6 we therefore make a number of consequential recommendations designed to ensure the effective operation of the garnishment procedure in relation to accounts with building societies and credit unions (and with banks) and to achieve an appropriate compromise between the interests of the judgment creditor and the garnishee.

1.22 There are a number of substantive differences between the garnishment provisions in the Supreme Court Rules, the District Court Act 1973 and the Local Courts (Civil Claims) Act 1970. Consequently in some respects the law operates differently in the different jurisdictions. These anomalies in the substantive law are incidentally significant to this reference because they would affect building societies and credit unions as particular classes of garnishee and would, if ignored, undermine the effectiveness of our principal recommendations. They are discussed in Chapter 7, where we recommend that the substantive law of garnishment should be uniform for all jurisdictions. In Chapter 7 we also consider the remedy of a charging order to enforce a judgment debt where the judgment debtor holds withdrawable shares in a building society or credit union.

1.23 The recommendations made throughout the Report are restated in the List of Recommendations which follows Chapter 7 and are embodied in the draft legislation in the Appendices to the Report The draft legislation would amend the District Court Act 1973 (Appendix A) and the Local Courts (Civil Claims) Act 1970 (Appendix B). The provisions to attach debts to satisfy a judgment debt in the Supreme Court are included in the Supreme Court Rules (Part 46) and not in the Supreme Court Act, 1970. Under the Act the Supreme Court Rule Committee is empowered to alter, add to or rescind the Rules for the time being in force, and to make additional rules, for the purpose of carrying the Act into effect.[12] If the legislation, as recommended, is implemented for the District Court and Local Courts, we recommend that appropriate amendments be made to the Supreme Court Rules consistent with Parliament's endorsement of the proposed reforms and the different procedure in the Supreme Court Because some of the reforms we propose arguably are of a substantive nature, we recognise that there may be some question as to the adequacy of the present rule- making power for this purpose. It may therefore be desirable to make an appropriate amendment to the Supreme Court Act to put the matter beyond doubt.

VI. OTHER FINANCIAL INSTITUTIONS

1.24 This reference is limited to considering reform of the law of garnishment in relation to building societies and credit unions. However the common law principles which prevent the attachment of moneys held by these organisations to the credit of members and other depositors apply equally to other forms of investment such as debentures, and to deposits with other types of organisations, eg insurance companies, rural trading and other co-operative societies and friendly societies. Also, from the point of view of the investor, investments in cash management trusts are analagous to withdrawable shares in a building society or credit union in that the investor may, in accordance with the terms of the particular trust deed, readily recover moneys invested by surrendering units held in the trust.

1.25 In the course of our discussions with various building societies and credit unions and their industry associations, some concern was expressed at the possible implications which selective reform of the law of garnishment might have for their competitive position in relation to other financial institutions. Since it seems improbable that any significant proportion of the investing public is likely to take the possibility of garnishment into account, let alone as a decisive factor, when deciding with whom and in what manner to invest funds, we doubt that reform of the law of garnishment as it applies to building societies and credit unions is likely to disadvantage these organisations in the marketplace. Nevertheless, as a general principle, the law ought to apply uniformly unless there are sound legal or practical reasons for making distinctions.

1.26 This wider issue, while clearly outside the scope of this reference, warrants consideration However in raising the matter we must also stress that, in our view, any reform of the law of garnishment to include moneys lodged with other types of financial institution should not proceed without thorough consideration of the legal nature of the transactions involved, the specific problems they may raise for effective attachment and the practical consequences of subjecting the type of financial institution in question to garnishee orders in view of its particular operations. We believe that the need for an inquiry of this type before implementing any such further reform will be apparent from a reading of this Report.

VII. CONSULTATIONS

1.27 In the course of preparing the draft report we had further discussions with Mr Baker and this officers and Mr Binns (para 1.3) and discussions with Ms Mary Donnelly of the Permanent Building Societies Association (NSW) Ltd. Mr Russell Dobson, General Manager of the Association of Central Credit Unions Limited and Mr R Elliott of the Association of NSW Credit Unions. In addition written submissions were sought from the three Associations. We also had discussions with officers of several building societies and credit unions regarding their particular operations and with officers of the Supreme Court, the District Court and Local Courts regarding garnishment procedures. Mr John Brownie QC advised the Commission on certain preliminary matters and acted as a consultant in the preparatory work on the reference. Mr G R Herron, Senior Manager of Westpac Banking Corporation's Legal Administration Section, NSW Division, assisted the Commission on aspects of banking practice and the garnishment procedure as it affects banks. To all of these we wish to express our appreciation for the valuable contribution they have made to the preparation of the Report.

1.28 It was not feasible to make the draft report available to all the organisations likely to be affected if our proposed reforms are adopted. However it was circulated for comment to the following people and organisations:

Mr R Baker, Director of the Department of Co-operative Societies and the Registrar of Permanent Building Societies and of Credit Unions

Permanent Building Societies Association (NSW) Ltd

Association of Central Credit Unions Ltd

Association of New South Wales Credit Unions Limited

The North Sydney Starr- Bowkett Building Co-operative Societies

The Newtown and Enmore Starr- Bowkett Building Co-operative Societies

Australia and New Zealand Banking Group Limited

Commonwealth Bank of Australia

National Australia Bank Limited

State Bank of New South Wales

Westpac Banking Corporation

1.29 Those organisations which commented on the draft report were also invited to comment on the draft legislation where they had expressed a wish to do so. In addition a meeting was held to discuss the final draft of the Report and the draft legislation, which were also circulated for comment to the Secretary of the Supreme Court Rule Committee, the Registrar of the District Court and the Director of Local Courts Administration. The contribution of the above organisations and individuals has been most helpful especially in matters touching on the day-to-day business of particular financial institutions.

VIII. PARLIAMENTARY COUNSEL

1.30 We also wish to record our thanks to Mr D R Murphy QC, Parliamentary Counsel, and in particular to Mr D Colaguiri, Assistant Parliamentary Counsel for the preparation of the draft legislation appended to this Report and for their advice and assistance.

FOOTNOTES

1. In the case of the Supreme Court the correct term is a “writ for levy of property” rather than a “writ of execution” - Supreme Court Rules, Pt44 rl and Pt45.

2. Supreme Court Rules, Pt42 r2(1)(a) and Pt45: District Court Act. 1973 ss107-110; Local Courts (Civil Claims) Act. 1970 ss58 and 59; Judgment Creditors’ Remedies Act, 1901 ss4,10 and 13.

3. Judgment Creditors’ Remedies Act, 1901 s27.

4. Partnership Act. 1892 s23(I1). There are additional means of enforcing a judgment debt in the Supreme Court - Supreme Court Rules, Pt42 r2(1)(d) (appointment of a receiver) and (e) (committal and sequestration). On the appointment of a receiver see R P Meagher. W M C Gummow and J R F Lehane. *Equity: Doctrine and Remedies* (Butterworths 2nd ed 1984) at 660-661 (paras 281 9-2822). On the remedies of judgment creditors. see J Farmer, *Creditor and Debtor Law in Australia and New Zealand* (CCH 1980) ch9.

5. The phrase “debt due or accruing” is that used in the relevant Rules of the Supreme Court (Supreme Court Rules. Pt46). The phrase” debt due, owing or accruing” is used in the District Court Act. 1973 (eg s97(2)) and the Local Courts (Civil Claims) Act. 1970 (eg s47). The difference in terminology appears to have no legal significance.

6. Supreme Court Act. 1970 s122 and Fourth Schedule. Pt46 r2.

7. Section 103(1) and (2).

8. Section 52A(1) and (2).

9. Supreme Court Rules. Pt46 r10A: District Court Act. 1973 s103(4),(5) and (6): Local Courts (Civil Claims) Act. 1970 s52A(4),(5) and (6).

10. This average figure is slightly inaccurate in that an insignificant portion of the aggregate share capital of permanent building societies is non-withdrawable capital.

11. Subsection (1) of s144 of the Act states:

Subject to this Act, a pension, allowance or benefit under this Act shall be absolutely inalienable, whether by way of, or in consequence of sale, assignment, charge, execution, bankruptcy or otherwise.

12. Section 124(1).

2. The Present Law of Garnishment in New South Wales

I. INTRODUCTION

2.1 Three aspects of the present law of garnishment in New South Wales are considered in this chapter

the procedure relating to garnishee orders:

the substantive law relating to garnishee orders so far as it is relevant for the purposes of this Report including the special provisions for the attachment of moneys in bank accounts and

the present position of building societies and credit unions in relation to garnishee orders.

An order attaching a debt due or accruing to a judgment debtor may issue out of the Supreme Court the District Court or a Local Court (para 2.3). An order issuing out of the Supreme Court is properly termed a “garnishment notice”. However for the purpose of general discussion we have ignored the procedurally-based differences between a Supreme Court garnishment notice and a District Court or Local Court garnishee order. The term “garnishee order” therefore includes garnishment notices except where specific reference is made to the garnishment procedure in the Supreme Court.

II. THE PROCEDURE RELATING TO GARNISHEE ORDERS

2.2 Legislation to enable a judgment creditor to attach debts due or accruing to the judgment debtor was first introduced in New South Wales in 1857[1] and followed legislation introduced in England in 1854.[2] The procedure relating to garnishee orders is now regulated by:

in the case of an order sought from the Supreme Court, Part 46 of the Supreme Court Rules:

in the case of an order sought from the District Court, sections 97 to 106 of the District Court Act 1973 and Part 33 of the District Court Rules: and

in the case of an order sought from a Local Court. sections 47 to 57 of the Local Courts (Civil Claims) Act, 1970 and Rules 47 to 50 of the Local Courts (Civil Claims) Rules.

2.3 A Supreme Court garnishee order can be sought to enforce a judgment debt resulting from proceedings in the Supreme Court.[3] A Supreme Court garnishee order can also be sought to enforce a judgment debt which results from proceedings in the Supreme Court of any other State or part of the Commonwealth or in a foreign

court if the interstate or foreign judgment can be and is registered in the Supreme Court[4] A judgment creditor can apply for a garnishee order to the Registrar of the District Court or the Registrar of a Local Court if the judgment debt resulted from proceedings concluded in that Court,[5] or the judgment debt resulted from proceedings in a court of like jurisdiction in any other State or part of the Commonwealth and the interstate judgment has been registered in the Court.[6]

2.4 An application for a garnishee order presupposes that the judgment creditor has sufficient information about the affairs of the judgment debtor to conclude that there is a debt due or accruing from a particular third party to the judgment debtor. The judgment creditor's information may come from past dealings with the judgment debtor, eg. financial details provided on an application for credit Alternatively the judgment creditor may have summoned the judgment debtor for oral examination by the Court as to the judgment debtor's income and assets[7] or, where the judgment debt issues out of a Local Court, have served an examination notice on the judgment debtor requiring the judgment debtor to provide specified information.[8]

2.5 The procedure for garnishee orders issuing out of the District Court and Local Courts is broadly the same. The judgment creditor applies to the Registrar of the Court for an order and, if an order is made, the Registrar duly notifies the judgment debtor.[9] The Registrar has discretionary power to issue the order and may refuse to do so if for some reason, such as the smallness of the judgment debt, he or she considers that the order should not be made.[10] Except in the case of an order attaching the wages or salary of the judgment debtor,[11] the order operates to attach in the hands of the garnishee:

> (a) in the case of an order issuing out of the District Court all debts which were due, owing or accruing from the garnishee to the judgment debtor when the garnishee order was made and which remain due, owing or accruing when the order is served, or
>
> (b) in the case of an order issuing out of a Local Court, all debts due, owing or accruing from the garnishee to the judgment debtor when the order is served.[12]

2.6 Under the order the garnishee is required to pay, in accordance with the relevant Act and Court Rules,

> (a) in the case of a District Court order, the debt attached by operation of the order, or
>
> (b) in the case of an order issuing out of a Local Court, the debt due from the garnishee to the judgment debtor

or so much of the debt as may be sufficient to satisfy the judgment debt specified in the order or the balance of the amount specified after deducting any amount as may be notified in writing to the garnishee by the judgment creditor or the Registrar as having been paid or credited to the judgment creditor on account of the judgment debt.[13] The amount payable under the order is to be paid to the Registrar, but may be paid to the judgment creditor direct if the garnishee serves notice on the judgment debtor of his or her intention to do so before payment.[14] Under the District Court Rules a garnishee has 14 days within which to comply with the order.[15] There is no specified time for compliance with a garnishee order issued out of a Local Court.[16]

2.7 If the garnishee disregards the order or only partially complies with it, it is up to the judgment creditor to take the matter further. If the judgment creditor is satisfied that the order has not been complied with, he or she may take out a summons requiring the garnishee to appear before the Court to show cause why the garnishee should not comply with the order.[17]

2.8 In the case of a garnishee order issuing out of the District Court. if the garnishee fails to appear in answer to the summons, or appears but does not satisfy the Court that he or she should not have to comply with the order (eg because there is no debt to attach), the Court may give judgment in favour of the judgment creditor against the garnishee for the amount of the attached debt or the unpaid balance of the judgment debt, whichever is the lesser, and the judgment creditor can proceed to enforce that judgment debt against the garnishee.[18] The District Court may also hear and determine third party claims in respect of the attached debt when 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 have some interest in the attached debt.[19]

2.9 In the case of a garnishee order issuing out of a Local Court if the garnishee fails to appear in answer to the summons, or appears but does not satisfy the Court that the alleged debt is *bona fide* in dispute, the Court may order that execution be levied against the property of the garnishee to recover the debt If, on the other hand, the Court is satisfied that there is a *bona fide* dispute about the alleged debt the Court is obliged to discharge the garnishee order where the debt if payable, exceeds $250 or does not exceed that amount but is not within certain categories of debt If the order is not dischargeable the Court must order a hearing of the dispute. Depending on the outcome of the hearing, the Court may give judgment in favour of the judgment creditor against the garnishee and the judgment creditor can proceed to enforce that judgment debt.[20] The Local Courts (Civil Claims) Act, 1970 makes no express provision for the hearing and determination of third party claims to the alleged debt. However a third party's interests will not be in jeopardy if the order has to be discharged and in the event of a hearing, a judgment against the garnishee depends on the judgment creditor's proving that the alleged debt is owed by the garnishee to the judgment debtor.[21]

2.10 In the case of orders issued out of either the District Court or a Local Court payment by the garnishee, whether in compliance with the garnishee order or after execution is levied by the judgment creditor against the garnishee, satisfies the judgment debt and discharges the garnishee as against the judgment debtor, to the extent of the amount paid.[22]

2.11 The procedure for garnishee orders issuing out of the Supreme Court differs from the procedures to obtain and enforce garnishee orders issuing out of the District Court or a Local Court Under Part 46 of the Supreme Court Rules the judgment creditor may, with leave of the Court serve a garnishment notice on the garnishee. Leave will not be granted unless it appears to the Court that the judgment debt has not been satisfied and that there is a debt due or accruing to the judgment debtor from the garnishee. The garnishment notice must specify the amount which the Court determines is payable to the judgment creditor and must also inform the garnishee of a date (the motion date) on which the judgment creditor will apply to the Court for an order that the garnishee pay him the debt attached by the notice or so much as is necessary to satisfy the amount specified.[23] The judgment creditor must serve the garnishment notice on the garnishee, and also on the judgment debtor, at least three full days before the motion date.[24] When the garnishment notice is served on the garnishee it operates to attach, to the extent of the amount specified in the notice, all debts mentioned in the notice which are due or accruing to the judgment debtor from the garnishee when the notice is served.[25]

2.12 The garnishee may pay the attached debt(s), to the extent of the attachment, into court If payment into court is made before the motion date, the garnishee may also retain out of the attached debt a prescribed amount for

costs.[26] If, on the motion date, the garnishee disputes liability to pay the attached debt to the judgment debtor, the Court may determine the issue and make suitable orders.[27] The Court may also hear and determine third party claims in respect of the attached debt when it appears to the Court that third party interests are involved.[28] Subject to any question of the garnishee's liability to the judgment debtor and to any third party interest in the attached debt the Court will order payment to the judgment creditor, either by the garnishee or out of moneys which the garnishee has already paid into court[29] When payment is made by the garnishee to the judgment creditor (whether by payment into court or pursuant to an order in the garnishee proceedings or as a result of enforcement of that order) the payment discharges the liability of the garnishee to the judgment debtor to the extent of the amount paid.[30]

2.13 The garnishment procedure involves two distinct steps: attachment and payment The most important difference between the Supreme Court procedure and the District and Local Courts procedures is the different way in which the payment step is dealt with. A Supreme Court garnishment notice operates only to *attach* any debts due or accruing from the garnishee to the judgment debtor and an order for payment to the judgment creditor is made only after the garnishee has had the opportunity of a hearing on the motion date. If the garnishee chooses to appear on the motion date, the procedure permits the Court to decide whether an order for payment is appropriate in the particular circumstances and, if so, to tailor the order to those circumstances. By contrast a garnishee order issuing out of the District Court or a Local Court operates both to attach any debts due or accruing from the garnishee and to order payment There are court proceedings only if the garnishee fails to pay under the order and the judgment creditor issues a summons to show cause for non-compliance. The fact that District Court and Local Court garnishee orders order payment without regard to the circumstances of the particular case can cause practical difficulties for both garnishees and judgment creditors, particularly in relation to garnishee orders affecting accounts. In Chapter 6 we recommend certain procedural reforms to overcome these difficulties.

III. THE SUBSTANTIVE LAW OF GARNISHMENT

2.14 This section of the Report is concerned with the substantive law of garnishment only insofar as it is relevant to the issues raised by the reference and considers:

- the nature of an attachable debt and
- the legislative provisions for the attachment of moneys in bank accounts.

Under the Supreme Court Rules debts due or accruing are attachable. Under the District Court Act 1973 and the Local Courts (Civil Claims) Act 1970 debts due, owing or accruing are attachable. Since the difference in terminology appears to have no legal significance,[31] for simplicity we have adopted the phrase "debts due or accruing" in the remainder of the Report unless use of the statutory terminology is necessary.

A. Attachable Debts

2.15 A garnishee order can operate only to attach "debts due or accruing" from the garnishee to the judgment debtor. There will be an attachable debt if, when the order is made, the garnishee is under an existing obligation

to pay money to the judgment debtor and that debt is then outstanding, ie “due”, or is payable some time in the future, ie “accruing”. The debt will be attached if, when the order is served on the garnishee, the relationship of debtor and creditor still exists between them and all or part of the debt remains due or accruing to the judgment debtor.[32] Therefore if a garnishee pays all or part of an attachable debt between the time the garnishee order is made and the time it is served, the order will be either wholly ineffective or effective to attach only so much of the debt as remains due or accruing when the order is served.

2.16 It is essential for the effectiveness of a garnishee order that the relationship of debtor and creditor exists between the garnishee and the judgment debtor at the relevant times. If dealings between them are such that a debt will or may become due or accruing from the garnishee, either in the period between the making and service of the order or after it is served, the relationship of debtor and creditor does not exist at the relevant times and the future debt. whether it be certain or contingent cannot be attached.[33] On the other hand. where a debt exists at the relevant times but is not payable until after the order is served, the order will be effective to attach the debt as a debt accruing.[34] The simplest example of a debt accruing is a loan from the judgment debtor to the garnishee which is not due for repayment until after the garnishee order is served. If, say, the loan is repayable by monthly instalments, it is a debt which accrues due, to the extent of each instalment, on the monthly repayment dates and the garnishee could be obliged to comply with the order by making the instalment payments when due until either the loan was repaid in full or, if the loan exceeded the judgment debt until the judgment debt was satisfied. However since under a garnishee order “no greater right is given to the creditor than the debtor had,”[35] the order cannot operate to accelerate payment of the accruing debt.

2.17 It has been said, with reference to a debt allegedly due, that

> [w]hether a debt sought to be attached was on the relevant day ‘due’ or ‘owing’ by the garnishee to the judgment debtor is a question whose answer is dependent upon the terms of the contract between them. The practical test ... is whether the debt was one for which on that day the judgment debtor could have immediately and effectively sued the garnishee.[36]

Similarly the practical test in relation to a debt alleged to be accruing is whether, given the contractual arrangements between the garnishee and the judgment debtor, the debt is one for which the judgment debtor could, on a future date and subject solely to the passage of time, immediately and effectively sue the garnishee. In other words the contractual arrangements between the garnishee and the judgment debtor[37] are fundamental to determining whether a garnishee order is effective in any particular case.

2.18 There are two other principles of the law of garnishment which are of particular relevance in the context of the attachment of moneys in accounts with building societies and credit unions. The first relates to joint debts: the second to rights of priority.

2.19 If the debt which is payable by the garnishee is not due or accruing solely to the judgment debtor but is a joint debt it cannot be attached notwithstanding that it may be possible to determine the exact portion of the joint debt that the judgment debtor is to receive.[38] Therefore if the debt sought to be attached is due or accruing from the garnishee to A and B jointly and the judgment debtor is A alone or A and C jointly, the garnishee order will be ineffective. However if the judgment debt is owed jointly by two or more judgment debtors, the judgment creditor may attach any debt due or accruing to any one of the judgment debtors to satisfy the judgment debt,[39] including a joint debt owed to two or more of the judgment debtors.[40] Therefore if A and C are joint judgment debtors and

the debt due or accruing from the garnishee is due or accruing to A alone or C alone or to A and C jointly, the garnishee order will be effective. The principle that joint debts are not attachable unless the joint creditors are also joint judgment debtors is significant in the context of this Report because accounts are often joint accounts.

2.20 The effect of a garnishee order is to place the judgment creditor in the shoes of the judgment debtor in relation to the debt sought to be attached and the judgment creditor can acquire no better rights in the debt than those of the judgment debtor. Therefore if the judgment debtor has assigned the debt (whether outright or by way of security) to a third party before the garnishee order is served, the order will be ineffective.[41] Again, if the judgment debtor has charged the debt in favour of a third party before the garnishee order is served, it will be ineffective to the extent of the third party's interest under the charge.[42] The effect of a prior charge on the rights of a judgment creditor under a garnishee order assumes special significance in the present context because of provisions in the various Acts regulating the activities of building societies and credit unions whereby a statutory charge can exist over an account with a building society or credit union (paras 6.19-6.31).

2.21 It is unnecessary to elaborate on the particular situations in which the Courts have held that there is, or is not, a debt due or accruing from a garnishee to a judgment debtor. The authorities illustrating the general principles in application are collected in Ritchie' s *Supreme Court Procedure*[43] and Chippindall & Sharp *District Court Act & Rules.*[44] The significant principle for present purposes is that there is no debt due or accruing from a garnishee if there is any precondition to be satisfied (other than the lapse of time) before the debt is payable to the judgment debtor, such as the presentation of a passbook[45] or receipt[46] or the giving of a period of notice for payment.[47] There is however one exception to this principle. Where money stands to the credit of a customer in a cheque account with a bank, a demand for payment by the customer is a prerequisite to the customer's bringing an action to recover the money - ie before a debt is due from the bank to the customer, a demand for payment must be made.[48] Notwithstanding this, it is now generally accepted that service of a garnishee order is "a sufficient demand by operation of law to satisfy any right a banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced".[49] This exception has not gone unquestioned[50] and for the most part the Courts have been unwilling to extend it beyond cheque accounts.

> [I]t is, to my mind, one proposition to hold that a garnishee order should be treated as equivalent to a simple demand by the judgment debtor, in a case in which a simple demand is all that is necessary in order to make the garnishee immediately liable, and quite another to say that such an order is to be taken in substitution for, and as the equivalent of, such a condition or stipulation as the production of a deposit book.[51]

B. Attachment of Bank Accounts

2.22 The common law principle that there is no attachable debt where some precondition to payment (other than the lapse of time) must be satisfied had the result that judgment creditors could not attach moneys in a deposit account in a bank. During the 1970's the New South Wales Parliament legislated to redress this situation and to remove any doubt that money in a cheque account was attachable.[52] The bank account provisions are contained in Rules 2 and 10A of Part 46 of the Supreme Court Rules section 103 of the District Court Act, 1973 and section 52A of the Local Courts (Civil Claims) Act, 1970. Rule 2 of Part 46 of the Supreme Court Rules states:

(1) A sum standing to the credit of a judgment debtor in an account in a bank shall, for the purpose of this Part, be a sum due or accruing to the judgment debtor, notwithstanding that any condition relating to demand of payment is unsatisfied.

(2) A sum standing to the credit of a judgment debtor in a deposit account in a bank shalt for the purposes of this Part be a sum due or accruing to the judgment debtor, notwithstanding that any of the following conditions applicable to the account has not been satisfied -

(a) a condition that notice is required before money is withdrawn;

(b) a condition that a personal application must be made before money is withdrawn,

(c) a condition that a deposit book must be produced before money is withdrawn: or

(d) a condition that a receipt for money deposited in the account must be produced before money is withdrawn.

The corresponding provisions in the District Court Act., 1973 and the Local Courts (Civil Claims) Act, 1970 are virtually identical and the minor drafting differences are of no present consequence. It is not necessary to elaborate on these provisions for the purposes of this part of the Report However they are discussed in Chapter 4, where we make several recommendations which are intended to clarify their operation.

2.23 The remaining provisions relating to the attachment of moneys in bank accounts are designed to protect banks in view of the nature of their operations. One provision applies to garnishee orders attaching moneys in bank accounts generally and protects a bank against the possibility that although the bank acts with reasonable diligence to give effect to a garnishee order, it nevertheless pays the whole or part of the attached debt to the judgment debtor, or otherwise deals with the debt so as to satisfy, as between the bank and the judgment debtor, the whole or any part of the debt In such a case the garnishee bank may apply for a court order that, for the purposes of the garnishee proceedings, the attached debt be reduced “to the extent of the payment or satisfaction”.[53] This provision protects a garnishee bank where, eg the garnishee order is served at the head office of the bank and, before the bank, acting with reasonable diligence, can take appropriate steps to give effect to the order, the branch with which the judgment debtor deals permits the judgment debtor to withdraw from an account affected by the order or meets a cheque or periodic payment out of the account.

2.24 The other protection provisions apply only to deposit accounts where it is a condition of the account that a “deposit book” must be produced when making withdrawals. They protect savings banks 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.[54] Under the provisions a bank 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 two months, commencing on the date of payment.[55] If the bank acts with reasonable diligence to give effect to the order but during the specified period a current” deposit book” is produced and as a consequence the bank pays the whole or any part of the attached debt to the judgment debtor, or otherwise deals with the debt so as to satisfy, as between the bank and the judgment debtor, the whole or any part of the debt, the bank may apply for a court order that the Registrar repay to the bank an amount equal to the amount paid out by the bank.[56] The Registrar cannot pay the judgment creditor the moneys paid into court by the bank until the period specified by the bank has expired unless, in the meantime, the Registrar is satisfied that the branch of the bank at which the judgment debtor keeps the account has recovered the “deposit book”. However if an application by the bank 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 bank's application for repayment is successful, the judgment creditor will then receive the balance (if any) of the moneys held by the Registrar.[57]

IV. ACCOUNTS WITH BUILDING SOCIETIES AND CREDIT UNIONS

2.25 Although building societies may have non- withdrawable share capital,[58] virtually all the share capital of New South Wales building societies is withdrawable, ie members of a building society may, subject to the legislation regulating the society and to its rules, apply to withdraw their shares in the society and obtain a refund of their subscriptions. At present the bulk of funds held by building societies is held as withdrawable share capital although building societies also hold substantial sums on deposit (paras 5.8 and 5.25). The share capital of credit unions is similarly withdrawable, although the bulk of funds held by these organisations represents deposits by members (para 5.34). In this part of the Report we consider to what extent if at all, the present law relating to the attachment of debts applies to withdrawable share accounts and deposit accounts with building societies and credit unions.

A. Common Law

1. Withdrawable Share Accounts

2.26 Under the common law money available to a member of a building society or credit union by the withdrawal of shares will be liable to attachment only when the relationship between the organisation and the member has become that of debtor and creditor. The mere fact that the member has the right to withdraw his or her shares does not create this relationship. Since the rules of building societies and credit unions invariably require a member to make some form of written application to withdraw shares, the essential debtor/creditor relationship will not arise until the member does so and also satisfies any other preconditions to withdrawal which may be imposed by legislation the rules of the particular organisation and the specific terms of the member's account.

2. Deposit Accounts

2.27 So far as ordinary deposits with building societies and credit unions are concerned the common law operates to similar effect where withdrawal is subject to any precondition to payment to the depositor other than the lapse of time, such as the presentation of a passbook or receipt. Although a deposit is a debt it is not due or accruing until any preconditions to payment are satisfied, except possibly in a case where the only precondition is "a simple demand for payment" (para 2.21).

2.28 In some instances deposits with a building society or credit union may be liable to attachment depending on the withdrawal procedures of the particular organisation For example some building societies and credit unions take fixed- term deposits. When a deposit is made the depositor may nominate an account into which the deposit plus outstanding interest is to be paid on expiry of the term and will receive some form of receipt recording the terms of the deposit If no account has been nominated, payment at the end of the term is conditional on presentation of the receipt document or on the organisation' s receiving further instructions as to how the deposit

is to be dealt with A deposit for a fixed term is a debt which accrues due on expiry of the term if the depositor is not required to satisfy any precondition to payment on that date and, as a debt accruing, is liable to attachment.[59] Therefore, where a depositor has nominated an account into which the deposit is to be paid on expiry of the term, there is no precondition to payment by the organisation on that date and the deposit will be liable to attachment.[60]

B. Bank Account Provisions

2.29 The existing bank account provisions (para 2.22) apply only in relation to an account or deposit account ”in a bank”. Consequently the provisions can affect accounts with building societies and credit unions only if these types of organisation can be characterised as banks.

2.30 The Supreme Court Rules and the respective Acts do not define “bank” for the purposes of the provisions. Therefore the meaning of the term must be derived from case law. Usually the issue is posed in terms of whether the putative bank “carries on the business of banking”. Recent English authority diverges from Australian authorities on the activities essential to the business of banking. The prevailing English test appears to be that adopted by the Court of Appeal in *United Dominions Trust Ltd v Kirkwood*[61] namely, that the business of banking is carried on if the putative bank conducts current accounts, pays cheques drawn on itself and collects cheques for its customers and these activities constitute its principal business. In borderline cases reputation as a bank may be decisive.[62] In Australia the description of the business of banking taken to be authoritative is that given by Mr Justice Isaacs in *Commissioners of the State Savings Bank of Victoria v Permewan, Wright & Co Ltd.*[63]

> The essential characteristics of the business of banking... may be described as the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilisation of the money so collected by lending it again in such sums as are required. These are the essential functions of a bank as an instrument of society It is, in effect a financial reservoir receiving streams of currency in every direction, and from which there issue outflowing streams where and as required to sustain and fructify or assist commercial, industrial or other enterprises or adventures.
>
> If that be the real and substantial business of a body of persons, and not merely an ancillary or incidental branch of another business, they do carry on the business of banking.[64]

2.31 It is apparent that Mr Justice Isaacs’ description of banking business is capable of including financial institutions other than recognised banks. Indeed in *United Dominions Trust Ltd v Kirkwood*[65] the English Court of Appeal in concluding that the description was no longer definitive insofar as it made no mention of the keeping of current accounts and the provision of cheque facilities, commented that if it were still the law building societies would all be bankers.[66] However, in the light of the High Court’s decision in *Australian Independent Distributors Ltd v Winter,*[67] it may not follow from Mr Justice Isaacs’ description of banking business that building societies and other organisations are banks merely because they take deposits and make loans.

2.32 In *Australian independent Distributors Ltd v Winter* the question was whether a co-operative society registered under the Industrial and Provident Societies Act 1923-1958 (SA) carried on banking business in contravention of the Act The society carried on its deposit-taking business in a manner common to building

societies. On joining the society a member was issued with a passbook. Moneys deposited with the society were treated as subscriptions for withdrawable shares in the society and interest was paid on fully-paid shares. The passbook contained an account of all deposits and withdrawals of capital and interest payments. One of the objects of the society was to obtain funds from members for the purpose of making loans to members to enable them to acquire land or buildings to be used as a residence or residence and business. The society had no power to lend money for other purposes or to non-members, but was empowered to borrow money from members or others on deposit or otherwise. In a joint judgment the High Court held that the society did not carry on banking business. The Court applied Mr Justice Isaacs test and considered it apparent that the second essential characteristic, ie the utilisation of money taken on deposit by lending it in such sums as are required, was absent.

> The power to lend money conferred upon the Society by Rule 7 was limited to the making of loans to its members to enable them to acquire land or buildings to be used for residential or business and residential purposes and in fact none of the Society's moneys was used for the making of loans for that or any other purpose. Having regard to that circumstance, Chamberlain J. held, and rightly held, that the Society had not carried on the business of banking'..[68]

2.33 It is unclear whether the Court's decision rested on the fact that the society was empowered to lend only to its members and for a particular purpose or the fact that, although the society had power to lend, it had not actually done so. Weaver and Craigie take the view that the decisive element in the Court's reasoning was that the society was empowered to lend only to members.[69] However in our view it is equally arguable that the circumstance to which the Court was referring was the fact that the society had made no loans, in which case the decision is slight authority for the proposition that a putative bank does not carry on the business of banking where it is empowered to lend, and lends, only to its members. It seems clear that whatever the scope of a putative bank's power to lend, if in fact no loans are made and if lending is an essential characteristic of the business of banking, it cannot be said to carry on banking business. On the other hand Mr Justice lsaacs' description of a bank as an instrument of society" which receives "streams of currency in ever',' direction" and lends "where and as required to sustain and fructify or assist commercial. industrial or other enterprises or adventures does suggest that a putative bank does not carry on banking business unless its services are available to the public at large and it lends for numerous purposes. Certainly recognised banks have these features. On this basis neither building societies nor credit unions carry on the business of banking, if only because they cannot make loans to the public at large but only to members.

2.34 In view of the uncertainty of definition which currently surrounds the term "bank", we have assumed for the purposes of this Report that building societies and credit unions cannot be characterised in law as banks and that the bank account provisions therefore have no application to deposit and withdrawable share accounts with these types of organisation.[70] This assumption is consistent with the common belief that building societies and credit unions are not banks. and also has regard to the existence of a State legislative framework within which these organisations, unlike recognised banks, must operate.

FOOTNOTES

1. Common Law Procedure Act. 1897 (20 Vic No 31) ss27- 33 (Supreme Court). The procedure was made available out of District Courts and Courts of Petty Sessions in 1881 - Small Debts Recovery Act. 1881 ss3-10.

2 Common Law Procedure Act 1854 (UK) ssLXI- LXVII.

3. *Ritchie's Supreme Court Procedure* (Butterworths 1984) Vol 1 Supreme Court Rules, Introductory Note to Pt46.

4. Service and Execution of Process Act 1901 (Cth) ss20-21 and Supreme Court Act, 1970 s22 (interstate judgments): Foreign Judgments (Reciprocal Enforcement) Act, 1973 and Administration of Justice Act, 1924 PtII (foreign judgments).

5. District Court Act, 1973 ss4 ("action") and 97: Local Courts (Civil Claims) Act, 1970 ss4 ("court") and 47.

6. Service and Execution of Process Act 1901 (Cth) ss20-21: District Court Act, 1973 s8(2): Local Courts (Civil Claims) Act, 1970 s7.

7. Supreme Court Rules, Pt43; District Court Act, 1973 ss90-94: Local Courts (Civil Claims) Act, 1970 ss41-46.

8. Local Courts (Civil Claims) Act, 1970 s43A.

9. District Court Rules, Pt33 r2: Local Courts (Civil Claims) Rules, r47.

10. District Court Act, 1973 s97; Local Courts (Civil Claims) Act, 1970 s47.

11. The special provisions of each of the Acts relating to the attachment of a judgment debtor's wages or salary are not relevant for present purposes.

12. District Court Act, 1973 s97(2); Local Courts (Civil Claims) Act, 1970 s47(2).

13. District Court Act, 1973 s97(3); Local Courts (Civil Claims) Act, 1970 s47(4). We note that it is not necessary for the purposes of this Chapter to consider the apparent differences in the operation of garnishee orders issuing out of the District Court and the Local Courts. However these differences and other aspects of the general garnishment provisions in the respective Acts and the Supreme Court Rules are discussed in Chapter 7, where we make recommendations directed to achieving uniformity of the law of garnishment as it applies in each jurisdiction so far as this is appropriate in view of procedural differences between the.

14. District Court Act, 1973 s105; Local Courts (Civil Claims) Act, 1970 s55.

15. District Court Rules, Pt33 r3(2) and District Court Form 83.

16. Local Courts (Civil Claims) Rules, rr47-50 and First Schedule Pt2 Form 48.

17. District Court Act, 1973 s102(1) and (2); Local Courts (Civil Claims) Act, 1970 s52(1) and (2).

18. District Court Act, 1973 s102(3).

19. District Court Act, 1973 s104. A garnishee has a duty to inform the Court of any third party claim of which the garnishee is aware - *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107: *Richards v Jager* [1909] VLR 140.

20. Local Courts (Civil Claims) Act, 1970 s52(3),(4) and (5).

21. *Id,* s52(5).

22. District Court Act, 1973 s105(2): Local Courts (Civil Claims) Act, 1970 s54.

23. Rules 3 and 8.

24. Rule 4.

25. Rule 5.

26. Rule 6.

27. Rule 9.

28. Rule 10.

29. Rules 7 and 8.

30. Rule 11.

31. See Chapter 1, note 5.

32. Supreme Court Rules. Pt46 r3(1) and (3)(b) and r5(1): District Court Act. 1973 s97(1) and (2)(a): Local Courts (Civil Claims) Act, 1970 s47(1) and (2)(a): *Webb v Stenton* (1883) 11 QBD 518: *O'Driscoll v Manchester Insurance Committee* [1915] 3 KB 499. These provisions in the Supreme Court Rules and the respective Acts are discussed further in Chapter 7, paras 7.1 3-7.18.

33. *Webb v Stenton* (1883) 11 QBD 518.

34. *Tapp v Iones* (1875) LR 10 QB 591: *Re Cowan's Estate: Rapier v Wright* (1880) 14 Ch D 638.

35. *Tapp v Jones* (1875) LR 10 QB 591 at 593.

36. *Bank of New South Wales v Barlex Investments Pty Ltd* (1964) 81 WN Pt2 (NSW) 281 at 283.

37. So far as the law of garnishment generally is concerned, it is misleading to suggest that the question of whether there is an attachable debt rests solely on the existence of a contract between the judgment debtor and the garnishee. The essential relationship of debtor and creditor can be created in other ways - eg a judgment in damages gives rise to a debtor/creditor relationship between the unsuccessful defendant and the plaintiff and the amount of damages payable by the defendant constitutes an attachable debt *(Holtby v Hodgson* (1890) 24 QBD 103). Again, for the purposes of garnishment a debtor/creditor relationship can arise between a trustee and a beneficiary as a consequence of the terms of the trust or the trustee's default in the performance of the trust(Webb v Stenton (1883) 11 QBD 518 at 526 and 530: *In re Greenwood: Sutcliffe v Gledhill* [1901] 1 Ch 887). However in the specific context of this reference the relationship of debtor/creditor will arise, if at all, by virtue of contractual arrangements between the particular building society or credit union and its judgment debtor depositor. The text reflects this fact.

38. *Macdonald v The Tacquah Gold Mines Company* (1884) 13 QBD 535: *Beasleyv Roney* [1891] 1 QB 509: *Lloyd v Jacobs* (1887) 3 WN (NSW) 144.

39. *Miller v Mynn* (1859) 28 LJQB 324.

40. *D J Colburt & Sons Pty Ltd v Ansen* [1966]2 NSWR 289.

41. *Edmunds v Edmunds* [1904] P 362: *W J Adams & Co Ltd v Blencowe* (1929) 46 WN (NSW) 150: *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1.

42. *Hirsch v Coates* 18 CB 757, 139 ER 1568: *In re London Pressed Hinge Company Limited: Campbell v London Pressed Hinge Company Limited* [1905] 1 Ch 576 at 581-582: *Badeley v Consolidated Bank* (1888) 38 Ch D 238: *In re General Horticultural Company: Ex parte Whitehouse* (1886) 32 Ch 1) 512.

43. Vol 1 Supreme Court Rules. Pt46 r3. Notes at 2976-2977.

44. Notes to s97. District Court Act. 1973, at 1118-1119.

45. *Re Australia and New Zealand Savings Bank Limited: Mellas v Evriniadis* [1972] VR 690 (overruling *Chubb v Emery* [1933] VLR 125): *Bagley v Winsome and National Provincial Bank Ltd* [1952] 2 QB 236: *Music Masters Pty Ltd v Minelle and Bank of New South Wales Savings Bank Ltd* 119681 Qd R 326: *Bank of New South Wales Savings Bank Ltd v Fremantle Auto Centre Pty Ltd and Poland* [1973] WAR 161 (overruling *Dalston Development Pty Ltd v Dean and Commonwealth Savings Bank of Australia* 119661 WAR 36): F D Armer, "Garnishee of

Savings Bank Deposits" (1970) 44 *Australian Law]ournal* 73: C R Craigie. "Garnishee of Savings Bank Deposits - A Reply" (1970) 44 *Australian Law Journal* 277.

46. C & E *Lewis Ltd v Gribben* [1955] NILR 51.

47. *Ibid.*

48. *Joachimson v Swiss Bank Corporation* [1921] KB 110.

49. *Id,* at 121. per Bankes LJ.

50. Eg Re *Australia and New Zealand* Savings *Bank Limited; Mellas v Evriniadis* [1972] VR 690 at 696-697. In this decision, where a judgment creditor unsuccessfully sought to attach money's in a savings account, the Victorian Supreme Court extensively reviewed the authorities relating to garnishee orders on bank accounts. It is to he noted that the exception also disregards the necessity that there he a debt due or accruing to the judgment debtor when the garnishee order is made. Ii there is no debt due to a current account- bolder until demand for payment is made and it is service of the order which operates as the demand for payment, there can be no debt due to the judgment debtor when the order was made and hence no debt capable it attachment at that time.

51. *Bagley v* Winsome *and National Provincial Bank Ltd* (1952) 2 Q13 236 at 244-245. per Jenkins LJ.

52. Supreme Court Act, 1970 s122 and Fourth Schedule, Pt46 r2: District Court Act. 1973 s103: Courts of Petty Sessions (Civil Claims) Amendment Act. 1975 Schedule 1 cl(74).

53. Supreme Court Rules. Pt46 r5(2): District Court Act. 1973 s103(3): local Courts (Civil Claims) Act, 1970 s52A(3). In the case of the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 this provision applies only in relation to the attachment of money in bank accounts. The comparable provision in the Supreme Court Rules is of general application. ie the Supreme Court may make an order reducing the amount of the attached debt in the case of any garnishee who acts with reasonable diligence to give effect to the garnishee order but nevertheless wholly or partially discharges his or her obligations to the judgment debtor in relation to the attached debt.

54. In Chapter 6 (para 6.17) we discuss the terms "deposit book" and "passbook" and recommend that the latter term be substituted in these provisions.

55. District Court Act, 1973 s103(4): Local Courts (Civil Claims) Act, 1970 s52A(4): Supreme Court Rules. Pt46 r10A(1). In the case of the Supreme Court Rules references to the Registrar in para 2.24 should he read is references to the Court.

56. District Court Act. 1973 s103(5): Local Courts (Civil Claims) Act, 1970 s52A(5): Supreme Court Rules. Pt46 r10A(2).

57. District Court Act. 1979 s103(6): Local Courts (Civil Claims) Act, 1970 s52A(6) Supreme Court Rules. Pt46 r10A(3).

58. Co-operation Act, 1923 ss55 and 82(3)(c); Permanent Building Societies Act, 1967 ss52(1) and 31 and Schedule 1(h).

59. Matinee Megrah & F R Ryder. *Paget's Law of Banking* (Butterworths 8th ed 1972) at 155.

60. We note that this conclusion may not be correct in relation to a fixed-term deposit which is payable in maturity to a nominated account if the deposit was made with a building society before 1 September 1985, or with a credit union before 1 July 1985, and the term of the deposit has not expired - see Co-operation Act, 1923 ss66(11) and 42(1), (7) and (8) and Third Schedule, amended by Co- operation (Amendment) Act, 1985 Schedule 3 cl(15)(h) (operative 1 September 1985. NSW Government Gazette No 122 30 August 1985 at 4545); Permanent Building Societies Act, 1967 s20(5). repealed by Permanent Building Societies (Amendment) Act, 1989 Schedule 2 c18(b) (operative 1 September 1985, NSW Government Gazette No 122 30 August 1985 at 4545); Credit Union Act,

1969 s12(7)(a), repealed by Credit Union (Amendment) Act. 1984 Schedule 2 cl(10)(b) (operative 1 July 1985. NSW Government Gazette No 98 28 June 1985 at 3000).

61. [1966] 2 QB 431.

62. *Ibid.* See also Megrah & Ryder. note 59. At 8-14; G A Weaver & C R Craigie. *The Law Relating to Banker and Customer* in *Australia* (Law BookCo 1975) at21-23.

65. (1915) 19 CLR 457.

64. *Id.* at 470-471. This passage was quoted with approval by Rich J in *Melbourne Corporation v The Commonwealth.* (1947) 74 CLR 11 at 64-65 and applied by the High Court in *Australian Independent Distributors Led v Winter* (1964)112 CLR 441: see also Weaver & Craigie. Note 61 at 2l-27. In *First Chicago Australia Ltd v Yango Pastoral Co Pty Ltd* [1977] 2 NSWLR 581. Glass JA (at 589) considered that the essential characteristics of banking had been defined in the *State Savings Bank of Victoria* case and *Australian Independent Distributors Ltd* is Winter. However Mahoney JA remarked (at 598-599) that the High Court's statement in the *State Savings Bank of Victoria case,* if read in the light of later decision may be seen as a statement done of the kinds of activities of banking rather than a definition of the concept of banking. The decision of the English Court of Appeal in *United Dominions Trust Ltd* is *Kirkwood* [1966] 2 QB 431 appears not to have been referred to in *First Chicago Australia Ltdv* Yango *Pastoral Co Pty Ltd.*

65. [1966] 2 QB 431.

66. *Id*. at 445-446. per Lord Denning MR and at 457-458. per Harman LJ.

67. (1964) 112 CLR 443.

68. *Id.* at 455.

69. Weaver & Craigie. note 62 at 17.

70. At present there is litigation taking place between the State Bank of New South Wales and the commonwealth Bank of Australia which may result in a definitive ruling as to whether a building society or at least one type of building society. carries on the business of banking - Federal Court of Australia Sydney Division No 248 of 1984. See also *The Australian Financial Review* 4 December 1984 at 2.

3. Reform in Other Jurisdictions

I. INTRODUCTION

3.1 In this chapter we consider recent changes in United Kingdom law which enable the attachment of moneys in deposit accounts and withdrawable share accounts with building societies and credit unions. Apart from the existing New South Wales provisions for the attachment of moneys in bank accounts, no other Australian jurisdiction appears to have implemented or considered any generally applicable reform of the common law relating to the attachment of moneys in bank and other accounts. However under the Rules of the Family Law Court (the Family Law Rules) moneys in accounts with banks, building societies and credit unions may be attached to effect compliance with certain orders of the Court. The relevant provisions in the Family Law Rules are also considered in this chapter.[1]

3.2 There is an administrative form of garnishment available to the Commissioner for Taxation to enable the Commissioner to recover unpaid tax liabilities.[2] As a result of recent amendments to Commonwealth taxation legislation,[3] moneys lodged by a defaulting taxpayer with a building society or credit union, whether by way of deposit or as withdrawable share capital, are attachable by the Commissioner. The taxation procedure is administrative rather than judicial and the provisions are extremely wide - eg they permit the attachment of moneys which may become due to the taxpayer (para 2.16). Therefore we have concluded that discussion of these provisions would serve little useful purpose since they raise issues beyond the scope of this reference.

II. RECENT REFORM IN THE UNITED KINGDOM

3.3 Until 1982 United Kingdom law made provision for the attachment of moneys in a deposit account in a bank in terms similar to subsection (2) of the New South Wales provisions for the attachment of moneys in bank accounts (para 2.22), although certain bank accounts were excluded from the provision.[4] There was no United Kingdom provision comparable to subsection (1) of the New South Wales provisions. In 1982 new legislation came into operation which extends application of the provisions to deposit accounts with institutions other than banks, including building societies and credit unions, and to withdrawable share accounts.[5] It appears that the new provisions have not yet been judicially considered.

3.4 The United Kingdom provision concerning the attachment of moneys in accounts is in the following terms:

> 40. (1) Subject to any order for the time being in force under subsection (4), this section applies to the following accounts, namely -
>
> (a) any deposit account with a bank or other deposit-taking institution: and

(b) any withdrawable share account with any deposit-taking institution.

(2) In determining whether, for the purposes of the jurisdiction of the High Court to attach debts for the purpose of satisfying judgments or orders for the payment of money, a sum standing to the credit of a person in an account to which this section applies is a sum due or accruing to that person and, as such, attachable in accordance with rules of court any condition mentioned in subsection (3) which applies to the account shall be disregarded.

(3) Those conditions are -

(a) any condition that notice is required before any money or share is withdrawn:

(b) any condition that a personal application must be made before any money is withdrawn

(c) any condition that a deposit book or share- account book must be produced before any money or share is withdrawn: or

(d) any other prescribed condition.

(4) The Lord Chancellor may by order make such provision as he thinks fit, by way of amendment of this section or otherwise, for all or any of the following purposes. Namely-

(a) including in, or excluding from, the accounts to which this section applies accounts of any description specified in the order:

(b) excluding from the accounts to which this section applies all accounts with any particular deposit-taking institution so specified or with any deposit- taking institution of a description so specified.

(5) Any order under subsection (4) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either I-louse of Parliament.

(6) In this section ‘deposit-taking institution’ means any person carrying on a business which is a deposit-taking business for the purposes of the Banking Act 1979.[6]

3.5 By virtue of subsection (6) and the provisions of the Banking Act 1979 (UK) the deposit- taking institutions within section 40 include building societies within the meaning of the Building Societies Act 1962 (UK) (both terminating and non-terminating building societies) and credit unions within the meaning of the Credit Unions Act 1979 (UK), as well as various other types of organisation such as friendly societies and insurance companies.[7] The only additional condition which has been prescribed for the purposes of subsection (3) is a condition in terms

similar to paragraph (d) of subsection (2) of the present New South Wales provisions relating to bank accounts, namely, "any condition that a receipt for money deposited in the account must be produced before any money is withdrawn."[8] Under the English Supreme Court Rules a garnishee order attaching moneys in an account with a Building Society or credit union cannot operate to reduce the amount standing to the judgment debtor's credit below one pound.[9] The reason for the one pound limit is that "in many cases an account- holder would cease to be a member of the garnishee building society or credit union if his or her account balance fell below one pound.[10] The limitation therefore protects a judgment debtor's membership in most but not all, cases.

3.6 The new United Kingdom legislation also enables the Lord Chancellor, by order, to describe a sum which a deposit-taking institution subjected to a garnishee order may deduct from the attached debt towards the clerical and administrative costs of complying with the order.[11] In making such an order the Lord Chancellor may prescribe different sums in different cases and, in particular. may prescribe sums differing according to the amount of the judgment debt to be satisfied under a garnishee order. However a sum so prescribed may not be deducted or, if it is deducted, may not be retained by a garnishee in a situation where the judgment debtor is insolvent and, under legislation comparable to section 118 of the Bankruptcy Act 1966 (Cth) and section 455 of the Companies (New South Wales) Code, 1981, the judgment creditor would be required to pay moneys received pursuant to the garnishee order to the trustee in bankruptcy or, as the case may be. the liquidator of the judgment debtor.

3.7 The United Kingdom legislation is general legislation which is intended to apply to a wide range of financial institutions irrespective of the particular nature of their financial operations. Although subsections (3)(d) and (4) permit ready reform of the law should the legislation prove inadequate or inappropriate in specific cases. it does not otherwise take account of particular problems which might arise in attempting to attach moneys in accounts with building societies and credit unions. However the inclusion of building societies and credit unions as "deposit-taking institutions" does indicate that the United Kingdom legislature saw no legal or policy reason why moneys in deposit or withdrawable share accounts with these institutions should not, in general. be liable to attachment. The inclusion of withdrawable share accounts within the provisions is of particular significance since it disregards the legal nature of these accounts and treats a sum credited to a withdrawable share account in the same way as a sum credited to a deposit account.

3.8 Three features of the United Kingdom provisions have influenced certain of the recommendations which we make in Chapters 4 and 6. They are:

section 40(4)(a) which permits particular types of account to be excluded from the provisions (para 4.16):

the limitation on the operation of a garnishee order on an account in a building society or credit union which ensures that there remains a minimum amount credited to the account (para 6.18): and

the provisions discussed in paragraph 3.6 whereby an amount for costs may be prescribed which the garnishee would be entitled to deduct from the attached debt before complying with the garnishee order (paras 6.54-6.58).

III. FAMILY LAW RULES

3.9 Rule4 of Order 33 of the Family Law Rules enables the attachment of debts and other moneys to satisfy certain Family Court orders for the payment of money, eg maintenance orders and orders for costs. Under Rule 4 —

(4) The following moneys may be the subject of a garnishment order

(a) a stim standing to the credit of the respondent in a bank, building society, co- operative housing society or similar society, credit union, credit society or investment fund or corporation, that is payable to the respondent on call or on notice:

(b) .....,

(c) any debt or other sum of money due or accruing to the respondent.

(18) An amount standing to the credit of a respondent in an account in a bank, building society, co-operative housing society or similar society, credit union or credit society, or investment fund or corporation, that is payable to the respondent on call or on notice shall subject to sub- rule (19), for the purposes of this rule, be a debt due to the respondent notwithstanding that any condition relating to the account or a demand or notice for payment under the account is unsatisfied.

(19) Where an amount referred to in sub- rule (18) is made the subject of an order under this rule then, unless the court otherwise orders, the first- mentioned order only operates to require payment of the said amount when any necessary period of notice has expired, but service on the garnishee of the order for payment of the said amount shall be deemed to be the giving of that notice.

3.10 Rule 4 came into operation on 2 January1985 and incorporates provisions formerly in Regulation 134 of the Family Law Regulations.[12] Subrules (4) and (18) repeat with some minor amendments, subregulations (4) and (18) of Regulation 134. However subrule (19) is a new provision It has the effect that where an amount in an account subject to a notice condition is attached, the attached amount is not due for payment under the garnishment order until it would have been due for payment had the respondent (who, in the context of this Report is the equivalent of a judgment debtor) given notice of withdrawal when the order was served. In other words, subrule (19) ensures that the contractual right of the garnishee to withhold payment until the applicable notice period has expired is not overridden by the garnishment order. This new provision is of interest because it supports our view that although a notice period should be disregarded for the purpose of attachment it should not be disregarded for the purpose of payment under a garnishee order (paras 4.9-4.12).

3.11 Under Rule 4 a sum standing to the credit of a respondent in a bank, building society or credit union is attachable under subrule (4)(a) or, by virtue of subrule (18), under subrule (4) (c) only if the sum is payable to the respondent" on call or on notice". The Full Court of the Family Court considered this requirement in *Paleopoulos and Paleopoulos,*[13] a case which dealt with Regulation 134.

3.12 In *Paleopoulos and Paleopoplos* a bank sought to have a garnishment order attaching money in a savings bank account set aside on the ground that the money was not payable on call or on notice" because withdrawal

from the account was conditional on the presentation of a signed withdrawal form and passbook and therefore it was not attachable under either subregulation (4) (a) (subrule (4) (a)) or subregulation (18) (subrule (18)). At first instance[14] Mr Justice Smithers dismissed the bank's application. His Honour reviewed various authorities supporting the common law position that the money was not a debt due or accruing because withdrawal was subject to presentation of the account-holder's passbook. He then considered the possible meanings of" on call" and "on notice" and concluded that the words "on call or on notice"

> ....are intended to distinguish between money held by an institution for repayment to the customer, on the one hand without any delay beyond that which is a consequence of the need for compliance with the method of withdrawal provided, and on the other hand only after the passing of a previously agreed period of time after notification by the customer that the money is required. In other words the subregulation is worded consistently with an intention to encompass all money in one of the institutions described which is payable immediately or after a period stipulated in a notice, no matter what method of payment is required by the conditions of the contract between the institution and the customer.[15]

On appeal, the Full Court upheld Mr Justice Smithers' decision and reasoning.[16] The Full Court's decision went some way to clarifying the scope of subrules (4) (a) and (18). However the operation of Rule 4 in relation to moneys held in accounts remains uncertain in some respects.

3.13 In *Paleopoulos and Paleopoulous*[17] the Court was concerned only with conditions as to the "method of payment' required by the terms of the contract between the garnishee bank and the respondent, ie conditions that required the presentation of a signed withdrawal form and a passbook Consequently it is not clear whether Mr Justice Smithers' statement is to be taken to limit the conditions to be disregarded under subrule (18) to conditions relating to the method of payment or whether other conditions relating to the account in question are also to be disregarded. For example certain accounts with banks, building societies and credit unions are payable on call or on notice subject to conditions as to the method of payment, but. also subject to conditions that a minimum balance is to be retained in the account and that withdrawals are to be made in minimum amounts. Depending on the amount to be satisfied under a garnishment order, in some cases minimum balance/minimum withdrawal conditions would have the result that, although there was an amount payable on call or on notice when conditions relating to the method of payment were disregarded, the garnishee would not he required to pay to the judgment debtor the actual amount to be satisfied under the garnishment order if the judgment debtor demanded payment of that amount. Consequently there would be no attachable debt by virtue of subrule (18) unless the minimum balance minimal withdrawal conditions were also to be disregarded tinder that subrule. On the other hand, it seems clear from Mr Justice Smithers' statement that, in certain circumstances, a deposit for a fixed term is not attachable under Rule 4. Where moneys have been deposited for a fixed term, withdrawal is subject to, say, presentation of a deposit receipt and the term has not expired when the garnishment notice is served. the amount of the deposit will not be attachable under either subrule 4(a) or by virtue of subrule (18), subrule 4(c) because the amount is not payable on call or on notice until the term of the deposit has expired. Nor is the amount otherwise attachable under subrule 4(c) as a debt due or accruing because payment is subject to presentation of the deposit receipt.

3.14 It is also doubtful whether Rule 4 is effective to permit the attachment of an amount standing to a respondent's credit in a withdrawable share account where the amount is payable to the respondent on call or on notice. The term account" is capable of encompassing a withdrawable share account and subrule (18), whatever its precise scope. at least requires that conditions as to the method of payment be disregarded. Therefore it would seem that amounts in some types of withdrawable share accounts could be attached under Rule 4. However we are aware of at least one instance where a Court of Petty Sessions discharged a Regulation 134 garnishment order which sought to attach an amount standing to the respondent's credit in a withdrawable share account with a building society.[18] The reasons for the Court's decision were that the procedure of garnishment is

not a satisfactory way to levy execution on property in the form of shares and the references to “moneys” and “money” in subregulation (4) (which recur in subrule (4)) indicated the inapplicability of Regulation 134 to shares. Further, and “most importantly’, the respondent’s rights in relation to the shares held did not extend to certainty of withdrawal because of the rules of the garnishee building society. To the extent that the decisive factor in the Court’s decision was that the amount in question was not payable “on call or on notice”, it is undoubtedly correct.[19]

3.15 Since it seemed likely that building societies and credit unions in this State would have some experience of Family Court garnishment orders, we inquired of the Permanent Building Societies Association (NSW) Ltd whether such orders had caused its members any practical difficulties which ought to be taken into account for the purposes of this reference. The Association was not aware of any practical problems and wrote to its members in this respect. The limited response to the Association’s circular suggests that either Family Court garnishment orders on building societies are rare or they cause the garnishees little practical difficulty.

3.16 The general approach taken in Rule 4(18) to enable the attachment of moneys in accounts with various institutions departs significantly from that adopted in the United Kingdom provisions and also the existing New South Wales provisions for the attachment of moneys in bank accounts. We are not persuaded that a provision modelled on Rule 4(18), but taking account of the present uncertainties and limitations of that provision, would be preferable to the format of the existing bank account provisions. We have concluded that any reform of the New South Wales provisions should follow the format of the existing provisions and identify, in the manner of subsection (2) (para2.22), each of the types of conditions which are to be disregarded for the purpose of attachment. We consider that this approach tends to greater certainty in the operation of the provisions.

FOOTNOTES

1. Order 33 r4. These provisions of the Family Law Rules are substantially the same as the provisions in reg 134 of the former Family Law Regulations (Statutory Rules 1975 No 210 (Cth) as amended). The Family Law Rules (Statutory Rules 1984 No 425 (Cth) and new Family Law Regulations (Statutory Rules 1984 No 426 (Cth)) came into operation on 2 January 1985 - Family Law Rules, Order 1 r2(1) and Family Law Regulations. regs 2 and 78. A regulation in substantially the same form as former Family Law reg 134 has been adopted tot the purpose of enforcing maintenance orders in New South Wales - Maintenance Act Regulations. reg 16.

2. Eg. Income Tax Assessment Act 1936 (Cth) s218.

3. Taxation Laws Amendment Act 1984 (Cth) s119(b) and also ss18(a) and (b). 194, 223(d) and 373(a) and (b).

4. Administration of Justice Act 1956 (UK) s38.

5. Supreme Court Act 1981 (UK) ss40 and 40A County Courts Act 1959 (UK) ss143 and 143A.

6. Supreme Court Act 1981 (UK). Section 143 of the County Courts Act 1959 (UK) is in the same terms.

7. Jacob et al, *The Supreme Court Practice* 1982. Vol 1. Fifth Cum Suppl, para 48/1/8A.

8. Supreme Court 049 r1(3).

9. *Id,* r1(4).

10. Letter from the lord Chancellors Department dated 11 June 1985.

11. Supreme Court Act 1981 (UK) s40A: County Courts Act 1959 (UK) s143 A.

12. Note 1.

13. [1980] FLC 90-838.

14. *Paleopoulos and Paleopoulos* [1979] FLC 90-704.

15. *Id.* at 78.555.

16. [1980] FLC 90-838. at 75.299.

17. [1979] FLU 90-704; [1980] FLC 90-838 (Full Court).

18. Transcript of proceedings. *Franze v Franze: United Permanent Building Society Ltd (Garnishee).* Court of Petty Sessions Balmain, No 38 of 1978. 18 January 1980.

19. Counsel for the respondent to the application for discharge of the order argued that a practical approach should be taken to the operation of Regulation 134 and that. looked at in that light. an investment in withdrawable shares was clearly the type of debt and right which could and should be the subject of a garnishment order. The Court recognised that “it may well be that the legislature wished to include all manner of investment in building societies as being the proper subjects of garnishment orders under reg 134 but I am of the view that this is a technical matter as put by counsel for the applicant and that being so I must have close regard to the legal application of the words used in the regs.” *Id,* third page of transcript of proceedings.

20. Three of the Association’s fourteen members replied. They indicated that they had experienced no practical difficulties because they had either never or only rarely been subjected to a Family Court garnishment order.

4. The Present Bank Account Provisions

I. INTRODUCTION

4.1 In Chapter 2 we set out the provisions which permit the attachment of moneys in accounts with banks in disregard of certain preconditions to withdrawal which otherwise would prevent effective attachment It is necessary to examine these provisions critically before we consider their extension to accounts in building societies and credit unions (Chapter 5). For this purpose we repeat the provisions as they appear in Part 46 of the Supreme Court Rules:

> 2(1) A sum standing to the credit of a judgment debtor in an account in a bank shall for the purpose of this Part be a sum due or accruing to the judgment debtor, notwithstanding that any condition relating to demand of payment is unsatisfied.
>
> (2) A sum standing to the credit of a judgment debtor in a deposit account in a bank shall for the purposes of this Part, be a sum due or accruing to the judgment debtor, notwithstanding that any of the following conditions applicable to the account has not been satisfied -
>
> (a) a condition that notice is required before money is withdrawn
>
> (b) a condition that a personal application must be made before money is withdrawn
>
> (c) a condition that a deposit book must be produced before money is withdrawn: or
>
> (d) a condition that a receipt for money deposited in the account must be produced before money is withdrawn.

4.2 The bank account provisions call for comment for the following reasons:

> the scope of subsection (1) is not clear,
>
> the term “bank” is not defined, leading to uncertainty whether the provisions apply to financial institutions which are not recognised banks;
>
> the provisions do not indicate when moneys attached in a deposit account are to be paid under the garnishee order where withdrawal from the account is subject to a notice condition; and
>
> the provisions may be inadequate to accommodate recent changes in banking operations (in particular the introduction of automated teller machines) and possible changes in the future.

II. RECOMMENDATIONS FOR REFORM OF THE BANK ACCOUNT PROVISIONS

A. Scope of Subsection (1)

4.3 Subsection (1) permits the attachment of a sum standing to the credit of a judgment debtor in an account 'notwithstanding that any condition relating to demand of payment is unsatisfied". Whilst it is clear that the subsection encompasses conditions additional to a condition that a demand of payment shall be made. it is not clear just what conditions might be characterised as conditions "relating to" a demand of payment. particularly having regard to subsection (2).

4.4 Subsection (2) applies only to deposit accounts. A deposit account is merely a type of account and in a broad sense, the conditions described in paragraphs (a) to (d) of subsection (2) are conditions "relating to" demand of payment On this basis it is arguable that, for subsection. (2) to have some operation, the draftsman[1] must have intended the words "relating to" in subsection (1) to be of limited scope. Therefore the subsection is to be restricted to a condition that a demand of payment is to be made and conditions as to the manner in which the demand is to be made, eg. a condition that it is to be made at a particular branch or in writing, or only by the account-holder. The alternative argument is that subsection (2) has been included out of caution in view of the cases specifically concerned with deposit accounts (para 2.22) and should not be taken to limit the operation of subsection (1). The difficulty with this argument is that, if the words "relating to" are to be given a wide interpretation, there is the danger that subsection (1) encompasses conditions relating to demand of payment which it would not be appropriate to disregard for the purposes of attachment For example in Chapter 5 we discuss certain conditions governing the withdrawal of shares and deposits from building societies and credit unions which we consider it would be inappropriate to disregard, but which could come within subsection (1) if the bank account provisions in their present form were extended to building societies and credit unions.

4.5 The present uncertain scope of the bank account provisions should be remedied. **We recommend that the provisions in the Supreme Court Rules, District Court Act, 1973 and Local Courts (Civil Claims) Act, 1970 which permit the attachment of an amount standing to the credit of a judgment debtor in a hank account be repealed. The existing provisions should be replaced by a single provision (the new account provision) which applies to all bank accounts and which specifies, in the manner of the existing provision applying to deposit accounts, the types of conditions applicable to accounts which are to be disregarded for the purpose of attachment.** If subsection (1) is repealed it will be necessary to specify in the new provision each type of condition relating to demand of payment which should continue to be disregarded for the purpose of attachment Therefore if the above recommendation is adopted, **the conditions to be disregarded under the new account provision should include a condition that a demand of payment is to be made and a condition as to the manner in which or place at which the demand is to be made.**

In Chapter 6 (paras 6.4-6.10) we also recommend that certain other conditions which can apply to accounts with building societies and credit unions (and also banks) be disregarded for the purposes of attachment. If our later recommendations are accepted the conditions specified in the new account provision will include these other conditions.

B. Meaning of the Term "Bank"

4.6 In Chapter 2 (paras 2.29-2.33) we discussed the legal uncertainty which surrounds the term “bank” in the context of considering whether the existing bank account provisions applied to accounts with building societies and credit unions. The uncertain application of the provisions in that context illustrates the general difficulty of determining whether any particular organisation which borrows and lends money is carrying on the business of banking and is therefore a bank. We consider that the provisions for the attachment of moneys in accounts should be so drafted that any particular financial institution can know whether or not it is within the scope of the provisions. Accordingly **we recommend that the new account provision should, in its application to banks, be limited to apply to**

(a) a bank within the meaning of the Banking Act 1959 (Cth): and

(b) a person who carries on State banking within the meaning of section 51(xiii) of the Constitution of the Commonwealth.

4.7 Banks within the meaning of the Banking Act 1959 (Cth) are those bodies corporate which are authorised under Part II of the Act to carry on banking business in Australia and also the Commonwealth Bank of Australia the Commonwealth Savings Bank of Australia the Commonwealth Development Bank of Australia the Australian Resources Development Bank Limited and the Primary Industry Bank of Australia Limited.[2] Consequently our recommendation in paragraph (a) would bring the named banks and bodies corporate with banking authorities within the account provisions. The Banking Act 1959 (Cth) also prohibits persons other than bodies corporate from carrying on any banking business in Australia and permits a body corporate to do so only if it has a Part II authority.[3] However the Treasurer may exempt a person who desires to carry on any banking business, but does not desire to carry on the general business of banking, from compliance with such provisions of the Act as might be specified in the exemption order.[4]

4.8 In view of the general prohibitions under the Banking Act 1959 (Cth) and the limited scope for exemption from these prohibitions, it is unlikely that any person or institution subject to the Act would be carrying on significant banking business of the type to which the account provisions are directed without a Part II authority. Therefore we consider that the provision recommended in paragraph (a), in combination with the provision in paragraph (b), is sufficiently inclusive. Although it is dependent on Commonwealth legislation which may be amended, it seems unlikely that the Commonwealth system of regulating banking by the issue of authorities, which is central to the definition and gives it the virtue of certainty, will change in the near future. However State banks such as the State Bank of New South Wales are outside the ambit of the Commonwealth’s legislative power in respect of banking and consequently are not banks within the meaning of the Banking Act 1959 (Cth), ie. they are not among the bodies corporate authorised under that Act to carry on banking business in Australia.[5] The recommendation in paragraph (b) ensures that State banks would be included as banks for the purposes of the account provisions.

C. Withdrawal Subject to a Notice Condition

4.9 Under subsection (2) of the bank account provisions (para 4.1), money in a deposit account is a sum due or accruing, and therefore attachable, notwithstanding that the bank requires notice before withdrawals are made from the account. However the subsection does not indicate whether, when a notice condition is to be disregarded, the garnishee bank is required to pay the attached sum immediately or when the period of notice would have expired had it been given on the date of service of the garnishee order, ie. whether the sum

attachable is attachable as a debt due or a debt accruing. If a notice period is disregarded in determining the time of payment by the garnishee bank then, contrary to the fundamental premise that the judgment creditor stands in the same position as the judgment debtor in relation to the attached debt, the judgment creditor stands in a better position to the extent that payment of the debt is accelerated. Therefore, although there appears to be no authority as to the time of payment of an amount in a deposit account which is subject to a notice condition, it seems clear in principle that the amount is attachable as a debt accruing.

4.10 At present a garnishee order issued out of the District Court requires compliance with the order within 14 days of service (para 2.6). Consequently, if a District Court order attaches an amount in a bank account subject to a notice period in excess of 14 days the garnishee bank is obliged to accelerate payment of the attached amount to comply with the order or risk proceedings being brought by the judgment creditor. To avoid this sort of situation arising **we recommend that the provisions for attaching moneys in accounts make it clear that where the withdrawal of an amount attached is subject to a period of notice, the garnishee is not required to make payment in compliance with the garnishee order until the notice period has expired.**

4.11 The draft legislation implements this recommendation in two ways. First, the introductory words of the account provision have been amended to make it clear that it is only for the purpose of determining whether an amount standing to the credit of a judgment debtor in an account is capable of attachment that the conditions set out in the provision are to be disregarded. Whether that amount or some part of it is actually attached depends on the contract between the garnishee and the judgment debtor and whether, eg. the account is a joint account, the garnishee is entitled to exercise a right of set-off against the account or the judgment debtor has made a prior assignment of the debt.

4.12 Second, in Chapter 6 (para 6.6) we recommend that where an amount in an account is attached, the garnishee order should be deemed to operate as a notice of withdrawal or demand of payment under the contract in respect of the account which the garnishee should be deemed to have received on the date of service of the order or, if the judgment debtor is not then entitled to give notice of withdrawal or demand payment, on the date the judgment debtor would have been entitled to do so. As indicated in paras 6.5-6.8 this recommendation solves several problems, including that of notice periods. It has the effect that where an account is not subject to a non-withdrawal period but is subject to a notice condition, service of the garnishee order has the same contractual consequences as would result if the garnishee had actually received notice of withdrawal from the judgment debtor on the date of service of the order. For example if the notice period is seven days, then, in accordance with the contract between the garnishee and the judgment debtor, the attached amount is not due for payment until seven days after the garnishee order is served. The effect of the recommendation where the account is subject to a non-withdrawal period and a notice condition is discussed when we consider non-withdrawal periods (paras 6.3-6.8).

D. Changes Resulting from Automation

4.13 At present the conditions which are to be disregarded for the purpose of attaching moneys in bank accounts comprise an exhaustive list. The provisions are not applicable unless the condition in question is either a condition" relating to demand of payment" or, in the case of a deposit account, a condition of a kind described in paragraphs (a) to (d) of subsection (2). In view of the introduction of automated deposit/withdrawal systems, not only by banks but also by some building societies and credit unions, it is necessary to consider whether conditions applying to the operation of "cashcard" facilities are within the provisions.

4.14 In the case of banks a cashcard facility may be used on either a cheque account or a deposit account To use the facility to withdraw funds the customer inserts a plastic card in an automated teller machine and separately keys-in a" personal identification number" (PIN), the account from which the withdrawal is to be made and the amount of the withdrawal. These actions constitute a demand of payment by the customer of and the keying- in of the customer's PIN is the essential precondition to payment. In our opinion an automated withdrawal would be within the broad terms of subsection (1) and, where the accessed account is a deposit account, also within paragraph (b) of subsection (2) because the condition that the customer's PIN be keyed - in is in the nature of a condition that a personal application must be made before money is withdrawn.

4.15 In para 4.5 we have recommended that the existing provisions be repealed and replaced with a single provision, in the form of subsection (2), which applies to accounts generally and includes additional conditions relating to demand of payment In our opinion the new provision we recommend would be adequate to accommodate automated withdrawal procedures. However the new provision should be sufficiently flexible to permit its ready application in the event that changes in the ways in which moneys are withdrawn result in conditions of withdrawal which would not be within the provisions as so amended. Therefore **we recommend that the conditions applicable to accounts which are to be disregarded for the purpose of attachment should include any condition prescribed by regulation.**

4.16 The recommendations in this Report are based on the current activities of building societies and credit unions (and also banks). The financial sector is highly innovative and in the forefront of technological change. Consequently it is reasonable to expect that reform based on the present activities of certain organisations within this sector may prove inappropriate in the future. For this reason **we recommend that the new account provision (para 4.5) should not apply to any account exempted by regulation.**

4.17 The recommendations we make in paras 4.15 and 4.16 apply only in relation to the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 and call for the inclusion in each Act of a power to make the appropriate regulations. As we point out in para 1.23 the Supreme Court Rule Committee is empowered to alter, add to or rescind the Supreme Court Rules for the time being in force, and to make additional rules. Consequently the Committee could exercise its rule-making power at any time to add to the list of conditions applicable to accounts which are to be disregarded for the purpose of attachment or to exclude a particular type of account from the operation of the provisions.

FOOTNOTES

1. The provisions as they appear in the Supreme Court Rules, and adopted in the District Court Act. 1973 and the Local Courts (Civil Claims) Act. 1970, are in the form recommended by this Commission in its 1969 Report. *Supreme Court Procedure.* LRC 7 (at 385). Unfortunately (but explicably in the context of that Report and its objectives). the Commission did not elaborate tin the provisions beyond commenting that they "will enlarge the circumstances in which a judgment debtor's credit balance with a bank can be attached by way of execution" (at 26).

2. Banking Act 1959 (Cth) s5(1); Primary Industry Bank Amendment Act 1978 (Cth) ss1(2), 3 and 7; and Commonwealth Banks Amendment Act 1984 (Cth) s33.

3. Sections 7 and 8.

4. Section 11.

5. The Commonwealth of Australia Act 63 and 64 Vic Ch 12 s51 (xiii): and Banking Act 1959 (Cth) s6.

5. Principle Recommendations for Reform

I. INTRODUCTION

5.1 We now come to the question whether the law should be reformed to permit the attachment or moneys starting to the credit of a judgment debtor in an account, including a withdrawable share account, with a building society or credit union. As we point out in Chapter 1, garnishment is an unusual procedure insofar as the garnishee is involuntarily, and usually unwillingly, involved in a matter of concern only to the judgment creditor and the judgment debtor. The procedure may cause the garnishee little inconvenience. On the other hand, the inconvenience suffered may be considerable, eg. when court proceedings ace necessary to establish the respective rights of the judgment creditor and the garnishee. The procedure may also place the garnishee in an invidious position because of his or her relationship, be it personal or commercial, with the judgment debtor. However the existence of the procedure reflects a policy decision that a garnishee's involvement in the affairs or the judgment creditor arid judgment debtor is justified in the interests of the judgment creditor.

5.2 The interests of the garnishee are protected by the fundamental principle that the judgment creditor stands in no better position than the judgment debtor in relation to the attached debt although the existing bank account provisions involve a departure from this principle in that they require certain terms of the contract between the garnishee bank arid the judgment debtor to be disregarded for the benefit of the judgment creditor. The departure is made on the basis that banks will not be unduly affected when the provisions also take account of the special nature of their operations.

5.3 Once the procedure of garnishment is taken as given, the question of reform in the present case is one of practicality rather than principle. We can see no argument in principle against law reform which would assist judgment creditors to enforce judgment debts in situations where there are funds readily available to the judgment debtor. The practical issue is to ensure that, having regard to the types of accounts offered by building societies and credit unions and the nature of their operations, any reform of the law is effective and appropriate in view of the contractual relationship which could exist between the garnishee organisation arid the judgment debtor member and, at the same time, causes the minimum inconvenience arid expense to the garnishee. The nature of the contract between a garnishee building society or credit union and the judgment debtor is central to the question of reform arid is to be determined by reference to the rules of the organisation arid the legislation by which its activities are regulated, and to any specific arrangements made between the parties within the constraints of the rules and the legislation.[1]

II. BUILDING SOCIETIES

5.4 There are three types of building societies:

co-operative housing societies, which are registered and regulated under the Co-operation Act, 1923;

Starr- Bowkett building societies, which also are registered and regulated under the Co-operation Act, 1923; and

building societies other than co-operative housing societies and Starr - Bowkett building societies, which are registered and regulated under the Building and Co-operative Societies Act, 1901 and the Co-operation Act, 1923,[2] the Co-operation Act, 1923 or the Permanent Building Societies Act, 1967 and which collectively are called “permanent building societies” in this Report.

The sole or principal object of the various types of building society is to raise funds for the purpose of making loans to members on the security of a mortgage of real property.[3]

5.5 Starr- Bowkett building societies may also lend on security of the paid-up share capital and deposits of the borrower member[4] and in certain circumstances may take a charge over the shares of a borrower member as additional security for the loan.[5] Prior to 1 September 1985 permanent building societies registered under the Co-operation Act 1923 or the Permanent Building Societies Act, 1967 also had statutory power to lend on security of the paid- up capital and deposits of a borrower member.[6] There is no longer any express statutory base for permanent building societies to take such security. However some permanent building societies have retained the power to do so, at least temporarily, by virtue of a transitional provision in the recent amending legislation,[7] and other societies may intend to take such security pursuant to other new provisions in the Permanent Building Societies Act, 1967.[8] Consequently we have assumed for the purposes of this Report that the situation can arise where a permanent building society has taken security over the paid-up capital or deposits of a borrower member in some manner which prevents the member withdrawing his or her capital or deposits while the loan is outstanding.

A. Co-operative Housing Societies

5.6 Table 5.1 shows the number of registered co-operative housing societies, their estimated total membership and their share capital as at 30 June 1982, 1983 and 1984:

Table 5.1: Co-operative Housing Societies

	1982	**1983**	**1984**
No. of registered Societies	214(a)	246	251
No. of members	59,000	59,000	58,745(b)
Total share options	$60,000	$60,635	$60,000

(a) During 1981/82, 3,191 terminating building societies were restructured and amalgamated into 241 co-operative housing societies consequent on the enactment of the Co-operation (Amendment) Act, 1981. As at 30 June 1982 these terminating building societies had not been struck off the register of co-operative societies.

(b) This figure does not include the directors of co-operative housing societies, who are required to be members and whose shareholdings account for the discrepancy between the estimated number of members and the total share capital of these societies - see para 5.6.

Source: Department of Co-operative Societies

5.7 Unlike other building societies a co-operative housing society cannot take money on deposit and can issue to each member of the society only that number of shares required for membership under the rules of the society.[9] For reasons related to the sources of loan funds available to co-operative building societies, virtually all these societies have adopted rules which stipulate that a member is to hold only one $1.00 share in the society.[10] Since co-operative housing societies cannot take deposits and the withdrawable shareholding of members is nominal, there is no practical reason for extending the provisions for the attachment of debts to these societies. Therefore **we recommend that the new account provision (para 4.5) should not apply to withdrawable shares in co-operative housing societies.**

B. Starr - Bowkett Building Societies

5.8 Table 5.2 shows the number of active Starr - Bowkett building societies and their total membership and share capital as at 30 June 1982, 1983 and 1984. Although Starr - Bowkett building societies have statutory power to take money on deposit,[11] it appears that they do not do so.

Table *5.2:* Starr- Bowkett Building Societies

	1982	**1983**	**1984**
No. of active societies	45	38	38
No. of members	16,000	14,793	14,464
Total share capital	$23,345,498	$22,687,419	$22,824,739
Total deposits	nil	nil	nil

Source: Department of Co-operative Societies

5.9 Starr - Bowkett building societies are terminating societies which operate broadly in the following way.[12] Each society is established with a maximum number of possible members, a minimum shareholding for membership and a limit on the maximum number of shares any one number can hold. Each share has a relatively substantial nominal value, eg $50.00. The amount which a member can borrow from the society is determined by the number of shares held by the member and the loan value of each share, so that if, say, a member holds 300 shares arid each share entitles the holder to borrow $100, in due course the member will

become entitled to take out a loan of $30,000. A member usually pays only a nominal portion of the subscription moneys for his or her shares when joining the society arid pays the outstanding subscription moneys by monthly payments of a minimum amount per share, eg 25 c. Within the minimum arid maximum shareholding limits members can take up shares to the extent that they are able to meet the initial and monthly subscription payments. The society commences lending to members when it has adequate funds to make a loan of the maximum possible amount (being the maximum shareholding multiplied by the loan amount per share).

5.10 Members acquire the right to take out a loan either by ballot or by auction. The balloting of loan entitlements is the essential and distinguishing characteristic of a Starr - Bowkett building society and each ballot determines the order in which members become entitled to an interest-free loan as funds become available to the society.[13] However the auctioning of loan entitlements is an alternative to the ballot system under the rules of most Starr - Bowkett building societies. Under the auction system members bid for a loan entitlement by offering an interest rate at which they are prepared to take our their loan. Where a society's rules permit loan entitlements to be auctioned the rules set a minimum and a maximum interest rate within which bids may be made. When a member takes up a loan entitlement the member's monthly commitments are increased by a fixed amount per share which represents instalment repayments of the loan amount and, in the case on auctioned loans, interest. During the life of a Starr - Bowkett building society each member of the society who has continued to make subscription payments will become entitled to take out a loan by ballot unless the member has successfully bid for a loan. Once a loan has been made to all members who have continued their subscription payments and wish to take out a loan, the net assets of the society are distributed periodically to members in proportion to their shareholding (either directly or by way of a credit to their loan account if their loan is riot yet repaid) and in due course the society is wound up.

5.11 In the case of Starr- Bowkett building societies shares in respect of which a loan has been made can be withdrawn only on repayment of the loan and payment of any other moneys due to the society. Shares in respect of which no loan has been made may be withdrawn, subject to any minimum non-withdrawal period stipulated in the rules of the society. The non - withdrawal period may be as short as one month or as long as five years. When a member withdraws shares he or she receives the amount of subscription is paid on the shares less any sums the society is entitled to deduct under its rules. In some cases the refund may not be payable until the end of the financial year in which notice of withdrawal is given unless the board approves earlier payment or until some time to be determined by the board depending on the availability of funds. The society's rules may also empower the board no limit the number of shares which a member may withdraw in any one financial year.

5.12 By virtue of section 57 of the Co-operation Act, 1923 the society may also have a statutory charge over the subscriptions and other moneys credited to a member's share account and a right to set off moneys credited or payable to the member against any debt due from the member to the society. There are provisions similar to section 57 in the Permanent Building Societies Act, 1967 and the Credit Union Act, 1969 and the various statutory charge provisions are discussed at paras 6.19-6.31. For the moment it is sufficient to note that, where shares in a Starr - Bowkett building society cannot be withdrawn because the member has taken out a loan in respect of those shares, the existence of a section 57 charge over the member's account would be irrelevant in relation to any garnishee order affecting the account. The garnishee order would be ineffective regardless of the existence of the statutory charge because the member's shares would not be withdrawable. However a member who has riot taken out a loan and whose shares are withdrawable may still owe money to the society, eg. arrears in subscriptions, unpaid fines or administrative charges. The rules of a Starr - Bowkett building society will usually, if not always, be such that the refund payable to a member on withdrawal of his or her shares will be the balance of the subscriptions credited to the member after deduction of various moneys which may be due or payable by the member under the rules. Consequently the debt due or accruing to the member on withdrawal of his or her shares (and hence the potentially attachable debt) would be the amount refundable to the member after the society exercised its contractual right to set off. However, irrespective of the rules of a particular Starr - Bowkett building society, where there was a debt due from a member to the society the member's share account would be subject to a statutory charge in favour of the society to secure the debt and any garnishee order

affecting the account could only be effective to attach any balance in the account after setting off the debt due to the society.[14]

5.13 We have not examined the rules of all current Starr - Bowkett building societies.[15] However it appears from those we have examined that the rules of a Starr - Bowkett society are intended to protect the financial stability of the society and ensure that it has a relatively stable how of subscription funds from which to make loans to members. The contract between a Starr - Bowkett building society and each member which is embodied in the rules of the society is also such that, if withdrawable share accounts in these societies were made liable to attachment notwithstanding preconditions to withdrawal limited to those specified in subsection (2) of the present bank account provisions (para 4.1), garnishee orders frequently would be ineffective because the judgment debtor had a loan from the society, the period during which shares could not be withdrawn had not expired or nothing was payable to the judgment debtor after the society exercised its contractual or statutory right to set off.

5.14 The aggregate funds invested with Starr-Bowkett building societies is relatively insubstantial when compared with the aggregate funds invested with permanent building societies (para 5.25). However the investment of any one member could be significant from the point of view of a judgment creditor. The potential significance to judgment creditors of funds in Starr - Bowkett building societies can be illustrated by reference to the rules of the Newtown and Enmore Starr-Bowkett Building Co-operative Society No 23 Limited (the Society).

5.15 Under the rules of the Society the maximum permissible shareholding is 1,000 shares and the minimum shareholding is 20 shares. The monthly subscription is 25c per share and subscriptions for shares in respect of which a loan has not been made may be withdrawn by notice in writing, at any time after five years from the date on which the shareholder became a member of the Society. If three members hold 1,000, 500 and 20 shares, their monthly subscriptions will be $250, $125 and $5 respectively and their annual subscription payments will total $3,000, $1,500 and $60 respectively. If none of the three members had taken out a loan by the end of the five year non- withdrawal period but had paid their subscriptions when due, the subscriptions credited to their accounts and available for withdrawal would be $15,000, $7,500 and $300 respectively.

5.16 We can see no reason why a judgment creditor of one of the hypothetical members of the Society should not have access to the refund to which the member would be entitled by withdrawal of his or her shares. **Therefore we recommend that the new account provision (para 4.5) should apply to withdrawable share accounts with Starr-Bowkett building societies.** However it does not follow from this recommendation that any refund which would be payable to a member of a Starr - Bowkett building society if the member chose to withdraw his or her shares necessarily would be attachable. Furthermore the rules of the garnishee society usually will be such that any attachable refund would be attachable as a debt accruing. The rules could also have the result that, although there was an amount to the credit of the judgment debtor for subscriptions, that amount would be extinguished by deductions for moneys payable to the society. The rules of the Society again provide examples.

5.17 The rules of the Society governing withdrawals include rules that:

> if the Society has borrowed money and its loan is not secured by a mortgage, a refund cannot be paid to a member withdrawing shares except with the consent of the Registrar of Co-operative Societies;

a refund is not payable until the end of the financial year in which notice of withdrawal is given unless the board of the Society consents to earlier repayment;

a refund can only be paid out of loan repayments received by the Society after receipt of the notice of withdrawal;

refunds are to be paid in the order in which the respective notices of withdrawal are received by the Society; and

the refund payable is the amount of the subscriptions paid by the member less any fines, charges or other dues owed by the member to the end of the financial year in which the notice of withdrawal is given and also less a sum which represents a fair proportion of any loss which the Society may incur before the end of that financial year.

5.18 Where the Society has an unsecured loan the first rule effectively operates as a precondition to be satisfied before any refund becomes due or accruing to a member withdrawing shares. Consequently any garnishee order on the account of a judgment debtor member which was served when the Society had an unsecured loan would be ineffective unless the member had already applied to withdraw his or her shares and the Registrar had consented to the withdrawal before service of the order. The second, third and fourth rules described above determine when a refund is payable. The fifth rule determines what the refund, if any, will be. Assuming that the Society receives adequate loan repayments after the notice of withdrawal is received, any refund which is payable to the member will accrue due for payment at the end of the financial year of withdrawal, and after all earlier applications for withdrawal have been met, unless the board consents to earlier repayment.

5.19 The rules of the Society clearly are designed to protect the financial stability of the Society and, in our view, it would be inappropriate to enact legislation which permitted the attachment of withdrawable share accounts with Starr - Bowkett building societies in disregard of such rules. A Starr - Bowkett society. unlike a permanent building society, has a finite life and a limited capital base and its ability to make a loan to each member is very much dependent on the due performance by every other member of his or her contractual undertakings. The distinctive nature of Starr - Bowkett building societies has led us to exclude these societies from one of the recommendations we make in Chapter 6.

5.20 In para 6.4 we recommend that a condition that money or shares cannot be withdrawn for a specified period be disregarded for the purpose of determining whether an amount in an account is attachable. In para 6.5 we further recommend that, although a non-withdrawal period should be disregarded for the purpose of attachment, it should not be disregarded for the purpose of payment under the garnishee order. As already indicated (para 5.11), the withdrawal of shares from a Starr - Bowkett building society is subject to a minimum non-withdrawal period which may be as short as one month or as long as five years. Consequently if our recommendation in para 6.4 were extended to withdrawable share accounts with these societies, unexpired non- withdrawal periods would have to be disregarded for the purpose of attachment. Although our recommendation in para 6.5 takes account of the garnishee's contractual rights as to payment, we consider that unexpired non-withdrawal periods on Starr - Bowkett withdrawable share accounts should not be disregarded for the purpose of attachment- The attachment of a sum in the hands of a Starr - Bowkett building society for the remainder of an unexpired non-withdrawal period, which may be up to five years, could impose a significant administrative burden on the society. It could also require the society, if acting prudently, to disregard the attached amount when calculating the funds available from time to time to make loans to members and thereby cause some disruption, albeit minor, to the society/s lending program and defer the borrowing rights of other members. Accordingly we have excluded withdrawable share accounts in Starr - Bowkett building societies from our recommendation in para 6.4.

5.21 Another distinctive feature of Starr-Bowkett building societies is the contractual significance of a notice of withdrawal of shares. As the example rules set out in para 5.17 indicate, the receipt of a notice of withdrawal can be essential to the operation of rules which determine when a refund is due to a member and the funds out of which the refund is to be paid Because of rules of this type another recommendation in Chapter 6 is of particular significance in relation to Starr - Bowkett building societies.

5.22 In para 6.6 we recommend that where an amount in an account *is* attached, service of the garnishee order should operate (subject to the expiry of any applicable non-withdrawal period) as receipt by the garnishee of a notice of withdrawal or demand of payment made under the contract in respect of the account. If adopted this recommendation would cause terms in the contract between the garnishee and the judgment debtor which depended on the receipt of a notice of withdrawal or demand of payment to come into operation although no notice or demand had been received by the garnishee. Consequently rules of the type referred to in para 5.21 would take effect as the result of service of the garnishee order. However service of a garnishee order would operate as receipt of a notice of withdrawal or demand of payment only when the amount in the judgment debtor's account had been attached by the order. It would not operate to make an amount in an account attachable. Consequently, because we have excluded Starr - Bowkett building societies from our recommendation that non- withdrawal periods should be disregarded for the purpose of attachment (para 5.20). our recommendation in para 6.6 could only apply to a withdrawable share account in a Starr - Bowkett building society if the non-withdrawal period applicable to the account had already expired when the garnishee order was served.

5.23 During consultations on our draft Report it was put to the Commission that it would be detrimental to the co-operative nature of Starr - Bowkett building societies if funds held by these societies were made liable to attachment We recognise that the ability of a Starr - Bowkett building society to achieve its objectives for the benefit of all members depends primarily on the performance by each member of his or her commitments under the society s rules. Nevertheless the rules are designed to protect the society, and consequently the interests of other members, where one member fails to meet his or her obligations or no longer wishes to be a member. Therefore there can be no detriment to a Starr - Bowkett building society if moneys in a withdrawable share account are liable to attachment only when they are withdrawable by the member and the amount attached is not payable under the order until it would have been payable to the member if he or she had applied to withdraw shares when the order was served.

5.24 We also anticipate that if our recommendations for reform are adopted Starr - Bowkett building societies would not be subjected to garnishee orders with any frequency. First the aggregate membership of these societies is relatively insignificant (Table 5.2. para 5.8). Secondly, a Starr - Bowkett share account is quite different from a deposit or withdrawable share account from which withdrawals are payable on demand and to which the account holder has ready access. Moneys subscribed for shares in a Starr - Bowkett building society are in the nature of a long-term investment In this respect a Starr-Bowkett share account is analogous to a fixed-term deposit in that the member anticipates that he or she will be able to meet all foreseeable day- to- day expenses and other financial commitments without having to resort to the funds paid into the society. Therefore garnishee orders on Starr - Bowkett share accounts would be likely only where the judgment debtor was a victim of unforeseen financial difficulties. However, whilst garnishee orders would be likely to be infrequent we do not consider that this is good reason to exclude Starr - Bowkett building societies from our reform proposals.

C. Permanent Building Societies

5.25 Table 5.3 shows the number of registered permanent building societies and their total membership, share capital and deposit holdings as at 30 June 1982. 1983 and 1984. grouped by reference to the legislation under which these societies are registered.

Table 5.3: Permanent[a] Building Societies

	1982	1983	1984
Building and Co-operative Societies Act, 1901			
No. of registered societies	3	3	3
No. of members	97,783	394,211	427,199
Total share capital	$139,338,000	$589,962,000(b)	$631,710,000
Total deposits	nil	nil	$61,193,000
Co-operation Act, 1923			
No. of registered societies	25	11	4
No. of active societies	4	5	3
No. of members	5,579	6,191	5,809
Total share capital	$10,324,000	$11,796,000	$12,125,000
Total deposits	nil	nil	nil
Permanent Building Societies Act, 1967			
No. of registered societies	46	47	47
No. of active societies	17	10	10
No. of members	3,369,195	3,398,044(b)	3,643,006
Total share capital	$4,959,827,000	$5,207,191,000	$5,659,155,000
Total deposits	$6,261,000	$914,750,000	$377,015,000

(a) See para S.4.

(b) In September 1982 the State Building Society of New South Wales Limited ceased to operate under the Permanent Building Societies Act, 1967 and registered under the Co-operation Act, 1923. On registration under the Co- operation Act, 1923 the Society transferred its engagements to the Rural Building and Investment Society Ltd, a society registered under the Building and C o- operative Societies Act, 1901 and incorporated pursuant to s41A of the Co-operation Act, 1923. Rural Building and Investment Society Ltd then changed its name to State Building Society Ltd. The significant increase in the aggregate membership and share capital of the societies registered under the 1901 Act is the result of this transfer, which correspondingly reduced the aggregate membership and share capital of the societies registered under the 1967 Act.

Source: Department of Co-operative Societies

5.26 Recent amendments to the Co-operation Act, 1923 and the Permanent Building Societies Act, 1967 have removed certain restrictions on the lending and borrowing activities of permanent building societies and allowed them a greater range of activities.[16] One likely consequence of these amendments will be a shift from withdrawable to fixed share capital, with deposits forming the bulk of the funds invested with some permanent building societies.[17]

5.27 Permanent building societies offer various types of deposit accounts and withdrawable share accounts, although it appears that not all societies take deposits,[18] and at least one society, United Permanent Building Society Ltd, now takes term investments only as deposits. Withdrawals may be made on demand, on notice or after a minimum period and usually require the presentation of a passbook and withdrawal form, some form of receipt or the use of a cashcard. Some deposit/share accounts are subject to minimum deposit/subscription requirements, ie the depositor/shareholder is required to invest a minimum amount. The investment may be for a fixed term or for a minimum period after which withdrawals maybe made on demand or on notice. A non-term minimum deposit/share account is usually also subject to a corresponding minimum balance condition and a condition that subsequent deposits and/or withdrawals are to be of a minimum amount. Societies also offer 'Christmas Club' accounts. Such accounts usually are subject to a condition that any withdrawal before November must be for the full amount in the account or a condition that any withdrawal before that time will result in a reduction in the interest rate otherwise payable on the account.

5.28 Most permanent building societies offer automated teller facilities, which are discussed in Chapter 4. As indicated in para 4.14 we consider that the new account provision we recommend in that chapter would encompass this type of facility. Some societies have also recently entered into agency agreements with individual banks which give the societies access to the cheque clearance system and enable them to offer cheque accounts which operate in the same manner as bank cheque accounts.[19] Most permanent building societies also provide cheque or order for withdrawal facilities. A cheque or order for withdrawal facility differs from a normal cheque account in that the cheque or order drawn on behalf of an account- holder is drawn on the society's own account. However the amount involved is debited to the account - holder's account and credited to the society's account when the society's cheque or order is drawn. Consequently, if the new account provision is extended to apply to permanent building societies, there is no risk that a society would have to meet its own cheque but be unable to recover funds from the account - holder because the account had been attached after the society's cheque had been drawn, but before it was presented.

5.29 The shares or deposits of a member of a permanent building society may not be withdrawable because the member has taken out a loan on the security of the member's paid-up share capital and deposits (para 5.5) However, in contrast to Starr - Bowkett building societies, where a member of a permanent building society has a loan that is not secured by the member's paid-up share capital and deposits, usually the rules of the society permit the member to withdraw any shares held over the minimum required for membership notwithstanding the loan.[20] Nevertheless, although a member may be entitled to withdraw from a deposit or withdrawable share account despite an outstanding loan, the account may be subject to a charge and a right of appropriation or set-off in favour of the society pursuant to the legislation under which the society is registered.[21]

5.20 The relevant statutory provisions are discussed at paras 6.19-6 31. At this point it is sufficient to note that if moneys in accounts with permanent building societies are made attachable, the situation could arise where a borrower member is in default on a loan when a garnishee order in respect of that member's account is served on the society. In such a situation the society would have a charge over the account to the extent of the debt then due to the society and the garnishee order could be ineffective because that debt exceeded the credit amount in the account.

5.31 Recent amendments to the Permanent Building Societies Act, 1967 also result in a further restriction on the withdrawal of shares from permanent building societies. Permanent building societies are now required to maintain adequate capital in accordance with a formula set down in the Act[22] and a withdrawal of shares in a society is permitted only to the extent that it does not result in the society failing to maintain its capital adequacy.[23] This new restriction would be unlikely to cause garnishee orders to be ineffective with any frequency. However the possibility that it could do so, particularly in a case where the garnishee society is in financial difficulties or temporarily over-extended, should be noted.

5.32 As we have already indicated in paras 2.29-2.34, it is not clear whether the account facilities offered by permanent building societies and their lending activities are such that these societies can. as a matter of law, be characterised as banks. Nevertheless the reality is that a particular type of deposit or withdrawable share account with a permanent building society is the practical equivalent of a bank account of the same type. There is also no difference in the legal nature of a particular type of deposit account with a permanent building society and the same type of deposit account with a bank. The legal nature of a withdrawable share account is, on the other hand, quite distinct from that of a deposit account. However the ability of the account-holder to withdraw his or her share subscriptions and any other moneys credited to the account places withdrawable share accounts on the same legal footing as deposit accounts, in that satisfaction by the account-holder of any preconditions to withdrawal from the account gives rise to a debt due or accruing from the society to the account-holder. Therefore **we recommend that the new account provision (para 4.5) should apply to deposit and withdrawable share accounts with permanent building societies.**

5.33 However an amount standing to the credit of a judgment debtor in a permanent building society account would not necessarily be attachable if the above recommendation were adopted. A garnishee order could be ineffective because

the judgment debtor's shares and deposits are security for a loan;

the account is subject to a non-withdrawal period which is still operative when the order is served;

the garnishee has a statutory charge over the account to secure a debt due from the judgment debtor; or

the account is subject to a minimum withdrawal or minimum balance condition which causes the order to be ineffective because the amount of the judgment debt to be satisfied under the order is such that, given the condition. the garnishee has no contractual obligation to pay that amount on demand by the judgment debtor.

A further problem could arise because, although the garnishee order is effective to attach the amount in the account, the attached debt is a fixed- term deposit which is not due for payment for a considerable period. In Chapter 6 we make further recommendations to ensure that moneys in accounts generally can be effectively and efficiently attached where attachment is appropriate and these recommendations take account of certain of the problems identified above.

III. CREDIT UNIONS

5.34 Credit unions are registered under, and regulated by, the Credit Union Act, 1969. They raise funds by share subscriptions and, if authorised by their rules to do so, by taking deposits from members and raising loans. These funds are used to make loans to members.[24] Table 5.4 shows the number of active registered credit unions and their total membership, share capital and deposits as at 30 June 1982, 1983 and 1984.

Table 5.4: Credit Unions

	1982	**1983**	**1984**
No. of registered credit unions	309	307	293
Total No. of members	723,503	755,141	801,090
Total share capital	$5,563,075	$5,705,996	$6,054,598
Total deposits	$964,948,077	$1,251,897,715	$1,479,281,56

Source: Department of Co-operative Societies

5.35 The shares held by a member of a credit union are withdrawable shares, ie the member may, subject to the Credit Union Act 1969 and the rules of the credit union, apply to withdraw the moneys subscribed for his or her shares.[25] The nominal value of shares and the minimum number required for membership vary as between credit unions. However the figures in Table 5.4 give an average shareholding per member of $7.69, $7.55 and $7.55 as at 30 June 1982, 1983 and 1984 respectively. The value of the average shareholding and its relative constancy over time suggest that members of credit unions tend to hold only the minimum number of shares required for membership in Chapter 6 (para 6.18) we recommend that a garnishee order should not have the effect of terminating the judgment debtor's membership of the garnishee organisation. Consequently, to the extent that members of credit unions hold only the minimum number of shares necessary for membership, there is no practical point in recommending that the value of a judgment debtor's shareholding in a credit union be made liable to attachment.

5.36 However it appears from those credit union rules which we examined that in the case of some credit unions, a member may hold shares additional to the minimum number required for membership.[27] When taken alone, the value of any additional shares held by a judgment debtor in a credit union is likely to be so inconsequential as not to warrant subjecting the credit union to a garnishee order in respect of those shares.[28] On the other hand the judgment debtor is also likely to have a deposit account with the credit union The value of any additional shares, when added to the amount credited to the deposit account, could mean the difference between satisfying and not satisfying the judgment debt in full or at least satisfying a greater portion of the judgment debt. Therefore **we recommend that the new account provision (para 4.5) should apply to withdrawable share accounts with credit unions.** This recommendation, coupled with our recommendation in para 6.18 that a garnishee order should not have the effect of terminating the judgment debtor's membership of the garnishee organisation, will limit the attachment of moneys in withdrawable share accounts with credit unions to those moneys representing the value of any additional shares the judgment debtor may hold.

5.37 Credit unions offer deposit accounts of the various types offered by permanent building societies (para 5.27), although not all credit unions offer all these types of deposit account. For example a small credit union may

offer only a deposit account similar to a savings bank account, fixed-term deposits and a 'Christmas Club' account, whilst a large credit union may also offer minimum deposit/minimum balance/minimum withdrawal accounts.[29] Some credit unions also offer automated teller deposit/withdrawal facilities. Withdrawals are usually, if not invariably, subject to the presentation of a passbook or membership card[30] or a cashcard.

5.38 As we have already indicated in para 5.32 there is no legal or practical distinction to be drawn between a particular type of deposit account with a bank and the same type of deposit account with another institution. Accordingly **we recommend that the new account provision (para 4.5) should apply to deposit accounts with credit unions.** However we point out that our comments in para 5.33 regarding the effective attachment of moneys in accounts with permanent building societies also apply in relation to deposit accounts with credit unions. In addition there are several matters specific no credit unions which call for comment.

A. Repayment Rules

5.39 The rules of all credit unions contain a standard rule relating to the withdrawal of deposits other than fixed-term deposits whereby repayment is to be made in the order in which applications for withdrawal are received. If the credit union has insufficient funds in hand to meet all withdrawal applications, any member who has applied for repayment of more than $400 is to be paid $400 when entitled to payment in order of priority the withdrawal application is to be re-dated as a new application and the member paid up to $400 when again entitled to payment in order of priority. If necessary this procedure continues until the amount initially sought to be withdrawn is paid in full. A further rule provides that fixed-term deposits rank for payment in priority to other deposits, with the result that the order of priority in which repayment is to be made to members withdrawing non-term deposits will be interrupted by the repayment of fixed-term deposits the terms of which expire between the time members withdrawing non-term deposits make applications for withdrawal and the time they are paid in full. Where a credit union has insufficient immediately available funds the interruption may well be of practical significance.

5.40 In view of these rules, if non- term deposits in credit unions are made attachable the situation could arise where a non-term deposit in excess of $400 is attached to satisfy a judgment debt in excess of $400 and payment of the initial $400 and the excess is not due until some indefinite date in the future. In other words, the date on which the attached debt or part of the attached debt accrues due for payment could be uncertain.[31] Obviously the probability of this sort of situation arising is slight since it requires the combination of a recalcitrant judgment debtor with a deposit in excess of $400, a judgment debt in excess of that amount and a non- liquid credit union. It appears that the last prerequisite alone would be extremely rare.[32]' For this reason the possibility is not a basis for recommending against reform which permits the attachment of non-term deposits with credit unions. On the other hand, in view oh the situation to which these rules are directed, any reform which intentionally or inadvertently overrode their effect would be inappropriate. For example if subsection (1) of the existing bank account provisions (para 4.1) were simply extended to apply to accounts in credit unions, the rules could be overridden because they can be characterised as conditions relating to demand of payment (para 4.4).

B. Section 6 of the Credit Union Act, 1969

5.41 In certain circumstances a credit union cannot allow a member who has taken out a loan to withdraw share capital or deposits (section 6(10)) or can allow the member to do so only if the board of the credit union believes, on reasonable grounds, that the member has, and will continue to have, sufficient income to repay his or her

indebtedness (section 6(10A)). If deposits with credit unions are made liable to attachment and a garnishee order sought to attach the deposit account of a borrower member whose shares and deposits were not withdrawable at all or were withdrawable only with the approval of the board, the garnishee order would be ineffective. The provision under which a member's shares and deposits cannot be withdrawn unless the board considers the member has, and will continue to have, sufficient income to repay the member's indebtedness applies wherever all or part of the members indebtedness consists of moneys outstanding in respect of a loan made after 1 January 1976.[33] Therefore it is probable that garnishee orders seeking to attach deposits in credit unions frequently would be ineffective because the judgment debtor had not fully repaid a loan made some time after that date.

5.42 Where the withdrawal of a judgment debtor's deposits (and any excess shares (para 5.36)) is conditional on the approval of the board, we can see no objection in principle to requiring a credit union to comply with a garnishee order unless the board believes, on reasonable grounds, that the member does not- or will not, have sufficient income to repay his or her indebtedness to the credit union. However to enforce compliance in this manner would often impose inconvenience and expense on a garnishee credit union because of the need fora board meeting which was not otherwise required for some time. Furthermore, where this statutory restriction on withdrawals applies, it is likely that the overall financial position of the judgment debtor would be such that the board would have reasonable grounds to conclude that the debt to the credit union was at risk. For such practical reasons it is better that a garnishee order be ineffective to attach deposits or withdrawable share capital to which section 6(10A) of the Credit Union Act. 1969 applies. Therefore no special provision is recommended.

C. Security Arrangements

5.43 The Credit Union Act, 1969 imposes limits on the amount which a credit unions may lend a member in excess of the member's aggregate share capital in, and deposits with, the credit union. The permissible amount varies depending on whether the loan is secured and on the terms of the loan.[34] Currently the maximum unsecured amount is $10,000.[35] A loan to a member of a credit union may be secured by a mortgage, charge, lien or other security over property.[36] The Association of Central Credit Unions, in its submission to the Commission. advised that the securities taken for loans in excess of the maximum unsecured amount are generally mortgages, bills of sale or liens or some formal arrangement on the member's savings or investment account and that "(t)he security of a lien over the member's savings or investments is used more so than the other types of security due to the areas of higher costs".[37] It appears that another type of "formal arrangement" is an assignment to the credit union of the member's deposits.[38]

5.44 We have not inquired into the specific terms of the securities which credit unions take over the shares and deposits of members. Nor would it be appropriate for us to do so. However we note that at common law a debtor cannot take a security over his or her own indebtedness to secure a debt from another and that consequently a bank cannot take a mortgage or charge over a deposit made by a customer as security for advances by the bank to the customer.[39] It seems that a security in favour of a debtor of his or her own indebtedness can. at best, operate as a contractual right in the debtor to set off his or her debt against the debt sought to be secured. It also appears that at common law a debtor cannot take an assignment of his or her own debt and that any such purported assignment can only operate as a release of the debt or a covenant not to sue.[40]

5.45 These common law principles may be relevant in relation to the types of securities which credit unions take over the deposits of members. However their relevance depends on the interpretation to be placed on those provisions of the Credit Union Act, 1969 which determine what securities credit unions are empowered to take and the extent to which, if at all, the Act overrides or qualifies the common law position We can do no more than

point out that should the common law principles apply in any particular case, they would be significant in the context of garnishee orders because they bear on the question of whether there is any debt due or accruing from the garnishee to the judgment debtor.

FOOTNOTES

1. Building and Co-operative Societies Act, 1901 ss34, 52(3) and 53(3): Co-operation Act, 1923 ss73 and 82: Permanent Building Societies Act, 1967 ss^{3} 1 and 32: and Credit Union Act. 1969 ss24 and 25.

2. The Building and Co- operative Societies Act, 1901 was repealed by the Co- operation Act, 1923 (s3) but, by virtue of s42(7) of the latter Act, continues to apply to those remaining societies which were registered tinder the earlier Act and did not become registered tinder the Co- operation Act, 1923 pursuant to s42 of that Act. Certain provisions of the Co-operation Act, 1923 also apply to the societies registered tinder the Act of 1901 (Co-operation Act, 1923 s42(8)).

3. Co-operation Act, 1923 s16(1) as amended by Co-operation Act (Amendment) Act, 1985 s5 and Schedule 2 cl(1) - operative 1 September 1985 (NSW Government Gazette No 122 30 August 1985 at 4545)): Permanent Building Societies Act, 1967 ss4, 4A, 4B and Schedule 3 (inserted by Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule 2 cl (1), Schedule 10 and Schedule 11 - operative 1 September 1985 (NSW Government Gazette No 122 30 August 1985 at 4545)). The effect of Schedule 10 of the Permanent Building Societies (Amendment) Act, 1985, coupled with various amendments tinder the Co-operation (Amendment) Act, 1985, is to bring building societies registered tinder the Building and Co-operative Societies Act, 1901 and building societies registered under the Co-operation Act, 1923 other than co-operative housing societies and Starr-Bowkett building societies within certain provisions of the Permanent Building Societies Act, 1967.

4. Co-operation Act, 1923 s16(1)(c) (inserted by Co-operation (Amendment) Act, 1983 s2 and Schedule 1 cl(2) and amended by Co-operation Act (Amendment) Act, 1985 s5 and Schedule 2 cl(1) (note 3)).

5. Co-operatives Regulations. 1961 reg 78.

6. Co-operation Act, 1923 s16(1) (c) (note 4) prior to amendment referred to in note 3: Permanent Building Societies Act, s4(1) prior to amendment referred to in note 3.

7. Permanent Building Societies (Amendment) Act, 1985 s6 and Schedule 12) note 3) and Permanent Building Societies Act, 1967 s127(1) and Schedule 3 (inserted by Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule 10 cl(2) and Schedule 11 (note 3)). We understand from the Department of Co-operative Societies that there are some societies which in fact come within the transitional provision because their rules have not been altered.

8. Eg. ss4A(4) and 4B (inserted by Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule 2 cl(1) (note 3)).

9. Co-operation Act, 1923 s16(2) (a)(ii) and (iii).

10. Information from the Registrar of Co- operative Societies. See also Standard Rules of Co-operative Housing Societies Being Financed with Government or Guaranteed Funds, r18(1) and (2) and Standard Rules of Co-operative Housing Societies Financed by the Same Lender. Not being the Government and Not Being Guaranteed, r18(1) and (2), made under Co-operation (Amendment) Act, 1981 and promulgated in NSW Government Gazette No 59 14 April 1981 at 2195 ff.

11. Co-operation Act, 1923 s17(1)(b).

12. The general description of Starr - Bowkett building societies is based on an examination of the rules of United Starr- Bowkett Co-operative Building Society No 19 Limited. Newtown and Enmore Starr - Bowkett Building Co-operative Society No 23 Limited and North Sydney Starr - Bowkett Building Co- operative Society No 10 Limited.

13. Co- operation Act. 1923 si 6(2)(b)(ii).

14. In *re General Horticultural Company: Ex parte Whitehouse* (1886) 32 Ch D 512: *M G Charley Pty Limited v F H Wells Pry Limited; Bank of NSW Garnishee* [1963] NSWR 22 at 28.

15. Note 12.

16. Co-operation (Amendment) Act, 1985: Permanent Building Societies (Amendment) Act 1985: and note 3.

17. Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule 5. in particular cls(1) and (5). Among the amendments relating to share capital effected by cl(5) of Schedule 5 is the inclusion in the principal Act of a new section. s52 (1). whereby a Permanent Building Society may, by special resolution, establish a scheme for the conversion of any of its withdrawable share capital to deposits if it is authorised to do 50 tinder its rules.

18. Eg. NSW Building Society Limited.

19. Information from Mary Edwards, Executive Director, Permanent Building Societies Association (NSW) Ltd.

20. Again, we have not reviewed the rules of all the permanent building societies. The rules examined were those of the NSW Building Society limited, the United Permanent Building Society Ltd, the Hibernian Permanent Building and Investment Society Limited (which transferred its engagements to the St George Building Society Ltd as from 1 December 1981 (see Permanent Building Societies Act, 1967 s40 and Report of the Registrar of Permanent Building Societies for Year Ended 30 lune 1982 at 8) and the State Building Society Ltd. From these rules it appears that the minimum number of shares required for membership of a permanent building society is usually, if not invariably, 20 $1.00 shares.

21. Co-operation Act, 1923 s57 as amended by Co-operation(Amendment) Act. 1989 s5 and Schedule 3 cl(11): Permanent Building Societies Act. 1967 s58 as amended by Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule 5 cl(6). Although there is no equivalent provision in the Building and Co-operative Societies Act, 1901, the statutory charge provision in the Co-operation Act 1923 (s57 as amended) now applies in relation to societies registered tinder the 1901 Act: Co-operation Act 1923 ss41 A(1) and (3) and 42(1), (7) and (8) and Third Schedule as amended by the Co-operation (Amendment) Act, 1985 s5 and

Schedule 8.

22. Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule 5 cl(9), Schedule 10 cl(2) and Schedule 11.

23. *Id.* Schedule 5 cl(5). Schedule 10 cl(2) and Schedule 11.

24. Credit Union Act, 1969 ss4 and 5.

25. Credit Union Act, 1969 ss24 and 44 and Schedule 1(t).

26. We did not do an exhaustive survey of the rules of credit unions. The rules examined were those of the Hibernian Credit Union Limited and the State Government Employees Credit Union Ltd.

27. Eg. Rule 24 of the Hibernian Credit Union Limited has a minimum membership requirement of 10 fully paid $1.00 shares but permits a member to hold tip to 20 fully paid $1.00 shares provided this does not exceed 1/5th of the shares in the credit unions. By contrast, under Rule 24 of the State Government Employees Credit Union Ltd the minimum and maximum shareholding is 1 fully paid $2.00 share.

28. As would be the case tinder Rule 24 of the Hibernian Credit Union Limited, note 27.

29. Information from Mr R Jobson, Secretary/Manager, Association of Central Credit Unions Ltd.

30. We understand that where the bond of association between members of a credit union is employment with a particular employer or group of employers and automatic salary deductions are paid by the member's employer to the member's account with the credit union, presentation of a membership card rather than a passbook is the norm, since in this case a passbook cannot provide an accurate account balance on presentation.

31. It is also a situation which could arise (again exceptionally) in relation to the attachment of withdrawable share accounts with permanent Building societies. Eg. the State Building Society Ltd and the Hibernian Permanent Building and Investment Society limited have a similar provision in their respective rules in relation to the withdrawal of shares.

32. Advice of Chief Inspector of Credit Unions, Department of Co-operative Societies.

33. Credit Union (Amendment) Act. 1979 ss2(5) and 5(b)) xi) and NSW Government Gazette No 168 19 December 1979 at 5378.

34. Credit Union Act, 1969 s6(6)-(TAS).

35. NSW Government Gazette No 100 19 July 198 at 267. The rules of a credit union must fix, within the statutory limits, the amount by which a member's indebtedness may exceed the aggregate of the members share capital and deposits. so that a particular credit union may, by choice or at the instance of the Registrar of Credit Unions, have a maximum unsecured amount of less than the statutory maximum.

36. Credit Union Act, 1969 ss3 ("mortgage") and 6(7A).

37. letter dated 22 March 1984.

38. Information from Mr F O'Driscoll, State Government Employees Credit Union Ltd.

39. *Broad v Commissioner of Stamp Duties* [1980] 2 NSWLR 40 at 46-48.

40. *Id,* at 46.

6. Consequential Recommendations for Reform

I. INTRODUCTION

6.1 In Chapter 5 we recommend reform of the law to permit the attachment of amounts standing to the credit of judgment debtors in withdrawable share accounts and deposit accounts with building societies (other than co-operative housing societies) and credit unions. In this chapter we make further recommendations for reform which we consider should be implemented if our principal recommendations are adopted. These additional recommendations take account of:-

conditions applying to certain withdrawable share accounts and deposit accounts which we consider should be included as conditions to be disregarded for the purposes of attachment;

the nature of the operations of building societies and credit unions and the need for special protection provisions of the kind which apply to banks;

the fact that building societies and credit unions are organisations of which the judgment debtor will usually be a member and not merely a customer[1];

statutory charge provisions under the respective Acts regulating building societies and credit unions;

practical problems with the attachment of debts accruing due at District Court and Local Court level;

the probability that garnishee orders seeking to attach withdrawable share accounts and deposit accounts with building societies and credit unions frequently would be ineffective; and

expenses incurred by garnishees in complying with garnishee orders.

II. CONSEQUENTIAL RECOMMENDATIONS

A. Special Conditions

6.2 There are three types of conditions which may apply to a deposit account/withdrawable share account with a building society or credit union which would not be within subsection (2) of the bank account provisions (para 4.1), amended as we recommend in Chapter 4. These are:

a condition that moneys or shares shall not be withdrawn for a specified period,

a condition that any withdrawal is to be for a minimum amount; and

a condition that a minimum balance is to be retained in the account.

These conditions may be within subsection (1) of the present bank account provisions. However we have recommended that these provisions be repealed and replaced with a single provision (the new account provision) which applies to accounts generally and specifies the various conditions applicable to accounts which are to be disregarded for the purpose of attachment (paras 4.3-4.5). It is therefore necessary to consider whether the above conditions should be included in the new account provision Since accounts in banks can also be subject to such conditions, what follows in paras 6.3-6.10 is equally applicable to bank accounts.

1. Non-Withdrawal Period

6.3 An account to which a non-withdrawal period applies is not the same as a fixed- term deposit account In the latter case there is a debt which accrues due on expiry of the term subject to satisfaction of any precondition to payment, stich 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. Consequently any garnishee order served during the non-withdrawal period would be ineffective, notwithstanding that the non-withdrawal period may expire within days of the order being served and the judgment debtor could then withdraw the amount sought to be attached.

6.4 **We recommend that, except in the case of an account with a Starr - Bowkett building society, a condition that moneys or shares shall not be withdrawn for a specified period be included as a condition to be disregarded for the purpose of determining whether an amount in an account is attachable.** As indicated in paras 5.19 and 5.20, we consider that accounts with Starr-Bowkett building societies should be excluded from this recommendation because of the distinctive nature of these societies.

6.5 Although we recommend that a condition that moneys or shares cannot be withdrawn for a specified period should be disregarded for the purpose of attachment we also consider that, as with a notice period (paras 4.9-4.12), an unexpired non-withdrawal period should not be disregarded in determining when an attached amount is due for payment. Again, where the account is subject to both a non-withdrawal period which has not expired and a notice period. It should be clear that both conditions are to take effect for the purpose of payment. This would ensure that the contractual rights of the garnishee are not overridden and can he achieved by a provision which equates service of a garnishee order with receipt by the garnishee of a notice of withdrawal or demand for payment for the purposes of the contract between the garnishee and the judgment debtor.

6.6 Accordingly we **recommend that where an amount in an account is attached, the garnishee order should be deemed to operate as a notice of withdrawal or demand of payment under the contract in respect of the account which the garnishee should be deemed to have received**

(a) on the date of service of the order: or

(b) where the judgment debtor is not entitled under the contract to give notice of withdrawal or demand payment on the date of service of the order - on the date on which the judgment debtor would have become entitled to do so.

We also recommend that a deemed notice of withdrawal or demand of payment should be stated to be irrevocable while the garnishee order remains in force. This further recommendation 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 that contract to countermand a not ice or demand to circumvent the contractual effect of the garnishee order.

6.7 These recommendations have the general effect that 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 a notice of withdrawal or demand of payment either when the order was served or, if the judgment debtor was not then entitled to give notice oh 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.

6.8 Our recommendations in para 6.6 take account of non- withdrawal periods and notice conditions. However they also ensure that contractual terms which depend for their operation on the receipt of a notice of withdrawal or demand of payment given or made in accordance with the contract - such as the example Starr - Bowkett rules set out in para 5.17 and the credit union rules discussed in paras 5.39-5.40 - will take effect by operation of law. It could be expected that garnishee Building societies and credit unions would take a practical approach to this problem and, for the purpose of payment under a garnishee order, give effect to the contract with the judgment debtor as if a notice or demand had been received when the order was served. However the provision we recommend overcomes the technical argument that although an amount in an account has been attached, the date on which it is due for payment to the judgment debtor (and therefore the date on which payment is required under the order) cannot be determined until a notice of withdrawal or demand of payment has been received by the garnishee in accordance with its rules.

2. Minimum Withdrawal/Minimum Balance Conditions

6.9 A garnishee order on an account subject to a condition that any withdrawal is to be for a minimum amount, or to a condition that a minimum balance is to be retained in the account, will not always be ineffective. This will happen only if, in the case of a minimum withdrawal amount, the amount to be satisfied under the order is less than the minimum withdrawal amount or, in the case of a minimum balance condition. the amount to be satisfied under the order is such that compliance with the order would reduce the balance in the judgment debtor’s account below the minimum. Nevertheless in either case the order will be ineffective unless the garnishee waives the relevant condition or statutory provision is made to disregard it.

6.10 Minimum withdrawal/minimum balance conditions facilitate the management of funds by financial institutions and also bear on the interest rate offered on the particular account It is improbable that, for any one financial institution, the incidence of garnishee orders affecting accounts subject to such conditions in the manner

indicated above would have any significance for the overall operations of the institution. Therefore we consider that such conditions can be disregarded without endangering the ability of a garnishee organisation to manage its funds. So far as the payment of interest is concerned, it appears that financial institutions offering accounts of the type in question usually protect themselves against the possibility of being bound to perform the contract with the depositor/shareholder notwith-standing breach of a minimum balance condition - eg. by making it a condition of the account that if the balance for any reason falls below the minimum, the account will be closed. To the extent that a particular institution may not already do so, it would have the option of making future accounts of this type subject to whatever terms it considered appropriate to protect its interests in the event that such an account was garnisheed. Therefore **we recommend that the conditions applicable to accounts which are to be disregarded for the purpose of attachment should include a condition that any withdrawal from an account is to be for a minimum amount and a condition that a minimum balance is to be retained in the account.**

B. Protection Provisions

6.11 Our inquiries indicate that, in general the manner in which building societies and credit unions conduct their operations does not present practical difficulties for these organisations which warrant protection provisions additional to those applying to banks (paras 2.23 and 2.24).[2]

1. Unavoidable Withdrawal After Attachment

6.12 We were particularly concerned that, because of an organisation' s procedures, there could be a significant delay between service of a garnishee order and the time when the garnishee could terminate withdrawals by the judgment debtor from the attached account, or between service of the order and the time when the garnishee would be able accurately to determine the amount in the account as at the date of service. Delay between the date of service of a garnishee order and the suspension of withdrawals from the account is significant because the order operates to attach the amount standing to the credit of the judgment debtor *as at the date of service.* Therefore, unless special provision is made, the garnishee is at risk in relation to any withdrawals made after that date. Again. any significant time lapse after service of a garnishee order issued out of the District Court or a Local Court caused by procedural delays in determining the credit balance in the judgment debtor's account at the date of service of the order exposes the garnishee to possible court proceedings for non- compliance with the order.

6.13 Our inquiries indicate that in some cases there would be short time delays between service of a garnishee order on a building society or credit union and the suspension of withdrawals from the attached account For example the automated teller system used by those credit unions which offer cashcard facilities is a computer tape system which involves a delay of up to 48 hours before a credit union user can program the system to refuse withdrawals by a particular customer and assess the balance of the customer's account. One building society has advised that the delay on its automated teller operations can be several days, depending on the location of the machine used.[3] Again, where a customer is able to withdraw through a country or interstate agent of a garnishee, there will be some delay in terminating the facility and/or processing any agency transactions on the account. It appears that a maximum delay of 5 days is the norm for intrastate agency transactions subject to abnormal circumstances such as a postal strike. However in relation to interstate transactions, eg where a customer is using a cashcard whilst travelling, the delay in processing transactions to the customer's account may be up to two weeks.

6.14 The Supreme Court Rules deal with the problem of unavoidable payment of an attached debt in contravention of the garnishee order by permitting *any* garnishee to apply to the Court for an order that the amount attached be reduced where, although the garnishee has acted with reasonable diligence to give effect to the order, all or part of the attached debt has been paid in accordance with the garnishee's contract with the judgment debtor.[4] However the comparable provisions under the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 only permit a garnishee *bank* to apply for a reduction order.[5] In Chapter 7 (paras 7.6-7.9) we recommend that the position should be uniform in all jurisdictions and that all garnishees should have the benefit of this protection If this later recommendation is not adopted, **we recommend that the provision in the District Court Act, 1973 and the Local Court (Civil Claims) Act, 1970 under which a garnishee bank may apply for an order to reduce the attached debt in cases of unavoidable payment after attachment be extended to apply to building societies and credit unions.**

6.15 For financial institutions the utility of these provisions depends on the garnishee's withdrawal procedures being such that any need to apply for a reduction order is apparent before the garnishee is required to comply with the garnishee order or appear in court proceedings in relation to the garnishee order. Consequently any substantial delay before a garnishee, acting with reasonable diligence, could suspend withdrawals may undermine the protection intended by the provision However, since time delays involved in processing transactions on accounts with building societies and credit unions appear generally to be short, extension of the District Court and Local Courts provisions should adequately protect building societies and credit unions. We have also taken the maximum delay period by interstate transactions into account in recommending that the period for compliance with a garnishee order issuing out of the District Court or a Local Court be 21 days (para 6.35). A three-week compliance period will give banks, building societies and credit unions ample time to determine the credit balance in the Judgment debtor's account at the date of service of the order and. if necessary, apply for a reduction order before the judgment creditor can bring any proceedings for non-compliance.

2. Passbooks

6.16 Some accounts with building societies and credit unions are subject to a condition that payments into and out of the account can be made only on presentation of a passbook in which each transaction and the adjusted balance in the account is recorded at the time of payment. When a garnishee order affects such an account there is the danger that the garnishee will make double payment of all or part of the attached debt by complying with the garnishee order and then making a further payment to the judgment debtor on presentation of the unadjusted passbook.

6.17 Provisions under the Supreme Court Rules, District Court Act 1972) and the Local Courts (Civil Claims) Act 1970 protect banks against the possibility of double payment where money can be withdrawn from a deposit account" only on presentation of a "deposit book". We consider that these provisions, which are discussed in para 2.24, should also apply to accounts with Building societies and credit unions which are subject to a condition that withdrawals can be made only on presentation of the account-holder's "deposit book". It appears that "deposit book" is usually understood to describe a book containing slips on which the account-holder records the details of a deposit whereas "passbook" is usually understood to describe a book in which the amount of each deposit and withdrawal and the adjusted account balance is recorded.[6] Building societies and credit unions use "passbook" in this sense and we consider that the existing provisions should be amended by adopting this term. We do not think that this change in terminology would cause any confusion so tar as banks are concerned. Accordingly **we recommend that the provisions which apply to deposit accounts in banks which are subject to a condition that a "deposit book" must be produced before money is withdrawn be extended to apply to deposit and withdrawable share accounts with building societies and credit unions which are subject to the same condition and that the term "passbook" be substituted for the term "deposit book".**

C. Membership

6.18 We consider that the relationship between a building society or credit union and a judgment debtor member should not be terminated by the operation of a garnishee order. Therefore **we recommend 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 should not be attachable.**

D. Statutory Charge Provisions

6.19 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.

6.20 Section 57 of the Co-operation Act, 1923,[7] which applies to Starr - Bowkett Building societies and to permanent Building societies registered under the 1923 Act or the Building and Co-operative Societies Act, 1901,[8] states:

> [(1)] A society shall have a charge upon the share or interest in the capital and on the credit balance *and deposits* of a member or past member and upon any dividend, interest, bonus or rebate payable to a member or past member in respect of any debt due from the member or past member to the society, and may set off any amount paid on account of that share or otherwise, or any amount credited or payable to the member or past member, in or towards payment of the debt.
>
> (2) The charge created by subsection (1) may be enforced, at any time after 7 days' notice to the member or past member, by the appropriation by the society of the capital, interest *or deposit* subject to the charge.
>
> (3) Any share in respect of which capital has been so appropriated shall be cancelled. (emphasis added)

Section 58 of the Permanent Building Societies Act, 1967,[9] which applies to the remaining permanent building societies, is in virtually identical terms.

6.21 Section 48 of the Credit Union Act, 1969[10] states:

> (1) A credit union ... shall have a charge upon the share or interest in the capital, and on the credit balance of a member or past member and upon any dividend, *interest* or rebate payable to a member or past member

> in respect of any debt due from the member or past member to the credit union ... and may set off any amount paid on account of that share or otherwise, or any amount credited or payable to the member or past member, in or towards payment of the debt.
>
> (2) The charge created by subsection (1) may be enforced, at any time after not less than 7 days' notice to the member or past member, by the appropriation by the credit union ... of the capital or interest subject to the charge.
>
> (3) Any share in respect of which capital has been appropriated pursuant to subsection (2) shall be cancelled. (emphasis added)

6.22 The significant difference between the statutory charge provisions is that the provisions which apply to building societies (para 6.20) expressly encompass any deposits of the defaulting member, whereas the provision applying to credit unions (para 6.21) does not The reference to deposits in the building society provisions is the result of recent amendment of the provisions[11] and removes a real doubt that the former provisions applied only to shares and amounts credited or payable in respect of shares. However a comparison of the new building society provisions with the credit union provision raises the question whether the latter provision encompasses deposits when it makes no express reference to deposits but otherwise is virtually identical. In our opinion the terms of section 48 of the Credit Union Act, 1969 are wide enough to include deposits without express reference, particularly when the section charges interest and the Act permits the payment of interest on deposits but not on share capital.[12] Furthermore, unless section 48 is so interpreted, it would offer credit unions little security for debts due from members when it is borne in mind that the shareholding of a defaulting member is likely to be of little value (para 5.35).

6.23 There is a further interpretative difficulty common to each of the statutory charge provisions. The first paragraph of each section charges *the whole* of a member's share or interest in the capital of the building society/credit union (and the whole of the moneys referred to) in respect of any debt due to the organisation On the other hand the second paragraph of each section empowers the building society/credit union to appropriate "the capital interest or deposit [capital or interest] subject to the charge". It is highly improbable that Parliament intended to authorise the appropriation of any more of the member's share or interest in the capital of the organisation (or the member's deposits) than is necessary to discharge the debt due to the organisation. Therefore the question is whether, since the first paragraph purports to charge the whole of the member's share or interest in capital and the moneys referred to, the second paragraph is to be read as authorising appropriation only to the extent necessary to discharge the debt due or whether, since the second paragraph authorises appropriation of the capital or interest or deposit subject to the charge, the first paragraph is to be read as creating a charge over the member's share capital and the moneys referred to only to the extent of the debt due, ie as creating a limited charge.

6.24 The latter interpretation is at odds with the usual operation of a charge to charge the whole of the asset(s) securing a debt- Normally the effective enforcement of a charge is possible only by sale. Consequently, unless an asset is divisible, the whole asset must be charged to enable transfer of ownership on sale. However, given the divisible nature of the particular assets covered by the statutory charge provisions, ie share capital and debts payable by the charge the notion of a limited charge is not untenable. Nevertheless we have concluded that the provisions charge the whole of the member's share or interest in capital and the moneys referred to.

6.25 We have reached this conclusion principally because subsections (2) and (3) of section 57 of the Co-operation Act, 1923 (para 6.20) are the result of recent amendments to the section.[13] The section did not previously authorise appropriation by the organisation Consequently it would be difficult to argue that the old section 57 created a limited charge because the argument hinges on the interaction between subsections (1) and (2) in the light of Parliament's presumed intention. On the other hand, section 58 of the Permanent Building Societies Act, 1967 already authorised appropriation prior to its recent amendment[14] and, when taken alone, raised the possibility of a limited charge. However the old section 58 was otherwise virtually identical to the old section 57, leading to the conclusion that the nature of the charge under both sections (and therefore also under section 48 of the Credit Union Act, 1969) was the same, ie unlimited. It seems unlikely that Parliament intended to alter the nature of a charge under section 57 by the inclusion of subsections (2) and (3) when the subsections otherwise operate to facilitate the enforcement of a charge and are, in this respect, in line with the other statutory charge provisions.

6.26 If our conclusion is incorrect and the provisions create a limited charge, they cause no difficulty in the context of garnishee orders. However if the provisions charge the whole of a member's share capital and other moneys referred to, they present a common problem in relation to a garnishee order on a member's deposit or withdrawable share account. Where a debt is due from the judgment debtor to the garnishee when the order is served, a charge will exist over the whole amount in the judgment debtor's account Consequently the order will 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.

There is no statutory obligation on a building society or credit union. once a charge arises, to exercise its rights under the applicable provision to discharge the charge. Therefore it is not obligated to set- off or appropriate in the event of service of a garnishee order. However if it chose to do so and the amount of the debt due from the judgment debtor exceeded the amount in the account, the debt sought to be attached under the order would be extinguished.

6.27 In the case of a garnishee order issuing out of the Supreme Court, the procedure in that Court (paras 2.11-2.13) would permit the garnishee organisation to either set off or appropriate and pay any balance into court or appear on the motion date to inform the Court of the existence of the statutory charge and whether there would be any balance to the judgment debtor's credit if the amount of the debt due to the garnishee was set off or appropriated under the applicable provision In either case the Court could make a suitable order as to payment. If the garnishee did not pay any balance into court or appear on the motion date to assert its rights in relation to the attached debt, the Court would order the garnishee to pay the attached debt to the judgment creditor and the garnishee's statutory rights would be overridden.

6.28 If the garnishee organisation does not comply with a District Court or Local Court garnishee order, the judgment creditor has to bring proceedings against the garnishee to determine what part, if any, of the attached debt should be paid in compliance with the order (paras 2.7-2.9). The garnishee may not comply with the order because there is no attachable debt after the garnishee exercises its statutory right to set off or appropriate, or because the garnishee chooses not to exercise its statutory rights and pay any balance due to the judgment debtor. If the first situation applies the garnishee is at risk of unnecessary court proceedings to establish that there is no attachable debt. This situation is one of the reasons for our recommendation in para 6.46 that building

societies and credit unions (and also banks) should be able, in appropriate cases, to serve on the judgment creditor an affidavit stating that there is no debt due or accruing instead of frequently being subjected to unnecessary court proceedings for non-compliance. If the second situation applies the judgment creditor is required to bring equally unnecessary court proceedings.

6.29 The nub of the judgment creditor's problem is the existence of the statutory charge and the fact that, under the respective charging provisions, it is left to the discretion of the garnishee organisation whether or not it exercises its right of set-off or appropriation. **Therefore we recommend that any charge upon an amount standing to the credit of a judgment debtor in an account with a building society or credit union, being a charge that is created by an Act under which the building society or credit union is registered or regulated, or by the rules of the building society or credit union, should be disregarded for the purposes of a garnishee order, but that the building society or credit union should continue to have its right to set off or appropriate all or any part of that amount.**

6.30 The form of this recommendation calls for some explanation. First, the inclusion of a "charge... created by an Act under which the building society ... is ... regulated" takes account of the recent amendment to the Co-operation Act, 1923 whereby the statutory charge provision in that Act now applies to building societies which are registered under the Building and Co-operative Societies Act, 1901, but whose activities are also regulated by the 1923 Act.[15] Secondly the recommendation extends to "a charge ... created ... by the rules of the building society or credit union" because the rules of many building societies and credit unions include a rule in the terms of the statutory charge provision applicable to the particular organisation. Usually such rules cross-refer to the statutory provision Where a rule does so, in our view the rule is dependent on the statutory provision and does not create an independent contractual charge over the member's account. However, in the absence of such a cross-reference, it may be arguable that a contractual charge exists which is independent of the statutory provision and which would be unaffected by our recommended provision if it did not extend to a charge created by the rules.

6.31 The practical effect of the recommended provision would be to oblige the garnishee organisation to set off or appropriate 50 much of the amount in the judgment debtor's account as is necessary to pay the debt due to the organisation unless it was willing to look to other means of recovering the debt from the judgment debtor. We consider that adoption of our recommendation would not be detrimental to building societies or credit unions. A statutory charge arises only when there is a debt due from a member, ie when there is a debt presently payable by the member. Conversely, the charge ceases to exist once the debt due is paid. Therefore any additional security in respect of moneys which were payable by the judgment debtor but not yet due, which the garnishee organisation might gain by not exercising its right to set off or appropriate immediately a debt became due from the judgment debtor, would be lost if the judgment debtor paid the debt due. In other words, the effect of our recommendation would be to place the garnishee in the same position as it would be in if the judgment debtor had paid the debt due personally. If the judgment debtor paid the debt the statutory charge would lapse and the judgment debtor would be free to withdraw the credit amount in the account unless some other condition applying to the account precluded withdrawal. Where some other condition did preclude withdrawal, the garnishee order would remain ineffective despite our recommendation unless the condition in question was one which was to be disregarded for the purpose of attachment.

E. Debts Accruing Due

6.32 The law does not limit the period for which a garnishee order may operate in respect of a debt accruing due. For example a fixed-term deposit with a bank within the scope of the present provisions applying to bank accounts is attachable as a debt accruing notwithstanding that at the date of service of the garnishee order, the fixed term may have a substantial period to run On the principle that the judgment creditor stands in no better

position than the judgment debtor in relation to the attached debt the garnishee should not be required to pax' under the garnishee order until such time as the deposit term has expired. Where the garnishee order issues out of the Supreme Court, the garnishee bank may appear on the motion date to put the facts before the Court to prevent an order requiring payment to the judgment creditor before the attached debt is due (paras 2.11-2.13). However, if the garnishee order issues out of the District Court compliance with the order is required within 14 days of service. If the garnishee bank does not comply within that time, the judgment creditor may summon the bank to show cause why the order should not be complied with (paras 2.7 and 2.8). There is no period of compliance stipulated for garnishee orders issued out of a Local Court.[16] However, if the garnishee bank does not comply with the order more or less immediately the judgment creditor may issue a summons to show cause (paras 2.7 and 2.9).

6.33 It is impossible to know to what extent the 14-day compliance Rule in the District Court may have operated to cause accelerated payment of an accruing debt or the frequency with which garnishees not obligated to pay an accruing debt in the immediate future have been subjected to District Court or Local Court proceedings to determine the respective rights of the garnishee and the judgment creditor in relation to payment of the debt The judgment creditor has to be satisfied that the garnishee has not complied with the order before he or she can summon the garnishee. In most cases there will be some communication between the garnishee and the judgment creditor before the judgment creditor takes out a summons. If the parties co-operate and are reasonable, the expense and inconvenience of unnecessary court proceedings should be avoided. Nevertheless the risk of unnecessary proceedings remains.

6.34 The problem of debts accruing is a general one and is not limited to the attachment of fixed-term deposits with banks. However it appears that it has arisen with some frequency by banks since several banks have evolved informal practices to try to avoid unnecessary court proceedings. It is also likely to be a significant problem for building societies and credit unions, not only in relation to fixed-term deposit/share accounts, but also in relation to accounts which are subject to a notice or non- withdrawal period (paras 4.9 and 6.3-6.7) and attached debts which are not due for payment until some time to be determined tinder the rules of the garnishee organisation (paras 5.17-5.18 and 5.39-5.40).

6.35 A garnishee becomes involved in garnishee proceedings without choice and should be subjected to the minimum inconvenience and expense necessary to enable the judgment creditor to enforce his or her rights without disregard of the rights of the garnishee. Therefore **we recommend that, in the case of a District Court or Local Court garnishee order that is not expressed to be for the attachment of any wage or salary, the garnishee be required to make payment in accordance with the order**

(a) within 21 days after service of the order or;

(b) in the case of any attached debt that is due for payment to the judgment debtor after the 21 day period - not later than the date on which the debt is due for payment.

The purpose of this recommendation is to clarify the time for payment under garnishee orders other than those which attach the judgment debtor's wage or salary. Where the attached debt is due at the time of service of the order or falls due within the 21 day period, the garnishee would be required to make payment under the order before the 21 day period expires. If the attached debt falls due after that period expires, the garnishee would have the option of making early payment, whether within the 21 day period or at some other time before the debt is due, or making payment on the due date.

6.36 The above recommendation is limited to garnishee orders that are "not expressed to be for the attachment of any wage or salary. There are special provisions in the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 which deal with garnishee orders that attach a wage or salary.[17] Under the District Court Rules a garnishee employer is required to make payment under such an order within 14 days after the wage or salary is due for payment to the judgment debtor.[18] There is no comparable provision in the Local Courts (Civil Claims) Rules. Although this reference is not concerned with garnishee orders attaching a judgment debtor's wage or salary, we consider that a time for payment under such orders should be specified and that, in view of our recommendation in para 6.35, this should also be dealt with in the relevant legislation Therefore **we recommend that, in the case of a District Court or Local Court garnishee order expressed to be for the attachment of any wage or salary, the garnishee be required to make payment in accordance with the order within 14 days after the wage or salary is due for payment to the judgment debtor.** We consider that 14 days is ample time to allow an employer to make payment and do not recommend that the period be 21 days. The 21 day period for other garnishee orders is intended to ensure that garnishee banks, building societies and credit unions have adequate time to process garnishee orders on accounts (paras 6.12-6.15). Although the period may be over-generous for other non-employer garnishees, we are not disposed to distinguish further between different types of garnishee order.

6.37 If our recommendation in para 6.35 is adopted, **we recommend that where an attached debt is due for payment to the judgment debtor after the initial 21 day compliance period, the garnishee be required to serve on the judgment creditor, before the 21 day period expires, a notice which sets out**

(a) the date on which the attached debt is, or is likely to be, due; and

(b) where the amount of the attached debt is less than the unpaid amount of the judgment debt specified in the garnishee order - the amount of the attached debt.

6.38 The requirement that the notice state when the accruing debt is, or is likely to be, due takes account of situations where the garnishee cannot give the exact date on which the debt is due - eg because of rules stich as those discussed in paras 5.17-5.18 and 5.39-5.40. If the garnishee fails to comply with the order by the date stated in the notice, the judgment creditor would have grounds for being satisfied that the order had not been complied with and for seeking to summon the garnishee to show cause for non- compliance. If the date stated is well into the future, the judgment debt may be satisfied in the meantime. If this occurs and the garnishee is not notified before the garnishee pays the attached debt, the rights of the judgment debtor in respect of the excess amount paid to the judgment creditor would be protected under existing provisions of the respective Acts.[19]

6.39 The amount of the attached debt is to be disclosed in a notice only if it is less than the unpaid amount of the judgment debt- In this situation disclosure is desirable because the amount of the attached debt may be so insignificant relative to the unpaid amount of the judgment debt that it would not be worthwhile for the judgment creditor to pursue the matter further if the garnishee does not pay the attached debt when it falls due. However, where the attached debt is sufficient to cover the unpaid amount of the judgment debt and this can be inferred from non-disclosure, we consider that it is an unnecessary invasion of the judgment debtor's privacy to require disclosure of the actual amount of the attached debt.

6.40 The notice procedure is intended to avoid unnecessary court proceedings. To this end we also considered the desirability of not allowing the judgment creditor to take out a summons for non-compliance before the date stated in the notice as the date on which the attached debt is. or is likely to be, due. This would ensure that a garnishee who served a notice was at no risk of unnecessary court proceedings. However it would also prevent a

judgment creditor obtaining a summons in a situation where the judgment creditor had reason to believe that the information given in the notice was incorrect. For this reason we think it would be inadvisable to prevent a summons issuing before the date stated in the notice. The costs penalty a judgment creditor could expect to incur if the judgment creditor brought unnecessary proceedings despite a notice (paras 6.58-6.60) should be an adequate deterrent against such proceedings. As a deterrent to abuse of the notice procedure by a garnishee, **we recommend that it be an offence for a person to make a false statement in a notice, knowing the statement to be false.**

6.41 The notice procedure is intended to ensure the disclosure of information which is relevant to the judgment creditor's decision to summon the garnishee for non-compliance once the initial 2l day compliance period has expired. Disclosure is achieved most effectively by requiring service of the notice on the judgment creditor and we consider that filing a notice in addition to service is unnecessary. However if the notice procedure is implemented, **we recommend that under the District Court and Local Courts (Civil Claims) Rules:**

a garnishee should be required to serve a notice at an address for service to be stated in the garnishee order;

the form of garnishee order should provide for the judgment creditor to insert an address for service; and

service by post and use of the document exchange system should be permitted.

We note that the last recommendation calls for no amendment of the District Court Rules, since the current rules already make appropriate provision for service by post or the document exchange system. However **the form of affidavit which must be filed in the District Court when a judgment creditor applies for a summons against a garnishee should be amended to take account of the notice procedure.**[20] It wilt in any event require amendment if our recommendation in para 6.35 is implemented. The matter of costs in relation to a notice is dealt with in paras 6.6 1-6.65.

6.42 The object of our recommendations in paras 6.35 and 6.37 is to ensure that the contractual rights of garnishees are protected without unnecessary court proceedings so far as this is possible while not disregarding the rights of judgment creditors. However, where a debt accrues due for payment after the recommended 21 day compliance period. it may well he in the interests of both the judgment debtor and the garnishee for the garnishee to accelerate payment under the order. On the one hand. it is in the judgment debtor' s interest to avoid liability for interest accruing on the unpaid judgment debt - at least where interest on the judgment debt would exceed any interest that the judgment debtor would receive if the attached debt were not paid until the due date. On the other hand, it is in the garnishee's interest to avoid the administrative inconvenience of having to ensure that it duly complies with the order when required in the future or, if it fails to do so. the inconvenience and expense of possible court proceedings. However there is a difficulty in the way of early payment where the attached debt accruing is a fixed-term deposit.

6.43 The difficulty arises because the interest payable to the depositor shareholder on a fixed-term deposit is determined by the length of the term. Consequently when a garnishee order attaching a fixed-term deposit is served the judgment debtor may have be en paid or credited with interest at a rate in excess of the rate which would be payable if the term of the deposit expired on the date the garnishee, with the agreement of the judgment debtor, terminates the deposit to allow early payment tinder the order. As a practical matter the garnishee will consider accelerated payment only if there is some adjustment for any excess interest paid or credited to the judgment debtor. However it is the amount attached on service of the garnishee order which

dictates the amount the garnishee is required to pay in compliance with the order and the garnishee and the judgment debtor cannot vary their contractual situation after that date so as to vary the amount payable tinder the order. Consequently the garnishee could not make early payment in compliance with the order unless the balance to the judgment debtor's credit after any adjustment for excess interest was sufficient to enable the garnishee to pay the amount that the garnishee was required to pay prior to the adjustment.

6.44 When accelerated payment of a debt accruing is in the interests of the garnishee and the judgment debtor the law should facilitate early payment if this is practical and is not likely to prejudice the judgment creditor. We have therefore considered the problem of excess interest in detail. The sort of provision required would he extremely complex because the concept of excess interest is itself complex and the provision would need to be limited to permit a deduction only in appropriate cases, ie only in those cases where all amounts standing to the credit of the judgment debtor when early payment was made were insufficient to cover the excess interest without resort to the attached amount. Because of the type of limitation required and the ease with which the balance in an account on any given day can be varied by the account-holder, possible abuse of the provision would also be a problem. On the other hand. it is unlikely that there would he many cases in which early payment of an attached fixed-term deposit is not possible because excess interest cannot be recovered without resort to the attached amount. It appears that the attachment of fixed term deposits is not common and the problem of excess interest will arise only in some of these cases. We have therefore concluded that on balance, the small number of cases where the problem will arise does not justify a provision of the kind necessary to solve the problem.

F. Inoperative Garnishee Orders

6.45 It is apparent that garnishee orders served on building societies and credit unions frequently would be ineffective because of various provisions in the legislation regulating building societies and credit unions or the rules of particular organisations and because the judgment debtor often would be a debtor of the garnishee. A garnishee order affecting an account with a Building society or credit union could also be ineffective simply because it sought to attach an amount in a joint account where the account-holders were not joint judgment debtors (para 2.19). In such cases, where the garnishee order issues out of the District Court or a Local Court, the garnishee is at risk of court proceedings to establish that there was no debt due or accruing to the judgment debtor in the particular circumstances. Where the order issues out of the Supreme Court, the garnishee has to appear on the motion date to inform the Court of the situation if it wishes to avoid an order for payment to the judgment creditor. The garnishee would usually recover costs in relation to such proceedings in the Supreme Court and the District Court and possibly also in a Local Court (paras 6.58-6.60). Nevertheless the unrecoverable expense and inconvenience involved in court proceedings should not be discounted, particularly for the large building societies and credit unions likely to be more frequently subjected to garnishee orders. Nor should the expense and inconvenience to the judgment creditor of unsuccessful proceedings be ignored.

6.46 We consider it is desirable to institute a procedure to minimise the inconvenience and expense which garnishees and judgment creditors incur where garnishee orders are ineffective because there was no debt to be attached. Accordingly **we recommend that where a garnishee under a District Court or Local Court garnishee order believes that there was no debt due or accruing to the judgment debtor when the order was served, the garnishee should be able to serve on the judgment creditor an affidavit to that effect which summarises the factual basis of the garnishee's claim.** The requirement that the garnishee summarise in the affidavit the factual basis of the garnishee's claim is intended to ensure that the procedure is not abused and is used only where the garnishee has reasonable grounds to believe that there was no debt to be attached. If this recommendation is implemented, as with the notice procedure (para 6.41) **we recommend that under the District Court and Local Courts (Civil Claims) Rules**

the garnishee should be required to serve the affidavit at the address for service to be stated in the garnishee order;

service by post and use of the document exchange system should be permitted; and

the form of affidavit to be filed in the District Court when a judgment creditor applies for a summons against a garnishee should be amended to take account of the procedure.

6.47 As with the notice procedure recommended in para 6.37, this recommendation is limited to the District Court and Local Courts. It has not been extended to the Supreme Court because of the different garnishment procedure in that court- Like the notice procedure, the object of the affidavit procedure is the disclosure of information which is relevant to the judgment creditor's decision to summon the garnishee for non-compliance. The judgment creditor is very likely to incur a costs penalty if the judgment creditor brings proceedings where there was no debt to be attached (paras 6.58-6.60).[21] Consequently where an affidavit is served, a reasonable judgment creditor would summon the garnishee only if the information in the affidavit did not substantiate the garnishee's claim or the judgment creditor had some other good reason to doubt the truth of the claim. However, unlike the notice procedure, the affidavit procedure is optional. Although service of an affidavit would particularly benefit judgment creditors by putting them on notice that proceedings for non-compliance may well be unsuccessful we are not disposed to recommend that the procedure be mandatory. The procedure assumes that there was no debt to be attached. Where there is no attached debt, it is not possible to relieve the garnishee who uses the procedure of the expense involved in doing so by way of prescribed costs. Because the garnishee is an involuntary participant in the garnishment process and the judgment creditor has chosen this means of enforcement we consider that the garnishee should be free to decide whether it is in the garnishee's best interests to use the procedure.

6.48 We have been prompted to recommend the affidavit procedure because of the frequency with which garnishee orders on accounts with building societies and credit unions, and also banks, are likely to be ineffective.[22] However our recommendation is not restricted to garnishee orders on accounts - any garnishee could use the procedure when appropriate. Since the purpose of the procedure is to minimise unnecessary proceedings in situations where there was no debt to be attached, we can see no reason why it should not be available to all garnishees.

6.49 We recognise that a provision to allow a garnishee to serve an affidavit to the effect that there was no debt to be attached may seem unnecessary when a garnishee who was so-minded could do this anyway or could disclose the relevant information to the judgment creditor in a less formal manner than by affidavit However we see value in a statutory provision which draws attention to the possibility and desirability of disclosure in an appropriate case, and in a manner which gives weight to the garnishee's claim. It might also he thought that there is little to motivate a garnishee to use the procedure when it involves additional expense. However a garnishee would be motivated to use the procedure when the expense of doing so is less than the *unrecoverable* expense which the garnishee would be likely to incur if proceedings for non-compliance were brought by the judgment creditor. We deal with the matter of costs in relation to the procedure in paragraphs 6.66-6.70.

G. Duty of Confidence

6.50 Although the notice and affidavit procedures we recommend in paras 6.35 and 6.46 are novel we consider that they would benefit garnishees, judgment creditors and the courts by minimising court proceedings. However they also involve disclosure to the court and the judgment creditor of information concerning the affairs of the

judgment debtor which the garnishee may be under a duty to keep confidential. We particularly have in mind the banker's duty of secrecy.[23] Practically the procedures are not available to a garnishee if their use would put the garnishee at risk of being liable in damages to the judgment debtor for breach of confidence. In the case of the affidavit procedure (para 6.46), it is also possible that the information required to be disclosed to substantiate the garnishee's claim included confidential information about the affairs of a third party.

6.51 A contractual duty of confidence is subject to the operation of the general law.[24] Consequently there is no actionable breach of confidence where a person is compelled by law to disclose confidential information. In our opinion this general principle would protect a garnishee who served a notice concerning a debt accruing against liability for any breach of confidence caused by disclosing the information required to be disclosed in the notice. Under our recommendations in paras 6.35 and 6.37 a garnishee is required, within 21 days after service of the garnishee order, to either pay the attached debt in accordance with the order or, if the attached debt is not due until after the 21 day period, serve on the judgment creditor a notice disclosing the information specified. Therefore, if the attached debt is not due until after the 21 day period, the garnishee would be compelled by law to serve a notice, although as a practical matter the garnishee could avoid doing so by waiving his or her contractual rights and paying the debt within the 21 day period.

6.52 However the affidavit procedure we recommend in para 6.46 is optional and it cannot be argued that the garnishee is compelled by law to disclose confidential information. **Therefore we recommend that a garnishee who serves an affidavit 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.**

H. Costs

1. General Costs Provision

6.53 Under the present provisions relating to the attachment of debts, where a garnishee order issues out of the District Court or a Local Court and the garnishee complies with the order by payment to the Registrar or the judgment creditor without any court proceedings, the garnishee generally is not entitled to make any deduction from the attached debt for any expense incurred in complying with the order.[25] By contrast, under the Supreme Court Rules, a garnishee who pays the attached debt into court before the motion date may retain out of the attached debt a prescribed sum for costs.[26] The current prescribed sum is $11.00.[27] Where the amount paid into court is calculated on the footing that the attached debt is reduced by the prescribed sum for costs, the effect of the rule is that the garnishee's liability to the judgment debtor is discharged to the extent of the amount actually paid plus the prescribed sum for costs.[28] We can see no reason in principle why, in the case of garnishee orders issuing out of the District Court or a Local Court, the garnishee rather than the judgment debtor should be required to bear the whole expense involved in complying with the order.

6.54 It maybe that the lack of provision for costs where court proceedings are not involved is based on the assumption that, since the garnishee is merely required to pay the Registrar or the judgment creditor instead of the judgment debtor, the garnishee will incur no expense additional to whatever expense would have been incurred by payment to the judgment debtor. Whilst this assumption may be correct in some instances it is questionable as a general proposition, particularly in relation to the attachment of accounts. It is probable that it would be more expensive fora garnishee bank, building society or credit union to process a garnishee order than to process a withdrawal request from a customer - eg. because action has to be taken to suspend withdrawals or

recover a passbook. Again, any garnishee required to comply with a garnishee order by serving notice of an attached debt which is due after the initial 21 day compliance period would incur additional expense.

6.55 In our view all garnishees under District Court and Local Court garnishee orders should be entitled to deduct a prescribed amount for costs incurred in complying with the order. However, if it is not considered appropriate to allow prescribed costs to all garnishees, such costs should be allowed in relation to the attachment of moneys in accounts with banks, building societies and credit unions. In the nature of the case these organisations are likely to be frequently subjected to garnishee orders and the expense of complying with such orders will be a recurring one, particularly for banks and the large permanent building societies.

6.56 We have also considered whether a provision for costs should, like the recent United Kingdom legislation (para 3.6), allow for different sums for costs in different situations and also take account of the possible insolvency of the judgment debtor. We have concluded that there is no necessity for varying sums for costs, particularly by reference to the amount of the judgment debt to be satisfied. The amount of the judgment debt would seem to be largely, if not entirely irrelevant to the question of the costs likely to be incurred by the garnishee in complying with the order. We have also concluded that a garnishee should be entitled to deduct and retain prescribed costs in the event of the judgment debtor's insolvency. We can see no reason why the garnishee, as a debtor of the insolvent judgment debtor, should be denied costs in the interests of the judgment debtor's creditors, particularly when. tinder the relevant insolvency legislation,[29] a judgment creditor required to pay moneys received under a garnishee order to the trustee in bankruptcy or, as the case may be, the liquidator of the judgment debtor is entitled to deduct the taxed costs of the attachment from the amount otherwise payable. The amount prescribed would also be insignificant in the context of distribution among the creditors of the insolvent judgment debtor.

6.57 For the above reasons **we recommend that provision be made in the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 to permit a garnishee to deduct a prescribed amount for costs incurred in complying with the garnishee order. Where the prescribed amount is deducted, the garnishee's liability to the judgment debtor should be discharged to the extent of the amount paid by the garnishee in compliance with the order plus the amount for costs. If it is not considered appropriate to allow costs to all garnishees, then prescribed costs should be allowed in relation to garnishee orders attaching moneys in accounts.** We note that our recommendation in para 6.65 should be taken into account in considering this recommendation.

2. Costs in Proceedings

6.58 Both the Supreme Court and the District Court have adequate power to award costs in garnishment proceedings,[30] although the situation is somewhat different from the usual situation as to costs. Normally costs follow the event, ie the party who is successful in the proceedings is usually awarded costs.[31] In garnishment proceedings the general rule is that costs are not awarded.[32] However they may be awarded in an appropriate case, eg a garnishee may be awarded costs where the garnishee has been obliged to appear before the court to establish that there was no debt to be attached.[33]

6.59 A Local Court has only limited powers to award costs. However in defended proceedings it may order one party to the proceedings to pay the other party an amount "for or towards the reasonable professional costs incurred by that other party in having a barrister or attorney.., acting on behalf of that other party.[34] It is arguable

that where a garnishee disputes a Local Court garnishee order and the Court orders a hearing (para 2.9), the Court could exercise this power to award an amount for professional costs to the judgment creditor or the garnishee as appropriate in the circumstances.[35] However the Director of Local Courts Administration has expressed serious reservations as to the applicability of this costs power to garnishment proceedings[36] and certainly it is not immediately obvious that it is applicable.

6.60 Whilst we recognise the general policy underlying the costs provisions in the Local Courts (Civil Claims) Act, 1970, we consider that a Local Court should have adequate and obvious power to award professional costs in garnishment proceedings. We also consider that because of the nature of garnishment proceedings the exercise of any such power should not be restricted by reference to the amount in issue between the parties, as is the case with a Local Court's general power to award professional costs in defended proceedings.[37] It seems particularly inappropriate to deny costs to a garnishee because the amount in issue (be it the amount of the alleged debt to the judgment debtor or the unpaid amount of the judgment debt) is less than a certain amount when the garnishee is an involuntary participant in the garnishment process. Accordingly **we recommend that Local Courts be given power to order a party to proceedings for non-compliance with a garnishee order to pay an amount for or towards the reasonable professional costs incurred by the other party in connection with the proceedings irrespective of the amount in issue between the parties and that the provision be included in the section of the Local Courts (Civil Claims) Act, 1970 which deals with such proceedings.** We make further recommendations regarding the power of Local Courts to award costs in paras 6.69 and 6.70.

3. Notice Procedure

6.61 In para 6. 37 we recommend that where a debt attached tinder a District Court or Local Court garnishee order is due for payment to the judgment debtor after the initial 21 day compliance period we recommend in para 6.35, the garnishee should be required to serve on the judgment creditor, within that period, a notice giving relevant details of the accruing debt. Two aspects of the notice procedure involve costs considerations: the expense incurred by a garnishee in preparing and serving a notice and the enforceability of the procedure.

6.62 Under the notice procedure the garnishee must prepare a notice containing specified information and serve it on the judgment creditor within 21 days of service of the garnishee order. The expense involved in actually preparing a notice is minimal because the information called for has to be determined anyway to assess the effect of the garnishee order. In other words, it is the sort of expense we consider justifies the general costs provision we recommend in para 6.57. We have also recommended that service of a notice by post or the document exchange system should be permitted (para 6.41). If garnishees have the option of serving a notice by post, we do not consider that they should be entitled to deduct a prescribed amount for service in addition to the general costs deduction we recommend. Service by post is simple and the cost involved is insignificant Although garnishees should be able to tise other, more expensive, modes of service if they wish, the expense involved should be borne by the garnishee and not passed to the judgment debtor by way of prescribed costs. For these reasons we make no recommendation for additional costs in respect of a notice.

6.63 The notice procedure as recommended is mandatory. Therefore some sanction on a garnishee who fails to serve a notice when required to do so is desirable to ensure compliance. Given the nature of the garnishment process, it is not appropriate to impose a direct statutory penalty such as a fine, on a defaulting garnishee. However compliance can be encouraged indirectly by way of costs disincentives.

6.64 We anticipate that where a garnishee fails to serve a notice and the judgment creditor brings premature proceedings for non-compliance, the court would take the garnishee's default into account when exercising its discretionary power as to costs and, if otherwise appropriate, impose a costs penalty on the garnishee. Conversely we anticipate that where a garnishee duly serves a notice and the judgment creditor brings premature proceedings despite the notice, the court would take this into account and the judgment creditor would incur a costs penalty if this were otherwise appropriate. However the inducement to comply with the notice requirement to avoid a costs penalty in any subsequent proceedings depends on the likelihood of there being proceedings. If there is little risk of this, the inducement is minimal Yet the very absence of a notice tends to minimise the risk of subsequent proceedings. The service of a notice precludes the possibility that there was no debt to be attached. In the absence of a notice the judgment creditor may not be prepared to risk the expense and inconvenience of bringing proceedings for non- compliance only to discover that there was no debt to be attached.

6.65 In para 6.57 we recommend that a garnishee under a District Court or Local Court garnishee order should be entitled to deduct a prescribed amount for costs incurred in complying with the order. As a further inducement to compliance with the notice procedure **we recommend that a garnishee who is required to serve a notice regarding an attached debt which is due after the initial 21 day compliance period should not be entitled to deduct from the attached debt the amount prescribed for costs unless the notice has been served as required.**

4. Affidavit Procedure

6.66 Different considerations apply where a garnishee serves an affidavit claiming that there was no debt to be attached (para 6.46). First, the expense involved in preparing an affidavit will not be insignificant However, since the procedure assumes that there is nu attached debt, it is not possible to shift the expense to the judgment debtor by way of prescribed costs. Secondly, one of three situations will arise after an affidavit has been filed:

the judgment creditor does not summon the garnishee for non-compliance;

the garnishee is summoned and in the subsequent proceedings the garnishee's claim that there was no attachable debt is established; or

the garnishee is summoned and in the subsequent proceedings it is established that there was an attachable debt.

6.67 Ideally the garnishee, as the involuntary third party in the garnishment procedure. should not have to bear the expense of the affidavit procedure in the first situation. However. as we have pointed out, it is not possible to shift the expense to the judgment debtor. In the absence of proceedings there is also no practical way of recovering appropriate costs from the judgment creditor. On the other hand the affidavit procedure is optional. Presumably the garnishee, in deciding to use the procedure, would balance the expense of doing so against the unrecoverable expense which the garnishee would be likely to incur in proceedings for non-compliance. The first situation assumes that use of the affidavit procedure has averted proceedings for non-compliance, ie. the garnishee is in a better position than the garnishee would have been in if the judgment creditor had brought proceedings. In this situation we consider it is not unreasonable for the garnishee to bear the expense involved in using the procedure.

6.68 The second and third situations assume that the judgment creditor brings proceedings despite the garnishee's affidavit. In these situations the ability of the garnishee to recover costs in relation to an affidavit depends on the power of the particular Court to award stich costs in an appropriate case. Moreover, since the judgment debtor is not a party, any costs in relation to an affidavit can be awarded, if at all, only against the judgment creditor.[38]

6.69 The District Court may order costs against any party to garnishee proceedings. However, in the absence of an order, costs do not follow the event and the parties must bear their own costs.[39] Consequently in District Court proceedings the garnishee could not recover costs in relation to an affidavit unless the Court so ordered. However it can be assumed that the Court would award these costs in an appropriate case. On the other hand, the costs provisions in the Local Courts (Civil Claims) Act, 1970[40] would not permit a Local Court to order the judgment creditor to pay any costs in relation to an affidavit. Nor would such costs be covered by our recommendation in para 6.60 regarding professional costs. Therefore we **recommend that the power of a Local Court to order the payment of costs against a party to proceedings for non-compliance with a garnishee order extend to ordering payment of an amount for or towards the reasonable expenses incurred by the other party in connection with the garnishee order.** This additional power would enable a Local Court to order a judgment creditor to pay an amount in relation to an affidavit if this was appropriate. It would also enable the Court to make an order against either party where that party's conduct in connection with the garnishee order had been stich as to involve the other party in expense additional to professional costs - eg. the additional costs incurred by a garnishee bank where the garnishee order fails to identify the judgment debtor's account adequately (para 7.11).

6.70 In para 6.60 we recommend that the Local Courts' costs provision be included in the section of the Local Courts (Civil Claims) Act, 1970 dealing with proceedings for non-compliance with a garnishee order rather than in the Division of the Act dealing with costs and expenses generally. In view of this recommendation **we recommend that the new costs provision also empower a Local Court to order payment by one party of an amount for or towards witnesses' expenses incurred by the other party.** This will avoid any question as to whether the general power of a Local Court to order payment of an amount for witnesses expenses[41] is intended to apply in relation to proceedings for non-compliance with a garnishee order when there is a specific costs provision for stich proceedings.

FOOTNOTES

1. Although building societies and credit unions may lend only to members, their power to take deposits is not restricted to taking deposits only from members - Co-operation Act, 1923 s66(1) as amended by Co-operation (Amendment) Act, 1985 s5 and Schedule 3 cl(15)(a), operative 1 September 1985 (NSW Government Gazette No 122 3(1 August 1985 at 4545): Permanent Building Societies Act, 1967 s20(1) (as amended by Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule 2 cl(8). operative 1 September 1985 (NSW Government Gazette No 122 30 August 1985 at 4545)) and(7) and 127 (inserted by Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule 10 cl(2). operative as before stated): Credit Union Act, 1969 536(1) (as amended by Credit Union (Amendment) Act, 1984 s5 and Schedule 3 cl (5)(a), operative 1 July 1985 (NSW Government Gazette No 98 28 June 1985 at 3000)) and (4).

2. Inquiries were made of the Permanent Building Societies Association (NSW) Ltd, the Association of Central Credit Unions Ltd and also the State Government Employees Credit Union Ltd, which is a large credit unions and offers a wide range of deposit accounts and facilities to its members. The Permanent Building Societies

Association (NSW) Ltd circularised its members to endeavour to identify any particular practical problems which might arise in relation to automated teller facilities.

3. Illawarra Mutual Building Society Ltd.

4. Part 46 r5(2).

5. District Court Act, 1973 s103(3): Local Courts (Civil Claims) Act, 1970 s52A(3).

6. *The Oxford English Dictionary* (1933 ed, 1961 reprint) Vol VII at 529 ('Passbook **...** 1. The account-book supplied by a bank to a person having a current or deposit account, in which entries are made of all sums deposited and drawn, so that the customer may at any time see what is his balance at the bank ..."): *The Macquarie Dictionary* (1981) at 1265 ('passbook... n.1.a bank book....3. a record of payments made to a building society") and 173 ("bankbook **...** n.a.book held by a depositor in which a bank enters a record of his account...").

7. As amended by the Co-operation (Amendment) Act, 1985 s5 and Schedule 3 cl(11) (note 1).

8. Co-operation Act, 1923 ss41 (A)(1) and (3) and 42(1), (7) and (8) and Third Schedule (as amended by the Co-operation (Amendment) Act, 1985 s5 and Schedule 8 (note 1)). Previously building societies remaining registered under the Building and Co-operative Societies Act, 1901 did not have the benefit of a statutory charge, although a comparable provision may have been included in a particular society's rules so as to create a contractual charge to secure any debt due to the society.

9. As amended by the Permanent Building Societies (Amendment) Act. 1985 s5 and Schedule 5 cl(6) (note I).

10. As amended by the Credit Union (Amendment) Act, 1984 s5 and Schedule 12 cl(26) (note 1). The amendments made are technical drafting amendments which in no way alter the substance of the section.

11. Notes 7 and 9.

12. Sections 12 and 49 as amended by Credit Union (Amendment) Act, 1984 s5 and Schedule 2 cl(10) and Schedule 4 cl(1) respectively (note 1).

13. Note7.

14. Note 9.

15. Note 8.

16. It may be that in practice the Registrar ol a Local Court would not issue a summons until some reasonable. period had elapsed since service of the garnishee order.

17. District Court Act, 1973 ss97(2)(a) and (b) and 98-101; Local Courts (Civil Claims) Act, 1970 ss47(2)(a) and (b) and 48-51.

18. Part 33 r3(3).

19. District Court Act, 1973 s106: Local Courts (Civil Claims) Act, 197t) s56.

20. District Court Act, 1973 s102(1) and District Court Rules. Pt33 r4, Pt47 r2 and Form 89.

21. So far as Local Court proceedings are concerned this statement assumes that the power of a Local Court to award costs in garnishment proceedings is put beyond question by adoption of our recommendation in para 6.60.

22. In the case of banks garnishee orders will be ineffective because there is no debt to be attached where. eg the account affected by the order is a joint account and the account- holders are not joint judgment debtors (para 2.19) or the bank is entitled to combine the affected account with another account held by the judgment debtor and combination results in extinction of the debt sought to be attached.

23. G A Weaver & C R Craigie. *The Law Relating to Banker and Customer in Australia* (Law Book Co 1979) at 166-173.

24. *Parry-Jones v Law Society* [19681] All ER 177; *Brayley v Wilton* [1976] 2 NSWLR 495, aff'd *Brayley v Wilton* (unreported) C of A No 13 of 1977 (19/4/77); *Crowley v Murphy* [1981] 52 FLR 123: *Tournier v Natiorial Provincial and Union Bank of England* [19241] KB 461. The last case deals specifically with the bankers duty of secrecy. Bankes LJ (at 473) stated:

On principle I think that the qualifications [of the contractual duty of secrecy implied in the relation of banker and customer] can be classified under four heads: (a) Where disclosure is under compulsion of law: (b) where there is a duty to the public to disclose: (c) *where the interests of the bank require disclosure:* (d) where the disclosure is made by the express or implied consent of the customer. (emphasis added)

One bank has suggested that the third head maybe one on which banks could rely in relation to disclosures of confidential information in a notice or affidavit However, as there is virtually no authority as to the precise scope of this qualification, we do not think it could be safely relied on.

25. The exceptional case is an order which attaches continuotisly the judgment debtor's salary or wages where the garnishee may deduct 10% from each amount otherwise payable under the order - District Court Act, 1973 s100: Local Courts (Civil Claims) Act, 1970 s50.

26. Part 46 r6(2)(a).

27. Schedule G. Fable 6. para 58A.

28. Part 46 r6(3) and r11(1)(a).

29. Bankruptcy Act 1966 (Cth) s118: Companies (New South Wales) Code, 1981 s455.

30. Supreme Court Act, 1970, s76 and Supreme Court Rules, Pt46 r12(2) and(3): District Court Act, 1973 s148A and 148 B (inserted by District Court (Procedure) Amendment Act, 1984 s5 and Schedule 3 cls(54) and (59) - operative 1 July 1985 (NSW Government Gazette No. 93 14 June 1989 at 2996) and District Court Rules, Pt33 r6.

31. Supreme Court Act, 1970 s76 and Supreme Court Rules. Pt52 r11; District Court Act, 1973 s148B (note 30) and District Court Rules, Pt39 r1A (inserted NSW Government Gazette No 93 14 June 1989 at 2631 and 2669 - operative 1 July 1985).

32. *Davidson v Secombe* (1892) 9 WN (NSW) 1.

33. *Willis v Municipality of Five Dock* (1895) 11 WN (NSW) 112: *Dean v Dwyer* (1924) 41 WN (NSW) 67: see also Supreme Court Rules. Pt46 r12(2).

34 Local Courts (Civil Claims) Act, 1970 s35 (subject to s36).

35. Where a hearing is ordered the judgment creditor is "deemed to have filed a plaint and summons to commence an action... against the garnishee" (Local Counts (Civil Claims) Act, 1970 s52(9)). Therefore it is arguable that where a garnishee contests liability for the debt alleged to be owing to the judgment debtor, the garnishee is a defendant who" defends an action commenced by the filing of an ordinary summons" for the purposes of s35 (note 34). an ordinary summons being any summons other than a default summons or a special summons (Local Courts (Civil Claims) Act, 1970 s23).

36. Letter dated 15 October 1985.

37. local Courts (Civil Claims) Act. 1970 s36.

38. *Hart v Muir* (1889) 6 WN (NSW) 62.

39. District Court Rules. Pt33. r6.

40. Sections 33-38.

41. Local Courts (Civil Claims) Act. 1970 s38.

7. Incidental Matters

I. INTRODUCTION

7.1 There are various anomalies between the garnishment provisions in the Supreme Court Rules, the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970. Some of these anomalies are inconsequential, eg. the attachment of “all debts due or accruing” under the Supreme Court Rules and the attachment of “all debts due, owing or accruing” under the District Court Act 1973 and the Local Courts (Civil Claims) Act, 1970. Other anomalies are significant because they generate confusion, unnecessarily complicate the garnishment process or discriminate between participants in the process at the different court levels for no apparent reason.

7.2 It is clearly desirable from the point of view of those affected by the garnishment provisions that the law be uniform where uniformity can be achieved consistently with the jurisdictional and procedural differences amongst the Supreme Court, the District Court and the Local Courts. To the extent that the law of garnishment is embodied in legislation it is dealt with separately in each jurisdiction. Moreover in the case of the Supreme Court the relevant provisions are included in the Supreme Court Rules and not in the Supreme Court Act, 1970. Consequently any reform of the garnishment provisions applying in the Supreme Court is a matter for the Supreme Court Rule Committee under its rule- making power and not a matter for Parliament.

7.3 Uniformity in the substantive law relating to the enforcement of judgment debts, including the substantive law of garnishment would be best achieved by means of a single statute which applied in all jurisdictions with jurisdictional and procedural matters dealt with in the respective Court Acts and Rules. This approach would also make reform of the substantive law a matter solely for Parliament and simplify the implementation of reform. However it is beyond the scope of this reference to recommend such fundamental change in the existing legislative framework. This is a matter for consideration under the Commission s *Procedure* reference (paras 1.11-1.15). Nevertheless we consider that some improvement of the present garnishment provisions is properly incidental to this reference.

7.4 At present banks are very probably the largest class of garnishee apart from employers. If the principal recommendations in this Report are implemented. it can be expected that building societies and credit unions also will be major classes of garnishee. Consequently anomalies in the law of garnishment as it applies generally in the different jurisdictions are particularly significant in the context of this reference. Therefore in this chapter we make a number of recommendations designed to achieve greater uniformity within the existing framework by removing anomalies which cannot be justified on jurisdictional or procedural grounds.

7.5 Under the Judgment Creditors’ Remedies Act, 1901 in certain cases a judgment creditor can obtain a charging order over shares belonging to the judgment debtor and can enforce the charge to satisfy the judgment debt. As a further matter incidental to the main issues raised by the reference we consider the remedy of a charging order in relation to withdrawable shares in building societies and credit unions.

II. ANOMALIES IN THE GARNISHMENT PROVISIONS

A Protection Provision

7.6 Under Rule 5(2) of Part 46 of the Supreme Court Rules, where a garnishee is served with a garnishment notice and

> acts with reasonable diligence for the purpose of giving effect to the attachment but nevertheless pays to the judgment debtor the whole or any part of the debt attached or otherwise deals with the debt attached so as to satisfy, as between the garnishee and the judgment debtor, the whole or any part of the debt attached.

the garnishee may obtain a court order that

> for the purposes of the garnishee proceedings the debt attached be reduced to the extent of the payment or satisfaction

There are similar provisions in the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970.[1] However the District Court and Local Courts provisions apply only in relation to garnishee orders attaching moneys in bank accounts. Consequently only banks have the benefit of the provision. Other garnishees who act with reasonable diligence to give effect to the garnishee order, but nevertheless pay all or part of the attached debt to the judgment debtor or otherwise deal with it so as to discharge all or part of their liability to the judgment debtor, must comply with the order and. in effect, pay all or part of the attached debt twice.

7.7 It is clear that this protection provision is essential for banks and equally essential for building societies and credit unions, particularly in view of the extent to which their operations involve electronic procedures. For example we understand that garnishee orders on bank accounts which are accessible by automated teller present a difficulty to banks because of the inability of a garnishee bank to enter details of the attachment into the computer system immediately on service of the order.[2] Consequently it is possible for the judgment debtor to have access to the account affected by the order before it can be programmed as being attached.

7.8 In Chapter 6 we recommend that building societies and credit unions should have the benefit of this protection provision (para 6.14). However we can see no reason in principle why other garnishees subjected to orders issuing out of the District Court or a Local Court should be denied the protection and be left to such remedies as they might have to recover any double payment from the judgment debtor. Indeed, given the nature of the garnishment procedure and the garnishee's involuntary involvement in the process, we consider that the present limitation is not merely discriminatory as between banks and other garnishees but is unjust. That a situation can arise where the law, in order to assist a judgment creditor to recover a judgment debt, places an innocent third party in the position of having to pay all or part of a debt twice and either bear the loss or resort to legal proceedings for recovery is, in our view, unacceptable. Therefore **we recommend that the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 be amended to allow all garnishees the benefit of the provision which permits a garnishee who acts with reasonable diligence to give effect to the**

garnishee order but nevertheless pays to the judgment debtor or otherwise satisfies all or part of the attached debt to apply for an order that the attached debt is **reduced to the extent of the payment or satisfaction.**

7.9 We do not think that adoption of this recommendation would have the practical consequence of creating a "floodgates" situation at District Court and Local Court level which might be thought to justify the present limitation. The provision would apply only where the garnishee had acted with reasonable diligence to give effect to the garnishee order. We consider that because of the expense and inconvenience involved in making an application under the provision, garnishees are unlikely to abuse the right to apply for an order where there is no reasonable prospect of convincing the Court that they had acted with reasonable diligence in the particular circumstances.

B. Content of a Garnishment Notice/Garnishee Order

7.10 Under the Supreme Court Rules and the District Court Rules:

> A garnishment notice [garnishee order] shall include such particulars of the debt attached as are known to, or reasonably capable of ascertainment by, the judgment creditor and as are necessary to enable the garnishee to identify the debt including, where the garnishee is a banker or other person carrying on business at more than one place, the place of keeping of the account on which the debt is due or accruing, so far as that place is known to, or reasonably capable of ascertainment by, the judgment creditor.[3]

There is no similar provision in the Local Courts (Civil Claims) Act, 1970 or in the Local Courts (Civil Claims) Rules.

7.11 Several of the banks which commented on our draft report noted that often there is insufficient detail in a garnishee order seeking to attach moneys in an account to enable the relevant account to be identified easily and promptly by the garnishee bank. One commentator suggested that the provision in the Supreme Court Rules and the District Court Rules should also apply to garnishee orders issuing out of Local Courts:

> Not only would judgment creditors improve their chances of recovery of judgment debts owed to them. but the resulting lessening of time which the Bank has to use in advising solicitors and other parties concerned that it is unable to comply with such orders would confer obvious benefits on the Bank in many instances. In many instances, double handling occurs due to the need for a fresh garnishee order to be issued.[4]

7.12 We endorse this suggestion. Accordingly **we recommend that a rule as to the particulars to be included in a garnishee order be included in the Local Courts (Civil Claims) Rules in the same terms as Rule 3 of Part 33 of the District Court Rules.** If this recommendation is adopted an indirect consequence may be to encourage judgment creditors to use the examination notice procedure available in Local Courts to obtain the relevant information. Greater use of the examination notice procedure would tend to lessen the frequency with

which ineffective garnishee orders are served on banks and, if our principal recommendations are adopted, building societies and credit unions.

C. The Effect of a Garnishment Notice/Garnishee Order

1. The Debts Attached

7.13 A comparison of the wording of section 97(2)(a) of the District Court Act. 1973 and Rule 5(1) of Part 46 of the Supreme Court Rules with the wording of section 47(2) (a) of the Local Court (Civil Claims) Act, 1970 indicates a difference in drafting between the provisions which although possibly of no legal consequence, is a source of conclusion. Again assuming that the provisions are identical in effect despite the drafting differences, the comparison highlights a shortcoming in all the provisions which is of particular significance in relation to the attachment of moneys in accounts.

7.14 Section 97(2) of the District Court Act, 1973 states in part:

A garnishee order shall take effect upon its being served on the garnishee. and upon its being so served -

> (a) except in a case to which paragraph (b) or(c) applies, shall operate to attach in the hands of the garnishee *all debts which were due, owing or accruing* from him to the judgment debtor *at the time when the garnishee order was made and which are so due, owing or accruing at the time of service of the garnishee order;* (emphasis added)

Paragraphs (b) and (c) apply in relation to garnishee orders attaching a judgment debtor's wage or salary and are not presently relevant.

7.15 The effect of section 97(2) (a) is that a District Court garnishee order operates to attach only those debts which are due, owing or accruing to the judgment debtor when the order is made and which remain due, owing or accruing when the order is served. Consequently. if an amount is paid out of an account between the making and the service of a garnishee order on the account. the debt attached is the credit balance in the account at the time of service. However, if an amount is paid into the account after the order is made but before it is served. the increase in the credit balance in the account when the order is served is not attached because the increased amount is not the debt existing when the order was made. The rule in *Clayton's Case*[5] can also operate to the unnecessary detriment of a judgment creditor. Under this rule withdrawals from a current account are to be off-set against payments into the account in sequential order. For example withdrawals on the account between the time a garnishee order is made and the time it is served may wholly extinguish the debt existing when the order was made, yet the account- holder may make payments into the account before the order is served and create a new debt.

7.16 The position appears to be the same for a garnishment notice out of the Supreme Court. Rule 5(1) of Part 46 of the Supreme Court Rules states:

> Upon service of a garnishment notice on a garnishee *all debts mentioned in the garnishment notice and due or accruing* to the judgment debtor from the garnishee shall, subject to subrule (2), be attached and bound in the hands of the garnishee to the extent of the amount specified in the garnishment notice. (emphasis added)

The reference to subrule (2) is a reference to the protection provision set out in para 7.6 and can be disregarded for present purposes. Under the Rules a judgment creditor may, with leave of the Court, file and serve a garnishment notice "of attachment....of debts due or accruing to the judgment debtor from the garnishee",[6] and the Court may grant leave only if it appears that "there is a debt due or accruing to the judgment debtor from the garnishee".[7] Consequently it seems that the only debts which can be mentioned in a garnishment notice are those which are due or accruing when leave to issue the notice is granted.

7.17 By contrast. section 47(2) of the Local Courts (Civil Claims) Act, 1970 states in part:

A garnishee order shall take effect upon its being served on the garnishee. and upon its being 50 served -

> (a) except in a case to which paragraph (b) applies or except in the case of an order to which section 48 applies, shall operate to attach in the hands of the garnishee *all debts due, owing or accruing* from him to the judgment debtor *at the time of service* of the garnishee order. (emphasis added)

Again the references to paragraph (b) and section 48 relate to garnishee orders attaching the judgment debtor's wage or salary and are not presently relevant. It appears from the terms ot section 47(2) that a garnishee order issuing out of a Local Court attaches any debt due, owing or accruing to the judgment debtor when the order is served, irrespective of whether that debt was due. owing or accruing to the judgment debtor when the order was made. However. despite the terms of the section. we doubt that this is the case.

7.18 Section 47(1) of the Local Courts (Civil Claims) Act, 1970 empowers the Registrar to make an order "that all debts due, owing. or accruing to the judgment debtor from any person specified in the order shall be attached". Therefore it must be those debts due, owing or accruing to the judgment debtor when the order is made which are attached by the order and, in our view, the reference to the time of service in section 47(2) merely ensures that the order does not attach any debt, or part of any debt. which the garnishee pays between the time the order is made and the time it is served.[8] In other words, we consider that section 47(2), when read with section 47(1), operates in the same manner as the comparable provisions in the Supreme Court Rules and the District Court Act, 1973. Nevertheless this is not immediately apparent and if our interpretation is incorrect there is an anomaly between the operation of garnishee orders at Supreme Court and District Court level and their operation at Local Court level. However, if this anomaly does exist. it has the result that the difficulties in relation to accounts discussed in para 7.15 do not arise in the case of Local Court garnishee orders.

7.19 Whatever the precise legal effect of section 47(2) (a) of the Local Courts (Civil Claims) Act 1970, we consider that the provisions in the Supreme Court Rules and the respective Acts should operate in like manner and that this should be apparent from the terms of the provisions. Moreover we can see no good reason why debts which become due or accruing to a judgment debtor between the time a garnishee order is made and the time it is served should not be available to the judgment creditor to satisfy the judgment debt Accordingly **we recommend that**

(a) the effect of a garnishment notice/garnishee order as to attachment should be uniform for the different levels of the court system;

(b) a judgment creditor should continue to have to satisfy the Court or Registrar that there is a debt due or accruing to the judgment debtor from the garnishee before leave to file and serve a garnishment notice is granted or before a garnishee order is made; and

(c) a garnishment notice/garnishee order should operate to attach in the hands of the garnishee all debts due or accruing to the judgment debtor at the time the notice/order is served, whether or not any such debt was due or accruing when -

(i) in the case of a Supreme Court garnishment notice, leave to file and service the notice was granted; or

(ii) in the case of a District Court or Local Court garnishee order, the order was made.

2. The Extent of Attachment

7.20 Under Rule 5(1) of Part 46 of the Supreme Court Rules a garnishment notice operates to attach all debts mentioned in the notice "to the extent of the amount specified in the garnishment notice". By contrast. the comparable provisions in the District Court Act. 1973 and the Local Courts (Civil Claims) Act, 1970 attach all debts due, owing or accruing without any limitation on the attachment. although what has to be paid in compliance with the order is limited by reference to the judgment debt.[9] The effect of a garnishee order which attaches all debts due or accruing without any limitation on the extent of attachment

is to make the garnishee custodier for the Court of the whole funds attached. and he cannot, except at his own peril, part with any of those funds without the sanction of the Court.[10]

The consequence of an unlimited garnishee order is of particular significance in the case of accounts with financial institutions. Until compliance with the order the garnishee cannot deal with any part of the attached debt, notwithstanding that the amount of the debt may be in excess of the amount to be paid under the order. Consequently a bank, building society or credit union could not, eg meet a cheque or periodic payment out of excess funds.

7.21 The form of garnishee order issuing out of the District Court orders all debts to be attached "to the extent of" a specified amount,[11] ie. it clearly limits the extent of the attachment despite the terms of the relevant provision in the District Court Act, 1973. A garnishee order issuing out of a Local Court orders all debts to be attached "to answer the unpaid amount of the judgment debt in this matter, that amount being $".[12] Although the Local

Courts' form is consistent with the relevant provision in the Local Courts (Civil Claims) Act 1970, it seems likely that many garnishees would assume the attachment to be limited to the amount stated in the order. Because of the forms of District Court and Local Court garnishee orders the lack in the legislative provisions of any limitation on the extent of attachment probably has little practical significance. However **we recommend that the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 be amended so that a garnishee order only operates to attach debts due or accruing to the judgment debtor "to the extent of the amount specified in the order".**

3. The Amount to be Paid

7.22 There are variations in the comparable provisions of the District Court Act, 1973 and the Local Courts (Civil Claims) Act 1970 as to what part of the attached debt the garnishee is required to pay to comply with the order. Under section 97(3) of the District Court Act 1973 a garnishee order is to specify the amount of the judgment debt and is to require the garnishee to pay, in accordance with the Act and the District Court Rules,

> *the debt ... attached* by operation of the order or so much thereof as may be sufficient to satisfy the judgment debt ... (emphasis added)

By contrast. under section 47(4) of the Local Courts (Civil Claims) Act 1970 a garnishee order is to specify the amount of the judgment debt and is to require the garnishee to pay, in accordance with the Act and the Local Courts (Civil Claims) Rules,

> *the debt due* from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt ... (emphasis added)

7.23 As indicated in para 7.14 a District Court garnishee order attaches all debts which were due, owing or accruing from the garnishee to the judgment debtor when the order was made and which remain due, owing or accruing when the order was served. Under the District Court Rules payment is to be made within 14 days after service.[13] We have elsewhere discussed the anomalous operation of the District Court 14-day payment rule where the garnishee order attaches a debt accruing which falls due for payment after the 14 day period (para 4.10).

7.24 By contrast, a garnishee order issuing out of a Local Court attaches all debts due, owing or accruing when the order was served. In para 7.19 we express the view that. despite the different terms of the comparable District Court and Local Courts provisions, a Local Court garnishee order operates as to attachment in the same manner as a District Court order. Similarly we have concluded that, despite the reference in section 47(4) to *the debt due* rather than *the debt attached,* section 47(4) operates as to payment in the same manner as section 97(3). The reference in section 47(4) to *the debt due* could be understood to require the garnishee to pay an attached debt only if it was due when the order was served and not to require the payment. in due course, of any attached debt which was accruing at that time. However this reading of section 47(4) is inconsistent with the attachment of both debts due and debts accruing. Therefore we consider that the reference to *the debt due* simply recognises the general principle that a garnishee order cannot operate to accelerate payment of a debt and is to be understood to mean that the order is to require the garnishee to pay the attached debt *when due* from the garnishee.

7.25 Whatever the intended operation of section 47(4) of the Local Courts (Civil Claims) Act. 1970 it produces confusion as to what debts, of those attached, are to be paid in compliance with a Local Court garnishee order. Accordingly **we recommend that section 47(4) of the Local Courts (Civil Claims) Act, 1970 be amended to make it clear that it is not merely those attached debts which are due when the order is served that are payable under a Local Court garnishee order. This should be done by substituting debt attached" for "debt due".** We consider that our recommendation in para 6.35 regarding payment under a garnishee order will avoid any confusion as to when a debt accruing is to be paid.

D. Disputed Garnishee Orders

7.26 Under the Supreme Court Rules, the District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 the respective courts are granted jurisdiction to hear and to determine issues in dispute where a garnishee contests a garnishee order. During consultations on the draft report it was suggested[14] that the provisions are each so worded that, on a strict interpretation it would be open to the particular Court to distinguish between disputes as to the garnishee's liability to pay an alleged debt and disputes as to the time for payment of an undisputed debt. and to refuse to hear the garnishee on the latter issue.

7.27 The relevant provisions are Rule 9 of Part 46 of the Supreme Court Rules, section 102(3) of the District Court Act. 1973 and section 52 of the Local Courts (Civil Claims) Act, 1970. Under Rule 9, where "the garnishee disputes liability to pay the debt attached", the Supreme Court has jurisdiction to "hear and determine the questions in dispute". Under section 102(3) of the District Court Act, 1973 the District Court is empowered to "hear and determine any question of the amount of the debt ... (if any) attached by the garnishee order". Again the jurisdiction of a Local Court to deal with a contested garnishee order under section 52(4) and (5) of the Local Courts (Civil Claims) Act. 1970 arises only when the garnishee "satisfies the court that the debt alleged by the judgment creditor to be owing by the garnishee to the judgment debtor is bona fide in dispute". Where a Local Court is not required to discharge a contested garnishee order (paras 7.29-7.31), it must "order that the question of whether the garnishee is liable to pay the debt or any part of the debt ... be set down for hearing" and, at the hearing, must give judgment against the garnishee "upon the judgment creditor proving the debt".

7.28 If our recommendation in para 6.37 as to serving notice of an attached debt which is due after the initial 21 day compliance period is adopted, we anticipate that the potential for disputes to arise about the time of payment of an attached debt will be reduced significantly. However it is possible that a garnishee who complies with an order by serving a notice may incorrectly state the date on which the attached debt falls due for payment The mistake may be simply a clerical error or it may reflect uncertainty about the precise date for payment caused by the particular contractual arrangements between the garnishee and the judgment debtor. If the garnishee does not notify the judgment creditor of any error in the notice in time to forestall premature proceedings, the only information available to the judgment creditor will be the incorrect information in the notice. Consequently proceedings could be brought in which the time of payment of the attached debt was disputed. Therefore **we recommend that the provisions in the Supreme Court Rules, District Court Act, 1973 and Local Courts (Civil Claims) Act, 1970 under which the respective courts are granted jurisdiction to hear and determine issues in dispute when a garnishee contests a garnishment notice/garnishee order should be amended to make it clear that the court's jurisdiction extends to disputes as to the time of payment of an attached debt.**

E. Local Courts' Limited Jurisdiction

7.29 In Chapter 2 (paras 2.8-2.9) we outlined the existing procedures in the District Court and in Local Courts when a garnishee fails to comply with the garnishee order and the judgment creditor summonses the garnishee to show cause for non-compliance. It will be recalled that. in the case of a garnishee order issuing out of a Local Court if the garnishee appears and satisfies the Court that there is a *bona fide* dispute about the debt sought to be attached. the Court is obliged to discharge the garnishee order if the debt in dispute exceeds $250 or does not exceed that amount but is not within certain categories of debt If the order is not dischargeable the Court must order a hearing of the dispute. The effect of the existing provisions is that a Local Court garnishee order must be discharged unless it seeks to attach an alleged debt of S250 or less which, if payable, is for a wage or salary, is payable out of a bank account or is a debt of a prescribed class. It appears that to date no debts of a particular class have been prescribed for the purpose of these provisions. These restrictions on jurisdiction by reference to the amount and type of debt in dispute have applied since the Courts of Petty Sessions (Civil Claims) Act 1970 (now renamed the Local Courts (Civil Claims) Act. 1970) came into operation.

7.30 It appears that the $250 limit no longer serves any useful purpose. Originally, under section 12(1) of the Courts of Petty Sessions (Civil Claims) Act. 1970. the monetary limit on the jurisdiction of Courts of Petty Sessions was $500 and section 12(2) enabled a defendant to an action in which the amount claimed exceeded $250 to transfer the action to a District Court The $250 limit in the garnishment provisions appears to have been imposed to prevent the transfer of disputes concerning garnishee orders to the District Court The monetary limit on the jurisdiction of Local Courts is now $5,000.[15] Section 12(2) was repealed in 1980[16] and the transfer of proceedings to the District Court is governed by Part IIIA of the Act. in particular section 21B. Under section 21B the District Court may, on application of a party to an action pending in a Local Court, order that the action be removed to the District Court. Since the defendant to an action pending in a Local Court can no longer transfer the action to the District Court as of right we can see no reason for retaining the $250 limit, particularly in view of the current monetary limit on the jurisdiction of Local Courts.

7.31 We can find no explanation for the restriction on the jurisdiction of a Local Court to hear disputes about garnishee orders by reference to the type of debt involved. Under the Local Courts (Civil Claims) Act, 1970 Local Courts have (and have always had) jurisdiction to hear and determine an action for the recovery of a debt where the amount claimed does not exceed the monetary limit on the Courts' jurisdiction.[17] The Act imposes certain restrictions on jurisdiction apart from the monetary limit.[18] However, in view of the Courts' jurisdiction in relation to debts generally, we can see no reason why jurisdiction to hear and determine a dispute about a debt sought to be attached should be restricted to particular classes of debt. Therefore **we recommend that the jurisdiction of Local Courts to hear and determine disputed garnishee orders be restricted only to the extent that their jurisdiction to hear and determine any action to recover a debt is restricted and that the restrictions on jurisdiction by reference to the amount of the debt and the type of debt alleged to be owing to the judgment debtor be removed.**

III. SECTION 27 OF THE JUDGMENT CREDITORS' REMEDIES ACT, 1901

7.32 In Chapter 5 we recommend that moneys which are available to a judgment debtor by the withdrawal of shares in a building society (other than a co-operative housing society) or a credit union should be attachable. However we acknowledge that this recommendation disregards the legal nature of withdrawable share accounts and the fact that. historically, the procedure of garnishment has been the mode of appropriating property of the judgment debtor in the form of debts, not shares. We have therefore considered the availability to a judgment creditor of the remedy of a charging order over the shares of a judgment debtor member of a building society or credit union.

7.33 Under section 27 of the Judgment Creditors' Remedies Act. 1901 if a judgment debtor under a judgment of the Supreme Court or the District Court:

> (a) has any stock or shares of or in any public company (whether incorporated or not), or any deposit in any bank of New South Wales, standing in his name in his own right, or in the name of any person in trust for him; or
>
> (b) has or is entitled to any equity of redemption or other equitable interest,

the judgment creditor may apply to the Supreme Court or to a Judge of the District Court for an order that the stock, shares, bank deposit or equitable interest, as the case may be, be charged with payment of the amount of the judgment debt plus interest.[19] If a charging order is made it operates initially as an order to the judgment debtor to show cause to the Court why the order should not be made absolute. Where the order charges stock or shares or a bank deposit it also operates to restrain the company in which the stock or shares are held, or the accountant and cashier of the bank holding the deposit, from permitting the transfer or disposal of the charged property.[20] If the judgment debtor does not, within the time stated in the order, show sufficient cause to the Court why the property should not be charged, the charging order is made absolute.[21]

7.34 A charging order entitles the judgment creditor to those remedies to which the judgment creditor would have been entitled had the charge been created by the judgment debtor rather than the Court.[22] However the judgment creditor cannot take any proceedings to enforce the charging order until at least three months after the order was first made.[23] The judgment debtor cannot take advantage of the time restriction on enforcement by disposing of the charged property in the meantime because any such disposition is invalid as against the judgment creditor.[24] The remedies potentially available to the judgment creditor are an order for sale of the charged property or, possibly, an order for foreclosure, although an order for sale or foreclosure may be unavailable if the freedom of the judgment debtor to dispose of the charged property is restricted.[25]

7.35 Section 27 raises several issues.

> Does the section apply to shares in building societies and/or credit unions?
>
> Should a charging order be the sole remedy available in respect of withdrawable shares, or an alternative remedy to attachment?
>
> Insofar as this reference proceeds on the basis that. from the point of view of judgment creditors, deposits with building societies and credit unions should be treated in like manner to deposits with banks, it is arguable that the section should be amended to permit charging orders over deposits in building societies and credit unions in like manner to deposits in banks "of New South Wales" or to exclude deposits in such banks.
>
> Should section 27 and its ancillary provisions be amended to give the remedy of a charging order a more general and precise application than at present?

A. Does Section 27 Apply to Shares in Building Societies and Credit Unions?

7.36 Section 27 applies to "shares of or in any public company (whether incorporated or not)". Its application to shares in building societies and credit unions depends on whether a building society or credit union is a "public company" and if so, whether "shares" includes shares which are withdrawable. We have concluded that the section probably applies to withdrawable shares in a building society or credit union but that this is by no means certain. Since we have also concluded that a charging order should not be the sole means of execution available to a judgment creditor in respect of withdrawable shares (para 7.38) and that reform of the charge provisions of the Judgment Creditors' Remedies Act, 1901 generally warrants consideration (para 7.42), we consider that it is unnecessary to set out our reasons for concluding that section 27 probably applies to withdrawable shares.[26]

B. Should a Charging Order be the Sole Remedy in respect of Withdrawable Shares or an Alternative Remedy to Garnishment?

7.37 Although a charging order is the usual means of enforcing a judgment debt against assets in the form of shares, we consider that a judgment creditor should not be limited to this method of enforcement in respect of withdrawable shares. Inquiries made of the Registrar of the District Court in Sydney and of the Supreme Court Registry indicate that charging orders under section 27 are rarely sought by judgment creditors. One reason suggested for this was that the procedure is relatively cumbersome and expensive.[27] Also a charging order is available only on application to the Supreme Court or the District Court,[28] whereas garnishee orders can be obtained to enforce judgment debts resulting from proceedings in a Local Court.

7.38 As indicated in para 7.36 we have concluded that section 27 probably applies to withdrawable shares in building societies and credit unions. If this conclusion is correct and our recommendations that such shares be made liable to garnishment are adopted. section 27 would provide an alternative means of enforcing a judgment debt issuing out of the Supreme Court or the District Court where the judgment debtor held withdrawable shares in a building society or credit union and restrictions on the withdrawal of those shares did not prevent the Court from making a suitable order to appropriate to the judgment creditor 50 much of the judgment debtor's share capital as might be necessary to satisfy the judgment debt. However it is not certain that section 27 does apply to withdrawable shares in building societies and credit unions. Nevertheless we are not disposed to recommend that the section be amended to ensure that it does so. We consider that the special nature of withdrawable shares and the practical similarity between withdrawable share accounts and deposit accounts makes garnishment the more appropriate means of enforcing a judgment debt against assets of this type.

7.39 Our view is reinforced by recent changes to the law relating to charging orders in the United Kingdom whereby shares in building societies cannot be made the subject of a charging order. The new United Kingdom legislation is outlined in para 7.41 and is the result of recommendations made by the United Kingdom Law Commission in a 1976 report on charging orders. The Commission recommended that withdrawable shares in building societies should not be liable to charging orders, both because this was opposed by the building societies and because

> on the whole we do not think that their inclusion would be appropriate. Although the making of a deposit with a Building Society may make the depositor a shareholder, he realises his asset, not through any dealing with his shares as such, but simply by withdrawing his deposit. We therefore feel that if it is desired to make this asset more readily amenable to execution process (a point on which we express no view), it might be better

to do so by bringing the account within the scope of a garnishee order (even though the relationship between the Building Society and its depositor-members may not strictly be one of debtor and creditor).[29]

C. Should Section 27 be Amended so that Deposits in Banks Stand on the Same Footing as Deposits in Building Societies and Credit Unions?

7.40 Section 27 enables a charging order to be made over "any deposit in any bank of New South Wales". If deposits in banks, building societies and credit unions are to be treated in like manner for the purposes of garnishment, then we can see no reason why they should not be treated in like manner for the purposes of section 27. On this basis the section might be amended to either encompass deposits in building societies and credit unions or exclude deposits in banks. We consider that bank deposits should be excluded from the section.[30] However, in view of our conclusion that reform of the charging provisions tinder the Judgment Creditors' Remedies Act, 1901 generally warrants consideration (para 7.42) and because of the limited use which is made of this remedy at present (para 7.37), we make no recommendation for amendment at this stage.

D. Should Section 27 and its Ancillary Provisions be Otherwise Amended?

7.41 Clearly it is outside the terms of this reference to consider the general application of the charging order provisions of the Judgment Creditors' Remedies Act. 1901. However we have already indicated the uncertain scope of section 27 in the present context (para7. 36). We also note that the English provision on which section 27(1)(a) was based has been amended over the years. The present comparable legislation is the Charging Orders Act 1979 (UK) which gives effect to recommendations made by the United Kingdom Law Commission in its 1976 report on charging orders).[31] Under this legislation securities of certain specified kinds, including government stock and stock in any body *(other than a building society)* incorporated within England or Wales, may be made subject to a charging order.[32] The terms "government stock" and "stock" are widely defined and, in particular, "stock" includes shares, debentures and any securities of the body concerned.[33] By contrast, debentures are not within section 27[34] and government and semi-government securities are also outside the section.

7.42 We make no recommendations to rectify the shortcomings of the Judgment Creditors' Remedies Act, 1901 so far as they bear directly on the terms of this reference because we believe that reform of the charging order remedy generally warrants consideration. This is within the scope of the Commission's *Procedure* reference, which is discussed in Chapter t (paras 1.11-1.15). The proposals put forward in the Commission's 1975 Working Paper "Draft Proposal Relating to the Enforcement of Money Judgments", involved repeal of the Judgment Creditors' Remedies Act, 1901 and also provided for the enforcement of a judgment debt by a charging order over" any property of the judgment debtor. As indicated in Chapter 1 (para 1.12) further work on the enforcement of judgment debts under the *Procedure* reference awaits the Australian Law Reform Commission's report on a model judgment debt recovery system under that Commission s *Debt Recovery* reference.

FOOTNOTES

1. District Court Act, 1973 s103(3); Local Courts (Civil Claims) Act, 1970 s52A(3).

2. Letter dated 15 February 1985 from Mr I M Gripper, Chief Solicitor, State Bank of New South Wales.

3. Supreme Court Rules, Pt46 r3(6); District Court Rules, Pt33 r3

4. Letter dated 13 December 1984 from Mr G R Herron, Senior Manager, Legal Administration, NSW Division, Westpac Banking Corporation.

5. *Devaynes v Noble; Clayton's Case* 1 Mer 529, 572; 35 ER 767, 781.

6. Part 46 r3(1)(a).

7. Part 46 r3(3)(b).

8. See also *Universal Guarantee Pty Ltd v Derefink* [1958] VR 51.

9. District Court Act. 1973 s97(2) (a) and (3); Local Courts (Civil Claims) Act, 1970 s47(2) (a) and (4).

10. *Rogers v Whiteley* [1892] AC 118 at 122. per Lord Watson.

11. District Court Rules. Pt47 r2 and Form 83.

12. Local Courts (Civil Claims) Rules. r3 and First Schedule Pt2 Form 48.

13. Part 33 r3(2).

14. Letter dated 15 February 1985 from Mr F I Bailey. Assistant General Manager, Commonwealth Bank Australia.

15. Courts of Petty Sessions (Civil Claims) Amendment Act. 1982 s5 and Schedule 1.

16. Courts of Perry Sessions (Civil Claims) Amendment Act. 1980 s5 and Schedule 1(2).

17. Section 12.

18. Section 19.

19. The power of a Judge of the District Court to make a charging order under s27 (the terms of which reflect the old District Courts system) derives from ss184. 187(1)(a) and 188(2) of the District Court Act. 1973.

20. Judgment Creditors' Remedies Act. 1901 s28.

21. *Id,* ss28 and 31.

22. *Id.* s27(2).

23. *id.* s27(3).

24. *Id.* s30.

25. The authorities are unclear as to whether an order for foreclosure can he granted. *Halsburys Law's of England* (4th ed 1976) Vol 17 at 353 (para 569 fn2) states that the judgment creditor's remedy is sale. not foreclosure. The relevant authorities are considered in *Dalston Development Pty Ltd v Dean* [1967] WAR 176 (at 178-179) where it was held that neither an order for sale nor for foreclosure in respect of a charging order over shares in a company was available where the order would he inconsistent with restrictive provisions on transfer contained in the company's articles.

26. For any reader who may wish to pursue this matter, the authorities and references relevant to our conclusion are: On whether building societies and credit unions are “public companies. see *in re Stanley: Tennant v Stanley* [1906] 1 Ch 131 esp at 134: *Brownlie v Russell* (1882-83)8 App Case 235 at 248-249: *In Re Griffith: Carry Griffith* (1879)12 Ch D 655: *Nicholls v Rosewarne* 6 CB (NS) 480 at 493, 141 FR 544 at 549: *Macintyre v Connell* 20 LJ Ch 284 at 288: *In re Sharp: Rickett v Sharp* (1890) 45 Ch D 286 at 289 and 290: Permanent Building Societies Act. 1967 (as amended by Permanent Building Societies (Amendment) Act 1985, in particular ss28- 30, 33, 82-84A and 108: Co-operation Act, 1923 (as amended by Co-operation (Amendment) Act, 1985 in particular ss39. 41 A. 45. 60, 76, 83 and 121): Building and Co-operative Societies Act, 1901 in particular ss52-54 and, in relation to building societies remaining registered under this Act, s42(8) of the Co-operation Act, 1923 and Permanent Building Societies Act. 1985 s127 and Schedule 3 (inserted by Permanent Building Societies (Amendment) Act, 1985 s5 and Schedule it) cl(2) and Schedule 11): and Credit Union Act. 1969 (as amended by Credit union (Amendment) Act, 1984) in particular ss21, 23, 26, 69, and 95. On whether “shares” encompasses withdrawable shares see *Cuthhertson v Graham* 43 Sc LR 17 at 20: *The Oxford English Dictionary* 1961 Vol 19 at 630 (“share”): and *Webster’s Third New International Dictionary* (1965) at 2(187 (“share”).

27. Mr Neaves, then Registrar of the District Court, Sydney.

28. Under the Supreme Court Rules (Pt47 r1) an application for a charging order must be made by motion in the proceedings in which the judgment or order giving rise to the judgment debt is made or given, which practically limits significantly the availability of a charging order as a means of execution There is no similar constraint in the District Court (see District Court Rules. Pt5 Div3 and Pt6 Div1.)

29. The Law Commission. *Charging Orders* (Law Com No 74 (1976) Cmnd 6412) at 26 (para 84).

30. Our reasons for this conclusion are:

Application of the section to bank deposits is uncertain because of the uncertainty surrounding the term “bank” (paras 2.10-2.34).

* It is not clear what constraints are placed on the operation of the provision by the requirement that any deposit sought to be charged be in a “bank of New South Wales”. It may be that it applies only in respect of deposits in banks incorporated in this State. in which case the provision would discriminate as between these banks and any banks operating within the State but incorporated elsewhere.

* In relation to a deposit in a bank a charging order operates to restrain “the accountant and cashier of such bank from permitting the transfer or disposal thereof”: Judgment Creditors’ Remedies Act, 1901 s28(c). Any accountant or cashier so restrained who transfers or disposes of the deposit before the order is discharged or made absolute by the Court is liable to the judgment creditor for the amount of the deposit or 50 much of it as would have been sufficient to satisfy the judgment debt. Judgment Creditors’ Remedies Act, 1901 s29. In our view these provisions are inappropriate in todays automated banking world.

31. Note 29.

32. Charging Orders Act 1979 (UK) s2. Units of any unit trust in respect of which a register of unit holders is kept within England and Wales are also among the prescribed types of securities and “unit trust” is widely defined so that it includes. eg cash management and real property trusts. Such interests would seem to be already caught by s27(1) in that a judgment debtor holding units in an investment unit trust would have a vested equitable interest in the trust fund proportionate to his or her unit holding and therefore an equitable interest chargeable within s27(1)(b).

33. *Id,* s6.

34. *Sellar v Charles Bright & Co Ltd* [1904] 2 KB 446.

35. Appendix B. Draft Money Judgments Enforcement Bill, ss49-51.

REPORT 46 (1985) - COMMUNITY LAW REFORM PROGRAM: ATTACHMENT OF MONEYS DEPOSITED WITH BUILDING SOCIETIES AND CREDIT UNIONS

List of Recommendations

The Present Bank Account Provisions

1. The provisions in the Supreme Court Rules, District Court Act 1973 and the Local Courts (Civil Claims) Act, 1970 which permit the attachment of an amount standing to the credit of a judgment debtor in a bank account should be repealed. The existing provisions should be replaced by a single provision (the new account provision) which applies to all bank accounts and which specifies, in the manner of the existing provision applying to deposit accounts, the types of conditions applicable to accounts which are to be disregarded for the purpose of attachment. The conditions to be disregarded under the new account provision should include a condition that a demand of payment is to be made and a condition as to the manner in which or place at which the demand is to be made.

(paras 4.3-4.5)

2. The new account provision should. in its application to banks, be limited to apply to

(a) a bank within the meaning of the Banking Act 1959 (Cth); and

(b) a person who carries on State banking within the meaning of section 51(xiii) of the Constitution of the Commonwealth.

(paras 4.6-4.8)

3. The provisions for attaching moneys in accounts should make it clear that where withdrawal of an amount attached is subject to a period of notice, the garnishee is not required to make payment in compliance with the garnishee order until the notice period has expired.

(paras 4.9-4.12)

4. The conditions applicable to accounts which are to be disregarded for the purpose of attachment should include any condition prescribed by regulation.

(paras 4.15 and 4.17)

5. The new account provision should not apply to any account exempted by regulation.

(paras 4.16 and 4.17)

Principal Recommendations for Reform

6. The new account provision should not apply to withdrawable shares in co-operative housing societies.

(paras 5.6 and 5.7)

7. The new account provision should apply to withdrawable share accounts with Starr-Bowkett building societies.

(paras 5.8-5.24)

8. The new account provision should apply to deposit and withdrawable share accounts with permanent building societies [ie building societies registered under the Building and Co-operative Societies Act, 1901, non-terminating building societies registered under the Co-operation Act, 1923 and building societies registered under the Permanent Building Societies Act, 1967].

(paras 5.25-5.33)

9. The new account provision should apply to withdrawable share accounts with credit unions.

(paras 5.34-5.36)

10. The new account provision should apply to deposit accounts with credit unions.

(paras 5.37 and 5.38)

Consequential Recommendations for Reform

11. Except in the case of an account with a Starr-Bowkett building society, a condition that moneys or shares shall not be withdrawn for a specified period should be included as a condition to be disregarded for the purpose of determining whether an amount in an account is attachable.

(paras 6.3 and 6.4)

12. When an amount in an account is attached. the garnishee order should be deemed to operate as a notice of withdrawal or demand of payment under the contract in respect of the account which the garnishee should be deemed to have received

(a) on the date of service of the order, or

(b) where the judgment debtor is not entitled under the contract to give notice of withdrawal or demand payment on that date, on the date on which the judgment debtor would have become entitled to do so.

A deemed notice of withdrawal or demand of payment should be irrevocable while the garnishee order remains in force.

(paras 6.5-6.8)

13. The conditions applicable to accounts which are to be disregarded for the purpose of attachment should include a condition that any withdrawal from an account is to be for a minimum amount and a condition that a minimum balance is to be retained in the account.

(paras 6.9 and 6.10)

14. The provision in the District Court Act, 1973 and the Local Courts (Civil Claims) Act 1970 under which a garnishee bank may apply for an order to reduce the attached debt in cases of unavoidable payment after attachment should be extended to apply to building societies and credit unions. This recommendation will only be necessary if our recommendation to extend the protection of this provision to all garnishees (Recommendation 29) is not adopted.

(paras 6.12-6.15)

15. The provisions which apply to deposit accounts in banks which are subject to a condition that a “deposit book” must be produced before money is withdrawn should be extended to apply to deposit and withdrawable share accounts with building societies and credit unions which are subject to the same condition and the term “passbook” should be substituted for the term deposit book.

(paras 6.16 and 6.17)

16. 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 should not be attachable.

(para 6.18)

17. Any charge upon an amount standing to the credit of a judgment debtor in an account in a building society or credit union, being a charge that is created by an Act under which the building society or credit union is registered or regulated or by the rules of the building society or credit union, should be disregarded for the purposes of a garnishee order, but the building society or credit union should continue to have its right to set off or appropriate all or any part of that amount.

(paras 6.19-6.31)

18. In the case of a District Court or Local Court garnishee order that is not expressed to be for the attachment of any wage or salary, the garnishee should be required to make payment in accordance with the order

(a) within 21 days after service of the order, or

(b) in the case of any attached debt which is due for payment to the judgment debtor after the 21 day period, not later than the date on which the debt is due for payment.

(paras 6.32-6.35)

19. In the case of a District Court or Local Court garnishee order expressed to be for the attachment of any wage or salary. the garnishee should be required to make payment in accordance with the order within 14 days after the wage or salary is due for payment to the judgment debtor.

(para 6.36)

20. Where an attached debt is due for payment to the judgment debtor after the initial 21 day compliance period, the garnishee should be required to serve on the judgment creditor, before the 21 day period expires, a notice which sets out

(a) the date on which the attached debt is, or is likely to be, due; and

(b) where the amount of the attached debt is less than the unpaid amount of the judgment debt specified in the garnishee order, the amount of the attached debt.

(paras 6.37-6.40)

21. It should be an offence for a person to make a false statement in a notice, knowing it to be false.

(para 6.40)

22. Under the District Court and Local Courts (Civil Claims) Rules a garnishee should be required to serve a notice at an address for service to be stated in the garnishee order, the form of garnishee order should provide for the judgment creditor to insert an address for service: and service by post and use of the document exchange system should be permitted. The form of affidavit which must be filed in the District Court when a judgment creditor applies for a summons against a garnishee should be amended to take account of the notice procedure.

(para 6.41)

23. Where a garnishee under a District Court or Local Court garnishee order believes that there was no debt due or accruing from the garnishee to the judgment debtor when the order was served, the garnishee should be able to serve on the judgment creditor an affidavit to that effect which summarises the factual basis of the garnishee's claim. Under the District Court and Local Courts (Civil Claims) Rules the garnishee should be required to serve the affidavit at the address for service to be stated in the garnishee order and service by post and use of the document exchange system should be permitted. The form of affidavit to be filed in the District Court when a judgment creditor applies for a summons against a garnishee should be amended to take account of the procedure.

(paras 6.45-6.49)

24. A garnishee who serves an affidavit should 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.

(paras 6.50-6.52)

25. Provision should be made in the District Court Act, 1973 and the Local Courts (Civil Claims) Act 1970 to permit a garnishee to deduct a prescribed amount for costs incurred in complying with the garnishee order. Where the prescribed amount is deducted, the garnishee's liability to the judgment debtor should be discharged to the extent of the amount paid by the garnishee in compliance with the order plus the amount for costs If it is not considered appropriate to allow costs to all garnishees, then prescribed costs should be allowed in relation to garnishee orders attaching moneys in accounts.

(paras 6.53-6.57)

26. Local Courts should be given power to order a party to proceedings for non-compliance with a garnishee order to pay an amount for or towards the reasonable professional costs incurred by the other party in connection with the proceedings irrespective of the amount in issue between the parties and the provision should be included in the section of the Local Courts (Civil Claims) Act, 1970 which deals with such proceedings.

(paras 6.58-6.60)

27. A garnishee who is required to serve a notice regarding an attached debt which is due after the initial 21 day compliance period should not be entitled to deduct from the attached debt the amount prescribed for costs unless the notice has been served as required.

(paras 6.63-6.65)

28. The power of a Local Court to order the payment of costs against a party to proceedings for non- compliance with a garnishee order should extend to ordering payment of an amount for or towards the reasonable expenses incurred by the other party in connection with the garnishee order. The new costs provision should also empower a Local Court to order payment by one party for or towards witnesses expenses incurred by the other party.

(paras 6.66-6.70)

Incidental Matters

29. The District Court Act, 1973 and the Local Court (Civil Claims) Act 1970 should be amended to allow all garnishees the benefit of the provision which permits a garnishee who acts with reasonable diligence to give effect to the garnishee order but nevertheless pays to the judgment debtor or otherwise satisfies all or part of the attached debt to apply for an order that the attached debt is reduced to the extent of the payment or satisfaction.

(paras 7.6-7.9)

30. A rule as to the particulars to be included in a garnishee order should be included in the Local Courts (Civil Claims) Rules in the same terms as Rule 3 of Part 33 of the District Court Rules.

(paras 7.10-7.12)

31. The effect of a garnishment notice/garnishee order as to attachment should be uniform for the different levels of the court system. A judgment creditor should continue to have to satisfy the Court or Registrar that there is a debt due or accruing to the judgment debtor from the garnishee before leave to file and serve a garnishment notice is granted or before a garnishee order is made. A garnishment notice/garnishee order should operate to attach in the hands of the garnishee all debts due or accruing to the judgment debtor at the time the notice/order is served, whether or not any such debt was due or accruing when

(i) in the case of a Supreme Court garnishment notice, leave to file and serve the notice was granted; or

(ii) it. the case of a District Court or Local Court garnishee order, the order was made.

(paras 7.13-7.19)

32. The District Court Act, 1973 and the Local Courts (Civil Claims) Act, 1970 should be amended so that a garnishee order only operates to attach debts due or accruing to the judgment debtor “to the extent of the amount specified in order.

(paras 7.20 and 7.21)

33. Section 47(4) of the Local Courts (Civil Claims) Act. 1970 should be amended to make it clear that it is not merely those attached debts which are due when the order is served that are payable under a Local Court garnishee order. This should be done by substituting “debt attached” for “debt due”.

(paras 7.22-7.25)

34. The provisions in the Supreme Court Rules, District Court Act, 1973 and Local Courts (Civil Claims) Act, 1970 under which the respective courts are granted jurisdiction to hear and determine issues in dispute when a garnishee contests a garnishment notice/garnishee order should be amended to make it clear that the court’s jurisdiction extends to disputes as to the time of payment of an attached debt.

(paras 7.26-7.28)

35. The jurisdiction of Local Courts to hear and determine disputed garnishee orders should be restricted only to the extent that their jurisdiction to hear and determine any action to recover a debt is restricted and the restrictions on jurisdiction by reference to the amount of the debt and the type of debt alleged to be owing to the judgment debtor should be removed.

(paras 7.29-7.31)

Appendix A - District Court (Amendment) Bill 1985

A BILL FOR

An Act to amend the District Court Act 1973 with respect to the attachment of money deposited with banks, building societies and credit unions, and for other purposes.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same, as follows:

Short title

1. This Act may be cited as the "District Court (Amendment) Act 1985".

Commencement

2. (1) Sections I and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Amendment of Act No. 9, 1973

3. The District Court Act 1973 is amended in the manner set forth in Schedule 1.

Savings and transitional provisions

4. (1) Nothing in this Act applies to or in respect of a garnishee order made under section 97 of the District Court Act 1973 before the day appointed and notified under section 2(2).

(2) Subject to subsection (1), the District Court Act 1973, as amended by this Act, applies to and in respect of a judgment debt arising before the day appointed and notified under section 2(2) as well as to and in respect of a judgment debt arising on or after that day.

SCHEDULE1

(Sec. 3)

AMENDMENTS TO THE DISTRICT COURT ACT 1973

(1) (a) Section 97(2)(a)-

Omit the paragraph insert instead-

(a) except in a case to which paragraph (b) or (c) applies, shall operate to attach in the hands of the garnishee, to the extent of the amount specified in the order, all debts which are due or accruing from the garnishee to the judgment debtor at the time of service of the order (whether or not they were so due or accruing at the time when the order was made);

(b) Section 97(2)(b)-

After “attach”, insert”, to the extent of the amount specified in the order,”.

(c) Section 97(3) -

Omit the subsection insert instead:

(4) A garnishee order shall specify the unpaid amount of the judgment debt owing to the judgment creditor and shall require the garnishee to pay, in accordance with this Act and the rules, the debt, wage or salary attached or so much thereof as may be sufficient to satisfy the unpaid amount so specified in the order after deducting there from such amount (if any) as may be notified in writing to the garnishee by the judgment creditor or the registrar

as having been paid or credited to the judgment creditor on account of that unpaid amount otherwise than pursuant to the order.

(2) Sections 97A - 97E -

After section 97, insert:

Affidavit that no debt due or accruing

97A. (1) Where a garnishee believes that, at the time of service of the garnishee order, there was no debt due or accruing from the garnishee to the judgment debtor, the garnishee may serve on the judgment creditor all affidavit to that effect, being an affidavit which contains a summary of the grounds on which that belief is based.

(2) A disclosure of any information in an affidavit served pursuant to subsection (1) shall not if the disclosure was in that case reasonable, subject the garnishee to any action liability, claim or demand.

Time for payment by garnishee

97B. (1) Payment shall be made in accordance with a garnishee order not expressed to be for the attachment of any wage or salary -

(a) within the period of 21 days after service of the order on the garnishee, or

(b) in the case of any debt attached which is due for payment to the judgment debtor after the expiration of that period - not later than the date on which that debt is due for payment to the judgment debtor.

(2) Payment shall be made in accordance with a garnishee order expressed to be for the attachment of any wage or salary within the period of 14 days after the wage or salary is due for payment to the judgment debtor.

Notice required for certain attached debts accruing

97C. (1) Where a garnishee order not expressed to be for the attachment of any wage or salary attaches a debt which is due for payment to the judgment debtor after the expiration of the period of 21 days after service of the order on the garnishee, the garnishee shall before the expiration of that period serve on the judgment creditor a notice which complies with Subsection (2).

(2) A notice under subsection (1) in respect of a debt shall specify -

(a) the date on which the debt is, or is likely to be, due for payment to the judgment debtor, and

(b) where the amount of the debt is less thin the unpaid amount of the judgment debt specified in the garnishee order - the amount of the debt.

(3) A person shall not make in a notice served pursuant to subsection statement which, to the person’s knowledge, is false.

Penalty: $200.

Garnishee's costs

97 D. Where a garnishee complies with a garnishee order (not being a garnishee order to which section 98 applies) within the time prescribed by section 97B and, where applicable, complies with section 97C(l) -

(a) the garnishee may retain out of the debt attached for the garnishee's own use the sum prescribed by the rules, and

(b) the amount so retained shall for the purposes of the debt attached, be deemed to have been paid by the garnishee to the judgment debtor.

Reduction of attached debt by Court

97E. Where, after service of a garnishee order on the garnishee, the garnishee acts with reasonable diligence for the purpose of giving effect to the attachment but nevertheless pays to the judgment debtor the whole or any part of the debt attached or otherwise deals with the debt attached so as to satisfy, as between the garnishee and the judgment debtor, the whole or any part of the debt attached, the Court may order that, for the purposes of the garnishee proceedings, the debt attached be reduced to the extent of the payment or satisfaction.

(3) Section 98(3) -

After "attach", insert ", to the extent of the amount specified in the order,".

(4) Section 100(3) -

Omit" section 105 (2) be deemed to have been paid by the garnishee", insert instead “the wage or salary be deemed to have been paid by the garnishee to the judgment debtor”.

(5) Section 102(3) -

Omit " any question of the amount of the debt wage or salary (if any) attached by the garnishee order, and may give -judgment for that amount or for the unpaid balance of the judgment debt, insert instead "any question in dispute concerning the liability of the garnishee to pay the debt- wage or salary sought to be attached by the garnishee order and may give judgment for the amount of that debt, wage or salary or the unpaid amount of the judgment debt”.

(6) Section 103 -

Omit the section, insert instead:

Bank, building society and credit union accounts

103. (1) In this section except in so far as the context or subject-matter otherwise indicates or requires - account includes-

(a) a deposit account or withdrawable share account: and

(b) any record of deposit or of subscription for withdrawable shares, but does not include an account or record which is prescribed by the regulations as exempt from the operation of this section.

"bank" means -

(a) a bank within the meaning of the Banking Act 1959 of the Commonwealth as amended and in force for the time being; or

(b) a person who carries on State banking within the meaning of section 51(xiii) of the Constitution of the Commonwealth,

“building society” means -

(a) a society registered under the Permanent Building Societies Act 1967,

(b) a Starr-Bowkett society or a non-terminating building society registered under the Co-operation Act 1923,

(c) a society mentioned in the Second Schedule to the Cooperation Act 1923; or

(d) a body in respect of which an exemption is in force under section 35 of the Permanent Building Societies Act 1967 or, in the case of a Starr-Bowkett society or a non-terminating building society, under section 61 of the Co-operation Act 1923,

“credit union” means -

(a) a credit union registered under the Credit Union Act 1969; or

(b) a body in respect of which an exemption is in force under section 28 of that Act;

"deposit- taking institution" means a bank, building society or credit union.

(2) For the purpose of determining whether an amount standing to the credit of a judgment debtor in an account in a deposit-taking institution is attachable as a debt due or accruing to the judgment debtor, the following conditions shall be disregarded;

(a) a condition that a demand must be made before any money or share is withdrawn;

(b) a condition relating to the manner in which or the place at which any Such demand is to be made;

(c) a condition that a passbook receipt or other document must be produced before any money or share is withdrawn;

(d) a condition that notice is required before any money or share is withdrawn;

(e) except in the case of an account in a Starr-Bowkett society, a condition that any money or share shall not be withdrawn for any specified period;

(f) a condition prescribing a minimum amount in respect of any withdrawal from the account;

(g) a condition that a minimum balance must be maintained in the account;

(h) a condition relating to the account prescribed by, the regulations for the purposes of this subsection.

(3) So much of the amount standing to the credit of a judgment debtor in a withdrawable share account in a building society or credit unions 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.

(4) Where an amount standing to the credit of a judgment debtor in an account in a deposit-taking institution is attached, the garnishee order shall be deemed to operate as a notice of withdrawal or demand for payment under the contract between the garnishee and judgment debtor in respect of the account, and that notice or demand shall, while the order remains in force, be irrevocable and shill be deemed to have been received by the garnishee -

(a) on the date of service of the order; or

(b) where the judgment debtor is not entitled under the contract to give a notice of withdrawal or make a demand for payment on the date of service of the order - on the date on which the judgment debtor would, but for the order, have become so entitled.

(5) Any charge upon an amount standing to the credit of a judgment debtor in an account in a building society or credit union being a charge that is created by an Act under which the building society or credit union is registered or regulated or by the rules of the building society or credit union, shall be disregarded for the purposes of a garnishee order, but nothing in the foregoing shall affect the rights of the building society or credit union to set off or appropriate the whole or any part of that amount.

(6) Where -

(a) before the expiration of the period of 21 days after service of a garnishee order on a deposit-taking institution with respect to a debt, being an amount standing to the credit of a judgment debtor in an account, the garnishee pays to the registrar the debt attached to the extent of the attachment; and

(b) one of the conditions applicable to the account is that a passbook must be produced before any money or share is withdrawn.

the garnishee may, at the time of payment of that amount to the registrar, by instrument in writing signed by an officer of the deposit-taking institution, require the registrar to retain the amount so paid for any specified period not exceeding 2 months commencing on the date of payment thereof.

(7) Where -

(a) a registrar is required under subsection (6) by a garnishee to retain an amount for a period specified under that Subsection; and

(b) the garnishee during that period makes application for an order under this subsection on the ground that the garnishee has acted with reasonable diligence in relation thereto but nevertheless, because of the production of a current passbook relating to that amount or any part thereof, has (whether during or before that period paid to the judgment debtor the whole or any part of the debt attached or otherwise dealt with the debt attached so as to satisfy, as between the garnishee and the judgment debtor, the whole or any part of the debt attached,

the Court may, if it thinks fit order the registrar to repay that amount or any part thereof to the garnishee.

(8) Where a registrar is required under subsection (6) by a garnishee to retain an amount for a period specified under that subsection the registrar shall not pay that amount or any part thereof to the judgment creditor -

(a) until after -

(i) the garnishee, by instrument in writing signed by an officer of the deposit- taking institution, informs the registrar that, or the registrar is otherwise satisfied that, a current passbook relating to that amount or any part thereof has, during that period, come into the possession of the garnishee at the place of keeping of the account to the credit of which the amount was standing, or

(ii) the expiration of that period,

whichever first occurs; and

(b) unless the registrar is satisfied on such information as is Table to the registrar, that no application made during that period by the garnishee for an order under subsection (7) in relation to that amount or any part thereof is still pending,

and where that amount or any part thereof is ordered to be repaid to the garnishee under subsection (7), the balance (if any) only is payable to the judgment creditor.

(9) The Governor may make regulations, not inconsistent, with this Act, for or with respect to any matter that by this section is required or permitted to be prescribed by the regulations.

(10) Regulations may be made under this section so as to applv differently according to such factors as may be specified in the regulations.

(7) Section 105(3) -

Omit " 103 (5)", insert instead " 103 (7)".

Appendix B - Local Courts (Civil Claims) Amendment Bill 1985

A BILL FOR

An Act to amend the Local Courts (Civil Claims) Act 1970 with respect to the attachment of money deposited with banks, building societies and credit unions, and for other purposes.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same, as follows:

Short title

1. This Act may be cited as the "Local Courts (Civil Claims) Amendment Act 1985".

Commencement

2. (1) Sections I and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (l), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Amendment of Act No. 11, 1970

3. The Local Courts (Civil Claims) Act 1970 is amended in the manner set forth in Schedule 1.

Savings and transitional provisions

4. (1) Nothing in this Act applies to or in respect of a garnishee order made under section 47 of the Local Courts (Civil Claims) Act 1970 before the day appointed and notified under section 2(2).

(2) Subject subsection(l), the Local Courts (Civic Claims)Act 1970, as amended by this Act applies to and in respect of a judgment debt arising before the day appointed and if notified under section 2(2) as well as to and in respect of a judgment debt arising on or after notified under section 2(2).

SCHEDULE 1

(Sec.3)

AMENDMENTS TO THE LOCAL COURTS (CIVIL CLAIMS) ACT 1970

(1) Section 37 -

Omit "or 36A(l)", insert instead ", 36A(l) or 52(6)".

(2) (a) Section 47(l) -

Omit ", owing,".

(b) Section 47(2) (a) -

Omit the paragraph insert instead-

(a) except in a case to which paragraph (1)) applies or except in the case of an order to which section 48 applies, shall operate to attach in the hands of the garnishee, to the extent of the amount specified in the order, all debts which are due or accruing from the garnishee to the judgment debtor at the time of service of the order whether or not they were so due or accruing at the time when the order was made);

(c) Section 47(2)(b)-

After"attac'n",insert",totheextentoftheaMOLIntspecifiediiitheorder,".

Section 47(4) -

Omit the subsection, insert instead-

(4) A garnishee order shall specify the unpaid amount of the judgment debt owing to the judgment creditor and shall require the garnishee to pay, in accordance with this Act and the rules, the debt wage or salary attached or so much thereof as may be sufficient to satisfy the unpaid amount so specified in the order after deducting therefrom such amount (if any) as may be notified in writing to the garnishee by the judgment creditor or the registrar as having been paid or credited to the judgment creditor on account of that unpaid amount otherwise than pursuant to the order.

(3) Section 47A-47E-

After section 47, insert:

Affidavit that no debt due or accruing

47A, (1) Where a garnishee believes that, at the time of service of the garnishee order, there was no debt due or accruing from the garnishee to the judgment debtor, the garnishee may serve on the judgment creditor an affidavit to that effect, being an affidavit which contains a summary, of the grounds on which that belief is based.

(2) A disclosure of any information in an affidavit served pursuant to subsection (1) shall not, if the disclosure was in that case reasonable, subject the garnishee to any action liability, claim or demand whatever.

Time for payment by garnishee

47B. (1) Payment shall be made in accordance with a garnishee order not expressed to be for the attachment of any wage or salary -

(a) within the period of 21 days after service of the order on the garnishee, or

(b) in the case of any debt attached which is due for payment to the judgment debt or after the expiration of that period - not later than the date on which that debt is due for payment to the judgment debtor.

(2) Payment shall be made in accordance with a garnishee order expressed to be for the attachment of any wage or salary within the period of 14 days after the wage or salary is due for payment to the judgment debtor.

(3) Nothing in this section affects the operation of section 53.

Notice required for certain attached debts accruing

47C. (1) Where a garnishee order not expressed to be for the attachment of any wage or salary attaches a debt which is due for payment to the judgment debtor after the expiration of the period of 21 days after service of the order on the garnishee, the garnishee shall, before the expiration of that period serve on the 'judgment creditor a notice which complies with subsection (2).

(2) A notice under subsection (1) in respect of a debt shall specify -

(a) the date on which the debt is, or is likely to be, due for payment to the judgment debtor; and

(b) where the amount of the debt is less than the unpaid amount of the judgment debt specified in the garnishee order - the amount of the debt.

(3) A person shall not make in a notice served pursuant to subsection (1) a statement which to the persons knowledge, is false.

Penalty: $200.

Garnishee's costs

47D. Where a garnishee complies with a garnishee order (not being a garnishee order to which section 48 applies) within the time prescribed by section 47B and, where applicable, complies with section 47C(l) -

(a) the garnishee may retain out of the debt attached for the garnishee's own use the sum prescribed by the rules; and

(b) the amount so retained shall for the purposes of the debt attached, be deemed to have been paid by the garnishee to the judgment debtor.

Reduction of attached debt by court

47E. Where, after service of a garnishee order on the garnishee, the garnishee acts with reasonable diligence for the purpose of giving effect to the attachment but nevertheless pays to the judgment debtor the whole or any part of the debt attached or otherwise deals with the debt attached so as to satisfy, as between the garnishee and the judgment debtor, the whole or any part of the debt attached, the court may order that, for the purposes of the garnishee proceedings, the debt attached be reduced to the extent of the payment or satisfaction

(4) Section 48(3) -

After" attach', insert ", to the extent of the amount specified in the order,".

(5) Section 50(3) -

Omit “section 54 be deemed to have been paid by the garnishee”, insert instead “the wage or salary be deemed to have been paid by the garnishee to the judgment debtor”.

(6) (a) Section 52(3) (c) -

After “judgment debtor”, insert "or the unpaid amount of the judgment debt, whichever is the lesser,".

(b) Section 52(4) -

Omit the subsection insert instead:

(4) Where a garnishee appears to show cause as mentioned in subsection (3) and satisfies the court that the debt alleged by the judgment creditor to be owing by the garnishee to the judgment debtor is bona fide in dispute, the court shall -

(a) where it is satisfied that it would not have jurisdiction under this Act in an action relating to the debt - by its .order, discharge the garnishee order which shall thereupon cease to have any force or effect; or

(b) in any other case-order that the question of whether the garnishee is liable to pay the debt or any part of the debt to the judgment debtor be set down for hearing in the court at a time and on a date specified in the order.

(c) Section 52(5) -

Omit "an amount equal to so much of that debt alleged to be owing by the garnishee to the judgment debtor as will satisfy the judgment debt in whole or in part, insert instead "the amount of the debt alleged to be owing by the garnishee to the judgment debtor or the unpaid amount of the judgment debt whichever is the lesser,".

(d) Section 52(6),(7) -

After section 52(5), insert:

(6) The court may, in an order under subsection (4)(a) or in a judgment under subsection (5), order the payment of such amount as may be specified in the order or judgment by one party to the other -

(a) for or towards the reasonable professional costs incurred by that other party in connection with proceedings under this section;

(b) for or towards the reasonable expenses incurred by that other party in connection with the garnishee order; and

(c) for or towards witnesses expenses incurred by that other party.

(7) Costs or expenses allowed as referred to in subsection (6) shall-

(a) in the case of an order under subsection (4) (a) - be a judgment against the party liable to pay the costs or expenses; or

(b) in the case of a judgment under subsection (5) - form part of the judgment,

and shall be enforced accordingly.

(7) Section 52A -

Omit the section, insert instead:

Bank, building society and credit union accounts

52A- (1) In this section except in so far as the context or subject-matter otherwise indicates or requires -

“account” includes-

(a) a deposit account or withdrawable share account: and

(b) any record of depositor of subscription for withdrawable shares, but does not include an account or record which is prescribed by the rules as exempt from the operation of this section;

"bank" means -

(a) a bank within the meaning of the Banking Act 1959 of the Commonwealth as amended and in force for the time being; or

(b) a person who carries on State banking within the meaning of section 51 (xiii) of the Constitution of the Commonwealth;

“building society” means -

(a) society registered under the Permanent Building Societies Act 1967;

(b) a Starr-Bowkett society or a non-terminating building society registered under the Co-operation Act 1923;

(c) a society mentioned in the Second Schedule to the Cooperation Act 1923,

(d) a body in respect of which an exemption is in force under section 35 of the Permanent Building Societies Act 1967 or, in the case of a Starr-Bowkett society or a non-terminating building society, under section 61 of the Cooperation Act 192 3-,

“credit union” means-

(a) a credit union registered under the Credit Union Act 1969, or

(b) a body in respect of which an exemption is in force under section 28 of that Act;

"deposit-taking institution" means a bank building society or credit union.

(2) For the purpose of determining whether an amount standing to the credit of a judgment debtor in an account in a deposit-taking institution is attachable as a debt due or accruing to the judgment debtor, the following conditions shall be disregarded:

(a) a condition that a demand must be made before any money or share is withdrawn;

(b) a condition relating to the manner in which or the place at which any such demand is to be made;

(c) a condition that a passbook, receipt or other document must be produced before any money or share is withdrawn;

(d) a condition that notice is required before any money or share is withdrawn;

(e) except in the case of an account in a Starr-Bowkett society, a condition that any money or share shall not be withdrawn for any specified period;

(h) a condition prescribing a minimum amount in respect of any withdrawal from the account;

(g) a condition that a minimum balance must be maintained in the account;

(h) a condition relating to the account prescribed by the rules for the purposes of this subsection.

(3) 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.

(4) Where an amount standing to the credit of a judgment debtor in an account in a deposit- taking institution is attached, the garnishee order shall be deemed to operate as a notice of withdrawal or demand for payment under the contract between the garnishee and judgment debtor in respect of the account, and that notice or demand shall, while the order remains in force, be irrevocable and shall be deemed to have been received by the garnishee -

(a) on the date of service of the order or

(b) where the judgment debtor is not entitled under the contract to give a notice of withdrawal or make a demand for payment on the date of service of the order - on the date on which the judgment debtor would, but for the order, have become so entitled.

(5) Any charge upon an amount standing to the credit of a judgment debtorinanaccountinabuildingsocietyorcredituniorLbeingachargethatis created by an Act under which the building society or credit union is registered or regulated or by the rules of the building society or credit union, shall be disregarded for the purposes of a garnishee order, but nothing in the foregoing shall affect the rights of the building society or credit union to set off or appropriate the whole or any part of that amount.

(6) Where -

(a) before the expiration of the period of 21 days after service of a garnishee order on a deposit-taking institution with respect to a debt, being an amount standing to the credit of a judgment debtor's an account, the garnishee pays to the registrar the debt attached to the extent of the attachment; and

(b) one of the conditions applicable to the account is that a passbook must be produced before any money or share is withdrawn,

the garnishee may, at the time of payment of that amount to the registrar, by instrument in writing signed by an officer of the deposit- taking institution, require the registrar to retain the amount so paid for any specified period not exceeding 2 months commencing on the date of payment thereof.

(7) Where -

(a) a registrar is required under subsection (6) by a garnishee to retain an amount for a period specified under that subsection; and

(b) the garnishee during that period makes application for an order under this subsection on the ground that the garnishee has acted with reasonable diligence in relation thereto but nevertheless, because of the production of a current passbook relating to that amount or any part thereof, has (whether during or before that period) paid to the judgment debtor the whole or any part of the debt attached or otherwise dealt with the debt attached so as to satisfy, as between the garnishee and the judgment debtor, the whole or any part of the debt attached,

the court may, if it thinks fit order the registrar to repay that amount or any part thereof to the garnishee.

(8) Where a registrar is required under subsection (6) by a garnishee to retain an amount for a period specified under that subsection the registrar shall not pay that amount or any part thereof to the judgment creditor -

(a) until after-

(i) the garnishee, by instrument in writing signed by an officer of the deposit-taking institution, informs the registrar that or the registrar is otherwise satisfied that, a current passbook relating to that amount or any part thereof has, during that period, come into the possession of the garnishee at the place of keeping of the account to the credit of which the amount was standing; or

(ii) the expiration of that period,

whichever first occurs, and

(b) unless the registrar is satisfied, on such information as is available to the registrar, that no application made during that period by the garnishee for an order under subsection (7) in relation to that amount or any part thereof is still pending,

and where that amount or any part thereof is ordered to be repaid to the garnishee under subsection (7), the balance (if any) only is payable to the judgment creditor.

(8) Section 55(2)-

Omit "52A(5)", insert instead "52A(7)".

Appendix C - Submissions Received

Association of Central Credit Unions Limited
Association of New South Wales Credit Unions Limited
Australia and New Zealand Banking Group Limited
Commonwealth Bank of Australia
T M Gripper, Chief Solicitor, State Bank of New South Wales
National Australia Bank Limited
Permanent Building Societies Association (NSW) Ltd
The Newtown and Enmore Starr-Bowkett Building Co-operative Societies
The North Sydney Starr-Bowkett Building Co- operative Society No 9 [and No 10] Ltd
Westpac Banking Corporation