

SOUTH AUSTRALIA

DEBTS REPAYMENT ACT, 1978

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being

Debts Repayment Act, 1978, No. 83 of 1978
[Assented to 30 November 1978]¹

¹ Act not in operation.

An Act to establish a Debtors' Assistance Office to assist persons in financial difficulties to overcome those difficulties, and for other purposes.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

PART I

PRELIMINARY

Short title

1. This Act may be cited as the *Debts Repayment Act, 1978*.

Commencement

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

Arrangement of Act

3. This Act is arranged as follows:—

PART I—PRELIMINARY

PART II—ADMINISTRATION

PART III—SCHEMES FOR THE REGULAR PAYMENT OF DEBTS

PART IV—MISCELLANEOUS

Interpretation

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

"the Administrator" means the Administrator of the Office:

"creditor" means any person to whom debts are owed by a debtor:

"debt" means any liability (including a contingent liability) to pay money except—

(a) a liability—

(i) incurred in the course of carrying on a trade or business;

or

(ii) arising under a guarantee or indemnity given in respect of a liability incurred in the course of carrying on a trade or business;

(b) a liability (not being a liability that does constitute a debt by virtue of subsection (2) of this section) secured by mortgage over land;

(c) a liability to pay maintenance under a written agreement or in pursuance of the order of a court;

or

(d) a penalty or fine imposed by a court for an offence:

3.

"debt counselling" means the furnishing of a debtor with advice and guidance with respect to his financial affairs including advice and guidance—

(a) as to how he may plan the expenditure of his income so as to be able to pay his debts as and when they fall due;

(b) as to the procedures available (whether under this Act or otherwise) for the settlement of his debts;

and

(c) as to the procedures available to creditors to enforce payment of debts:

"debt counsellor" means a person appointed as a debt counsellor under this Act:

"debtor" means a natural person who is liable to pay debts:

"mortgage debt" means a liability secured by mortgage over land that constitutes a debt by virtue of the provisions of subsection (2) of this section:

"the Office" means the Debtors' Assistance Office established by this Act:

"property" means real or personal property:

"scheme" means a scheme for the regular payment of debts under Part III of this Act:

"security" means—

(a) any mortgage, charge or lien over real or personal property of a debtor;

or

(b) any guarantee or indemnity in relation to a debt:

"the Tribunal" means the Credit Tribunal established under the *Consumer Credit Act, 1972-1973*.

(2) Where—

(a) a liability is secured by mortgage over land;

(b) the land constitutes the usual place of residence of the mortgagor;

and

(c) the liability is not a liability—

(i) incurred in the course of carrying on a trade or business;

or

4.

- (ii) arising under a guarantee or indemnity given in respect of a liability incurred in the course of carrying on a trade or business,

that liability constitutes a debt for the purposes of this Act.

Act to bind the Crown

5. This Act binds the Crown.

5.

PART II

ADMINISTRATION

DIVISION I—ADMINISTRATION OF ACT

Administration of Act

6. (1) This Act shall be administered by the Minister of Prices and Consumer Affairs.

(2) The Minister of Prices and Consumer Affairs shall not be divested of the administration of this Act by proclamation or any other executive act.

DIVISION II—ESTABLISHMENT AND FUNCTIONS OF THE DEBTORS'
ASSISTANCE OFFICE

Establishment of the Office

7. There shall be an office entitled the "Debtors' Assistance Office".

Functions of the Office

8. The functions of the Office are—

- (a) to provide debt counselling for any members of the public who desire such counselling;
 - (b) to assist debtors in working out satisfactory arrangements for the settlement of their debts;
 - (c) to negotiate with creditors, or to arrange meetings between debtors and their creditors, in an endeavour to bring about satisfactory arrangements for the settlement of debts;
 - (d) to provide training in debt counselling;
 - (e) to conduct research into matters related to debt counselling;
 - (f) to publish information relating to debt counselling;
 - (g) to receive and distribute funds payable in accordance with schemes for the regular payment of debts;
- and
- (h) to do anything incidental to the performance of any of the preceding functions.

DIVISION III—ADMINISTRATION OF THE OFFICE

Administration of the Office

9. (1) There shall be an Administrator of the Office and such other staff of the Office as may be necessary for the proper administration of the affairs of the Office.

(2) The Administrator and each other member of the staff of the Office shall be appointed and shall hold office subject to the *Public Service Act, 1967-1978*.

DIVISION IV—DEBT COUNSELLORS

Debt counsellors

10. (1) The Minister may, by instrument in writing, appoint a fit and proper person to be a debt counsellor.

(2) A person is, subject to this Act, eligible for appointment as a debt counsellor if—

(a) he is an officer or employee—

(i) of the Crown;

or

(ii) of some reputable agency,

and intends to practise as a debt counsellor in his capacity as such;

(b) he is a member or officer of a benevolent or charitable organization that provides, or proposes to provide, debt counselling as a community service, and he intends to practise as a debt counsellor on behalf of that organization;

or

(c) he carries on a prescribed profession and intends to practise as a debt counsellor in the course of that profession.

(3) An appointment may be made under this section subject to such conditions as the Minister thinks fit and specifies in the instrument of appointment.

(4) A debt counsellor shall observe any direction of the Administrator in relation to debt counselling or any related matters.

Penalty: Two hundred dollars.

PART III

SCHEMES FOR THE REGULAR PAYMENT OF DEBTS

Application for assistance

11. (1) Where a debtor desires assistance under this Part he may apply to a debt counsellor for such assistance.

(2) An application under this section—

(a) must be in the prescribed form;

(b) must include particulars of—

(i) the income, property, usual living expenses, debts and other liabilities of the debtor, his spouse (if he is cohabiting with his spouse), and his dependants;

(ii) all claims and demands that have been made against the debtor;

and

(iii) such other matters as may be prescribed.

(3) Subject to subsection (4) of this section, an application for assistance may not be made under this Part where the total liabilities of the debtor exceed ten thousand dollars or such other amount (not exceeding fifteen thousand dollars) as may be prescribed.

(4) For the purposes of determining the total liabilities of a debtor under subsection (3) of this section, a liability to repay a debt secured by a mortgage over land shall not be taken into account.

Preparation of scheme

12. (1) Where an application is made to a debt counsellor under this Part and the counsellor is satisfied—

(a) that the debtor is in financial difficulties;

and

(b) that it would be in the interests of the debtor and his creditors if a scheme for the regular payment of the debtor's debts were established under this Part,

the counsellor may formulate a scheme for the regular payment of those debts.

(2) A scheme for the regular payments of debts—

(a) must be in writing;

(b) must contain a statement of all the debts covered by the scheme;

(c) must require the debtor to make such periodic or other payments to the Office for distribution amongst his creditors as may be stipulated in the scheme;

8.

(d) must, subject to this section, provide for the distribution of amounts paid to the Office in pursuance of the scheme amongst the creditors without preference unless special reasons for granting the preference exist and are stated in the scheme;

and

(e) must limit the extent to which the debtor may incur debts during the subsistence of the scheme.

(3) Subject to this section, a scheme may—

(a) provide for the sale, or conversion into money, of any of the property of the debtor;

(b) prohibit or restrict the sale or disposal of specified property by the debtor or any other transaction affecting specified property of the debtor;

(c) provide for the payment of interest upon outstanding amounts due to creditors;

(d) provide for the modification of contractual provisions relating to—

(i) the interest to be paid by the debtor;

(ii) the amount of instalments to be paid by the debtor;

and

(iii) the time of payment of instalments by a debtor.

(4) Where a scheme modifies contractual rights and liabilities, that modification is effective only during the subsistence of the scheme.

(5) Where a mortgage debt was incurred for the purpose of purchasing or improving the land on which it is secured (or for extinguishing a mortgage debt that was so incurred), a scheme covering that debt—

(a) may not—

(i) reduce the amount of any instalment payable under the mortgage;

(ii) postpone the payment of any instalment payable under the mortgage;

(iii) reduce the rate of interest payable under the mortgage;

and

(b) must provide for the payment of all arrears (if any) outstanding under the mortgage at the commencement of the scheme within twelve months of the commencement of the scheme.

(6) Where a mortgage debt is covered by a scheme—

(a) any provision in the mortgage whereby, upon default by the mortgagor in complying with the terms of the mortgage, payment of the amount secured by the mortgage is to be made before it would otherwise be payable, is during the subsistence of the scheme, of no effect;

and

(b) where the provisions of the mortgage provide that a lower rate of interest is chargeable if instalments are paid within specified times, interest at the lower rate shall continue to be payable, during the subsistence of the scheme, notwithstanding that the mortgagor is in arrears in the payment of instalments.

Reference of scheme to Tribunal

13. (1) When a debt counsellor has formulated a scheme under this Part, he shall—

(a) refer the scheme to the Tribunal;

and

(b) cause a copy of the scheme together with—

(i) such information relating to the financial position of the debtor as may be prescribed;

and

(ii) a statement of the time and place fixed by the Tribunal for hearing representations of creditors in relation to the scheme,

to be served on all creditors affected by the scheme.

(2) The following persons may give evidence, or make representations, to the Tribunal in relation to a proposed scheme—

(a) the debtor;

(b) a debt counsellor;

(c) any creditor affected by the proposed scheme;

and

(d) any other person who may, in the opinion of the Tribunal, be able to assist it to arrive at a just decision.

(3) Representations may be made to the Tribunal—

(a) personally, or by counsel or other representative;

or

(b) in writing.

(4) The Tribunal may, after considering any evidence or representations made in pursuance of this section—

(a) approve a scheme with or without amendment;

or

(b) reject a scheme.

(5) Upon approving a scheme under this section, the Tribunal may order a creditor to whom debts covered by the scheme are owed to return any property—

(a) that has, within the period of six months immediately preceding the date of the order, been seized by the creditor in pursuance of a security;

and

(b) that is still in the possession of the creditor,

not being property that has, in pursuance of the security, become property of the creditor.

(6) Where a scheme contains a provision prohibiting or restricting the sale or disposal of any interest in land by a debtor the Tribunal may direct the Registrar-General to register a memorandum of that provision on the relevant certificate of title to the land.

(7) After the registration of a memorandum by the Registrar-General in pursuance of a direction of the Tribunal under subsection (6) of this section, any transaction entered into by the debtor in contravention of the provision of the scheme to which the memorandum relates is void and of no effect.

(8) Where the Tribunal approves a scheme under this section, the scheme shall, subject to this Part, remain in force for a term, not exceeding three years, stipulated in the scheme.

(9) The Tribunal may, on the application of a debtor or creditor, vary an approved scheme—

(a) by admitting further debts to the scheme;

or

(b) in any other manner.

(10) Notice of an application for the variation of an approved scheme—

(a) must, if the application is made by a creditor, be given—

(i) to the debtor;

and

(ii) to all other creditors affected by the scheme or the proposed variation;

and

(b) must, if the application is made by the debtor, be given to all creditors affected by the scheme, or the proposed variation.

(11) The Tribunal shall cause notice to be given to all creditors affected by an approved scheme of the approval of the scheme or of any variation of the scheme.

Proceedings not to be taken during subsistence of approved scheme

14. (1) Subject to subsection (4) of this section, during the subsistence of an approved scheme, a creditor—

(a) is not entitled to take any proceedings under the law of the State against a debtor for recovery of a debt covered by the scheme;

and

(b) is not entitled to enforce any security relating to any debt covered by the scheme.

(2) Subject to subsection (4) of this section, any proceedings under the law of the State against a debtor for recovery of a debt covered by an approved scheme, or for enforcement of a security relating to any such debt, that had been instituted but not completed at the time of the approval of the scheme shall, during the subsistence of the scheme be stayed.

(3) A public utility shall not cut off or restrict the supply of water, electricity or gas to a debtor by reason of non-payment of a debt covered by an approved scheme.

(4) This section does not affect the enforcement of a security over personal property of the debtor unless the Tribunal is satisfied, and certifies upon approval of the scheme, that the scheme, provides for—

(a) complete discharge of the secured debt during the subsistence of the scheme;

or

(b) a reduction of the secured debt during the subsistence of the scheme that bears to the amount of the secured debt at the commencement of the scheme a greater proportion than the amount of the expected depreciation of the property subject to the mortgage bears to the value of that property at the commencement of the scheme.

(5) Any creditor to whom a debt covered by an approved scheme is owed and who knowing of the approval of the scheme takes or prosecutes proceedings under the law of the State for the recovery of the debt or the enforcement of a security relating to the debt (except as may be allowed by this Act or the approved scheme) shall be guilty of an offence and liable to a penalty not exceeding one thousand dollars.

Notification of non-compliance with Scheme

15. If it comes to the knowledge of a debt counsellor that a debtor has contravened, or failed to comply with a provision of an approved scheme, he shall give notice of that fact—

(a) to the Tribunal;

and

(b) to all creditors to whom debts covered by the scheme are owed.

Revocation of an approved scheme

16. (1) If the Tribunal is satisfied upon the application of a debt counsellor or a creditor—

(a) that a debtor has, in making an application under this Part—

(i) withheld material information;

or

(ii) made a material misstatement;

or

(b) that a debtor has contravened or failed to comply with a provision of an approved scheme,

the Tribunal shall, subject to subsection (2) of this section, revoke the scheme.

(2) The Tribunal need not revoke a scheme—

(a) on the ground that the debtor, in making an application under this Part, has withheld material information or made a material misstatement if the Tribunal is satisfied that the debtor did not intend to deceive or defraud;

or

(b) on the ground that the debtor has contravened or failed to comply with a provision of the scheme if the Tribunal is satisfied that the contravention or default is trivial and should, in the circumstances of the case, be excused.

Termination of approved scheme

17. An approved scheme terminates—

(a) upon the expiration of the term of the scheme;

(b) upon the death of the debtor;

(c) upon the debtor entering into a composition, deed of assignment, or deed of arrangement, under the *Bankruptcy Act 1966* of the Commonwealth;

13.

(d) upon the making of an order sequestrating the estate of the debtor under the *Bankruptcy Act 1966* of the Commonwealth.

or

(e) if the debtor applies to take the benefit of any law of the Commonwealth for the relief of bankrupt or insolvent debtors.

Register of approved schemes

18. (1) There shall be a register of approved schemes.

(2) The Tribunal shall—

(a) upon approving a scheme—cause a copy of the approved scheme to be filed in the register;

(b) upon varying or revoking an approved scheme—cause a memorandum of the variation or revocation to be filed in the register.

(3) The Registrar of the Tribunal shall, upon application by any person who satisfies him that he has a proper interest in the contents of the register, permit him to inspect any part of the register.

PART IV

MISCELLANEOUS

Constitution of Tribunal for the purposes of proceedings under this Act

19. For the purpose of proceedings under this Act, the Tribunal may be constituted of—

(a) the Chairman;

or

(b) the Registrar.

Waiver or limitation of rights under this Act

20. (1) A person is not competent to waive or limit his rights under this Act.

(2) Any provision of a contract or agreement, the tendency of which is to restrict or discourage the exercise of rights conferred by this Act, is void.

Service

21. A notice or document required or permitted to be served on a person under this Act shall be duly served if—

(a) it is given personally to the person on whom it is to be served;

(b) it is left at or sent by registered or certified mail to his usual place of business or residence;

or

(c) an order of the Tribunal for substituted service of the notice or document has been complied with.

Time not to run against plaintiff in certain cases

22. The time prescribed by the law of this State for commencing any proceedings, or taking any step in proceedings, or with a view to commencing proceedings, shall not run while the plaintiff or prospective plaintiff is prohibited by this Act from commencing or prosecuting the proceedings.

Deceptive statements

23. Any person who makes a false or misleading statement to a debt counsellor in, or in relation to, an application for assistance under this Act, knowing the statement to be false or misleading, shall be guilty of an offence and liable to a penalty not exceeding one thousand dollars or imprisonment for three months or both.

Debtor must disclose existence of scheme

24. A debtor in relation to whom a scheme is in force under this Act who seeks to obtain credit from any person without disclosing the existence of the scheme shall be guilty of an offence and liable to a penalty not exceeding one thousand dollars, or imprisonment for three months, or both.

Proceedings

25. Proceedings for an offence against this Act shall be disposed of summarily.

Report on administration of this Act

26. (1) The Administrator shall, as soon as practicable after the thirtieth day of June in any year, make a report to the Minister upon the administration of this Act during the preceding period of twelve months.

(2) The Minister shall cause copies of the report to be laid before both Houses of Parliament as soon as practicable after his receipt thereof.

Regulations

27. (1) The Governor may make such regulations as are contemplated by this Act, or as are necessary or expedient for the purposes of this Act.

(2) Without limiting the generality of the foregoing, those regulations may—

- (a) prescribe any form for the purposes of this Act;
- (b) prescribe, and provide for the payment of, fees and charges;
- (c) provide for the waiver or remission of fees prescribed under this Act;
- (d) prescribe the qualifications required for appointment as a debt counsellor;
- (e) regulate any proceedings under this Act;

and

- (f) prescribe penalties, not exceeding two hundred dollars, for breach of, or non-compliance with, any regulation.