

Western Australia

## **Debtors Act 1871**

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## Debtors Act 1871

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Western Australia

## Debtors Act 1871

**An Act for the Punishment of Fraudulent Debtors, and for other purposes.**

*[Assented to 13 January 1871.]*

Be it enacted —

### PRELIMINARY

**1. Short title**

This Act may be cited for all purposes as the *Debtors Act 1871*.

**2. Commencement and construction of Act**

This Act shall not come into operation until the day on which *The Bankruptcy Act 1871*, comes into operation,<sup>1</sup> which day is hereinafter referred to as the commencement of this Act; and words and expressions defined or explained in *The Bankruptcy Act 1871*,<sup>2</sup> shall have the same meaning in this Act.

**Part I — Exceptions to the abolition of  
imprisonment for debt**

**3.        Power to commit for small debts**

Subject to the provisions herein after mentioned, and to the prescribed rules, any Court may commit to prison, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court.

Provided —

- (i)    That the jurisdiction by this section given of committing a person to prison shall, in the case of any Court other than the Supreme Court, be exercised only by an order made in open court, showing on its face the ground on which it is issued.
- (ii)   That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

Proof of the means of the person making default may be given in such manner as the Court thinks just; and for the purpose of such proof, the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules.

Any jurisdiction by this section given to the Supreme Court may be exercised by the Chief Justice sitting in Chambers, or otherwise, in the prescribed manner.

For the purposes of this section any Court may direct any debt due from any person, in pursuance of any order or judgment of that or any other Competent Court, to be paid by instalments, and may from time to time rescind or vary such order.

Persons committed under this section by the Supreme Court may be committed to the prison in which they would have been confined if arrested on a writ of *capias ad satisfaciendum*; and every order of committal by the Supreme Court shall, subject to the prescribed rules, be issued, obeyed, and executed in the like manner as such writ.

This section, so far as it relates to any Local Court, shall be deemed to be substitution for sections 51 and 52 of the Ordinance for the recovery of *Small Debts and Demands, 1863*; <sup>3</sup> and that Ordinance shall be construed accordingly, and shall extend to orders made by the Local Court with respect to sums due, in pursuance of any order or Judgment of any Court other than a Local Court.

No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place.

Any person imprisoned under this section shall be discharged out of custody upon a certificate signed in the prescribed manner, to the effect that he has satisfied the debt or instalment of a debt, in respect of which he was imprisoned, together with the prescribed costs (if any).

*[Section 3 amended by No. 4 of 1965 s.2.]*

*[4. Section 4 repealed by No. 36 of 1935 s.3.]*

**5. Saving for *Bankruptcy Act 1871***

Nothing in this part of this Act shall in any way affect any right or power under *The Bankruptcy Act 1871*, <sup>2</sup> to arrest or imprison any person.

**s. 6**

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**6.            Definition of “prescribed”**

In this part of this Act the term “**prescribed**” means as follows: —

As respects the Supreme Court, prescribed by general rules and orders to be made in pursuance of *The Supreme Court Ordinance, 1861*; <sup>4</sup>

As respects the Local Courts, prescribed by general rules to be made under *The Small Debts Ordinance, 1863*; <sup>3</sup>  
and

As respects any other Court, prescribed by the rules to be made, with the approval of the Chief Justice, by the persons having power to make rules in relation to the practice of such Court; or if there be no such persons, by the Judge of such Court.

And general rules and orders may respectively be made by such authorities as aforesaid, for the purpose of carrying into effect this part of this Act.



## **Part II — Punishment of fraudulent debtors**

*[7-10. Sections 7, 8, 9 and 10 repealed by 1 and 2 Edw. VII, No. 14 s.3.]*

### **11. Debts incurred by fraud**

Where a debtor makes any arrangement or composition with his creditors under the provisions of *The Bankruptcy Act 1871*,<sup>2</sup> he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends.

### **12.<sup>5</sup> Order by Court for prosecution on report of trustee**

Where a trustee in any bankruptcy reports to any Court exercising jurisdiction in bankruptcy, that in his opinion a bankrupt has been guilty of any offence under this Act, or where the Court is satisfied, upon the representation of any creditor or member of the committee of inspection, that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the Court shall, if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence.

### **13. Expenses of prosecution**

Where the prosecution of the bankrupt under this Act is ordered by the Court, then, on the production of the order of the Court, the expenses of the prosecution shall be allowed, paid, and borne, as expenses of prosecutions for felony are allowed, paid, and borne.

*[14-15. Sections 14 and 15 repealed by 1 and 2 Edw. VII, No. 14 s.3.]*

*[16. Repealed by 55 Vict. No. 32 s.145.]*

**s. 17**

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**17.        Punishments under this Act cumulative**

Where any person is liable under any other Act, Ordinance, Act of Parliament, or at Common Law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act, Ordinance, Act of Parliament, or at Common Law, or under this Act, so that he be not punished twice for the same offence.

### **Part III — Warrants of attorney, *cognovits*, and orders for judgment**

**18. Warrants of attorney and *cognovit actionem* to be executed  
in the presence of an attorney on behalf of the person**

After the commencement of this Act, a warrant of attorney to confess judgment in any personal action, or *cognovit actionem* given by any person, shall not be of any force unless there is present some attorney of the Supreme Court on behalf of such person, expressly named by him and attending at his request to inform him of the nature and effect of such warrant or *cognovit* before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be the attorney for the person executing the same, and state that he subscribes as such attorney.

**19. Warrants, etc., not formally executed invalid**

A warrant of attorney to confess judgment or *cognovit actionem*, not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.

**20. Filing of warrant of attorney and *cognovit actionem***

Where in an action a warrant of attorney to confess judgment or a *cognovit actionem* is given, and the same, or a true copy thereof, is not filed with the officer acting as clerk of the dockets and judgments within twenty-one days next after the execution thereof (as required by the statutory practice of the Supreme Court for preventing frauds upon creditors by secret warrants of attorney to confess judgment), the same shall be deemed fraudulent, and shall be void; and if any such warrant of attorney or *cognovit actionem* so filed was given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment with the warrant or

**s. 22**

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*cognovit* before the filing thereof, otherwise the warrant of *cognovit* shall be void.

[21. Section 21 repealed by No. 36 of 1935 s.3.]

**22. Application of 3 Geo. IV., c. 39 and 6 and 7 Vict., c. 66 to Judge's orders**

The provisions of the Act of the third year of King George the Fourth (chapter 39),<sup>6</sup> and of the Act of the session of the sixth and seventh years of Her Majesty's reign (chapter 66),<sup>6</sup> "To enlarge the provisions of an Act for preventing frauds upon creditors by secret warrants of attorney to confess judgment," for liberty to file a warrant of attorney or *cognovit actionem*, or a copy thereof, with the clerk of the dockets and judgments, and for the clerk to make certain entries and search in relation thereto, and for entering satisfaction thereon, and for fees for search, and filing and taking office copies, shall extend and be applicable to every such Judge's order.

**REPEAL**

**23. Enactments described in schedule repealed**

The enactments described in the Schedule of this Act are hereby repealed; but this repeal shall not affect the past operation of any such enactment, or affect the validity or invalidity of anything done or suffered before the commencement of this Act, or of any right, title, obligation, or liability accrued, or restriction imposed, before the commencement of this Act, by or under any such enactment; nor shall this repeal interfere with the institution or prosecution of any proceedings in respect of any offence committed against, or under any penalty or forfeiture incurred under, any enactment hereby repealed.

## Schedule

### ENACTMENTS REPEALED

20 Vict. 9	An Ordinance to enlarge the remedies of creditors against the persons of their debtors.	
24 Vict. 15. ( <i>in part</i> )	An Ordinance to provide for the (in part) more effectual administration of Justice by establishing a Supreme Court	} In part: namely, Section 25.
27 Vict. 21. ( <i>in part</i> )	An Ordinance for the recovery of small debts and demands.	
31 Vict. 8. ( <i>in part</i> )	An Act for adopting certain Acts of Imperial Parliament	} In part: namely, Sections 51 to 54 both inclusive, and Section 73.
		} In part: namely, so much and so far as adopts and puts in force the tenth Section of an Act of the Imperial Parliament (18 & 19 Vic. c.15), intituled <i>An Act for the better protection of purchasers against judgments, Crown debts, cases of lis pendens, and life annuities or rent charges.</i>

**Notes**

- <sup>1.</sup> This is a compilation of the *Debtors Act 1871* and includes the amendments made by the other written laws referred to in the following table.

**Compilation table**

Short title	Number and Year	Assent	Commencement	Miscellaneous
<i>Debtors Act 1871</i>	34 Vict. No. 21 1871	13 January 1871	1 April 1871 (see 34 Vict. No. 20 section 2)	
<i>The Bankruptcy Act 1892</i>	55 Vict. No. 32	18 March 1892	1 May 1892 (see 55 Vict. No. 20 section 3)	
<i>The Criminal Code, Schedule 3</i>	1 and 2 Edward VII No. 14	19 February 1902	1 May 1902 (see 1 and 2 Edw. VII. No. 14 section 2)	
<i>Supreme Court Act 1935, section 3</i>	36 of 1935	3 April 1936	1 May 1936 (see <i>Gazette</i> 9 April 1936 p.527)	Reserved 7 January 1936 (see 34 Vict. No. 20 section 2)
<i>Debtors Act Amendment Act 1965</i>	4 of 1965	15 September 1965	15 September 1965	

- <sup>2.</sup> Repealed by *Bankruptcy Act 1892*.

- <sup>3.</sup> Now see *Local Courts Act 1904*.

- <sup>4.</sup> Now see *Supreme Court Act 1935*.

- <sup>5.</sup> Section 140 of the *Bankruptcy Act 1892* (Act 55 Vict. No. 32), provides —

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**140.** Section twelve of the *Debtors Act 1871*, shall be construed and have effect as if the term a trustee in any bankruptcy: included the official receiver of a bankrupt's estate, and shall apply to offences under this Act as well as to offences under the *Debtors Act 1871*.

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- <sup>6.</sup> Repealed by 4 and 5 Elizabeth 2, c. 46, s. 16. (*Administration of Justice Act 1956*.)