

# **BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 1 – Bankruptcy**

#### **Debtor applications**

#### *Section 14 – Debtor applications*

50. Section 14(1) of this Act extends section 1A of the 1985 Act to add determining debtor applications for sequestration to the other functions of the AiB.
51. A “debtor application” is the name given to the new process by which a debtor applies to the AiB for his or her estate to be sequestrated. This replaces the current process where a debtor has to petition the court. Creditors seeking sequestration of a debtor’s estate will continue to have to petition the sheriff (see the changes made by section 16 of this Act).
52. Subsections (2) to (8) make a number of amendments of the 1985 Act setting up the procedure for debtor applications.
53. Subsection (2) inserts new subsections (1A) to (1C) into section 2 of the 1985 Act giving the AiB power to appoint a trustee in sequestration following a debtor application or deeming the AiB to be the trustee if no-one else is appointed. In a case where the debtor meets the criteria for being a low income, low asset debtor (under new section 5A of the 1985 Act, inserted by section 15(2) of this Act) subsection (1C) provides that the AiB is to be the trustee.
54. Subsections (3)(a) and (4) make amendments setting out who can make debtor applications and who must proceed by petition to the sheriff.
55. Subsection (3)(b) inserts new subsections (4B) and (4C) into section 5 of the 1985 Act, providing that debtor applications are to be made to the AiB, and giving the Scottish Ministers power to make regulations setting out the procedure in and form of debtor applications, and setting the fees that the AiB may charge in relation to those applications.
56. Subsection (5) inserts new section 6B into the 1985 Act which provides that a debtor making a debtor application has to state whether the debtor’s main place of business is in the UK or elsewhere in the EU or whether the debtor has an establishment in the UK or elsewhere in the EU. If the debtor is already subject to proceedings elsewhere in the EU and those proceedings are regarded under EU law as main proceedings for insolvency then the debtor has to send a copy of the debtor application to the person in charge of those proceedings.

57. Subsection (6) inserts new section 8A into the 1985 Act which makes provision for debtor applications in similar terms to the provisions relating to petitions in section 8 of that Act.
58. Subsection (7) makes amendments to section 9 of the 1985 Act. It provides that the AiB may determine debtor applications from debtors who live in Scotland, have an established place of business in Scotland or, if the debtor is not a natural person, who were constituted under Scots law and carried on business in Scotland at any time.

### ***Section 15 – Debtor applications by low income, low asset debtors***

59. Section 15(1) of this section inserts into section 5(2B)(c) of the 1985 Act an additional criteria under which a debtor can apply to the AiB for sequestration. The new criterion is that the debtor is unable to pay his or her debts and meets the conditions listed in new section 5A of the 1985 Act. Note, however, that the new criteria is additional to the existing requirements of sub-section (2B) of section 5 of the 1985 Act, and debtor will therefore still have to satisfy the qualifying debt limit threshold and the bar on being sequestrated twice in any 5-year period as set out in paragraphs (a) and (b) of that subsection.
60. Subsection (2) inserts new section 5A into the 1985 Act.

### **New section 5A – Debtor applications by low income, low asset debtors**

61. Section 5A sets out the conditions under which the new criteria in section 5(2B)(c) will be met. The conditions are set out in subsections (2) to (4) and generally relate to the debtor having a low level of income and a minimal amount of assets. Subsection (5) gives the Scottish Ministers the power to make regulations setting out what income and assets are to be included and how they are to be determined for the purposes of subsections (2) to (4). It also provides the power to add further conditions and to vary or remove those further conditions. The power in subsection (5) is subject to the affirmative resolution procedure of the Scottish Parliament (see new section 72(2) and (3) of the 1985 Act as inserted by section 35 of this Act).