



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 73

The Absconding Debtors Act 1877-1965

REPORT

DECEMBER 1981

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

The Commissioners are -

Mr D K Malcolm, QC, Chairman

Mr E G Freeman

Mr H H Jackson

Mr C W Ogilvie

Mr L L Proksch.

The Executive Officer and Director of Research is Mr P H Clarke. The Commission's offices are on the 16th Floor, City Centre Tower, 44 St George's Terrace, Perth, Western Australia, 6000. Telephone: 325 6022.

To: THE HON I G MEDCALF, QC, MLC
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on the *Absconding Debtors Act 1877-1965*.

David K Malcolm, QC
Chairman

17 November 1981

CONTENTS

CHAPTER 1 - INTRODUCTION

- | | | |
|----|-------------------------|-----|
| 1. | TERMS OF REFERENCE | 1.1 |
| 2. | PRELIMINARY SUBMISSIONS | 1.2 |
| 3. | THE WORKING PAPER | 1.3 |

CHAPTER 2 - THE ABSCONDING DEBTORS ACT 1877-1965

- | | | |
|----|--------------------------------------|------|
| 1. | HISTORICAL BACKGROUND | 2.1 |
| 2. | SUMMARY OF THE ACT | 2.7 |
| 3. | FIRST WARRANT | 2.8 |
| 4. | SECOND WARRANT | 2.13 |
| 5. | FREQUENCY OF USE | 2.15 |
| 6. | COSTS | 2.16 |
| 7. | TERMINATION OF SECOND WARRANT | 2.17 |
| 8. | OFFENCES | 2.20 |
| 9. | IS THE ACT A VALID LAW OF THE STATE? | 2.21 |

CHAPTER 3 - OTHER COMPARABLE LEGISLATION

- | | | |
|----|--|-----|
| 1. | LEGISLATION PREVENTING A PERSON LEAVING THE STATE | 3.1 |
| 2. | SECTION 25(9) OF THE SUPREME COURT ACT 1935-1981:
THE MAREVA INJUNCTION | 3.5 |

CHAPTER 4 - THE LAW ELSEWHERE

- | | | |
|----|---|-----|
| 1. | INTRODUCTION | 4.1 |
| 2. | LEGISLATION COMPARABLE WITH THE ABSCONDING
DEBTORS ACT 1877-1965 | |
| | (a) South Australia | 4.2 |
| | (b) Northern Territory | 4.3 |
| 3. | LEGISLATION COMPARABLE WITH SECTION
63(2)-(4) OF THE SUPREME COURT ACT 1935-1981 | 4.5 |

CHAPTER 5 - THE NEED FOR LEGISLATION 5.1

CHAPTER 6 - RECOMMENDATIONS : THE SCOPE OF NEW LEGISLATION

- | | | |
|----|--|-----|
| 1. | INTRODUCTION | 6.1 |
| 2. | DEFEATING, ENDANGERING OR MATERIALLY
PREJUDICING THE PROSECUTION OF A CAUSE OF
ACTION OR THE PROSPECTS OF ENFORCING A JUDGMENT | 6.2 |
| 3. | CAUSES OF ACTION | 6.4 |
| 4. | AMOUNT OF MONEY INVOLVED | 6.6 |
| 5. | MARRIED WOMEN | 6.9 |

CHAPTER 7 - RECOMMENDATIONS: PROCEDURE

1.	INTRODUCTION	7.1
2.	INSTITUTION OF PROCEEDINGS	7.2
3.	THE APPROPRIATE JUDICIAL OFFICER	7.4
4.	ISSUE OF A SUMMONS OR WARRANT	7.6
5.	EXECUTION OF A WARRANT	7.7
6.	OBTAINING THE RESPONDENT'S RELEASE	7.9
7.	PREVENTING THE RESPONDENT FROM LEAVING THE STATE	7.13

CHAPTER 8 - RECOMMENDATIONS: SAFEGUARDS

1.	PROTECTION OF RESPONDENTS	8.1
2.	REVIEW OF DECISIONS AND DISCHARGE OF WARRANTS	8.5

CHAPTER 9 - SUMMARY OF MAIN RECOMMENDATIONS 9.1

APPENDIX I - LIST OF THOSE WHO COMMENTED ON THE WORKING PAPER

APPENDIX II - THE ABSCONDING DEBTORS ACT 1877-1965

APPENDIX III - CHAPTER 2 OF THE WORKING PAPER - "IS THE ACT A VALID LAW OF THE STATE?"

APPENDIX IV- THE ABSCONDING DEBTORS ACT 1978-1979 (NORTHERN TERRITORY)

CHAPTER 1 INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission was asked to review the *Absconding Debtors Act 1877-1965*.

2. PRELIMINARY SUBMISSIONS

1.2 In order to gather information about the manner in which the Act was used the Commission asked The Stipendiary Magistrates' Institute of Western Australia, the Royal Association of Justices of Western Australia and the Law Society of Western Australia to assist it in obtaining information from their members on the matters the subject of the reference. The Commission also sought preliminary comments from the members of these Associations on the question whether the Act should be retained and, if so, on ways in which it might be improved. Comments were received from a number of magistrates and legal practitioners, justices of the peace and the Royal Association of Justices of Western Australia.

3. THE WORKING PAPER

1.3 In December 1980, the Commission issued a working paper¹ to inform the public of the issues involved in the project and to elicit comment. The names of individuals and organisations who commented are listed in Appendix I to this Report.

¹ *The Absconding Debtors Act 1877-1965* (December 1980). Referred to in this Report as the "Working Paper".

CHAPTER 2

THE ABSCONDING DEBTORS ACT 1877-1965

1. HISTORICAL BACKGROUND

2.1 At common law from early times processes were available in actions for breach of civil obligations whereby debtors could be arrested and imprisoned either before or after judgment. The plight of such debtors, and the occasional use of imprisonment by fraudulent debtors,¹ led to statutes to remedy some of the defects in these procedures.² In Western Australia, the first such Act was the first Act passed in the Colony. This Act established a Court of Civil Judicature.³ Section 8 provided that all actions in the Civil Court should be commenced by summons and not by arrest and that all process of execution was to be directed against property and not the person. This provision thus abolished not only imprisonment by way of execution of a judgment debt, but the processes involving arrest and imprisonment prior to judgment, such as the common law remedy of *capias ad respondendum* and the equitable remedy of *ne exeat*.⁴ This reluctance to provide for arrest or imprisonment in civil actions appears to have been prompted at least in part by a want of a proper prison for the reception of persons so arrested and a want of funds to maintain people while in prison.⁵

2.2 There was one exception to this reluctance to use imprisonment or arrest in civil matters. Section 9 of the Act establishing a Court of Civil Judicature provided that a person having a ground of action against any other person about to leave the Colony could apply for a warrant for that person's arrest. Unless the person about to leave the Colony gave reasonable security to abide the result of proceedings in the Court, he could be kept in custody until the termination of the proceedings. The person applying for such a warrant was required to prosecute the case with reasonable diligence. If not, the person in custody could be discharged.

¹ If a debtor refused to present himself at trial, the court could not proceed to judgment. Also the debtor could avoid execution against certain of his property. Not all those imprisoned were in distressed circumstances, and some even practised professions from prison.

² See generally, D St L Kelly, *Debt Recovery in Australia* (1977), Chp 3

³ 2 Wm IV No 1, *Court of Civil Judicature Act 1832*. As to the early history of law in the Colony see generally E Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (1980) esp Chp 9.

⁴ As to *ne exeat*, see generally R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (1975), 63.

⁵ See 6 Wm IV No 1, *Court of Civil Judicature Act Amendment Act 1836*, s 10.

2.3 In 1861 the Court of Civil Judicature was replaced by a Supreme Court and the Act establishing a Court of Civil Judicature was repealed by the *Supreme Court Ordinance*. Sections 8 and 9 of the 1832 Act were substantially re-enacted.⁶ The procedure for the arrest of a person about to leave the Colony was restricted, however, to claims for sums of twenty pounds or more.⁷

2.4 Local Courts were established by the *Small Debts Ordinance 1863*. These courts had jurisdiction to hear claims for debts or damages with respect to sums up to fifty pounds. However, they did not have power to prevent a debtor leaving the Colony. Section 25 of the *Supreme Court Ordinance 1861* was repealed by the *Debtors Act 1871*. Section 4 of this Act provided that a defendant in an action in the Supreme Court involving a claim of fifty pounds or more who was about to quit the Colony could, in certain circumstances, be prevented from leaving the Colony if his absence from Western Australia would "materially prejudice the plaintiff in the prosecution of his action". The equivalent of this provision is now found in section 63(2)-(4) of the *Supreme Court Act 1935-1981*.⁸ The 1871 Act followed the English *Debtors Act of 1869*.

2.5 In the same year, the *Absconding Debtors Act 1871* provided for the arrest of debtors owing a sum not less than ten pounds⁹ and under fifty pounds where there was probable ground for believing that the debtor was about to quit the Colony in some vessel then in port. Once the debtor was arrested, the case could be heard and determined by a magistrate. The magistrate, if satisfied that the debtor was indebted to the applicant, could commit the debtor to prison, in default of payment of the debt, until the vessel left the port, or until the debtor gave security not to depart the Colony in the vessel. This Act was repealed by the *Absconding Debtors Act 1877-1965*.

2.6 The *Absconding Debtors Act 1877-1965* was enacted mainly because of difficulties encountered with an assisted passage scheme introduced in 1875. The Government of the Colony found that many immigrants under the scheme did not settle in Western Australia but travelled on to Victoria and New South Wales. The Government therefore required all such

⁶ Sections 23 and 25 respectively of the *Supreme Court Ordinance 1861*.

⁷ Id, s 25. Also, An Act to Extend the Remedies of Creditors Against Debtors About to Leave the Colony (1844) 8 Vict, No 10, provided that if the sole acceptor of a bill payable in the colony was about to leave the colony he could be arrested and action taken against him even though the bill was not due.

⁸ See paras 3.1 and 4.5 to 4.8 below.

⁹ Between 1861 and 1871 therefore there had been no power to so restrict a debtor owing less than twenty pounds.

immigrants after 1876 to enter into an agreement to remain in the colony for three years or to refund the whole of their passage money.¹⁰ The main object of the new provisions was to prevent such people departing without paying that sum of money.¹¹

2. SUMMARY OF THE ACT

2.7 Broadly, the purpose of the *Absconding Debtors Act 1877-1965*¹² ("the Act") is to enable a person ("the claimant") who alleges that he has a good cause of action, in debt or otherwise, to prevent another person ("the respondent")¹³ leaving the State without first paying the debt or meeting the claim or giving security therefore. This is done by the claimant obtaining a warrant from a justice of the peace¹⁴ for the arrest of the respondent if it appears that the respondent is about to "quit" the State. Once the respondent has been arrested a hearing is held before a justice of the peace, unless in the meantime the respondent has paid the debt or otherwise satisfied the claimant. At the hearing, a second warrant can be issued if the justice of the peace is satisfied that the claimant has a good cause of action and that the respondent is about to quit the State. The purpose of the second warrant is to enable the respondent to be arrested should he then attempt to leave the State without paying the debt or satisfying the claim. If he is so arrested he must be taken from the relevant means of transport and "liberated". The respondent is only permitted to leave the State if he pays the sum of money claimed or undertakes to pay any sum of money which is ordered by any court to be paid and gives security by bond with at least one surety for double the amount claimed. The provisions of the Act are discussed in greater detail below.

¹⁰ J S Battye, *Western Australia, A History from its Discovery to the Inauguration of the Commonwealth* (1978), 318 and 319, and *WA Parl Deb* (1876) Vol 1, 30 and 113.

¹¹ *WA Parl Deb* (1877) Vol 2, 129.

¹² The Act is reproduced as Appendix II.

¹³ The term "respondent" is used to refer to a person who may be prevented from leaving the State under the Act or under any new legislation. Unless the context indicates otherwise it does not mean a person against whom an action has been commenced in a court.

¹⁴ The Act refers to a justice of the peace. Magistrates and judges are, by virtue of their offices, justices of the peace.

3. FIRST WARRANT

2.8 Under the Act any "professing creditor", by affidavit made by himself or any other "credible person", may obtain a warrant from a justice of the peace directing any police constable to apprehend the respondent if the justice is satisfied that -

- (i) the respondent is "indebted to" the claimant for a sum not less than \$40.

A warrant may also be obtained by any duly authorised person¹⁵ if the justice is satisfied by affidavit that -

- (ii) the respondent is under "an engagement to remain in the State for any agreed term, or otherwise to pay any sum of money not less than forty dollars on his leaving the State prior to the expiration of such term";¹⁶ or
- (iii) the claimant has "a good cause of action" against the respondent for an amount of not less than forty dollars.

In any of these circumstances it is also necessary to show that there is a reasonable ground for believing that the respondent is about to "quit" the State without paying the debt or sum of money he is required to pay or discharging his obligation.¹⁷

2.9 The provision relating to a person under an arrangement to remain in the State was enacted because of difficulties encountered with the assisted passage scheme introduced in 1875.¹⁸ It may also apply to a private agreement where, for example, a person is brought to Western Australia under a contract of service on condition that he remain in the State for an agreed term, or repay any removal expenses paid by his employer if he departs prior to the expiration of that term. However, it would be unusual for a contract to be in such terms. It is

¹⁵ This appears to permit a person such as a company secretary who has been so authorised by the company to commence proceedings on its behalf under the Act.

¹⁶ It would seem that a warrant cannot be issued for his arrest if the engagement does not require the payment of a sum of money on his early departure.

¹⁷ *Absconding Debtors Act 1877-1965*, s 1.

¹⁸ Para 2.6 above.

more likely that the contract would require the employee to remain with the employer for an agreed term.¹⁹

2.10 The question arises whether the Act applies to a married woman. It applies to any person who is "indebted" to a creditor. At the time the Act was passed, a married woman was not considered as having any separate property. However, she could be sued jointly with her husband, and the debt recovered from property belonging to the latter.

2.11 The position was altered in 1892 when the *Married Women's Property Act* was passed. This provided that a married woman could be sued separately and the debt recovered from her separate property.²⁰ Because of this change it was argued in *Cleary v Ayles*²¹ that a married woman was a person "indebted" within the meaning of the Act. The Full Court of the Supreme Court of Western Australia held, however, that the *Married Women's Property Act* simply enabled a debt to be recovered from a married woman's separate property. It imposed no personal liability on her to pay the debt, and therefore it could not be said that she was a person indebted. The Full Court relied upon the decision in *Scott v Morley*²² as authority for the proposition that the *Married Women's Property Act* does not create personal liability but proprietary liability only.

2.12 Although it was held in *Cleary v Ayles*²³ that a married woman cannot be "indebted" for the purpose of the Act, it may be possible to obtain a warrant under either of the other two grounds, namely, where it is alleged that the claimant has a good cause of action against a married woman or where it is alleged that a married woman is under an engagement to remain in the State.

¹⁹ For example, the State Government from time to time pays the fares and removal expenses to Western Australia of people who are appointed to vacancies in the public service. These payments are made on condition that the person serve an agreed term or repay the expenses.

²⁰ Section 1(2) provides:

" A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*... and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

²¹ (1903) 6 WALR 38.

²² (1887) 20 QBD 120. The Court of Appeal comprised Lord Esher MR, Bowen and Fry LJJ. Western Australia has not yet passed legislation similar to that passed in England in 1935 to overcome the effects of this decision.

²³ In *Davison v Fullerton* (unreported) Supreme Court of Western Australia No 167 of 1976, *The West Australian* 4.11.1976, 3, Jackson CJ held himself bound by *Cleary v Ayles*.

4. SECOND WARRANT

2.13 It is not always necessary to arrest a respondent under the first warrant. The Commission is advised that on many occasions the sum alleged to be outstanding is paid by the respondent in order to avoid arrest. In most of the court files studied by the Commission, however, it was found necessary to arrest the respondent. Where a respondent has been arrested under the first warrant he must be taken before a justice who is required to "hear and inquire into the case".²⁴ Preliminary submissions received by the Commission indicated that there was some uncertainty as to the procedure to be followed on such a hearing. In particular, it was said that it was not clear whether the provisions in the *Justices Act 1902-1980* apply to such a hearing. These provisions ensure that both parties are heard. In any case, it would seem that the rules of natural justice apply, and the respondent would be entitled to a hearing.

2.14 If, on such a hearing, the justice is satisfied that the respondent is within one of the three categories referred to in paragraph 2.8 above and that he is about to quit the State without paying his debt or the sum of money owing, or discharging his obligation, the justice may, by a second warrant, direct any constable to apprehend the respondent whenever he is found on any means of transport about to leave the State without paying the debt or sum of money claimed or the sum agreed to be paid on his leaving the State.²⁵ The Commission understands that a magistrate has held that "quit" means to "leave permanently".²⁶ In one case studied by the Commission, however, a second warrant was issued notwithstanding that evidence was given that the respondent was merely going on a holiday and had a return airline ticket. When a person is arrested on a second warrant he must be taken from the means of transport and liberated.²⁷

5. FREQUENCY OF USE

2.15 The Commission has been unable to obtain any precise information on how many applications for warrants have been made under the Act. The Commission has, however, been able to study files held by the Courts of Petty Sessions at Perth, East Perth and Fremantle.

²⁴ *Absconding Debtors Act 1877-1965*, s 2.

²⁵ Ibid.

²⁶ There is support for this view in a Canadian case: *Fleck Bros Ltd v Petroustas* (1964) 45 DLR (2d) 190, 191. In this case the Judge held that the words "quit the Province" meant a "final departure" and not a "temporary absence".

²⁷ *Absconding Debtors Act 1877-1965*, s 2

Although these files do not represent all applications under the Act, they do provide an indication of the circumstances in which the Act is being used and the sums of money involved. The study covered thirty-five applications for warrants made in the years 1970-1980 inclusive.²⁸ A wide range of causes of action were alleged, the most common being for an outstanding loan of money (7). In other cases it was alleged that money was outstanding for goods sold and delivered or work done (6), as a result of a default on a hire-purchase agreement (5), on a judgment debt (3) or for the rental or use of a telephone (3). In at least one case the matter in dispute was not a liquidated debt. In that case the claimant alleged that he had a good cause of action to recover damages for an assault, for property which had been stolen and for other property which had been damaged.

6. COSTS

2.16 There is no provision in the Act under which a justice can make an order as to the payment of the costs of proceedings relating to the issue of the first warrant or to the hearing referred to in paragraph 2.13 above. There are provisions in the *Justices Act 1902-1980* under which justices have a discretion to make an order as to costs,²⁹ but these provisions appear to be restricted to proceedings commenced by way of complaint. Despite the fact that there appears to be no provision under which an award of costs can be made, in one case studied by the Commission such an award was made against an unsuccessful applicant.

7. TERMINATION OF SECOND WARRANT

2.17 The second warrant may be terminated in three ways. First, it appears that the second warrant will be automatically discharged if the respondent undertakes by bond, with at least one surety for double the amount claimed -

- (i) to pay any sum of money which may be recovered from him in respect of the alleged debt or liability; or

²⁸ The Commission received advice from one justice of the peace that he had dealt with 32 applications for warrants since 1965. Enquiries by the Australian Finance Conference of its members revealed six instances of applications, and one or two of threats to apply, over a two year period.

²⁹ *Justices Act 1902-1980*, ss 151 and 152.

- (ii) to remain in the State until he pays any sum of money which he may have contracted to pay on his leaving the State.³⁰

2.18 Secondly, a respondent may apply to two justices for an order quashing the warrant if all necessary and proper proceedings for the final determination of any claim or matter in respect of which the warrant was issued have not been taken and completed with reasonable diligence.³¹

2.19 Thirdly, a respondent may, after the expiration of three months from the date of issue of the second warrant, apply to the Chief Justice for an order quashing it.³² The Chief Justice may quash the warrant upon such terms and conditions as he may think fit if he is satisfied that the respondent has no means of paying the debt or debts in respect of which the warrant was issued.³³ Where any warrant has been so quashed, no fresh warrant may be issued under the Act against the respondent for a period of six months.³⁴

8. OFFENCES

2.20 The Act creates two offences. First, it is an offence for a respondent who has been arrested under a warrant issued under the Act to quit or make preparation to quit the State with intent to defraud the claimant of the debt or sum of money or the amount or liability in respect of which the warrant was issued.³⁵ Secondly, it is an offence for a person swearing an affidavit for the purpose of obtaining a warrant to obtain it "...unlawfully or maliciously, injuriously or oppressively, or by abuse of process".³⁶ The penalty for both offences is a fine not exceeding \$200 or a term of imprisonment not exceeding six months.

³⁰ *Absconding Debtors Act 1877-1965*, s 2. It has, however, been suggested by Mr R H Burton SM, in a paper prepared for a training course for justices at the Perth Technical College, that the provision relating to sureties does not apply to the situation where the sum of money claimed is a sum payable under an engagement to remain in the State.

³¹ *Id.*, s 3.

³² *Id.*, s 4.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Id.*, s 5A.

³⁶ *Id.*, s 5(1). The recommendations of the Commission as to whether a respondent should be entitled to recover the fine and whether a new civil remedy should be created are set out in para 8. 3 below.

9. IS THE ACT A VALID LAW OF THE STATE?

2.21 The question whether or not the Act infringes section 92 of the Commonwealth Constitution which provides, in part, that "...trade, commerce, and intercourse among the States....shall be absolutely free" was considered in the Working Paper.³⁷ The Crown Solicitor, in an opinion prepared for the Attorney General and made available to the Commission, preferred the view that the Act was valid. The Commission, while acknowledging the force of this opinion, concluded that the matter was not beyond doubt.³⁸ Apart from those cases on section 92 of the Constitution which suggest that the Act may be invalid, there are other judgments which suggest that the Act may be invalid on another ground, deriving from the fact of federation itself, rather than from specific provisions of the Constitution. This view was put in *R v Smithers: Ex Parte Benson*³⁹ by Barton J when dealing with an attempt by a State to exclude residents of other States as undesirables. In declaring the Statute invalid his Honour said that:

" ..the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation. "

A similar view was put by Griffith CJ. However, both judges reserved their position on whether the States retained a residual right to control the movement of persons in some situations. In recent years this view has been reiterated by Murphy J, in *Buck v Bavone*,⁴⁰ in the following terms:

"The right of persons to move freely across or within State borders is a fundamental right arising from the union of the people in an indissoluble Commonwealth. This right is so fundamental that it is not likely it would be hidden away in s 92, restricted to interstate intercourse in a clause dealing with uniform duties of customs, in a chapter headed 'Finance and Trade'. The right is not an absolute right, but is almost absolute and could not be impaired, except on extremely strong grounds such as the administration of criminal justice in serious cases".

2.22 Although the Commission has come to no firm conclusion on the question whether or not the Act is valid, the Commission considers that it is important to draw attention to these

³⁷ The chapter of the Working Paper in which this issue was discussed is reproduced as Appendix III to this Report.

³⁸ Para 2.12 of the Working Paper.

³⁹ (1912)16 CLR 99, 109-110.

⁴⁰ (1976) 135 CLR 110, 137.

doubts as to the validity of the Act, because they suggest that there may be limits to the State's power to legislate to restrict or prevent a debtor travelling from Western Australia to another State or a Territory. The recommendations made in this Report are made on the basis that the State has the power to pass such legislation. Even if the State does not have such a power with respect to interstate travel, it does have power to legislate to prevent or restrict debtors leaving Western Australia and travelling directly to another country.

CHAPTER 3 OTHER COMPARABLE LEGISLATION

1. LEGISLATION PREVENTING A PERSON LEAVING THE STATE

3.1 The Act is not the only legislation in Western Australia under which a person may be prevented from leaving the State. Section 63(2) of the *Supreme Court Act 1935-1981* provides:

"Where the plaintiff in any action in the Supreme Court proves at any time before final judgment by the affidavit of himself or some other person, to the satisfaction of a Judge -

- (a) that such plaintiff has a cause of action against the defendant to the amount of one hundred dollars or upwards, or has sustained damage to that amount, and
- (b) that there is probable cause for believing that the defendant is about to remove out of the jurisdiction of the Court unless he is apprehended, and
- (c) that the absence of the defendant will materially prejudice the plaintiff in the prosecution of his action,

the Judge may order such defendant to be arrested and imprisoned until further order of the Court or a Judge, unless and until he has sooner given security not exceeding the amount claimed in the action that he will not remove out of the jurisdiction of the Court without the leave of the Court or a Judge:

Provided that the plaintiff claiming such order of arrest shall prosecute his action with reasonable diligence, otherwise a Judge may discharge the defendant from custody:

Provided also that where the action is for a penalty or sum in the nature of a penalty other than a penalty in the nature of any contract, it shall not be necessary to prove that the absence of the defendant will materially prejudice the plaintiff in the prosecution of the action; and the security given shall be to the effect that any sum recovered against the defendant in the action shall be paid. "

Section 63(3) and (4) then make supplementary provision to give effect to these provisions of section 63(2). The District Court of Western Australia has the same power.¹ There is no corresponding provision in the *Local Courts Act 1904-1976*. The powers referred to above are additional to the provisions contained in the *Absconding Debtors Act 1877-1965*. It would appear that the fact that an action had been commenced in the Supreme Court or the District

¹ *District Court of Western Australia Act 1969-1981*, s 54.

Court (or, for that matter, a Local Court) would not mean that a warrant could not be issued under the *Absconding Debtors Act 1877-1965* for the arrest of a party to the action.

3.2 The Supreme Court also has power under section 251 of the *Companies Act 1961-1979* to order the arrest of a person who is about to abscond if he is liable to contribute to the assets of a company in the event of its being wound up. Section 251 provides:

"The Court, at any time before or after making a winding up order, on proof of probable cause for believing that a contributory is about to quit the State or otherwise to abscond or to remove or conceal any of his property for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable personal property to be seized and him and them to be safely kept until such time as the Court orders."

3.3 Other legislation in Western Australia which is analogous to the Act includes the *Masters and Servants Act 1892-1972*. That Act, however, does not deal specifically with persons intending to quit the State but with persons who are "about to abscond" before the hearing of a complaint alleging neglect or refusal to fulfil a contract of service. If they fail to give security to the satisfaction of a justice for appearance to the complaint, such persons may be arrested and detained in custody pending the hearing of the complaint. Provision is also made for imprisonment for neglect or refusal to comply with an order made pursuant to the summons to fulfil a contract and to give security therefore.

3.4 There are also provisions relating to criminal offences in the case of absconding bankrupts in, for example, section 516 of the *Criminal Code*, and section 272 of the *Bankruptcy Act 1966-1980* (Cth).

2. SECTION 25(9) OF THE SUPREME COURT ACT 1935-1981: THE MAREVA INJUNCTION

3.5 Before the founding of Western Australia the mercantile cities of England such as London, Bristol, Exeter and Lancaster had developed a custom known as "foreign attachment", attributed to Roman and continental sources,² by which if a defendant was not within the jurisdiction the plaintiff was able to attach any money or goods of the defendant within the jurisdiction as soon as a writ was issued. *An Act to Facilitate Actions Against*

² In France the procedure is known as saisie arret and in Scotland as arrestment.

Persons Absent from the Colony, and Against Persons Sued as Joint Contractors (1842) 6 Vict, No 4, adopted this procedure in Western Australia. The Act was however expressly repealed by the *Supreme Court Act 1935-1981*.

3.6 Development of a similar remedy was suggested by the United Kingdom Committee on the Enforcement of Judgment Debts (the "Payne Committee"). In 1969 the Committee recommended that the United Kingdom equivalent of section 63(2)-(4) of the *Supreme Court Act 1935-1981* be repealed and be replaced by new provisions to be inserted into the *Rules of the Supreme Court* and of the County Courts.³ The Payne Committee proposed that the court on the application of the creditor before or after judgment, should be enabled, if it is satisfied that a debtor is, with the intention of defeating the creditor's claim, about to make any disposition of or to transfer out of the jurisdiction or otherwise deal with any property, to make such order as it thinks fit for restraining the debtor from so doing or otherwise protecting the creditor's claim.⁴ The Committee envisaged the "necessity of restraining a debtor as a matter of urgency before it has been possible to commence proceedings, and ordering that a writ in the action should be issued on the next day on which the court office is open".⁵

3.7 The Payne Committee proposed that -⁶

- (i) The order should be made by a judge of the High Court or the County Courts, who should have an unfettered discretion so that he could prevent the power from being abused or used oppressively.
- (ii) The creditor should satisfy the court by affidavit or oral evidence on oath that he has a good cause of action against the debtor.
- (iii) He should satisfy the court by the same means that the debtor has property available to meet the judgment in due course, in full or in part, and that there is probable cause for believing that the debtor is about to dispose of the property,

³ Report of the Committee on the *Enforcement of Judgment Debts* (1969, Cmnd 3909), 325 para 1259. In Western Australia the equivalent rules would be the *Rules of the Supreme Court 1971-1981*, which are at present also the rules used in the District Court, and the *Local Court Rules 1961-1980*.

⁴ Id, 324 para 1253.

⁵ Id, 324 para 1254.

⁶ Id, 324-325 paras 1255-1258.

or transfer it out of the jurisdiction, or otherwise deal with it so as to defeat the creditor's claim.

The Committee also made recommendations with respect to the time at which the order could be made, the attendance of the respondent at court, the enforcement of the order, the deposit of the respondent's passport with his or the claimant's solicitor and discharge of the debtor. None of these recommendations of the Committee have been implemented.

3.8 Since 1975 the English courts have developed a new form of injunction to deal with the same problem as was earlier dealt with by "foreign attachment" and as was suggested by the Payne Committee. In *Rasu Maritima SA v Pertamina*⁷ Lord Denning drew upon the old procedure of foreign attachment in support of the development of the new procedure by which in certain circumstances it is possible to obtain an injunction to prevent a person from transferring assets out of the jurisdiction. This new procedure was first permitted in 1975 and is known as a "Mareva" injunction.⁸

3.9 A Mareva injunction may be granted under section 25(9) of the *Supreme Court Act 1935-1981* (WA),⁹ which is in like terms to section 45 of the English *Supreme Court of Judicature (Consolidation) Act 1925-1978*. It has also been suggested that the jurisdiction to grant Mareva injunctions may be based in the inherent jurisdiction of the court.¹⁰ The granting of the Mareva injunction has been followed in Australia in a number of cases.¹¹ The Mareva injunction is an injunction granted ex parte against a defendant in a pending action to restrain him from removing assets from the jurisdiction and so stultifying any judgment in favour of the plaintiff. It forms an exception to the general rule that a plaintiff cannot require the court to impound a defendant's assets in advance of judgment. The exception was at first narrowly based, being granted only against foreigners in commercial cases. It has been steadily

⁷ [1977] 3 All ER 324, 331-334.

⁸ *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213.

⁹ *Sanko Steamship Co Ltd v DC Commodities (A'Asia) Pty Ltd* [1980] WAR 51. It would appear that such an injunction could also be granted by the District Court under s 57(2) of the *District Court of Western Australia Act 1969-1981* in respect of matters otherwise within the jurisdiction of the court: *Hondros and Tholet v Chesson* [1981] WAR 146. It is doubtful whether a Local court could grant such an injunction: See D R Williams, *Equitable Remedies in the Inferior Courts*, (unpublished paper delivered at WA Law Summer School, 1977) and S Owen-Conway, *The Equitable Jurisdiction of the Inferior Courts in Western Australia* (1979) 14 UWAL Rev 150, 155.

¹⁰ See generally I McGill, *The Jurisdictional Basis for the Mareva Injunction*, (1980) 3 UNSWL Jo 434, 439-441.

¹¹ *Praznovsky v Sablyack* [1977] VR 114, *JD Barry Pty Ltd v M & E Constructions Pty Ltd* [1978] VR 185, *Balfour Williamson (Australia) Pty Ltd v Douterluingne* [1979] 2 NSWLR 884, and *Sanko Steamship Co Ltd v DC Commodities (A'Asia) Pty Ltd* [1980] WAR 51.

widened so that it is now available where the claim is for personal injuries¹² and where the defendant is not a foreigner or foreign based. In *Barclay-Johnson v Yuill*,¹³ Megarry VC extensively surveyed the jurisdiction in a judgment which was endorsed by the Court of Appeal in *Rahman (Prince Abdul) bin Turki al Sudairy v Abu-Taha*.¹⁴ Megarry VC concluded his judgment as follows: ¹⁵

"It seems to me that in the short five years of its life, the *Mareva* doctrine has shed all the possible limitations of its origin. It is now a quite general doctrine, free from any possible requirements of foreignness, commerce or anything else; and in a proper case it depends only upon the existence of a sufficient risk of the defendant's assets being removed from the jurisdiction with a consequent danger of the plaintiff being deprived of the fruits of the judgment that he is seeking".

The English cases seem to show that a plaintiff has to establish five basic elements in order successfully to claim such an injunction. The plaintiff must show that -

- (a) there are "some grounds for believing" that the defendant has assets within the jurisdiction (but even the inference, drawn from a bank account in overdraft, that monies are available has been held to qualify for this purpose);¹⁶
- (b) there is a real danger that the assets will be removed from the jurisdiction of the court if the court does not intervene¹⁷ and that there is a consequent risk that the judgment may go unsatisfied; ¹⁸
- (c) he has a "good arguable case" on the facts of the dispute;
- (d) the matter is justiciable in the English courts;

¹² *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252.

¹³ [1980] 1 WLR 1259.

¹⁴ [1980] 1 WLR 1268.

¹⁵ [1980] 1 WLR 1259, 1267.

¹⁶ *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972.

¹⁷ For example, the fact that the defendant is a foreign government agency might be a relevant counter-argument: *Establissement Esefka International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd's Rep 445.

¹⁸ If the debtor has substantial assets in a jurisdiction where the judgment can be enforced or procedures are available to attach assets transferred to that jurisdiction the grant of a Mareva injunction may be declined: *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972, 979. As to the location of available assets also see A Black, *The Sheriff to the Aid of Mareva, or Vice Versa* [1981] New Law Jo 771.

- (e) the harm to the defendant caused by the granting of the injunction does not outweigh the benefit to the plaintiff.

3.10 In *Pivovarovff v Chernabaeff*¹⁹ the Full Court of South Australia questioned the jurisdiction to grant such injunctions, and in any event indicated two limits upon the granting of them. First, the Full Court indicated that such an injunction should not be granted unless the defendant is out of the jurisdiction.²⁰ It has been held in *Chartered Bank v Daklouche* that this limitation, originally thought to exist by the English courts, may be dispensed with in certain circumstances.²¹ Secondly, the Full Court of South Australia indicated that the Mareva injunction should only be granted in relation to assets forming the subject matter of the suit in question. This limitation has not been adopted by the courts in Western Australia, Victoria and England.²² However, the reasoning in *Pivovarovff v Chernabaeff* was followed by the Supreme Court of New South Wales, *Ex Parte BP Exploration Co (Libya) Ltd; Re Hunt*.²³ In that case of Powell J also questioned whether the Court, in any case, had power to grant a Mareva injunction and also indicated further discretionary limits to the issue of such injunctions even assuming jurisdiction existed.²⁴ In *The Siskina*²⁵ the House of Lords held that a Mareva injunction "presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders... are but ancillary". It must be "part of the substantive relief to which the plaintiff's cause of action entitles him; the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in [England] and enforceable [there] by the final judgment for an injunction ". However, the House of Lords did not either finally affirm or deny the general

¹⁹ (1978) 16 SASR 329.

²⁰ This was the case in *Sanko Steamship Co Ltd v DC Commodities (A'Asia) Pty Ltd* [1980] WAR 51.

²¹ [1980] 1 WLR 107. Also see *Barclay-Johnson v Yuill* [1980] 1 WLR 1259, *Rahman (Prince Abdul) bin Turki al Sudairy v Abu-Taha* [1980] 1 WLR 1268 and *AJ Bekhor and Co Ltd v Bilton* [1981] 2 WLR 601.

²² *Sanko Steamship Co Ltd v DC Commodities (A'Asia) Pty Ltd* [1980] WAR 51, *Praznovsky v Sablyack* [1977] VR 114 and *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1980] 1 All ER 480.

²³ [1979] 2 NSWLR 406. But in New South Wales a Mareva injunction was granted by Sheppard J in *Balfour Williamson (Australia) Pty Ltd v Douterluingne* [1979] 2 NSWLR 884. Apparently other Judges have also granted Mareva injunctions in the Supreme Court of New South Wales Commercial List: see (1980) 18 NSW Law Soc Jo 183. Mareva injunctions have also been granted in New Zealand: C B Cato, *The Mareva Injunction and its Application in New Zealand* [1980] NZ Law Jo 270 and RJ Calnan, *The 'Mareva' Injunction* (1980) 9 NZUL Rev 279.

²⁴ Such as -

- (i) whether the assets could be removed before judgment was registered;
- (ii) the value of the assets relative to the amount of the judgment;
- (iii) whether the assets were encumbered to a third party; and
- (iv) whether the court could control the defendant if he ignored the injunction.

²⁵ *Siskina (Owners of Cargo) v Distos Compania Naviera SA, The Siskina* [1977] 3 All ER 803, per Lord Diplock at 823 and 825.

power to grant such injunctions. Thus the exact limits to the granting of such an injunction at present seem to be unsettled.²⁶

3.11 However, the use of the Mareva injunction has been widely hailed. Lord Scarman has described it ²⁷ as a "brilliant judicial invention" and as "plainly essential if one is to ensure justice in our courts. Without the Mareva injunction, assets would, in many cases, have disappeared long before any judgment could be enforced". In 1979 Mustill J estimated that in England applications for the Mareva injunction were running at twenty per month. It is clearly a popular commercial procedure. Lord Denning has drawn favourable attention to the recommendations of the Payne Committee, and has also urged the adoption by legislation of provisions to overcome the limitations imposed by the House of Lords in the *Siskina* case, as a way of broadening the remedy even further.²⁸ On the other hand, doubts have been expressed that the remedy may be in danger of abuse.²⁹

²⁶ See J Bowers & H Rosen, *Mareva Injunctions: An Analysis of Recent Cases*, [1981] New Law Jo 517.

²⁷ *The Law Society's Gazette* (Eng), 18.3.1981, 298.

²⁸ Lord Denning, *The Due Process of Law* (1980), 150-151.

²⁹ See for example, G Jones, *The Rise of the Mareva Injunction*, 11 UQ Law Jo 133, and also a note at (1981) 97 Law Quarterly Rev 4.

CHAPTER 4

THE LAW ELSEWHERE

1. INTRODUCTION

4.1 The Commission has carried out a comparative study of the law in Australia, New Zealand and England. Of the jurisdictions studied only two have legislation comparable with the *Absconding Debtors Act 1877-1965*: South Australia and the Northern Territory. The law in those jurisdictions is outlined below. Legislation in the jurisdictions studied comparable with section 63(2)-(4) of the *Supreme Court Act 1935-1981* is also outlined below.

2. LEGISLATION COMPARABLE WITH THE ABSCONDING DEBTORS ACT 1877-1965

(a) South Australia

4.2 In South Australia a warrant can be issued for the arrest of a respondent where it is shown that the respondent -

- (1) (a) owes \$30 or more (whether on an unsatisfied judgment of a Local Court or otherwise) to the claimant, or
- (b) has, through breach of contract, caused damage to the extent of \$150 or more to the claimant; and
- (2) there are reasonable grounds for believing that he is about to quit the State with intent to avoid or delay the claimant, or with intent to remain out of the State so long that the claimant may be delayed in the recovery of the debt or damages.¹

A person arrested under such a warrant must be released if he either pays the sum endorsed on the warrant for the debt, damages and costs or deposits that sum with the bailiff or other arresting officer or the keeper of the jail in which he is held to abide the result of the action.²

¹ *Local and District Criminal Courts Act 1926-1981*, s 271.

² *Id*, s 275. The *Local and District Criminal Courts Act Amendment Act 1978*, which has not been proclaimed, amends this Act. One amendment provides for the sum to be deposited with the sheriff instead of the "bailiff or other arresting officer".

(b) Northern Territory

4.3 In the Northern Territory, under the *Absconding Debtors Act 1978-1979*, a magistrate or a judge of the Supreme Court may issue a warrant for the arrest of a debtor for the purpose of preventing him leaving the Territory if there are reasonable grounds for believing that - ³

- (a) the debtor owes a debt to the applicant;
- (b) the debtor is about to leave the Territory;
- (c) failure to arrest the debtor would defeat, endanger or materially prejudice an applicant's prospects of recovering a debt; and
- (d) the debt -
 - (i) is for wages due by the debtor to the applicant; or
 - (ii) is for an amount not less than the prescribed amount.⁴

A debtor who has been arrested under such a warrant must be released if - ⁵

- (a) the debtor -
 - (i) tenders to the applicant the amount of money specified in the warrant as the debt and costs; or
 - (ii) deposits with a member of the police force for payment into court that amount of money to abide the determination of the claim;
- (b) the applicant for the warrant consents in writing to the release; or
- (c) a magistrate or judge orders that the debtor be released from custody.

³ *Absconding Debtors Act 1978-1979*, ss 4, 5(1) and 6(2). This Act is reproduced as Appendix IV. There is no corresponding legislation in the Australian Capital Territory.

⁴ The Act commenced operation on 5 December 1980. The prescribed amount is \$500: *Absconding Debtors Regulations 1980*, reg 2,

⁵ *Absconding Debtors Act 1978-1979*, s 12.

4.4 If a debtor who has been arrested is not so released he must within twenty-four hours of arrest be brought before a judge or magistrate.⁶ A judge or a magistrate before whom a debtor is brought may make such order as he thinks fit including an order:⁷

- "(a) that the debtor be released, either conditionally or unconditionally, from custody;
- (b) that the debtor undertakes, in writing ...that he will not leave the Territory or a specified part of the Territory, ...until an amount of money specified by the court is paid;
- (c) that the debtor give security, either with or without surety, for the payment of a specified sum;
- (d) that the debtor pay a specified sum to the applicant or to another person;
- (e) that the debtor pay a specified sum into court to await the finalization of any other action upon the debt;
- (f) that the debtor be committed to prison –
 - (i) in such a manner;
 - (ii) for such a period; or
 - (iii) under such conditions,
 as the court considers just; and
- (g) that the applicant take such action within such time and in such manner as the magistrate or Judge considers necessary or desirable for the recovery of the debt."

By section 17, if the judge or magistrate is not satisfied beyond reasonable doubt as to all material matters, he must order that the debtor be released from custody.

3. LEGISLATION COMPARABLE WITH SECTION 63(2)-(4) OF THE SUPREME COURT ACT 1935-1981

4.5 Section 63(2)-(4) of the *Supreme Court Act 1935-1981* is based on section 6 of the *English Debtors Act 1869*. Western Australia was not the only jurisdiction to adopt the

⁶ Id, s 11(2).

⁷ Id, s 16.

provision and there are comparable provisions in South Australia, Tasmania and New Zealand.⁸

Both Victoria and Queensland have enacted similar legislation.⁹ The major difference between the Victorian and Queensland provisions, and the provisions in the other jurisdictions referred to above, is that in Victoria and Queensland it is necessary to show that the plaintiff's action would be defeated by the defendant's departure. In the other jurisdictions it is necessary to show that the absence of the defendant will "materially prejudice the plaintiff in the prosecution of his action".¹⁰

4.6 In Victoria there is also provision in the *Imprisonment of Fraudulent Debtors Act 1958-1980* for the arrest of a person who has sufficient means to satisfy a judgment or order if he is about to leave Victoria without paying the outstanding moneys.

4.7 The New South Wales Supreme Court is the only Supreme Court in Australia which does not have a power comparable with section 63(2)-(4) of the *Supreme Court Act 1935-1981*.¹¹ Sections 5 and 10 of the *Supreme Court Act 1970-1980* (NSW) repealed certain earlier provisions and expressly provided that no person shall be arrested under the jurisdiction of the Court formerly exercised by writ of *capias ad respondendum* or by writ of *ne exeat* or otherwise on mesne process. These provisions were enacted following recommendations of the New South Wales Law Reform Commission in its two reports on *Supreme Court Procedure*.¹² In the Second Report the Commission said that arrest on mesne process was "...a process quia timet in aid of arrest in execution" and should only be preserved if arrest in execution ought to be preserved. It concluded that arrest in execution should be abolished. It did, however, concede that if it were necessary, it might be possible to frame legislation for the arrest of a judgment debtor who conceals his property or who is about to abscond. The New South Wales Law Reform Commission took the view that as section 6 of the *Debtors Act 1869* was designed to secure the presence of the defendant where his absence

⁸ *Supreme Court Act 1935-1981* (SA), s 35, *Debtors Act 1870-1958* (Tas), s 5(2), *Judicature Act 1908-1980* (NZ), s 55 and the *District Courts Act 1947-1980*, s 109. As to the position in South Australia see Law Reform Committee of South Australia, *Report relating to the reform of the law of Execution of Civil Judgments* (1974), esp pp 9-10. The Committee's recommendations are consistent with those made in this Report.

⁹ *Supreme Court Act 1958-1981* (Vic), s 128, and *Common Law Process Act 1867-1972* (Qld), s 48.

¹⁰ For a discussion of the difference between the South Australian and Victorian provisions see *Southern Drug Co Ltd v Lagos* (1980) 24 SASR 590 discussed at para 7.16 below.

¹¹ *Elliott v Elliot* [1975] 1 NSWLR 148.

¹² Law Reform Commission of New South Wales, *Supreme Court Procedure* (1969), Appendix A, 15, para 30, and *Second Report on Supreme Court Procedure* (1971), 15-23, paras 18-64.

would materially prejudice a plaintiff in the prosecution of his action and not to aid execution or give security for satisfaction of the judgment and as the section had become obsolescent in England the section should not be introduced in New South Wales.¹³ In the District Court of New South Wales, however, a judgment creditor may obtain a writ ordering the bailiff to arrest a judgment debtor if -¹⁴

- (a) the judgment debt has not been satisfied; and
- (b) the judgment debtor is about to leave or to remove property from the Commonwealth of Australia with intent to evade payment of the judgment debt.

On arrest the judgment debtor can be discharged on payment of the amount specified in the writ and the costs of executing the writ, or at the request of the judgment creditor or by the Court.¹⁵

4.8 In the Australian Capital Territory, a person named as the defendant in the writ can be arrested under a writ of *capias ad respondendum* if a Judge of the Supreme Court is satisfied that -¹⁶

- (a) the plaintiff has *prima facie* a good cause of action in respect of his claim against the defendant;
- (b) such cause of action is for a sum of \$40 or more;
- (c) the defendant is about to leave the jurisdiction of the Court;
- (d) the action will be defeated unless the defendant is apprehended; and

¹³ *Second Report on Supreme Court Procedure* (1971), 22, paras 53-54.

¹⁴ *District Court Act 1973-1980* (NSW), s 113(1) and (2).

¹⁵ *Id.*, s 114.

¹⁶ Sections 5 and 6 of the *Arrest on Mesne Process Act 1902* (NSW) (No 24) which is in force in the Australian Capital Territory under s 6 of the *Seat of Government Acceptance Act 1909-1973* (Cth). The *Arrest on Mesne Process Act 1902* has been repealed in New South Wales: *Supreme Court Act 1970-1990*, s5.

- (e) the application is made within a reasonable time after the fact of the defendant's intention so to leave the jurisdiction came to the knowledge of the plaintiff or might have become known to him by reasonable diligence on his part.

Once arrested the defendant must be held in custody until he gives a security for or deposits the sum endorsed on the writ plus \$20.¹⁷

¹⁷ Id, s 9.

CHAPTER 5

THE NEED FOR LEGISLATION

5.1 The Commission considers that there is a need for a means by which a respondent can be prevented from leaving the State, or removing assets from the State, in certain circumstances. This is because there are substantial obstacles in the way of a person who wishes to commence or pursue an action against, and if successful recover any sum of money ordered to be paid by, a person who has left the State.¹ These obstacles are not all overcome by section 63(2)-(4) of the *Supreme Court Act 1935-1981* or by the availability of Mareva injunctions in some circumstances.

5.2 A claimant may not always have an opportunity to institute proceedings before the respondent leaves the State, as he may not become aware of the respondent's intention to leave the State until shortly before the intended time of departure. Regular airline flights to other States and other countries enable persons to leave the State at short notice. The court office or registry out of which the writ or summons must be issued to institute the proceedings may be closed between the time the claimant becomes aware that the respondent intends to leave and the time of his departure. Even if a writ or summons were issued before the respondent left the State, it must then be served on the respondent.

5.3 More importantly, even if served in Western Australia the respondent would still not be under any obligation to remain in the State or to leave assets here which could be used to satisfy a judgment.

5.4 If a writ or summons were issued after the respondent left the State it would still have to be served on the respondent outside the State. Although there are means of serving legal process on people outside Western Australia there are practical difficulties which reduce their value. The *Service and Execution of Process Act 1901-1980* (Cth) for example, enables court processes, such as writs of summons, to be served on people in the other Australian

¹ In the Working Paper the Commission tentatively expressed the view that it would be desirable to provide legislation under which a respondent could be prevented from leaving the State as an aid to debt recovery or to the enforcement of other legal obligations. All those who commented on this proposal supported it: The Australian Finance Conference, the Law Society of Western Australia, the Rural and Industries Bank of Western Australia, the Credit Manager of the Sunday Times and Mr J Wilson JP. The Commission also sought comments in the Working Paper on whether or not there should be power to restrain a respondent from transferring property out of the jurisdiction. Two of the commentators favoured such a provision: The Australian Finance Conference and the Credit Manager of the Sunday Times. One commentator, Mr J Wilson JP, considered that there was no need for any additional power.

jurisdictions. In addition, Order 10 of the *Rules of the Supreme Court 1971-1981* provides for the service of process of the Supreme and District Courts in other Australian jurisdictions and overseas. A summons issued out of the Local Court may also be served outside the State.² The respondent's new address, however, may not be known and may be impossible to trace. In any event, the claimant will incur additional delay and expense in service. Possibly an enquiry agent will have to be engaged in order to locate the respondent. Almost certainly a solicitor or a process server will be required so that service can be effected.

5.5 Even if a claimant were able to serve the writ or summons on a respondent either before or after he left the State, difficulties would be encountered in enforcing any judgment which might be obtained against the respondent if the respondent did not have sufficient assets in the State to satisfy the judgment. If the respondent did not have sufficient assets in the State it may be possible to enforce the judgment elsewhere. The *Service and Execution of Process Act 1901-1980* (Cth) enables a judgment to be enforced in the other Australian jurisdictions. It is also possible to enforce judgments in a number of countries which provide for the reciprocal enforcement of judgments.³ Again, however, the services of a solicitor may be required in order to register the judgment and issue proceedings in the place to which the respondent has moved.

5.6 Inevitably the procedures enabling a claimant to proceed against and enforce a judgment in another jurisdiction involve delay and in most cases will be more cumbersome and costly than proceedings against a person who is resident in or who has property in this State. Indeed the cost of proceeding against a person in another jurisdiction - even where such proceedings are possible - may prove to be prohibitive.

5.7 It might be considered that the development of the use of the Mareva injunction in recent years would have made it unnecessary to have a power to prevent a respondent leaving the State or removing assets from the State. The Commission has, for several reasons, concluded that the Mareva injunction should not be the sole such aid to debt recovery and the enforcement of legal obligations. First, the validity of such injunctions has been questioned by the Full Court of South Australia and by at least one Supreme Court judge in New South

² *Local Court Rules 1961-1980*, Order 6 rules 1 and 2.

³ For the Western Australian legislation see the *Foreign Judgments (Reciprocal Enforcement) Act 1963-1980*. The countries are listed in the 1980 Index to *The Statutes of Western Australia*, 219-222

Wales.⁴ Secondly, the scope of the Mareva injunction is uncertain. In particular, it has not been clearly established in Australia that it is available where the respondent is within the jurisdiction. The Mareva injunction is a discretionary remedy the limits of which are still being worked out.⁵ The remedy is primarily one developed for use in large commercial matters where a foreign defendant has assets within the jurisdiction. These are not the characteristics typically associated with use made of the *Absconding Debtors Act 1877-1965*. Thirdly, the cost of obtaining a Mareva injunction may be significantly greater than the cost of an action similar to that available under the Act, and it might not be worthwhile seeking such an injunction unless a relatively large sum of money is involved. Fourthly, only a Supreme Court judge or possibly a District Court judge can grant such an injunction.⁶ These judges are generally situated in Perth and would be less accessible than a justice of the peace or a stipendiary magistrate. Finally, the Mareva injunction is a procedure which may only be used after proceedings have been instituted in a court.

5.8 The Commission considers that the Mareva injunction is a valuable remedy and recommends that the scope and jurisdictional basis for its use by judges of the Supreme Court and District Court be confirmed by attention to the *Supreme Court Act 1935-1981*, section 25(9), and the *Rules of the Supreme Court 1971-1981*. Consideration could also be given to a provision allowing a judge to restrain or set aside transactions designed to defeat proceedings or to prevent the transfer of assets prior to the institution of proceedings by analogy with the provisions of section 85 of the *Family Law Act 1975-1979*. Section 89 of the *Property Law Act 1969-1979* which provides for setting aside alienations of property with intent to defraud creditors would not appear to go sufficiently far to cover all possibilities. Such matters are, however, beyond the scope of the Commission's terms of reference. Whether or not reforms of this nature are introduced, the Commission considers that there will remain a need for legislation along the lines of the present *Absconding Debtors Act*.

⁴ Para 3.10 above.

⁵ Ibid.

⁶ Para 3.9 above.

CHAPTER 6

RECOMMENDATIONS: THE SCOPE OF NEW LEGISLATION

1. INTRODUCTION

6.1 While the Commission is of the view that the general purpose of the Act is as relevant today as it was when it was enacted in 1877, the Commission considers that the Act should be repealed and replaced with a new Act because, as the Law Society of Western Australia stated in its comments on the Working Paper, the Act is:

" ...written in quaint old language which is difficult to follow, confers very considerable powers and does not specify procedures to be followed in a satisfactory manner."

The Commission also considers that the circumstances in which the powers can be exercised should be altered in some respects and that the procedures whereby the powers may be exercised should place less reliance on the arrest of a respondent. The Commission accordingly recommends that the Act should be repealed and replaced with a new Act. The legislation should be primarily designed not to detain persons in Western Australia or to enforce attendance in court but to ensure that a cause of action or judgment is not defeated by the respondent personally leaving, or by his causing the removal of assets from, Western Australia. The following paragraphs contain a discussion of the circumstances in which it should be possible to prevent a respondent leaving or removing assets from the State.¹

2. DEFEATING, ENDANGERING OR MATERIALLY PREJUDICING THE PROSECUTION OF A CAUSE OF ACTION OR THE PROSPECTS OF ENFORCING A JUDGMENT

6.2 At present, the Act provides that the first and second warrants may be issued if the justice of the peace is satisfied that the respondent is about to "quit" the State. Although the matter is not free from doubt, it appears that this means to leave the State permanently.² As the Commission considers that the purpose of preventing a person from leaving the State or removing assets from the State should be to facilitate the settlement of a dispute or the

¹ The following chapter contains a discussion of the procedure which should be provided in the new Act. Chapter 8 contains a discussion of safeguards which should be provided to prevent the powers being abused.

² Para 2.14 above.

recovery of a debt, the Commission does not consider that the powers should be limited to the situation where a person is leaving the State permanently. A more important consideration is whether or not the respondent's departure would prejudice the prosecution of the claimant's cause of action or his prospects of enforcing a judgment. For example, the prosecution of a claimant's case could be prejudiced if the respondent were not in the jurisdiction to answer interrogatories. The Commission therefore recommends that it should be possible to prevent a respondent leaving or removing property from the State if such action would "defeat, endanger or materially prejudice" the prosecution of the claimant's cause of action³ or his prospects of enforcing a judgment.⁴

6.3 In deciding whether or not the prosecution of a claimant's cause of action or the prospects of enforcement of a judgment would be defeated, endangered or materially prejudiced, one fact which could be considered would be whether the respondent was leaving the State permanently, and if so, whether the procedures available for proceeding against that person in the jurisdiction to which he was travelling meant that the claimant would be materially prejudiced. If a person were travelling outside the State on a holiday or a business trip, the person's absence on such a trip would not be likely to defeat, endanger or materially prejudice a claimant unless the trip was intended to be for a considerable period of time, and there were no available assets remaining in Western Australia against which judgment could be enforced.

3. CAUSES OF ACTION

6.4 At present, so long as a sum not less than \$40 is in dispute, the Act may be used where the respondent is "indebted to" the claimant, "under an engagement to remain in the State for any agreed term, or otherwise to pay any sum of money not less than forty dollars on his leaving the State prior to the expiration of such term" to the claimant or where the claimant has "a good cause of action" against the respondent. It therefore appears that the Act may be used in respect of any cause of action for a sum not less than \$40, and whether or not the action involves a liquidated sum of money. It may also in respect of a judgment debt. Although the most common use of the Act appears to be in respect of liquidated claims it has been used for unliquidated claims. For example, in the case referred to in paragraph 2.15

³ The meaning of the phrase "in the prosecution of his action" which is taken from section 63(2)-(4) of the *Supreme Court Act 1935-1981* is discussed at para 7.16 below.

⁴ There is a similar but slightly narrower phrase in the *Absconding Debtors Act 1978-1979* (NT), s 4(3)(c).

above, the claimant alleged that he had a good cause of action to recover damages for assault, for property which had been stolen and for other property which had been damaged. In two other cases it was alleged that the claimant had a cause of action against the respondent for damage to the claimant's motor vehicle resulting from a motor vehicle accident. While causes of action for unliquidated claims are more difficult to dispose of speedily, the Commission does not consider that this is a cogent reason for limiting the scope of new legislation to liquidated claims. The Commission therefore recommends that the new legislation should apply to any cause of action. The Commission also recommends that the new legislation should continue to apply to an unsatisfied judgment debt.⁵ The new legislation should not apply to a cause of action which has not accrued. Thus, the legislation would not enable the arrest of a debtor who owed a sum of money which was not yet due or payable.⁶

6.5 There is also a need to consider whether new legislation should apply where a person is, either expressly or impliedly, under an engagement to remain in the State for an agreed term or otherwise to pay a sum of money on leaving the State prior to the expiration of that term as the Act now provides. As was stated in paragraph 2.6 above, the existing provisions were originally intended to apply to a person who had travelled to the colony of Western Australia at the expense of the Government. At first sight, such a provision may appear to be anachronistic. However, the Commonwealth Government has operated an assisted passage scheme under which a migrant undertook to repay the financial assistance granted towards the cost of passage to Australia if he left Australia before completing two years' residence. If the Commission's recommendation that the new legislation should apply to any cause of action were adopted it would not be necessary to make specific provision for this sort of scheme in the new legislation because the scheme involves a contract between a migrant and the Commonwealth Government.⁷ If a migrant attempted to leave Australia from Western Australia within two years without repaying the financial assistance, the Commonwealth Government would have an action for breach of contract.

⁵ The Commission's proposals in the Working Paper were supported by the commentators who adverted to these matters: The Australian Finance Conference, the Credit Manager of the Sunday Times and the Law Society of Western Australia.

⁶ See the definition of "debt" in section 4(1) of the Northern Territory legislation set out in Appendix IV. The Northern Territory legislation does not extend to unliquidated claims nor to moneys not yet due and payable.

⁷ The scheme is not operating at present.

4. AMOUNT OF MONEY INVOLVED

6.6 At present a person may be prevented from leaving the State under the Act if he is indebted to the claimant for a sum not less than \$40,⁸ or if a person has a good cause of action against him for a sum not less than \$40.

6.7 In the Working Paper, the Commission suggested that the figure could be set at the sum of \$250.⁹ The commentators on the Working Paper expressed a wide divergence of views on the minimum monetary limit which should be set. Indeed, one commentator suggested that no minimum monetary limit should be set,¹⁰ because in his opinion the "effect on an individual's liberty is ...a secondary consideration and cannot be compared with the concern of the creditor". Another commentator,¹¹ suggested that the sum should be left at \$40. Three commentators suggested that the sum of \$250 was satisfactory.¹² The Law Society of Western Australia suggested that, the powers should only be available in respect of a substantial sum of money: \$1, 000. This is the same as the minimum sum provided for presenting a creditor's bankruptcy petition against a debtor.¹³

6.8 As the exercise of the powers to prevent a person leaving or removing property from the State have such a serious effect on an individual's liberty and could cause considerable inconvenience, embarrassment and expense, the Commission considers that it is desirable to provide a minimum monetary limit. The Commission recommends that the limit be set at the sum of \$500. This figure is the same as the sum set in the Northern Territory *Absconding Debtors Act 1978-1979* in respect of debts.¹⁴ The Commission recommends that this sum be prescribed in regulations so that it can be readily amended.

⁸ This would appear to include a judgment debt. The sum of \$40 was set in 1960: *Absconding Debtors Act Amendment Act 1960*, s 3.

⁹ This figure was based on an adjustment of the existing amount prescribed in the *Absconding Debtors Act 1877-1965* (\$40) for the movement in the Index of Wage Rates between 1960 (the year in which the sum of \$40 was set) and 1978 (the last year for which a rate was available). Upon such an adjustment the sum would have been \$174. Allowing for further adjustment it was suggested that a sum of \$250 would be reasonable in December 1980.

¹⁰ Mr J Wilson, JP.

¹¹ Mr T J Collinson.

¹² The Australian Finance Conference, the Rural and Industries Bank of Western Australia and the Credit Manager of the Sunday Times.

¹³ *Bankruptcy Act 1966-1980* (Cth), s 44(1)(a).

¹⁴ Para 4.3 above. Of the 35 files relating to applications for warrants under the Act in the years 1970-1980 (inclusive) studied by the Commission, the majority, 26 involved sums of \$500 or more.

5. MARRIED WOMEN

6.9 One anomaly with the Act is in its application to married women.¹⁵ The Commission can see no justification for this, and recommends that it should be possible to prevent a married woman leaving or removing assets from the State in the same circumstances as any other person.¹⁶

¹⁵ Paras 2.10 to 2.12 above.

¹⁶ Five commentators adverted to this matter: The Australian Finance Conference, the Law Society of Western Australia, the Rural and Industries Bank of Western Australia, the Credit Manager of the Sunday Times and Mr J Wilson JP. All agreed that married women should be treated in the same way as any other person. The desirability of a review of the *Married Women's Property Act 1892-1962* is beyond the terms of reference of the Commission but see the Law Reform Commission of Saskatchewan, *Tentative Proposals for an Equality of Status of Married Persons Act* (1981). Without such a review, rather than amend the *Married Women's Property Act 1892-1962*, it would probably be preferable to provide specifically that the new legislation applied to a married woman.

CHAPTER 7

RECOMMENDATIONS: PROCEDURE

1. INTRODUCTION

7.1 In this Chapter the Commission sets out the procedure which it recommends should be adopted in the new legislation. It is based, to some extent, on the existing procedure under the *Absconding Debtors Act 1877-1965* and the procedure provided in the Northern Territory *Absconding Debtors Act 1978-1979*. The procedure discussed below is applicable to cases in which the claimant has an unsatisfied judgment debt or alleges that he has a good cause of action against the respondent and whether or not an action has been commenced.

2. INSTITUTION OF PROCEEDINGS

7.2 Proceedings to prevent a person leaving the State should be commenced by an ex parte application for a summons or a warrant to issue for the arrest of the respondent. The application should be in a prescribed form.¹ It should be made by the person (or where the claimant is more than one person or is a body corporate, by any person duly authorised by or on behalf of the claimant) who alleges the claimant has a good cause of action or an unsatisfied judgment debt and should be supported by an affidavit setting out the material facts.² The onus should be placed on the claimant to satisfy the justice of the peace that the claimant has a prima facie cause of action. In those cases in which the application is refused, the original application and affidavit should be transmitted by the judicial officer hearing the application to the nearest Local Court which should act as a repository for the documents in case they are required for production in any subsequent legal proceeding or for the purpose of compiling statistics or information for any later review of any new legislation.³

7.3 One way in which a power to prevent a person leaving the State could be abused would be for a person who was aware that a respondent intended to leave the State deliberately to delay taking steps to obtain a summons or warrant until the respondent's

¹ The present Act makes no provision for forms to be prescribed. Two forms of warrant, printed by the Government Printer and numbered 606 and 606a, are widely used in respect of the existing Act.

² This procedure is similar to the existing procedure. The material facts which should be required should include reference to any prior proceedings instituted in respect of the claim.

³ As to the procedure where an application is successful see footnote 1 on page 40.

departure was imminent.⁴ By obtaining a summons or warrant and arresting the respondent shortly before departure, the claimant could place undue pressure on the respondent to settle the alleged cause of action irrespective of its merits. The Commission considers that it is undesirable for legal process to be used in such a manner. In order to prevent such an abuse, the Commission recommends that, at the time of an application for a summons or warrant, the claimant should be required to show that the application has been made within a reasonable time after the circumstances relied on as evidence of the respondent's intention to leave the jurisdiction came to his knowledge.

3. THE APPROPRIATE JUDICIAL OFFICER

7.4 At present, the application for a warrant under the Act can be made to a justice of the peace. Justices of the peace perform many administrative functions such as issuing warrants of arrest and search warrants in criminal cases, and taking affidavits. However, they are not usually involved directly in civil proceedings in this State. It may be considered by some to be incongruous for them to be involved in a matter which is ancillary to a civil proceeding, particularly as they would be required to consider whether the claimant has a prima facie cause of action. However, there would be practical difficulties in providing that an application could be made only to a magistrate since magistrates are not always available especially in the country towns from which a person could leave Western Australia. For these reasons the Commission recommends that, where an action has not been instituted, it should be possible to make an application for a summons or warrant to a justice of the peace or a magistrate.

7.5 As was stated in paragraph 3.1 above, the Act appears to apply even where an action has been commenced in the Supreme Court, the District Court or a Local Court. The Commission recommends that the new legislation should continue to be available in these circumstances. However, where the basis for the application is a cause of action for which legal proceedings have already been commenced, the Commission recommends that the application for a warrant or summons could be made to a judicial officer of the court in which the action has been commenced, or to a justice or magistrate. In the case of the Supreme Court

⁴ In many cases, of course, the claimant only becomes aware of the respondent's intentions very shortly before the respondent's intended departure time. However, an application was recently brought before the Supreme Court (*Murphy v Sanad Mohammed el Hosseini*, Supreme Court of Western Australia No 2420 of 1980. See *The West Australian*, 6.12.1980) based on an allegation that a claimant was withholding action under the Act until the defendant to a writ sought to leave the State. Brinsden J ruled that he had no jurisdiction to prevent an application for an Absconding Debtors warrant in those circumstances.

such an application would be made to a Judge or to the Master, Principal Registrar or a Registrar, and in the case of the District Court, to a Judge or the Registrar. In some cases this will be difficult or impossible because of the urgency of the application or the remoteness of the parties.

4. ISSUE OF A SUMMONS OR WARRANT

7.6 The justice or other judicial officer would, under the Commission's recommendations, be able to issue a warrant⁵ for the arrest of the respondent where he is satisfied that -

- (i) the respondent is preparing to or is about to leave the State;
- (ii) the respondent's absence would defeat, endanger or materially prejudice the prosecution of the claimant's cause of action or his prospects of enforcing a judgment; and
- (iii) the application has been made within a reasonable time after the circumstances relied on as evidence of the respondent's intention to leave the jurisdiction came to the knowledge of the claimant.

To avoid the unnecessary arrest of a respondent, the Commission recommends that the justice or other judicial officer should, as an alternative in appropriate cases, be able to issue a summons requiring the respondent to appear before the most convenient judicial officer available to deal with the matter. This might be either a judicial officer of a court with appropriate jurisdiction or of the nearest Local Court. The summons should be returnable at an appointed time and place⁶ and it should be in a prescribed form containing the same particulars as the warrant referred to above. It should be served on the respondent personally together with a copy of the application and the affidavit. If the respondent failed to appear at

⁵ The warrant should be in a prescribed form and should state -

- (i) the name and address of the claimant and the respondent;
- (ii) the nature and amount of alleged debt or cause of action ;
- (iii) whether any proceedings have previously been instituted in respect of the claim, and if so, particulars thereof ;
- (iv) the costs, if any, which are sought by the claimant; and
- (v) the office or title of the person to whom it is addressed, that is, a police officer: see para 7.8 below.

⁶ Where either a summons or a warrant is issued, the judicial officer should file the original application and affidavit in the nearest Local Court or, where an action has been commenced in a court with respect to the claim, in that court.

the appointed time and place, or if it appeared that he intended to leave the State prior to the hearing, a warrant for his arrest could then be issued. It should not be necessary for the respondent to appear before the judicial officer if he has in the meantime -

- (i) tendered to the claimant the amount of money specified in the summons as the claim and costs ⁷ or otherwise settled the claim;
- (ii) deposited with the appropriate Court that amount of money for payment into Court to abide the determination of the claim; or
- (iii) given security by surety or otherwise for payment of the amount claimed and costs, to the satisfaction of the claimant. ⁸

5. EXECUTION OF A WARRANT

7.7 A warrant should have a limited "life" of one month from the date of issue.⁹ It should be issued to the claimant who should hand it, together with a copy of the application and of the affidavit, each certified by the judicial officer, to the officer responsible for executing it. When the warrant is executed, the officer executing it should endorse the time and place of execution on it. Once the respondent has been arrested he should be taken before the justice or the court holding the hearing referred to in paragraphs 7.10 and 7.11 below as soon as practicable.

7.8 At present, a police officer is responsible for executing a warrant issued under the Act. In the Working Paper the Commission suggested that police officers should continue to be responsible for executing warrants. However, in his comments on the Working Paper, the Commissioner of Police, Mr J H Porter, expressed concern at the demands this proposal would place on police resources and the cost to the Police Department of performing this function. The Commissioner also pointed out that the matter involved a civil dispute. For these reasons he suggested that warrants should be executed by the officers usually responsible for performing arrests in civil proceedings, that is, a Local Court bailiff or the

⁷ Provision should be made for a simple scale of costs to be promulgated and varied from time to time.

⁸ In cases (ii) and (iii) the respondent should also be required to provide to the appropriate Court or to the claimant, as the case may be, both an address for service in Western Australia binding on him in further proceedings and details of his place of residence. The claimant should in any case be required to appear on the return of the summons to report to the court on the service of the summons and any subsequent developments.

⁹ *Absconding Debtors Act 1978-1979* (NT), s 8 and the order under s 63(2) of the *Supreme Court Act 1935-1981* (Form No 101 of the *Rules of the Supreme Court 1971-1981*) for the arrest of a person. Warrants do not at present have a limited life.

Sheriff of the Supreme Court or District Court, with the assistance of the police if necessary. The Commission sees some merit in the reasons given by the Commissioner. However, the Commission recognises that in most cases a warrant issued under the Act will need to be speedily implemented, often at times outside normal business hours. There would therefore be considerable difficulty in obtaining the services of a bailiff or sheriff without prior notice in many cases. In addition whilst concerned with civil debts or other civil claims, a warrant issued under the Act is a judicial order. The Commission foresees some difficulty in the enforcement of such warrants by bailiffs on occasions. The Commission therefore reluctantly recommends that warrants continue to be executed by police officers.¹⁰ It seems to be appropriate that claimants meet the cost of the proceedings rather than that the burden be placed on the general body of taxpayers. It may therefore be desirable that a fee be prescribed, payable initially by claimants, and recoverable against unsuccessful respondents, to offset the cost of police involvement.

6. OBTAINING THE RESPONDENT'S RELEASE

7.9 When the officer executes the warrant he should give the respondent a copy of it, together with the certified copy of each of the application and the affidavit. The purpose of this procedure is to enable the respondent to obtain details of the alleged cause of action so that he can obtain his release from custody by -

- (i) tendering to the claimant the amount of money specified in the warrant as the claim and costs or otherwise settling the claim;
- (ii) depositing with the arresting officer for payment into court that amount of money to abide the determination of the claim;¹¹ or
- (iii) giving security by surety or otherwise for payment of the amount claimed and costs, to the satisfaction of the claimant.¹²

¹⁰ In any case, in country areas police officers carry out the duties of bailiffs in other than major centres.

¹¹ *Absconding Debtors Act 1978-1979* (NT), s.12. There is no such procedure at present in Western Australia. Following arrest a respondent is now taken before a justice for the enquiry as to whether a second warrant should be issued.

¹² In cases (ii) and (iii) the respondent should also be required to provide to the appropriate Court or to the claimant, as the case may be, both an address for service in Western Australia binding on him in further proceedings and details of his place of residence.

7.10 If the respondent pays the amount specified in the warrant to the claimant or into court or gives security he should be released. If not, the respondent should be taken, as soon as practicable, before the nearest justice of the peace.¹³ The justice of the peace or, where a respondent appears in response to a summons,¹⁴ the appointed court, should hold a hearing into the allegations contained in the application. The normal rules of evidence and procedure of a civil court should apply to the hearing, as far as practicable. The justice or other judicial officer should be required to inquire both as to the allegations made by the claimant and as to the property and means of the respondent. The parties should be under a duty to answer such inquiries upon oath or affirmation.

7.11 If the justice or other judicial officer is not satisfied as to the material matters,¹⁵ he should order that the respondent be released from custody and he should have power to order the claimant to pay to the respondent costs according to a prescribed scale. Where he is satisfied as to those matters, he should have power to order that the respondent be released unconditionally¹⁶ or that the respondent be released subject to an order that he be required to -

- (1) remain in the State until the action is completed, or until the claim is satisfied, or until the order is discharged or quashed;¹⁷
- (2) surrender his passport or travel tickets or both to the Clerk of the nearest Local Court;¹⁸
- (3) give security, either with or without surety, for the payment of a specified sum to the claimant or for the payment to the claimant of any sum which may be

¹³ Perhaps a voluntary roster of available justices and magistrates could be organised in the Perth metropolitan area. The Commission understands that a duty justice will usually be available at East Perth Court to deal with these matters in any event, even outside normal hours.

¹⁴ Para 7.6 above. Where the respondent has been arrested pursuant to a warrant issued in respect of a cause of action for which legal proceedings have already been commenced, the justice should have power to refer the matter to a judicial officer of the court in which the action has been commenced, if it is convenient to do so and does not impose undue hardship or delay on one or other of the parties.

¹⁵ That is, the matters which must be established before a respondent can be prevented from leaving the State.

¹⁶ Such a power might be exercised, for example, where the judicial officer concludes that restraints on the respondent would be pointless, or unduly harsh in the circumstances or that the respondent will in any event meet any claim or that the creditor's conduct disentitles him to relief.

¹⁷ See paras 8.7 and 8.9 below.

¹⁸ In the case of a hearing in the Supreme Court or the District Court this would be to the Master or Registrar of the court concerned.

recovered against the respondent in respect of the alleged cause of action and costs;

- (4) pay a specified sum into court to await the completion of the action;
- (5) keep property in the State until the action is completed;
- (6) provide to the claimant an address for service in Western Australia and details of his place of residence. The address for service should be binding on the debtor in further proceedings; or
- (7) meet a combination of these conditions.¹⁹

Once the justice or other judicial officer has determined the matter he should have a discretion to make an order as to the costs relating to the application and the hearing, according to a prescribed scale.²⁰

7.12 The Commission wishes to emphasise that the justice or other judicial officer, upon completion of the should have no power of further detention of the respondent.

7. PREVENTING THE RESPONDENT FROM LEAVING THE STATE

7.13 Where the justice or other judicial officer has ordered the respondent to be released subject to one or more of the conditions set out in paragraph 7.11 above he should at that time issue a warrant for the arrest of the respondent should he attempt to leave the State, or, as the case may be, if there are reasonable grounds for believing that he is about to leave the State, in contravention of or without first complying with the order. The warrant should be delivered to the claimant for execution by a police officer. As with the present legislation the police officer's function would be simply to prevent the respondent leaving the State until the conditions of the order are satisfied.²¹ The existing legislation has operated on this basis for over one hundred years. Whilst it may be thought that to give to the claimant only a power to

¹⁹ These provisions are a modification of the provisions of the *Absconding Debtors Act 1978-1979* (NT), s 16 and of the provisions of the existing Act with certain additional provisions which seem desirable.

²⁰ See para 8.3 below as to further action by a successful respondent.

²¹ The respondent would also commit an offence: see paras 7.14 and 7.15 below.

restrain the respondent from leaving the State when he appears likely to do so is inadequate, the Commission has received no submissions that this is the case and its study of files referred to in paragraph 2.15 above and its discussion with those familiar with the operation of the Act indicates that the procedure in fact operates efficiently. The Commission considers that the risks inherent in permitting a claimant to detain a respondent as is envisaged in the Northern Territory legislation²² outweigh the risks of fraudulent debtors evading the operation of the warrant.

7.14 At present, it is an offence for a person who has been arrested under a warrant issued under the Act to quit or make preparations to quit the State with intent to defraud the claimant.²³ If, as has been recommended above, a justice or other judicial officer were given power to order that the respondent remain in the State, a respondent who left or attempted to leave the State contrary to such an order would be in contempt of court under section 178 of the *Criminal Code*. That section provides:

“Any person who, without lawful excuse, the proof of which lies on him, disobeys any lawful order issued by any Court of justice, or by any person authorised by any public Statute in force in Western Australia to make the order, is guilty of a misdemeanour, unless some mode of proceeding against him for such disobedience is expressly provided by Statute, and is intended to be exclusive of all other punishment.

The offender is liable to imprisonment for one year.”

7.15 However, the Commission considers that in addition to the provisions of section 178 of the *Criminal Code* it is desirable to retain a provision similar to section 5A of the Act in any new legislation. The provision would be based on different criteria, and would be apparent on the face of the legislation itself and the penalty can be made appropriate to the offence. The Commission recommends that the fine of \$200 be increased to \$500.

7.16 As has been pointed out by the New South Wales Law Reform Commission,²⁴ section 63(2)-(4) of the *Supreme Court Act 1935-1981* (WA) is a provision not in aid of execution but to secure the presence of a defendant where his absence would materially prejudice the plaintiff in the prosecution of his action. For that reason and because the provision had become obsolete in England, the Commission recommended it should not be adopted in New

²² *Absconding Debtors Act 1978-1979* (NT), s 16.

²³ *Absconding Debtors Act 1877-1965*, s 5A.

²⁴ Para 4.7 above.

South Wales. In *Southern Drug Co Ltd v Lagos*²⁵ Cox J discussed the South Australian equivalent provisions in the following words:

"The critical words relate to the prejudice apprehended by the plaintiff in the prosecution of his action. These words come from s 6 of the *Debtors Act, 1869* (UK). In proceedings under that Act, analogous to those before me, they have been strictly construed and confined to the means by which the plaintiff is to obtain a judgment against the defendant. Subsequent proceedings to enforce the judgment are not related to the 'prosecution' of the action, and the legislation has nothing to say to them.

[T]he scope of s 35 of the *Supreme Court Act* is very narrow - narrower, certainly, than s 271 of the *Local and District Criminal Courts Act*,²⁶ and narrower, in some respects though not in others, than a writ of *ne exeat*. It is not a mere piece of debt-collecting machinery. It assists the plaintiff wherever he may need the defendant in order to prove his claim against him - to answer interrogatories, say, or even to give evidence for him at the trial. Such cases will be rare, of course, and no doubt that helps to explain why s 35 has, so far as I can discover, been rarely used. (I might observe that its English progenitor - s 6 of the *Debtors Act 1869* - seems also to have fallen into desuetude.)"

His Honour pointed out that Victorian and New South Wales decisions based on legislation in terms that the defendant's absence would mean that the cause of action would "be defeated"²⁷ suggest that it is enough, to satisfy this test, to show that the plaintiff would be frustrated in recovering his judgment by not having the defendant within the jurisdiction at the time final judgment is given. This Commission believes that section 63(2)-(4) of the *Supreme Court Act 1935-1981* is rarely used in Western Australia and that the recommendations made in this Report would make retention of the provision unnecessary. No doubt use of the provision is discouraged by the requirement of detention in custody unless security is given. The provision also does not apply in Local Court proceedings although it is available in Supreme Court and District Court proceedings involving sums as low as \$100. The Commission has designed its recommendations to cover the situations envisaged by section 63(2)-(4) as well as those now dealt with by the *Absconding Debtors Act 1877-1965*.²⁸ The Commission accordingly recommends that section 63(2)-(4) of the *Supreme Court Act 1935-1981* be repealed.

7.17 The Australian Finance Conference suggested that provisions such as those contained in Part IV of the Northern Territory *Absconding Debtors Act 1978-1979* dealing with

²⁵ (1980) 24 SASR 590, 592 and 594.

²⁶ See para 4.2 above.

²⁷ For example *Supreme Court Act 1958-1981* (Vic), s 128, discussed at para 4.5 above.

²⁸ Para 6.2 above.

restraints on transfer or removal of property from the jurisdiction should be specifically included in any new legislation in Western Australia. The Commission agrees that these provisions are a useful adjunct to Absconding Debtors legislation and should be provided for in amending legislation as an additional remedy available to claimants. In some cases the respondent may be a corporation, or even a natural person not personally wishing to leave Western Australia, but seeking to avoid enforcement of liabilities by the transfer of assets elsewhere. In such cases the Absconding Debtors procedure may have advantages over, for example, the Mareva injunction or other provisions, because of its speedy, inexpensive and easily accessible procedures.

CHAPTER 8

RECOMMENDATIONS: SAFEGUARDS

1. PROTECTION OF RESPONDENTS

8.1 The Commission is aware of a number of cases in which it has been alleged that the provisions of the Act have been abused.¹ The Commission has recommended that the power to prevent a person leaving the State should be limited to circumstances in which his absence would defeat, endanger or materially prejudice the prosecution of the claimant's cause of action or his prospects of enforcing a judgment. This would limit the scope for abuse of the process. Such abuse should also be limited by the provision for a hearing in an appropriate Court.² However, the Commission considers that it is necessary to provide further protection.

8.2 The Act does, at present, provide some protection for respondents against abuse of the process. That protection is provided by the provision that it is an offence for a person making an affidavit for the purpose of obtaining a summons or warrant to obtain it " ... unlawfully or maliciously, injuriously or oppressively, or by abuse of process".³ The Commission recommends that a similar offence be provided under the new legislation, but that a summons or warrant should be deemed to have been obtained oppressively if the person obtaining it -

- (i) had reasonable cause to believe that the claim on which his affidavit was based was one which could not be sustained at law;
- (ii) had no reasonable cause to believe that the respondent intended to leave the State or that the respondent's absence would defeat, endanger or materially prejudice the prosecution of the claimant's cause of action or his prospects of enforcing a judgment; or
- (iii) without reasonable cause, neglected to make his application for a summons or warrant within a reasonable time after the circumstances relied on as evidence of the respondent's intention to leave the jurisdiction came to the knowledge of the claimant.

¹ See, for example, para 5.11 of the Working Paper.

² Para 7.10 above.

³ Para 2.20 above.

8.3 In the Working Paper the Commission discussed whether or not a respondent should be able to recover the whole or a portion of the fine for such an offence.⁴ It is not usual for the whole or a portion of a fine to be paid to the victim of a criminal offence. The appropriate remedy is a claim for restitution of property⁵ or criminal injuries compensation⁶ or some form of civil action. The Commission can see no cogent reason for departing from the usual practice and providing for the whole or a portion of the fine to be paid to a respondent. The Commission considers that it is desirable to leave the respondent to obtain compensation through civil remedies. It appears that an action for malicious process can be sustained where a person has instituted the process maliciously and without reasonable cause.⁷ In the Working Paper,⁸ the Commission also raised the question whether or not a new civil remedy should be created based either on negligence on the part of the claimant or on strict liability if a claimant obtained a summons or warrant but was unsuccessful in his action against the respondent. The Law Society of Western Australia recommended a civil remedy based on the institution of proceedings without reasonable cause. The Commission agrees that it would be desirable to alter the existing common law remedy with its emphasis on malice to one so based notwithstanding the possibility that occasionally a person may be deterred from using the process merely for fear of the consequences. This is because the consequences of misuse of the procedure outweigh the possible deterrent effect of the availability of such a remedy against unsuccessful and unmeritorious claimants.

8.4 The prime purpose of the scheme suggested by the Commission is to enable a claimant to prevent a respondent leaving the State where his absence would defeat, endanger or materially prejudice the prosecution of the claimant's cause of action or his prospects of enforcing a judgment. In those cases in which a respondent has been ordered to remain in the State, and the claimant has not previously commenced his action, the Commission recommends that he should be required to do so (and also that he should file a copy of the writ or summons in the court in which the earlier documents have been filed)⁹ within five days of the date of the order. If the proceedings are not instituted and the copy of the writ or summons

⁴ Para 5.38 of the Working Paper.

⁵ This would not be appropriate here as property has not been stolen, destroyed or damaged by the claimant.

⁶ The respondent would not be entitled to recover compensation under the *Criminal Injuries (Compensation) Act 1970-1976* because compensation may only be recovered under that Act for bodily injury or loss caused by or directly arising from such injury.

⁷ See *Roy v Prior* [1970] 2 All ER 729, and W V H Rogers, *Winfield and Jolowicz on Tort* (11th ed 1979), Chp 21.

⁸ Para 5.39 of the Working Paper.

⁹ See para 7.6 above.

filed within five days, the respondent should be at liberty to leave the State¹⁰ and the claimant should not be permitted to obtain a further summons or a warrant for the arrest of the respondent on that particular matter. The order and any warrant issued under the Act would become void. Any security or surety entered into by the respondent would be discharged. The respondent should be able to recover his passport and travel tickets and any money paid into court or other security.

2. REVIEW OF DECISIONS AND DISCHARGE OF WARRANTS

8.5 At present decisions of justices under the Act can be reviewed by the Supreme Court under section 197 of the *Justices Act 1902-1980*.¹¹ That right of appeal would apply to a decision made on the hearing before a justice referred to in paragraph 7.10 above but not to a hearing in a Local Court or other court exercising civil jurisdiction. Nor would the right of appeal provided in section 107 of the *Local Courts Act 1904-1976* apply to a decision made in a Local Court hearing because the hearing would not be an "action" or "matter".

8.6 Warrants can be discharged only by one of three methods referred to in paragraphs 2.17 to 2.19 above.

8.7 Rather than extend either of the appeal provisions referred to in paragraph 8.5 above to include a decision made on a court hearing or retain either of the provisions referred to in paragraphs 2.18 and 2.19 above, the Commission recommends that provision should be made for a claimant or respondent (as the case may be) to apply to a Supreme Court judge in Chambers by way of summons for an order that -

- (a) any warrant or summons issued against the respondent be discharged;
- (b) any order made be varied or quashed; or
- (c) any refusal to make an order be set aside and an order be made by the judge.¹²

¹⁰ It should be stated in the order that the respondent is at liberty to leave the State notwithstanding the warrant if the claimant fails to institute proceedings within five days of the date of the order.

¹¹ An appeal was made under this provision by a person against whom a second warrant had been issued in *Davison v Fullerton* (unreported) Supreme Court of Western Australia, No 167 of 1976.

¹² This application should be the only means of appeal under the new legislation.

8.8 Where a warrant or summons is set aside or order quashed, the claimant should not be permitted to apply for a further summons, warrant or order within six months unless the claimant introduces further information in support of his claim that was not or could not reasonably have been introduced at the time when the application was made for the summons, warrant or order that was set aside or quashed.¹³

8.9 A justice or other judicial officer should however have power to discharge or vary his own order where either the respondent or indeed the claimant brings before him additional information in support of an application so to do served upon the other party where appropriate.

¹³ *Absconding Debtors Act 1978-1979 (NT)*, ss 20(1) and 22

CHAPTER 9

SUMMARY OF MAIN RECOMMENDATIONS

9.1 The Commission summarises its recommendations as follows -

Repeal of Existing Legislation

1. The *Absconding Debtors Act 1877-1965* and section 63(2)-(4) of the *Supreme Court Act 1935-1981* should be repealed and replaced by new legislation.

(Paragraphs 6.1 and 7.16)

New Legislation

2. There is a need for powers by means of which a respondent can be prevented from leaving the State or removing assets from the State in certain circumstances.

(Paragraphs 5.1 to 5.7)

The Scope of New Legislation

3. It should be possible to prevent a person who is preparing or about to leave or remove assets from the State from leaving or removing assets from the State where the departure or removal of the assets would -

- (a) defeat, endanger or materially prejudice the prosecution of the claimant's cause of action or the prospects of enforcing a judgment;
- (b) the cause of action is with respect to a sum of money not less than \$500; and
- (c) the application has been made within a reasonable time after the circumstances relied on as evidence of the respondent's intention to leave the jurisdiction came to the knowledge of the claimant.

(Paragraphs 6.2 to 6.8 and 7.3)

4. The new legislation should apply to a married woman in the same circumstances as to any other person.

(Paragraph 6.9)

Procedure

5. Proceedings should be commenced by an ex parte application for a summons or warrant supported by an affidavit.

(Paragraph 7.2)

6. The application should be made to a justice of the peace or a magistrate.

(Paragraph 7.4)

7. However, where an action has been commenced in the Supreme Court, the District Court or a Local Court it should be possible to make the application to a judicial officer of that Court.

(Paragraph 7.5)

8. The justice or other judicial officer should be able to issue either a summons requiring the respondent to appear before a court or a warrant to apprehend the respondent and take him before a justice or a court.

(Paragraphs 7.6 and 7.7)

9. A respondent need not appear or be taken before a justice or the court if the respondent -

- (i) tenders to the claimant the amount of money specified in the summons or warrant as the claim and costs or otherwise settles the claim;
- (ii) deposits with the appropriate court or the arresting officer for payment into court that amount of money to abide the determination of the claim; or
- (iii) gives security by surety or otherwise for payment of the amount claimed and costs, to the satisfaction of the claimant.

(Paragraphs 7.6 and 7.9)

10. A warrant should be executed by a police officer.

(Paragraph 7.8)

11. Where a respondent has been arrested he should be taken as soon as practicable before the nearest justice of the peace.

(Paragraph 7.10)

12. When a respondent appears before or is taken before a justice of the peace or a court, the justice or other judicial officer should hold a hearing into the matters referred to in paragraph 3 above and if satisfied as to those matters, the justice or other judicial officer should have power to order that the respondent be released unconditionally or that he be released subject to an order that he be required to -

- (1) remain in the State until the action is completed, or until the claim is satisfied, or until the order is discharged or quashed;
- (2) surrender his passport or travel tickets or both to the Clerk of the nearest Local Court or other appropriate court officer;
- (3) give security, either with or without surety, for the payment of a specified sum to the claimant or for the payment to the claimant of any sum which may be recovered against the respondent in respect of the alleged cause of action and costs;
- (4) pay a specified sum into court to await the completion of the action;
- (5) keep property in the State until the action is completed;
- (6) provide to the claimant an address for service in Western Australia and details of his place of residence. The address for service should be binding on the debtor in further proceedings; or
- (7) meet a combination of these conditions.

(Paragraph 7.11)

13. The justice or court should have a discretion to make an order as to costs.
(Paragraph 7.11)

14. Where an order has been made that the respondent should remain in the State, the justice or other judicial officer should issue a warrant for the arrest of the respondent should he attempt to leave the State or there are reasonable grounds for believing that he is about to leave the State in contravention of the order.
(Paragraph 7.13)

Protection of Respondents

15. It should continue to be an offence to make an affidavit for the purpose of obtaining a summons or warrant unlawfully, maliciously, injuriously, oppressively, or by abuse of process, but the meaning of "oppressively" should be clarified.
(Paragraph 8.2)

16. A new civil remedy for abuse of the new legislation should be created, based upon the institution of legal proceedings without reasonable cause.
(Paragraph 8.3)

17. In those cases in which a respondent has been ordered to remain in the State and the claimant has not previously commenced an action, the action should be commenced within five days of the date of the order.
(Paragraph 8.4)

18. If the action is not so commenced, the respondent should be at liberty to leave the State.
(Paragraph 8.4)

Review of Decisions and Discharge of Warrants

19. Provision should be made for a claimant or respondent to apply to a Supreme Court judge in Chambers by way of summons for an order that -

- (a) any warrant or summons issued against the respondent be discharged;
- (b) any order made be varied or quashed; or
- (c) any refusal to make an order be set aside and an order be made by the judge.

(Paragraph 8.7)

20. A justice or other judicial officer should however have power to discharge or vary his own order where either the respondent or indeed the claimant brings before him additional information in support of an application so to do served upon the other party where appropriate.

(Paragraph 8.9)

The Mareva Injunction

21. The scope and jurisdiction of the Supreme Court and of the District Court to issue Mareva injunctions should be confirmed by attention to the *Supreme Court Act 1935-1981*, section 25(9), and the *Rules of the Supreme Court 1971-1981*.

(Paragraph 5.8)

Other Matters

22. Provisions similar to those contained in Part IV of the Northern Territory *Absconding Debtors Act 1978-1979* dealing with restraints on transfer or removal of property from the jurisdiction should be specifically included in any new Absconding Debtors legislation in Western Australia, as an additional remedy available to claimants.

(Paragraph 7.17)

23. A provision similar to section 5A of the *Absconding Debtors Act 1877-1965* should be retained in any new legislation.

(Paragraphs 7.14 and 7.15)

D K Malcolm, QC
Chairman

E G Freeman
Member

H H Jackson
Member

C W Ogilvie
Member

L L Proksch
Member

1 December 1981

APPENDIX I
LIST OF THOSE WHO COMMENTED ON THE WORKING PAPER

Associated Banks in Western Australia

Australian Finance Conference

Citicorp Australia Ltd

Mr T J Collinson

Commissioner of Police, Mr J H Porter

The Law Society of Western Australia

The Rural and Industries Bank of Western Australia

The Credit Manager of the Sunday Times

Mr J Wilson, JP

APPENDIX II

THE ABSCONDING DEBTORS ACT 1877-1965

[As amended by Acts:

43 Vict., No. 24 of 1879, assented to 1st October, 1879;
No. 12 of 1960, assented to 6th October, 1960;
No.113 of 1965, assented to 21st December, 1965.]

AN ACT to repeal an Act entitled "An Act to facilitate the arrest of Absconding Debtors," and to make other provision in lieu thereof. [Assented to 17th August, 1877.]

Amended by No. 12 of 1960, s. 2. Whereas the laws now in force for the arrest of debtors absconding from the State are insufficient for that purpose, and it is further expedient to afford facilities to prevent persons who may have engaged to pay any sum or sums of money on their leaving the State from leaving the State without paying the same: Be it therefore enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows:-

Amended by No 12 of 1960, ss.2 and 3; No.113 of 1965, s.8. 1. If any professing creditor shall, by affidavit of himself or any other credible person, satisfy any Justice of the Peace in the said State that any person is indebted to such creditor in any sum not less than forty dollars; or if any duly authorised person shall by affidavit satisfy any such Justice that any person is under an engagement to remain in the State for any agreed term- or otherwise to pay any sum of money not less than forty dollars on his leaving the State prior to the expiration of such term; or if any duly authorised person shall by affidavit satisfy any such Justice that ~~he~~ has a good cause of action against any person to an amount not less than forty dollars; and if in either of such cases it be further shown to the satisfaction of such Justice as aforesaid that there is reasonable ground for believing that the person so indebted or under engagement or liability as aforesaid is about to quit the State without paying his said debt or the sum of money he is under engagement to pay on leaving the State, or discharging his liability as aforesaid, it shall be lawful for such Justice of the Peace, by a warrant to be signed by him, to direct any constable to apprehend such person so about to quit the State.

Amended by No.12 of 1960, ss. 2 and 4. 2. Upon the arrest of any such person under any such warrant, he shall be brought as soon as may be before a Justice of the Peace, who shall proceed to hear and inquire into the case; and it shall be lawful for such Justice to take and receive evidence upon affidavit upon any such inquiry; and if it shall appear to such Justice that such person so arrested is indebted as aforesaid, or is under an engagement or any liability as aforesaid, or¹ is about to quit the State without paying his said debt or the sum of money as aforesaid or discharging his said liability, it shall be lawful for the said Justice, by warrant under his hand, to direct any constable to apprehend such debtor or other person as often as he may be found in or on, or

¹ The reprint of the Act dated 15 May 1978 contains the word "or".
The Act, as originally printed contains the words "and that he" instead of "or".

boarding or entering a vessel, aircraft, railway train, motor vehicle, or any other vehicle or means of transport, whether of the kind or class as those so expressly mentioned or not, about to leave the State, in default of payment of his said debt or the sum of money as aforesaid, or discharging his said liability, or unless and until he shall sooner give security by bond with at least one sufficient surety for double the amount claimed, and conditioned for the payment of any sum which may be recovered against him in respect of the alleged debt or liability as aforesaid, or, in the case of a person under engagement as aforesaid, that he will not leave the State without first paying any sum of money which he may have contracted to pay on his leaving the State. Provided always, that any person arrested as lastly mentioned shall be forthwith brought from the vessel, aircraft, train or vehicle which he was in or on or was boarding or entering, and liberated.

3. All necessary and proper proceedings for the final determination or recovery of any claim or matter in respect of which any such last mentioned warrant has issued as aforesaid, shall be taken and completed with reasonable diligence; in default whereof any person against whom any such warrant has issued may apply to any two Justices to quash the said warrant, and such Justices are hereby empowered, in case it shall appear to them that the said proceedings have not been taken or completed with such diligence as aforesaid, to quash the said warrant.

Amended by
No.12
1960, s.5.

4. At any time after the expiration of three of months from the issuing of any such last mentioned warrant as aforesaid, it shall be lawful for the person against whom such warrant has issued to apply to the Chief Justice to quash the same, and thereupon it shall be lawful for the Chief Justice, on being satisfied that such person has no means wherewith to pay the debt or debts in respect of which any such warrant has issued to quash the said warrant, and also any other warrant that may have been issued against such person, pursuant to the provisions of this Act, upon such terms and conditions as to him may seem fit; and after any such warrant or warrants have been quashed by the Chief Justice under the provisions of this section, no fresh warrant shall issue against such person under the provisions of this Act for a period of six months.

Persons unlaw-
fully or
maliciously
arresting to be
liable to fine.
Added by 43
Vict., No.24,
ss. 1 to 4;
renumbered s.5
in 1928 reprint.
Amended by
No.12 of 1960,
s.6; No.113 of
1965, s.8.

5. (1) In all cases where a person shall be arrested under the provisions of this Act, the person making the affidavit upon which the warrant of apprehension issues shall, if the said, warrant be unlawfully or maliciously, injuriously or oppressively, or by abuse of process obtained, be guilty of an offence, and be liable on summary conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding six months.

(2) [Repealed by No.12 of 1960, s.6.]

(3) Such conviction shall be in addition to any civil remedy which the person aggrieved and so arrested might but for such conviction have against the person so convicted or any other person in respect of the matter complained of.

(4) [Repealed by No.12 of 1960, s.6.]

Added by No.
12 of 1960,
s .7.

Amended by
No.113 of
1965, s .8.

5A. A person who, after he has been arrested under a warrant issued pursuant to the provisions of this Act, quits or makes preparation quit the State with intent to defraud the creditor of the debt or sum of money or the amount of liability in respect of which the warrant was issued, is guilty of an offence, and is liable on summary conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding six months.

S.5 of 41
Vict., No.17,
renumbered s.6
in 1928 reprint.

6. The Act of the Legislative Council, No.27 of 1871, is hereby repealed.

APPENDIX III
CHAPTER 2 OF THE WORKING PAPER -
"IS THE ACT A VALID LAW OF THE STATE?"

2.1 The *Absconding Debtors Act* was enacted in 1877 prior to Federation and the adoption of the Commonwealth *Constitution*. Section 92 of the *Constitution* provides, in part, that "trade, commerce, and intercourse among the States...shall be absolutely free". As a result of this provision, the power of the State (as well as that of the Commonwealth) to enact valid legislation with respect to inter-State trade, commerce and intercourse is limited. A statutory provision which contravenes the section is invalid.

2.2 Whether or not the Act contravenes section 92 raises a number of questions. The first is whether the phrase "trade, commerce, and intercourse" is limited to commercial intercourse such as the transportation of goods or whether it extends beyond that to include a person travelling inter-State for other purposes such as to visit a relative or friend. This matter appears to have been settled by the High Court in *R v Smithers; Ex parte Benson*.¹ In this case, Isaacs J, referring to the term "intercourse" said: ²

"To limit it to commercial intercourse would make the right of personal freedom to pass a State line depend on the fact whether the individual was engaged in trade or commerce, and if that were to be given a restricted signification, the people of the Commonwealth would have to rest their right to cross a State line, not on their personality or their common citizenship, but on the sordid fact of some inter-State business transaction".

Likewise Higgings J.³

"No due effect can be given to the word 'intercourse' unless it be treated as including all migration or movement of persons from one State to another - of children returning from their holidays, of friends visiting friends, as well as commercial travellers returning to their warehouse".

¹ (1912) 16 CLR 99. That case arose from a conviction under the *Influx of Criminals Prevention Act 1903* (NSW). The Act provided that it was an offence for a person to enter New South Wales if –

- (i) he had been convicted in any other State of an offence for which he was liable to suffer death or imprisonment for one year or longer; and
- (ii) three years had not elapsed since the termination of any imprisonment imposed on such a conviction.

See also *Duncan v State of Queensland* (1916) 22 CLR 556, 593 per Barton J and *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29, 82 per Dixon J.

² (1912) 16 CLR 99, 113.

³ Id. 118.

Thus it appears that section 92 is not limited to commercial intercourse but applies to any inter-State movement of a person. Therefore, as the *Absconding Debtors Act* imposes a restriction on the ability of a debtor to leave Western Australia, it would appear to impose a restriction on intercourse between the States within the meaning of the section and prima facie to be invalidated by it. However, the issue is far more complex than this.

2.3 The fundamental difficulty in applying the provisions of section 92 to, any particular statute lies in the conceptual basis of the section. Whilst section 92 requires that inter-State trade, commerce and intercourse shall be absolutely free yet the *Constitution* presupposes an orderly and governed community.

2.4 A number of factors might be suggested as guides in determining whether section 92 operates to invalidate a particular statute.⁴

2.5 In *The Commonwealth v Bank of New South Wales* Lord Porter enunciated two general propositions:⁵

“(1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s.92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.”

2.6 Legislation may have a direct effect even though it is not a law with respect to trade, commerce and intercourse.⁶ Consideration must be given to the legal effect of the legislation and whether it "not remotely or incidentally ...but directly"⁷ restricts inter-State trade, commerce and intercourse. A law is said to have a direct effect if it takes a fact, event or thing itself forming part of trade, commerce and intercourse among the States and proceeds by reference to it to impose a restriction.⁸

2.7 It may be argued that the *Absconding Debtors Act 1877-1965* takes an event forming part of trade, commerce and intercourse among the States, namely, the fact that a respondent

⁴ See generally P H Lane *The Australian Federal System* (2nd ed 1979), 755-847 and Colin Howard, *Australian Federal Constitutional Law* (2nd ed 1972), 259-358,

⁵ (1949) 79 CLR 497, 639.

⁶ *SOS (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529, 573-574.

⁷ *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 637.

⁸ *Hospital Provident Fund Pty Ltd v State of Victoria* (1953) 87 CLR 1,17 per Dixon CJ.

is about to quit the State and travel to another State, and proceeds by reference to that event to impose a restriction and that therefore the Act has a direct effect on intercourse between the States. On the other hand it may be considered that the direct legal operation of the Act is with respect to undischarged debtors and that it has only an incidental effect on inter-State trade, commerce and intercourse.

2.8 Merely because an Act has a direct effect on inter-State trade, commerce and intercourse however is not necessarily decisive. As Lord Porter pointed out,⁹ in certain circumstances regulation of trade, commerce and intercourse among the States is permissible because it is considered to be compatible with its absolute freedom.

2.9 As an example of the type of regulation which may be permitted his Lordship said that "regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens."¹⁰ It therefore seems clear that in determining whether the regulation is reasonable a number of factors including the nature of the law concerned and the burden imposed on inter-State trade, commerce and intercourse must be considered.

2.10 Permissible regulation is not confined to laws which ensure that those engaging in inter-State trade, commerce and intercourse may "better enjoy the freedom which s 92 guarantees; that is to say, to laws which ensure that interstate trade is not anarchic and that true freedom, not mere license, prevails *in that trade*."¹¹ The High Court has, for example, recognised that laws relating to public health, safety, or crime and laws designed to protect the public from fraudulent practices may be compatible with the freedom of inter-State trade, commerce and intercourse because they are designed to accommodate inter-State trade, commerce and intercourse to the interests of the wider community.¹² However, the boundaries of permissible regulation have never been finally delineated.¹³

2.11 For these reasons it is difficult to say with any degree of certainty whether or not the *Absconding Debtors Act 1877-1965* is merely regulatory. It could be argued that the Act falls within the scope of permissible regulation because, in adjusting the rights of creditor and

⁹ *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 639.

¹⁰ Id, 641.

¹¹ *Permewan Wright Consolidated Pty Ltd v Trehwitt* (1979) 54 ALJR 98, 105 per Stephen J.

¹² Id, 105-106.

¹³ Id, 106.

debtor, by authorising the claimant in effect to prevent an undischarged debtor leaving the State until the claim is satisfied or secured, it accommodates the interests of inter-State trade, commerce and intercourse to the interests of the wider community. Such an argument would, however, carry greater weight if the Act were confined to respondents leaving the State with the intention of avoiding the repayment of a debt or the fulfilment of an obligation, that is if there were an element of fraud in the respondent's decision to leave the State.¹⁴

2.12 The Commission raised the question of the validity of the Act with the Attorney General. The Attorney General has forwarded to the Commission an opinion prepared by the Crown Solicitor which was also approved by the Solicitor-General. The Crown Solicitor preferred the view that the Act was valid because the effect of the Act on inter-State trade, commerce and intercourse was indirect since the Act was concerned with debtors rather than with intercourse among the States but that in any event it was regulatory legislation not invalidated by section 92, The Commission considers that the matter is not beyond doubt.¹⁵

2.13 If an Act is invalid consideration must be given to two techniques for the construction of statutes known as "reading down" and "severance".¹⁶ These techniques provide a means whereby an otherwise invalid statute can be interpreted so that it can operate in areas in which it is valid. If sections 1 and 2 of the Act were invalid it may be possible to read them as applying only to respondents intending to travel overseas. If it is not possible for the sections to be read down in such a way, consideration must be given to whether they can be severed. However, severance appears to be inapplicable because the structure of the Act indicates that the legislature intended that the Act should stand or fall as a whole. Even if the Act offends section 92 of the *Constitution* it is possible that it remains a valid and effective State Act in relation to a respondent intending to travel directly from Western Australia to another

¹⁴ As in the South Australian provision referred to in para 4.2 below. Similarly if the departure would materially prejudice the recovery of the debt: as in the Northern Territory provision referred to in para 4.3 below.

¹⁵ A further possible limitation on the State's power in this area results from section 49 of the *Northern Territory (Self-Government) Act 1978* (Cth). That section provides:

"Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free,"

In *Lamshed v Lake* (1958) 99 CLR 132 it was held that an identical provision (section 10 of the *Northern Territory (Administration) Act 1910* (now repealed)) was a valid law of the Commonwealth Government (under section 122 of the Constitution) and was binding, not only on the administration of the Territory, but also on the States. A State law which is inconsistent with section 49 will be invalid under section 109 of the Constitution. If the Act were invalid, its provisions could not be used to prevent a person travelling from Western Australia to the Northern Territory.

¹⁶ See generally, Colin Howard, *Australian Federal Constitutional Law* (2nd ed 1972), 18-27.

country. Notwithstanding its own doubts on the matter, for the purpose of this working paper, the Commission will proceed on the assumption that the Act is valid.

APPENDIX IV
THE ABSCONDING DEBTORS ACT 1978-1979
(NORTHERN TERRITORY)*

THE NORTHERN TERRITORY
OF AUSTRALIA

No 125 of 1978

AN ACT

To make provision for and in respect of the Apprehension of certain Debtors

[Assented to 21 December 1978]

Be it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act 1978* of the Commonwealth, as follows:

PART I – PRELIMINARY

Short title	This Act may be cited as the <i>Absconding Debtors Act 1978-1979</i> .
Commencement	2. This Act shall come into operation on a date to be fixed by the Administrator by notice in the <i>Gazette</i> .
Repeal and Savings	3.(1) Part XIII of the <i>Local Courts Act</i> is repealed. (2) The repeal effected by sub-section (1) does not affect any proceedings commenced under section 248 of the <i>Local Courts Act</i> but not completed on the day upon which the Act comes into operation.
Interpretation Amended by No 98 of 1979, s 4.	4.(1) In this Act, unless the contrary intention appears – "applicant" means a person who applies for an order or warrant under this Act; "debt" means a liquidated debt, whether pursuant to a judgment or otherwise, that is due and payable in the Territory; "debtor" includes a person who an applicant alleges owes a debt to the applicant ; "Judge" has the same meaning as in the <i>Northern Territory Supreme Court Act 1961</i> of the Commonwealth; "justice" has the same meaning as in the <i>Justices Act</i> ;

* This is an unofficial consolidation of the Act.

"Local Court" means a Local Court of Full Jurisdiction under the *Local Courts Act*;

"magistrate" has the same meaning as in the *Magistrates Act*;

"Master of the Supreme Court" includes a Deputy Master of the Supreme Court;

"member" means a member of the Police Force.

"Police Force" means the Police Force of the Northern Territory;

"property" includes realty and personalty or, an interest, whether legal or equitable, in property;

"Supreme Court" means the Supreme Court of the Northern Territory;

"wages" means -

- (a) any sum due under -
 - (i) a contract of employment; or
 - (ii) an award or industrial agreement regulating conditions of employment; and
- (b) any sum due for long service leave, annual holidays or sick leave .

(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 this Act, a person is satisfied as to all material matters in relation to a debtor if he is satisfied that there are reasonable grounds for believing that -

- (a) the debtor owes a debt to the applicant;
- (b) the debtor is about to leave the Territory;
- (c) failure to arrest the debtor would defeat, endanger or materially prejudice an applicant's prospects of recovering a debt; and
- (d) the debt -
 - (i) is for wages due by the debtor to the applicant; or
 - (ii) is for an amount not less than the prescribed amount.

PART II - ISSUE OF WARRANTS

Application for warrant

5. (1) Subject to this Act, a person may, at any time, apply to a magistrate or Judge for a warrant to issue for the arrest of a debtor for the purpose of preventing that debtor from leaving the Territory.

(2) An application under sub-section (1) shall be -

- (a) in the prescribed form; and
- (b) supported by an affidavit as to all material matters in relation to which the magistrate or Judge is, under section 6(2), required to be satisfied.

Issue of
warrant

6.(1) A magistrate or Judge may issue a warrant for which an application has been made under section 5 in accordance with this Part.

(2) A magistrate or Judge shall not issue a warrant under sub-section (1) unless he is satisfied, after reasonable inquiry, as to all material matters.

(3) A warrant issued under sub-section (1) shall-

- (a) be in the prescribed form;
- (b) specify-
 - (i) the amount of the alleged debt;
 - (ii) the costs, if any, which are claimed by the applicant; and
 - (iii) the name of the person to whom it is addressed; and
- (c) bear such other endorsements as are prescribed.

Transmission
to court

Amended by No
114 of 1979, s.3

7. A magistrate or Judge who issues a warrant under this Part shall within 24 hours after the warrant has been issued -

- (a) if the debt claimed is not more than \$10,000, transmit -
 - (i) the application for the warrant;
 - (ii) any affidavit lodged with the application; and
 - (iii) a copy of the warrant,to the Clerk of the nearest Local Court; or
- (b) if the debt claimed is more than \$10,000 transmit -
 - (i) the application for the warrant ;
 - (ii) any affidavit lodged with the application; and
 - (iii) a copy of the warrant,to the Master of the Supreme Court.

PART III -EXECUTION OF WARRANTS

Execution
of warrants

8. A warrant issued under Part II may be executed in the Territory by -

- (a) the person to whom the warrant is addressed; or
- (b) a member of the Police Force,

within one month from the date of issue of the warrant.

Endorsement

9. A person who executes a warrant issued under Part II shall endorse the warrant with the time and place of its execution.

Service of
Warrant

10. A person who executes a warrant issued under Part II shall serve the debtor with a copy of the warrant -

- (a) where the person serving the warrant is a member of the Police Force - as soon as is practicable after the execution of

- the warrant; and
- (b) in any other case - upon the execution of the warrant.

Debtor to be
brought before court
Amended by No
114 of 1979, s.3

11.(1) A person who executes a warrant issued under Part II shall immediately take the debtor to the nearest police station.

(2) The officer in charge of a police station to whom a debtor is brought in pursuance of sub-section (1) shall -

- (a) hold the debtor in custody; and
- (b) within 24 hours of, or as soon as practicable after, receiving the debtor into custody, bring the debtor -
 - (i) if the debt claimed is not more than \$10,000 -before a magistrate or Judge; or
 - (ii) if the debt claimed is more than \$10,000- before a Judge.

(3) An endorsement in accordance with section 9 is sufficient authority for any officer within the meaning of the *Prisons Act* who is in charge of a prison or police station to receive the debtor named in the warrant into custody.

Release

12. The member in charge of a police station referred to in section 11(1) or the officer referred to in section 11(3) shall release a debtor held in custody if -

- (a) the debtor -
 - (i) tenders to the applicant the amount of money specified in the warrant as the debt and costs; or
 - (ii) deposits with that member or the officer for payment into court that amount of money to abide the determination of the claim;
- (b) the applicant consents in writing to the release; or
- (c) a magistrate or Judge orders that the debtor be released from custody.

PART IV -RESTRAINT ON TRANSFER OR REMOVAL OF PROPERTY

Application for
order restraining
transfer of
removal of
property
Amended by No
98 of 1979, s.4

13. (1) Subject to this Act, a person may, at any time, apply to a Judge or magistrate for an order restraining -

- (a) the transfer of any of the property of the debtor situated in the Northern Territory; or
- (b) the removal of any of the property of the debtor out of the Northern Territory.

(2) An application under sub-section (1) shall be -

- (a) in the prescribed form; and
- (b) supported by an affidavit as to the matters in relation to

which the Judge is, under section 14(2), required to be satisfied.

Order restraining transfer of removal of property Amended by No. 98 of 1979, s.4

14. (1) Upon an application made under section 13, a Judge or magistrate may make such order as he sees fit

(2) A magistrate or Judge shall not make an order under sub-section (1) unless he is satisfied, that there are reasonable grounds for believing that –

- (a) the debtor owes a debt to the applicant;
- (b) the debtor has an interest in property situated in the Territory;
- (c) the property in which the debtor has an interest is about to be -
 - (i) transferred; or
 - (ii) removed from the Territory;
- (d) failure to make the order would defeat, endanger or materially prejudice the applicant's prospects of recovering the debt; and
- (e) the debt -
 - (i) is for wages due by the debtor to the applicant; or
 - (ii) is for an amount not less than the prescribed amount.

Hearing of Applications

15. (1) Subject to this section, a Judge may hear and determine an application under section 13 *ex parte*.

(2) A Judge may order that -

- (a) a copy of the application under section 14 be served on; or
- (b) notice of that application be given to,

any person.

(3) If a person other than the debtor has an interest in property specified in an application under section 13 the Judge shall order that -

- (a) a copy of the application be served on; or
- (b) notice of that application be given to,

that person, and that person may take part in the proceedings as if he were a party thereto.

PART V - HEARING OF PROCEEDINGS

Powers of Court

16. Subject to this Part, the magistrate or Judge before whom a debtor is brought under section 11(2)(b) or 14(2) may make such order as he thinks fit including an order -

- (a) that the debtor be released, either conditionally or unconditionally, from custody;

- (b) that the debtor undertakes, in writing in a form approved by the court, that he will not leave the Territory or a specified part of the Territory, as the case may be, until an amount of money specified by the court is paid;
- (c) that the debtor give security, either with or without surety, for the payment of a specified sum;
- (d) that the debtor pay a specified sum to the applicant or to another person;
- (e) that the debtor pay a specified sum into court to await the finalization of any other action upon the debt;
- (f) that the debtor be committed to prison -
 - (i) in such a manner ;
 - (ii) for such a period; or
 - (iii) under such conditions ,
 as the court considers just; and
- (g) that the applicant take such action within such time and in such manner as the magistrate or Judge considers necessary or desirable for the recovery of the debt.

Release of debtors

17. If the magistrate or Judge referred to in section 16 is not satisfied beyond reasonable doubt as to all material matters, he shall order that the debtor be released from custody.

Failure to comply with conditions

18.(1) A member of the Police Force may arrest without a warrant a debtor who is conditionally released from custody under section 17 and who that member reasonably suspects has failed, or is about to fail, to comply with a condition to which his release from custody was subject.

(2) A member of the Police Force who arrests a debtor under subsection (1) shall within 24 hours of, or as soon as practicable thereafter, the arrest of the debtor -

- (a) if the order under which the debtor was released from custody was made by a magistrate - bring the debtor before a magistrate; or
- (b) if that order was made by a Judge - bring the debtor before a Judge.

(3) The magistrate or Judge referred to in subsection (2) may revoke the order under which the debtor was released if he is satisfied that -

- (a) there has been a failure by the debtor to comply with a condition under which the debtor was released; or
- (b) the debtor is about not to comply with that condition.

(4) A magistrate or Judge who revokes an order under sub-section (3) may make such further order as he thinks fit including any order which he could have made, had the revoked order not been made.

Hearing of claims for debt

19.(1) A magistrate or Judge before whom - proceedings are brought under this Act may, subject to this section, hear and determine a claim for the alleged debt as if the proceedings under this Act were

proceedings for the recovery of the alleged debt under the *Local Courts Act* or the Northern Territory *Supreme Court Act 1961* of the Commonwealth, as the case may be.

(2) A magistrate or Judge shall not hear and determine a claim for a debt in any proceedings brought under this Act unless the debtor and the creditor agree.

(3) The magistrate or Judge may make such orders as he thinks fit to enable the matter to be continued as proceedings in an action in the Local Court or the Supreme Court, as the case may be.

(4) A decision in any proceedings under this section has effect as a decision of the Supreme Court or Local Court, as the case may be, and may be enforced accordingly.

PART VI – REVIEW

Applications
for review

20. (1) A debtor may, at any time, apply to a Judge for an order that -
(a) any warrant issued against him be set aside;
(b) he be discharged from custody; or ;
(c) any order previously made under this Act by a magistrate be varied or quashed.

(2) Subject to sub-section (3), an application under sub-section (1) shall be
(a) in writing ;
(b) in the prescribed form; and
(c) filed in the Supreme Court.

(3) An application under sub-section (1) may, at the discretion of the Judge, be made, heard and determined -
(a) by telephone;
(b) by radio; or
(c) in such other manner as the Judge may direct.

Review

21. A Judge to whom an application is made under section 20 may make such orders as he thinks fit.

Restraint on further
Applications

22. If -
(a) a warrant issued under this Act is set aside; or
(b) an order made under this Act is quashed,

under this Part, the applicant shall not make any further application for a warrant under Part II or an order under Part IV against the debtor in respect of the same debt or part thereof within 6 months after the date of that warrant or order, as the case may be, unless the applicant introduces further information in support of his application that was not and could not reasonably have been introduced at the time when

the warrant or order set aside or quashed, as the case may be, was applied for.

Appeals 23. Proceedings in the nature of an appeal brought by any person from any order made under this Act shall not in any way restrict or limit the powers of a Judge under this Part.

PART VII - MISCELLANEOUS

Protection of persons executing warrants 24. A person who executes a warrant for the arrest of any person under this Act does not incur any civil liability if he acts reasonably and without actual knowledge of any defect in the warrant or of any lack of jurisdiction in the person who issued the warrant.

Offence 25. A person shall not falsely, frivolously, vexatiously or oppressively make an application under section 5 (which relates to applications for warrants) or 14 (which relates to applications for orders restraining the transfer or removal of property).

Penalty: \$4,000 or imprisonment for 2 years.

Procedure Amended by No 114 of 1979, s.3 26. Subject to -
 (a) this Act;
 (b) any Rules of Court; or
 (c) any order or direction of a magistrate or Judge,

where -

(d) the amount of the debt is more than \$10, 000 - the practice and procedure applicable to proceedings in the Supreme Court shall, in so far as is practicable, apply to proceedings under this Act; or
 (e) the amount of the debt is not more than \$10 ,000 – the practice and procedure applicable to proceedings in the Local Court shall, in so far as is practicable, apply to proceedings under this Act.

Other jurisdictions or powers 27. Nothing in this Act restricts or limits -
 (a) any other jurisdiction or powers exercisable by or vesting in the Supreme Court or a Judge thereof; or
 (b) any other remedies a person may have against a debtor.

Jurisdiction of Supreme Court 28. The Supreme Court has jurisdiction to hear and determine all matters under Part IV, V or VI.

Rules of Court 29. The Chief Judge may make Rules of Court under the *Northern Territory Supreme Court Act 1961* of the Commonwealth prescribing-
 (a) the practice and procedure to be followed;

- (b) the forms to be used; and
 - (c) the fees to be paid,
- under this Act.

Regulations

30. The Administrator may make regulations not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act (matters in respect of which Rules of Court may be made under section 29 excepted).