

Absconding Debtors Act 1877

Terms of Reference

In September 1978, the Attorney-General asked the Commission to review the use and operation of the *Absconding Debtors Act 1877* (WA) ("the Act").

Background of Reference

The Act was originally enacted because of difficulties encountered with the assisted passage scheme to colonial Western Australia. It was intended to enable the colony to claim the cost of passage from those who departed the colony within three years' of arrival. Broadly, the Act enabled a person who had a legitimate claim in debt or otherwise to prevent another from leaving the state without first paying the debt or meeting the claim. The issue for the Commission was whether the Act was so infrequently used as to warrant its repeal or replacement. The question whether the Act infringed s 92 of the Commonwealth Constitution, which protected free trade and intercourse between the states, was also in issue.

Nature and Extent of Consultation

Initially, 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 solicit the opinions of their members on the operation of the Act. In December 1980, the Commission also issued a working paper to stimulate public comment.

The Commission received submissions from justices of the peace, legal practitioners, magistrates, the Law Society of Western Australia, the Commissioner of Police, banks, the representative associations of financial institutions, and private citizens. The Commission delivered its final report on the subject in November 1981.¹

Recommendations

After considering the operation of the Act, the Commission concluded that it should be repealed and replaced by a new Act. The Commission made 23 recommendations in total including:

- Recommendations providing that the new legislation should make it possible to prevent a person who is about to leave or remove assets from the state from doing so where that person's departure would prejudice the prosecution of the claimant's cause of action and the cause of action relates to a sum of money that is not less than \$500.
- Recommendations pertaining to the procedure of issuing warrants and the hearing of the matter once the respondent is arrested. The recommended system provides that once the respondent is placed in custody, the respondent may obtain his or her release by settling the claim. Alternatively, if the respondent does not settle the claim, he or she will be brought before a justice of the peace for a hearing into the matter.
- Recommendations as to the protection of respondents in order to prevent the abuse of the proposed legislation.
- Recommendations relating to the variation or discharge of warrants, which provide that justices of the peace or judicial officers should have the power to vary or discharge their own orders or alternatively those orders can be discharged or varied by a Supreme Court judge in Chambers.
- Recommendations pertaining to restraints on the removal of property and other consequential matters.

¹ Law Reform Commission of Western Australia, *Absconding Debtors Act 1877*, Project No 73 (1981).

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The Commission also tentatively concluded that there would be no foreseeable problem with infringement of s 92 of the Commonwealth Constitution in the implementation of the proposed regime.

Legislative or Other Action Undertaken

The Commission's recommendations were substantially enacted² by the *Restraint of Debtors Act 1984* (WA), which commenced on 11 July 1986.³

² Western Australia, *Parliamentary Debates*, Legislative Council, 2 August 1984, 329–330. (Mr JM Berinson, Attorney-General).
³ Western Australia, *Government Gazette*, 11 July 1986, 2333.