

2008-2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**BANKRUPTCY LEGISLATION AMENDMENT BILL 2009**

REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Robert McClelland MP)

## **BANKRUPTCY LEGISLATION AMENDMENT BILL 2009**

### **SECTION 1 - GENERAL OUTLINE**

1. The objects of this Bill are:
  - (a) to provide a more streamlined process for fixing trustee remuneration and a more transparent process for reviewing that remuneration;
  - (b) to strengthen the penalties for some offences and ensure these are in line with the penalties for other similar offences;
  - (c) to remove the outdated concept of Bankruptcy Districts in order to provide more flexibility in personal insolvency administration;
  - (d) to increase the minimum debt for a creditor's petition to reflect changes in the economic environment;
  - (e) to increase the stay period that follows a declaration of intent to file a debtor's petition to allow debtors to better assess their options; and
  - (f) to increase the debt, income and asset tests thresholds for debt agreements to ensure the thresholds keep pace with increasing wages and the increasing availability of credit.
2. Schedule 1 contains amendments relating to remuneration of registered trustees administering bankrupt estates. These amendments will commence on a single date to be fixed by Proclamation.
3. Schedule 2 contains amendments relating to offences. These amendments will commence on a single date to be fixed by proclamation.
4. Schedule 3 contains amendments relating to the removal of Bankruptcy Districts. These amendments will commence the day after the Act receives Royal Assent.
5. Schedule 4 contains amendments relating to increasing the minimum debt for a creditor's petition, increasing the stay period that follows the filing of a declaration of intent to file a debtor's petition and increasing the debt, income and assets test for debt agreements. The amendments contained in Part 1 of Schedule 4 will commence 28 days after Royal Assent. The amendments contained in Part 2 of Schedule 4 will commence on a day to be fixed by Proclamation.

#### Financial Impact Statement

6. There are no financial implications for the Commonwealth arising from these amendments.

## SECTION 2 – POLICY OBJECTIVES

7. The principal purpose of the amendments to be made by this Bill is to modernize the national personal insolvency scheme and to make it more efficient.

8. In particular, the Bill includes amendments which recognize that the majority of bankruptcies relate to consumer debts and involve bankrupts with relatively few assets and little income. The 2008-2009 financial year produced the highest ever level of personal insolvency activity (36,479). This represents an increase of 11 per cent on the 2007-2008 financial year level of personal insolvency activity. The vast majority of these are non-business bankruptcies principally involving consumer debts.

9. Given these prevailing circumstances surrounding most bankruptcies, the system could do more to encourage informed decision making and access to alternative solutions. Many debtors who are overwhelmed by debts find it difficult to deal with all their creditors and may not always have the time available to do this. There are also opportunities to ensure debtors receive information and advice from a wider range of sources which will assist in rational decision making. These issues are addressed by the amendments to extend to 28 days the period of effect of a declaration of intent to file a debtor's petition and increasing the availability of debt agreements.

### Trustee Remuneration

10. The proposed reforms relating to trustee remuneration have been developed following consultation with key stakeholders including insolvency practitioners, financial counsellors and creditors. Details of the proposed reforms were announced on 22 May 2008.

11. The overall purpose of the amendments relating to remuneration of trustees is to provide a clearer regime for setting and reviewing remuneration. In particular, they provide a more accessible and streamlined process for challenging the trustee's remuneration claim. The amendments reinforce the principle that creditors have oversight of a trustee's administration of a bankrupt estate and should be required to approve claims for remuneration. This ensures creditors, who are the beneficiaries, can be satisfied that the remuneration is reasonable and reflects the value added to the estate by the trustee's work.

12. The amendments also provide the Inspector-General in Bankruptcy with enhanced oversight to ensure trustees are following the rules when claiming remuneration. There will be a new review process where the trustee's remuneration claim is disputed. This process will be free to the applicant (most often the bankrupt) and which is flexible by allowing it to be tailored to the particular issues in dispute.

13. It is important to ensure trustees are accountable to creditors in relation to their remuneration. However, an effective insolvency system also relies on there being trustees of a high calibre who are willing to undertake the work. The amendments recognise this by streamlining the process for claiming a basic amount of remuneration (set at \$5000) which reasonably reflects the essential tasks which every trustee must undertake. The trustee will not require creditor approval for claims up to

this amount. Any additional remuneration will require the approval of creditors. This will avoid unnecessary expense to the estate. The increase in the minimum remuneration entitlement will also replace the existing mechanism for default remuneration which allows a trustee to claim remuneration by reference to an outdated scale of fees without consulting creditors. This will ensure greater oversight by creditors of the trustee's remuneration.

#### Offences

14. The overall purpose of the amendments relating to offences is to:
- introduce an infringement notice regime as an alternative to prosecution for offences of strict liability;
  - ensure the penalties for some offences (particularly those involving fraud) reflect the seriousness of the conduct and are consistent with penalties for similar offences in other Commonwealth, State and Territory legislation;
  - provide stronger powers to obtain a statement of affairs from a bankrupt who fails to file this as required; and
  - provide stronger powers for the Inspector-General in Bankruptcy to investigate possible offences under the Act.

#### Removal of Bankruptcy Districts

15. The overall purpose of the amendments relating to the removal of bankruptcy districts is to deliver a more efficient, national personal insolvency scheme. Over time the use of Bankruptcy Districts as an organising principle in bankruptcy administration has become increasingly cumbersome.

#### No retrospective amendments

16. All amendments will apply prospectively only.

### **SECTION 3 – notes on sections**

#### Section 1 - Short Title

17. The Bankruptcy Legislation Amendment Bill 2009 (the Bill) proposes amendments to the *Bankruptcy Act 1966*. Section 1 of the Bill provides that, when the Bill has been enacted, it will be known as the *Bankruptcy Legislation Amendment Act 2009*.

#### Section 2 - Commencement

18. Section 2 will provide a table setting out when the amendments to be made by the Bill will commence. Sections 1 to 3 and anything else not covered by this table will commence on the day on which the Bill receives Royal Assent.

19. Schedules 1 and 2 will commence on a single date to be fixed by Proclamation. However, if any of the amendments do not commence within the

period of 6 months beginning on the day on which the Act receives Royal Assent, they commence on the first day after the end of that period.

20. Schedule 3 will commence the day after this Bill receives Royal Assent. The amendments contained in Part 1 of Schedule 4 will commence 28 days after Royal Assent. The amendments contained in Part 2 of Schedule 4 will commence on a day to be fixed by Proclamation.

### Section 3 – Schedules

21. Proposed section 3 is a drafting device to allow all the amendments proposed to be made to the Act to be set out in Schedules. The items in the Schedules will amend the Act and will have effect according to their terms. Notes on the Schedule items follow.

## **SCHEDULE 1 – REMUNERATION OF TRUSTEES OF ESTATES OF BANKRUPTS**

### Amendments relating to creditors’ meetings

22. Items 1 to 6 will amend section 64U which deals with the procedure for dealing with trustee remuneration at a meeting of creditors.

23. Item 1 will repeal subsections 64U(2) to (4). Subsection 64U(2) refers to remuneration as prescribed by regulations pursuant to subsection 162(4). Subsection 162(4) is being repealed so subsection 64U(2) will no longer be required. Subsections 64U(3) and (4) are being replaced by new subsections 64U(5) and (5A) without any change to their respective meaning.

24. The amendments to be made by items 2 to 6 are consequential upon the repeal of subsection 64U(2) and will make no substantive change to the operation of the section.

### Creditors’ resolutions without a meeting where resolution relates to remuneration

25. Item 7 will amend section 64ZBA which provides for creditors’ resolutions without a meeting. The amendments will clarify that this process can be used for a resolution relating to the trustee’s remuneration and set out the requirements for a notice relating to such a proposal. These requirements will be set out in subsection (2A) and are in line with existing requirements relating to notices the trustee must give when the proposal is considered at a meeting of creditors (see section 64U).

26. Item 8 will amend subsection 64ZD(1) to replace a reference to subsection 64U(4) with a reference to subsection 64U(6A). This is consequential upon the amendment made by items 1 and 4 and will result in no substantive change in meaning.

### Minimum amount of remuneration payable

27. Items 9 to 11 will amend section 161B which provides that a trustee is entitled to a minimum amount of remuneration.

28. Item 9 will amend subsection 161B(1) which currently provides that, where the remuneration payable to a trustee would be less than a specified amount (the 'statutory minimum'), the trustee is entitled to remuneration of that amount. This minimum amount is considered to be nominal and the amendment will increase it to \$5000 (or another amount prescribed by regulations). This higher amount recognises that every trustee is required to undertake certain basic tasks in administering an estate and that it is unnecessary and not cost effective to require the trustee to obtain the approval of creditors for that minimum amount in every case. In effect, the trustee will be able to draw remuneration of \$5000 in every estate without the approval of creditors.

29. Item 10 will amend subsection 161B(1A) to remove the reference to section 304A which deals with indexable amounts. As the statutory minimum is being changed to a fixed \$5000, it will no longer be subject to indexation.

30. Item 11 will repeal subsections 161B(2) and (3). Subsection 161B(2) currently allows the trustee to recover the statutory minimum directly from the bankrupt if there are insufficient assets in the estate. This is inconsistent with the general principle that a trustee should be remunerated from the estate. Subsection 161B(3) currently refers to section 304A which deals with indexable amounts. As the statutory minimum is being changed to a fixed \$5000, it will no longer be subject to indexation.

#### Remuneration where there is no creditors' resolution

31. Item 12 will repeal subsection 162(4) which currently provides an entitlement for a trustee to be remunerated as prescribed by the regulations where the remuneration has not been fixed by creditors or the committee of inspection. Regulation 8.08 provides for a default remuneration scale based on the IPAA Guide to Hourly Rates published by the Insolvency Practitioners Association of Australia. The IPAA last issued that Guide on 18 June 1999 and does not intend to revise or reissue it. The use of a default scale has been judicially criticised on the basis that it undermines effective price competition.

32. In place of the current default scale for remuneration, a new process will be introduced to deal with circumstances in which it is not practical or cost effective to seek creditor approval for remuneration (for example, where the amount sought is relatively small or creditors do not respond to a remuneration proposal put forward by the trustee). There is a need for a process which provides certainty to the trustee that remuneration is approved before they commence time consuming and expensive work in administering the estate. New subsections 162(4), (4A) and (4B) will allow the trustee to apply to the Inspector-General to decide the trustee's remuneration. The circumstances in which the trustee may make such an application and the matters to be considered by the Inspector-General in making a decision will be prescribed in regulations. However, it is intended to be available where it would not be cost effective to seek creditor approval or where the creditors have not responded to a proposal relating to remuneration. It would also be available where the creditors have

rejected a proposal from the trustee relating to remuneration. In general terms, when making a decision on an application from a trustee, the Inspector-General will need to be satisfied that the trustee has followed the correct process in notifying creditors and estimating remuneration (including ensuring that tasks are charged at the appropriate rate for the level of staff expected to undertake the work), that the work has been adequately described to creditors, that the estimate of remuneration appears commensurate with the tasks to be performed and that the work appears necessary and reasonable. It is not intended that the Inspector-General will be making any decisions relating to the hourly rates charged by a trustee.

33. The amendments will not provide a mechanism for review of the Inspector-General's decision. If a trustee is not satisfied with the decision, it is open to the trustee to vacate the office by the method provided in the Act, or put a revised remuneration proposal to creditors. Likewise, creditors who are unhappy with a determination of the Inspector-General have the option of replacing the trustee under section 181.

#### Review of remuneration and costs

34. Item 13 will repeal section 167 which currently provides for taxation of costs of a person other than the trustee who provides services in relation to the administration of an estate. The process for taxing remuneration of a trustee is currently set out in regulations. The amendments made by item 13 will provide for a single process for reviewing remuneration and costs which will replace the current taxation regime for both.

35. To support the new process, item 13 will also introduce new section 166 which will require the trustee, in relation to the payment for services provided by another person in relation to the administration of an estate, to give such notices to the bankrupt and creditors as are required by the regulations. This is consistent with the current requirements for notices relating to the remuneration of the trustee.

36. The process for reviewing remuneration and costs will be established in new section 167. However, this section will set out principles and a broad framework with details of the process to be prescribed in regulations. Section 167 will provide a power to make regulations for the following purposes:

- subsection (1) – the Inspector-General reviewing decisions relating to a trustee's remuneration and allowing the bankrupt or a creditor to apply for such a review;
- subsection (2) – the Inspector-General reviewing a bill of costs for services provided by a third party in relation to the administration of an estate and allowing the trustee to apply for such a review;
- subsection (3) – the process for conducting such reviews including the Inspector-General's powers, provision of information and documents by the trustee or a third party, the decisions which the Inspector-General may make in relation to the review and the notification of decisions by the Inspector-General; and
- subsection (4) – repayment of any amounts of remuneration which the Inspector-General decides are excessive.

37. Subsection 167(5) will provide that the amount of any excess as determined by the Inspector-General is recoverable as a debt due to the bankrupt estate – this can be recovered by the Inspector-General by action against the trustee in a court of competent jurisdiction.

38. Subsection 167(6) will allow the trustee, the bankrupt or a creditor to appeal to Court from a decision of the Inspector-General. If the decision affects a third party under subsection (2), that third party will have the same right of appeal.

39. Subsection 167(7) will provide that subsections (3) and (4) do not limit subsections (1) and (2). This is intended to ensure that the review processes established by subsections (1) and (2) can be as broad as necessary. For example, the regulations may provide, in relation to the processes, that the Inspector-General can:

- reject an application which is frivolous or vexatious;
- extend the time for making an application in certain circumstances;
- conduct the review in writing, or conduct interviews, or conduct a hearing; or
- consider material other than that provided by the parties.

40. A significant difference between the new review process and the current taxation process is that it will be free to the applicant. The costs will be recovered through the realisations charge as part of the broader cost recovery arrangements applying to the Insolvency and Trustee Service Australia.

#### Definition of ‘indexable amount’

41. Items 14 to 16 will amend section 304A which provides for the indexation of certain amounts under the Act. Paragraph (i) of the definition of ‘indexable amount’ refers to remuneration payable under 161B (minimum entitlement to remuneration). As section 161B is being amended to provide that the minimum remuneration is a fixed amount of \$5000 or another amount prescribed by the regulations, indexation is no longer necessary. The amendments made by items 14 to 16 are consequential upon the repeal of section 161B.

#### Application of amendments

42. Item 17 provides that the amendments made by the Schedule will apply in relation to bankruptcies for which the date of bankruptcy is on or after the day on which this item commences. That is, the amendments apply prospectively only.

### **SCHEDULE 2 – OFFENCE PROVISIONS ETC.**

43. Item 1 will amend subsection 6A(1) to include a reference to the new section 77CA. Section 6A deals with the form and content of a statement of affairs. The amendment will ensure that these requirements as to form and content apply to a notice under section 77CA requiring a person to give a statement of affairs to the Official Receiver.

### Inspector-General's powers to investigate possible offences

44. Items 2, 3 and 4 deal with the powers of the Inspector-General in Bankruptcy to investigate possible offences against the Act. The amendments will clarify that the Inspector-General can make inquiries, conduct investigations and require a person to provide information in connection with the investigation of possible offences.

45. Item 2 will amend subsection 12(1) which sets out the duties of the Inspector-General. The amendments will insert new paragraph 12(1)(bc) providing that the Inspector-General may make such inquiries and investigations as he or she thinks fit with respect to whether a person has committed an offence against the Act. This is similar to the powers already available to the Inspector-General under subsection 12(1) to conduct inquiries and investigations into the conduct and affairs of a bankrupt, trustee or debt agreement administrator.

46. Item 3 will amend subsections 12(1BA) and (1B) to insert a reference to the new paragraph 12(1)(bc). Subsection 12(1BA) allows the Inspector-General to conduct an inquiry or investigation at any time. Subsection 12(1B) allows the Inspector-General to provide a copy of a report resulting from an inquiry or investigation to any person the Inspector-General thinks fit.

47. Item 4 will insert new provisions which will allow the Inspector-General to compel a person to provide information relevant to an inquiry or investigation under paragraph 12(1)(bc). This is in line with the powers already available to the Official Receiver under section 77C to compel a person to provide information related to the examinable affairs of a bankrupt. Subsection 12(2A) will allow the Inspector-General to give a written notice to any person requiring the person to provide information where the Inspector-General believes on reasonable grounds that the person has information relevant to an inquiry or investigation under paragraph 12(1)(bc). The notice must specify the period within which and the manner in which the information must be given. Subsection 12(2B) will provide that the period specified in the notice for giving the information must be at least 14 days after the notice is given. Subsection 12(2D) will further provide that the notice must set out the effect of subsection (2C), which provides for an offence of failing to comply with the notice, and section 137.1 of the *Criminal Code*, which deals with giving false or misleading information.

48. Subsection 12(2C) will provide that failure to comply with a notice given under subsection 12(2A) is an offence. The penalty provided for this offence will be imprisonment for 12 months which is consistent with the penalty for the similar existing offence of failing to comply with a notice under section 77C (see section 267B).

49. Subsection 12(2E) will provide that subsection (2A) does not limit the application of subsection (2) in relation to an inquiry or investigation under paragraph (1)(bc). Subsection (2) deals with the general powers of the Inspector-General under the Act. The purpose of this amendment is to ensure that these general powers are

available to the Inspector-General in addition to the specific powers to be provided by new subsection 12(2A).

#### Offence relating to notification of sequestration orders

50. Items 5, 6 and 7 will amend subsection 52(1A) which requires a petitioning creditor to provide a copy of a sequestration order to the Official Receiver. This is important because the Official Receiver is responsible for maintaining the National Personal Insolvency Index (NPII), the public record of bankruptcy related events. The NPII allows those who may have financial or other dealings with a bankrupt or someone subject to a formal insolvency process to know about those events. Subsection 52(1A) currently does not provide any consequences for a creditor who fails to comply with this requirement. The amendments will provide an offence for failing to comply. Item 5 will amend subsection 52(1A) to provide a 2 day time limit for providing a copy of the order to the Official Receiver.

51. Item 6 will provide a penalty of 5 penalty units for failing to comply with this requirement. The note directs readers to new section 277B about infringement notices which will apply to certain offences of strict liability and provide an alternative to prosecution (see paragraph 95).

52. Item 7 will provide that subsection (1A) is an offence of strict liability. This is appropriate as prompt notification of a sequestration is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

#### Offence relating to failure to file a statement of affairs

53. Item 8 will amend subsection 54(1) by increasing the penalty for a bankrupt who fails to file a statement of affairs as required from 5 to 25 penalty units. Under subsection 54(1), a person who becomes bankrupt as the result of a sequestration order is required to file a statement of affairs within 14 days of being notified of the bankruptcy. The statement of affairs is the most important information required by a trustee to commence administering the bankrupt estate. Failure to comply significantly frustrates the trustee's ability to administer the estate in a timely way and prevents or delays returns to creditors from the realisation of assets in the estate. Therefore, this is seen as a very serious offence which should be treated accordingly. In addition to the increase in the penalty in subsection 54(1), the Official Receiver will have a new power to compel a bankrupt to provide a statement of affairs – failure to comply in those circumstances will have even more serious consequences (see paragraph 57)

54. Item 9 will amend subsection 56F which applies to the bankruptcy of partnerships. Where a person who is a member of a partnership files a debtors' petition against the partnership, each member of the partnership becomes bankrupt. Section 56F requires each non-petitioning partner to file a statement of affairs within 14 days of being notified of bankruptcy. The amendment will increase the penalty for failure to comply from 5 to 25 penalty units (in line with the amendments to subsection 54(1) described previously).

### Offences relating to notification of compositions and arrangements

55. Items 10 and 11 will amend subsections 73(1A) and (1B) which require a trustee to give a copy of a proposal under section 73 to Official Receiver within 2 working days after receiving the proposal. The amendments will provide that failure to comply with this requirement is an offence of strict liability and provide a penalty of 5 penalty units. This offence will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of section 73 proposals is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

56. Items 12, 13 and 14 will amend subsection 74(5A) which requires a trustee to notify the Official Receiver of an annulment under section 74 (where creditors accept a proposal for a composition of scheme of arrangement). Item 12 will amend subsection (5A) to require the trustee to provide the notification within 2 days (in line with other similar requirements elsewhere in the Act). The amendments to be made by items 13 and 14 will provide that failure to comply with this requirement is an offence of strict liability and provide a penalty of 5 penalty units. This offence will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of an annulment is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

### Power of Official Receiver to obtain statement of affairs

57. Item 15 will insert new section 77CA which will provide the Official Receiver with a specific power to compel a bankrupt to provide a statement of affairs. This power will be part of the range of existing powers given to the Official Receiver to assist trustees in the administration of estates. A person who becomes bankrupt as the result of a sequestration order is required, under section 54, to file a statement of affairs within 14 days of being notified of the bankruptcy. The statement of affairs is the most important information required by a trustee to commence administering the bankrupt estate. Failure to comply significantly frustrates the trustee's ability to administer the estate in a timely way and prevents or delays returns to creditors from the realisation of assets in the estate. Therefore, this is seen as a very serious offence which should be treated accordingly. In addition to the increased penalty under subsection 54(2) for failure to comply, the new section 77CA will provide the Official Receiver with a power to require the bankrupt to give a statement of affairs within 14 days of the notice. If the bankrupt fails again to comply after having had the obligation brought to his or her attention by the Official Receiver giving such a notice, the bankrupt will have committed a further and more serious offence. That offence will be covered by section 267B and the penalty will be imprisonment for 12 months.

### Failure of bankrupt to surrender passport to trustee

58. Items 16 to 19 relate to the failure of a bankrupt to surrender his or her passport to the trustee as required by subsection 77(1). A bankrupt who fails to hand

over his or her passport has a means to leave the country and avoid their obligations under the Act. The proper administration of the bankrupt estate is significantly impeded where the trustee is unable to seek information from the bankrupt about, for example, property, income, transactions and dependants. The net result could be that the trustee is unable to realise property, and creditors will not receive a dividend that they may have, had the bankrupt not left the country, been able to receive. The amendments will include this failure as a ground for objection to the bankrupt's discharge (item 16) which will extend the period of bankruptcy to 8 years (item 18). This ground for objection will be one for which the trustee does not have to give reasons in the notice of objection (item 17).

#### Offences relating to notification of annulments

59. Items 20 to 23 will amend sections 153A and 153B which relate to annulment of bankruptcy. The amendments will create offences of strict liability where the trustee fails to notify the Official Receiver of an annulment. This will allow the Official Receiver to maintain an accurate NPII.

60. Item 20 will amend subsection 153A(2) to require the trustee to provide notification of an annulment under subsection 153A(1) within 2 days (in line with other similar requirements elsewhere in the Act). This will allow the Official Receiver to maintain an accurate NPII. The amendments to be made by items 21 and 22 will provide that failure to comply with this requirement is an offence of strict liability and provide a penalty of 5 penalty units. This offence will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of an annulment is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

61. Item 23 will add a new requirement to subsection 153B (annulment by Court) requiring the trustee to notify the Official Receiver of an annulment within 2 days of becoming aware of the order. This will allow the Official Receiver to maintain an accurate NPII. The amendments will also provide that failure to comply with this requirement is an offence of strict liability and provide a penalty of 5 penalty units. This offence will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of an annulment is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

#### Offences relating to trustee's failure to hand over certificate of registration

62. Items 24 and 25 will amend section 155J which requires a person whose registration as a trustee ceases for any reason to give his or her certificate of registration to the Inspector-General. There is currently no time limit prescribed for the return of the certificate. Item 24 will amend subsection 155J(1) to provide that the certificate must be given to the Inspector-General before the end of the period of 7 days beginning on the day the person ceased to be registered. Item 25 will provide a penalty of 5 penalty units. This offence will be covered by the proposed new infringement notice regime (see paragraph 95).

### Offence where trustee pays money into private bank account

63. Item 26 will amend the penalty for the offence provided by section 168 (trustee not to pay money into private account). The penalty will be based on penalty units rather than a specified dollar amount. This is in line with general Commonwealth policy. This offence will be covered by the proposed new infringement notice regime (see paragraph 95).

### Annual estate returns - trustees

64. Item 27 will insert new section 170A requiring a trustee to give the Inspector-General an annual return in relation to the administration of each bankrupt estate administered during the year. The return must be given within 35 days after the end of the year and be in the approved form. This amendment will formalise an existing requirement which has existed for a number of years. The return provides the Inspector-General with necessary information relating to the operation of the Act generally as well as the trustee's compliance with the Act in relation to specific estates (including payment of interest and realisations charges under the *Bankruptcy (Estate Charges) Act 1997*). Currently, the Inspector-General relies on the general information gathering powers in section 12 to require trustees to provide this information. The amendment will provide specifically for this return including its formal requirements. In addition, failure to provide the return will be an offence of strict liability with a penalty of 5 penalty units. This offence will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as the annual estate return is integral to the effective regulation of trustees. Trustees will be well aware of the requirement to file these returns.

65. There will be an equivalent requirement for debt agreement administrators (see item 33).

### Offences relating to trustee's books, records and accounts

66. Items 28 and 29 will insert the same note at the end of both subsections 173(1) and 175(5) referring to section 277B (about infringement notices). The offences provided by these subsections will be covered by the proposed new infringement notice regime (see paragraph 95).

### Offence relating to notification of trustee's death

67. Items 30 to 32 will amend subsection 182(4) which provides that, where a trustee dies, the person administering the deceased trustee's estate must notify the Official Receiver of that fact. This is an important obligation as it allows the Official Receiver to ensure a seamless transfer of the administration of the estate and to maintain an accurate NPII. The amendments will provide a clear time limit for providing that notification to the Official Receiver (28 days rather than 'forthwith') and will provide for a penalty of 5 penalty units. This offence will be covered by the proposed new infringement notice regime (see paragraph 95).

### Annual estate returns – debt agreement administrators

68. Item 33 will insert new section 185LEA requiring a debt agreement administrator to give the Inspector-General an annual return in relation to the administration of each debt agreement administered during the year. The return must be given within 35 days after the end of the year and be in the approved form. This amendment will formalise an existing requirement. The return provides the Inspector-General with necessary information relating to the operation of the Act generally as well as the administrator's compliance with the Act in relation to specific debt agreements (including payment of interest and realisations charges under the *Bankruptcy (Estate Charges) Act 1997*). Currently, the Inspector-General relies on the general information gathering powers in section 12 to require trustees to provide this information. The amendment will provide specifically for this return including its formal requirements. In addition, failure to provide the return will be an offence of strict liability with a penalty of 5 penalty units. This offence will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as the annual estate return is integral to the effective regulation of debt agreement administrators who will be well aware of the requirement to file these returns.

### Offence relating to notification of administrator's death

69. Items 34 to 36 will amend subsection 185ZA(1) which provides that, where a debt agreement administrator dies, the person administering the deceased administrator's estate must notify the Official Receiver of that fact. This is an important obligation as it allows the Official Receiver to ensure a seamless transfer of the administration of the agreement and to maintain an accurate NPII. The amendments will provide a clear time limit for providing that notification to the Official Receiver and a penalty of 5 penalty units for failing to do so. The time limit of 28 days will commence from the time that the person administering the deceased administrator's estate begins administering the estate. This offence will be covered by the proposed new infringement notice regime (see paragraph 95).

### Offence relating to administrator's failure to hand over certificate of registration

70. Items 37 to 44 will amend section 186N which requires a person whose registration as a debt agreement administrator ceases to give his or her certificate of registration to the Inspector-General. Section 186N covers registration ceasing voluntarily or a result of cancellation by the Inspector-General or the Court. There is currently no time limit prescribed for the return of the certificate. Items 37, 39, 41 and 43 will amend subsections 186N(1), (3), (5) and (6A) to provide that the certificate must be given to the Inspector-General before the end of the period of 7 days beginning on the day the person ceased to be registered. Items 38, 40, 42 and 44 will provide a penalty of 5 penalty units for each of these offences. These offences will be covered by the proposed new infringement notice regime (see paragraph 95).

### Offences relating to personal insolvency agreements

71. Items 45 and 46 will amend section 218 which requires the trustee of a

personal insolvency agreement to notify creditors and the Official Receiver of its execution. Item 45 reduces the period within which the trustee must notify the Official Receiver from 21 to 2 days (which will be in line with other similar requirements elsewhere in the Act). Currently there is no consequence for a trustee who fails to comply with this requirement. Item 46 will provide that failure to comply with this requirement is an offence of strict liability and provide a penalty of 5 penalty units. These offences will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of a personal insolvency agreement is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

72. Items 47 to 56 will amend section 224A which deals with notice that a personal insolvency agreement has been set aside, varied or terminated.

73. Subsection 224A(1) requires the trustee to file with the Official Receiver a copy of a resolution to terminate a personal insolvency agreement. Item 47 will amend subsection 224A(1) to provide that the trustee must file this within 2 days (rather than ‘immediately’ as is currently provided). Item 48 will provide a penalty of 5 penalty units. These offences will be covered by the proposed new infringement notice regime (see paragraph 95).

74. Subsection 224A(2) requires the trustee to file with the Official Receiver a copy of a variation to a personal insolvency agreement. Item 49 will amend subsection 224A(2) to provide that the trustee must file this within 2 days (rather than ‘immediately’ as is currently provided). Item 50 will provide a penalty of 5 penalty units. These offences will be covered by the proposed new infringement notice regime (see paragraph 95).

75. Subsections 224A(3), (4) and (5) require the trustee to file with the Official Receiver details of termination of a personal insolvency agreement. Items 51 and 53 will amend subsections 224A(3) and (4) to provide that the trustee must file this within 2 days (rather than ‘immediately’ as is currently provided) – subsection 224A(5) already includes the 2 day time limit. Items 52, 54, 55 and 56 will provide that failure to comply with any of these requirements is an offence of strict liability and provide a penalty of 5 penalty units for each of the offences. These offences will be covered by the proposed new infringement notice regime (see paragraph 95).

76. Strict liability is appropriate for offences under section 224A as prompt notification of changes relating to personal insolvency agreements is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

#### Offences relating to administration of deceased estates in bankruptcy

77. Items 57 to 67 will amend various provisions relating to notification of events in connection with the administration of deceased estates in bankruptcy.

78. Items 57, 58 and 59 will amend subsection 244(14) which requires that a creditor who has obtained an order under Part XI of the Act for the administration of a

deceased estate in bankruptcy to give a copy of the order to the Official Receiver. The amendments will provide that the creditor must file this within 2 days and that failure to comply with this requirement is an offence of strict liability and provide a penalty of 5 penalty units. These offences will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of an order for the administration of a deceased estate in bankruptcy is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

79. Items 60, 61 and 62 will amend subsection 245(3) which requires that a creditor who has obtained a sequestration order against the estate of a deceased person to give a copy of the order to the Official Receiver. The amendments will provide that the creditor must file this within 2 days and that failure to comply with this requirement is an offence of strict liability and provide a penalty of 5 penalty units. These offences will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of a sequestration order is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

80. Item 63 will amend subsection 246(1) which requires the legal personal representative of a deceased person whose estate is being administered under Part XI to file a statement of the deceased person's affairs within 28 days of being notified of the order. In line with other amendments relating to statements of affairs in bankruptcy, item 63 will increase the penalty for failing to comply with that requirement from 5 to 25 penalty units.

81. Item 64 will amend section 247 which allows a person administering the estate of a deceased person to petition the Court for an order that the deceased person's affairs be administered under Part XI. Item 64 will introduce new subsection 247(3) which require the person administering the deceased person's estate to give to the Official Receiver a copy of an order made under this section within 2 days and that failure to comply with this requirement is an offence of strict liability and provide a penalty of 5 penalty units. These offences will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of an order is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

82. Items 65, 66 and 67 will amend subsection 252A(2) which requires the trustee of the estate of a deceased person whose estate is being administered under Part XI to give to the Official Receiver a written certificate of an annulment resulting from payment of the debts of the estate. The amendments will require the trustee to give this to the Official Receiver within 2 days and provide that failure to comply with this requirement is an offence of strict liability which is subject to a penalty of 5 penalty units. These offences will be covered by the proposed new infringement notice regime (see paragraph 95). Strict liability is appropriate as prompt notification of an annulment is necessary to preserve the integrity of the National Personal Insolvency Index (NPII) which is the public record of bankruptcy and personal insolvency events.

### Amendments to Part XIV (Offences)

83. Item 68 will amend subsection 263(1) to increase the penalty for these offences from 3 years to 5 years. The offences contained in this subsection all involve an intent to defraud. The increased penalty recognises the seriousness of these offences in the context of bankruptcy. It will also bring the offences into line with other similar offences in Commonwealth, State and Territory crimes legislation.

84. Item 69 will amend subsection 265(3) to increase the penalty for this offence from 3 years to 5 years. The offence contained in this subsection involves an intent to defraud. The increased penalty recognises the seriousness of this offence in the context of bankruptcy. It will also bring the offence into line with other similar offences in Commonwealth, State and Territory crimes legislation.

85. Items 70, 71 and 72 will amend subsection 265(5) which provides an offence for obtaining property, incurring debts or obtaining credit by fraud. Item 70 will amend the provision to make it clear that a person can commit this offence either alone or jointly with another person.

86. Item 71 will amend subsection 265(5) which includes an offence of obtaining credit by fraud. Subsection 265(5) provides that a person who, after presentation of the petition on which he or she became bankrupt, 'in incurring any debt or liability, obtains credit by fraud' commits an offence. This will be amended to provide an offence where the person 'incurs any debt or liability by fraud'. This will overcome deficiencies in the meaning of 'credit' by ensuring the offence can relate to any debt or liability.

87. Item 72 will increase the penalty for an offence under subsection 265(5) from 3 years to 5 years. The offence contained in this subsection involves an intent to defraud. The increased penalty recognises the seriousness of this offence in the context of bankruptcy. It will also bring the offence into line with other similar offences in Commonwealth, State and Territory crimes legislation.

88. Item 73 will amend subsections 266(1) (and (3) to increase the penalty for these offences from 3 years to 5 years. The offences contained in this subsection involve an intent to defraud. The increased penalty recognises the seriousness of these offences in the context of bankruptcy. It will also bring the offences into line with other similar offences in Commonwealth, State and Territory crimes legislation.

89. Item 74 will amend subsection 267(1)(d) which relates to a false declaration given by a debtor or bankrupt in a statement of affairs. The amendment recognises that a statement of affairs will now be able to be given to the Official Receiver under new section 77CA.

90. Item 75 will amend subsection 267(2) which provides that it is an offence to sign a false declaration. The word 'sign' will be replaced with 'make' to recognise that some declarations can be given by electronic means without a signature in the traditional sense.

91. Item 76 will amend section 267B to provide an offence for failing to provide information under new section 77CA (see paragraph 57). The penalty for an offence under section 267B is imprisonment for 12 months. Section 267B also provides an offence for failing to comply with a notice under subsection 6A(3) which allows the trustee to demand further information or evidence where the statement of affairs is incomplete or false or misleading. It is considered that failure to comply with the new section 77CA, given the fundamental importance of a statement of affairs in administering a bankrupt estate, should attract the same penalty.

92. Items 77 and 78 will amend subsections 268(3) (and (7)) to increase the penalty for these offences from 3 years to 5 years. The offences contained in this subsection involve an intent to defraud. The increased penalty recognises the seriousness of these offences in the context of bankruptcy. It will also bring the offences into line with other similar offences in Commonwealth, State and Territory crimes legislation.

93. Items 79 and 80 will amend subsection 269(1) which provides offences for obtaining credit above a certain amount or making similar arrangements whilst an undischarged bankrupt without disclosing the fact of bankruptcy. The amendments will extend these offences to debtors who are, at the time of the conduct, party to a debt agreement under Part IX.

94. Item 81 will amend section 272 which provides offences for a bankrupt who leaves Australia. Paragraphs (1)(a) and (b) include offences for preparing to leave Australia with intent to defeat creditors. The penalty for these offences will be increased from 3 to 5 years. The offences contained in these paragraphs involve an intent to defraud. The increased penalty recognises the seriousness of these offences in the context of bankruptcy. It will also bring the offences into line with other similar offences in Commonwealth, State and Territory crimes legislation.

#### Infringement notices for offences

95. Items 82 and 83 will introduce an infringement notice regime for offences of strict liability contained in the Act. Under an infringement notice regime, a non-judicial officer is empowered to give a notice alleging the offence to a suspected offender providing that the suspected offender may pay a specified penalty to avoid prosecution. Such a regime would provide an efficient means of penalising behaviour which, while relatively minor in criminality, can have significant repercussions for the effective administration of bankrupt estates, integrity of the NPII or regulation of insolvency practitioners. The issuing of a notice would not replace the current penalties but would serve as an alternative to prosecution.

96. The amendments to be made by this Bill will enable regulations to be made for the purposes of establishing the infringement notice regime. The penalty payable for the offences to be covered is limited to the amount specified in the table in new subsection 277B(2).

#### Application of amendments

97. Item 84 includes application provisions for some amendments in this

Schedule. Those items not covered will apply from commencement.

98. Item 84(1) provides that the amendment made by item 5 applies in relation to orders made on or after commencement. This means that the requirement under section 52 for a creditor to give a copy of a sequestration order to the Official Receiver within 2 days applies only in relation to sequestration orders made on or after commencement.

99. Item 84(2) provides that the amendment made by item 12 applied in relation to special resolutions passed on or after commencement. This means that the requirement under section 74 for a trustee to give written notice of an annulment to the Official Receiver within 2 days applies only in relation to special resolutions passed on or after commencement.

100. Item 84(3) provides that the amendment made by item 15 applies in relation to bankruptcies for which the date of bankruptcy is before, on or after commencement. This means that the new power under section 77CA for the Official Receiver to obtain a statement of affairs applies to all bankruptcies where the bankrupt has not filed a statement of affairs. This includes bankruptcies which existed before these amendments commence. This is appropriate as the obligation to file a statement of affairs already exists – the new power is simply allowing the Official Receiver to enforce that existing obligation.

101. Item 84(4) provides that the amendments made by items 16 to 19 apply in relation to bankruptcies for which the date of bankruptcy is on or after commencement. This means that the new ground for objecting to discharge (failure to hand over a passport to the trustee) is available only where the date of bankruptcy is on or after commencement.

102. Item 84(5) provides that the amendments made by items 20 and 23 apply in relation to bankruptcies that are annulled on or after commencement. This means that the requirement for the trustee to notify the Official Receiver of an annulment within 2 days applies only where the bankruptcy is annulled on or after commencement (regardless of the date of bankruptcy).

103. Item 85(6) provides that the amendment made by item 24 applies in relation to persons ceasing to be registered as a trustee on or after commencement. This means that the obligation for a person who ceases to be registered as a trustee to return his or her certificate of registration within 7 days applies only where the person ceases to be registered on or after commencement.

104. Item 84(7) provides that the amendments made by items 27 and 33 apply in relation to financial years ending on or after commencement. This means that the requirement for trustees and debt agreement administrators to give annual estate returns applies from the first financial year ending on or after commencement (that is, the financial year during which the amendments commence).

105. Item 84(8) provides that the amendments made by items 31 and 35 apply in relation to deaths occurring on or after commencement. This means that the requirement for the person administering the estate of a deceased trustee or

administrator to notify the Official Receiver of the death within 28 days applies only where the person dies on or after commencement.

106. Item 84(9) provides that the amendment made by item 37 applies in relation to notices given under subsection 186J(2) on or after commencement. This means that the obligation for a person who ceases to be registered as a debt agreement administrator to return his or her certificate of registration within 7 days applies only where the person gives notice surrendering his or registration on or after commencement.

107. Item 84(10) provides that the amendments made by items 39, 41 and 43 apply in relation to cancellations made on or after commencement. This means that the obligation for a person who ceases to be registered as a debt agreement administrator to return his or her certificate of registration within 7 days applies only where the person ceases to be registered on or after commencement.

108. Item 84(11) provides that the amendments made by items 45 and 46 apply in relation to personal insolvency agreement entered into on or after commencement. This means that the requirement for a trustee to give to the Official Receiver a copy of a personal insolvency agreement within 2 days of its execution applies only to personal insolvency agreement entered into on or after commencement. Similarly, the offence for failing to comply with this obligation applies only where the agreement is entered into on or after commencement.

109. Item 84(12) provides that the amendment made by item 47 applies in relation to terminations or variations occurring on or after commencement. This means that the requirement for a trustee to give to the Official Receiver a copy of a resolution varying or terminating a personal insolvency agreement within 2 days applies only to variations or terminations which occur on or after commencement.

110. Item 84(13) provides that the amendment made by item 49 applies in relation to variations occurring on or after commencement. This means that the requirement for a trustee to give to the Official Receiver a copy of a variation of personal insolvency agreement (under subsection 221A(5)) within 2 days applies only to variations which occur on or after commencement.

111. Item 84(14) provides that the amendment made by item 51 applies in relation to terminations occurring on or after commencement. This means that the requirement for a trustee to give to the Official Receiver a copy of a termination of a personal insolvency agreement (where the termination results from something within the terms of the agreement) within 2 days applies only to terminations which occur on or after commencement.

112. Item 84(15) provides that the amendments made by items 53, 57, 60 and 64 apply in relation to orders made on or after commencement. Item 53 relates to Court orders setting aside personal insolvency agreements. Items 57, 60 and 64 relate to orders in connection with the administration of deceased estates in bankruptcy. The requirement to provide copies of any of these orders to the Official Receiver within 2 days applies only to orders made on or after commencement.

113. Item 84(16) provides that the amendment made by item 65 applies in relation to annulments occurring on or after commencement. This relates to the annulment of an order for the administration of a deceased estate in bankruptcy. The requirement to give a certificate of annulment to the Official Receiver within 2 days applies only where the annulment occurs on or after commencement.

114. Item 84(17) provides that the amendments made by items 70 and 71 apply in relation to the obtaining of property, and the incurring of debts and liabilities, on or after commencement. This means that these offences, as amended, can occur only where the conduct occurred on or after commencement.

115. Item 84(18) provides that the amendment made by item 75 applies in relation to declarations made on or after commencement. This means that the offence, as amended to include declarations made other than in writing with a written signature, can only be committed where the conduct occurs on or after commencement.

116. Item 84(19) provides that the amendments made by items 79 and 80 apply in relation to debt agreements made on or after commencement. These items will extend offences relating to obtaining credit whilst bankrupt to debtors who are party to debt agreements. The application provision means that the offence can only be committed by a debtor who has entered into the debt agreement on or after commencement of the amendments.

### **SCHEDULE 3 – REMOVAL OF BANKRUPTCY DISTRICTS**

117. The amendments made by this Schedule will remove the concept of Bankruptcy Districts from the Act and make other amendments consequential upon this.

118. The Act currently allows the Inspector-General to declare a part of Australia to be a Bankruptcy District. There is currently a District for each State and Territory. The Act provides that an Official Receiver shall be appointed for each District. Over time the use of Bankruptcy Districts as an organising principle in bankruptcy administration has become increasingly cumbersome and out of step with delivering an efficient national personal insolvency service. In addition, most aspects of the bankruptcy system now operate administratively rather than through the Courts which means the concept of Districts is now of little consequence.

119. The most significant feature of the Act relating to Bankruptcy Districts is that certain actions must be performed by the Official Receiver for the District in which a matter originates. For example:

- where the court makes a sequestration order, the petitioning creditor must give a copy of the order to the Official Receiver for the District in which the order was made – subsection 52(1A);
- where a sequestration order is made, the bankrupt must file a statement of affairs with the Official Receiver for the District in which the order was made – subsection 54(1);
- the trustee must give a copy of a bankrupt’s proposal under section 73 to the Official Receiver for the District in which the bankrupt resides – subsection 73(2);

- where a registered trustee dies, the person administering the deceased estate must notify, in writing, the Official Receiver for the District in which the trustee was ordinarily resident – subsection 182(4);
- where a debt agreement administrator dies, the person administering the deceased estate must give written notice of that fact to the Official Receiver for the District in which the administrator was ordinarily resident – subsection 185ZA(1);
- where a debt agreement administrator dies, the Inspector-General must appoint an Official Receiver for a District as the replacement administrator – subsection 185ZB(1); and
- a registered trustee or solicitor who consents to act as a controlling trustee under Part X must give a copy of the debtor’s authority and the statement of affairs to the Official Receiver for the District in which the debtor resides – subsection 188(5).

120. Perhaps more significantly, the Official Receiver for a District is able to exercise the power, and perform the functions of, the Official Trustee that relate to a matter that is determined under section 5AA to have originated in that District – subsection 18(8). This means that an Official Receiver is not able to act as the Official Trustee for matters originating in other Districts.

121. These restrictions are no longer necessary or appropriate and impose unnecessary limitations on the administration of bankruptcy and related matters.

122. Item 1 will amend subsection 5(1) to remove the definition of ‘District’.

123. Item 2 will amend the definition of ‘the Official Receiver’ in subsection 5(1) so that it can refer to any Official Receiver (rather than the Official Receiver for a particular District).

124. Item 3 will repeal section 5AA which currently determines the place of origin of bankruptcy and insolvency matters. It does so by reference to Districts which will no longer be necessary.

125. Item 4 will repeal section 13 which currently allow the Inspector-General to declare any part of Australia a Bankruptcy District. This power will no longer be necessary.

126. Item 5 will amend section 15 which deals with the appointment and powers of Official Receivers. Currently, there must be an Official Receiver for each Bankruptcy District. As there will no longer be Bankruptcy Districts, the amendment will allow the Minister to appoint such number of Official Receivers as the Minister thinks necessary. This will allow for flexibility to appoint Official Receivers on a geographical or functional basis. Alternatively, there could be a single Official Receiver who delegates powers to officers exercising powers on his or her behalf.

127. Items 6, 7 and 8 will amend section 18 which deals with the powers and functions of the Official Trustee. Currently, subsection 18(8) provides that the Official Receiver for a District may exercise the powers and perform the functions of the Official Trustee that relate to a matter that is determined under section 5AA to

have originated in that District. This restriction is no longer required. Item 6 will amend subsection 18(8) to provide simply that the Official Receiver may exercise the powers, and perform the functions, of the Official Trustee thus removing any geographically based limitations.

128. Subsection 18(8B) currently allows the Inspector-General to act as the Official Trustee other in relation to matter mentioned in subsection (8) (that is, other than where the Official Receiver is empowered to act). This is intended to ensure that the Inspector-General is not actually administering any bankrupt estates, debt agreements or personal insolvency agreements. Item 7 will maintain that position by providing that the Inspector-General can act as the Official Trustee other than in relation to individual insolvency administrations. Item 8 includes definitions for the purposes of subsection 18(8B).

129. Item 9 will repeal subsection 20B(5) which currently requires the Official Trustee to open a bank account in each District for the purposes of the Common Investment Fund. That will no longer be required.

130. Items 10 to 12 and 14 to 16 will amend various provisions which require a person to give a document to the Official Receiver for the District in which a person resides or where an order was made. These restrictions are no longer required and the amendments will allow the person to give the document to any Official Receiver.

131. Subsection 73(1B) currently defines 'working day' to include a day that is not a public holiday in the District in which the bankrupt resides. Item 13 will amend this definition to replace 'District' with 'place' consequential upon the abolition of Districts.

132. Item 17 is a transitional provision to ensure existing Official Receiver appointments continue once the amendments made by this Bill commence. The amendments will commence on the day after Royal Assent. The effect of the transitional provision is that any person is an Official Receiver immediately before commencement is taken to have been appointed under the Act as amended by this Schedule. The transitional provision will also ensure that any power exercised or function performed by an Official Receiver acting as Official Trustee before commencement will remain valid.

#### **SCHEDULE 4 – OTHER AMENDMENTS**

##### Increasing the minimum debt for a creditor's petition to \$10,000

133. Currently under the Act a creditor can petition for bankruptcy where the debtor owes at least \$2,000. Similarly, a creditor can request that the Official Receiver issue a bankruptcy notice where the debtor owes at least \$2,000. The amount has been \$2,000 since 1996 and was proposed as early as 1988 in the Harmer Report (the Australian Law Reform Commission's General Insolvency Inquiry). It is wrong to set in motion all the machinery of bankruptcy for the purpose of winding up a debtor's estate when, as is often the case, one creditor has a debt due to him of an amount not much more than \$2,000. Raising the amount of the petitioning creditor's debt will lessen the opportunity to use bankruptcy procedures as a debt collection

process. It is an established principle of the law of bankruptcy that, when a creditor sets in motion proceedings in bankruptcy, they do so for the benefits of all the debtor's creditors. Moreover, there has been a significant change in the value of money and levels of individual indebtedness since 1996 when the Bankruptcy Act was last amended in this respect.

134. During 2008-09, of 1953 sequestration orders made across Australia and matched by amounts in Bankruptcy Notices, 1551 were for an amount greater than \$10,000; 217 were for an amount between \$5,001 and \$10,000; and 174 were for an amount between \$2,000 and \$5,000.

135. Item 1 will increase the threshold amount for issuing a bankruptcy notice from \$2,000 to \$10,000. Item 2 will increase the threshold amount for filing a creditor's petition from \$2,000 to \$10,000. Item 3 will make an equivalent amendment in relation to applications from creditors for an order that a deceased estate be administered as a bankrupt estate under Part XI of the Act.

136. Item 4 specifies that the higher threshold of \$10,000 will apply to bankruptcy notices issued on or after commencement.

#### Increasing the stay period that follows the declaration of intent to file a debtor's petition

137. Under the Act a debtor can give the Official Receiver a declaration of intent to file a debtor's petition. Currently, once the debtor's declaration of intent to file is given, creditors cannot take action to recover any debts for a stay period of 7 days. Item 5 will increase the stay period from 7 days to 28 days by amending subsection 5(1).

138. A 7 day stay period does not give debtors enough time to assess their options. If a debtor is not fully informed about their options they may act precipitously. In any given 7 day period there will only be at most 5 working days (less when a public holiday falls during the seven day period). Given that most professional advisors that a debtor may wish to consult during the stay period are only open during normal working hours it would be very difficult for a debtor to obtain adequate advice during the 7 day stay period. If the 7 day stay period falls during the period leading up to the end of the financial year or during the Christmas period the debtor's difficulties in obtaining adequate advice during the stay period will be compounded. In addition, debtors typically owe money to a number of creditors and it can be difficult, at a time of financial stress, to achieve an outcome with each individual creditor within 7 days.

139. Item 6 will amend subsection 6A(1) so that section 6A applies to statements of affairs made under subsection 54A(2). Section 6A sets out the requirements for statements of affairs (with the exception of statements of affairs that are made under Part XI of the Act). It is expected that the statement of affairs required to accompany a declaration of intent to file a debtor's petition will be simpler than that required for bankruptcy and other forms of administration,

140. Items 7 and 8 will amend section 54A to the effect that a declaration of intent to file a debtor's petition under section 54A must be accompanied by a statement of

the debtor's affairs and a copy of that statement. The requirement to file a statement of affairs will mitigate the risk of the debtor dissipating assets during the stay period.

141. Items 9 and 10 amend section 54C so that, if the Official Receiver accepts a declaration of intent to file debtor's petition, the Official Receiver must give written notice of the acceptance of the declaration to each of the creditors disclosed in the debtor's statement of affairs. Giving written notice of the acceptance of the declaration puts creditors on notice that they cannot seek to recover unsecured debts during the stay period and gives them official notice of the commencement and end dates for the stay period. It will also encourage creditors to be proactive in assisting the debtor to consider their options.

#### Increasing the debt income and assets thresholds for eligibility for debt agreements

142. A debt agreement is a voluntary agreement between a debtor and creditors proposed by the debtor. It is principally aimed at consumer debtors with lower levels of income, assets and debts. Consequently, there are statutory thresholds which determine eligibility.

143. Item 11 provides for the "threshold amount" for eligibility for debt agreements to be increased by amending subsection 185C(5). Currently the "threshold amount" in relation to a particular point in time, is defined as being 7 times the amount that, at that time, is specified in column 3, item 2, Table B, point 1064-B1, Pension Rate Calculator A, in the *Social Security Act 1991*. Item 11 increases the multiplier from 7 to 8.4. This translates into a 20 % increase.

144. The present thresholds are: after tax income of less than \$62,735.40; unsecured debts, and assets, of less than \$86,647.20. These thresholds were last revised in 2002 with the aim of making debt agreements more widely available. They were also considered in a review of debt agreements conducted prior to amendments which commenced on 1 July 2007. During that review, it was decided to retain the thresholds at their current levels until the next review of debt agreements scheduled for 2010. This was to allow time to evaluate the effectiveness of the 2007 amendments which were aimed at restoring creditor confidence in the system and addressing the unacceptably high failure rate. However, it is considered that a modest increase in the thresholds in advance of the 2010 review is consistent with current policy and merely recognizes the increases in debt, wealth and available income since the thresholds were last revised. Since the 2007 amendments, the termination rate has fallen to around 4% of debt agreements made since 1 July 2007. This compares with a termination rate of 35-40% under the previous rules. In addition, the rate of acceptance by creditors of debt agreement proposals has increased from less than 70% to over 85%. This demonstrates greater confidence by creditors in the system.

#### Presentation of false section 54A declaration to be an offence

145. Section 267 makes it an offence for a debtor or bankrupt to sign a declaration made under certain sections of the Act which the debtor or bankrupt knows to be false. Item 12 amends paragraph 267(1)(a) to the effect that a debtor or bankrupt who signs a declaration presented under section 54A that they know to be false will be

committing an offence. This will ensure that a section 54A declaration is treated in the same way as other similar declarations.

Application of Schedule 3 amendments

146. Item 13 sets out how the amendments made under Schedule 3 will be applied.