

RESTRAINT OF DEBTORS ACT 1984.

(No. 73 of 1984.)

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RESTRAINT OF DEBTORS.

No. 73 of 1984.

AN ACT to make provision for and in respect of the protection of creditors in certain circumstances and to repeal the Absconding Debtors Act 1877.

[Assented to 29 November 1984.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I—PRELIMINARY.

1. This Act may be cited as the *Restraint of Debtors Act 1984*. Short title.

Commence-
ment.

2. This Act shall come into operation on a day to be fixed by proclamation.

Interpreta-
tion.

3. (1) In this Act, unless the contrary intention appears—

“applicant” means a person applying for an order or warrant under this Act;

“debt” means any sum of money, whether liquidated or not and whether pursuant to an order or judgment or otherwise, that is due and legally recoverable in the State or for which a person has a cause of action in the State, and “indebted” has a corresponding meaning;

“debtor” means—

(a) in relation to proceedings under Part II, a natural person who an applicant alleges is indebted to the applicant; and

(b) in relation to proceedings under Part III, a person, whether a natural person or a body corporate, who or which an applicant alleges is indebted to the applicant;

“judicial officer” means—

(a) in relation to the Supreme Court, a Judge, a Master, the Principal Registrar, or a Registrar of the Supreme Court duly appointed under the Supreme Court Act 1935 or a duly appointed acting Judge, acting Master, acting Principal Registrar, or acting or Deputy Registrar of the Supreme Court;

(b) in relation to the District Court a Judge or acting Judge of that court or—

- (i) where that court sits at Perth, the Registrar of that court;
- (ii) where that court sits at any place other than Perth, the Deputy Registrar of that court sitting at that other place;

“property” means real or personal property and includes any legal or equitable interest in such property.

(2) A reference in this Act to the transfer of property includes a reference to the sale, or the assignment otherwise than for valuable consideration, of that property.

(3) For the purposes of Part II, a person or a court, as the case may be, is satisfied as to all material matters in relation to an application concerning a debtor if he or it is satisfied that there are reasonable grounds for believing that—

- (a) the debtor is indebted to the applicant;
- (b) the debtor is about to leave the State;
- (c) the absence of the debtor from the State would defeat, endanger, or materially prejudice the prosecution of the claimant's cause of action or the prospects of enforcing a judgment;
- (d) the alleged debt is for an amount not less than \$500 or such greater amount as may be prescribed; and
- (e) the application has been made within a reasonable time after the circumstances relied on as evidence of the debtor's intention to leave the State came to the knowledge of the applicant.

(4) For the purposes of Part III, a court is satisfied as to all material matters in relation to an application concerning a debtor if it is satisfied that there are reasonable grounds for believing that—

- (a) the debtor is indebted to the applicant;
- (b) the debtor has property situated in the State;
- (c) property of the debtor is about to be—
 - (i) transferred; or
 - (ii) removed from the State;
- (d) transfer of, or removal from the State of, the property would defeat, endanger, or materially prejudice the prosecution of the claimant's cause of action or the prospects of enforcing a judgment;
- (e) the alleged debt is for an amount that is not less than \$500 or such greater amount as may be prescribed; and
- (f) the application has been made within a reasonable time after the circumstances relied on as evidence of the impending transfer or removal from the State of property came to the knowledge of the applicant.

Married
women.

4. Where a debt would, by reason of the Married Women's Property Act 1892, be recoverable out of the separate property of a married woman, that married woman is to be regarded for the purposes of this Act as being indebted to the person who would be entitled to so recover the debt, and this Act applies in relation to that married woman as to any other debtor.

PART II—ABSCONDING DEBTORS.

5. (1) Subject to this Act, a person may, at any time, for the purpose of preventing a debtor from leaving the State, apply—

Application
for warrant.

- (a) where proceedings in respect of the debt to which the application relates have been commenced in the Supreme Court or District Court, to a judicial officer of that court or to any magistrate or justice;
- (b) in any other case, to any magistrate or justice,

for a warrant to issue for the arrest of the debtor.

(2) An application under subsection (1) shall be—

- (a) in the prescribed form; and
- (b) supported by an affidavit—
 - (i) as to all material matters in relation to which the person to whom the application is made is required by section 6 to be satisfied before issuing a warrant or summons under that section;
 - (ii) as to whether any previous application has been made under this section or section 17 in respect of the same debtor in relation to the same debt;
 - (iii) as to whether any other application has, within the period of one year last preceding the making of the application for which the affidavit is required, been made under this section or section 17 in respect of the same debtor in relation to any other debt; and

- (iv) where any application as referred to in subparagraph (iii) has been made, setting out details of the debt concerned, the outcome of the application, and such other particulars, if any, as may be prescribed.

Issue of
warrant or
summons.

6. (1) A person to whom an application is made under section 5 (1) for a warrant to issue may, if he is satisfied as to all material matters—

- (a) issue a warrant directed to a non-commissioned officer or constable of the Police Force for the debtor named in the application to be arrested and brought before the court specified in the warrant;

or

- (b) issue a summons addressed to the debtor named in the application requiring him to appear before the court specified in the summons at a time and place so specified.

(2) A warrant or summons issued under subsection (1) shall be in the prescribed form, shall specify the amount of the alleged debt and the costs, if any, that are claimed by the applicant, and shall bear such other endorsements, if any, as are prescribed.

(3) The court specified in a warrant or summons issued under subsection (1) shall be the Supreme Court, the District Court, a Local Court, or a court of petty sessions.

Warrant
where
default
on summons
anticipated.

7. (1) Where upon an application under section 5 (1) a summons is issued requiring the debtor to appear before a court specified in the summons at a time so specified and before the time so specified the applicant has reasonable grounds for believing

that the debtor is unlikely to appear in accordance with the summons, he may make a further application to any person to whom an application may be made under section 5 (1) for a warrant to issue for the arrest of the debtor.

(2) A person to whom an application is made under subsection (1) may, if he is satisfied that there are reasonable grounds for the applicant's belief that the debtor is unlikely to appear in accordance with the summons, issue a warrant directed to a non-commissioned officer or constable of the Police Force for the debtor to be arrested and brought before the court specified in the warrant, being a court referred to in section 6 (3).

8. (1) A person who issues a warrant or summons under section 6 shall cause to be transmitted to the registry of the court before which the debtor is to be brought or is required to appear—

Transmission
of warrant or
summons to
court.

- (a) the application under section 5 (1);
- (b) the affidavit or, if there be more than one, every affidavit in support of the application under section 5 (1); and
- (c) a copy of the warrant or summons so issued.

(2) A person who issues a warrant under section 7 shall cause a copy of the warrant so issued to be transmitted to the registry of the court before which the debtor is to be brought.

9. A summons issued under section 6 shall be served personally on the debtor named in the summons not less than 7 days before the day on which he is summoned to appear, and shall be accompanied by a copy of—

Service of
summons.

- (a) the application upon which the summons was issued; and
- (b) the affidavit or, if there be more than one, every affidavit in support of the application.

Appearance
upon
summons
may be
avoided.

10. (1) A debtor who has, in accordance with section 9, been served with a summons issued under section 6 is not required to appear as specified in the summons if, before the time so specified for his appearance, he—

- (a) tenders to the applicant, in a form acceptable to the applicant, the amount of money specified in the summons as the alleged debt and costs;
- (b) gives security, either with or without surety, to the satisfaction of the applicant for the payment of the amount of money so specified; or
- (c) deposits with the court before which he is required to so appear the amount of money so specified, to abide the determination of the claim.

(2) Where, under subsection (1), a debtor tenders or deposits, or gives security for the payment of, the amount of money specified in a summons issued under section 6 and any notice thereof required by the regulations to be given to the court has been given, a warrant shall not be issued under section 7 or 15 in relation to that summons.

Execution of
warrant.

11. (1) A warrant issued under section 6, 7, or 15 may be executed in the State by a non-commissioned officer or constable of the Police Force within one month from the day on which the warrant was issued.

(2) A person executing a warrant referred to in subsection (1) shall—

- (a) at the time of, or as soon as practicable after, executing the warrant, serve the debtor with—
 - (i) a copy of the warrant; and

- (ii) where the warrant was issued under section 6 or 7, a copy of the application upon which the warrant was issued and any affidavit in support of the application;
- (b) endorse on the warrant the time and place at which the warrant was executed; and
- (c) forthwith take the debtor to the nearest police station.

(3) A person upon whose application a warrant is issued under section 6, 7, or 15 shall pay in respect of the execution or attempted execution of that warrant such fee as is prescribed by the regulations and the amount of any fee so payable may be recovered from that person in a court of competent jurisdiction as a debt due to the Crown.

12. The officer in charge of a police station to which a debtor is brought in accordance with section 11 (2) (c) shall—

Arrested
debtor
brought
before court.

- (a) hold the debtor in custody; and
- (b) except where he releases the debtor from custody under section 13 (a) or (b), cause the debtor to be brought before the court specified for that purpose in the warrant within 24 hours of receiving the debtor into custody, or as soon after the expiry of that period as is practicable.

13. An officer in charge of a police station who is holding a debtor in custody under section 12 shall release the debtor from custody if—

Release of
arrested
debtor.

- (a) the debtor—
 - (i) tenders to the applicant, in a form acceptable to the applicant, the amount of money specified in the warrant as the alleged debt and costs;

- (ii) gives security, either with or without surety, to the satisfaction of the applicant for the payment of the amount of money so specified; or
 - (iii) pays to the officer so in charge for deposit with the court specified in the warrant the amount of money so specified, to abide the determination of the claim;
- (b) the applicant consents in writing to the release of the debtor; or
- (c) an order is made under section 14 or Part V for the release of the debtor.

Preliminary
hearing.

14. (1) Subject to subsection (2), the court before which a debtor is brought in accordance with a warrant issued under section 6, 7, or 15 or before which a debtor appears in answer to a summons issued under section 6 may make such order as it thinks fit including an order—

- (a) that, where the debtor is in custody, the debtor be released, either conditionally or unconditionally, from custody;
- (b) that the debtor undertake in writing, in a form approved by the court, that he will not leave the State until a specified amount of money is paid;
- (c) that the debtor give security, either with or without surety, for the payment of a specified amount of money;
- (d) that the debtor deposit a specified amount of money with the court to abide the determination of the claim;
- (e) that the debtor surrender any ticket, passport, or other document to the court;

- (f) that, within such time and in such manner as is specified, the applicant take such action for the recovery of the alleged debt as is specified; and

- (g) as to costs.

(2) If the court before which a debtor is brought as referred to in subsection (1) is not satisfied as to all material matters it shall order that the debtor be released, either conditionally or unconditionally, from custody.

(3) In subsection (1) "specified", in relation to an order, means specified by the court making the order.

15. Where a debtor who has, in accordance with section 9, been served with a summons issued under section 6 does not appear before the court specified in the summons at the time and place so specified, the person upon whose application the summons was issued may apply for and the court may, upon being satisfied that service was so effected, issue a warrant directed to a non-commissioned officer or constable of the Police Force for the debtor to be arrested and brought before the court as soon as practicable after his arrest.

Failure to
appear upon
summons.

16. (1) A member of the Police Force may, without a warrant—

Failure to
comply with
conditions.

- (a) arrest a debtor who is conditionally released from custody pursuant to an order under section 14 or Part V if the member of the Police Force reasonably suspects that the debtor has failed, or is about to fail, to comply with a condition subject to which he was so released from custody;
- (b) arrest a debtor who, pursuant to an order under section 14 (1) (b) or Part V, has given an undertaking that he will not leave the State until a specified amount of money

is paid, if the member of the Police Force reasonably suspects that the debtor has breached, or is about to breach, that undertaking.

(2) A member of the Police Force who arrests a debtor under subsection (1) shall, within 24 hours of the arrest of the debtor, or as soon after the expiry of that period as is practicable, bring the debtor before the court that ordered his release from custody or ordered him to give the undertaking, as the case may be.

(3) The court before which a debtor is brought under subsection (2) may—

- (a) revoke an order pursuant to which the debtor was released if it is satisfied that the debtor has failed, or was or is about to fail, to comply with a condition of the order; and
- (b) make such order as it sees fit including any order that could have been made under section 14 (1) when the debtor was brought before or appeared before, that court as referred to in that provision.

(4) Where, under subsection (3), a court revokes an order pursuant to which a debtor was released, the debtor is, by force of the order of revocation, committed to police custody and shall thereafter be held in custody as if the order for the debtor's release had not been made.

PART III—RESTRAINT ON TRANSFER OR REMOVAL OF PROPERTY.

Application
for
restraining
order.

17. (1) Subject to this Act, a person may, at any time, apply for an order restraining—

- (a) the transfer of any of the property of a debtor that is situated in the State; or
- (b) the removal from the State of any of the property of a debtor that is situated in the State.

(2) An application under subsection (1) may be made—

- (a) where proceedings in respect of the alleged debt to which the application relates have been commenced in any court referred to in section 6 (3), to that court;
- (b) in any other case, to any such court in which proceedings might be commenced in respect of the alleged debt to which the application relates.

(3) An application under subsection (1) shall be—

(a) in the prescribed form; and

(b) supported by an affidavit—

- (i) as to all material matters in relation to which the court to which the application is made is required by section 19 (2) to be satisfied before making an order under section 19 (1);
- (ii) as to whether any previous application has been made under section 5 or this section in respect of the same debtor in relation to the same debt;
- (iii) as to whether any other application has, within the period of one year last preceding the making of the application for which the affidavit is required, been made under section 5 or this section in respect of the same debtor in relation to any other debt; and

- (iv) where any application as referred to in subparagraph (iii) has been made, setting out details of the debt concerned, the outcome of the application, and such other particulars, if any, as may be prescribed.

Hearing of
application.

18. (1) Subject to subsection (3), an application under section 17 may be heard and determined *ex parte*.

(2) The court hearing an application under section 17 may order that—

- (a) the applicant take such steps as the court sees fit to ascertain the ownership of property in respect of which an order is sought; and
- (b) the applicant serve or cause to be served on the debtor or any other person—
 - (i) a copy of the application and any affidavit in support of the application; or
 - (ii) notice of the application.

(3) A person other than the debtor who has an interest in property in respect of which an order is sought may, whether or not he has been served with a copy of, or given notice of, the application, take part in the proceedings as a party thereto.

Making of
restraining
order.

19. (1) Upon an application made under section 17 the court to which the application is made may make such order as it sees fit, which may include an order as to costs.

(2) An order restraining the transfer or removal from the State of property shall not be made under subsection (1) unless the court making the order is satisfied as to all material matters.

PART IV—CONSENT JURISDICTION.

20. (1) Where the court before which a debtor is brought in accordance with a warrant issued under this Act or appears in answer to a summons issued under section 6, or the court to which an application is made under section 17, in relation to an alleged debt is not a court of competent jurisdiction for the recovery of the alleged debt, the court may—

Determina-
tion of
claim.

- (a) with the consent of the debtor and the applicant, hear and determine the claim for the alleged debt as if the proceedings under this Act were proceedings in a court of competent jurisdiction for the recovery of the alleged debt;
- (b) decline to hear and determine any claim under paragraph (a) or, having commenced to hear any claim under that paragraph, decline to further hear and determine the claim;
- (c) in respect of the hearing under this Part of a claim, or any part of a claim, make such order as to costs as it sees fit.

(2) A court having jurisdiction under subsection (1) to hear and determine a claim may make such orders as it sees fit to enable the matter to be continued and disposed of as proceedings in a court of competent jurisdiction.

(3) A decision of a court in proceedings under this section has effect and may be enforced as a decision of a court of competent jurisdiction.

PART V—REVIEW.

21. (1) An applicant, debtor, or other person who is a party to proceedings under this Act may apply for an order—

Application
for review.

- (a) that a warrant or summons issued under this Act be varied or set aside;

(b) that an order made in proceedings under this Act be varied or quashed; or

(c) where the debtor is in custody under this Act, that the debtor be released from custody,

or for any order sought in proceedings under this Act that the court hearing those proceedings declined to make.

(2) An application under subsection (1) for an order—

(a) that a warrant or summons issued under this Act be varied or set aside; or

(b) that a debtor who has been arrested pursuant to a warrant issued under this Act be released from custody,

may be made to the person who issued the warrant or summons or to the Supreme Court.

(3) An application under subsection (1) other than an application to which subsection (2) applies may be made to the court that made or declined to make the order concerned, as the case may be, or to the Supreme Court.

(4) A person aggrieved by a decision or order made other than by the Supreme Court upon the hearing of an application under subsection (1) may apply to the Supreme Court for the review of that decision or order.

Review.

22. (1) Where an application is made under section 21 the person to whom or the court to which the application is made has jurisdiction to hear and determine the application and may make such order as he or it sees fit, which may include an order as to costs.

(2) An order made under subsection (1) shall have effect according to its tenor and where an order is so made as to costs other than by a court, it may be lodged in a Local Court and enforced as an order of that court.

(3) An application made under section 21 to the Supreme Court shall be heard by a single Judge sitting in chambers.

23. Where under this Act a summons or warrant is issued or an order is made in proceedings relating to a debt and under section 22 the summons or warrant is set aside or the order is varied or quashed, the person who instituted the proceedings shall not, within 6 months of the setting aside of the warrant or summons or varying or quashing of the order, as the case may be, make any further application under Part II or Part III that relates to the same debtor and to the same debt, or any part thereof, unless—

Further
proceedings
restrained.

(a) the applicant introduces further information in support of the application that was not, and could not reasonably have been, introduced at the time when the warrant or summons was set aside or the order was varied or quashed; or

(b) the person who or court that set aside the warrant or summons or varied or quashed the order, having regard to the merits of the case, gives the applicant leave to make such further application within that time.

24. Where this Act provides for the review of a matter proceedings in the nature of an appeal shall not be instituted in respect of that matter under any other Act.

Appeals
under
other Acts
excluded.

PART VI—MISCELLANEOUS.

Protection.

25. A member of the Police Force or other person on whom a power is conferred or duty is imposed under this Act is not personally liable in civil proceedings, and the Crown is not liable, for any act done or default made by him in good faith for the purpose, or purportedly for the purpose, of carrying this Act into effect.

Improper applications.

26. A person shall not make any application under section 5, 7 or 17 if—

- (a) the applicant has reasonable cause to believe that—
 - (i) he does not have a cause of action for the alleged debt that is recognized by the law; or
 - (ii) the amount likely to be recovered in the action is less than \$500 or such greater amount as may be prescribed;
- (b) in the case of an application under section 5, the applicant has no reasonable cause to believe that—
 - (i) the debtor intends to leave the State; and
 - (ii) the absence of the debtor from the State would defeat, endanger, or materially prejudice the prosecution of the claimant's cause of action or the prospects of enforcing a judgment; or
- (c) the application has not been made within a reasonable time after the circumstances relied on as evidence of—
 - (i) in the case of an application under section 5, the debtor's intention to leave the State;

- (ii) in the case of an application under section 17, the impending transfer or removal from the State of property,

came to the knowledge of the applicant.

Penalty: \$2 000.

27. (1) Where a person makes an application under this Act without reasonable cause or contrary to any provision of this Act, the debtor shall be entitled to recover from that person in a court of competent jurisdiction—

Special civil
remedy.

- (a) any expenses actually and reasonably incurred by the debtor as a result of the making of the application; and
- (b) any moneys outlaid by the debtor before he became aware of the making of the application where—
 - (i) the purpose for which the moneys were outlaid is, as a result of the making of the application, defeated;
 - and
 - (ii) the moneys outlaid are not legally recoverable by the debtor.

(2) The remedy provided by subsection (1) does not restrict, limit or otherwise affect any other remedy that the debtor may have against any person.

28. Subject to this Act and to any order or direction of the court to which an application is made under this Act, the practice and procedure to be adopted for proceedings under this Act shall, in so far as is practicable, be as are generally applicable to proceedings in that court or as may otherwise be prescribed in the rules of court.

Procedure

Savings.

29. Nothing in this Act restricts, limits, or otherwise affects—

- (a) any other jurisdiction or powers of any court or person; or
- (b) any other remedy a person may have against a debtor.

Regulations.

30. The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act and in particular—

- (a) prescribing the circumstances in which and the person to whom a court with which money is deposited in accordance with an order of the court or under section 10 (1) (c) or 13 (a) (iii) shall pay out money so deposited;
- (b) providing for a court before which a debtor has been summoned to appear to be notified where, before the time specified for his appearance, the debtor tenders, or gives security for the payment of, the amount of money specified in the summons as the alleged debt and costs;
- (c) creating offences against those regulations and prescribing penalties not exceeding \$200 in respect of those offences.

Repeal.

31. The Absconding Debtors Act 1877 is repealed.
