



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 73

The Absconding Debtors Act 1877-1965

WORKING PAPER

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

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PREFACE

The Law Reform Commission has been asked to review the *Absconding Debtors Act 1877-1965*.

The Commission has completed its first consideration of this matter and now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments, with reasons where appropriate, on individual issues raised in the working paper, on the paper as a whole or on any other matter coming within the Commission's terms of reference, are invited. The Commission requests that they be submitted by 16 February 1981.

Unless advised to the contrary, the Commission will assume that comments received on this working paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

A notice has been placed in *The West Australian* offering to send, without charge, a copy of the working paper to anyone interested in it and inviting comments thereon.

The research material on which the working paper is based will, upon request, be made available at the offices of the Commission.

This working paper is based on material available to the Commission in Perth on 4 November 1980.

CHAPTER 1

PRESENT LAW

INTRODUCTION

1.1 Broadly, the purpose of the *Absconding Debtors Act 1877-1965* (referred to in this working paper as "the Act") is to enable a person¹ who alleges that he has a good cause of action (in debt or otherwise) against a respondent² to prevent the respondent 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 peace³ 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 then 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.

1.2 In order to gather information about the manner in which the Act has been 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 circumstances in which the Act has been used. The Commission also sought preliminary comments from the members of the associations referred to above on the question whether the Act should be retained and, if so, on ways in which it might be improved. Comments have been received from a number of

¹ Herein called "the claimant".

² The term "respondent" is used to refer to a person who may be prevented from leaving the State under the Act or under any future legislation. Unless the context indicates otherwise it does not mean a person against whom an action has been commenced in a court.

³ The Act refers to a justice of the peace. Magistrates and judges are, by virtue of their offices, justices of the peace.

magistrates and legal practitioners, a justice of the peace and the Royal Association of Justices of Western Australia. Those comments have been taken into account in the working paper.

FIRST WARRANT

1.3 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 person⁴ if the justice is satisfied 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 \$40 on his leaving the State prior to the expiration of such term";⁵ or
- (iii) the claimant has "a good cause of action" against the respondent for an amount of not less than \$40.

In the three circumstances referred to above 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.⁶

1.4 The Commission has been unable to obtain any statistical information relating to the issue of warrants under the Act. However, comments made by people who made preliminary submissions to the Commission indicate that the Act is used most commonly in cases involving liquidated debts. In one of the cases reported to the Commission 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.

⁴ 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.

⁵ 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.

⁶ *Absconding Debtors Act 1877-1965*, s 1. The Act is reproduced as Appendix I.

1.5 The provision relating to a person under an engagement to remain in the State was enacted 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 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.⁷ The object of the provision was to prevent such people departing without paying that sum of money.⁸ The provision 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 more likely that the contract would require the employee to remain with the employer for an agreed term.⁹

1.6 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.

1.7 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.¹⁰ Because of this change it was argued in *Cleary v Ayles*¹¹ 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

⁷ Battye, *Western Australia, A History from its Discovery to the Inauguration of the Commonwealth* (University of Western Australia Press, 1978) 318 and 319, and *WA Parl Deb* (1876) Vol 1, 30 and 113.

⁸ *WA Parl Deb* (1877) Vol 2, 129.

⁹ 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.

¹⁰ 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."

¹¹ (1903) 6 WALR 38.

person indebted.¹² The Full Court relied upon the decision in *Scott v Morley*¹³ as authority for the proposition that the *Married Women's Property Act* does not create personal liability but proprietary liability only.

1.8 Although it was held in *Cleary v Ayles* 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.

SECOND WARRANT

1.9 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".¹⁴ Preliminary submissions received by the Commission indicate that there is some uncertainty as to the procedure to be followed on such a hearing. In particular, it is not clear whether the provisions in the *Justices Act 1902-1979* 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.

1.10 If, on such a hearing, the justice is satisfied that the respondent is within one of the three categories referred to in paragraph 1.3 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.¹⁵ The Commission understands that a magistrate has held that "quit" means to "leave permanently".¹⁶ When a

¹² 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*.

¹³ (1887) 20 QBD 120. The Court of Appeal comprised Lord Esher MR, Bowen and Fry LJJ.

¹⁴ *Absconding Debtors Act 1877-1965*, s 2.

¹⁵ *Ibid.*

¹⁶ There is support for this view in a Canadian case: *Fleck Bros Ltd v Petroutsas* (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".

person is arrested on a second warrant he must be taken from the means of transport and liberated.¹⁷

COSTS

1.11 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 the previous paragraph. There are provisions in the *Justices Act 1902-1979* under which justices have a discretion to make an order as to costs,¹⁸ but these provisions appear to be restricted to proceedings commenced by way of complaint.

TERMINATION OF SECOND WARRANT

1.12 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
- (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.

1.13 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.¹⁹

1.14 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.²⁰ The Chief Justice may quash the warrant upon such terms and conditions as he may think fit if he is satisfied

¹⁷ *Absconding Debtors Act 1877-1965*, s 2.

¹⁸ *Justices Act 1902-1979*, ss 151 and 152.

¹⁹ *Absconding Debtors Act 1877-1965*, s 3.

²⁰ *Ibid*, s 4.

that the respondent has no means of paying the debt or debts in respect of which the warrant was issued.²¹ 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.²²

OFFENCES

1.15 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.²³ 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".²⁴ The penalty for both offences is a fine not exceeding \$200 or a term of imprisonment not exceeding six months.

²¹ Ibid.

²² Ibid.

²³ Ibid, s 5A.

²⁴ Ibid, s 5(1). The questions whether a respondent should be entitled to recover the fine and whether a new civil remedy should be created are discussed in paras 5.38 and 5.39 below.

CHAPTER 2

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 interstate 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 interstate 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 interstate business transaction".

Likewise Higgins 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 *Ibid*, 118.

Thus it appears that section 92 is not limited to commercial intercourse but applies to any interstate 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 interstate 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 interstate 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 interstate trade, commerce and intercourse.

2.8 Merely because an Act has a direct effect on interstate 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 interstate trade, commerce and intercourse must be considered.

2.10 Permissible regulation is not confined to laws which ensure that those engaging in interstate 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 interstate trade, commerce and intercourse because they are designed to accommodate interstate 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

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

¹⁰ *Ibid*, 641.

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

¹² *Ibid*, 105-106.

¹³ *Ibid*, 106.

within the scope of permissible regulation because, in adjusting the rights of creditor and 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 interstate 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 interstate 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.

CHAPTER 3

OTHER LEGISLATION UNDER WHICH PEOPLE MAY BE PREVENTED FROM LEAVING WESTERN AUSTRALIA

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 1935-1979* 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."

The District Court of Western Australia has the same power.¹ There is no corresponding provision in the *Local Courts Act 1904-1976*. Although the Supreme Court and the District Court have the powers referred to above it would appear that the fact that an action had been commenced in the Supreme Court or the District 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.

¹ *District Court of Western Australia Act 1969-1978*, s 54.

3.2 The question also arises whether section 63(2) of the *Supreme Court Act 1935-1979* infringes section 92 of the *Constitution*. Its legal effect is to prevent a defendant quitting the court's jurisdiction if his departure would materially prejudice the plaintiff in the prosecution of his action. It might be argued that because it presupposes existing legal proceedings and as it requires material prejudice to the plaintiff section 63(2) is more "reasonable" regulation than the *Absconding Debtors Act 1877-1965*. The matter is however still open.²

3.3 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."

As with section 63(2) of the *Supreme Court Act 1935-1979*, it might be argued that as the power of arrest arises only after court proceedings have been commenced, that is, after a petition for the winding up of a company has been filed, and is for the purpose of preventing a person evading the payment of calls or avoiding an examination with respect to the affairs of a company, section 251 of the *Companies Act 1961-1979* is also more "reasonable" regulation than the *Absconding Debtors Act 1877-1965*.

3.4 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

² It could also be argued that the object of the legislation is consistent with a constitutional objective, namely the prevention of frustration of judicial proceedings in a Federal system, and should therefore be an implicit exception to s 92. For example, s 118 of the *Constitution* provides that full faith and credit must be given throughout the Commonwealth to the judicial proceedings of every State. Thus a law of the Commonwealth which provided that a person could be arrested in say, Victoria, for the purpose of extraditing him to Western Australia if he failed to answer a summons of a Western Australian court would be a law designed to ensure that that State's judicial proceedings were not frustrated. Section 63(2) of the *Supreme Court Act 1935-1979* has the same objective. It simply operates earlier, to prevent the defendant from leaving the jurisdiction.

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. Because the operation of the Act is not directly concerned with any movement across interstate boundaries and is concerned merely to provide a mechanism to enable the enforcement of contracts of service the effect on trade, commerce and intercourse between the States can perhaps be regarded as indirect or remote.

CHAPTER 4

THE LAW ELSEWHERE

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. There is also a discussion of legislation in the jurisdictions studied comparable with section 63(2) of the *Supreme Court Act 1935-1979*.

LEGISLATION COMPARABLE WITH THE ABSCONDING DEBTORS ACT 1877-1965

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 thirty dollars 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 one hundred and fifty dollars 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 1926-1976*, s 271.

² *Ibid*, 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".

Northern Territory

4.3 In the Northern Territory, under the *Absconding Debtors Act 1978-1979* (which has not yet commenced operation), 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 5(1) and 6(2). This Act is reproduced as Appendix II. There is no corresponding legislation in the Australian Capital Territory.

⁴ The Act has not yet commenced operation (as at 4 November 1980) and no amount has been prescribed.

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

LEGISLATION COMPARABLE WITH SECTION 63(2) OF THE SUPREME COURT ACT 1935-1979

4.4 Section 63(2) of the *Supreme Court Act 1935-1979* is based on section 6 of the English *Debtors Act 1869*. Western Australia was not the only jurisdiction to adopt the provision and there are comparable provisions in South Australia, Tasmania and New Zealand.⁶ Both Victoria and Queensland have enacted similar legislation.⁷ 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.

4.5 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 with intent to defraud his judgment creditor.

4.6 The New South Wales Supreme Court is the only Supreme Court in Australia which does not have a power comparable with section 63(2) of the *Supreme Court Act 1935-1979*.⁸ In the District Court, however, a judgment creditor may obtain a writ ordering the bailiff to arrest a judgment debtor if -⁹

- (a) the judgment debt has not been satisfied; and

⁶ *Supreme Court Act 1935-1980* (SA), s 35.
Debtors Act 1870-1958 (Tas), s 5(2).

⁷ *Judicature Act 1908-1979* (NZ), s 55 and the *District Courts Act 1947-1979*, s 109.
Supreme Court Act 1958-1980 (Vic), s 128.

⁸ *Common Law Process Act 1867-1972* (Qld), s 48.

⁸ *Elliott v Elliott* [1975] 1 NSWLR 148 and ss 5 and 10 of the *Supreme Court Act 1970-1980* which 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 report *Supreme Court Procedure* (1969). The Commission considered that imprisonment for debt was an archaic procedure: Appendix A of the Report, 15, para 30. This matter was reconsidered by the Commission in its Second Report on Supreme Court Procedure (1971). In that 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: Second Report, 18-19.

⁹ *District Court Act 1973-1980* (NSW), s 113(1) and (2).

- (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.¹⁰

4.7 In the Australian Capital Territory, a person can be arrested under a writ of *capias ad respondendum* if a Judge of the Supreme Court is satisfied that -¹¹

- (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 forty dollars 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
- (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 \$20.¹²

¹⁰ Ibid, s 114.

¹¹ Sections 5 and 6 of the *Arrest on Mesne Process Act 1902* (No 24) (NSW) 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 1970-1980*, s 5.

¹² Ibid, s 9.

CHAPTER 5

DISCUSSION: PREVENTING A RESPONDENT LEAVING THE STATE

INTRODUCTION

5.1 The discussion in Chapter 2 on the constitutional validity of the Act leaves doubt as to the State's powers to legislate to prevent debtors and others leaving the State. It appears that the Act may be invalid wholly or that the State may only be able to legislate to prevent a respondent leaving the State when he intends to travel directly to another country.¹ However, the discussion below proceeds on the assumption that the Act is valid and discusses the Act on its merits.

SHOULD A RESPONDENT BE PREVENTED FROM LEAVING THE STATE?

5.2 The preliminary submissions received by the Commission from magistrates, legal practitioners, a justice of the peace, the Australian Finance Conference and the Royal Association of Justices of Western Australia indicate that it is useful to have a provision whereby a respondent can be prevented from leaving the State as an aid to debt recovery and to the enforcement of other legal obligations. For this a number of reasons are advanced.

5.3 It may not always be possible to institute proceedings against a respondent before the respondent leaves the State. The claimant may not become aware of the respondent's intention to leave the State until shortly before his time of departure. The court office or registry out of which the writ or summons must be issued may be closed during that time.²

5.4 Even if a writ or summons is issued it must be served and 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.

5.5 Once a person against whom a claim is outstanding has left the State there are further substantial obstacles against a claimant successfully bringing proceedings against him.

¹ That is, if he is leaving Western Australia directly for that country. If he travelled to another country via another State or the Northern Territory, it may be that s 92 of the *Constitution* and s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) (as the case may be) would afford him protection against being detained in the State.

² *Rules of the Supreme Court 1971-1980*, Order 5 and the *Local Courts Act 1904-1976*, ss 40 and 41.

5.6 First any writ or summons if not previously served would have to be served on the respondent outside Western Australia. The *Service and Execution of Process Act 1901-1980* (Cth) enables court processes, such as writs of summons, to be served on people in the other Australian jurisdictions. In addition, Order 10 of the *Rules of the Supreme Court 1971-1980* provides for the service of process of the Supreme and District Courts in the other Australian jurisdictions and overseas. A summons of a Local Court may also be served outside the State.³ 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.

5.7 Secondly, the claimant having effected service and obtained judgment must try to enforce the judgment against the respondent. The *Service and Execution of Process Act 1901-1980* (Cth) enables 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.⁴ Again, however, the services of a solicitor will be required in order to register the judgment and issue execution proceedings in the place to which the respondent has moved.

5.8 Inevitably the procedures enabling a claimant to proceed against and enforce 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.

5.9 The Commission is therefore tentatively of the view that it is desirable to provide legislation under which a respondent can be prevented from leaving the State.⁵

5.10 At the same time the Commission recognises that the arrest of a person can be very embarrassing and that a limitation on the movement of a person may prove to be very inconvenient. This may be particularly so where, for example, the person has purchased

³ *Local Court Rules 1961-1980*, Order 6 rules 1 and 2.

⁴ For the Western Australian legislation see the *Foreign Judgments (Reciprocal Enforcement) Act 1963-1965*. The countries are listed in the 1979 Index to *The Statutes of Western Australia*, 218-221.

⁵ The circumstances in which this should be permitted are discussed below. It may also be desirable to prevent a respondent removing or transferring property from the State. This matter is discussed in Ch 6.

airline tickets and has to join flights in other cities. It may also prove to be costly, for example, where the respondent does not receive a refund of the cost of any cancelled airline ticket.

5.11 There is also a danger that such a power could be used by creditors in an oppressive manner. The Commission has received correspondence from one person in which it is alleged that a warrant issued under the Act was used to prevent him and his wife travelling to Melbourne in order to find work in their specialised field because the creditor claimed that it was not in their best interests to live in that city.⁶

5.12 It is necessary therefore to ensure that there are adequate safeguards to prevent the powers contained in the Act being used in an oppressive or undesirable manner or in unnecessary circumstances. A number of possible safeguards are discussed below.⁷ It may also be desirable to restrict the operation of the Act to cases in which large sums of money are involved.⁸

IN WHAT CIRCUMSTANCES SHOULD A RESPONDENT BE PREVENTED FROM LEAVING THE STATE?

Amount of money involved

5.13 At present a person may be prevented from leaving the State under the Act if he is indebted to the creditor for a sum not less than forty dollars,⁹ or if a person has a good cause of action against him for a sum not less than forty dollars. In South Australia the remedy against a person about to abscond is only available in the case of debts of thirty dollars or more (whether pursuant to a judgment or otherwise) or where the claimant has sustained damages of one hundred and fifty dollars or more through a breach of contract. The remedy in the Northern Territory is even more limited and is only available in respect of a liquidated debt (whether pursuant to a judgment or otherwise) for wages or in other cases for a sum in excess of an amount to be prescribed.

⁶ Two solicitors who made preliminary submissions to the Commission also said that they were aware of other cases in which a warrant was issued under the Act in circumstances in which, in their opinion, it was not justified.

⁷ Paras 5.36 to 5.40 below.

⁸ Paras 5.13 and 5.14 below.

⁹ This would appear to include a judgment debt. The sum of \$40 was set in 1960: *Absconding Debtors Act Amendment Act 1960*, s 3.

5.14 As the exercise of the power to prevent a person leaving the State has such a serious effect on an individual's liberty and can cause considerable inconvenience, embarrassment and expense it may be argued that the power to prevent a person leaving the State should be available only where the matter in dispute involves a substantial sum of money. On the other hand, it may be argued that the difficulties associated with and the cost involved in recovering any sum of money where a person is outside of Western Australia justify making the power available for amounts greater than say \$250.¹⁰

Unliquidated claims

5.15 Although the Act is mainly used against persons who owe liquidated sums of money, the Act is not confined to this situation. Cases can and do arise where the claimant seeks to prevent a person from leaving the jurisdiction when it is not clear that any money is owed. For example, in the case referred to in paragraph 1.4 above proceedings were being commenced to recover damages for an assault, for property which had been stolen and for other property which had been damaged. In such a case either liability or amount may be in dispute. At present, the Commission considers that the power should not be limited to cases involving liquidated debts, but should be available where the claimant alleges that he has any good cause of action. Unliquidated claims for damages may involve large sums of money and be of great importance to the claimant. On the other hand, of their nature, they may be difficult to dispose of speedily. The Commission would, however, welcome comments on these matters.

Unsatisfied judgment debts

5.16 The Act should also be available to prevent a respondent quitting the State to avoid an already existing judgment debt.

Engagements to remain in Western Australia

5.17 Under the Act a person may be prevented from leaving the State if he is under an engagement to remain in the State for an agreed term, or otherwise to pay a sum of money not

¹⁰ If the existing amount prescribed in the *Absconding Debtors Act 1877-1965* (\$40) were adjusted 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 is available) the sum would be approximately \$174. Allowing for further inflation the sum of \$250 now seems reasonable. Perhaps the legislation should give the appropriate Minister power to prescribe a different sum from time to time.

less than \$40 on his leaving the State prior to the expiration of that term. As was stated in paragraph 1.5 above, this was 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. The Commission understands that the Commonwealth Government continues to operate an assisted passage scheme under which a migrant must undertake to repay the financial assistance granted towards the cost of passage to Australia if he leaves Australia before completing two years' residence. Specific provision for this sort of scheme in the Act would not be necessary in any future legislation because the scheme involves a contract between a migrant and the Commonwealth Government. If a migrant attempted to leave Australia from Western Australia within two years without repaying the financial assistance, the Government would have a good cause of action against him in contract. He could be prevented from leaving for this reason under the Commission's proposal in paragraph 5.15 above. On the other hand there may exist from time to time contracts of service or for services which require a person to remain within Western Australia at least by implication, for example, to perform as an entertainer.

Need the respondent be leaving Western Australia permanently?

5.18 At present, the Act provides that the first and second warrants may be issued if the justice of peace is satisfied that the person is about to "quit" the State. Although the matter is not free from doubt, it appears that this means to leave permanently.¹¹ If the purpose of preventing a person leaving the State is to facilitate the recovery of a debt, or the institution of proceedings and the settlement of a dispute, it does not appear to be necessary to limit such a power to a person who is going to leave the State permanently. A more important consideration is whether the person's departure would prejudice the claimant, and this could occur even if the respondent intended to return to the State. The Northern Territory *Absconding Debtors Act 1978-1979* provides that a debtor may only be arrested if his departure from the Territory would "defeat, endanger or materially prejudice an applicant's prospects of recovering a debt".¹² In South Australia it is necessary to show that it is the debtor's intention to avoid or delay the claimant or to remain out of the State so long that he may be delayed in the recovery of the debt or damages.¹³

¹¹ Para 1.10 above.

¹² *Absconding Debtors Act 1978-1979* (NT), s 4(3)(c).

¹³ *Local and District Criminal Courts Act 1926-1976* (SA), s 271(b). For reference to the constitutional validity of these provisions see para 2.11 above.

5.19 At present the Commission tentatively favours the approach taken in the Northern Territory. In deciding whether the claimant's cause of action or the enforcement of a judgment would be defeated, endangered or materially prejudiced, the judicial officer could take into account whether the debtor was leaving the State permanently, and if so, whether in the particular circumstances the procedures referred to in paragraphs 5.6 and 5.7 above affected the question of whether the claimant would be materially prejudiced. Such an approach would not prevent a person travelling overseas on a holiday or a business trip, unless it was for a considerable period of time.

Married women

5.20 One anomaly with the Act is that it does not apply to a married woman.¹⁴ The Commission can see no justification for such a limitation, and considers that it should be possible to prevent a married woman leaving the State in the same circumstances as any other person.¹⁵

PROCEDURE TO BE ADOPTED

Introduction

5.21 In the following paragraphs the Commission sets out the procedure which it suggests should be followed. It is based, to some extent, on the existing procedure under the *Absconding Debtors Act 1877-1965*, the procedure provided in the Northern Territory *Absconding Debtors Act 1978-1979* and Part XIII of the South Australian *Local and District Criminal Courts Act 1926-1976*. The Commission would welcome comments on the suggested procedure. The procedure discussed below is for cases in which the claimant has an unsatisfied judgment debt or alleges that he has a good cause of action against the respondent but where the action has not been commenced. Where an action has been commenced, the procedure would be similar except that the proceedings relating to preventing the respondent leaving the State, such as the application for a summons or warrant or the hearing referred to

¹⁴ Paras 1.6 to 1.8 above.

¹⁵ Rather than amend the *Married Women's Property Act 1892-1962*, it would probably be preferable to provide specifically that the *Absconding Debtors Act 1877-1965*, or any Act which replaced it, applied to a married woman.

in paragraph 5.31 below, would be held before a judicial officer of the court in which the action was pending according to the procedure of that court. The powers referred to in paragraphs 5.32 and 5.33 below should be available to that judicial officer.

Institution of proceedings

5.22 The Commission suggests that proceedings to prevent a person leaving the State should be commenced by an application for a warrant to issue for the arrest of the respondent. The application should be in a prescribed form. It should be made by the person (or any duly authorised person) who alleges he has a good cause of action and should be supported by an affidavit setting out the material facts.¹⁶ In those cases in which the application is refused, the original application and affidavit should be transmitted by the judicial officer to the nearest Local Court which should act as a repository for them in case they are required for production in any subsequent legal proceeding or for the purpose of compiling statistics for any later review of the Act.¹⁷

5.23 One way in which the power to prevent a person leaving the State can be abused is for a person who is aware that a respondent intends to leave the State to delay taking steps to obtain a summons or warrant until the respondent's departure is imminent. 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 suggests that, at the time of an application for a summons or warrant, the claimant should be required to show that it has been made within a reasonable time after the fact of the respondent's intention to leave the jurisdiction came to his knowledge.

To whom should an application be made?

5.24 In those cases in which an action has not been instituted, the question arises whether it should be possible to make the application to a justice of the peace or only to a magistrate. 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

¹⁶ This procedure is similar to the existing procedure.

¹⁷ As to the procedure where an application is successful see footnote 21 below.

and search warrants in criminal cases, and taking affidavits. However, they are not usually involved directly in civil proceedings in this State, and it may be considered 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's cause of action or prospects of enforcing a judgment debt would be defeated, endangered or materially prejudiced if the respondent left the State. The Commission would welcome comments on whether such an application should be made to a justice of the peace or whether it should be made only to a magistrate. There would be a practical difficulty in providing that an application could be made only to a magistrate, namely that magistrates are not always available in the country towns from which a person could leave Western Australia.

5.25 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 considers that the power to prevent a person leaving the State 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 application for a warrant or summons¹⁸ should in principle be made to a judicial officer of the court in which the action has been commenced. In the case of the Supreme Court an application could be made to the Master, Principal Registrar or a Registrar, and in the case of the District Court, to the Registrar. Special provision however might have to be made for access to such officers on weekends and public holidays, for example, by a duty roster. If such a procedure were provided, section 63(2) of the *Supreme Court Act 1935-1979* would be unnecessary and could be repealed.¹⁹

Issue of a summons or warrant

5.26 The judicial officer would, under the Commission's tentative proposals, be able to issue a warrant²⁰ for the arrest of the respondent where he is satisfied that -

¹⁸ Para 5.22 above.

¹⁹ See paras 6.5 and 6.6 below for another possible approach.

²⁰ 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) the costs, if any, which are sought by the claimant; and
- (iv) the office or title of the person to whom it is addressed, that is, a police officer (s 6(3) of the *Absconding Debtors Act 1978-1979* (NT)).

- (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 claimant's cause of action or prospects of enforcing a judgment debt; and
- (iii) the application has been made within a reasonable time after the fact of the respondent's intention to leave the jurisdiction came to the knowledge of the claimant.

However, as the arrest of a person can be a rather harrowing experience, the Commission would welcome comments on whether the judicial officer should, as an alternative in appropriate cases, be able to issue a summons requiring the respondent to appear before a magistrate sitting as a Local Court at an appointed time and place.²¹ The summons should be in a prescribed form containing the same particulars as the warrant referred to above. The summons should be served on the respondent personally together with a copy of the application and the affidavit. If the respondent failed to appear at 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 would not be necessary to appear before the Local Court if the respondent -

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

5.27 A warrant should have a limited "life" of one month from the date of issue.²² 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 police officer responsible for executing it. When the warrant is executed, the officer executing it should endorse the time

²¹ Where either a summons or a warrant is issued, the judicial officer should file the original application and affidavit in the court before which the hearing referred to in paras 5.29 to 5.33 below is to be held. Where, however, the application was made to a court in which an action was pending (para 5.25 above) the documents would be filed in that court.

²² *Absconding Debtors Act 1978-1979* (NT), s 8 and the order under s 63(2) of the *Supreme Court Act 1935-1979* (Form No 101 of the *Rules of the Supreme Court 1971-1980*) for the arrest of a person. Warrants do not at present have a limited life.

and place of execution on it. Once the respondent has been arrested he should be held in custody by the police.

Obtaining the respondent's release

5.28 When the police 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 debt or costs or otherwise settling the claim;
- (ii) depositing with the police officer for payment into court that amount of money to abide the determination of the claim;²³ or
- (iii) giving security by surety or otherwise for payment of the amount claimed and costs, to the satisfaction of the claimant.

5.29 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, it is desirable that he be taken before a judicial officer whether a justice of the peace, magistrate or judge as soon as practicable. In the Northern Territory, where the debtor has not been released, the procedure then followed depends on the amount of the debt claimed. If it exceeds \$2,000 the officer in charge of the police station where the debtor is held must, within twenty-four hours, or as soon as practicable, take the debtor before a judge of the Supreme Court. If the sum is less than \$2,000, he must take the debtor before a magistrate or judge of the Supreme Court.²⁴ This distinction is made because the magistrate or judge may, if the parties agree, proceed with a hearing of the claim for the alleged debt.²⁵ It is therefore necessary for the debtor to be taken before a judicial officer with jurisdiction to determine such a claim.

5.30 If such a procedure were adopted in Western Australia, it would be necessary to provide for the respondent to be taken before a magistrate of a Local Court, a District Court

²³ *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.

²⁴ *Id.*, s 11(2).

²⁵ *Id.*, s 19.

judge or a Supreme Court judge, depending on the sum claimed.²⁶ Although such a procedure would enable a matter to be settled quickly it may be desirable to expressly provide for adjournment of a hearing to enable the respondent to seek legal advice in appropriate cases. It might be undesirable for the hearing of the substantive issue in dispute to proceed without the normal interlocutory proceedings which focus attention on the issues in dispute between the parties. The procedure could also prove to be cumbersome, particularly if the respondent was arrested in a country town and had to be taken before a District or Supreme Court judge at Perth.

5.31 An alternative to the Northern Territory approach would be to provide that where a respondent has not been released in the circumstances referred to in paragraphs 5.28 and 5.29 above he should be taken, within twenty-four hours, or as soon as practicable thereafter, before the nearest Local Court. In such a case, or where a respondent appears in response to a summons,²⁷ the court should hold a hearing into the allegations contained in the application. Where the warrant or summons was issued by a judicial officer of a court in which an action had been commenced²⁸ the hearing should be held before an officer of that court. So far as they are applicable, the provisions of the *Local Courts Act 1904-1976* should apply to the hearing in the Local Court.

5.32 If the magistrate is not satisfied as to the material matters,²⁹ he should order that the respondent be released from custody. Where he is satisfied as to those matters, he should have power to order that the respondent be released unconditionally or that he be required to -

- (1) remain in the State until the action is completed or until the order is set aside or quashed;
- (2) surrender his passport to the Clerk of the Local Court;
- (3) give security, either with or without surety, for the payment of a specified sum to the claimant;
- (4) pay a specified sum into court to await the completion of the action;³⁰ or

²⁶ The Local Court has jurisdiction to hear personal actions for amounts up to \$3,000: *Local Courts Act 1904-1976*, s 30. The District Court has jurisdiction to hear personal actions for amounts up to \$20,000: *District Court of Western Australia Act 1969-1978*, s 50. There is no monetary limit to the Supreme Court's jurisdiction.

²⁷ Para 5.26 above.

²⁸ Para 5.25 above.

²⁹ That is, the matters which must be established before a respondent can be prevented from leaving the State.

- (5) meet a combination of conditions (1), (2), (3) and (4).³¹

Once the magistrate has determined the matter he should have power to make an order as to the costs relating to the application and the hearing.

5.33 It may also be necessary to empower the Court to order that the respondent be committed to prison.³² The provision of such a power would not be for the purpose of punishing the respondent, but to ensure that he remained in the State. If such a power were considered to be too severe it could be limited to circumstances in which the respondent had admitted that he owed the money to the claimant but refused to pay it even though he had the means to pay. Alternatively, it could be limited to cases in which the respondent had been ordered to remain in the State and the Court was satisfied that he had attempted to leave the State in contravention of the order or intended to do so.

Preventing the respondent from leaving the State

5.34 If the magistrate has ordered the respondent to remain in the State until the claim is satisfied, the action is completed or until the order is set aside or quashed, he should at that time issue a warrant for the arrest of the respondent if he should attempt to leave the State or if there are reasonable grounds for believing that he is about to leave the State in contravention of the order. The warrant should be delivered to the claimant but should only be executed by a police officer. The police officer executing the warrant should take the respondent before a Local Court magistrate or District Court or Supreme Court judge as the case may be within twenty-four hours of his arrest or as soon as practicable. The Court should have power to make any of the orders referred to in the previous paragraphs.

5.35 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.³³ If, as has been suggested above, a court were given power to order that the

³⁰ *Absconding Debtors Act 1978-1979* (NT), s 16.

³¹ It may also be desirable to give the magistrate power to make an order restraining the respondent from removing or transferring property from the State. At present the justice only has power to issue a warrant for the arrest of the respondent should he attempt to quit the State. The question of whether the Court should have power to make an order restraining the respondent from removing or transferring property from the State is discussed in Ch 6.

³² Such a power is created by *Absconding Debtors Act 1978-1979* (NT), s 16(f).

³³ *Absconding Debtors Act 1877-1965*, s 5A.

respondent remain in the State, the Commission considers that such a provision may be unnecessary because a respondent who left or attempted to leave the State in such circumstances 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."

However, it may be thought preferable to retain a section equivalent to the existing section 5A in any amending Act.

PROTECTION OF RESPONDENTS

5.36 In paragraph 5.11 above the Commission referred to a case in which it was alleged that the provisions of the Act were abused. Two legal practitioners who made preliminary submissions to the Commission said that they were aware of other cases in which, in their opinion, the provisions of the Act had been abused. The Commission has suggested that the power to prevent a person leaving the State should be limited to circumstances in which his absence would materially prejudice the claimant. This would limit the scope for abuse of the process. Such abuse should also be limited by the provision for a hearing in a Local Court.³⁴ However, it may be necessary to provide further protection.

5.37 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 warrant to obtain it" ...unlawfully or maliciously, injuriously or oppressively, or by abuse of process".³⁵

These expressions are not defined. It has been suggested that for the purposes of the section a warrant should be deemed to have been obtained oppressively if the person obtaining it -

³⁴ Para 5.31 above.

³⁵ Para 1.15 above.

- (i) had reasonable cause to know that the claim on which his affidavit was based was one which could not be sustained at law; or
- (ii) had no reasonable cause to suppose that the respondent was leaving the jurisdiction to avoid satisfying the claim in question, or that, if he left, the claim would not be satisfied; or
- (iii) without reasonable cause, neglected to make his application for a warrant in such time as would permit the respondent to make proper answer thereto without having to delay his departure; and

that the person aggrieved by the actions of the convicted person might bring an action for damages for that wrong (including damages for injury to feelings), the calculation of such damages to take account of any part of the penalty summarily awarded by the convicting magistrate.

The Commission would welcome comments on whether any future legislation should contain an offence along these lines. At present the maximum penalty provided for a breach of the section is a fine of \$200 or six months' imprisonment. Perhaps the maximum fine should be \$500 or \$1,000. In the Northern Territory the maximum penalty is a fine of \$4,000 or imprisonment for two years.

5.38 Prior to 1960, the Act provided that the whole of the penalty imposed for the offence referred to in the previous paragraph should be payable to the person aggrieved. That provision was removed by an amendment to the Act in 1960.³⁶ The reason given was that it was considered to be undesirable that the fine should be paid to the claimant.³⁷ Although the Commission agrees with the view that it would be undesirable for the respondent to be paid the whole, or a portion, of the fine it would welcome comments on whether the respondent should be able to recover the whole, or a portion, of the fine where, for example, he has suffered a specific loss.³⁸

³⁶ *Absconding Debtors Act Amendment Act 1960.*

³⁷ *WA Parl Deb* (1960) Vol 155, 798.

³⁸ 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.

5.39 However, it is the Commission's tentative view that it is more desirable to leave the respondent to obtain compensation through civil remedies such as an action for malicious process. It appears that such an action can be sustained where a person has instituted some process maliciously and without reasonable cause.³⁹ Consideration could be given to providing a new civil remedy 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. However, it may not be desirable to alter the existing common law remedy with its emphasis on malice because it appears to be designed to ensure that a person is not deterred from using legal process merely for fear of the consequences.

5.40 The prime purpose of the scheme suggested by the Commission is to prevent a respondent leaving the State where his absence would materially prejudice the claimant's cause of action or his ability to recover a debt. 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 considers that he should do so (and also that he should file a copy of the writ or summons in the Local Court in which the order was made) within five days of the date of the order. If the proceedings are not instituted and the copy of the writ or summons filed within five days, the respondent should be at liberty to leave the State⁴⁰ and the claimant should not be permitted to obtain a further warrant for his arrest on that particular matter. The magistrate's order and any warrant issued by the magistrate would become void. Any security or surety entered into by the respondent would be discharged. The respondent would be able to recover any money paid into court, and he would be able to recover his passport.

REVIEW OF DECISIONS AND DISCHARGE OF WARRANTS

5.41 At present decisions of justices under the Act can be reviewed by the Supreme Court under section 197 of the *Justices Act 1902-1979*.⁴¹ That right of appeal would not, however, apply to a decision made on the hearing before a Local Court referred to in paragraph 5.31 above because section 197 of the *Justices Act 1902-1979* does not apply to Local Courts. Nor would the right of appeal provided in section 107 of the *Local Courts Act 1904-1976* apply to a decision made on the hearing because the hearing would not be an "action" or "matter."

³⁹ See *Roy v Prior* [1970] 2 All ER 729, and Winfield and Jolowicz, on *Tort* (10th ed, 1975), 485.

⁴⁰ It should be stated in the order that the respondent is at liberty to leave the State if the claimant fails to institute proceedings within five days of the date of the order.

⁴¹ 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.

5.42 Warrants can be discharged only by one of three methods referred to in paragraphs 1.12 to 1.14 above.

5.43 Rather than extend either of the appeal provisions referred to in paragraph 5.41 above to include a decision made on the hearing or retain either of the provisions referred to in paragraphs 1.13 and 1.14 above, the Commission considers 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 set aside or discharged;
- (b) that 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.

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. ⁴²

⁴² *Absconding Debtors Act 1978-1979 (NT)*, ss 20(1) and 22.

CHAPTER 6

DISCUSSION: FREEZING THE RESPONDENT'S ASSETS

INTRODUCTION

6.1 As stated above, even if it were possible for a claimant to institute proceedings against a respondent before the respondent left the State it could still be very difficult to satisfy any judgment obtained against him. This would be particularly so if the respondent removed or transferred all of his property from the State before the judgment was given. In certain circumstances it seems at present to be possible to obtain an injunction to prevent a person so transferring assets out of the jurisdiction.

THE MAREVA INJUNCTION

6.2 Such an injunction, known as a Mareva injunction,¹ may be granted under section 25(9) of the *Supreme Court Act 1935-1979*² which is in like terms to section 45 of the English *Supreme Court of Judicature (Consolidation) Act 1925-1978*. The granting of the Mareva injunction is a recent development initiated in the United Kingdom and followed in Australia in a number of cases.³ The English cases seem to show that a plaintiff has to establish five basic elements in order to successfully claim such an injunction. The plaintiff must show that-

- (a) 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)⁴;

¹ *Mareva v International Bulkcarriers* [1980] 1 All ER 213.

² *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 1969-1978*. However, the District Court seems to have no power to grant equitable remedies by way of primary relief: *Elliott v Palmiero and Petrucci*, (unreported) District Court of Western Australia Action No 564 of 1978. It is doubtful whether a Local Court could grant such an injunction: *Civil Procedure in Western Australia, A Student's Manual* (Ed by G D Clarkson QC and S Owen-Conway), 2-15 to 2-20.

³ *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.

⁴ *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972.

- (b) there is a real danger that the assets will be removed from the jurisdiction of the court if the court does not intervene⁵ and that there is a consequent risk that the judgment may go unsatisfied;⁶
- (c) he has a "good arguable case" on the facts of the dispute;
- (d) the matter is justiciable in the English courts;
- (e) the harm to the defendant caused by the granting of the injunction does not outweigh the benefit to the plaintiff.

The Court of Appeal in England has held that a Mareva injunction can be granted in both "commercial" and "non-commercial" actions.⁷

6.3 In *Pivovarovff v Chernabaeff*⁸ the Full Court of South Australia questioned the validity of such injunctions and 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.⁹ This limitation, also originally thought to exist by the English courts, was subsequently overcome in certain circumstances in the United Kingdom in *Chartered Bank v Daklouché*.¹⁰ 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.¹¹ However, the reasoning in *Pivovarovff v Chernabaeff* was followed by the Supreme Court of New South Wales in *Ex parte BP Exploration Co (Libya); Re Hunt*.¹² In that case

⁵ For example, the fact that the defendant is a foreign government agency might be a relevant counter-argument: *Establishment Esefka International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd's Rep 445.

⁶ 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.

⁷ *Allen and Others v Jambo Holdings Ltd and Others* [1980] 2 All ER - a personal injury claim.

⁸ (1978) 16 SASR 329.

⁹ This was the case in *Sanko Steamship Co Ltd v DC Commodities (A'Asia) Pty Ltd* [1980] WAR 51.

¹⁰ [1980] 1 WLR 107. Also see *Barclay-Johnson v Yuill*, *The Times*, 23 April 1980 and *Bin Turki v Abu-Taha*, *The Times*, 17 June 1980.

¹¹ *Sanko Steamship Co Ltd v DC Commodities Pty Ltd* [1980] WAR 51, *Praznovsky v Sabyack* [1977] VR 114 and *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1980] 2 WLR 488.

¹² [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. Mareva injunctions have also been granted in New Zealand: C Cato, 'The Mareva Injunction and its Application in New Zealand' [1980] *New Zealand Law Journal* 270.

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.¹³ In *The Siskina*¹⁴ the House of Lords held that a Mareva injunction could not be granted unless the injunction sought was part of the relief to which the plaintiff's cause of action entitled him. The House of Lords did not either finally affirm or deny the general power to grant such injunctions. Thus the exact limits to the granting of such an injunction at present seem to be unsettled. Whilst the matter may not be within the terms of reference, the Commission considers that the procedure is a useful one and that the Supreme Court and District Court should be given ample jurisdiction to issue such injunctions in appropriate cases.

6.4 Although it thus seems to be possible to obtain an injunction from the Supreme Court and possibly the District Court in certain circumstances to prevent a respondent transferring assets from the State it may be desirable to specifically empower the Court holding the hearing referred to in paragraph 5.31 above to make an order restraining the respondent from removing or transferring his property from the State.¹⁵ Such an order could be either an alternative to or in addition to an order requiring the respondent to meet any of the conditions referred to in paragraph 5.32 above. One advantage of such a specific power would be that the Court would have comprehensive powers to deal with a respondent and it would not be dependant upon a creditor or claimant making an application for a Mareva injunction.

THE RECOMMENDATIONS OF THE PAYNE COMMITTEE

6.5 In 1969 the United Kingdom Committee on the Enforcement of Judgment Debts (the "Payne Committee") recommended that the United Kingdom equivalent of section 63(2) of the *Supreme Court Act 1935-1979*¹⁶ be repealed and be replaced by new provisions to be

¹³ 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.

¹⁴ *Siskina (Owners of Cargo) v Distos Compania Naviera SA, The Siskina* [1977] 3 All ER 803.

¹⁵ However, because of the constitutional problems referred to in Ch 2, the power may have to be limited to property being removed or transferred to another country, and not to another State or to the Northern Territory.

¹⁶ Para 3.1 above.

inserted into the *Rules of the Supreme Court* and of the County Courts.¹⁷ The Payne Committee proposed that the court on the application of a 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 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.¹⁸

6.6 The Committee proposed the following conditions -¹⁹

- (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 can prevent this wide 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 same, or transfer it out of the jurisdiction, or otherwise deal with the same so as to defeat the creditor's claim.
- (iv) The order should only be made after the writ or summons has been issued, or alternatively on terms that the writ or summons should be issued on the next day on which the court office is open.
- (v) There should be power to order the attendance of the debtor at Court and, if need be, to detain him until he has disclosed the whereabouts of the property and lodged it in safe keeping, or otherwise given security as approved by the court.
- (vi) The order should be enforceable by committal of the debtor for contempt, if he should take any steps showing that he intends imminently to leave the country and to take with him or otherwise dispose of the assets.
- (vii) The order should be discharged immediately on the debtor depositing the specified assets or lodging security as ordered by the Court.

¹⁷ 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 1971-1980*, which are at present also the rules used in the District Court, and the *Local Court Rules 1961-1980*.

¹⁸ Ibid, 324 para 1253.

¹⁹ Ibid, 324-325 paras 1255-1258.

- (viii) In practice such an order might not infrequently be backed by an order to, or undertaking by, the respondent to deposit his passport with his or the claimant's solicitor until the order has been obeyed. Where this procedure is followed the necessity to apprehend the respondent would rarely arise.

Such proposals, of course, go beyond, but include, the issue of the removal or transfer of property from the State.

6.7 The disadvantages of the procedures are however that the debtor may conceal property or remove property in defiance of the court order. The *Absconding Debtors Act 1877-1965* has a more immediate and personal effect than either the Mareva injunction or the Payne Committee proposals which, of course, gives the Act both its advantage and its potential for abuse.

6.8 There is presently provision both in the rules of the Supreme Court (which apply both in the Supreme Court and District Court) and in the rules of the Local Court enabling the court to order the detention, custody, preservation or inspection of any property *which is the subject-matter of a cause or matter or as to which any question may arise therein.*²⁰ This is, of course, a very much more limited power.

6.9 The Commission seeks comment on these proposals, and whether if such jurisdiction was conferred there would remain a need for Absconding Debtors legislation. Attention is drawn to Part IV of the *Absconding Debtors Act 1978-1979* (NT) which may form a suitable model for Western Australia.

²⁰ *Rules of the Supreme Court 1971-1980*, Order 52 rule 2; *Local Court Rules 1961-1980*, Order 14 rule 3.

CHAPTER 7

QUESTIONS AT ISSUE

7.1 The Commission welcomes comment (with reasons where appropriate) on any matter arising out of the paper, and in particular on the following -

1. Should it be possible in any circumstances to prevent a respondent leaving the State as an aid to debt recovery or to the enforcement of other legal obligations?

(paragraphs 5.2 to 5.12)

2. If so, what conditions should be met before a respondent is prevented from leaving the State, and should the claimant be required to show that -

(a) he has -

(i) a liquidated debt ;

(ii) an unliquidated claim ;

(iii) an unsatisfied judgment debt;

(b) the respondent is contemplating leaving or is about to leave the State;

(c) the respondent's absence would defeat, endanger or materially prejudice the claimant's cause of action or prospects of enforcing a judgment debt; and

(d) the application has been made within a reasonable time after the fact of the respondent's intention to leave the jurisdiction came to the knowledge of the claimant?

(paragraphs 5.15 to 5.19 and 5.23)

3. Should there be a minimum monetary limit on the circumstances in which an application can be made to prevent a respondent leaving the State, and if so, what sum should be prescribed?

(paragraphs 5.13 and 5.14)

4. Should it be possible to prevent a respondent who is a married woman leaving the State as an aid to debt recovery or to the enforcement of other legal obligations?

(paragraph 5.20)

5. What procedure should be provided, and in particular -
 - (a) should it be possible to make the application to a justice of the peace or only to a magistrate;
(paragraph 5.24)
 - (b) should that judicial officer have the option of issuing a warrant or a summons;
(paragraph 5.26)
 - (c) should a hearing be held in a court, and if so what powers should the Court have?
(paragraphs 5.29 to 5.33)

6. What protection should be provided for respondents, and in particular -
 - (a) should there be an offence along the lines of that referred to in paragraph 5.37;
 - (b) should a new civil remedy be created;
(paragraphs 5.38 and 5.39)
 - (c) in those cases in which a claimant has not previously commenced an action, should he be required to do so within five days of any order requiring the respondent to remain in the State?
(paragraph 5.40)

7. Should provision be made for a review of decisions and the discharge of warrants relating to respondents by way of an application to a judge of the Supreme Court?
(paragraphs 5.41 and 5.43)

8. Should any further provision be made for jurisdiction for the Supreme Court, District Court and Local Courts -
 - (a) to grant "Mareva" injunctions;
 - (b) along the lines proposed by the Payne Committee?
(paragraphs 6.1 to 6.9)

APPENDIX I

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 intituled "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 boarding or entering a vessel, aircraft, railway train, motor vehicle, or any other vehicle or means of

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".

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 lastmentioned 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 of 1960,
s.5.

4. At any time after the expiration of three months from the issuing of any such lastmentioned 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
unlawfully 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
1960, s. 7.
Amended by
No. 113 of
1965, s. 8.

5A. A person who, after he has been arrested of under a warrant issued pursuant to the provisions of this Act, quits or makes preparation to 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 II
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	1. 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 this 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> ; "Local Court" means a Local Court of Full Jurisdiction under the <i>Local Courts Act</i> ; "magistrate" has the same meaning as in the <i>Magistrates Act</i> ; "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 sub-section (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 sub-section (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).