

EXPOSURE DRAFT

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BANKRUPTCY AMENDMENT (DEBT AGREEMENT REFORM) BILL 2018

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, Senator the Hon George Brandis QC)

BANKRUPTCY AMENDMENT (DEBT AGREEMENT REFORM) BILL 2018

GENERAL OUTLINE

1. This Bill amends the *Bankruptcy Act 1966*.
2. The Bill will effect a comprehensive reform of Australia's debt agreement system. Debt agreements are an increasingly popular alternative to bankruptcy. Between 2007 and 2016, new debt agreements increased from 6,560 to 12,640 per year. Over the same period, new bankruptcies declined from 25,754 to 16,842 per year. As a result, the commercial debt agreement administrator industry now performs a significant financial advising function, including in relation to people in financially vulnerable circumstances. Consequently, debtors, creditors and the public should have reason to place trust and confidence in the debt agreement system.
3. Significant measures in the Bill make provision for:
 - the types of practitioners authorised to be debt agreement administrators
 - registration, deregistration and the obligations of debt agreement administrators
 - formation, administration, variation and termination of debt agreements
 - protections against debt agreements that cause financial hardship or have other defects, and
 - powers of the Inspector-General in Bankruptcy (Inspector-General) with respect to debt agreements and debt agreement administrators.
4. It is intended that the measures in the Bill will boost confidence in the professionalism of administrators, deter unscrupulous practices, enhance transparency between the administrator and stakeholders, and ensure that the debt agreement system is accessible and equitable.

DATE OF EFFECT

5. The majority of amendments in the Bill will commence six months after Royal Assent. This will give debt agreement administrators and the Australian Financial Security Authority (AFSA) time to prepare for commencement of the reforms.

FINANCIAL IMPACT

6. The Bill will have no direct financial impact.

GLOSSARY

7. The following abbreviations are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Amending Act	<i>Bankruptcy Amendment (Debt Agreement Reform) Act 2018</i>
Bankruptcy Act	<i>Bankruptcy Act 1966</i>
Bankruptcy Regulations	<i>Bankruptcy Regulations 1996</i>
Bill	<i>Bankruptcy Amendment (Debt Agreement Reform) Bill 2018</i>
Practice Rules	<i>Insolvency Practice Rules (Bankruptcy) 2016</i>

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

8. The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

9. The Bill will amend the Bankruptcy Act to effect a comprehensive reform of Australia's debt agreement system. The aims of the Bill are to boost confidence in the professionalism of administrators, deter unscrupulous practices, enhance transparency between the administrator and stakeholders and to ensure that the debt agreement system is accessible and equitable.

Human rights implications

10. The impact of the Bill on the following human rights has been considered:

- the right to privacy and reputation, and
- penalty provisions.

The right to privacy

11. Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The right to privacy may be engaged if the measures in the Bill involve the collection, use, disclosure or publication of personal information.

12. The Bill interacts with the right to privacy by providing for disclosure of information held by the Official Receiver, regarding commercial arrangements between debt agreement administrators and brokers or related entities (where these are natural persons), to be provided to affected creditors (item 33 of Part 6 Schedule 1). This disclosure may include personal information relating to the brokers and related entities. As noted above, the disclosure of personal information without a person's consent will engage, and limit, the protection from arbitrary and unlawful interference with privacy in article 17 of the ICCPR.

13. The right in article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

14. To the extent that the measures in the Bill will limit the right in article 17 of the ICCPR, they are lawful and non-arbitrary. The amendment in the Bill allowing for the

disclosure of information relating to brokers and related entities is for a legitimate purpose (to ensure that the voting process is fair and transparent) and is limited to disclosures that are necessary to achieve this purpose. In the absence of this amendment, a proposed administrator is not required to disclose any broker or referrer arrangements, including any commissions or other payments involved, to the debtor or affected creditors.

15. Item 33 of Part 6 Schedule 1 inserts new paragraphs 185C(2D)(f) and 185C(2D)(g) which require the proposed administrator to record details of any broker or referrer information, and to declare whether an affected creditor is also a related entity, in the certificate required by subsection 185C(2D). Item 38 of Schedule 1 mandates that a copy of the certificate is sent to affected creditors. These amendments will give affected creditors the opportunity to account for the administrator's referral arrangements, as well as notify them of potential conflicts of interest when a creditor is a related entity to the administrator, when voting on whether to accept the debt agreement.

16. Providing all affected creditors with an opportunity to review an administrator's relationships promotes a fair and transparent voting process. Money that the debtor pays to brokers or related entities is money that the debtor could have otherwise paid to affected creditors.

17. The requirement to disclose any information under the Bill is limited to the legitimate purpose of disclosing conflicts of interest and ensuring that the creditor voting process is fair and transparent. Most affected creditors are large credit providers and are generally required to comply with the Australian Privacy Principles (APPs) in the *Privacy Act 1988* (Privacy Act).

Civil Penalty

18. The right to a fair trial and fair hearing are protected by article 14(1) of the ICCPR. The right to a fair trial and fair hearing applies to both criminal and civil proceedings. The Parliamentary Joint Committee on Human Rights Guidance Note 2 notes that civil penalty provisions may engage criminal process rights under articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.

19. Item 29 of Part 8 Schedule 2 inserts a new strict liability offence provision of 50 penalty units for contravention of existing requirements to maintain a separate bank account for funds relating to the debt agreement. Similarly, item 30 of Part 8 Schedule 2 inserts a new strict liability offence of 5 penalty units for failure of the debt agreement administrator to maintain accurate books or produce records relating to a trust account when requested by the Inspector-General. As an alternative to the civil penalty provision, item 31 of Part 8 Schedule 2 provides that a breach of new subsection 185LE(1A) (item 30) can, where appropriate, be addressed by way of infringement notice with an amount payable to the value of 1 penalty unit. These amendments align the bankruptcy and debt agreement regimes and improve the integrity of the debt agreement regime by ensuring that trust accounts are easily identifiable and appropriately regulated.

20. Item 21 of Part 3 Schedule 3 of the Bill inserts a new section 186HA to mandate that registered debt agreement administrators must maintain adequate and appropriate professional indemnity and fidelity insurance and that failure to do so amounts to an offence.

In the case of intentional or reckless failure, a penalty of 1,000 penalty units will apply. However, if the failure is not intentional or reckless, it is considered a strict liability offence with a penalty of 60 penalty units. The application of strict liability, as opposed to absolute liability, preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities. This defence maintains adequate checks and balances for individuals who may be accused of breaching such offences.

21. Strict liability offences are appropriate in this area of regulation, as it is necessary to strongly deter misconduct that can have serious consequences for affected parties. Strict liability offences also reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by the AFSA. Strict liability is particularly beneficial to these regulatory bodies as they need to deal with offences expeditiously to maintain public confidence in their regulatory regimes. The strict liability offences in the Bill meet all the conditions listed in the Guide to Framing Commonwealth Offences (pages 23 and 24). For example, the fines for the offences do not exceed 60 penalty units for an individual. By providing a strict liability enforcement regime for duties of debt agreement administrators, the Bill significantly enhances the likelihood of compliance by administrators. The severity of the penalty for intentionally or recklessly failing to comply with these requirements and the need for a strict liability offence reflects the importance of adequate and appropriate insurance for debt agreement administrators. As providers of professional services who often deal with large sums of money, debt agreement administrators must hold adequate and appropriate insurance to mitigate the risks associated with the profession.

22. The civil penalty provisions contained in the Bill should not be considered ‘criminal’ for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary. Further, the provisions do not apply to the general public, but to a sector or class of people who should reasonably be aware of their obligations under the Bankruptcy Act (e.g. debt agreement administrators). Imposing the civil penalties will enable an effective disciplinary response to non-compliance. Finally, the civil penalties are for small amounts, with no sanction of imprisonment for non-payment of the penalty.

Criminal Penalty

23. Article 14 of the ICCPR provides that, in the determination of any criminal charge against a person, that person shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 15 of the ICCPR provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

24. The Bill introduces three new criminal penalty provisions, which are consistent with the obligations in articles 14 and 15 of the ICCPR. Item 41 of Part 6 Schedule 1 inserts new subsection 185EC(6), which introduces an offence for a proposed debt agreement administrator that gives, agrees, or offers to give an affected creditor an incentive for voting a certain way on a debt agreement proposal. Items 11 and 15 of Part 2 Schedule 2 introduce equivalent offence provisions (new subsections 185MC(6) and 185PC(6)) for debt agreement administrators in circumstances when considering proposals to vary or terminate a debt agreement respectively.

25. These amendments will expressly prohibit debt agreement administrators offering affected creditors cash payments in return for the creditor voting to approve the termination

of the debt agreement. The offence for a proposed debt agreement administrator contravening these new provisions is three months imprisonment. This punishment is appropriate and proportionate to deter fraudulent conduct in the financial sector which can have severe consequences for both affected creditors and debtors.

Conclusion

26. The Bill is compatible with human rights.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

27. Clause 1 provides for the short title of the Act to be the *Bankruptcy Amendment (Debt Agreement Reform) Act 2018*.

Clause 2 – Commencement

28. Clause 2 provides for the commencement of each provision in the Bill, as set out in the table.

29. The majority of the amendments in the Bill will commence the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent. These amendments include:

- Division 1 of Part 1 Schedule 1, relating to the types of practitioners authorised to be debt agreement administrators
- Parts 2 to 6 of Schedule 1, relating to reimbursement of debt agreement administrator expenses, the value of debtor's property in a debt agreement proposal, the payment to income ratio to be applied to a debt agreement payment schedule, protections to prevent undue hardship to the debtor and measures to address the potential effects of a debt agreement administrator's conflict of interest on a debt agreement proposal
- Part 1 of Schedule 2, relating to the length of debt agreements
- Part 1 of Schedule 3, relating to applications for debt agreement administrator registration, and
- Items 16 to 29 of Schedule 3, relating to conditions of debt agreement administrator registration, the ongoing obligation on debt agreement administrators to maintain insurance, the grounds of cancellation of debt agreement administrator registration, and expanded powers of the Inspector-General.

30. This timeframe provides debt agreement administrators and AFSA with sufficient time to prepare for commencement of the reforms.

31. The following amendments are consequential to the amendments listed above, and therefore commence immediately after their commencement. These amendments include:

- Part 2 of Schedule 2, relating to proposals to vary debt agreements, which commence immediately after Part 1 of Schedule 2
- Parts 3 to 9 of Schedule 2, relating to proposals to terminate debt agreements, court orders to terminate debt agreements, voiding debt agreements, debt agreement administrators to refer evidence of debtor offences, reporting requirements for debtors in arrears, alignment of offences between the debt agreement and bankruptcy

regimes, and the time for submitting annual returns, which commence immediately after Parts 2 to 6 of Schedule 2

- item 15 of Schedule 3, which clarifies the Minister cannot delegate the ability to make legislative instruments for the purposes of determining industry conditions for registered debt agreement administrators, which commences immediately after Parts 2 to 6 of Schedule 2, and
- Schedules 4 and 5, relating to technical amendments and provisions dealing with unclaimed moneys, which commence immediately after Parts 2 to 6 of Schedule 2.

32. Item 3 in the table provides that Division 2 of Part 1 Schedule 1 will commence twelve months after Royal Assent. The amendments under Division 2 of Part 1 Schedule 1 repeal and replace provisions that provide for unregistered administrators to be declared ineligible to administer a debt agreement.

33. The effect of item 5 of Division 1, Part 1 Schedule 1 (transitional provisions—replacement administrator) is that an unregistered administrator cannot administer a debt agreement 12 months from the Royal Assent. The provisions dealing with the ineligibility and replacement of unregistered administrators will be obsolete after this point. Accordingly, Division 2 of Part 1 Schedule 1 will commence twelve months after the Royal Assent.

Clause 3 – Schedules

34. Clause 3 provides that the legislation specified in a Schedule to the Amending Act is amended or repealed as set out in the Schedule.

Schedule 1 – Debt agreement proposals

AMENDMENTS TO THE *BANKRUPTCY ACT 1966*

GENERAL OUTLINE

35. Five schedules are included with the Bill. The amendments in Schedule 1 will modify the requirements for, and treatment of, debt agreements proposals.

36. These amendments include: limiting the types of practitioners authorised to be debt agreement administrators, the types of information the debtor must record in a debt agreement proposal, the certifications the proposed administrator must make, and the standards for how the Official Receiver must handle proposals.

Part 1 of Schedule 1 — Persons who may be authorised to deal with debtor’s property

Division 1 – Main amendments

Items 1 and 2 – Subsection 185C(2)

37. Subsection 185C(2) currently sets out the requirements for a debt agreement proposal. Under current paragraph 185(2)(c), a debt agreement proposal must authorise the Official Trustee, a registered trustee or another person to administer the debt agreement. Due to the effect of current subsections 185E(1), 185E(2A), 185(2B) and 185(2C), a debtor or other person who is not a registered debt agreement administrator or registered trustee, is able to administer a debt agreement if they pass the basic eligibility test under section 186A and are not administering more than 5 debt agreements at a time.

38. The purpose of the registration system is to ensure that debt agreement administrators have the knowledge, skills and attributes to professionally undertake their role. Allowing unregistered administrators to manage debt agreements, even if it is their own debt agreement, undermines the integrity of the system and ultimately has the potential to cause further undue financial hardship to debtors.

39. Item 1 amends paragraph 185C(2)(c) so that only a registered debt agreement administrator, registered trustee or the Official Trustee can be authorised to administer a debt agreement.

40. Item 2 adds a note to subsection 185C(2) to clarify that a debtor cannot administer their own debt agreement unless they are a registered debt agreement administrator or registered trustee.

Item 3 – Subsections 185E(1), (2A), (2B) and (2C)

41. The requirements for a debt agreement proposal, as set out in subsections 185C(2), 185(2A), 185(2B) and 185(2C), currently allow for a debtor or other person who is not a registered debt agreement administrator or registered trustee to administer a debt agreement if they pass the basic eligibility test under section 186A, and are not administering more than 5 debt agreements at a time. This includes debtors self-administering their own debt agreements.

42. To ensure that debt agreement administrators have the knowledge, skills and attributes to professionally undertake their role, items 1 and 2 of Part 1 Schedule 1 amend subsection 185C(2) so that only a registered debt agreement administrator, registered trustee or the Official Trustee can be authorised to administer a debt agreement.

43. Subsection 185E(1) currently requires the Official Receiver to give the debtor prescribed information if the debtor is self-administering their debt agreement. Under the amendments at items 1 and 2 of Part 1 Schedule 1, the only debtors able to self-administer their debt agreements will be registered debt agreement administrators or registered trustees.

44. As the registration system mandates having the requisite knowledge, skills and attributes to professionally undertake the role of administering a debt agreement, registered debt agreement administrators and trustees self-administering their own debt agreement will already be aware of the prescribed information, such as the consequences of entering into a debt agreement, and the availability of alternative debt relief options. Accordingly, to avoid duplication of the requirements of registration, item 3 repeals subsection 185E(1).

45. Subsections 185(2A), 185(2B) and 185(2C) currently stipulate that the Official Receiver must not accept a debt agreement proposal for processing unless the debt agreement is administered by a registered debt agreement administrator, a registered trustee, or a person that passes the basic eligibility test and is not the administrator of more than 5 debt agreements.

46. Item 1 of Part 1 Schedule 1 amends paragraph 185C(2)(c) so that only a registered debt agreement administrator, registered trustee or the Official Trustee can be authorised to administer a debt agreement. Accordingly, to avoid duplication of these requirements, item 3 repeals subsections 185(2A), 185(2B) and 185(2C).

Item 4 – Application provision

47. Item 4 sets out the application provisions for amendments to the Bankruptcy Act made under Division 1 Part 1 Schedule 1. The requirement for debt agreement proposals to authorise a registered debt agreement administrator, registered trustee or Official Trustee to administer the agreement will apply to debt agreement proposals given to the Official Receiver on or after commencement of item 4, being the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Item 5 – Transitional provisions—replacement administrator

48. The requirements for a debt agreement proposal, as set out in subsections 185C(2), 185(2A), 185(2B) and 185(2C), currently allow for a debtor or other person who is not a registered debt agreement administrator or registered trustee to administer a debt agreement if they pass the basic eligibility test under section 186A, and are not administering more than 5 debt agreements at a time.

49. To ensure that debt agreement administrators have the knowledge, skills and attributes to professionally undertake their role, items 1 and 2 of Part 1 Schedule 1 amend subsection 185C(2) so that only a registered debt agreement administrator, registered trustee or the Official Trustee can be authorised to administer a debt agreement.

50. The requirement for debt agreement administrators to be registered will ensure that debtors entering into a debt agreement on or after the commencement of item 4, Part 1 Schedule 1, will benefit from having a qualified debt agreement administrator facilitating their debt agreement. Item 4, Part 1 Schedule 1 commences the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent. To ensure debtors who have given the Official Receiver proposals for debt agreements before the commencement of item 4 similarly benefit from these amendments, item 5 provides for transitional arrangements.

51. Item 5 provides for the Official Trustee to replace an unregistered administrator of a debt agreement, entered into before the commencement of item 4, Part 1 Schedule 1, under section 185ZB. This replacement will occur immediately before the end of the period of six months beginning on the day item 5 commences. Under Clause 2 of the Amending Act, item 5 commences the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent. Accordingly, an unregistered administrator who is administering a debt agreement at Royal Assent will have 12 months to register as a debt agreement administrator or trustee if they wish to keep administering the debt agreement/s they are currently administering. This replacement timeframe provides an unregistered administrator with an opportunity to keep administering their agreement/s, while also ensuring that debtors can benefit from the knowledge and expertise of a registered practitioner.

52. Under clause 51(xxxi) of the Constitution, the Commonwealth can only make laws acquiring property on just terms, including the provision of just terms compensation. Item 5 additionally provides that if the Official Trustee replaces an unregistered administrator under section 185ZB, and the replacement results in an acquisition of property from the administrator otherwise than on just terms, the Commonwealth is liable to pay compensation to the administrator.

Division 2 – Other amendments

Items 6 to 11 – Section 185ZB, section 186A, subdivision D of Division 8 of Part IX, and section 186Q

53. The requirements for a debt agreement proposal, as set out in subsections 185C(2), 185(2A), 185(2B) and 185(2C), currently allow for a debtor or other person who is not a registered debt agreement administrator or registered trustee to administer a debt agreement if they pass the basic eligibility test under section 186A, and are not administering more than 5 debt agreements at a time.

54. To ensure that debt agreement administrators have the knowledge, skills and attributes to professionally undertake their role, items 1 and 2 of Part 1 Schedule 1 amend subsection 185C(2) so that only a registered debt agreement administrator, registered trustee or the Official Trustee can be authorised to administer a debt agreement.

55. Section 186M of the Bankruptcy Act currently provides for the Inspector-General to declare a person who is not a registered debt agreement administrator or a registered trustee as ineligible to act as a debt agreement administrator. The amendments under items 1 and 2 of Part 1 Schedule 1 will make this power obsolete since unregistered debt agreement administrators will no longer be able to administer debt agreements. Item 9 therefore repeals section 186M.

56. Under current subsection 185ZB(4), the Official Trustee becomes the replacement administrator for a debt agreement administered by an unregistered debt agreement administrator who becomes ineligible to act as an administrator under section 186M.

57. As an unregistered debt agreement administrator can no longer administer a debt agreement, as a result of items 1 and 2 of Part 1 Schedule 1, and section 186M will be repealed under item 9, item 6 subsequently repeals subsection 185ZB(4).

58. Items 7, 8, 10 and 11 either amend or repeal subsection 185ZB(6), paragraphs 186A(1)(h) and (3)(e) and paragraphs 186Q(c) and 186Q(d) to reflect the repeal of section 186M.

Item 12 – Saving provisions

59. Subsection 185ZB(4) provides for the Official Trustee to replace an unregistered debt agreement administrator declared ineligible under section 186M. Subsection 185ZB(6) requires the Official Receiver to write to notify the parties to the debt agreement that the Official Trustee has become the replacement administrator and if the Official Receiver intends to appoint another person as the new administrator.

60. Section 186M of the Bankruptcy Act currently provides for the Inspector-General to declare a person who is not a registered debt agreement administrator or a registered trustee as ineligible to act as a debt agreement administrator. Item 9, Part 1 Schedule 1 repeals section 186M as unregistered debt agreement administrators will no longer be able to administer debt agreements as a result of the amendments under items 1 and 2 of Part 1 Schedule 1. Item 9, Part 1 Schedule 1 commences 12 months after the Amending Act receives the Royal Assent.

61. Item 12 provides that subsections 185ZB(4) and (6) will continue to apply to a person who, before the commencement of item 9, Part 1 Schedule 1, became ineligible to act as an administrator under section 186M. This saving provision is necessary because an unregistered administrator could be declared ineligible under section 186M just prior to the repeal of subsection 185ZB(4). In the absence of this saving provision, the Official Trustee would not replace the unregistered debt agreement administrator found ineligible under section 186M, and the Official Receiver would not be required to notify the parties to the agreement.

Part 2 of Schedule 1 — Reimbursement of expenses

Items 13 to 15 – After subsection 185C(3A) and section 185LA

62. Debt agreement administrators typically recover expenses or disbursements incurred in administering a debt agreement. A recoverable expense could be a dishonour fee imposed on a debt agreement administrator where the debtor does not have sufficient funds in their account to service a direct debit arrangement. Expenses of running a business such as overheads, rent, electricity and wages are not recoverable expenses. Currently, it is not clear what debt agreement administrators can claim as expenses, how administrators may recover the expenses, and who bears the cost of the expenses. Most debt agreement administrators recover expenses directly from the funds held in trust for the administration of the debt agreement. Accordingly, debt agreement administrators take expenses in priority to creditors which are party to the debt agreement, which reduces the creditors' expected return.

63. Item 13 inserts new subsection 185C(3B) which provides that a debt agreement proposal must detail the types of expenses the debt agreement administrator can recover. This requirement ensures that creditors and debtors have an opportunity to assess the reasonableness of an administrator's practices in relation to expenses.

64. Section 185LA currently sets out the general duties of a debt agreement administrator. Under paragraph 185LA(a), these duties currently include a requirement to deal with the debtor's property in accordance with the debt agreement. Subsequent to the amendment in item 13, items 14 and 15 insert a new subsection 185LA(2), which provides that the debt agreement administrator has a duty to not reimburse themselves for expenses that were not specified in new subsection 185C(3B).

65. Including this requirement as a duty will allow the Inspector-General, under paragraphs 186K(3)(b), for an individual, or 186L(3)(b) for a company, to seek a written explanation from a debt agreement administrator, following a failure to perform their duties, with a view to possibly cancelling their registration

Item 16 – Application provisions

66. Item 16 sets out the application provisions for amendments to the Bankruptcy Act made under Part 2 Schedule 1.

67. The amendment to section 185C (item 13 – the requirement for debt agreement proposals to specify recoverable expenses) will apply to debt agreement proposals given to the Official Receiver on or after commencement of item 16, being six months after the day the Amending Act receives Royal Assent.

68. The amendments to section 185LA (items 14 and 15 – the debt agreement administrator has a duty to not reimburse themselves for expenses not specified in the debt agreement) will apply to debt agreements that come into force on or after commencement of item 16 of Part 2 Schedule 1, where the debt agreement proposals were given to the Official Receiver on or after commencement of item 16, being the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Part 3 of Schedule 1 — Value of debtor's property

Item 17 – Paragraph 185C(4)(c)

69. Currently, paragraph 185C(4)(c) of the Bankruptcy Act prevents a debtor from giving the Official Receiver a debt agreement proposal if, at the proposal time, the value of the debtor's property that would be divisible among creditors if the debtor were bankrupt (assets threshold) is more than the threshold amount. Under subsection 185C(5), the threshold amount means 7 times the amount that, at that time, is specified in column 3, item 2, Table B, point 1064-B1 of Pension Rate Calculator A, in the *Social Security Act 1991*. As of November 2017, this amount is \$111,675.20.

70. Due to the recent rises in Australian property prices, particularly in capital and major cities, the current threshold amount prevents a significant proportion of Australians from accessing the debt agreement system. Item 17 therefore doubles the threshold amount to ensure a greater proportion of debtors have access to the debt agreement system.

Item 18 – Application provision

71. Item 18 sets out the application provisions for amendments to the Bankruptcy Act made under Part 3 Schedule 1. The higher assets eligibility threshold will apply to debt agreement proposals given to the Official Receiver on or after commencement of item 18, being the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Part 4 of Schedule 1 — Payment to income ratio

Items 19 to 21 – Subsection 10(1) and section 185C

72. Currently paragraph 185C(2D)(c) of the Bankruptcy Act contains the only restriction on the size or frequency of a debtor’s proposed payments under a debt agreement. It specifies that a debt agreement administrator should certify that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due. While this certification provides a safeguard against the submission and adoption of unsustainable payment schedules, it does not always prevent debt agreements that could cause the debtor undue financial hardship. For example, a debtor could propose to devote a significant proportion of their after tax income to debt agreement payments. The payment schedule could be sustainable but the debtor could suffer undue financial stress in discharging the obligations.

73. Item 20 inserts new paragraph 185C(4)(e), which provides that a debtor cannot give the Official Receiver a debt agreement proposal if the total payments under agreement exceed the debtor’s income by a certain percentage. Item 21 provides that the Minister can determine this percentage by legislative instrument under new subsection 185C(4B).

74. Comparing a debtor’s required payments under a debt agreement to their after tax income is a useful gauge for the sustainability of a payment schedule, since a debtor’s income is usually the primary source of their payments. However, comparing a yearly figure (the debtor’s after tax income) with an amount which is not necessarily a yearly figure (the total amount of payments the debtor is required to make under a debt agreement), creates an asymmetry of parameters in calculating the relevant percentage. Due to this asymmetry, prescribing an appropriate percentage would need to account for the fact that agreements last for different timeframes.

75. Section 185C provides the requirements for a debt agreement proposal. Currently there is no limitation on the proposed timeframe for making payments under a debt agreement. Item 1 of Part 1 Schedule 2 inserts a new provision into section 185C to specify that a debt agreement proposal must not propose to make payments under the agreement for a timeframe longer than three years from the day the agreement was made. A note in the new provision directs the reader to section 185H which clarifies ‘when’ a debt agreement is made.

76. By limiting the proposed timeframe for making payments under a debt agreement to three years, these amendments will allow the Minister to calibrate the determined percentage to a three year payment schedule. While this percentage would not always capture an excessive payment schedule caused by a shorter timeframe, the Official Receiver can use its powers created by Part 5, Schedule 1 to refuse the debt agreement proposal on the basis that the agreement would cause the debtor undue hardship.

77. The legislative instrument making power exercisable by the Minister to determine the percentage under new subsection 185C(4B) is a key consumer-protection safeguard. As such, item 19 amends subsection 10(1) to provide that the Minister cannot delegate this power.

Item 22 – Application provision

78. Item 22 sets out the application provisions for amendments to the Bankruptcy Act made under Part 4 Schedule 1. The requirement that debt agreement proposals contain a payment schedule where the debtor's income exceeds the total payments to be made under the agreement by a prescribed percentage will apply to debt agreement proposals given to the Official Receiver on or after commencement of item 22, being the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Part 5 of Schedule 1 — Undue hardship to debtor

Item 23 – After subsection 185E(2AA)

79. Paragraph 185C(2D)(c) of the Bankruptcy Act currently specifies that a debt agreement administrator should certify that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due. This requirement is primarily a quantitative assessment, requiring, among other things, a comparison of the debtor's disposable income with their routine payment commitments under the debt agreement. This certification by the debt agreement administrator prevents the submission, and acceptance by the Official Receiver under paragraph 185E(2)(c) of the Bankruptcy Act, of many agreements that would cause the debtor undue hardship.

80. Item 23 inserts a new subsection 185E(2AB), which provides that the Official Receiver can refuse to accept a debt agreement proposal for processing if the Official Receiver reasonably believes that complying with the debt agreement would cause undue hardship to the debtor. Given the significant protections included elsewhere in the Amending Act, including requiring debt agreement administrators to be registered (inserted by items 1 and 2 of Division 1 Part 1 Schedule 1) and the requirement for a debt agreement proposal to satisfy a payment to income ratio test (inserted by items 19 to 21 of Part 4 Schedule 1), it is envisaged that the Official Receiver would only be called upon in exceptional circumstances to consider whether to exercise its discretion under new subsection 185E(2AB) not to send the debt agreement proposal to affected creditors for voting. For example, when facts have been brought to the Official Receiver's attention which leads the Official Receiver to reasonably believe that complying with the debt agreement would cause the debtor undue hardship.

Item 24 – Application provision

81. Item 24 sets out the application provisions for amendments to the Bankruptcy Act made under Part 5 Schedule 1. The Official Receiver's power to refuse to accept debt agreement proposals which may cause undue hardship to the debtor will apply to debt agreement proposals given to the Official Receiver on or after commencement of item 24, being the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Part 6 of Schedule 1 — Other matters

Items 25 to 32 – Section 185 and subsection 185C(2D)

82. Section 5 of the Bankruptcy Act defines the term *administrator* in relation to the person authorised by a debt agreement to deal with property under an agreement already in force. This definition does not cover a proposed administrator as recorded on a debt agreement proposal on submission to the Official Receiver. To provide greater clarity in the Bankruptcy Act, and for drafting simplicity, item 25 inserts a new definition into section 185 for a *proposed administrator*, in relation to a debt agreement proposal, to be the person specified under paragraph 185C(2)(c).

83. Items 26 to 32 make amendments to subsection 185C(2D) consequential to incorporating the new definition.

Items 33 and 38 – At the end of subsection 185C(2D) and at the end of paragraph 185EA(2)(a)

84. Under subsection 185C(2D), a debt agreement proposal provided to the Official Receiver must be accompanied by a certificate signed by the debt agreement administrator nominated by the debt agreement proposal (the proposed administrator), certifying the proposed administrator has satisfied various requirements in setting up the debt agreement proposal with the debtor.

85. A proposed administrator could use a broker or referrer in its business model. Currently, a proposed administrator is not required to disclose any broker or referrer arrangements, including any commissions or other payments involved, to the debtor or affected creditors. If broker arrangements are not disclosed, the debtor would lose any opportunity to exercise their discretion to cease their relationship with the proposed administrator before submitting their debt agreement proposal, if they object to the proposed administrator's broker or referrer arrangements. Affected creditors may also want the opportunity to vote against debt agreement proposals that include certain broker arrangements.

86. Opaqueness of a proposed administrator's relationships is also problematic if an affected creditor under the proposed debt agreement is a related entity of the proposed administrator. For example, an entity could provide credit to a debtor to assist them with debts and, at a later time, refer the debtor to a proposed administrator that is a related entity. The debtor and other affected creditors may object to the proposed administrator and an affected creditor being connected in such a way if this connection is not properly disclosed prior to the commencement of the debt agreement.

87. Item 33 therefore inserts new paragraphs 185C(2D)(f) and 185C(2D)(g), which require the proposed administrator to record details of any broker or referrer information, and declare whether an affected creditor is also a related entity, in the certificate required by subsection 185C(2D). Since the debtor submits the subsection 185C(2D) certificate to the Official Receiver, they will have an opportunity to review the information before submitting the debt agreement proposal.

88. Currently, on processing a debt agreement proposal, the Official Receiver is required by subsection 185EA(1) to write to each affected creditor known to the Official Receiver to

ask each affected creditor to vote on the debt agreement proposal. Subsection 185EA(2) ensures each affected creditor receives a copy of the debt agreement proposal and the debtor's statement of affairs, to assist with the voting process.

89. Item 38 inserts new subparagraph 185EA(2)(a)(iii) which requires the Official Receiver to additionally send affected creditors the subsection 185C(2D) certificate, which will include any disclosures on brokers or related entities by the proposed administrator. This provision will give affected creditors the opportunity to account for the administrator's referral arrangements, as well as whether a creditor is a related entity to the administrator, when voting on whether to accept the debt agreement.

90. Most affected creditors are likely to be large credit providers, and they are therefore generally required to comply with the Australian Privacy Principles (APPs) in the Privacy Act. However, some affected creditors are either individuals or small businesses with an annual turnover of less than \$3 million. These creditors, as credit providers, are required to comply with the credit reporting provisions of Part IIIA of the Privacy Act, but are not generally required to comply with the APPs. New subparagraph 185EA(2)(a)(iii) will provide that information regarding an administrator's relationships with brokers, referrers and related entities must be disclosed to all affected creditors. Accordingly, certain affected creditors to whom the personal information is disclosed will not generally be subject to the APPs in the Privacy Act.

91. Notwithstanding this privacy concern, providing all affected creditors with an opportunity to review an administrator's relationships is essential. Money that the debtor pays to persons or entities that are not creditors, such as brokers, is money that the debtor could have otherwise paid to an affected creditor. To ensure that the voting process is fair and transparent, when an affected creditor votes on accepting a debt agreement proposal or variation, the affected creditor must be able to consider these payments to be able to decide whether they are willing to be repaid less money than they are owed.

Items 34 to 37 – Subsection 185C(3) and subsection 185C(3A)

92. Section 5 of the Bankruptcy Act defines the term *administrator* in relation to the person authorised by a debt agreement to deal with property under an agreement already in force. This definition does not cover a proposed administrator as recorded on a debt agreement proposal on submission to the Official Receiver. To provide greater clarity in the Bankruptcy Act, and for drafting simplicity, item 25 of Part 6 Schedule 1 inserts a new definition into section 185 for a *proposed administrator*, in relation to a debt agreement proposal, to be the person specified under paragraph 185C(2)(c).

93. Items 34 to 37 make amendments to subsections 185C(3) and 185C(3A) consequential to incorporating the new definition.

Items 39 and 40 – At the end of section 185EA and after subsection 185EC(1)

94. Currently, on processing a debt agreement proposal, the Official Receiver is required by subsection 185EA(1) to write to each affected creditor known to the Official Receiver to ask each affected creditor to vote on the debt agreement proposal. Subsection 185EA(2) ensures each affected creditor receives a copy of the debt agreement proposal and the debtor's statement of affairs, to assist with the voting process.

95. If the proposed administrator of the debt agreement charges an upfront fee which the debtor has not fully paid when submitting the debt agreement proposal, the proposed administrator becomes an affected creditor with voting rights on the debt agreement corresponding to the outstanding amount owing. A proposed administrator could also have voting rights on a debt agreement they are administering if they hold a credit licence and previously lent the debtor money. Alternatively, a related entity of the proposed administrator could be an affected creditor on a debt agreement proposal to be administered by the proposed administrator.

96. Allowing a proposed administrator, or its related entity, to vote on an agreement they propose to administer creates a conflict of interest. If the proposed administrator is the only creditor to vote on a debt agreement proposal, its vote will bind all affected creditors. Alternatively, the voting result may turn on the proposed administrator's vote. This conflict of interest undermines public and creditor confidence in the debt agreement system.

97. Item 39 therefore inserts new subsection 185EA(4). New paragraphs 185EA(4)(a) and 185EA(4)(b) provide that the Official Receiver should not request a vote from a proposed administrator that is an affected creditor, or from a related entity to the proposed administrator.

98. Under subsection 185C(2D), a debt agreement proposal provided to the Official Receiver must be accompanied by a certificate signed by the proposed administrator, certifying the proposed administrator has satisfied various requirements in setting up the debt agreement proposal with the debtor. Item 33 of Part 6 Schedule 1 inserts new paragraph 185C(2D)(g), which requires the proposed administrator to declare whether an affected creditor is also a related entity in the subsection 185C(2D) certificate. Since the debtor submits the subsection 185C(2D) certificate to the Official Receiver, the Official Receiver will therefore be able to identify which affected creditors are related entities of the proposed administrator. Under new paragraph 185EA(4)(b), the Official Receiver will not seek a vote from these affected creditors on the debt agreement proposal.

99. To be excluded from voting under new paragraph 185EA(4)(b), the affected creditor would need to be a related entity when they became an affected creditor, rather than when the proposed administrator fills out its disclosure under new paragraph 185C(2D)(g). This better captures circumstances where a creditor purchased debt, or provided credit, in such a way that could inappropriately influence voting on a debt agreement proposal.

100. Currently, subsection 185EC(1) provides the rule for acceptance of a debt agreement proposal. In order for the proposal to be accepted, a majority in value of the affected creditors who reply to the Official Receiver's request for a vote (under subsection 185EA(1)) must accept the debt agreement proposal.

101. As an example of how the majority in value rule currently operates – Jason's unsecured creditors are Credit 1, Credit 2 and Credit 3. He owes \$30,000 to Credit 1, \$20,000 to Credit 2 and \$20,000 to Credit 3. Jason submits a debt agreement proposal to the Official Receiver where he authorises proposed administrator Debt Agreements 123 to administer his debt agreement should it come into force. Debt Agreements 123 was a related entity to Credit 2 at the time Credit 2 became an affected creditor to Jason. After accepting the debt agreement proposal for processing, the Official Receiver requests a vote from the three affected creditors. All three creditors reply to the request: Credit 1 approves the proposal; Credit 2 and Credit 3 reject the proposal. Of the \$70,000 owed by Jason to his

three creditors, a majority in value is more than \$35,000. As Credit 1 has \$30,000 of voting power, the proposal is not accepted.

102. To ensure the results of the vote are not impacted by potential conflicts of interest, item 40 inserts new subsection 185EC(1A), which amends the acceptance rule to require the Official Receiver to disregard any votes received from the proposed administrator or a related entity of the proposed administrator.

103. If a proposed administrator does not disclose that an affected creditor was their related entity when they became an affected creditor, and the Official Receiver becomes aware of the relationship before the debt agreement proposal is accepted, new subsection 185EC(1A) will allow the Official Receiver to disregard the affected creditor's vote.

104. As an example of how the *amended* majority in value rule will operate – the example involving Jason, above, is identical. If Debt Agreements 123 fails to disclose that Credit 2 is a related entity, Jason will submit an incomplete subsection 185C(2D) certificate to the Official Receiver with the debt agreement proposal. After accepting the debt agreement proposal for processing, the Official Receiver requests a vote from the three affected creditors (being unaware at this stage that Credit 2 is a related entity of the proposed administrator). All three affected creditors reply to the request for a vote: Credit 1 approves the proposal; Credit 2 and Credit 3 reject the proposal. On receiving the votes, the Official Receiver becomes aware that Credit 2 is a related entity of the proposed administrator. Following new subsection 185EC(1A), the Official Receiver disregards the vote from Credit 2. With Credit 2 disregarded, the majority in value rule now disregards Credit 2's debt. Of the \$50,000 owed by Jason to Credit 1 and Credit 3, a majority in value is more than \$25,000. As Credit 1 has \$30,000 of voting power, the debt agreement proposal is accepted.

105. The conflict of interest concerns underlying amendments under items 39 and 40 do not apply where a debtor proposes to self-administer their own debt agreement, and an affected creditor is a related entity. Accordingly, items 39 and 40 insert new subsections 185EA(5) and 185EC(1B), which provide that a related entity to the proposed administrator is not prevented from voting on a debt agreement if the debtor is self-administering their agreement.

Item 41 – At the end of section 185EC

106. Under subparagraph 185C(2)(d)(i), a debt agreement proposal must provide that all provable debts under the agreement must rank equally. Prior to the commencement of this requirement, a debt agreement proposal could provide for the distribution of funds to creditors other than in proportion to their debts. This created an opportunity for creditors with larger debts, and consequently greater voting power under paragraph 185EC(1)(b), to request that the debt agreement provide them with more than their proportionate share of any dividends. These arrangements unfairly disadvantaged creditors with smaller debts. A creditor could circumvent the requirement for debts to rank equally by requesting cash incentives from the proposed administrator in exchange for its acceptance of the debt agreement proposal.

107. Item 41 inserts new subsection 185EC(6), which introduces an offence for a proposed administrator that gives, agrees, or offers to give an affected creditor an incentive for voting a certain way on a debt agreement proposal.

108. The offence for a proposed administrator contravening new subsection 185EC(6) is three months imprisonment. This punishment is appropriate to deter fraudulent conduct in the financial sector which can have severe consequences for both affected creditors and debtors.

Item 42 – Application provision

109. Item 42 sets out the application provisions for amendments to the Bankruptcy Act made under Part 6 Schedule 1. These provisions will apply in relation to debt agreement proposals given to the Official Receiver on or after commencement of item 42, being the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Schedule 2 – Debt agreements

AMENDMENTS TO THE *BANKRUPTCY ACT 1966*

GENERAL OUTLINE

110. The amendments in Schedule 2 set standards for the operation of debt agreements. These amendments cover the length of debt agreements and mechanisms for terminating and voiding debt agreements. The amendments also cover an administrator's duties in their administration of debt agreements.

Part 1 of Schedule 2 — Length of debt agreements

Item 1 – After subsection 185C(2)

111. Section 185C provides the requirements for a debt agreement proposal. Currently, there is no limitation on the proposed timeframe for making payments under the proposed debt agreement. As a consequence, debt agreements are frequently running for longer than five years, in part due to debtors proposing one or more variations to the debt agreement.

112. The option for a debtor to prolong a debt agreement through a variation could discourage a debtor and its proposed administrator from exercising financial prudence at the debt agreement proposal stage. For example, a debtor may commit to a payment schedule that is likely to be unaffordable, knowing that he or she can simply prolong the agreement if they cannot maintain the payments.

113. The absence of a limitation on the proposed timeframe could also contribute to unreasonably high dividend rates for lower income debtors. For example, if a debtor can only afford to pay a certain amount of money per month, it will always be possible to lengthen an agreement to meet that monthly payment. A creditor or the proposed administrator is therefore able to request an unreasonably high dividend or remuneration rate.

114. A long debt agreement prevents an insolvent debtor from achieving a fresh start. Item 1 of Part 1 Schedule 2 inserts a new provision into section 185C to specify that a debt agreement proposal must not propose to make payments under the agreement for a timeframe longer than three years from the day the agreement was made. A note in the new provision directs the reader to section 185H which clarifies 'when' a debt agreement is made. A three year timeframe aligns with the length of income contributions under bankruptcy.

Item 2 – Paragraph 185E(2)(a)

115. Section 185E provides the circumstances under which the Official Receiver may accept a debt agreement proposal for processing. This includes a requirement for the Official Receiver to be satisfied that subsections 185C(2), (2A), (2B), (2E) and (4) have been complied with.

116. Item 1 of Part 1 Schedule 2 inserts a new subsection 185C(2AA) into section 185C to specify that a debt agreement proposal must not propose to make payments under the agreement for a timeframe longer than three years from the day the agreement was made.

117. Item 2 of Part 1 Schedule 2 inserts a reference to new subsection 185C(2AA) into paragraph 185E(2)(a) to ensure that the Official Receiver does not accept a debt agreement proposal for processing if it proposes to make payments under the agreement for a timeframe longer than three years.

Items 3 and 4 – After subsection 185M(1C) and subsection 185M

118. Under subsection 185M(1) a debtor or a creditor who is a party to a debt agreement may give the Official Receiver a written proposal to vary the debt agreement. Currently, there is no limitation on the proposed timeframe for making payments under the agreement, including through a proposal to vary an existing debt agreement.

119. Item 3 of Part 1 Schedule 2 inserts a new subsection (1D) into section 185M to ensure that existing debt agreements cannot propose a variation if the timeframe for making payments under the agreement would be longer than three years from the day the agreement was made. A note in the new provision directs the reader to section 185H which clarifies ‘when’ a debt agreement is taken to be made.

120. Under subsection 185M(2), the Official Receiver must process a proposal to vary a debt agreement if it is satisfied that the proposal is in the approved form and is accompanied by an explanatory statement containing the relevant information. Item 4 of Part 1 Schedule 2 inserts a reference to new subsection 185M(1D) into subsection 185M(2) to ensure that the Official Receiver does not process the variation if the proposed timeframe for making payments under the agreement would be longer than three years from the day the agreement was made.

121. These amendments align with the new provision (subsection 185C(2AA)) inserted by item 1 of Part 1 Schedule 2 that provides a debt agreement proposal must not propose to make payments under the agreement for a timeframe longer than three years from the day the agreement was made.

122. The amendments created by Part 1 Schedule 2 limit the payment timeframe that a debtor can propose to three years. However, to ensure the debt agreement system has sufficient flexibility, this limitation does not prevent a debt agreement from running longer than the proposed timeframe, even where the agreement runs longer than three years. For example, if a debtor proposes a three year timeframe for making payments under the debt agreement, the obligations may not have been discharged three years after the day the agreement was made. Despite surpassing the proposed timeframe, the debt agreement will continue until it is terminated by six month arrears default under section 185QA (if it does not end or terminate earlier under another provision).

Item 5 – Application provisions

123. Item 5 sets out the application provisions for amendments to the Bankruptcy Act made under Part 1 Schedule 2.

124. The amendments to section 185C (item 1 – limiting the proposed timeframe for making payments under the agreement at three years) and section 185E (item 2 – prohibiting the Official Receiver from accepting a debt agreement proposal for a debt agreement that proposes to make payments under the agreement for a timeframe longer than three years) will apply in relation to debt agreement proposals given to the Official Receiver on or after

the commencement of item 5 of Part 1 Schedule 2, being the day after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent. This will ensure that new debt agreement proposals cannot propose to make payments under the agreement for a timeframe longer than three years.

125. The amendments to section 185M (items 3 and 4 – prohibiting variations to debt agreements that would extend the proposed timeframe for making payments under the agreement beyond three years) will apply in relation to debt agreements that come into force on or after the commencement of item 5 of Part 1 Schedule 2, where the debt agreement proposals were given on or after that commencement. This will ensure that the restriction on proposed timeframes does not apply to a variation proposal unless the original proposal was also subject to the same restriction.

Part 2 of Schedule 2 — Proposals to vary debt agreements

Items 6 and 7 – After subsection 185LG(2) and after subsection 185M(1D)

126. Under paragraph 185C(2D)(c), the proposed administrator is required to certify that the payments under the debt agreement proposal are sustainable. ‘Sustainability’ in this context refers to the debtor being able to discharge the obligations created by the debt agreement as and when they fall due. This provision prevents the debtor and creditors from entering into agreements that are likely to fail. It also ensures that the debtor does not endure undue financial hardship by committing to an unfeasible payment schedule.

127. Item 20 of Part 4 Schedule 1 inserts new paragraph 185C(4)(e), which provides that a debtor cannot give the Official Receiver a debt agreement proposal if the total payments under agreement exceed the debtor’s income by a certain percentage. Item 21 of Part 4 Schedule 1 provides that the Minister can determine this percentage by legislative instrument under new subsection 185C(4B).

128. Comparing a debtor’s required payments under a debt agreement to their after tax income is a useful gauge for the sustainability of a payment schedule, since a debtor’s income is usually the primary source of their payments. However, comparing a yearly figure (the debtor’s after tax income) with an amount which is not necessarily a yearly figure (the total amount of payments the debtor is required to make under a debt agreement), creates an asymmetry of parameters in calculating the relevant percentage. Due to this asymmetry, prescribing an appropriate percentage would need to account for the fact that agreements last for different timeframes.

129. Item 1 of Part 1 Schedule 2 inserts a new provision into section 185C to specify that a debt agreement proposal must not propose to make payments under the agreement for a timeframe longer than three years from the day the agreement was made. A note in the new provision directs the reader to section 185H which clarifies ‘when’ a debt agreement is made.

130. By limiting the proposed timeframe for making payments under a debt agreement to three years, these amendments will allow the Minister to calibrate the determined percentage to a three year payment schedule. While this percentage would not always capture an excessive payment schedule caused by a shorter timeframe, the Official Receiver can use its powers created by Part 5, Schedule 1 to refuse the debt agreement proposal on the basis that the agreement would cause the debtor undue hardship.

131. Notwithstanding paragraph 185C(2D)(c), and the amendments in Part 4 Schedule 1, the debt agreement administrator is not currently required to certify that a variation proposal made under section 185M is sustainable. As such, it is currently possible for debt agreements to be varied in a manner which creates unsustainable payment obligations for the debtor.

132. Item 7 of Part 2 Schedule 2 inserts subsections 185M(1E) and 185M(1F) aimed at ensuring that variations to a debt agreement are sustainable.

133. New subsection 185M(1E) provides a formula to be used to calculate the amount allowable for repayment under a variation to a debt agreement. The formula stipulates that the total of the payments that the debtor would be required to make under the varied agreement divided by the debtor's after tax income, should not exceed the percentage outlined in the instrument to be made by the Minister under new subsection 185C(4B), as per item 21 of Part 4 Schedule 1. This creates an alignment with the amendments at item 20 of Part 4 Schedule 1, relating to the amount allowable for repayment under an original debt agreement proposal.

134. New subsection 185M(1F) requires the debt agreement administrator to certify that the debtor is likely to be able to discharge the obligations created by the agreement (as proposed to be varied) as and when they fall due. This creates an alignment with the existing requirements of administrators under paragraph 185C(2D)(c) when dealing with proposals to enter into debt agreements.

135. Item 6 of Part 2 Schedule 2 inserts subsection 185LA(3) to ensure that the debt agreement administrator certifies that the information contained in a subsection 185M(1F) certificate (relating to the sustainability of payment under a varied agreement) is correct before signing it. Given the consequences to a debtor and affected creditors of entering into an unsustainable agreement, a debt agreement administrator that breaches this duty can be issued with a show-cause notice under sections 186K or 186L, which can result in cancellation of registration as a debt agreement administrator.

Item 8 – Subsection 185M(2)

136. Under subsection 185M(2), the Official Receiver may process a proposal to vary a debt agreement if it is satisfied that the proposal is in the approved form and is accompanied by an explanatory statement containing the relevant information. Item 8 of Part 2 Schedule 2 inserts a reference to new subsections 185M(1E) and (1F) into subsection 185M(2). This will allow the Official Receiver to refuse to process the variation if it is satisfied that the proposal will create payment obligations that the debtor is unlikely to be able to discharge.

Item 9 – After subsection 185M(2)

137. The amendments contained in Parts 1 and 2 of Schedule 2 are intended to ensure that debt agreements cannot be varied in a manner which creates unsustainable payment obligations for the debtor. Under subsection 185M(2), the Official Receiver must process a proposal to vary a debt agreement if it is satisfied that the proposal is in the approved form and is accompanied by an explanatory statement containing the relevant information. Item 4 of Part 1 Schedule 2 inserts a reference to new subsection 185M(1D) into subsection 185M(2) to ensure that the Official Receiver does not process the variation if the proposed timeframe for making payments under the agreement would be longer than three years from the day the agreement was made.

138. Items 6 and 7 of Part 2 Schedule 2 also insert new subsections 185M(1E) and 185M(1F), which provide a formula to be used to calculate the amount allowable for repayment under a variation to a debt agreement, and require the debt agreement administrator to certify that the debtor is likely to be able to discharge the obligations created by the agreement (as proposed to be varied) as and when they fall due.

139. Consistent with other amendments contained in Parts 1 and 2 of Schedule 2, item 9 of Part 2 Schedule 2 inserts a new subsection 185M(2A), which provides that the Official Receiver can refuse to accept a debt agreement variation proposal for processing if the Official Receiver reasonably believes that complying with the debt agreement (as proposed to be varied) would cause undue hardship to the debtor.

140. This provision aligns the debt agreement variation proposal stage with the insertion of new subsection 185E(2AB) at the debt agreement proposal stage (as inserted by item 23 of Part 5 Schedule 1). In line with the intent of new subsection 185E(2AB), it is envisaged that the Official Receiver would only be called upon in exceptional circumstances to consider whether to exercise its discretion under new subsection 185M(2A) not to send the debt agreement variation proposal to affected creditors for voting. For example, when facts have been brought to the Official Receiver's attention which leads the Official Receiver to reasonably believe that complying with the debt agreement (as proposed to be varied) would cause the debtor undue hardship.

141. Under current subsection 185E(4), the debtor has a right to apply to the Administrative Appeals Tribunal (AAT) for a review of the Official Receiver's decision on whether to accept a debt agreement proposal for processing. Similarly, subsection 185MD(4) makes provision for a debtor or an affected creditor to apply to the AAT for a review of the Official Receiver's decision to withdraw a proposal to vary a debt agreement under subsection 185MD(2). Subsection 185MD(3) further requires the Official Receiver to provide written notice of the decision, and the reasons for the decision, to withdraw a proposal to vary a debt agreement to the debtor and any affected creditors who are known to the Official Receiver. No similar provisions currently exist to allow for a debtor or an affected creditor in relation to the Official Receiver's decision not to process a debt agreement variation proposal.

142. According to the Attorney-General's Department's Australian Administrative Law Policy Guide, as a matter of policy, an administrative decision that will, or is likely to, adversely affect the interests of a person should be subject to merits review, unless it would be inappropriate or there are factors justifying the exclusion of merits review. In line with this principle, and to ensure consistency with subsections 185E(4) and 185MD(3) and (4), item 9 of Part 2 Schedule 2 also inserts new subsections 185M(2B) and (2C).

143. New subsection 185M(2B) requires the Official Receiver to provide written notice of the decision, and the reasons for the decision, not to process a proposal to vary a debt agreement to the debtor and any affected creditors who are known to the Official Receiver. New subsection 185M(2C) further allows the debtor or an affected creditor to seek AAT review of that decision.

Items 10 and 11 – At the end of section 185MA and after subsection 185MC(1)

144. Currently, on processing a proposal to vary a debt agreement, subsection 185MA(1) requires the Official Receiver to seek approval to the variation from each affected creditor. Paragraph 185MA(2)(a) ensures each affected creditor receives a copy of the debt agreement variation proposal and an explanatory statement, to assist with the approval process.

145. If the debt agreement administrator charged an upfront fee before the debtor submitted the debt agreement proposal, and the debtor had not fully paid the fee when they submitted the debt agreement proposal, the administrator would be an affected creditor with voting rights at the proposal and variation stages. The administrator could also have voting rights under a debt agreement they are administering if they hold a credit licence and previously lent the debtor money. Alternatively, a related entity of the administrator could be an affected creditor of the debt agreement to be varied.

146. Allowing an administrator, or its related entity, to vote on a variation to an agreement they are administering creates a conflict of interest. If the administrator is the only creditor to vote on a variation proposal, its vote will bind all creditors. Alternatively, the voting result may turn on the administrator's vote. This conflict of interest undermines public and creditor confidence in the debt agreement system.

147. Item 10 therefore inserts a new subsection 185MA(4). New paragraph 185MA(4)(a) provides that the Official Receiver should not request a vote on a debt agreement variation proposal from an administrator that is an affected creditor. This provision aligns with new paragraph 185EA(4)(a), inserted by item 39 of Part 6 Schedule 1, which provides that the Official Receiver must not seek a vote on a debt agreement proposal from a proposed administrator.

148. Under subsection 185C(2D), an original debt agreement proposal provided to the Official Receiver must be accompanied by a certificate signed by the proposed administrator, certifying the proposed administrator has satisfied various requirements in setting up the debt agreement proposal with the debtor. Item 33 of Part 6 Schedule 1 inserts new paragraph 185C(2D)(g), which requires the proposed administrator to declare whether an affected creditor is also a related entity in the subsection 185C(2D) certificate. Since the debtor submits the subsection 185C(2D) certificate to the Official Receiver at the debt agreement proposal stage, the Official Receiver will therefore be able to identify which affected creditors are related entities of the proposed administrator.

149. Under new paragraph 185MA(4)(b), the Official Receiver will not seek a vote from these affected creditors on the proposal to vary the debt agreement. This provision aligns with new paragraph 185EA(4)(b), inserted by item 39 of Part 6 Schedule 1, which provides that the Official Receiver must not seek a vote on a debt agreement proposal from an affected creditor who was a related entity to the proposed administrator upon becoming an affected creditor.

150. Currently subsection 185MC(1) provides the rule for acceptance of a variation proposal. In order for the proposal to be accepted, a majority in value of affected creditors who reply to the Official Receiver's request for a vote (under subsection 185MA(1)) must accept the debt agreement variation proposal.

151. To ensure the results of the vote are not impacted by potential conflicts of interest, item 11 inserts new subsection 185MC(1A) which amends the acceptance rule to require the Official Receiver to disregard any votes from the proposed administrator or a related entity of the proposed administrator.

152. The conflict of interest concerns underlying amendments under items 10 and 11 do not apply where an administrator is self-administering their own debt agreement, and an affected creditor is a related entity. Accordingly, items 10 and 11 insert new subsections 185MA(5) and 185MC(1B), which provide that a related entity to the administrator is not prevented from voting on a debt agreement variation proposal if the debtor is self-administering their agreement.

153. These amendments align with the amendments made at items 39 and 40 of Part 6 Schedule 1 which preclude the administrator or a related entity of the administrator from voting on a proposal to establish a debt agreement, except in circumstances where the administrator is the debtor and the related entity is an affected creditor. Together with the amendments at items 13 and 14 of Part 3 Schedule 2, these amendments will reduce conflicts of interest and increase fairness for affected creditors in the voting process.

Item 12 – At the end of section 185MC

154. Item 12 inserts subsection 185MC(6), which introduces an offence for a debt agreement administrator that gives, agrees, or offers to give an affected creditor any valuable consideration with a view to securing the affected creditor's acceptance or non-acceptance of the proposal to vary the agreement. This will expressly prohibit administrators offering affected creditors cash payments in return for the creditor voting to approve the variation to the debt agreement.

155. The offence for an administrator contravening new subsection 185MC(6) is 3 months imprisonment. These amendments align with the amendments made at item 41 of Part 6 Schedule 1 which introduces an offence for a debt agreement administrator that gives, agrees or offers to give an affected creditor valuable consideration in relation to a proposal to accept a debt agreement. This punishment is appropriate to deter fraudulent conduct in the financial sector which can have severe consequence for both creditors and debtors.

Item 13 – Application provisions

156. Item 13 sets out the application provisions for amendments to the Bankruptcy Act made under Part 2 Schedule 2. These application provisions ensure that the amendments do not apply to proposals to vary debt agreements, where the original debt agreement proposal was given to the Official Receiver before commencement of item 13, being immediately after the commencement of item 5 of Part 1 Schedule 2. This means the amendments will only apply to debt agreements which were proposed immediately after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Part 3 of Schedule 2 — Proposals to terminate debt agreements

Items 14 and 15 – At the end of section 185PA and after subsection 185PC(1)

157. Currently, on processing a proposal to terminate a debt agreement, subsection 185PA(1) requires the Official Receiver to seek approval to the termination from

each affected creditor. Paragraph 185PA(2)(a) ensures each affected creditor receives a copy of the debt agreement termination proposal and an explanatory statement, to assist with the approval process.

158. If the debt agreement administrator charged an upfront fee before the debtor submitted the debt agreement proposal, and the debtor had not fully paid the fee when they submitted the debt agreement proposal, the administrator would be an affected creditor with voting rights at the proposal, variation and termination stages. The administrator could also have voting rights under a debt agreement they are administering if they hold a credit licence and previously lent the debtor money. Alternatively, a related entity of the administrator could be an affected creditor of the debt agreement to be terminated.

159. Allowing an administrator, or its related entity, to vote on a proposal to terminate a debt agreement they are administering creates a conflict of interest. If the administrator is the only creditor to vote on a termination proposal, its vote will bind all creditors. Alternatively, the voting result may turn on the administrator's vote. This conflict of interest undermines public and creditor confidence in the debt agreement system.

160. Item 14 therefore inserts a new subsection 185PA(4). New paragraph 185PA(4)(a) provides that the Official Receiver should not request a vote on a proposal to terminate a debt agreement from an administrator that is an affected creditor. This provision aligns with new paragraph 185EA(4)(a), inserted by item 39 of Part 6 Schedule 1, and new paragraph 185MA(4)(a), inserted by item 10 of Part 2 Schedule 2, which provide that the Official Receiver must not seek a vote on a proposal to establish or vary a debt agreement from a proposed administrator.

161. Under subsection 185C(2D), an original debt agreement proposal provided to the Official Receiver must be accompanied by a certificate signed by the proposed administrator, certifying the proposed administrator has satisfied various requirements in setting up the debt agreement proposal with the debtor. Item 33 of Part 6 Schedule 1 inserts new paragraph 185C(2D)(g), which requires the proposed administrator to declare whether an affected creditor is also a related entity in the subsection 185C(2D) certificate. Since the debtor submits the subsection 185C(2D) certificate to the Official Receiver at the debt agreement proposal stage, the Official Receiver will therefore be able to identify which affected creditors are related entities of the proposed administrator.

162. Under new paragraph 185PA(4)(b), the Official Receiver will not seek a vote from these affected creditors on the proposal to vary the debt agreement. This provision aligns with new paragraph 185EA(4)(b), inserted by item 39 of Part 6 Schedule 1, and new paragraph 185MA(4)(a), inserted by item 10 of Part 2 Schedule 2, which provide that the Official Receiver must not seek a vote on a proposal to establish or vary a debt agreement from an affected creditor who was a related entity to the proposed administrator upon becoming an affected creditor.

163. Currently subsection 185PC(1) provides the rule for acceptance of a proposal to terminate a debt agreement. In order for the proposal to be accepted, a majority in value of affected creditors who reply to the Official Receiver's request for a vote (under subsection 185PA(1)) must accept the debt agreement termination proposal.

164. To ensure the results of the vote are not impacted by potential conflicts of interest, item 15 inserts new subsection 185PC(1A) which amends the acceptance rule to require the

Official Receiver to disregard any votes from the proposed administrator or a related entity of the proposed administrator.

165. The conflict of interest concerns underlying amendments under items 14 and 15 do not apply where an administrator is self-administering their own debt agreement, and an affected creditor is a related entity. Accordingly, items 14 and 15 insert new subsections 185PA(5) and 185PC(1B), which provide that a related entity to the administrator is not prevented from voting on a debt agreement termination proposal if the debtor is self-administering their agreement.

166. These amendments align with the amendments made at items 39 and 40 of Part 6 Schedule 1 which preclude the administrator or a related entity of the administrator from voting on a proposal to establish a debt agreement, except in circumstances where the administrator is the debtor and the related entity is an affected creditor. Together with the amendments at items 10 and 11 of Part 2 Schedule 2, these amendments will reduce conflicts of interest and increase fairness for affected creditors in the voting process.

Item 16 – At the end of section 185PC

167. Item 16 inserts subsection 185PC(6), which introduces an offence for a debt agreement administrator that gives, agrees, or offers to give an affected creditor any valuable consideration with a view to securing the affected creditor's acceptance or non-acceptance of the proposal to terminate the agreement. This will expressly prohibit administrators offering affected creditors cash payments in return for the creditor voting to approve the termination of the debt agreement.

168. The offence for an administrator contravening new subsection 185PC(6) is 3 months imprisonment. These amendments align with the amendments made at item 41 of Part 6 Schedule 1 and item 12 of Part 2 Schedule 2 which introduce offences for a debt agreement administrator that gives, agrees or offers to give an affected creditor valuable consideration in relation to a proposal to accept or vary a debt agreement. This punishment is appropriate to deter fraudulent conduct in the financial sector which can have severe consequence for both creditors and debtors

Item 17 – Application provisions

169. Item 17 sets out the application provisions for amendments to the Bankruptcy Act made under Part 3 Schedule 2. These application provisions ensure that the amendments do not apply to proposals to terminate debt agreements, where the original debt agreement proposal was given to the Official Receiver before commencement of item 17, being immediately after the commencement of Parts 2 to 6 of Schedule 1. This means the amendments will only apply to debt agreements which were proposed immediately after the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Part 4 of Schedule 2 — Court orders to terminate debt agreements

Item 18 – After paragraph 185Q(4)(b)

170. Subsection 185Q(4) currently provides that the Court can make an order to terminate a debt agreement in certain circumstances. This includes if the debtor has failed to carry out

a term of the agreement, if carrying out the agreement would cause injustice or undue delay to the creditors or the debtor, or for any other reason the agreement should be terminated and it is in the creditors' interest to do so.

171. Item 18 of Part 4 Schedule 2 inserts a new paragraph 185Q(4)(ba) which provides that the Court may make an order to terminate a debt agreement on the grounds that the administrator has contravened any of the new subsections 185EC(6), 185MC(6) or 185PC(6), inserted by item 41 of Part 6 Schedule 1, item 12 of Part 2 Schedule 2 and item 15 of Part 3 Schedule 2. These new provisions make it an offence for the administrator to give, agree or offer to give an affected creditor any valuable consideration (for a vote on a proposal to accept, vary or terminate a debt agreement) with a view to securing the affected creditor's acceptance or non-acceptance of the proposal.

172. Notwithstanding that the Court can currently make orders to terminate an agreement under paragraph 185Q(4)(c) 'for any other reason', this amendment provides express authority for the Court to terminate an agreement for contravention of the new subsections 185EC(6), 185MC(6) or 185PC(6) which is appropriate given the gravity of the offences referred to in those provisions.

Part 5 of Schedule 2 — Voiding debt agreements

Items 19 to 22 – Subsection 185T(2)

173. A debt agreement is not always an appropriate debt relief option for a debtor. Given that many debtors have low financial literacy, an unscrupulous administrator is in a position to exploit a debtor's lack of knowledge. In many circumstances, it is difficult to verify whether a debtor was misled through unprofessional conduct. However in some circumstances, it may be clear that an administrator breached a duty under the Act in establishing the debt agreement. For example, the administrator might have breached its duty to certify the subsection 185C(2D) certificate, as stated in paragraph 185LG(2)(b).

174. Under paragraph 185Q(4)(b), a debtor can apply to the Court to terminate a debt agreement if it would cause him or her injustice. However, for a debtor that is in a substantially worse position by virtue of having carried out part of a debt agreement, termination cannot undo the harm inflicted on the debtor.

175. Section 185T provides that a debtor, a creditor or the Official Receiver may apply to the Court for an order declaring that all, or a specific part, of a debt agreement is void. Subsection 185T(2) provides the grounds under which an order of that nature may be made. Currently this is limited to two circumstances: if all or part of the debt agreement was not made in accordance with, or comply with, Part IX of the Bankruptcy Act; or if the statement of affairs lodged with the debt agreement omitted a material particular or was incorrect.

176. If an application under section 185T is successful, the Court can order to declare a debt agreement void under subsection 185U(1), and can additionally order compensation under subsection 185U(6). Unlike termination, this empowers a court to put a debtor into a similar position as they would have been had the debt agreement not been entered into. However, it is unclear whether this option is available to a debtor who entered into a debt agreement on the basis of poor administrator conduct amounting to a breach of statutory duty under Part IX of the Bankruptcy Act.

177. Items 19 to 21 of Part 5 Schedule 2 extend the grounds on which an application can be made to the Court for an order declaring that a debt agreement is void to include instances where an administrator: has committed a breach of duty; has breached a condition in an instrument under new subsection 186F(4) or 186G(2B); or has breached a condition imposed under section 20-35 of Schedule 2 of the Bankruptcy Act. These amendments ensure that a debtor can be put into a similar position they would have been had the debt agreement not been entered into. This includes removing the debtor's name from the National Personal Insolvency Index, awarding damages, and declaring that the debtor has not committed an act of bankruptcy. The Court will have the power to make such orders as it sees fit in relation to the debt agreement.

178. Item 22 provides that the amendments made under Part 5 Schedule 2 apply in relation to debt agreements that come into force on or after the commencement of item 22, being immediately after the commencement of Parts 2 to 6 of Schedule 1 (which commence at the end of the period of six months beginning on the day the Amending Act receives the Royal Assent).

Part 6 of Schedule 2 — Debt agreement administrators to refer evidence of offences

Item 23 – At the end of subsection 185LA(1)

179. Section 185LA sets out general duties of an administrator of a debt agreement. These duties include dealing with the debtor's property in the manner specified in the debt agreement, and giving information about the administration of the agreement to the debtor and the creditor(s) in certain circumstances.

180. Under paragraphs 19(1)(h) and (i) a trustee has a duty to consider whether the bankrupt has committed any offences under the Bankruptcy Act and, if so, to refer the conduct to the Inspector-General or to relevant law enforcement authorities. Administrators currently have no similar duty.

181. Item 23 of Part 6 Schedule 2 amends section 185LA to extend the duties of a debt agreement administrator to reflect those conferred on trustees under paragraphs 19(1)(h) and (i) of the Bankruptcy Act. This will improve the integrity of the debt agreement regime and ensure that misconduct is dealt with promptly by the appropriate law enforcement authorities.

Item 24 – Application provision

182. Item 24 provides that the amendments made under Part 6 Schedule 2 apply in relation to debt agreements that come into force on or after the commencement of item 24, where the debt agreement proposals were given on or after that commencement. Item 24 commences immediately after the commencement of Parts 2 to 6 of Schedule 1 (which commence at the end of the period of six months beginning on the day the Amending Act receives the Royal Assent).

Part 7 of Schedule 2 — Reporting requirements for debtors in arrears

Items 25 to 27 – Subsection 185LB(3)

183. Section 185LB provides that the administrator of a debt agreement must notify creditors of a 3-month arrears default by the debtor in certain circumstances. Currently this obligation applies regardless of the amount of the arrears. If the arrears amount is particularly low, the administrative cost of complying with this obligation may exceed the likely benefits.

184. Items 25 to 27 amend subsection 185LB(3) to increase the threshold by which an administrator is obliged to report a 3-month arrears default. Item 27 inserts new subparagraph (c)(i) into subsection 185LB(3) to provide that administrators are only required to report to creditors under 185LB(1) if the value of the arrears exceeds either 20 per cent of the payment due for the period, or \$300, whichever is higher.

185. Item 27 inserts new subparagraph 185LB(3)(c)(ii) which provides that the administrator must report the 3-month arrears default if no payment was made in the period to reduce any of the due payments.

186. These amendments ensure that administrators are only required to notify creditors of a 3-month arrears default by a debtor if the amount that the debtor is in arrears is significant having regard to the value of the payments due and the cost of notifying creditors. New subparagraph 185LB(3)(c)(i) stipulates the applicable amount as both a percentage and monetary amount to avoid capturing circumstances which should not be reported.

Item 28 – Application provision

187. Item 28 provides that the amendments made under Part 7 Schedule 2 apply in relation to debt agreements that come into force on or after the commencement of item 28, being immediately after the commencement of Parts 2 to 6 of Schedule 2 (which commence at the end of the period of six months beginning on the day the Amending Act receives the Royal Assent).

Part 8 of Schedule 2 — Alignment of offences

Item 29 – After subsection 185LD(2)

188. Section 185LD requires the administrator to maintain a separate bank account for funds relating to the debt agreement. This enables accounts holding debt agreement moneys to be more readily identified by the Inspector-General in the performance of its regulatory functions. It also assists in the identification of moneys to which each debt agreement applies. Only debt agreement funds may be deposited into this account.

189. Sections 65-5 and 65-15 of Schedule 2 of the Bankruptcy Act contain the equivalent provisions to section 185LD relating to trustees. Building on from this, section 65-25 of Schedule 2 prohibits trustees from paying any money out of the administration account other than for the purposes of administration of the estate, in accordance with the Bankruptcy Act, or by direction of the Court. There is no equivalent to section 65-25 of Schedule 2 which relates to administrators.

190. Item 29 of Part 8 Schedule 2 inserts a new subsection 185LD(2A) which mirrors the prohibitions contained at section 65-25 of Schedule 2. This amendment prohibits debt agreement administrators from paying any money out of the account other than for the

purposes of administration of the debt agreement, in accordance with the Bankruptcy Act, or by direction of the Court.

191. These amendments align the bankruptcy and debt agreement regimes and improve the integrity of the debt agreement regime by ensuring that trust accounts are easily identifiable and appropriately regulated.

Item 30 – After section 185LD

192. Section 185LD requires the administrator to maintain a separate bank account for funds relating to the debt agreement. This enables accounts holding debt agreement moneys to be more readily identified by the Inspector-General in the performance of its regulatory functions. It also assists in the identification of moneys to which each debt agreement applies. Only debt agreement funds may be deposited into this account.

193. Sections 65-5 and 65-15 of Schedule 2 of the Bankruptcy Act contain the equivalent provisions to section 185LD relating to trustees. Those provisions attach a strict liability offence of 50 penalty units for failure to comply. Currently no strict liability offence applies to administrators who breach section 185LD.

194. Item 30 of Part 8 Schedule 2 inserts a new strict liability offence provision of 50 penalty units, consistent with the provisions relating to trustees at sections 65-5 and 65-15 of Schedule 2, for contravention of established subsections 185LD(1) and 185LD(2), and new subsection 185LD(2A), as inserted by item 29 of Part 8 Schedule 2.

195. The application of strict liability, as opposed to absolute liability, preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities. This defence maintains adequate checks and balances for individuals who may be accused of breaching such offences.

196. Strict liability offences are appropriate in this area of regulation, as it is necessary to strongly deter misconduct that can have serious consequences for affected parties. Strict liability offences also reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by the AFSA. Strict liability is particularly beneficial to these regulatory bodies as they need to deal with offences expeditiously to maintain public confidence in their regulatory regimes.

197. The strict liability offences in new subsection 185LD(2A) meet all the conditions listed in the Guide to Framing Commonwealth Offences (pages 23 and 24). For example, the fines for the offences do not exceed 60 penalty units for an individual. By providing a strict liability enforcement regime for duties of debt agreement administrators, the Bill significantly enhances the likelihood of compliance by administrators.

198. This amendment aligns the bankruptcy and debt agreement regimes and improves the integrity of the debt agreement regime by ensuring that trust accounts are easily identifiable and appropriately regulated.

Item 31 – After subsection 185LE(1)

199. Subsection 185LE(1) requires a debt agreement administrator to keep sufficient records as are necessary to give a full and correct depiction of the administration of each

debt agreement. The subsection also provides the Inspector-General with the power to access the administrator's records and require the administrator to answer an inquiry in relation to a debt agreement, in order to facilitate its regulatory functions pursuant to the Bankruptcy Act.

200. Section 70-10 of Schedule 2 of the Bankruptcy Act contains the equivalent provision to section 185LE relating to trustees' obligation to keep proper books. That provision attaches a strict liability offence of 5 penalty units for failure to comply. Currently no strict liability offence applies to administrators who breach section 185LE.

201. Item 31 of Part 8 Schedule 2 inserts a new strict liability offence provision of 5 penalty units, consistent with the provision relating to trustees at section 70-10 of Schedule 2 of the Bankruptcy Act, for contravention of paragraphs 185LE(1)(a) or 185LE(1)(b).

202. The application of strict liability, as opposed to absolute liability, preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities. This defence maintains adequate checks and balances for individuals who may be accused of breaching such offences.

203. Strict liability offences are appropriate in this area of regulation, as it is necessary to strongly deter misconduct that can have serious consequences for affected parties. Strict liability offences also reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by the AFSA. Strict liability is particularly beneficial to these regulatory bodies as they need to deal with offences expeditiously to maintain public confidence in their regulatory regimes.

204. The strict liability offences in new subsection 185LE(1A) meet all the conditions listed in the Guide to Framing Commonwealth Offences (pages 23 and 24). For example, the fines for the offences do not exceed 60 penalty units for an individual. By providing a strict liability enforcement regime for duties of debt agreement administrators, the Bill significantly enhances the likelihood of compliance by administrators.

205. This amendment aligns the bankruptcy and debt agreement regimes and improves the integrity of the debt agreement regime by ensuring that records of trust accounts are correct, which will assist the Inspector-General in administering the regulatory functions under the Bankruptcy Act.

Item 32 – Subsection 277B(2) (after table item 5)

206. Section 277B provides that as an alternative to prosecution, a penalty of an amount set out in the table contained in subsection 277B(2), can be imposed through an infringement notice.

207. New subsection 185LE(1A), inserted by item 31 of Part 8 Schedule 2, provides that a debt agreement administrator commits an offence if they fail to keep sufficient records and make the records available for audit under section 185LE.

208. Item 32 of Part 8 Schedule 2 inserts a new provision into the table contained in subsection 277B(2) which provides that a breach of new subsection 185LE(1A) can, where appropriate, be addressed by way of infringement notice with an amount payable to the value of 1 penalty unit.

209. This amendment aligns with the penalty amounts set out for the equivalent of section 185LE relating to trustees contained at sections 70-10 and 70-25 of Schedule 2 of the Bankruptcy Act. Those provisions also allow an offence can be addressed by way of infringement notice with a value of 1 penalty unit.

Item 33 – Application provisions

210. Item 33 sets out the application provisions for amendments to the Bankruptcy Act made under Part 8 Schedule 2.

211. The amendments to subsection 185LD(2A) (item 28 – prohibiting money to be paid out of the trust account in certain circumstances) will apply in relation to debt agreement proposals that come into force on, after, or were in force immediately before commencement of item 33, being immediately after the commencement of Parts 2 to 6 of Schedule 2 (which commence at the end of the period of six months beginning on the day the Amending Act receives the Royal Assent). Accordingly, a debtor breaches a duty under new subsection 185LD(2A) regardless of whether the debt agreement came into force after commencement of item 33, or was in force immediately before commencement (even if the breach took place before commencement of item 33). The retrospective application of this duty reflects the seriousness of breaching it.

212. The amendments to section 185LDA (item 30 – creating an offence for breach of duties relating to the trust account) will apply in relation to money received on or after commencement of item 33. The new offence relating to subsection 185LD(2A) will only apply to money paid out of the account on or after the commencement of item 32. Accordingly, an administrator that breaches the duty under new subsection 185LD(2A) for an act committed before commencement of item 33, does not commit an offence under new section 185LDA.

213. New subsection 185LE(1A) (item 31 – creates an offence against administrators for failing to keep sufficient records) will apply in relation to debt agreements that come into force on or after the commencement of item 33.

Part 9 of Schedule 2 — Time for submitting annual returns

Item 34 – Subsection 185LEA(1)

214. Every year an administrator must prepare and submit to the Inspector-General an annual return which collates and details information on active debt agreements managed by the administrator. The annual return is intended to inform the AFSA's report to Parliament on the operation of the Bankruptcy Act. Under paragraph 12(1)(d), AFSA must report on the operation of the Bankruptcy Act after the financial year. In practice, AFSA integrates this report into its annual report. Section 46 of the Public Governance, Performance and Accountability Act 2013 states that government agencies, such as AFSA, must submit annual reports by 15 October.

215. Subsection 185LEA(1) states that an administrator must submit an annual return to the Inspector-General within 35 days after the financial year. Paragraph 70-5(3)(b) of Schedule 2 of the Bankruptcy Act states that the corresponding deadline for registered trustees is 25 business days. While 35 days and 25 business days denote a similar timeframe, the inconsistency hinders AFSA's collection and processing functions.

216. Item 34 of Part 9 Schedule 2 amends subsection 185LEA(1) so that the applicable deadline for annual return submission is 25 business days after the financial year. This ensures consistency between the deadlines for trustee and debt agreement administrator annual returns and assists AFSA to perform its regulatory functions.

Item 35 – Application provision

217. The amendments made by Part 9 of Schedule 2 apply in relation to financial years ending after the commencement of item 35, being immediately after the commencement of Parts 2 to 6 of Schedule 2 (which commence at the end of the period of six months beginning on the day the Amending Act receives the Royal Assent).

Schedule 3 – Registered debt agreement administrators

AMENDMENTS TO THE *BANKRUPTCY ACT 1966*

GENERAL OUTLINE

218. The amendments in Schedule 3 modify the standards that registered debt agreement administrators must satisfy. These amendments cover a registered debt agreement administrator's prerequisites for registration, ongoing obligations and grounds for deregistration. The amendments also cover the Inspector-General's powers to investigate registered debt agreement administrators.

Part 1 of Schedule 3 — Applications for registration

Items 1 and 2 – Section 185

219. Paragraph 20-20(4)(b) of Schedule 2 of the Bankruptcy Act requires a registered trustee to take out professional indemnity insurance and fidelity insurance to qualify for registration. Currently there is no similar requirement for applicants seeking registration as debt agreement administrators to hold insurance. The absence of a requirement to hold insurance is problematic because large amounts of money flow through the debt agreement system and the larger administrators deal with considerably larger inflows of money than an average registered trustee.

220. Items 6 to 13 of Part 1 Schedule 3 insert provisions that require debt agreement administrators to obtain adequate and appropriate professional indemnity and fidelity insurance, similar to the requirements set out in paragraph 20-20(4)(b) of the Bankruptcy Act, in order to have their applications for registration and renewal of registration approved by the Official Receiver.

221. Section 185 provides definitions for Part IX of the Bankruptcy Act. Item 1 of Part 1 Schedule 3 inserts new definitions of 'adequate and appropriate fidelity insurance' and 'adequate and appropriate professional indemnity insurance' (to apply to Part IX only) to incorporate the meaning of those phrases as effected by new section 185A.

222. New section 185A, as inserted by item 2 of Part 1 Schedule 3, provides that the Inspector-General may determine, in a legislative instrument, what constitutes adequate and appropriate insurance in specified circumstances or for specified classes of registered debt agreement administrators. This amendment aligns with the equivalent provision for trustees at section 25-1 of Schedule 2 of the Bankruptcy Act. It ensures that the Inspector-General can adjust the insurance requirements as necessary to reflect current practices and regulatory standards.

Items 3 and 4 – Subsection 186C(1)

223. Currently under subsection 186C(1), the Inspector-General must approve or refuse to approve an application for registration as a debt agreement administrator within 60 days of receiving the application. The process to assess an application is time-consuming, as the Inspector-General must undertake necessary checks as well as process the application before arranging an interview with the applicant. There is not currently a legislative requirement for

the Inspector-General to interview applicants, however in practice this routinely takes place as part of the assessment process.

224. Item 3 of Part 1 Schedule 3 inserts a new subsection (1A) into section 186C to require the Inspector-General to interview applicants for registration as debt agreement administrators as soon as practicable after receiving the application. This amendment will minimise delays in processing applications and provide the Inspector-General with sufficient flexibility to adjust timeframes to reflect the varying levels of complexity that each application presents. This amendment aligns with a similar obligation for the assessment of trustee registrations under regulation 8.30 of the Bankruptcy Regulations.

225. Item 4 of Part 1 Schedule 3 amends subsection 186C(1) so that the Inspector-General's deadline for making a decision is 45 business days after the date of interviewing the applicant. Setting a timeframe based on the date of interview, rather than the date of application, will allow the Inspector-General to devote sufficient time to process and consider applications. This amendment will also align the requirement for processing a debt agreement administrator's application with that of a trustee's application for registration under subsection 20-20(3) of Schedule 2 of the Bankruptcy Act.

Items 5 and 6 – Subsection 186C(2)

226. Paragraph 20-20(4)(b) of Schedule 2 of the Bankruptcy Act requires a registered trustee to take out professional indemnity insurance and fidelity insurance to qualify for registration. Currently there is no similar requirement for applicants seeking registration as debt agreement administrators to hold insurance. The absence of a requirement to hold appropriate insurance is problematic because large amounts of money flow through the debt agreement system and the larger administrators deal with considerably larger inflows of money than an average registered trustee.

227. Under subsection 186C(2), the Inspector-General must approve an application by an individual for registration as an debt agreement administrator if certain criteria are met. This includes the applicant passing the basic eligibility test (defined by section 186A), having the ability and knowledge to perform the duties of an administrator, and holding the qualifications and experience (if any) prescribed by the Bankruptcy Regulations.

228. Items 5 and 6 of Part 1 Schedule 3 amend subsection 186C(2) to expand the criterion under which the Inspector-General must approve an individual's application for registration as a debt agreement administrator. Under the new paragraphs 186C(2)(f) and (g), the Inspector-General must refuse to approve applications where there is no evidence in writing that the applicant has taken out adequate and appropriate professional indemnity and fidelity insurance, or is not a fit and proper person.

229. The insertion of new paragraph 186C(2)(f) aligns with the equivalent provisions for trustees at section 20-20(4) of Schedule 2 of the Bankruptcy Act. This will ensure that all applicants have sufficient safeguards in place to cover possible future claims against them as registered debt agreement administrators.

230. Currently, the Inspector-General cannot reject an applicant in cases where the applicant passes the criteria set out in the basic eligibility test (defined by section 186A) but nevertheless is not a fit and proper person. Item 6 also inserts paragraph 186C(2)(g) which

requires the Inspector-General to refuse to approve an application for registration if the individual is not a fit and proper person.

Item 7 – Subsection 186C(3)

231. Section 186C(3) currently provides that the Inspector-General must approve an individual's application for renewal, regardless of any outstanding charges the administrator owes AFSA. The corresponding registered trustee renewal system provides that the Inspector-General must not extend a trustee's registration if they owe more than \$500 of notified estate charges. This condition is established by the combined effect of paragraph 20-75(1)(e) of Schedule 2 and subsection 20-10(2) of the Practice Rules.

232. Section 20-75 of Schedule 2 requires a registered trustee to take out professional indemnity insurance and fidelity insurance to qualify for registration renewal. Currently, debt agreement administrators have no similar prerequisite when applying for registration renewal. The absence of a prerequisite to hold appropriate insurance is problematic because large amounts of money flow through the debt agreement system and the larger administrators deal with considerably larger inflows of money than an average registered trustee.

233. Item 7 of Part 1 Schedule 3 repeals subsection 186C(3) and substitutes a new provision. This amendment provides that the Inspector-General must refuse to approve an individual's application for registration renewal unless adequate and appropriate professional indemnity and fidelity insurance is maintained by the applicant, and the applicant does not owe more than the prescribed amount of notified estate charges.

234. Item 13 of Part 1 Schedule 3 inserts a new subsection 186C(5A) which provides that a person owes a notified estate charge if:

- the person owes either a charge under the *Bankruptcy (Estate Charges) Act 1997*, or a penalty under section 281 (late payment penalty) under the Bankruptcy Act, and the Inspector-General has notified the person of the unpaid estate charge at least one month and 10 business days before the person's registration as a debt agreement administrator ceases to be in force.

235. These amendments align with equivalent provisions for registration renewal for trustees under section 20-75 of Schedule 2 of the Bankruptcy Act. This will ensure that all individual applicants for renewal of debt agreement administrator registration have sufficient insurance in place to cover possible future claims against them as registered debt agreement administrators, as well mandate administrators to pay any outstanding notified estate charges prior to registration renewal. This will ensure that debt agreement administrators set a good example in relation to their own debt management.

Items 8 to 12 – Subsection 186C(4)

236. Under subsection 186C(4) the Inspector-General must approve an application made by a company for registration as a debt agreement administrator if certain criteria are met. This includes the applicant company passing the basic eligibility test (defined by subsection 186A(3)), and having the ability and knowledge to perform the duties of a debt agreement administrator. If these criteria are not met, the Inspector-General must refuse to approve the application.

237. Items 8 to 12 of Part 1 Schedule 3 insert new provisions into subsection 186C(4) that require prospective company debt agreement administrators to obtain adequate and appropriate professional indemnity and fidelity insurance in order to have their applications for registration approved by the Official Receiver, similar to the requirements set out for trustees in paragraph 20-20(4)(b) of Schedule 2 of the Bankruptcy Act.

238. Section 185 provides definitions for Part IX of the Bankruptcy Act. Item 1 of Part 1 Schedule 3 inserts new definitions of ‘adequate and appropriate fidelity insurance’ and ‘adequate and appropriate professional indemnity insurance’ (to apply to Part IX only) to incorporate the meaning of those phrases as effected by new section 185A.

239. New section 185A, as inserted by item 2 of Part 1 Schedule 3, provides that the Inspector-General may determine, in a legislative instrument, what constitutes adequate and appropriate insurance in specified circumstances or for specified classes of registered debt agreement administrators. This amendment aligns with the equivalent provision for trustees at section 25-1 of Schedule 2 of the Bankruptcy Act. It ensures that the Inspector-General can adjust the insurance requirements as necessary to reflect current practices and regulatory standards.

240. Currently, the Inspector-General cannot reject a company applicant in cases where the company applicant passes the criteria set out in the basic eligibility test (defined by section 186A) but has otherwise engaged in unethical practice and is not considered a fit and proper person. Item 12 of Part 1 Schedule 3 also inserts new paragraphs 186C(4)(f) and (g). These provisions require the company applicant to be a fit and proper person, and for each director in the company to be a fit and proper person, in order for the Inspector-General to approve an application for registration as a debt agreement administrator. This amendment aims to protect debtors by ensuring that company debt agreement administrators have the requisite skills and ethical practice to perform their duties with the best interests of the debtor in mind.

Item 13 – Subsection 186C(5)

241. Subsection 186C(5) currently provides that the Inspector-General must approve an application by a company for renewal of registration as a debt agreement administrator, regardless of any outstanding charges the administrator owes the AFSA. The registered trustee renewal system, on the other hand, provides that the Inspector-General must not extend a trustee’s registration if they owe more than \$500 of notified estate charges. This condition is established by the combined effect of paragraph 20-75(1)(e) of Schedule 2 and subsection 20-10(2) of the Practice Rules.

242. Section 20-75 of Schedule 2 requires a registered trustee to take out professional indemnity insurance and fidelity insurance to qualify for registration renewal. Currently, debt agreement administrators have no similar prerequisite when applying for registration renewal. The absence of a prerequisite to hold appropriate insurance is problematic because large amounts of money flow through the debt agreement system and the larger administrators deal with considerably larger inflows of money than an average registered trustee.

243. Item 13 of Part 1 Schedule 3 repeals subsection 186C(5) and substitutes a new subsection (5). This amendment provides that the Inspector-General must refuse to approve applications for registration renewal by a company unless adequate and appropriate professional indemnity and fidelity insurance is maintained by the applicant company, and

the applicant company does not owe more than the prescribed amount of notified estate charges.

244. Item 13 also inserts a new subsection 186C(5A) which provides that a person or company owes a notified estate charge if:

- the person owes either a charge under the *Bankruptcy (Estate Charges) Act 1997*, or a penalty under section 281 (late payment penalty) under the Bankruptcy Act, and
- the Inspector-General has notified the person of the unpaid estate charge at least one month and 10 business days before the person's registration as a debt agreement administrator ceases to be in force.

245. These amendments align the process of registration renewal for company debt agreement administrators with that of trustees under section 20-75 of Schedule 2 of the Bankruptcy Act. This will ensure that all applicant companies have sufficient insurance in place to cover possible future claims against them as registered debt agreement administrators, as well mandate company debt agreement administrators to pay any outstanding notified estate charges prior to registration renewal. This will ensure that debt agreement administrators set a good example in relation to their own debt management.

Item 14 – Application provision

246. Item 14 provides that amendments made under Part 1 Schedule 3 apply in relation to applications for registration and renewal of registration as a debt agreement administrator (under section 186B of the Bankruptcy Act) made on or after the commencement of item 14, being at the end of the period of six months beginning on the day the Amending Act receives the Royal Assent.

Part 2 of Schedule 3 — Conditions of registration

Items 15 to 18 – Subsection 10(1), section 186F and section 186G

247. Section 105-1 of Schedule 2 of the Bankruptcy Act provides the Minister with the power to create practice standards for registered trustees. The Inspector-General can give a show-cause notice to a registered trustee who breaches a standard in the Practice Rules and a committee can subsequently deregister them pursuant to section 40-55 of Schedule 2 of the Bankruptcy Act. Currently, the Minister has no power to set industry standards for registered debt agreement administrators.

248. Section 186F sets out the conditions of registration for debt agreement administrators who are individuals (i.e. not companies). The Inspector-General may, by written notice given to the (prospective) debt agreement administrator, impose specified conditions on the person's registration as a debt agreement administrator under subsection 186F(2). Section 186G sets out the equivalent provisions for the registration and conditions for debt agreement administrators that are companies.

249. Items 16 to 18 of Part 2 Schedule 3 insert new subsections into sections 186F and 186G. New subsections 186F(3) and 186G(2A) provide that the registration of individual and company debt agreement administrators is subject to conditions, and that the Minister

has the power to make legislative instruments for the purposes of determining the conditions under new subsections 186F(4) (individuals) or 186G(2B) (companies).

250. Currently, the Inspector-General can give an individual debt agreement administrator (under existing paragraph 186K(3)(d)) or a company debt agreement administrator (under existing paragraph 186L(3)(c)) a show-cause notice, as potential grounds for cancelling their registration, upon their contravention of a condition of the individual's or company's registration as a debt agreement administrator. The legislative instrument created by the Minister under new subsection 186F(4) will set these conditions of registration.

251. The amendments introduced by items 16 to 18 of Part 2 Schedule 3 will enable the Minister to more readily adjust specific debt agreement administrator practice requirements and professional attributes to ensure that debtors and creditors are adequately protected from administrator misconduct or unprofessional practice.

252. Subsection 10(1) currently provides that the Minister may delegate all powers under the Bankruptcy Act other than the power to delegate itself under subsection 10(1).

253. Item 15 of Part 2 Schedule 3 builds on the amendments to subsection 10(1) as inserted by item 19 of Part 4 Schedule 1. Item 19 of Part 4 Schedule 1 amends subsection 10(1) to provide that the Minister cannot delegate his power under new subsection 185(4B) (as inserted by item 21 of Part 4 Schedule 1) to determine (by legislative instrument) a percentage by which the total payments under a debt agreement can exceed the debtor's after tax yearly income.

254. Item 15 of Part 2 Schedule 3 amends subsection 10(1) to additionally exclude the powers under new subsections 186F(4) and 186G(2B), as inserted by items 16 and 17 of Part 2 Schedule 3. The legislative instrument making power exercisable by the Minister under new subsections 186F(4) and 186G(2B) to determine industry standards for registered debt agreement administrators is a key consumer-protection safeguard. As such, item 15 amends subsection 10(1) to provide that the Minister cannot delegate this power.

Item 19 – After subsection 186H(1)

255. Section 105-1 of Schedule 2 of the Bankruptcy Act provides the Minister with the power to create practice standards for registered trustees. Currently, the Minister has no power to set industry standards for registered debt agreement administrators.

256. Items 16 to 18 of Part 2 Schedule 3 insert new subsections into sections 186F and 186G. New subsections 186F(3) and 186G(2A) provide that the registration of individual and company debt agreement administrators is subject to conditions, and that the Minister has the power to make legislative instruments for the purposes of determining the conditions under new subsections 186F(4) (individuals) or 186G(2B) (companies).

257. Existing subsection 186H(1) further provides that a debt agreement administrator may apply to the Inspector-General to have any conditions on their registration changed or removed.

258. Item 19 of Part 2 Schedule 3 inserts a new subsection 186H(1A) to ensure that the conditions determined in an instrument under new subsections 186F(4) or 186G(2B), as inserted by items 16 to 18 of Part 2 Schedule 3, cannot be removed upon application under

subsection 186H(1). This amendment will ensure that the an application to change or remove registration conditions only applies to specified conditions placed on a debt agreement administrator's registration under subsection 186C(9).

Item 20 – Application provisions

259. Item 20 provides that amendments made to sections 186F and 186G under Part 2 Schedule 3 will apply to all debt agreement administrators regardless of whether they became registered before or after the commencement of item 20, being the end of the period of six months after the day the Amending Act receives the Royal Assent. This will ensure fairness and consistency in the application of industry-wide conditions across the debt agreement regime, as well as simplify and streamline regulatory functions of the AFSA.

Part 3 of Schedule 3 — Ongoing obligation to maintain insurance

Item 21 – After Subdivision B of Division 8 of Part IX

260. Paragraph 20-20(4)(b) of Schedule 2 of the Bankruptcy Act requires a registered trustee to take out professional indemnity insurance and fidelity insurance to qualify for registration. Currently there is no similar requirement for applicants seeking registration as debt agreement administrators to hold insurance. The absence of a requirement to hold appropriate insurance is problematic because large amounts of money flow through the debt agreement system and the larger administrators deal with considerably larger inflows of money than an average registered trustee.

261. Items 6 to 13 of Part 1 Schedule 3 insert provisions that require debt agreement administrators to obtain adequate and appropriate professional indemnity and fidelity insurance, similar to the requirements set out in paragraph 20-20(4)(b) of the Bankruptcy Act, in order to have their applications for registration and registration renewal approved by the Official Receiver.

262. Section 185 provides definitions for Part IX of the Bankruptcy Act. Item 1 of Part 1 Schedule 3 inserts new definitions of 'adequate and appropriate fidelity insurance' and 'adequate and appropriate professional indemnity insurance' (to apply to Part IX only) to incorporate the meaning of those phrases as effected by new section 185A.

263. New section 185A, as inserted by item 2 of Part 1 Schedule 3, provides that the Inspector-General may determine, in a legislative instrument, what constitutes adequate and appropriate insurance in specified circumstances or for specified classes of registered debt agreement administrators.

264. Item 21 of Part 3 Schedule 3 inserts a new section 186HA to mandate that registered debt agreement administrators must maintain adequate and appropriate professional indemnity and fidelity insurance, and that failure to do so amounts to an offence. In the case of intentional or reckless failure, a penalty of 1,000 penalty units will apply. However, if the failure is not intentional or reckless, it is considered a strict liability offence with a penalty of 60 penalty units.

265. The application of strict liability, as opposed to absolute liability, preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance

of probabilities. This defence maintains adequate checks and balances for individuals who may be accused of breaching such offences.

266. Strict liability offences are appropriate in this area of regulation, as it is necessary to strongly deter misconduct that can have serious consequences for affected parties. Strict liability offences also reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by the AFSA. Strict liability is particularly beneficial to these regulatory bodies as they need to deal with offences expeditiously to maintain public confidence in their regulatory regimes.

267. The strict liability offences in new subsection 186HA(3) meet all the conditions listed in the Guide to Framing Commonwealth Offences (pages 23 and 24). For example, the fines for the offences do not exceed 60 penalty units for an individual. By providing a strict liability enforcement regime for duties of debt agreement administrators, the Bill significantly enhances the likelihood of compliance by administrators.

268. These amendments align with the equivalent provision for trustees at section 25-1 of Schedule 2 of the Bankruptcy Act. The severity of the penalty for intentionally or recklessly failing to comply with this requirement and the need for a strict liability offence reflects the importance of adequate and appropriate insurance for debt agreement administrators. As providers of professional services who often deal with large sums of money, debt agreement administrators must hold adequate and appropriate insurance to mitigate the risks associated with the profession.

Item 22 – Application provision

269. Item 14 Part 1 Schedule 3 provides that the prerequisite to hold sufficient insurance applies to applications for registration as a debt agreement administrator made after commencement of item 14, being at the end of the period of six months after the Amending Act receives the Royal Assent. Accordingly, item 22 of Part 3 Schedule 3 provides that the obligation for debt agreement administrators to maintain insurance also only applies to registered debt agreement administrators who applied for registration on or after the end of the period of six months after the Amending Act receives the Royal Assent.

Part 4 of Schedule 3 — Cancellation of registration

Items 23 and 24 – Subsections 186K(3) and 186L(3)

270. Section 186K provides the circumstances in which the Inspector-General may cancel an individual's registration as a debt agreement administrator. Subsection 186K(3) lists various grounds for which the Inspector-General can request the debt agreement administrator to provide a written explanation of why they should continue to be registered. The equivalent provisions for company debt agreement administrators are set out in subsection 186L(3).

271. Items 23 and 24 of Part 4 Schedule 3 insert new paragraphs into subsection 186K(3) and 186L(3) to expand the grounds under which the Inspector-General may request a written explanation from the debt agreement administrator to justify their continued registration.

272. New paragraphs 186K(3)(e) and (f) and 186L(3)(d) and (e) empower the Inspector-General to request a written explanation if the debt agreement administrator ceases

to have adequate and appropriate professional indemnity or fidelity insurance, or the administrator is not a fit and proper person. Similarly, new paragraph 186L(3)(f) enables the Inspector-General to request a written explanation if the debt agreement administrator is a company and a director of the company is not a fit and proper person.

273. These amendments will enable the Inspector-General to cancel a debt agreement administrator's registration under subsections 186K(4) or 186L(4) if:

- the debt agreement administrator does not respond to the written request
- the Inspector-General is not satisfied with the debt agreement administrator's explanation that the administrator does in fact hold the required insurance, or
- the Inspector-General is not satisfied with the debt agreement administrator's explanation for behaving in a manner that indicates they are not a fit and proper person.

274. Empowering the Inspector-General to deregister administrators on the grounds set out in new paragraphs 186K(3)(e) and (f) and 186L(3)(d), (e) and (f) will enhance compliance by debt agreement administrators. Possible deregistration in these circumstances is appropriate to ensure that debt agreement administrators have sufficient insurance in place to cover future claims against them. Possible deregistration will also ensure that debt agreement administrators are fit and proper persons. These amendments aim to protect debtors by ensuring that debt agreement administrators have the requisite skills and ethical practice to perform their duties with the best interests of the debtor in mind.

Item 25 – Application provision

275. Item 14 Part 1 Schedule 3 provides that the prerequisite to hold sufficient insurance applies to applications for registration as a debt agreement administrator made after commencement of item 14, being at the end of the period of six months after the Amending Act receives the Royal Assent. Accordingly, item 25 of Part 3 Schedule 3 provides that the obligation for debt agreement administrators to maintain insurance and be a fit and proper person also only applies to registered debt agreement administrators who applied for registration on or after the end of the period of six months after the Amending Act receives the Royal Assent.

Part 5 of Schedule 3 — Trust accounts

Item 26 – After subsection 186LA(1)

276. Section 185LD requires registered debt agreement administrators and trustees who are administering one or more debt agreements to maintain a separate bank account and to pay all moneys received from debtors under a debt agreement into that account.

277. Subsection 186LA(1) sets out the conditions under which the Inspector-General may obtain information from a bank concerning trust accounts held by a registered debt agreement administrator or a registered trustee administering a debt agreement. Under these conditions, the Inspector-General can only require the bank to provide information on a debt agreement administrator's bank account, administered under section 185LD, if the Inspector-General has already requested a written explanation (also referred to as issuing a

show-cause notice) from the debt agreement administrator under subsection 186K(3), subsection 186L(3) or subsection 40-40(1) of Schedule 2 of the Bankruptcy Act. However, the Inspector-General can only issue a show-cause notice to the practitioner if he or she has *reasonable grounds to believe* any of the criteria specified under those subsections.

278. In certain circumstances, the Inspector-General may need information from a bank regarding a debt agreement administrator's trust accounts in order to reach the 'reasonable grounds to believe' standard. For example, items 14 and 15 of Part 2 Schedule 1 insert a new subsection 185LA(2), which provides that the debt agreement administrator has a duty to not reimburse themselves for expenses that were not specified in new subsection 185C(3B) (as inserted by item 13 of Part 2 Schedule 1). If the Inspector-General suspected a debt agreement administrator had failed to carry out their duties by improperly reimbursing themselves for expenses, the Inspector-General would require the debt agreement trust account bank statements to be reasonably satisfied of the improper use of trust moneys.

279. Currently, if the Inspector-General only suspects (as opposed to reasonably believes) that the debt agreement administrator is misusing trust money, current subsection 186LA(1) does not allow the Inspector-General to make additional enquiries with the bank to test that suspicion and reach the reasonably believes standard. Being unable to be reasonably satisfied in this manner means the Inspector-General cannot issue a show-cause notice in order to cancel the debt agreement administrator's registration. These conditions currently do not allow the Inspector-General to prevent trust moneys being misused. In the case of a registered trustee administering a debt agreement, while the criteria under subsection 40-40(1) of Schedule 2 of the Bankruptcy Act is more comprehensive, it is still insufficient to reach the reasonable belief standard for the Inspector-General to make additional enquiries with the bank.

280. Item 26 of Part 5 Schedule 3 inserts a new subsection 186LA(1A) to enable the Inspector-General to obtain information concerning a debt agreement administrator or registered trustee's debt agreement trust account from a bank without first issuing a show-cause notice. The Inspector-General will be able to require this information from the bank under existing subsection 186LA(2) if it reasonably suspects, in connection with the account, that the debt agreement administrator has contravened a provision of the Act, failed to properly carry out their duties, or contravened a condition of their registration.

281. This amendment provides that if the Inspector-General reasonably suspects that the practitioner is misusing trust money, such as under existing subsection 185LD(2) or new subsection 185LA(2) (inserted by items 14 and 15 of Part 2 Schedule 1), it can obtain information from the bank under new subparagraphs 186LA(1A)(b)(i) or (ii). If the obtained information gives the Inspector-General reasonable grounds to believe that the moneys are being misused, the Inspector-General could then issue a show-cause notice to the practitioner under paragraph 186K(3)(b), for example, on the grounds that the practitioner failed to properly carry out their duties as a debt agreement administrator. Issuing the show-cause notice would subsequently allow the Inspector-General to immediately freeze the practitioner's trust account under existing subsection 186LB(2).

282. While the insertion of subsection 186LA(1A) allows the Inspector-General to bypass the show-cause notice requirement when requiring information on a practitioner's trust account, the new power is appropriate given the serious consequences of a debt agreement administrator practitioner misusing trust moneys destined for creditors. To ensure that the

Inspector-General cannot misuse this power, new paragraph 186LA(1)(b) includes the test of ‘reasonably suspects’, which requires reasonableness of the Inspector-General’s suspicion and reasonableness of the grounds for suspicion.

Item 27 – Application provision

283. Item 27 provides that amendments contained in Part 5 of Schedule 3 will apply to debt agreements that come into force on or after the commencement of item 27, being the end of the period of six months after the Amending Act receives the Royal Assent.

Part 6 of Schedule 3 — Functions of Inspector-General

Item 29 – After paragraph 12(1)(bc)

284. Section 12 of the Bankruptcy Act sets out the functions of the Inspector-General including the circumstances in which he or she may make enquiries or investigate matters. Paragraph 12(1)(bb) provides the Inspector-General with the power to investigate and inquire into an administrator’s conduct relating to a debt agreement. The scope of this power applies to the period starting when a debt agreement is made under section 185H. The Inspector-General’s investigation and inquiry powers do not include the period prior to debt agreement being made (including the period before the debtor lodges a debt agreement proposal). Prior to lodging a debt agreement proposal, the debtor will typically sign an engagement contract with the administrator for the administrator’s service. Most contracts include the upfront fee amount and set conditions around the upfront fee’s payment.

285. Item 29 of Part 6 Schedule 3 inserts a new paragraph 12(1)(bd) to provide that the Inspector-General’s investigation and inquiry powers extend to any conduct of a debt agreement administrator. This amendment will allow the Inspector-General to investigate or inquire into the registered debt agreement administrator’s conduct during the period starting from when the debt agreement administrator and debtor first engage. If the agreement is not ultimately made, this will not prevent the Inspector-General from investigating or inquiring into the conduct. The Inspector-General will also be able to investigate and inquire into a debt agreement administrator’s advertising or other methods used to attract debtors.

Item 30 – Application provision

286. Item 30 provides that the Inspector-General will be able to investigate conduct of a debt agreement administrator that has occurred on or after the commencement of item 30 Part 6 Schedule 3 regardless of whether the administrator was registered before, on or after that commencement. This ensures that the Inspector-General will be able to investigate the conduct of debt agreement administrators registered at commencement, but protects these administrators from having their conduct investigated or inquired into if the conduct occurred prior to commencement.

Schedule 4 – Registered trustees

AMENDMENTS TO THE *BANKRUPTCY ACT 1966*

GENERAL OUTLINE

287. The amendments in Schedule 4 are technical amendments for drafting simplicity, and clarify the Minister's power to make rules under the Practice Rules extends to registered trustees administering debt agreements.

Items 1 and 3 – Subsection 10(1) and subsection 105-1(6) of Schedule 2

288. Subsection 10(1) currently provides that the Minister may delegate all powers under the Bankruptcy Act other than the power to delegate itself under section 10(1).

289. For drafting simplicity, item 1 of Schedule 4 moves the Minister's inability to delegate its power to make rules by legislative instrument (being the Practice Rules) under subsection 105-1(1) of Schedule 2 of the Bankruptcy Act from subsection 105-1(6) to subsection 10(1).

290. To avoid duplication of this provision, item 3 of Schedule 4 subsequently repeals subsection 105-1(6).

Item 2 – At the end of section 20-35 of Schedule 2

291. Section 20-35 of Schedule 2 of the Bankruptcy Act currently provides for the Practice Rules to impose industry conditions on all registered trustees, or registered trustees of a specified class.

292. Items 16 to 18 of Part 2 Schedule 3 insert new subsections 186F(3) and 186G(2A), which provide that the registration of individual and company debt agreement administrators is subject to conditions, and that the Minister has the power to make legislative instruments for the purposes of determining the conditions under new subsections 186F(4) (individuals) or 186G(2B) (companies).

293. The amendments introduced by items 16 to 18 of Part 2 Schedule 3 will enable the Minister to more readily adjust specific debt agreement administrator practice requirements and professional attributes to ensure that debtors and creditors are adequately protected from administrator misconduct or unprofessional practice.

294. To ensure the Practice Rules reflect similar industry conditions for registered trustees administering debt agreements, item 2 of Schedule 4 inserts new subsection 20-35(3) of Schedule 2 to clarify the Minister's power to amend the Practice Rules extends to amendments for the purposes of imposing conditions on registered trustees administering debt agreements.

Item 4 – Application provision

295. Item 4 of Schedule 4 provides that amendments contained in item 2 of Schedule 3 will apply to a person who becomes a registered trustee, or registered trustees who are registered

immediately before, the commencement of item 24, being immediately after the end of the period of six months after the Amending Act receives the Royal Assent.

Schedule 5 – Unclaimed money

AMENDMENTS TO THE *BANKRUPTCY ACT 1966*

GENERAL OUTLINE

296. The amendments in Schedule 5 modify the requirements for registered personal insolvency practitioners to pay unclaimed moneys to the Commonwealth, as well as the process for persons to apply for unclaimed moneys.

Item 1 – Subsection 153A(5)

297. Under section 153A a bankruptcy is annulled upon the registered trustee's satisfaction that all debts have been paid by the bankrupt. If money is paid to the Official Receiver under subsection 153A(4) because the creditor cannot be found or identified, it is taken to be paid in full to the creditor. Currently subsection 153A(5) provides that if money is paid to the Official Receiver under subsection (4) then the provisions of subsections 254(3) and (4) apply. Item 4 of Schedule 5 repeals and replaces those provisions with new subsections (3) to (9).

298. Accordingly, item 1 of Schedule 5 amends section 153A(5) to insert references to new subsections (3) to (9), which will enable a person to make an administrative claim to the Official Receiver, rather than the Court, for moneys paid to the Commonwealth under section 254. The new subsections set out the processes for making, assessing and giving notice of the outcome of an application as well as provide a mechanism for review of the Official Receiver's original determination by the Court.

299. The amendment to section 153A will ensure that despite annulment of a bankruptcy, a person can apply to have any moneys owed repaid to them by determination of the Official Receiver or order of the Court.

Item 2 – Subsection 252A(5)

300. Under section 252A if the trustee of a deceased person's estate is satisfied that all the debts of the estate have been paid in full, the order for the administration of the estate under Part XI of the Bankruptcy Act is annulled, on the date the last payment was made.

301. If money is paid to the Official Receiver under subsection 252A(4) because the creditor cannot be found or identified, it is taken to be paid in full to the creditor. Currently subsection 252A(5) provides that if money is paid to the Official Receiver under subsection (4) then the provisions of subsections 252A(3) and (4) apply. Item 4 of Schedule 5 repeals and replaces those provisions with new subsections (3) to (9).

302. Accordingly, item 2 of Schedule 5 amends section 252A(5) to insert references to new subsections (3) to (9), which will enable a person to make an administrative claim to the Official Receiver, rather than the Court, for moneys paid to the Commonwealth under section 254. The new subsections set out the processes for making, assessing and giving notice of the outcome of an application as well as provide a mechanism for review of the Official Receiver's original decision by the Court.

303. The amendment to section 252A will ensure that despite annulment of an administration of a deceased person's estate, a person can apply to have any moneys owed repaid to them by determination of the Official Receiver or order of the Court.

Item 3 – Paragraph 254(2)(a)

304. Paragraph 254(2)(a) provides that a trustee or a debt agreement administrator must pay to the Commonwealth any unclaimed dividends or moneys. The requirement for a debt agreement administrator to pay unclaimed dividends or moneys to the Commonwealth should only apply where the debt agreement administrator has identified the person entitled to the moneys. In some circumstances, the debt agreement administrator will identify the person but it will not be practicable to pay them, such as if the person cannot be located.

305. Item 3 of Schedule 5 amends paragraph 254(2)(a) to ensure that the paragraph applies where the person entitled to the money has been identified but is unable to be located despite the debt agreement administrator making all reasonable efforts. In situations where it is clear that some person is entitled to the money, but that person cannot be identified because the source of the money cannot be ascertained, section 254 does not apply.

Item 4 – Subsections 254(3) and (4)

306. Section 254 requires trustees and debt agreement administrators to pay unclaimed dividends or moneys, or moneys that are not intended to be distributed, to the Commonwealth. Under subsection 254(3), a person who claims to be entitled to any moneys paid to the Commonwealth under section 254 can apply to the Court for an order declaring they are entitled to the money that they are claiming. However, in many instances, the costs of seeking a court order would exceed the amount of money they are seeking to claim.

307. In comparable regimes, the regulator has the power to pay applicants unclaimed moneys. For example, under section 1341 of the Corporations Act 2001, the Australian Securities and Investments Commission (ASIC), rather than the Court, has the authority to pay the applicant unclaimed moneys that ASIC determines they are entitled to.

308. Item 4 repeals subsections (3) and (4) and inserts new subsections (3) to (9) into section 254 to enable a person to make an administrative claim to the Official Receiver, rather than the Court, for moneys paid to the Commonwealth under section 254. These amendments set out the processes for making, assessing and giving notice of the outcome of an application as well as provide a mechanism for review of a decision made by the Official Receiver by the Court.

309. New subsection (9) clarifies that a determination made under new subsection (4) (Official Receiver satisfied person is entitled to moneys) or new subsection (6) (Official Receiver not satisfied person is entitled to moneys) is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Item 5 – Application and saving provisions

310. Paragraph 1(a) of item 5 of Schedule 5 provides that a person can apply to the Official Receiver for unclaimed moneys paid to the Commonwealth on or after the commencement of Schedule 5, being immediately after the end of the period of 6 months after the Amending Act receives the Royal Assent, using the new subsection 254(3).

311. Paragraph 1(b) of item 5 Schedule 5 provides that a person can apply to the Official Receiver for unclaimed moneys paid to the Commonwealth before the commencement of Schedule 5 under new subsection 254(3) where an application had not been made to the Court under the current subsection 254(3) prior to commencement. This ensures, where possible, applications can be processed by the Official Receiver, rather than the Court, which is a more efficient and cost effective mechanism.

312. Subsection (2) of item 5 Schedule 5 provides that where a person has applied to the Court for an order under subsection 254(2) or (2A) (for moneys owing) before commencement of item 5 Schedule 5, subsections 254(3) and (4) as in force immediately before commencement of item 5 shall continue to apply. This will ensure consistency in the administration of applications currently before the Court.