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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by authority of
the Honourable Michael Duffy M.P., Attorney-General)

(This replaces the Explanatory Memorandum presented on
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LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1990

OUTLINE

This Bill makes several amendments of a policy nature to legislation within the Attorney-General's portfolio. It also makes some minor technical amendments to legislation.

The most significant amendments to be made by the Bill will -

- make a number of amendments to section 4 of the Acts Interpretation Act 1901 to overcome technical difficulties which have arisen in relation to the operation of the provision. The amendments will make it possible to combine, in the one statutory instrument, regulations etc. made under an amendment Act (relying on s.4) with regulations etc. made under provisions of the parent Act that are already in operation. The amendments will also allow different commencement dates to be prescribed for different provisions of an instrument made under s.4;

- amend some provisions in Part VA of the Australian Security Intelligence Organization Act 1979, which deals with the functions and procedures of the Parliamentary Joint Committee on ASIO;

- repeal unproclaimed provisions of the Australian Security Intelligence Organization Amendment Act 1986 to remove from the Australian Security Intelligence Organization Act 1979 provisions which, if proclaimed, would have allowed ASIO staff to be employed on a statutory basis rather than a contractual one;

- amend the Bankruptcy Act 1966 to implement proposals for change put forward by the Chief Justice of the Federal Court relating to acceptance of a debtor's petition when a creditor's petition is pending against the particular debtor and to provide immunity from suit to judges issuing search warrants. The amendments also implement suggestions made by the Auditor-General relating to the imposition of fees for registration of trustees, certain functions conferred by the Act on the Auditor-General and the preparation of the Annual Report on the operation of the Act;

- amend the Circuit Layouts Act 1989 to comply with the recently concluded World Intellectual Property Organisation Treaty on Intellectual Property in Respect of Integrated Circuits and to bring our legislation into line with other countries and so obtain reciprocal protection overseas for Australian-made integrated circuits;

- amend the Family Law Act 1975 to require leave of the Full Court of the Family Court before an appeal against some interlocutory orders can proceed;

- amend the Federal Court of Australia Act 1976 to allow a single Judge, as well as the Full Court, to hear an application to amend grounds of appeal and to stay an order of the Full Court; provide that, where a person is on bail pending an appeal to the Court from a conviction or sentence imposing a term of imprisonment, any time that the person is on bail shall not count as part of

the term of imprisonment to which the appellant has been sentenced; and permit the Court, where it thinks that the interests of justice so require, to determine in a particular case that interest is payable on a judgment debt at a rate less than that fixed by the Federal Court Rules;

. amend the Human Rights and Equal Opportunity Commission Act 1986 and the Sex Discrimination Act 1984 to bind the Crown in right of the ACT and to amend the former Act to permit the Commonwealth to enter into inter-governmental arrangements for the performance of human rights functions with the ACT;

. amend the Racial Discrimination Act 1975 to provide that discriminatory acts which are motivated by several reasons, including race, are prohibited, without the need to prove that racial discrimination was the dominant reason, and also provide for vicarious liability of employers and principals for racially discriminatory acts by their employees or agents done in the course of their employment or agency duties. A further amendment will include, within the meaning of prohibited racial discrimination, acts that indirectly discriminate by means of imposing a requirement or condition which is not reasonable in the circumstances and which adversely affects a particular racial or ethnic group;

. amend the Service and Execution of Process Act 1901 to allow a police officer, who has arrested a fine-defaulter without producing to him the warrant of apprehension authorising his arrest,

to produce to him at a later time a facsimile copy of the warrant instead of the original warrant, and also to allow a police officer, before executing a warrant of commitment issued under section 26H of the Act, to receive payment from a person of the whole amount of any fine to which the warrant relates; and

. amend the Statutory Declarations Act 1959 to provide similar recognition to the laws of the Northern Territory as is given to the laws of the States under the Act.

FINANCIAL IMPACT STATEMENT

None of the amendments will have any direct financial impact. However, after regulations consequential upon the amendments to the Bankruptcy Act 1966 have been made, there is expected to be a slight rise in revenue from fees and some minor savings as a result of the proposal to extend the range of judicial powers that may be delegated to Registrars of the Federal Court by the Judges.

There is the possibility of flow-on costs should the ACT Government enter into a co-operative arrangement with the Commonwealth for the performance of human rights functions in the Australian Capital Territory, consequent upon passage of a proposed amendment to the Human Rights and Equal Opportunity Commission Act 1986.

NOTES ON CLAUSES

PART I - PRELIMINARY

Clause 1 - Short title

1. This clause provides for the Act to be cited as the Law and Justice Legislation Amendment Act 1990.

Clause 2 - Commencement

2. This clause provides for the commencement of the Act. Most substantive provisions will come into force on the 28th day after Royal Assent. To allow amendments to relevant Regulations, the amendments to the Bankruptcy Act 1966 will commence on a day or days to be fixed by Proclamation. Each amendment of the Circuit Layouts Act 1989 commences immediately after the commencement of the section of that Act which it amends.

PART 2 - AMENDMENTS OF THE BANKRUPTCY ACT 1966

Clause 3 - Principal Act

3. Formal.

Clause 4 - Interpretation

4. Section 5 of the Bankruptcy Act contains a number of interpretative provisions which define particular words and phrases used in that Act. Clause 4 proposes the following amendments to the definitions in section 5 of the Act:

(a) the definition of 'public examination' is repealed. The public examination was defined to be an examination under section 69 of the Act. This Bill

proposes the repeal of section 69, and the transfer of provisions unique to it to section 81 of the Act, which also deals with examinations. The repeal of section 69 will simplify the Act.

(b) the expression 'eligible judge' is defined to be a Judge of the Court declared by the Minister to be an eligible judge for the purposes of subsection 129A(2) of the Act. Section 129A is a new section proposed to be inserted by clause 18 of this Bill which will enable the Minister to declare a Judge to be an eligible judge for the purposes of issuing search warrants. The issue of search warrants is regarded at law as an administrative function which does not attract judicial immunity. Judicial immunity will be conferred upon eligible judges in relation to the function of issuing search warrants;

Clause 5 - Delegation by Minister or Secretary

5. Section 10 of the Act enables the Minister or the Secretary to delegate all or any of their powers under the Act. Because the Registrar of the Federal Court of Australia is the public service administrative supervisor of Registrars in Bankruptcy, the Secretary delegated the power of appointment of Registrars in Bankruptcy, Deputy Registrars in Bankruptcy and the power to appoint persons to act in those capacities to the Registrar of the Federal Court. By virtue of the definition of "officer" in subsection 10(7) of the Act, the Secretary or Minister may only delegate his or her powers to a person holding or performing the duties of an office in the Department.

6. However, the Courts and Tribunals Administration Amendment Act 1989, which came into operation on 1 January 1990 converted the office of Registrar of the Federal Court into an independent statutory office, the occupant of which is appointed by the Governor-General on the recommendation of the Chief Justice of the Federal Court. Accordingly, the Registrar of the Federal Court is no longer an "officer" in the Department within the meaning of section 10, and the delegation

of power to appoint Registrars and Deputy Registrars in Bankruptcy by the Secretary to the Registrar of the Federal Court lapsed on 1 January 1990.

7. Clause 5 of the Bill proposes the repeal of the definition of "officer" in subsection 10(7) of the Act. Because of the repeal, the word "officer" in section 10 will have the meaning given to that term by subsection 5(1) of the Act which is that "officer" means an officer of a court exercising jurisdiction in bankruptcy or an officer of the Commonwealth. The repeal of subsection 10(7) by the Bill will reinstate the power of the Secretary to delegate his or her powers to the Registrar of the Federal Court in appropriate cases.

Clause 6 - Registrars and Deputy Registrars

8. Section 14 of the Act creates the statutory offices of Registrar and Deputy Registrar in Bankruptcy. For reasons of administrative convenience, it is necessary to enable persons to perform some, but not all of the powers of a Registrar in Bankruptcy. The Insolvency and Trustee Service Australia, the Division of the Attorney-General's Department with responsibility for administration of the Act has a sub-office located at Townsville. There is no Federal Court registry in that city. The officer in charge of the Insolvency and Trustee Service office at Townsville has been appointed as a Deputy Registrar in Bankruptcy to enable the office to accept debtor's petitions in bankruptcy, thus avoiding the need for debtors residing in northern Queensland wishing to become bankrupt to visit Brisbane or send the petition and relevant documentation through the mail.

9. The Act does not permit persons to be given specified powers of Registrars. It only enables the appointment of a person as a Registrar, and that appointment carries with it all of the powers, functions and duties of the office of Registrar. Paragraph 6(a) of the Bill proposes the insertion of a new subsection (1A) into section 14 of the Act. Proposed subsection 14(1A) will enable the Secretary, by writing, to

direct an officer to perform the functions of a Registrar which are specified in the direction for a specified period or until the direction is revoked.

10. Paragraph 6(b) of the Bill proposes an amendment to subsection 14(2A) of the Act consequential upon the insertion of proposed subsection 14(1A).

Clause 7 - Duties etc. of trustee

11. This clause provides for the repeal of paragraphs 19(1)(e) and 19(1)(f) and subsections 19(1A) and 19(1B) of the Act. Section 19 of the Act specifies some duties of trustees and Official Receivers, and these paragraphs and subsections impose duties in relation to applying for, advertising of and participating in the public examination of bankrupts. Since section 69 providing for the public examination is to be repealed, the statement of these duties in relation to public examinations become unnecessary, and their repeal is also proposed.

Clause 8 - The Common Investment Fund

12. Division 2 of Part II of the Act establishes a Common Investment Fund into which the Official Trustee in Bankruptcy is required to invest funds it realises in the course of administering bankrupt estates and other insolvencies. Australia is divided into a number of Bankruptcy Districts, which largely correspond with the States and Territories of the Commonwealth. The functions of the Official Trustee in Bankruptcy are carried out by the Insolvency and Trustee Service Australia (ITSA), a Division of the Attorney-General's Department. In both Queensland and New South Wales, ITSA has two offices, which need to be able to operate bank accounts with banks in close geographical proximity to the ITSA offices for the purposes of the Common Investment Fund.

13. Subsection 20B(5) of the Act casts a duty on the Official Trustee to ensure that at all times one bank account for the purposes of the Common Investment Fund is maintained for each

Bankruptcy District. Clause 8 of the Bill proposes the amendment of subsection 20B(5) so as to eliminate doubt about whether more than one account for the purposes of the Common Investment Fund can be maintained in a particular Bankruptcy District. Where it is necessary for reasons of administrative convenience to have more than one bank account for the Common Investment Fund for a particular Bankruptcy District, as in the case where there is more than one ITSA office in a Bankruptcy District, there will be clear statutory authority for the operning of more than one account for that Bankruptcy District.

Clause 9 - Exercise of powers by certain officials

14. Section 31A of the Act empowers Judges of the Federal Court of Australia to delegate to the Registrar, a Deputy Registrar, a District Registrar or a Deputy District Registrar of that Court certain judicial powers, including the power to make sequestration orders on a creditor's petition, to dismiss creditor's petitions and to make orders for the administration of deceased estates in bankruptcy. Subsection 31A(8) imposes a limitation on what powers may be delegated by providing that where a creditor's petition or a petition for an order that a deceased estate be administered in bankruptcy is contested, the Registrar may not continue to hear the application but must refer it to the court.

15. Clause 9 of the Bill proposes the repeal of subsection 31A(8), so that the Judges of the Federal Court will be able to delegate to the Registrars powers to make orders in cases where the creditor's petition or petition for an order for a deceased estate to be administered in bankruptcy are contested.

Clause 10 - Debtor's petition

16. Section 55 of the Act provides that a debtor may present a debtor's petition in the prescribed form, accompanied by a statement of affairs to a Registrar in Bankruptcy. The Registrar is obliged to accept the petition where it is in accordance with the prescribed form, and upon its acceptance, the debtor becomes a bankrupt.

17. Bankruptcy proceedings on a creditor's petition are quite different. In order to found a petition, there must be a debt of $1,500 or more owing to the creditor, and the debtor must have committed an act of bankruptcy, such as failing to comply with the requirements of a bankruptcy notice.

18. Where a person becomes a bankrupt on a creditor's petition, the title of the trustee to the bankrupt's property relates back to the first available act of bankruptcy within the period of 6 months prior to the presentation of the petition. Subject to various exceptions, property owned by the debtor from the date of that act of bankruptcy vests in the trustee for realisation and distribution to creditors.

19. Clause 10 will remedy a defect in the procedures under the Act whereby a debtor against whom a creditor's petition is pending presents a debtor's petition which is accepted by the Registrar, with the consequence that the person becomes bankrupt by virtue of that acceptance, rather than by virtue of the making of a sequestration order on the creditor's petition. In such a case, it may be that the act of bankruptcy which founded the presentation of the creditor's petition occurred more than 6 months before the presentation and acceptance of the debtor's petition. If, in the intervening period between that act of bankruptcy and the date of acceptance of the debtor's petition the debtor has not committed a further act of bankruptcy, the title of the trustee to the bankrupt's property will relate from the date of bankruptcy only. There have been cases where debtors have used these procedural loopholes to advantage, disposing of money and assets between the time of the presentation of the creditor's petition and their own presentation of debtor's petitions. If the debtor is able to avoid the making of a sequestration order for more than 6 months after he or she has committed the act of bankruptcy which founded the creditor's petition, and then presents a debtor's petition, the trustee cannot recover money or assets which may have been disposed of. The petitioning creditor's only remedy is to go through the costly and time-consuming procedure of having the bankruptcy on the

debtor's petition annulled, and to resurrect the creditor's petition. An example of a case where this was done is Clyne v Deputy Commissioner of Taxation (1984) 154 CLR 581.

20. Paragraph 10(b) of the Bill will insert proposed subsection (3A) into section 55. This subsection will provide that where a debtor presents a debtor's petition and a creditor's petition is pending against that debtor, either alone or jointly with another person or against a partnership of which the debtor is a member, the Registrar in Bankruptcy must refer the debtor's petition to the Court for a direction whether to accept it or reject it. The Court will then be able to determine whether it is appropriate to make a sequestration order on the pending creditor's petition, or to direct the Registrar to accept the debtor's petition.

21. Paragraphs 10(a) and (c) make amendments to section 55 consequential upon the insertion of proposed subsection 55(3A).

Clause 11 - Debtor's petition against partnership

22. Section 56 of the Act provides a procedure for debtors who are in partnership to present a debtor's petition against some or all of the members of the partnership. As with section 55, where the petition is in accordance with the prescribed form and accompanied by a statement of affairs, the Registrar must accept the petition, and thereupon the petitioners become bankrupt.

23. The procedural defect which exists with section 55, where the debtors might present a debtor's petition when a creditor's petition is pending against the partnership, also exists in section 56. Clause 11 of the Bill will make amendments to section 56 analogous to those proposed for section 55 by clause 10. Section 56 will also be amended to confer upon the Court power to amend the partnership debtor's petition in a case where a creditor's petition is pending against one or only some of the partners by deleting the names of those debtors.

24. Paragraph 11(e) will insert proposed subsection 56(7AA) into the Act which provides that where a creditor's petition is pending against the partnership or any of its members, the Registrar must refer any debtor's petition presented by the partners to the Court for a direction whether or not to accept the debtor's petition. This paragraph will also insert proposed subsection (7AB), which empowers the Court to direct the Registrar to accept the petition, to amend the petition, or to direct the Registrar to reject the petition.

25. Paragraphs 11(a), (b), (c), (d), (f) and (g) make amendments to section 56 consequential upon the insertion of subsections (7AA) and (7AB) by paragraph 11(e).

Clause 12 - Debtor's petition by joint debtors who are not partners

26. Section 57 of the Act provides for the presentation of debtor's petitions by joint debtors who are not partners. Clause 12 will make amendments to section 57 analogous to those proposed for sections 55 and 56 by clauses 10 and 11 respectively.

27. Paragraph 12(b) of the Bill provides for the insertion of proposed subsection 57(3A). Proposed subsection 57(3A) provides that where a creditor's petition is pending against any of the joint debtors, whether alone or jointly with another person, the Registrar shall refer the debtor's petition to the Court for a direction whether or not to accept it.

28. Paragraphs 12(a) and (c) make amendments to section 57 consequential upon the insertion into section 57 of subsection 57(3A).

Clause 13 - Heading to Division 5 of Part IV

29. Clause 13 proposes a purely formal consequential amendment to the heading of Division 5 of Part IV of the Act, repealing the words 'Public Examination'. The amendment is made

necessary by the repeal of section 69 and of the definition of 'public examination' in subsection 5(1) of the Act proposed by the Bill.

Clause 14 - Repeal of section 69

30. Section 69 of the Act provides for the examination on oath of a person who is a bankrupt, or who has been discharged from bankruptcy, about the person's conduct and examinable affairs, which includes the person's financial affairs and those of other entitities such as companies, partnerships and trusts with whom the person is or has been associated. The person is not excused from answering questions on the ground that the answer may tend to incriminate him or her. The Registrar has no discretion whether or not to issue the summons under this section. In most other respects, the provisions of section 69 are identical with those of section 81 of the Act which enables the bankrupt as well as other persons to be summoned for examination.

31. Subclause 14(1) will repeal section 69. The provision of section 69 which restricts the bankrupt's right to refuse to answer questions on the ground that the answer may tend to incriminate him or her will be incorporated with some modifications into section 81 by clause 15 of the Bill, discussed below. This change will consolidate the two examination provisions into one which will simplify the Act.

32. Subclause 14(2) provides that despite the repeal of section 69, that section as in force immediately before the commencement of the Bill will continue to apply in relation to a person who became bankrupt before the commencement of the Bill. This provision is necessary because in some cases applications will have been made to the Registrar in Bankruptcy for the issue of a summons to a person to be examined under the section, and other preparatory work may have been done by trustees in anticipation of an examination going ahead.

Clause 15 - Discovery of bankrupt's property etc.

33. Section 81 provides for the examination on oath of bankrupts, debtors and persons who have knowledge about the financial affairs of bankrupts, debtors and their associated entities. Subsection 69(12) of the Act provides that an examinee under that section, that is a person who is a bankrupt or who having been bankrupt has been discharged, is required to answer all questions put or allowed to be put to him or her, including questions the answer to which may tend to incriminate him or her, unless the Court, the Registrar or the magistrate otherwise directs.

34. Among the main differences between section 69 and section 81 are that the Registrar has no discretion to issue a summons under section 69, and there is a discretion under section 81. Only the bankrupt can be summoned under section 69, whereas the bankrupt and other persons may be summoned under section 81. Further, the common law privilege against self-incrimination is restricted by subsection 69(12) in the case of a bankrupt, although there is no such restriction in the case of the bankrupt under section 81.

35. The changes to the Act made by clauses 14 and 15 will have the effect of reinstating the discretion of the Registrar whether to issue a summons to the bankrupt or not in all cases, and to preserve the statutory restriction on the privilege against self-incrimination provided for by subsection 69(12). This will be achieved by the insertion, by subclause 15(1), of proposed subsection 81(11AA) into the Act, which provides that the bankrupt is not excused from answering any question put to him or her at the examination on the ground that the answer may incriminate him or her, subject to any contrary direction by the Court, the Registrar or the magistrate.

36. Subclause 15(2) is an application provision similar to subclause 14(2) of the Bill. The subclause provides that section 81 as in force immediately before the commencement of the Bill will continue to apply in relation to the examination of a person who became a bankrupt before the commencement of

the Bill. This will ensure that bankrupts and discharged bankrupts who are undergoing or about to undergo an examination under the section are not subject to any liabilities that they were not subject to before the commencement of the amendments, in particular, the restriction on the limited privilege against self-incrimination that is being imported from the provisions of section 69.

Clause 16 - Priority Payments

37. Section 50 of the Child Support (Registration and Collection) Act 1988 provides that a trustee of a bankrupt employer's property must pay any amounts outstanding by way of unremitted child support automatic withholding deductions to the Child Support Registrar after paying the costs and expenses of the administration and taking remuneration, but before making a distribution of dividends to other creditors. This priority is the same as that conferred upon the Commissioner of Taxation in respect of unremitted income tax instalment deductions. Section 109 of the Act specifically refers to the priorities created by the Income Tax Assessment Act 1936, but was not amended consequentially to take account of the priority created by the Child Support (Registration and Collection) Act 1988.

38. Clause 16 will amend subsection 109(1) by inserting a reference to section 50 of the Child Support (Registration and Collection) Act 1988. This will help to avoid confusion on the part of insolvency practitioners.

Clause 17 - Property divisible among creditors

39. Section 116 of the Act enumerates a number of types of property which are not property divisible among creditors. In a bankruptcy, only the divisible property of the bankrupt vests in the trustee for realisation and distribution to creditors, and the bankrupt may retain the benefit of any other property. Section 116 presently provides that amounts payable to a bankrupt under various rural adjustment schemes for the

purposes of rehabilitation or household support do not form part of the divisible property of the bankrupt, and do not, accordingly, vest in the trustee.

40. A new rural adjustment scheme was negotiated between the Commonwealth, the States and the Northern Territory and approved by the States and Northern Territory Grants (Rural Adjustment Act) 1988. Clause 17 proposes the amendment of section 116 by extending the protection accorded to moneys paid under existing rural adjustment schemes to moneys payable under the new scheme approved by the 1988 Act. Clause 17 will insert new paragraph 116(2)(mb) into the Act to achieve this result.

Clause 18 - Insertion of new section

129A - Eligible Judges

41. Section 130 of the Act provides for the issue of warrants of search and seizure in respect of property of a bankrupt, and confers powers on judges to issue the warrants. Whilst the issue of a warrant is regarded at law as an administrative function, the power may validly be conferred on judges. However, it appears that judicial immunity from suit does not extend to the performance by judges of administrative functions.

42. Clause 18 of the Bill proposes the insertion of section 129A into the Act, which is modelled on section 6D of the Telecommunications (Interception) Act 1979. Under that Act, eligible judges declared by the Minister are authorised to issue warrants for the interception of telephonic communications.

43. Proposed subsection 129A(1) provides that a Judge of the Court, being a Court with jurisdiction in bankruptcy, may by writing consent to be declared to be an eligible judge by the Minister under proposed subsection 129A(2). Proposed subsection 129A(3) confers statutory judicial immunity by providing that an eligible judge has in relation to his or her

power to issue warrants under section 130 of the Act the same protection and immunity as a Justice of the High Court has in relation to proceedings before the High Court.

Clause 19 - Warrant for seizure of property connected with the bankrupt

44. Section 130 of the Act makes provision for the issue of search and seizure warrants in a case where a trustee of a bankrupt estate has reasonable grounds for suspecting that there is, on any premises property of the bankrupt, property connected with the bankrupt and his or her financial affairs or the financial affairs of an associated entity of the bankrupt, or any books or records relating to those financial affairs.

45. Section 130 provides for the issue of a search and seizure warrant by a judge of the Court or a magistrate. As mentioned in the explanatory notes to clause 18, the issue of a warrant is an administrative function which does not attract judicial immunity. Therefore, clause 18 proposes the insertion of section 129A providing for immunity of judges in relation to the issue of warrants. Clause 19 of the Bill amends section 130 of the Act consequentially upon the insertion of section 129A, by substituting the expression 'eligible judge' for the expressions 'Judge of the Court' or 'Judge'. Only eligible Judges will be able to issue warrants under section 130.

46. Another change proposed to section 130 by clause 19 is the removal of the power of magistrates to issue search and seizure warrants under the section. Under the section at present, Judges and magistrates may issue warrants. The serious nature of search and seizure warrants makes it preferable for judges of a court exercising jurisdiction in bankruptcy to scrutinise the actions of bankruptcy trustees in applying for warrants of this kind.

Clause 20 - Order relating to property of entity

47. Section 139D of the Act is contained in Division 4A of Part VI dealing with orders in relation to the property of entities controlled by a bankrupt. The Division enables the Court to order that an entity, being a partnership, trust, company or another person transfer property or money to the trustee of a bankrupt's estate in a case where the entity acquired the property or money by reason of the physical or intellectual efforts of the bankrupt, and where the bankrupt has the use and enjoyment of the property or money but has no legal or equitable interest in it. Section 139D specifically deals with items of property which are made available for the use and enjoyment of a bankrupt by an associated entity of the bankrupt.

48. The Court's power to make an order in relation to property or money is so confined that the bankrupt must have had the use and enjoyment of the property before the date of bankruptcy. It proves to be often the case however, that property is made available for the use and enjoyment of the bankrupt after the date of bankruptcy, but before discharge. The amendment proposed to section 139D by clause 20 will remedy this defect by enabling the Court to make orders in respect of property made available for the use and enjoyment of the bankrupt before the end of the bankruptcy, that is, before he or she is discharged. The clause substitutes the word 'end' for 'date' in paragraph 139D(1)(a). The word 'end' is defined in relation to a bankruptcy in subsection 5(1) of the Act as being the discharge of the bankrupt from the bankruptcy.

Clause 21 - Order relating to entity's net worth

49. Section 139E of the Act makes analogous provision to section 139D, except that the Court is able to order an entity to pay a sum of money to the trustee in bankruptcy where the bankrupt has contributed to an enhancement of the net worth of the entity, in the period before the date of bankruptcy.

50. Clause 21 proposes the same amendment to section 139E as does clause 20 to section 139D, so that the power of the Court to make orders requiring an entity to transfer money to the trustee will extend to a case where the bankrupt's efforts result in an increase in the net value of the entity after the date of bankruptcy, but before the bankrupt is discharged from his of her bankruptcy.

Clause 22 - Discharge of bankrupt by operation of law

51. Section 149 of the Act provides for the automatic discharge of a bankrupt on the third anniversary of the date of bankruptcy. In some cases, the period of bankruptcy may be extended to five years. This occurs where the Registrar in Bankruptcy, the Inspector-General in Bankruptcy, the trustee or a creditor files an objection to discharge. The Court may order that a bankrupt not be discharged by operation of law. When automatic discharge was first introduced, it took place after 5 years. The entry of an objection precluded automatic discharge. The Bankruptcy Amendment Act 1980 provided for automatic discharge after 3 years, and provided for the automatic lapse of objections 5 years from the date of bankruptcy.

52. A bankrupt who again becomes a bankrupt whilst undischarged from an earlier bankruptcy is not eligible for automatic discharge, but must apply to the Court. Many bankrupts do not do this, and remain bankrupt for life. The bankrupt himself or herself continues to be exposed to potential liability for offences in relation to incurring credit. The bankrupt estate continues to be active, and this causes administrative problems, because any property acquired by a person who is undischarged forms part of the bankrupt estate. In the frequent event that there are insufficient assets realised within the first few years of the bankruptcy to pay an one hundred cents in the dollar dividend to creditors, property will continue to fall into the estate and it may remain active for many years, beyond the time when creditors have died, ceased to exist or the trustee has

decided to take no further action. Moreover, in the case of real property, bankruptcy has an effect on title, giving rise to an equitable interest on the part of the trustee. If the interest is not dealt with, a good chain of title to land cannot be given by a vendor. These considerations, coupled with doubts about the effect of transitional provisions included in the Bankruptcy Amendment Act 1980 and the Commonwealth Functions (Statutes Review) Act 1974, which Act transferred the power of Official Receivers to object to automatic discharge to the Inspector-General in Bankruptcy, makes it necessary in the interests of certainty in conveyancing and real estate transactions and of certainty about the status of individuals who have been bankrupt, to ensure that a bankrupt is discharged from bankruptcy on the third anniversary of each and every bankruptcy.

53. Paragraph 149(3)(a) of the Act provides that a person is not eligible for automatic discharge if at the time when he or she would have been discharged automatically, he or she is undischarged from an earlier bankruptcy. Paragraph 149(3)(b) provides that if the person has, since the date of bankruptcy, again become a bankrupt, then he or she is not eligible for automatic discharge. Paragraph 22(a) of the Bill proposes the repeal of these two paragraphs, thus removing these restrictions on automatic discharge. Paragraph 22(b) of the Bill makes an amendment to paragraph 149(14)(c) consequential upon the repeal.

Clause 23 - Insertion of new section

149A - Discharge of bankrupts in certain other cases

54. Clause 23 of the Bill proposes the insertion of section 149A of the Act which is complementary to the amendments to section 149 proposed by clause 22. It is necessary, in order to resolve the uncertainties about the status of individuals and conveyancing transactions referred to above, that doubts about whether persons have been discharged from previous bankruptcies be resolved.

55. Proposed section 149A provides that where a person is an undischarged bankrupt solely by reason of the operation of paragraphs 149(3)(a) or (b) of the Act immediately before their repeal on the commencement of this Bill, then the person is to be automatically discharged by force of proposed section 149A.

Clause 24 - Insertion of new section:

154A - Official Receiver's Report

56. Part VIII of the Act deals with trustees and Division 1 of that Part deals with the registration and appointment of trustees. Section 155 of the Act enables a natural person to apply to the Court for an order that he or she be registered as a trustee. The Bankruptcy Rules impose an obligation on Official Receivers in Bankruptcy to make inquiries about applicants for registration and to file a report with the Court about the applicant's fitness to be registered as a trustee. It is appropriate that such a requirement as is imposed by the Bankruptcy Rules should be contained in the Act, rather than in subordinate legislation made under it.

57. Proposed section 154A will import into the Act the interview procedure for applicants for registration as a trustee which are currently contained in the Bankruptcy Rules.

58. Proposed subsection 154A(1) provides that a person who intends to apply for registration as a trustee must apply to the Official Receiver for the Bankruptcy District in which he or she intends to make the application for a report. By proposed subsection 154A(2), the application must be made in writing as prescribed, and be accompanied by the prescribed fee.

59. Under proposed subsection 154A(3), once the Official Receiver has received the application for the report, has caused the applicant to be interviewed and has made other

inquiries about the applicant, the Official Receiver must prepare a written report stating the Official Receiver's opinion of the applicant's ability to perform the duties of, and fitness to be registered as, a trustee.

60. Proposed subsection 154A(4) requires that the Official Receiver's report contain a summary of the results of the interview and any enquiries made by the Official Receiver, and provides that the report may set out any other matters that the Official Receiver thinks should be taken into account by the Court in considering the person's application under section 155.

Clause 25 - Registration of persons as trustees

61. Paragraph 25(1)(a) of the Bill proposes the substitution of subsection 155(3) of the Act by a new subsection requiring an application to the Court for registration as a trustee to be made in writing and to contain prescribed information. The application must be accompanied by the prescribed fee and the Official Receiver's report about the applicant under proposed section 154A to be inserted into the Act by clause 24 of the Bill.

62. Subsection 155(3A) of the Act empowers the Court to make an order directing that an applicant for registration as a trustee be registered upon him or her entering into a bond. Before making the order, the Court must be satisfied of certain matters about the applicant's educational qualifications and suitability to be registered. As a matter of practice under the law as it stands at present, the Court will always have before it a report by the Official Receiver about the applicant, which it will consider along with other material presented on the applicant's behalf. Once again, the requirement for the report to be filed is contained in the Bankruptcy Rules. Paragraph 25(1)(b) of the Bill will amend paragraph 155(3A)(d) of the Act so that the provision will specifically direct the Court to have regard to the Official Receiver's report about the applicant in determining whether

to make an order directing the registration of the applicant as a trustee.

63. Paragraph 25(1)(c) of the Bill proposes the insertion of a new subsection (3C) into section 155. Proposed subsection 155(3C) specifies that the registration of a person as trustee remains in force for a period of three years from the day on which the applicant enters into the bond which is a prerequisite to actual registration. A weakness with section 155 as it presently stands is that registration once granted continues for the lifetime of the trustee. There have been many instances in the past where trustees have ceased to carry on business without advising that they have done so or without relinquishing their registration. Other problems that have been exposed by the Auditor-General's examination of the Bankruptcy Administration and subsequent inquiries by the Joint Parliamentary Committee of Public Accounts, include the fact that registration is comparatively easy, that there is no periodic review of the continued fitness of a person to be registered as a trustee and that the mechanisms for terminating registration in appropriate cases are inadequate. Although trustees are required under section 161A of the Act to furnish triennial statements about the conduct of their practises this in itself has not proved to be a sufficient means of monitoring trustee activities. The insertion of subsection 155(3C) will ensure that within the existing registration procedure, there is periodic review of trustee's activities in the context of applications for extension of registration under proposed section 155A to be inserted by clause 26 of this Bill.

64. Paragraph 25(1)(d) of the Bill proposes the repeal of subsection 155(5) of the Act. This subsection provides that a person who is registered as a trustee is entitled upon request and payment of the prescribed fee to be issued with a certificate of registration. No certificates of registration have ever been requested or issued under this subsection, nor has a fee ever been prescribed. It is the order of the Court directing registration and the entry into the approved bond and surety that entitles a person to practise as a registered

trustee. The Auditor-General has suggested that it would be appropriate to prescribe a fee, however this suggestion has not been taken up because it would make it less likely that a person would ask to be issued with a certificate if issue of the certificate attracted a fee. Proposed section 155B, which will also be inserted into the Act by clause 26 of the Bill, will provide for the issue of certificates by the Registrar. In section 155, and in proposed sections 154A and 155A, liability to pay fees will arise from procedures preliminary to the grant of registration, the grant of registration itself and the extension of registration.

65. Paragraphs 25(1)(e) and 25(1)(f) of the Bill provide for the removal of the concept of suspension of registration from the Act. Suspension of registration is an inappropriate sanction to be imposed on a trustee. By their very nature, trusts involve ongoing administration until the terms of the trust are fully carried out. In the case of bankruptcy trustees, a statutory trust is created by the Act in relation to each and every bankruptcy and other insolvency administration. The trusts so created are not fully administered until an one hundred cents in the dollar dividend is paid to all unsecured creditors or the administration is concluded in some other way, for example because the trustee's title to further property is statute-barred, there is no further property vested in the trustee for distribution to creditors or because the terms of a deed of assignment or deed of arrangement have been fully carried out. The Act does not specify what the consequences of suspension of registration are. If the consequences are that the trustee is not able to perform further work as a trustee, and that trustee has a number of administrations on hand, then steps must be taken to appoint a new trustee, because the statutory trust must continue to be administered and not held in abeyance until such time as the period of suspension comes to an end. In practical terms, if the consequence of suspension is that the trustee cannot continue to perform the functions of a trustee, then it is no different from cancellation of the registration of the trustee. The uncertainty surrounding the consequences

of suspension of the registration of a trustee are such that it is not desirable that suspension be open as a sanction available against a trustee, and accordingly, these provisions of the Bill provide for its repeal.

66. Paragraph 25(1)(g) of the Bill proposes the insertion of subsections 155(5E) and 155(5F) into the Act. Proposed subsection 155(5E) provides a simple method whereby a registered trustee may relinquish his or her registration. Under the Act at present, a trustee must apply to the Court to have his or her registration cancelled. Applications to the Court attract substantial filing fees which act as a disincentive to a person to apply for cancellation of registration. The new subsection will permit a trustee who wishes to relinquish his or her registration to give notice in writing of that fact to the Registrar, and to specify a day on which he or she wishes to stop being a registered trustee. Under proposed subsection 155(5F), the person ceases to be a registered trustee from the date specified by him or her in the notice to the Registrar under proposed subsection 155(5E).

67. Subclauses 25(2), (3) and (4) are transitional provisions under which all existing registered trustees will be brought within the new arrangements.

68. Subclause 25(2) provides that persons already registered as trustees under section 155 may within 3 months of the commencement of the Bill give notice to the Registrar that the person wishes to continue to be a registered trustee.

69. Subclause 25(3) provides that where a person gives notice that he or she wishes to continue to be a registered trustee, then the person shall be deemed to have been registered under section 155 of the Act as amended by the Bill for a three year term from the day on which notice is given to the Registrar.

70. Subclause 25(4) provides that an existing registered trustee who does not give notice of his or her intention to continue to be a registered trustee within 3 months from the commencement of the Bill ceases to be a registered trustee at the end of that three month period.

Clause 26 - Insertion of new sections:

155A - Extension of term of registration

155B - Certificates of registration

71. Proposed section 155A sets out a procedure for extension of terms of registration and provides for the periodic review of a trustee's conduct of the business of trustee, thus rectifying two problems exposed by inquiries by the Auditor-General and the Joint Parliamentary Committee of Public Accounts.

72. Under proposed subsection 155A(1), a person who is registered under section 155 of the Act may, within 6 months before the expiry of the term of the registration, apply to the Registrar for a further three year extension of the term of the registration. Proposed subsection 155A(2) provides that an application for extension of the term of registration must be made in writing and accompanied by the prescribed fee.

73. Within 2 days of receiving the application for extension of registration, the Registrar, must under proposed subsection 155A(3), notify the Inspector-General and each of the Official Receivers of the application.

74. Proposed subsection 155A(4) provides that within 7 days of receiving notice of an application for extension of the term of registration, the Inspector-General or an Official Receiver may object to the grant of extended registration by notice in writing to the Registrar. Proposed subsection 155A(5) provides that in a case where no objection is made by the Inspector-General or an Official Receiver, the Registrar must grant an extended term of registration, but where an objection is made, the Registrar must refer the application to the Court for a direction whether to grant or refuse it. Under proposed subsection 155A(6), the Registrar must comply with a direction by the Court to grant or refuse the application for extension of registration.

75. Proposed subsection 155A(7) provides that where the Registrar grants an application for renewal of registration, the term of registration is extended for a period of three years starting immediately after the end of the current term of the registration.

76. Proposed subsection 155A(8) makes provision for the situation where a person applies for an extension of the term of his or her registration, and the application is not finally determined before the current period of registration expires, for example, because the matter cannot be dealt with by the Court before that time. In such a case, the registration is to be treated as remaining in force until the application for its extension is finally determined.

New section 155B - Certificates of registration

77. Section 155B provides for the issue of certificates of registration to registered trustees by the Registrar. Under proposed subsection 155B(1), the Registrar is required to cause a registered trustee to be issued with a certificate of registration. Proposed subsection 155B(2) casts an obligation on a person who has ceased for any reason to be a registered trustee to forward his or her certificate of registration to the Registrar as soon as practicable after ceasing to be a trustee. By proposed subsection 155B(3), a person who does not, without reasonable excuse, comply with the requirement to surrender his or her certificate of registration after ceasing to be a registered trustee is guilty of an offence punishable upon conviction by a fine not exceeding $100.

Clause 27 - Gazettal of registration etc.

78. Section 156 of the Act provides that where a person is registered as qualified to act as a trustee, or where a person's registration is suspended or cancelled or his or her name is removed from the register, the Registrar is to cause notice of that fact to be published in the Gazette as soon as practicable. As noted above in relation to the amendments to section 155, the concept of suspension of the registration of a trustee is to be done away with.

79. Clause 27 amends section 156 in consequence of the repeal of those provisions of section 155 enabling the suspension of the registration of a registered trustee. As amended by the Bill, section 156 will require the Registrar to publish a notice in the Gazette of the fact that a person has stopped being a registered trustee, no matter what the reason for the person having stopped being a registered trustee.

Clause 28 - Trustee's account and audit

80. Section 175 of the Act requires registered trustees to furnish accounts of receipts and payments to the Registrar in respect of each bankruptcy of which he or she is the trustee. Subsection 175(2) empowers the Registrar to cause the accounts to be audited by an appropriate person. Subsection 175(3) enables the Registrar to submit the accounts for audit by the Auditor-General and subsection 175(4) enables persons to apply to the Registrar to have accounts audited. Subsection 175(6) provides that the costs of an audit carried out under section 175, other than audits by the Auditor-General are to be borne by the estate.

81. The Auditor-General has expressed the view that it is inappropriate for the Australian Audit Office to carry out audits of the accounts of non-Commonwealth agencies or instrumentalities such as registered trustees. Audits under legislation of non-Commonwealth agencies are more appropriately carried out by the department or portfolio agency with administrative responsibility for regulating such agencies. Paragraphs 28(a) and 28(b) of the Bill propose the repeal of references in section 175 to the carrying out of audits of registered trustees' accounts by the Auditor-General.

82. Most Registrars in Bankruptcy are District and Deputy District Registrars of the Federal Court of Australia. The Chief Justice of the Federal Court of Australia has expressed the view that it is inappropriate for the Registrars in Bankruptcy to have a regulatory role in relation to registered trustees, because that role could involve them in litigation

before the Court of which, in their capacities as District Registrars and Deputy District Registrars, they are also officers and in which they perform delegated judicial powers.

83. Accordingly, clause 28 of the Bill also proposes amendment of section 175 of the Act to transfer responsibility for authorising the audit of registered trustees' accounts from the Registrar to the Inspector-General in Bankruptcy and the Official Receivers, who are officers of the Insolvency and Trustee Service Australia, a Division of the Attorney-General's Department, the Department which administers the Act. Paragraph 28(a) proposes the repeal of subsections 175(2), (3) and (4) and the insertion of a new subsection (2). The proposed subsection 175(2) provides that the Inspector-General or an Official Receiver may, on his or her own motion or at the request of a creditor or the bankrupt, audit an account which is furnished to the Registrar, or cause it to be audited by an appropriate person.

Clause 29 - Court may order trustee to make good loss caused by breach of duty

84. As mentioned earlier in this explanatory memorandum, provisions enabling the suspension of a trustee's registration are to be repealed by the Bill. Section 176 of the Act confers various powers on the Court to make orders where a breach of duty by a trustee has occurred, and paragraph 176(2)(b) of the Act confers a power on the Court of suspending a trustee's registration for a specified period. Clause 29 proposes the consequential amendment to paragraph 176(2)(b) of the Act of repealing the reference to suspension of a trustee's registration.

Clause 30 - Controlling trustee's accounts

85. Section 211 of the Act makes the same provision in respect of the furnishing of accounts by controlling trustees as section 175 makes in respect of trustees in bankruptcy. Controlling trusteeships arise under Division 2 of Part X of

the Act, and are preparatory to the entry into a deed of assignment or deed of arrangement by a debtor, or the acceptance by a debtor's creditors of a composition.

86. Clause 30 will amend section 211 in the same manner as clause 28 will amend section 175. The references in the section to the audit of controlling trustees' accounts by the Auditor-General will be removed. The power of Registrars to authorise audits of controlling trustees' accounts will be removed and power will be conferred on the Inspector-General in Bankruptcy and the Official Receivers to conduct audits or to authorise the carrying out of audits by an appropriate person.

Clause 31 - Court may order controlling trustee to make good loss caused by breach of duty

87. Section 212 of the Act makes the same provision in relation to controlling trustees as does section 176 in relation to bankruptcy trustees, enabling the Court to make certain orders in a case where a controlling trustee is found to have committed a breach of duty as controlling trustee. Included among the orders which may be made by the Court are orders suspending the registration of a trustee under section 155 for a specified period.

88. Clause 31 proposes the same amendment to section 212 as will be made to section 176 by clause 29. References to orders for the suspension of the registration of a trustee will be repealed consequential upon the repeal of the power in section 155 to suspend registration.

Clause 32 - Control of controlling trustees by the Court

89. Section 212B of the Act provides for the Court to undertake inquiries into the conduct of controlling trustees. Such inquiries may be undertaken on the application of a creditor, the debtor or the Registrar. Section 179 of the Act makes the same provision in relation to bankruptcy trustees.

90. Section 179 of the Act was amended by the Bankruptcy Amendment Act 1987 to confer on the Inspector-General in Bankruptcy standing to apply to the Court for an inquiry under that section. Unfortunately, the need to make a corresponding amendment to section 212B was overlooked at the time. Clause 32 proposes to amend section 212B to confer standing on the Inspector-General in Bankruptcy to apply to the Court for an inquiry into the conduct of a registered trustee.

Clause 33 - Law of State or Territory may be proclaimed

91. Part XIA of the Act, entitled 'Farmers' Debts Assistance', provides for stays on the presentation of bankruptcy petitions by or against persons in receipt of rural adjustment assistance under various State and Territory laws enacted pursuant to rural adjustment agreements. As mentioned previously in this explanatory memorandum in relation to the amendments of section 116 of the Act proposed by clause 17 of the Bill, a new rural adjustment scheme has been introduced, approved by the States and Northern Territory Grants (Rural Adjustment) Act 1988.

92. Clause 33 of the Bill proposes an amendment to section 253B of the Act to recognise the new rural adjustment scheme approved by the States and Northern Territory Grants (Rural Adjustment) Act 1988 and to allow State and Territory laws made pursuant to that scheme to be proclaimed by the Governor-General as laws to which Part XIA of the Act applies. The effect of proclamation of a State or Territory law is that there is a stay on the presentation of bankruptcy petitions by or against a person who is receiving financial assistance under the terms of that law pursuant to the rural adjustment scheme.

Clause 34 - Transcript of evidence etc.

93. Section 255 of the Act makes elaborate provision in relation to the recording and transcription of evidence given at examinations under the Act and in proceedings before the Court. Subsections 255(1) to (4) require the Registrar in

Bankruptcy to approve persons for the purposes of the section who are able to record and transcribe evidence. Evidence must be recorded and transcribed by approved persons in order for transcripts which are prepared to be readily admissible in evidence.

94. Court recording and reporting functions have in the past been carried out exclusively by the Commonwealth Reporting Service, an agency within the Attorney-General's portfolio. Under prevailing arrangements, the Registrar is required to approve each and every new employee of the Commonwealth Reporting Service for the purposes of section 255, a rather cumbersome procedure. With the decision to commercialise the Commonwealth Reporting Service, and eventually to expose it to competition from private sector reporting and transcribing services, the elaborate approval procedure would become unworkable. No other legislation specifies the manner in which evidence should be recorded and transcribed and there is no reason why such provisions should continue to be included in the Act.

95. Paragraph 34(a) of the Bill proposes the repeal of subsections 255(1) to (4) which set out the approval process. The effect of the repeal will be that the method of recording and transcribing evidence will no longer be specified in the Act.

96. Paragraphs 34(b) and (c) amend subsection 255(5) so that it will provide that the Registrar will be able to give such directions as he or she considers necessary for ensuring that where a transcript of any recorded evidence, argument, ruling or direction is required, that a transcript is prepared. A transcript prepared in accordance with directions given by the Registrar will be admissible in evidence.

Clause 35 - Failure of person to attend before the court etc.

97. Section 264A of the Act creates offences which are committed by persons who have failed to appear before the

Court as a witness or who have failed to attend for examination. A person other than a bankrupt or person who has been discharged from bankruptcy does not commit an offence by failing to appear as a witness or failing to appear for examination unless he or she was tendered a reasonable sum for expenses. However, where a bankrupt or a person who has been discharged from bankruptcy is summoned for examination under section 69 of the Act, the person is not entitled to receive money in respect of expenses, and commits an offence by failing to appear for the examination. Anomalously, the law appears to require that the bankrupt or discharged bankrupt be tendered a reasonable sum for expenses where the person is summoned to attend for examination under section 81 of the Act. The Bill will rectify this anomaly by making it clear that bankrupts and discharged bankrupts will not be entitled to money in respect of expenses when summoned to attend for examination about their financial affairs. The repeal of section 69, proposed by subclause 14(1) of the Bill, makes it necessary consequentially to amend section 264A to remove references to section 69 that appear in that section.

98. Subclause 35(1) will repeal subsection 264A(1) and insert new subsections 264A(1) and (1A). Proposed subsection 264A(1A) provides that a person to whom section 264A applies must not, without reasonable excuse, fail to attend as required by a summons issued under the section or fail to appear from day to day to give evidence as required, unless excused from attendance by the Court, the Registrar or the magistrate as the case may be. As such, the proposed subsection preserves the statutory offence created by existing subsection 264A(1).

99. Proposed subsection 264A(1) sets out the application of section 264A. Under proposed paragraph 264A(1)(a), the section applies to a person who before or after the commencement of the Bill is served with a summons to attend for examination under a provision of the Act other than section 81 or to appear as a witness before the Court and is tendered a reasonable sum for expenses. A person falling within these categories will commit an offence if he or she fails to attend for examination or as a witness when summoned to do so.

100. Under proposed paragraph 264A(1)(b), section 264A applies to a person who is served with a summons to attend for examination under section 81, whether before or after the commencement of the Bill, and who is tendered a reasonable sum for expenses, if the person is not the 'relevant person' within the meaning of section 81. A person falling within this category commits an offence by failing to appear for examination under section 81 in accordance with a summons issued to that person under that section. The 'relevant person' within the meaning of section 81 is the bankrupt or person who has been discharged from bankruptcy.

101. Under proposed paragraph 264A(1)(c), a person who is the 'relevant person' within the meaning of section 81 and who is served with a summons under that section, whether before or after the commencement of the Bill, commits an offence by failing to appear for examination as required by the summons.

102. Subclause 35(2) of the Bill is the application provision in respect of the amendments made to section 264A of the Act by subclause 35(1). Under paragraph 35(2)(a) of the Bill, subsection 264A(1) of the Act as in force immediately before the commencement of the Bill continues to apply in relation to a person who was served with a summons to attend for examination under section 69 of the Act before the commencement of the Bill. As noted previously, section 69 as in force immediately before the commencement of the Bill will continue to apply in relation to the examination of a person as if it has not been repealed, by virtue of subclause 14(2) of the Bill.

103. Paragraph 35(2)(b) of the Bill provides that subsection 264A(1) of the Act as in force immediately before the commencement of the Bill will continue to apply in relation to a person who was a 'relevant person' within the meaning of section 81 as in force immediately before the commencement of the Bill and who was served with a summons to attend for examination under section 81 before that commencement.

Clause 36 - Arrest of person failing to attend before the Court etc.

104. Subsection 264B(1) of the Act empowers the Court, the Registrar or a magistrate to issue a warrant for the arrest of a person who fails to attend to give evidence or appear for examination. Under subsection 264B(2), a warrant for arrest may not be issued unless it is established that the person was tendered a reasonable sum for expenses. In the case of a summons to a bankrupt or discharged bankrupt to attend for examination under section 69, the examinee has no entitlement to be tendered with a reasonable sum for expenses, and a warrant may issue for the person's arrest where the person fails to appear.

105. With the repeal of section 69 proposed in this Bill, it is necessary to make consequential amendments to section 264B to provide that a warrant may issue for the arrest of a person failing to appear for examination as required where the person has been tendered a reasonable sum for expenses. In the case of a bankrupt or discharged bankrupt who fails to appear, there will be no requirement for the applicant for the warrant to establish that the person was tendered a reasonable sum for expenses.

106. Paragraph 36(1)(a) will amend subsection 264B(2) so that it will provide that a warrant may not issue to a person mentioned in proposed paragraph 264A(1)(a) unless it is proved that the person was tendered a reasonable sum for expenses. The persons mentioned in proposed paragraph 264A(1)(a) are persons served with a summons to attend for examination (under a provision other than section 81 of the Act) or as a witness, and who have been tendered a reasonable sum for expenses.

107. Paragraph 36(1)(b) of the Bill will repeal the reference to section 69 that is currently contained in subsection 264B(2). The amendments will preserve the position that a person other than a bankrupt or a discharged bankrupt is entitled to be tendered with a reasonable sum for expenses

when he or she is summoned to attend for examination or to appear as a witness, and that where the person is not given money in respect of expenses, a warrant may not issue for the person's arrest. A warrant may however issue for the arrest of a bankrupt or discharged bankrupt for simple failure to attend as required by the summons, as such persons are not entitled to money in respect of expenses.

108. Subclause 36(2) is the application provision in respect of the amendments to section 264B by subclause 36(1). Subsection 264B(2) of the Act as in force immediately before the commencement of the Bill will continue to apply in relation to a person served with a summons to attend for examination under section 81 of the Act before the commencement of the Bill.

Clause 37 - Protection in respect of reports

109. Section 306B provides immunity from suit in respect of statements made in good faith in reports prepared pursuant to various provisions of the Act by the Inspector-General in Bankruptcy, an Official Receiver or a trustee.

110. By the Bankruptcy Amendment Act 1987, section 189A was inserted into Division 2 of Part X of the Act, which requires controlling trustees to prepare a report about the affairs of a debtor whose property is subject to control under that Division. It was inadvertently omitted to extend the statutory protection accorded by section 306B to controlling trustees required to prepare reports under that section. Clause 37 of the Bill proposes the insertion of a reference to subsection 189A(1) into section 306B of the Act.

111. Clause 37 of the Bill also proposes an amendment to section 306B to accord protection to Official Receivers in respect of reports required to be prepared by them about applicants for registration as a trustee, under proposed section 154A to be inserted by clause 24 of the Bill.

Clause 38 - Annual Report

112. Section 314 of the Act requires the Minister to cause an Annual Report on the operation of the Act to be laid before each House of Parliament. Section 34C of the Acts Interpretation Act 1901 requires periodic reports, prepared by officials for presentation to Ministers, to be prepared as soon as practicable after the end of the particular period being reported upon, and in any event, not later than 6 months after the end of the period. The official whose responsibility it is to prepare the report must apply to the Minister for an extension of time where he or she is of the view that it will not be possible to prepare the report within that 6 month period, and must give the reasons for his or her view. The Minister is able to grant extensions of time. It has been suggested by the Auditor-General that the Act ought to be amended so that the time limit for presenting the report applies in relation to the report on the Act.

113. In order to attract the operation of section 34C of the Acts Interpretation Act 1901 and impose the time limit there provided for in respect of the Annual Report on the operation of the Act, clause 38 proposes to substitute a new section for section 314. Proposed section 314 provides that the Inspector-General must give to the Minister after the end of each financial year, a report on the operation of the Act during that financial year for presentation to Parliament.

Clause 39 - Rules and regulations

114. Subsection 315(1) of the Act permits the Governor-General to make rules or regulations not inconsistent with the Act and goes on to enumerate a list of specific topics about which such rules or regulations may be made.

115. Paragraph 315(1)(c) enables rules to be made about the application of provisions of the Act to proceedings instituted under subsection 9(3) of the Act. That subsection related to proceedings pending under State bankruptcy or insolvency

legislation prior to the commencement of the Bankruptcy Act 1924. Subsection 9(3) was repealed as spent by the Bankruptcy Amendment Act 1980 and the consequential repeal of paragraph 315(1)(c) was omitted. Clause 39 provides for the repeal of the paragraph.

116. Paragraph 315(1)(e) provides for the making of rules in relation to the appointment by telegram of proxies for creditors. Telegrams no longer exist as a means of telecommunication, and accordingly clause 39 provides for the repeal of this paragraph.

PART 3 - AMENDMENTS OF THE CIRCUIT LAYOUTS ACT 1989

Clause 40 - Principal Act

117. Formal.

Clause 41 - Interpretation

118. This clause will amend the definition of 'circuit layout' in section 5 of the Principal Act essentially to clarify that it is not intended to be restricted to two-dimensional representations of an integrated circuit. This will remove doubts as to whether the definition covers circuit layouts designed as a whole on a computer, rather than as a series of 2-dimensional 'masks'.

Clause 42 - References to all joint makers

119. This clause corrects a drafting error in section 14 of the Principal Act by substituting for the reference to 'this Division' a reference to 'this Part'.

Clause 43 - Innocent commercial exploitation

120. This clause will amend subsection 20(1) of the Principal Act so that it is limited to commercial exploitation of an integrated circuit rather than applying to the broader

concept of commercial exploitation of a 'circuit layout'. In addition, subsection 20(1) will be amended to limit its application to 'unauthorised' integrated circuits, that is, those made in accordance with a circuit layout without the authorisation of the owner of the rights in the layout.

Clauses 44 - 46 - Copying for various purposes

121. These clauses will extend the exceptions to infringement in section 21 (copying for private use), section 22 (copying for research or teaching purposes) and section 23 (evaluation or analysis) so that they cover not only the making of a copy of an eligible layout but also the making of an integrated circuit in accordance with the layout or a copy of the layout.

Clause 47 - Use for purposes of defence or security

122. This clause will qualify the exception to infringement in section 25 of the Principal Act. The exception will apply only after reasonable steps have been taken to obtain the licence of the owner of the rights in the layout.

Clause 48 - Eligible foreign countries

123. This clause will make a technical drafting amendment to section 42 of the Principal Act to enable regulations to be made in respect of eligible foreign countries in advance of Australia finalising the necessary steps to become a party to a convention relating to the protection of circuit layouts.

PART 4 - AMENDMENTS OF OTHER ACTS

Clause 49 - Amendments of other Acts

124. This clause provides that the Acts specified in the Schedule are amended as set out in the Schedule.

SCHEDULE

AMENDMENTS OF OTHER ACTS

ACTS INTERPRETATION ACT 1901

125. The amendments to section 4 of the Act will omit subsection 4(2) and substitute subsections 4(1A), (2) and (2A). Subsection 4(1A) allows rules, regulations etc. made under Acts already in effect and rules, regulations etc. made by virtue of subsection 4(1) to be combined in the one statutory instrument. Subsection 4(2) prescribes when appointments made by virtue of subsection 4(1) are to come into operation. Subsection 4(2A) prescribes when provisions of an instrument which are made by virtue of subsection 4(1) come into operation.

126. A new paragraph 22(1)(a) is substituted to expand the terms which are to be taken to include a body politic or corporate. The amendment to subsection 22(2) is consequential upon the substitution of the new paragraph 22(1)(a).

127. Paragraph 22(1)(aa) is inserted to define 'individual' to mean a natural person as opposed to a body corporate or body politic.

128. The insertion of paragraph 33A(ba) will prevent a person from acting in a vacant office for more than 12 months.

129. The insertion of subsection 46(2) will allow an authority which has power to make an instrument or resolution specifying a matter or thing, or doing anything in relation to a matter or thing, to identify the matter or thing by reference to a class or classes of matters or things.

130. The amendment to subsection 46A(1) will make it clear that any provision, not simply the provision under which an instrument is made, may provide that an instrument is a disallowable instrument.

131. The substitution of subsection 48(2) will ensure that a retrospective regulation etc. which has a prejudicial effect contrary to paragraphs (a) and (b) has no effect, and is not simply rendered ineffective to the extent to which it is retrospective.

AUSTRALIAN CAPITAL TERRITORY SUPREME COURT ACT 1933

132. Clause 49 inserts amendments to the Australian Capital Territory Supreme Court Act 1933. Section 8AA is repealed and a new section 8AA is inserted.

133. Subsection 8AA(1)provides that the jurisdiction of the Supreme Court, in relation to applications for admission to practise as a barrister or solicitor, must be exercised by at least 3 Judges unless the Chief Justice otherwise directs. The power to otherwise direct is a substantive change from the existing provision.

134. Subsection 8AA(2) provides that the jurisdiction of the Supreme Court is to be exercised by 3 Judges in matters relating to the issue or cancellation of practising certificates and in matters relating to the professional behaviour or conduct of legal practitioners. This provision restates the requirements of the existing provision.

135. Subsection 8AA(3) provides that a single Judge may give directions of an interlocutory nature in matters covered by subsection(2). This provision qualifies the general requirement in subsection(2) and is a substantive change from the existing provision.

AUSTRALIAN SECURITY INTELLIGENCE ORGANIZATION ACT 1979

136. Subsection 92G(3) of the Australian Security Intelligence Organization Act is amended to make provision for the Parliamentary Joint Committee on the Australian Security Intelligence Organization to disclose or publish, not just evidence taken in private as at present, but also the contents

of documents produced to the Committee in private. The subsection is also being amended so that it requires the Committee to obtain, under subsection 92G(1), the authority of the person who gave evidence or produced a document to the Committee or the Director-General of Security, as the case requires, before so disclosing or publishing that evidence or the contents of that document.

137. Subsection 92G(4) is also amended so that it provides that the Committee shall not disclose or publish documents produced to the Committee in private unless, after taking the advice of the Attorney-General, the Committee is satisfied that disclosure would not disclose a matter that the Committee is not, under section 92N, permitted to disclose in a report to the Parliament.

138. A new section 92P is substituted to make it subject to subsection 92G(1), which makes it an offence for a person to disclose evidence taken by the Committee or the contents of a document produced to the Committtee in private unless that disclosure is authorised in accordance with the requirements of that subsection. New section 92P also authorises any subsequently constituted Committee to consider evidence taken by, or a document produced to a previously constituted Committee as if it were evidence taken by or a document produced to the first-mentioned Committee.

139. A new subsection 92R(2) is substituted. It provides that, where evidence, or the contents of a document, taken by or produced to the Committee in private, are published, section 4 of the Parliamentary Papers Act 1908 applies to the publication as if it were a publication under section 2 of that Act.

AUSTRALIAN SECURITY INTELLIGENCE ORGANIZATION AMENDMENT ACT 1986

140. Section 33 of the Australian Security Intelligence Organization Amendment Act 1986 ('the Act') amended section 84 of the Australian Security Intelligence Organization Act 1979 with the effect, had it been proclaimed, of changing the basis of employment of ASIO staff from contract to statute.

141. The employment policy underlying the 1986 amendment has now been reviewed and a satisfactory arrangement that retains the contract of employment while giving the Director-General scope to vary terms and conditions in a manner consistent with the Government's public sector employment principles has been arrived at. The object of the provisions inserted by the Act, namely, to allow the terms and conditions of ASIO staff to be varied without the cumbersome requirement of gaining the consent of each staff member, has now been achieved by alternative means. A new form of contract provides this flexibility.

142. Section 36 of the Act would, if proclaimed, have provided a saving provision for existing contractual agreements in the event that statutorily based employment had commenced. With the repeal of section 33, section 36 is, of course, redundant.

143. Section 37 of the Act would, if proclaimed, have repealed section 90 of the Australian Security Intelligence Organization Act 1979, a regulation making power in relation to the employment of staff. Such a power would have been inconsistent with a statutorily based employment scheme; hence the repeal of section 90. The retention of the contractual arrangement now makes the repeal of section 90 unnecessary.

FAMILY LAW ACT 1975

144. Appeals to the Family Court Subsection 94(1) is amended to reflect the change to appeal procedures introduced by the new section 94AA.

145. Leave to appeal needed in some cases A new section 94AA is to be inserted after section 94. New section 94AA provides that leave of the Full Court will be required to appeal to the Full Court of the Family Court from interlocutory decrees of a single judge of the Family Court, or from State or Territory Courts exercising jurisdiction under the Act. This provision will not apply to proceedings relating to the custody, guardianship or welfare of, or access to, a child.

146. New subsection 94AA(1) provides that an appeal does not lie to the Full Court of the Family Court from a prescribed decree, except by leave of the Full Court of that Court.

147. New subsection 94AA(2) provides that an application for leave is to be determined by a Full Court of the Family Court.

148. New subsection 94AA(3) provides that the Rules of Court may provide that applications for leave to appeal may be dealt with without an oral hearing, subject to conditions to be stated in the Rules.

149. New subsection 94AA(4) provides definitions of "child welfare matter" and "prescribed order" for the purposes of section 94AA. "Child welfare matter" has the same meaning as in Part VII of the Act. A "prescribed decree" is any decree, made by a single judge of the Family Court of Australia, or a decree of a Family Court of a State or a State or Territory Supreme Court when constituted by a single judge, that is an interlocutory decree, other than a decree made in a child welfare matter.

FEDERAL COURT OF AUSTRALIA ACT 1976

150. The proposed amendment to section 25 inserts new subsections 25(2) and 25(2A). At present subsection 25(2) permits a single Judge, as well as a Full Court, to hear and determine applications for leave or special leave to appeal to the Court or for an extension of time within which to institute an appeal. Provision exists under subsection 25(2) for Rules of Court to be made enabling those applications to be dealt with, subject to conditions prescribed by the Rules, without an oral hearing. The proposed amendment will expand the matters falling within the appellate jurisdiction of the Court that are able to be heard and determined by a single Judge, as well as by a Full Court, to include applications for leave to amend the grounds of an appeal to the Court and to stay an order of a Full Court. It will also permit Rules of Court to be made enabling those applications to be dealt with, subject to conditions prescribed by the Rules, without an oral hearing.

151. The proposed amendment will also insert a new section 29A. It will provide that where a person has appealed to the Court from a conviction or from a sentence imposing a term of imprisonment, any time the person is on bail pending the determination of that appeal shall not count as part of the term of imprisonment to which the appellant has been sentenced.

152. The proposed amendment will overcome the consequences of the decision of the Full Court of the Federal Court in Petreski v Cargill (1988) 79 ALR 235. In that case, the appellant, who had been convicted of offences before an ACT Court and sentenced to a term of imprisonment, had been granted bail pending the determination of his appeal by the Federal Court against the convictions. An application was not made for a stay of execution of the sentence under section 29 of the Act. The Full Court held that, in the circumstances of the case, the term of imprisonment continued to run while the appellant was on bail, with the result that it had expired before the determination of the appeal.

153. The proposed amendment to subsection 51A(4) will substitute the word "applicant" for "plaintiff". The Federal Court Rules identify a person or corporation commencing an action as an applicant.

154. The proposed amendment to section 52 inserts a new subsection 52(2). Section 52 at present provides that interest on a judgment debt under a judgment of the Court carries interest from the date the judgment is entered at such rate as is fixed by the Federal Court Rules. The proposed amendment will permit the Court, where it thinks the interests of justice so require, to determine in a particular case that interest is payable on a judgment debt at a rate less than the rate fixed by the Federal Court Rules. The proposed amendment will allow an appropriate rate of interest to be payable on judgment debts arising from proceedings in the Court involving a foreign currency. The rate of interest fixed by the Federal Court Rules under section 52 of the Act is, at present, 15%.

Section 51A of the Act, which enables the Court to order that interest is payable on debts up to the date on which judgment is entered, gives the Court a discretion to order that interest is payable at such rate as it thinks fit. Proceedings in the Court have involved loans in foreign currency where interest rates have been in the region of 3% to 5%. A successful applicant in the Court might well end up with a windfall, receiving pre-judgment interest at, say, 3% and post-judgment interest at 15%. This situation could be quite unfair, particularly where the judgment debtor is proposing to appeal.

155. The proposed amendment to subsection 56(1) will substitute the words "an applicant" for "a plaintiff". The Federal Court Rules identify a person or corporation commencing an action as an applicant.

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION ACT 1986

156. Section 45 will amend the Human Rights and Equal Opportunity Commission Act to place the Australian Capital Territory on the same footing in relation to that Act as the States and the Northern Territory, in particular so that -

- the Human Rights and Equal Opportunity Commission Act binds the Crown in right of the ACT to the same extent as it binds the Crown in right of the States and the Northern Territory;

- the Commonwealth is enabled to enter into an intergovernmental arrangement with the ACT, as it can with a State or the Northern Territory for the purposes of sections 16 and 18.

157. The definitions in subsection 3(1) of the Human Rights and Equal Opportunity Commission Act will be amended:

- to include the ACT in the definition of 'State' and to exclude the ACT from the definition of 'Territory';

- to include Ministers of the ACT in the definition of 'Minister'; and
- to include ACT enactments (as defined in the Australian Capital Territory (Self-Government) Act 1988 in the definition of 'State enactments' and to exclude them from the definition of 'Commonwealth enactments'.

MARRIAGE ACT 1961

158. At present, subsection 9C(6) of the Act requires notification in the Gazette of each approval, or revocation of an approval, of a marriage education organisation. Following the introduction of full user pay principles in the Government Printing Service for Gazette notices, it has been decided that the requirement to notify the approval, or revocation of an approval, of a marriage education organisation can be as expeditiously achieved at a lower cost by other methods.

159. Subsection 9C(6) is to be amended to omit the requirement that notice of these matters be published in the Gazette, and substitute a requirement that notice be given in such manner as the Minister considers appropriate.

160. The amendment will not inconvenience the public, as the Department publishes a directory of approved marriage counselling and education organisations every year, which is widely circulated to community groups and others who refer people to these organisations.

RACIAL DISCRIMINATION ACT 1975

161. Section 45 will amend the Racial Discrimination Act in three respects.

Indirect Discrimination

162. Section 45 will insert into the Racial Discrimination Act subsection 9(1A) which deals with indirect discrimination against persons of a particular race, colour, descent or

national or ethnic origin. The purpose of the amendment is to make it clear that the Racial Discrimination Act extends to acts of indirect racial discrimination. The effect of subsection 9(1A) will be that where a term, condition or requirement, which is imposed on a person and which is not reasonable in the circumstances, impairs the equal enjoyment of any human right by persons of that person's race, colour, descent or national or ethnic origin, then the imposition of the term, condition or requirement will be treated as involving a distinction based on or done by reason of the person's race, colour, descent or national or ethnic origin. Subsection 9(1A) of the Racial Discrimination Act provides that it is unlawful to do an act involving such a distinction. The operation of subsection 9(1A) will involve an examination of whether the imposed term, condition or requirement impacts disproportionately on persons of the same race, colour, descent or national or ethnic origin as the person on whom the term, condition or requirement is imposed. It will not be necessary, to establish such a disproportionate impact, that the imposition impairs the enjoyment of a human right by every person of that race, colour, descent or national or ethnic origin.

Section 18 amendment

163. Amendments to section 18 will ensure that the prohibition on acts done by reason of a person's race, colour, descent or national or ethnic origin extends to the cases where a racially discriminatory reason is one of a number of reasons for the doing of an act. It will not be necessary to establish that the issue of race, colour, descent or national or ethnic origin was the dominant reason for the doing of the act.

Vicarious liability

164. New subsection 18A(1) will extend the liability of a person for racially discriminatory acts to acts done by the person's agent or employee in the course of their employment

or agency duties. However, new subsection 18A(2) will exempt the person from liability where the person took all reasonable steps to prevent the racially discriminatory act being done by the employee or agent.

SERVICE AND EXECUTION OF PROCESS ACT 1901

165. Two amendments are proposed to Part IVA of the Act, which provides procedures for the interstate enforcement of fines.

166. The first amendment will insert a definition of 'facsimile' into subsection 26A(1). It will also amend subsection 26E(5) to allow a police officer, who has apprehended a person without producing to him the warrant of apprehension authorising his apprehension, to produce to him within 48 hours, or such longer time as may be fixed by a Justice of the Peace, a facsimile copy of the warrant instead of the original warrant.

167. The second amendment will insert a new subsection 26J(1A) to allow payment of an amount, in respect of a fine in relation to which a warrant for commitment has issued, to be made to and received by the police officer executing the warrant, before he or she takes the person liable to pay the fine into custody. The proposed amendment to subsection 26J(1) is consequential on that amendment.

168. This amendment will also insert a new subsection 26J(1B) to provide that a police officer, who has received a payment under subsection 26J(1A), must not execute the warrant of commitment but must return it to the Clerk of the Court that made the order of committal at the same time that he or she forwards the payment to the Clerk under subsection 26J(4).

169. The amendment to subsection 26J(2) is consequent upon new subsection 26J(1A). It will prohibit a police officer executing a warrant of commitment from receiving part only of the unpaid amount of the fine referred to in the warrant.

SEX DISCRIMINATION ACT 1984

170. Section 45 will amend the Sex Discrimination Act, in a similar way as the amendments to the Human Rights and Equal Opportunity Commission Act, to place the Australian Capital Territory on the same footing in relation to that Act as the States and the Northern Territory, in particular so that the Sex Discrimination Act binds the Crown in right of the ACT to the same extent as it binds the Crown in right of the States and the Northern Territory.

171. The definitions in subsection 4(1) of the Sex Discrimination Act will be amended to include the ACT in the definition of 'State' and to exclude the ACT from the definition of 'Territory'. Section 45 will also effect a consequential amendment to the definition of 'administrative office' to provide for ACT members of the Assembly, members of the Executive and Ministers.

STATUTORY DECLARATIONS ACT 1959

172. Section 4 of the Act is amended to insert a definition of 'State' and 'Territory'. 'State' is defined to include the Northern Territory and 'Territory' is defined to exclude the Northern Territory. The effect of these definitions is to exclude the operation of sections 6,7 and 10 in respect of laws of the Northern Territory. The Northern Territory already has in place legislation providing for Statutory Declarations to be made in respect of Northern Territory laws.

173. Paragraph 12(1)(a) of the Act is amended to exclude the Northern Territory from the reference to States. Paragraph 12(1)(b) is amended to provide an express reference to the Northern Territory. These two amendments are to ensure that the Courts of the Northern Territory retain their jurisdiction in respect of offences under the Act.

1990

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1990

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Amendment to be moved on behalf of the Government)

(Circulated by authority of
the Honourable Michael Duffy M.P., Attorney-General)

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AMENDMENT TO BE MOVED ON BEHALF OF THE GOVERNMENT TO THE LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1990

OUTLINE

The amendment to be moved by the Government to this Bill is a technical amendment. The amendment will avoid unintended retrospective operation of the provisions in Part III of the Bill, which give effect to a technical amendment to the definition of a "circuit layout" in the Circuit Layouts Act 1989, and bring various exemptions into line with those provided in the May 1989 Washington Treaty on Intellectual Property in Respect of Integrated Circuits.

FINANCIAL IMPACT STATEMENT

The amendment will have no financial impact.

NOTES ON AMENDMENT TO BE MOVED ON BEHALF OF THE GOVERNMENT TO THE LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1990

This amendment to subclause 2(4) of the Bill will ensure that proposed Part III of the Bill comes into operation on Royal Assent.