BANKRUPTCY AMENDMENT BILL 1979

EXPLANATORY MEMORANDUM

(Circulated by the Minister representing

the Minister for Business & Consumer Affairs,

The Honourable P. D. Durack)

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CONTENTS

COURTS

PROCEEDINGS IN CONNEXION WITH BANKRUPTCY

EFFECT OF BANKRUPTCY ON PROPERTY AND PROCEEDINGS

FIRST MEETINGS OF CREDITORS, PUBLIC EXAMINATION AND COMMITTEE OF INSPECTION

CONTROL OVER PERSON AND PROPERTY OF DEBTORS AND BANKRUPTS

ADMINISTRATION OF PROPERTY

DISCHARGE OF BANKRUPTS

TRUSTEES

ARRANGEMENTS WITH CREDITORS WITHOUT SEQUESTRATION

MISCELLANEOUS

OTHER PROVISIONS

BANKRUPTCY AMENDMENT BILL 1979

EXPLANATORY MEMORANDUM

(Prepared by the Department of Business and Consumer Affairs)

INTRODUCTION

The Bankruptcy Amendment Bill 1979 (hereafter referred to as the 'Bill') contains a series of amendments to the Bankruptcy Act 1966 that have been decided upon by the Government following a review of the operation of the Act. The purpose of this explanatory memorandum (hereafter referred to as 'ex memo') is to explain these amendments which are in the first instance outlined briefly (ex memo paras 7 to 18). The clauses of the Bill are then dealt with sequentially (ex memo paras 19 et seq).

Bankruptcy Act 1966

2. The present Bankruptcy Act was passed by the Commonwealth Parliament in 1966 and came into operation on 4 March 1968, following a comprehensive report that was compiled in 1962 by a committee under the Chairmanship of the late Sir Thomas Clyne. ("Report of the Committee Apppointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth", Commonwealth Government Printer 1962, ref.8440/62 - hereafter referred to as the 'Clyne Committee Report').

3. The Bankruptcy Act 1966 repealed the Bankruptcy Act 1924-1965 (hereafter referred to as 'the repealed Act' or 'the 1924 Act'). Subsequently the present Act has been

amended by the following Acts:-

- Bankruptcy Act 1968 (No. 121 of 1968)
- Judges' Remuneration Act 1969 (No. 40 of 1969)
- Bankruptcy Act 1970 (No. 122 of 1970)
- Statute Law Revision Act 1973 (No. 216 of 1973)
- Postal and Telecommunications (Transitional Provisions) Act 1975 (No. 56 of 1975)
- Acts Citation Act 1976 (No. 37 of 1976)
- Administrative Changes (Consequential Provisions) Act 1976 (No. 91 of 1976)
- Federal Court of Australia Act 1976 (No. 156 of 1976)
- Bankruptcy Amendment Act 1976 (No. 161 of 1976)
- Remuneration and Allowances Amendment Act 1977 (No. 111 of 1977).

(References in this explanatory memorandum to 'the Act' or to the 'Bankruptcy Act 1966' are, unless otherwise stated, references to the Bankruptcy Act 1966 as amended by these amending Acts).

Review of bankruptcy legislation

4. These amending Acts were concerned with specific issues and did not involve any general review of bankruptcy legislation. However, after its creation, the Department of Business and Consumer Affairs completed a review of the Bankruptcy Act. This review took account of administrative deficiencies in the current Act, judicial decisions, submissions from professional bodies and developments overseas. The review also had regard to the generally accepted principles which have evolved in the development of the modern law of bankruptcy:-

> "It is now generally accepted in our community that, when a person is unable to pay his debts and is in a hopeless financial position, the law should enable proceedings to be taken, either by the debtor himself or by a creditor, so that most of his property can be taken and used to pay his creditors in proportion to the amounts owed to each of them. It is generally accepted too that, unless the debtor has been guilty of some dishonesty, extravagance or other improper conduct in his financial affairs, the law should enable him to be freed from the burden of his accumulated debts in order to allow him to make a fresh start. It is the modern law of bankruptcy that gives effect to these generally accepted principles."

(D.J. Rose 'Lewis's Australian Bankruptcy Law' (1978) 7th edition p.1; The Law Book Company Limited; hereafter referred to as 'Rose' - see also para 7 of the Clyne Committee Report).

5. Following this review the Government decided on a series of amendments to the Act which are now embodied in this Bill. This decision was announced by the then Minister for Business and Consumer Affairs in a media release dated 11 January 1978:-

> "The Minister for Business and Consumer Affairs, Mr Wal. Fife, today announced that the government had approved the introduction of a Bill to amend the Bankruptcy Act.
>
> Mr Fife said that while the present Act, which came into operation on 4 March 1968 had generally proved to be satisfactory the Government considered there were some aspects of the legislation which now required amendment.
>
> Experience in the administration of the Act had revealed certain deficiencies and changes were also desirable to take account of developments in other

related fields of law and changes in social attitudes.

The Government also proposes to introduce into the Act several new concepts. These proposals are intended to facilitate the administration of bankrupt estates and to reduce the cost to the Consolidated Revenue Fund of that administration.

....."

6. Each of the amendments contained in the Bill is concerned with one or more of the following matters:-

- the creation of the common investment fund;

- a more equitable adjustment of the rights of both debtors and creditors; and

- improvements in the administration and effectiveness of the Bankruptcy Act.

Common Investment Fund

7. In order to recoup part of the cost to the Government of the trustee services now provided by Official Receivers, the Bill provides for all moneys held by the proposed Official Trustee on account of bankrupt estates to be treated as a common investment fund and the resulting interest paid into the Consolidated Revenue Fund (Bill cl.16). (This proposal, which is in line with a long-standing practice in the United Kingdom, will not significantly affect the return received by the creditors in each estate).

8. Particulars of the total amounts standing to the credit of trust accounts administered by the Official Receivers as trustees are as follows:-

30 June 1977	$6,880,789
30 June 1978	$7,420,396
30 June 1979	$8,616,787

9. The introduction of the amendments will allow the bulk of these moneys to be invested, thus accruing interest which will help to reduce the shortfall of revenue over expenditure in the administration of the Bankruptcy Act. Particulars of this shortfall over the last three financial years are as follows:-

Financial Year	Costs	Receipts	Shortfall
1976/77	$3,365,152	$1,308,600	$2,056,552
1977/78	$3,860,342	$1,661,388	$2,198,954
1978/79	$3,948,819	$1,858,379	$2,090,440

10. Reviews have been conducted within the Department of Business and Consumer Affairs of the current level of fees (which were increased significantly in 1977). While the matter is being kept under review, it is considered that the shortfall in revenue could not easily be made up by an increase in fees because:-

(a) The major fee taken by Official Receivers is assessed on a fixed minimum plus a percentage of

realisations and thus it takes some account of changing money values and increasing costs. Any increase in this fee would defeat its own purpose because there would be a corresponding increase in the number of estates with insufficient realisations to pay the fee assessed.

(b) Any further increase could deter people from using the bankruptcy legislation to effect its proper social functions (see ex memo para 4, above).

11. For these reasons the establishment of the common investment fund is seen as the best means of further reducing the cost to the Government of administering the Act.

Rights of debtors and creditors

12. The review of the Bankruptcy Act revealed that changes were desirable to maintain an equitable adjustment of the rights of debtors and creditors, taking into account developments in other related fields of law and changes in social attitudes.

13. Some of the more significant amendments in this area are as follows:-

(a) The minimum amount which will support a creditor's petition for a sequestration order or an order for the administration in bankruptcy of the estate of a deceased person is raised from $500 to $1000 (Bill cls. 26 and 136). This will take account of changing money values and also discourage the use of the bankruptcy process as a means of intimidation or harassment in respect of small debts.

(b) The protection against creditors given to the proceeds of assurance policies (present s.116) will be extended to include those proceeds which are received by a person shortly before he becomes a bankrupt (Bill para 54(1)(b)).

(c) Rehabilitation loans or grants made to farmers out of moneys provided to the States pursuant to Commonwealth rural reconstruction legislation will be protected against creditors (Bill para 54(1)(e)).

(d) Because of the social significance of maintenance obligations, all current claims for arrears of maintenance will become provable in bankruptcy but, at the same time, the person entitled to the maintenance payment will retain his or her rights under the general law to enforce payment of any arrears or lump sum entitlements (see ex memo paras 105 to 108 for details). Certainty and consistency in this matter is of considerable social importance.

(e) The priority extended to a claim for wages (present para 109(1)(f) will be increased from $600 to $1,500 (Bill s-cl. 51(1) - proposed para s.109(1)(e)) and the present upper limit of $2,000 on a claim for workers' compensation will be removed (Bill s-cl. 51(1) - proposed para s.109(1)(f)). In addition, a person advancing moneys for the payment of wages will be entitled to the same priority as the employee who receives the benefit of the advance would have been entitled to had his wages remained unpaid (Bill s-cl.51(1) - proposed s-secs. s.109(2)(3) & (4)).

These amendments in relation to wages will bring bankruptcy law into line with the corresponding provisions in relation to corporate insolvencies (s.292 of the existing State and Territory companies legislation). The amendments also accord with the minimum action considered necessary by Commonwealth and State Ministers for Labour in their 1972 resolution on the priority to be accorded to payment of Commonwealth taxes and charges vis-a-vis employee entitlements in winding-up proceedings and bankruptcies.

(f) The priority accorded to the Crown in right of the Commonwealth will be abolished except in relation to tax instalments deductions and with-holding tax on dividends and interest remitted overseas (see Bill s-cls. 51(1)). However, the Commonwealth will retain its present exemption from the operation of the "relation back" and preference provisions of the Act in relation to income tax collections.

(g) Earlier discharges from bankruptcy will become possible (Bill cl. 72).

(h) The provisions of Part X of the Act providing for arrangements with creditors without sequestration have been the subject of considerable litigation. Amendments to Part X will remove a number of uncertainties and bring about a more workable scheme in the interests of all parties (Bill cls. 99 to 135).

14. Administrative efficiency in the Bankruptcy Branch is rapidly deteriorating due to the marked increase

in bankruptcies over the past 4 years. There has been a 103% increase in the incidence of bankruptcies since 1975/76 and over 92% in Part X administrations in the same period. In 1975/76 there was a total of 1900 Part IV and Part XI bankruptcies while in 1978/79 this figure had risen to 3,857.

15. The Department of Business and Consumer Affairs is seeking to improve the administrative efficiency of the Branch in four ways:-

(a) the implementation of a management review;

(b) the introduction of ADP and related facilities;

(c) a review of staffing needs;

(d) amending the Act so that it is more practical and economical to administer and more in keeping with modern business practices.

16. Some of the more significant amendments that are proposed to improve the administration and efficiency of the Bankruptcy Act are as follows:-

(a) The Official Trustee in Bankruptcy will replace individual Official Receivers as the trustee of estates of bankrupts and deceased persons (Bill cl. 12 - ex memo paras 40 to 44).

(b) Unnecessary public examinations will be able to be dispensed with (Bill cl. 38 - proposed s-secs 69(13) and (14)). This will eliminate time consuming but useless examinations.

(c) It will not be necessary to call the statutory first meeting of creditors in any bankruptcy unless the Official Receiver is of the opinion that it is desirable one should be held (Bill cl. 37). This will eliminate formal procedures which are time consuming and unproductive.

17. In approximately 70% of estates it is now taking at least two years to realise the assets and distribute proceeds to creditors and this period of time is growing longer. The introduction of these and other proposed amendments should, with adequate staffing support, result in a substantial reduction in the time taken to finalise estates.

Transitional provisions

18. The Bill contains a series of detailed transitional provisions, some of which are specifically mentioned in the relevant parts of the ex memo. A large number of the amending provisions will only apply to, or in relation to, a person, and the estate of a person, who became a bankrupt after the commencement of the amending provisions.

19. The remainder of this explanatory memorandum deals sequentially with the clauses of the Bill.

Cl. 1: Short Title

20. The Bill, when enacted, will be cited as the Bankruptcy Amendment Act 1979 (Bill s-cl.1(1)). The Bankruptcy Act 1966 is referred to in the Bill as the Principal Act (Bill s-cl. 1(2)).

Cl. 2: Commencement

21. Certain provisions of the Bill will come into operation on the day the Act receives the Royal Assent (set out in Bill s-cl.2(1)). The remaining provisions of the Bill will come into operation on a date to be fixed by proclamation (Bill s-cl.2(2)). These latter provisions will be brought into operation once the necessary Rules and administrative arrangements have been made. (Many of these provisions are those relating to, or consequential upon, the creation of the common investment fund and the transfer of the trustee functions of each Official Receiver to the Official Trustee in Bankruptcy.)

AMENDMENTS TO PART 1 (PRELIMINARY)

22. Cls. 3 to 5 of the Bill amend Part 1 of the Act dealing with various preliminary matters (present ss. 1 to 9).

Cl. 3: Interpretation

23. There is a series of amendments to the general interpretation provision (s. 5) (Bill cl.3).

24. Particulars of the amendments are as follows:-

- approved bank is defined to mean a trading bank or other bank approved by the Treasurer. This definition will be relevant to proposed s-secs 20(2), 20(3) and 20B(4) relating to the keeping of bank accounts (Bill cls. 15 and 16).

- Books are widely defined to cover all written records and records that are kept by electronic process (similar definition to that in s-sec 5(1) of existing State and Territory companies legislation). This definition will be relevant to s-sec. 175(5) dealing with an audit of the records to be kept by a trustee (Bill cl. 89). Consequential amendments are made elsewhere (see, e.g. Bill paras 8(b) and (c)).

- debtor's petition is re-defined to cover a petition presented by joint debtors against themselves (Bill cl. 33).

- the statutory office holders (Inspector-General, Registrar, Deputy Registrar and Official Receiver) are re-defined to take account of the amendments relating to acting appointments (Bill cl.12). In addition, an 'official receiver' will now be referred to as an 'Official Receiver' (see also Bill Schedule item 2).

- magistrate is re-defined to take account of the proposed intergovernmental arrangements for the services of State or N.T. magistrates (Bill cl.12) (see also Queen Victoria Memorial Hospital v. Thornton 87 C.L.R. 144). Magistrates can conduct examinations of bankrupts and others (see Bill cls. 38 and 41).

- maintenance agreement is defined to cover any maintenance agreement that is registered or approved by an Australian court under the Family Law Act (see ss.86 and 87 of that Act), including maintenance agreements that relate to illegitimate children.

- maintenance order is defined to cover any maintenance order under whatever law.

- Official Trustee is defined to mean the Official Trustee in Bankruptcy created by the amended s. 18 (see Bill cl. 12).

- the date of the bankruptcy is re-defined to cover, in addition, the date on which a debtor becomes bankrupt following a debtor's petition against a partnership or by joint debtors who are not partners (see Bill cl. 33).

- the repealed Act (i.e. the 1924 Act) has been re-defined to take account of the new method of citation following the Acts Citation Act 1976 (see Acts Interpretation Act s.10).

- references to a trustee of an estate or deed or composition will continue to be read as references to two or more trustees as the case requires (Bill para 3(2)(k)), either as joint trustees or as joint and several trustees. References to a trustee will no longer include an Official Receiver (present para 5(4)(a)) as the trustee functions of each Official Receiver are being transferred to the Official Trustee in Bankruptcy (see ex memo paras 40 to 44).

Cl. 4: Application of Act : Infants

25. Following the reduction in the age of majority to 18 years for certain purposes, it is made clear that the Bankruptcy Act still applies to a person who is below the age of 21 (i.e., persons who were 'infants' at common law (Bill cl.4)). The amendment does not effect any substantive change in the law: it merely reflects provisions made in other Acts and changes which have already been made to the Bankruptcy Rules see, e.g.,rr. 185, 186 and 189).

Cl. 5: Act to bind the Crown

26. The Act (which currently binds the Crown in right of the Commonwealth and of each of the States) will also bind the Crown in right of the Northern Territory (Bill cl.5). The amendment takes account of the new status of the Northern Territory.

Cl. 6: Law of States and Territories

27. The provisions (present s-secs 9(2) to (4)) saving proceeedings under the previous State Bankruptcy and Insolvency Acts are no longer necessary and are omitted (Bill cl.6). Unless an objection was still in force, any person declared bankrupt under a State Act would have been automatically discharged on 4 March 1971 (present s-sec 149(2)). In addition, because of State statutes of limitations, it would no longer be possible to take proceedings against persons who were subject to the earlier State Acts. These Acts are still on the statute books except in New South Wales which repealed its Bankruptcy Act in 1978.

AMENDMENTS TO PART II (ADMINISTRATION)

28. Cls. 7 to 16 of the Bill amend Part II of the Act dealing with administration (present ss. 10 to 20).

29. Background: To assist in general Ministerial supervision of bankruptcy proceedings there is an Inspector-General in Bankruptcy (hereafter referred to as the 'Inspector-General') who is appointed by the Governor-General (s. 16). His duties are to make investigations required by the Minister and to supervise and report on the work of the various other statutory office holders under the Act.

30. The Commonwealth is divided, for the purposes of bankruptcy administration, into 9 Bankruptcy Districts. The Governor-General can appoint (s. 16):-

(a) a Registrar in Bankruptcy and as many Deputy Registrars in Bankruptcy as are necessary (hereafter referred to as 'Registrar' and 'Deputy Registrar' respectively) for each Bankruptcy District (further background on their duties and functions is contained in ex memo para 33); and

(b) an Official Receiver for each Bankruptcy District (further background on the role of an Official Receiver is contained in ex memo paras 37 and 38).

31. Part II will now be divided into two Divisions:-

- Division 1 - General (Bill cl.7); and

- Division 2 - Common Investment Fund (Bill cl.16).

Amendments to Division 1 (General)

Cl. 8: Functions of Inspector-General in Bankruptcy

32. In addition to his present powers to make such inquiries and investigations as the Minister directs (presents s-sec 12(1)), the Inpsector-General will also be able to make such other inquiries and investigations as he thinks fit into the conduct of a trustee (including the Official Trustee) in relation to an administration of an estate under the Act (Bill para 8(a)). There are also consequential amendments (Bill paras 8(b) and (c)) following the amended definition of 'books'. This will assist in the investigation of complaints relating to the administration of the Act.

Cl. 9: Registrars and Deputy Registrars

33. The Governor-General will be able to appoint, for each Bankruptcy District, so many Deputy Registrars as are determined by Proclamation (Bill para 9(a)). This will remove doubts as to the number that can be appointed under the present Act and facilitate the making of acting appointments.

34. A Deputy Registrar will be able to exercise all the powers and perform all the functions of a Registrar (Bill para 9(b)).

Cl. 10: Stamp of Registrars

35. Background: The duties and functions of a Registrar can be divided analytically into two groups:-

(a) statutory duties and functions which are imposed on the Registrar by the Act or by the Rules; for

example, the issue of a bankruptcy notice (s. 41) or the acceptance of a debtor's petition (s. 55 - see paras 86 to 91 of the Clyne Committee Report); and

(b) duties and functions which arise from the Registrar's role as the provider of registry facilities for a Court exercising jurisdiction in bankruptcy: for example, the receipt of a creditor's petition that is filed in the office of a registrar (r.12).

36. New Provision: Each Registrar will have a stamp (Bill cl. 10). This will enable the ready authentication of documents which are issued by or filed with the Registrars as part of their statutory duties. Bankruptcy documents marked with such a stamp will be receivable in evidence (see Bill cl. 151).

Cl. 11: Official Receivers

37. The Inspector-General will be able to specify not only the period of time for which an officer can be directed to perform the duties etc. of an Official Receiver (present s-sec 15(4)) but also which of the duties are to be performed and that the performance is to be for an indefinite period (Bill cl.11). These new provisions will assist in the utilization of staff and will facilitate the performance by Official Receivers of their statutory duties (present s.19) in relation to bankrupt estates.

Cl. 12: proposed ss. 17 and 17A: Acting Appointments

38. The provisions relating to acting appointments have been redrafted to bring them into line with the

standard provisions that are now to be used in relation to such matters (Bill cl.12). Among other things, the new provisions should remove any doubts as to the validity of acts done by persons with acting appointments (proposed s-secs 17(7) and 17A(7)).

Cl. 12: proposed s. 17B: Arrangements for services of State or Northern Territory Magistrates

39. The Governor-General will be able to arrange with the Governor of a State or the Administrator of the Northern Territory as the case may be, for magistrates to perform functions under the Bankruptcy Act (Bill cl.12). This amendment will remove any doubts as to the power of State magistrates to conduct public examinations of bankrupts and others (ss. 69 and 81) and will facilitate administration in the more remote areas of the Commonwealth.

Cl. 12: proposed s.18: The Official Trustee in Bankruptcy

40. Background: Each Official Receiver has two separate roles:-

(a) The Official Receiver exercises and performs powers and functions of an investigatory nature in relation to the conduct and trade dealings of each bankrupt (present s. 19 - this role will remain personally with each Official Receiver).

(b) In almost every bankruptcy the Official Receiver fills the office of trustee of the bankrupt's estate (present s. 160) (for example, in the year ended 30 June 1979, there was a total of 3857 new Part IV and Part XI bankruptcies of which 3846

estates were administered by Official Receivers, and 11 estates were administered by registered trustees).

41. Each Official Receiver has the powers and functions of a trustee in relation to those estates of which he is trustee. However, the property belonging to each of these estates is vested in a body corporate known as The Official Receiver in Bankruptcy and constituted by all of the Official Receivers together (present s. 18).

42. Amendments: In addition to holding property, the body corporate will now replace individual Official Receivers as the trustee of estates of bankrupts and deceased persons. In addition, its name will be changed to the Official Trustee in Bankruptcy (hereafter referred to as the 'Official Trustee') to reflect more clearly its intended trustee functions (Bill cl.12 - proposed s. 18).

43. The amendments will remove the problems that can arise at present because of the separation of the legal entity holding the property from the person performing the function and, at the same time, provide the benefits of incorporation - continuity, flexibility and a clarification of legal responsibility for the performance of the trustee functions. Consequential amendments are made to other sections of the Bankruptcy Act (Attachment A details the amendments consequent on the transfer of each Official Receiver's trustee functions to the Official Trustee and Attachment B details amendments consequent on the change of the body corporate's name to the 'Official Trustee in Bankruptcy').

Cl. 12: proposed s. 18A: Liability of the Official Trustee

44. The Official Trustee will be subject to the same personal liability in respect of an act done or omitted to be done by it as an individual trustee would be (Bill cl. 12 - proposed s-sec 18A (1)). However, the Commonwealth will indemnify the Official Trustee against any personal liability incurred by it under this provision or in giving effect to a direction of the Court (under s. 50) to take control of the property of a debtor (proposed s-sec 18A (2)). Any indemnity provided by the Commonwealth will be subject to other indemnities obtained by the Official Trustee (proposed s-secs 18A (3) and (4)).

Cl. 13: Duties etc. of Official Receiver

45. An Official Receiver will be able to authorise a person other than an officer of the Court or of the Commonwealth (present para 19(1)(d) to attend a first meeting of creditors on behalf of the Official Receiver (Bill cl.13 - this was also possible under the 1924 Act). This will facilitate the holding of first meetings in country areas where it would be expensive or inconvenient to send an appropriately qualified public servant. (Rr. 71 and 94 will be amended so that such a person can also exercise at any meeting of creditors any proxy given to the Official Receiver).

Cl. 14: proposed s. 19A: Liability of statutory office holders

46. The Commonwealth will indemnify certain officers of the bankruptcy administration for certain actions undertaken in good faith in the performance of their duties (Bill cl.14 - proposed s. 19A).

Cl. 14: propsed s.19B: Officers to act in aid of each other

47. Any officer having functions, powers or duties under this Act will act in aid of any other officer having functions, powers or duties under this Act (Bill cl.14 - proposed s.19B). This will facilitate administration by, for example, removing any doubts as to the ability of officers to assist with the public examination of a bankrupt in a Bankruptcy District other than the district in which the bankruptcy occurred (see also Bill cl.84 which will enable costs to be taxed in other Districts).

Cl. 15: Bank Accounts

48. The Registrars, the Official Receivers and the Official Trustee will maintain such bank accounts as are directed by the Inspector-General and will comply with his directions in relation to the banking of money into those bank accounts (Bill para 15(c)). This will enable the Inspector-General to ensure that adequate arrangements are made for the banking and auditing of moneys which are not covered by the Audit Act:-

(a) The Audit Act 1901 applies to moneys received by Registrars and Official Receivers on account of the Consolidated Revenue Fund. The Audit Act will also apply to the proposed Common Investment Fund and to the proposed Common Investment Fund Equalisation Account.

(b) The Audit Act does not apply to deposits on petitions or certain moneys paid into Court or to moneys held in bankrupt estates. The Audit Act will also not apply to any trust moneys held by the Official Trustee which do not form part of the Common Investment Fund.

Cl. 16: Proposed Division 2 - Common Investment Fund

49. Cl. 16 of the Bill inserts a new Division dealing with the creation of the Common Investment Fund.

50. Background: At present the Bankruptcy Act permits an Official Receiver to invest funds belonging to a bankrupt estate of which he is the trustee for the benefit of that estate. In practice, only a small part of those moneys is invested because it is necessary to make separate investments for each estate and, in many estates, the funds held are too small to justify separate investment. (For example, at 30 June 1979 the funds held by Official Receivers totalled $8,616,787: this money belonged to 15,510 estates which were being administered as at that date).

51. Under the new provisions set out in cl.16 of the Bill, all trust moneys held by the body corporate, the Official Trustee, in relation to the estates of bankrupts or deceased debtors will be treated as a common fund for purposes of investment. This will permit close investment of most of the moneys held in the fund from time to time and it is estimated that the resulting interest will exceed $650,000 in a full year. This interest will be paid into the Consolidated Revenue Fund in order to offset the cost to the Commonwealth of the Official Receivers' trustee services in relation to those estates, increasing revenue by approximately 33 and one third percent over current receipts. In certain circumstances moneys in the common investment fund will be deemed to have earned interest for the benefit of the person or persons entitled to share in the distribution of those moneys (proposed s.20J).

52. The principle of applying interest in this way has always been a feature of bankruptcy legislation in the United Kingdom and it was also embodied in the bankruptcy laws of several of the Australian States prior to 1928. No increase in staff will, at this stage, be required to administer this investment fund although minor adjustments to existing staff resources may be necessary.

53. Amendments: To give effect to the provisions outlined above, there will be a new Division 2 inserted in Part II of the Act , which will contain detailed provisions in relation to the following:-

(a) the creation of the Common Investment Fund (proposed s. 20B);

(b) the establishment of an Investment Board (consisting of the Permanent Head and the Inspector-General) to ensure that moneys in the Common Investment Fund are properly invested in the most advantageous manner (proposed s. 20C);

(c) the permitted forms of investment for moneys in the Common Investment Fund (proposed s. 20D - based on s. 42 of the Superannuation Act 1976 which sets out the investments permitted for the Superannuation Fund);

(d) borrowing for the Common Investment Fund where the Investment Board considers this desirable to avoid realising an investment at an inappropriate time (proposed s. 20E);

(e) to ensure that moneys in the Common Investment Fund are not deemed to be held on account of any particular estate (proposed s. 20F);

(f) the creation of the Common Investment Fund Equalisation Account (a trust account for the purposes of s. 62A of the Audit Act 1901) - this means that the Equalisation Account will form part of the Trust Fund as provided for in Part IX of the Audit Act 1901 and as such it will be subject to the provisions of that Act - and the payment of moneys into and out of that account, including the payment of excess moneys into the Consolidated Revenue Fund (proposed ss. 20G and 20H); and

(g) the circumstances in which interest will be paid to particular persons in respect of moneys in the Common Investment Fund (proposed s. 20J), namely:-

(i) where investments accrued before the Common Investment Fund is established;

(ii) where the distribution of moneys belonging to an estate is unduly delayed; or

(iii) where moneys in the Common Investment Fund are found to belong to a third party.

54. Consequential amendments are made to other provisions of the Act (see Attachment C for particulars).

AMENDMENTS TO PART III (COURTS)

55. Cls. 17 to 22 of the Bill amend Part III of the Act dealing with Courts. (In this ex memo a reference to 'the Court' is a reference to a Court having jurisdiction in bankruptcy under the Bankruptcy Act. The Courts having jurisdiction in bankruptcy are set out in present s-sec. 27(1)).

Cl. 17: Federal Court of Bankruptcy

56. The provisions (present s-secs 26(4) to (6)) requiring each Registrar to have a stamp similar to the Federal Court of Bankruptcy are repealed (Bill cl.17(1): the repealed provisions will continue to apply to documents or copies marked before the commencement of cl. 17 -see s-cl. 17(2)). This amendment is consequential upon the new provisions relating to stamps (see Bill cl. 10 - proposed s. 14A). This will enable there to be a uniform procedure for the sealing of documents in all Bankruptcy Districts.

Cl. 18: Courts to act in aid of each other

57. Background: S. 122 of the U.K. Bankruptcy Act 1914 enables 'British courts' to act in aid of each other (continued in operation by present s-sec 29(2)). However, with the constitutional changes in the British Commonwealth there have been difficulties in the construction of this provision. In any event, it does not apply to non-Commonwealth countries.

58. Amendments: Australian Courts exercising jurisdiction in bankruptcy will act in aid of the Bankruptcy Courts of the External Territories, Canada, New Zealand and the United Kingdom (which have similar

bankruptcy legislation to Australia) and of other prescribed countries and may act in aid of the Bankruptcy Courts of non-prescribed countries. They may also request Bankruptcy Courts in other countries to act in their aid (Bill cl.18 - cf.s. 135 of the New Zealand Insolvency Act 1957).

Cl.19: Exercise of jurisdiction

59. The matters to be heard and determined in open Court (present s. 31) are amended (Bill cl.19):-

(a) to exclude appeals relating to proofs of debt where the amount involved is $500 or less (Bill para 19(a) - the current limit is $200); and

(b) to include application for an order declaring a provision of a deed of assignment, of a deed of arrangement or of a composition to be void or otherwise (Bill para 19(b) - consequential on Bill cl. 117, which amends present s. 222 to enable the Court to make such an order); and

(c) to include applications for an order annulling the order for administration of a deceased estate in bankruptcy. (Bill para 19(d) - consequential on Bill cl. 143 which confers on the Court the power to make such an order).

60. It is considered desirable that there be appropriate publicity for these applications.

Cl. 20: Extension and abridgement of times

61. The Court will be able to extend or abridge times fixed by the Court or the Registrar (Bill para 20(a)). A

similar power is given to the Registrar in relation to times fixed by the Registrar (Bill para 20(b)). The power does not extend, in either case, to an extension of time for compliance with a bankruptcy notice which is dealt with elsewhere (see Bill para 24(1)(c)).

Cl.21: Transfer of proceedings

62. The provisions relating to the transfer of proceedings (present s. 35) are amended to take account of

- changes in Court procedures (motions are no longer used); and

- the fact that documents filed in respect of proceedings, motions or applications are filed with a Registrar who is separate from the Court. (See also Bill paras 78(c) and (d) amending present s-secs 157(6) and (7) so that objections to the appointment of a trustee will be filed with the Registrar for the appropriate District).

Cl. 22: Power of the Court to rescind etc. orders

63. Once a sequestration order or an order for the administration of a deceased estate has been signed and sealed (see r. 124 and re Edgar (1973) 2 A.L.R. 649), the Court will not be able to rescind that order or to suspend its operation (Bill cl. 22). This amendment takes account of the particular consequences for status and property that flow from the making of a sequestration order or an order for administration. Rescission of a sequestration

order otherwise than by way of annulment does not terminate the bankruptcy. Upon the making of a sequestration order the debtor becomes a bankrupt and remains one until he is discharged or the bankruptcy is annulled (see Re Deriu 16 F.L.R. 420 and present s-sec 43(2)).

AMENDMENTS TO PART IV

(PROCEEDINGS IN CONNEXION WITH BANKRUPTCY)

64. Cls. 23 to 39 of the Bill amend Part IV of the Act dealing with proceedings in connexion with a bankruptcy (present ss. 40 to 76).

65. This Part provides two different ways in which a person can become a bankrupt:-

- Divisions 1 and 2: on the petition of a creditor following the commission of an act of bankruptcy within the 6 months prior to the presentation of the petition; or

- Division 3: on his own petition (a debtor's petition).

Amendments to Division 1 (Acts of bankruptcy)

Cl. 23: Acts of bankruptcy

66. It will be possible to issue a bankruptcy notice in respect of a judgement or order for the payment of money made by a Court exercising bankruptcy jurisdiction made after the date of Assent (Bill cl.23). This is not possible at present because such a judgement or order is not 'final' within present para 40(1)(g) (Re Pannowitz 6 A.L.R. 287). This amendment will provide an effective and certain means of enforcing judgements or orders for the payment of money made by the Court. The judgement or order must be less than 6 years old (see Bill para 24 (1)(b)).

Cl. 24: Bankruptcy notices

67. A bankruptcy notice cannot be based on a judgement or order of the Court that is more than 6 years old (Bill paras 24(1)(a) and 24(1)(b)).

68. The Court may extend times fixed by the Court or the Registrar for compliance with the requirements of a bankruptcy notice where the debtor is seeking to set aside the bankruptcy notice itself or the judgement or order on which the notice is based providing the debtor is acting bona fide and with due diligence. A similar power is given to the Registrar in relation to times for compliance fixed by him (Bill cl.24 - see also cl.20 dealing with the extension or abridgement of other times). These amendments will overcome doubts as to the present powers of the Court and the Registrar in this regard.

Amendments to Division 2 (Creditors' petitions)

69. Background: At present, a creditor or creditors to whom $500 or more is owing may present a creditor's petition asking the Court to make a sequestration order against the estate of the debtor if the debtor has committed an act of bankruptcy within the 6 months prior to the filing of the petition and, at that time, had some connexion with Australia. This minimum amount of $500 will be raised to $1000 (Bill cl. 26 - see also cl. 136).

Cl. 25: Sequestration orders

70. A debtor who becomes a bankrupt on a creditor's petition will continue as a bankrupt until, among other things, the bankruptcy is annulled under present ss. 74 or 154 (Bill cl.25). The amendment will clarify the power of the Court to annul a bankruptcy (see also Bill cl.22).

Cl. 26: Conditions on which creditor may petition

70A. Under the existing Bankruptcy Act, a creditor cannot present a petition against a debtor for a debt or debts of less than $500. That figure has remained unchanged since the legislation came into operation on 4 March 1968. The minimum amount required to found a creditor's petition in a bankruptcy proceeding will be increased from the present $500 to $1000 and will thereby take account of changing money values. (A similar amendment is made in respect of a creditor's petition for the administration in bankruptcy of the estate of a deceased person - Bill cl. 136 : ex memo para 269A).

Cl. 27: Deposit by petitioning creditor

71. It will no longer be necessary to lodge a deposit with a creditor's petition to cover advertising expenses etc. (present s. 48) (Bill s-cl. 27(1)).

Cl. 28: Control of property before sequestration

72. The Official Trustee (rather than an Official Receiver as is the case under present s. 50) will, in the future, be the body that the Court may direct to take control of property before sequestration (Bill para 28(1)(a)). This amendment is consequential on the transfer to the Official Trustee of the trustee functions of each Official Receiver. The Official Trustee will, in such circumstances, have the same power to examine witnesses under s. 81 as a trustee has (Bill para 28(1)(b)).

Cl. 29: Extension of creditor's petition

73. Background: At present a creditor's petition lapses 12 months after its presentation unless it has, in the meantime, been finally dealt with by the Court (present s-sec 52(4)).

74. Amendment: The Court will be able to extend the currency of a creditor's petition beyond the present period of 12 months for a period of up to 24 months (Bill cl. 29). This will enable the Court to prevent possible injustice or hardship which might otherwise result from the lapse of a petition. The Court will, of course, have a completely unfettered discretion to refuse to extend the currency of a creditor's petition.

Cl. 30: Consolidation of proceedings

75. Background: Where two or more partners or joint debtors have become bankrupt (whether on a creditor's or debtor's petition) the Court may consolidate the proceedings (present s. 53).

76. Amendment: To facilitate the administration of estates where a consolidation order has been made:-

(a) The estates will be applied in the order set out in s. 110 which deals with the application of the estates of joint debtors (Bill cl. 30 - proposed s-sec 53(2) - it has always been presumed, but never provided, that this is the case).

(b) The Court will be able, for the purpose of determining the property available for distribution in the joint estate (see Division 3 of Part VI), to declare (Bill cl. 30 - proposed s-sec 53(3)) that specified dates are:-

(i) the date on which the petitions are to be deemed to have been presented (unless the Court specifies another date the 'commencement of the bankruptcy' will be the earliest act of bankruptcy committed within the 6 months preceding the presentation of the petition - see s. 115);

(ii) the date of the bankruptcy in respect of each estate (this will determine which debts can be proved in each estate - see s. 82); and

(iii) the date of the commencement of the bankruptcy in respect of each estate (subject to certain exceptions all the property of a bankrupt at the commencement of the bankruptcy becomes available for the payment of his debts - secs.58).

77. The Court needs to be able to specify both the date of the petition and the date of the commencement of the bankruptcy as it can be dealing with creditors' petitions or debtors' petitions or a combination of both. It can have applications before it which will require orders declaring dates for petitions in respect of all the estates, dates of bankruptcy in respect of each estate and the commencement date in respect of all estates. (See also Bill cl. 140 which will enable the Court to make a consolidation order where one or more of the partners or debtors is already bankrupt and where there has already been an order for administration under Part XI in respect of one or more of the deceased partners or joint debtors).

Cl. 31: Bankrupt's statement of affairs

78. Background: Following the making of a sequestration order a bankrupt is required to file, within 14 days of the date of the order, a statement of affairs (s. 54).

79. Amendments:-

(a) Such statements will now be required within 14 days from the date on which the debtor is notified of the bankruptcy (Bill para 31(1)(a)).

(b) The statement will have to be filed in the office of the Registrar for the Bankruptcy District in which the sequestration order was made (Bill para 31(1)(b)). This is the office that they should be filed in for the completion of the record and for the convenience of the searching public and the Official Receiver administering the estate.

(c) A joint statement of affairs will be required from joint debtors who are made bankrupt (Bill para 31(1)(c)). This amendment will facilitate administration of the joint estate and enable the trustee to comply with the requirements of present s. 110 relating to the application of assets of joint debtors (see also Bill cl. 30). (There are also consequential amendments to present s-secs 54(3) and 54(4) - see Bill paras 31(1)(d) and (e)).

The amendments will only apply to persons who became bankrupt after the amendments come into operation - Bill s-cl. 31(2).

Amendments to Division 3 (Debtor's petitions)

80. Background: A debtor may, on his own initiative, file a debtor's petition. He becomes bankrupt upon the acceptance of his petition by the Registrar.

Cl. 32: Debtor's petition

81. Background: s. 55 of the Act sets out the procedure to be followed by a person who wishes to become bankrupt on his own petition.

82. Amendment: The following amendments have been made to this provision (Bill cl. 32):-

(a) Once a debtor becomes bankrupt on a debtor's petition, the Registrar will send a copy of the debtor's statement of affairs to the Official Receiver (Bill paras 32(1)(a) and (c)). There is no present requirement to do this and it will enable the Official Receiver to discharge his duties promptly. The amendment will bring the provision relating to a debtor's petition into line with the requirements relating to a creditor's petition (present para 54(1)(b)). It is also made clear that the debtor's petition is presented to and accepted by the Registrar and the statement of affairs merely accompanies the petition (Bill para 32(1)(b)).

(b) A debtor who has executed a composition will not now be entitled to present a petition against himself unless, among other things, the composition has been declared void (Bill para 32 (1)(d) - see also cl. 33 - proposed s-sec 56(10) relating to debtor's petitions against a

partnership). This amendment will remove an inconsistency which exists between the position of a debtor under a composition under Part X and a debtor under a deed of assignment or arrangement under Part X.

(c) A debtor who becomes a bankrupt on a debtor's petition will continue as a bankrupt until, among other things, the bankruptcy is annulled under present ss. 74 or 154 (Bill para 32(1)(e)). The amendment will clarify the power of the Court to annul the sequestration order (see also Bill cls. 22 and 25).

(d) Creditors will be able to inpsect the statement of affairs (Bill para 32(1)(f)).

83. These amendments in relation to a debtor's petition will only apply to a debtor's petition presented after the amendments come into operation (Bill s-cl. 32(2)).

Cl. 33: proposed s. 56: Debtor's petition against partnership

84. The provisions relating to the presentation of a debtor's petition against a partnership (s. 56) have been re-drafted. The main changes are as follows:-

(a) Where a debtor's petition has been presented against a partnership by some only of the partners the Court will now be empowered, with the consent of one or more of the petitioning partners, to direct the Registrar to accept the petition as if it were the petition of the consenting partners only (proposed s-sec

56(7)(b)). This will avoid forcing partners who wish to become bankrupt into a position where they have to submit to the delay, inconvenience and expense of further petitions and statements of affairs (cf. present s. 45 which permits a creditor's petition to be presented against one or more of the debtor partners).

(b) Where the Registrar does accept a debtor's petition against a partnership, the Official Receiver will receive copies of the statements of affairs that have been prepared (proposed s-sec 56(8)) and copies of any further statements of affairs by partners who do not join in the petition (proposed s-sec 56(13)).

(c) It is also made clear that the Registrar accepts the petition and not the statement of affairs (proposed para 56(7)(a)).

(d) There is a provision for notice to non-petitioning creditors (proposed para 56(6)(b)).

85. These amendments will only apply to a debtor's petition against a partnership presented after the commencement of the amendments (Bill s-cl. 33(2)). Consequential amendments are made to the farmers' debts assistance provisions (see Bill paras 143(a) and (c)).

Cl. 33: proposed s. 57: Debtor's petition by joint debtors who are not partners

86. Background: At present a joint debtor's petition cannot be presented by joint debtors who are not partners (Re Pepper (1966) 14 F.L.R. 828). This means that there

is an inconsistency with creditors' petitions (present s. 46 permits a creditor's petition to be presented against two or more joint debtors whether partners or not) even though there are more joint debtors who are not partners seeking to file debtors' petitions than there are such debtors having creditors' petitions issued against them.

87. Amendment: It will now be possible for joint debtors who are not partners to present a joint debtor's petition subject generally to the same provisions as apply to a joint debtor's petition presented by partners (Bill cl. 33 - proposed s. 57 - the present s. 57, which enabled a creditor to inspect a statement of affairs, is repealed by cl. 33 and set out separately in proposed s-secs 55(4), 56(17) and 57(11)). Only the petitioning joint debtors can become bankrupt. A consequential amendment is made to farmers' debts assistance provisions (see Bill para 145(c) : proposed para 253D(2)(c)).

Cl. 33: proposed s.57A: time at which person becomes bankrupt on debtor's petition

88. Background There are some uncertainties as to the time at which a person becomes a bankrupt and the point of time from which after-acquired property vests in the bankrupt:-

(a) While there is no current judicial authority for it, the present view of the operation of Part IV of the Act is that the point of time from which a bankruptcy takes effect is determined by whether the bankruptcy results from the acceptance of a debtor's petition or from a sequestration order on a creditor's petition. The view is that:-

(i) if it results from the acceptance of a debtor's petition (an administrative act) the bankruptcy dates from the actual time of the acceptance of the petition;

(ii) if it results from the making of a sequestration order (a judicial act) the bankruptcy dates from the first moment of the day on which the order is made.

(b) The property of the bankrupt that vests in the Official Trustee (as the corporate trustee will be known) is:-

(i) the property of the bankrupt at the point of time at which he becomes a bankrupty (see (a) above) (present para 58(1)(a)); and

(ii) the property of the bankrupt acquired after the day of the bankruptcy ('after-acquired property' - present para 58(1)(b) and s-sec (58)(6)).

This means that the following property does not vest in the Official Trustee:-

(iii) debtor's petition : property acquired after, but on the same day as, the petition is accepted; and

(iv) creditor's petition: any property acquired on the day of the sequestration order.

(c) The reference point for some of the provisions avoiding certain transactions (present ss 120 and

122) and the related protective provisions (present ss 123 and 124) is when the debtor becomes a bankrupt - this time varies as set out in sub-para (a) above.

(d) The present provisions relating to the protection of persons dealing in good faith with after-acquired property (s. 126) apply back to property acquired by the bankrupt after he became a bankrupt - for the reasons mentioned in sub-paras (a) and (b) above, it will cover property that is not after-acquired property for the purposes of s-sec 58(6).

(e) There are similar problems in relation to procedures under Part X and Part XI of the Act.

88A. To resolve some of these uncertainties there are a series of amendments:-

(a) The bankruptcy of a person will commence on the first point in time on the day on which he becomes a bankrupt. This will apply the same rule to a debtor's petition (see Bill cl. 33: proposed s. 57A) as is applied to a sequestration order (no amendment is required in relation to a sequestration order under Part IV or an order for administration under Part XI.

(b) Property will vest in the Official Trustee as property of the bankrupt if it was the bankrupt's property on the day before he became a bankrupt and as after-acquired property if he acquires it at any time on or after the day on which he becames a bankrupt. The protection provisions in present s. 126 will have a similar application.

(c) Similar adjustments in relation to property have been made in relation to proceedings under:-

(i) Part X: see Bill paras 100(a) and 103(c)

(ii) Part XI: see Bill para 141(1)(b) - s-sec 58(6) will apply.

(d) The avoiding provisions in ss 120 and 122 and the protection provisions in ss 123 and 124 will now apply in relation to transactions that take place before (but not on) the day on which the person becomes a bankrupt. Such transactions can only be transactions in relation to property of the person before he becomes a bankrupt. Transactions with after-acquired property will be protected by s. 126.

88B. Amendment: The time at which a person becomes a bankrupt by virtue of the presentation of a debtor's petition will be deemed to be the first instant of the day on which the petition is accepted by the Registrar (Bill cl. 33 - proposed s. 57A - see also ex memo paras 88 and 88A).

Amendments to Division 4 (Effect of bankruptcy on property and proceedings)

Cl. 34: Vesting of property

89. Background: Once a debtor becomes bankrupt, his property vests in the statutory corporation presently known as 'The Official Receiver in Bakruptcy' (s. 58).

90. Amendments:-

(a) The references to the statutory corporation are amended to take account of its new name and the fact that it will take over the trustee functions of each Official Receiver (Bill paras 34(1)(a) to (d) - see also ex memo paras 40 to 44).

(b) The right of a creditor for maintenance to pursue remedies against the property of any bankrupt is preserved (Bill para 34(1)(e) - proposed new s-sec 58(5A) - see also ex memo paras 105 to 108 below which outline the treatment of maintenance in this Bill).

(c) Property acquired by a bankrupt on the day on which he becomes a bankrupt will now vest in the Official Trustee as after-acquired property (Bill para 34(1)(f): this will remove an hiatus in the existing legislation). (See also Bill para 100(a) which excludes from the definition of divisible property in relation to a deed of assignment property acquired on or after the day of execution of the deed and Bill cl. 103 which

makes a similar inclusion in the definition of 'the debtor's property' for the purposes of the control of such property by the controlling trustee under s. 190).

Cl. 35: Second or subsequent bankruptcy

91. Background: Present s. 59 provides for the situation where a person who is already a bankrupt again becomes a bankrupt. The joint effect of present paras 59(1)(a) and 59(1)(b) is that property acquired by or devolving on the bankrupt after the earlier bankruptcy and up to and including the date of the later bankruptcy vests in the trustee of the earlier bankruptcy, whereas property acquired by or devolving upon the bankrupt after the second bankruptcy vests in the trustee of the later bankruptcy. It is considered that a more equitable provision to make for a subsequent bankruptcy would be one allowing the creditors in the later bankruptcy to have first recourse to those assets remaining in the earlier estate which were acquired by or devolved on the bankrupt after the date of the earlier bankruptcy. Any such assets are, in practically all cases, acquired by the bankrupt at the expense of the creditors in the later bankruptcy. This is the situation which prevails in the English Act and was the provision in the 1924 Act.

92. Amendments: The following provisions will now apply in relation to the estate of a bankrupt who becomes a bankrupt again after the commencement of the new provisions (Bill cl. 35):-

(a) Property acquired by or devolving on a bankrupt after he becomes a bankrupt and which, or the proceeds of which, have not been distributed

amongst the creditors in his bankruptcy at the time of the presentation of a petition on which, or by virtue of the presentation of which, he again becomes a bankrupt will divest from the trustee in the earlier bankruptcy and vest in the trustee of the later bankruptcy (proposed paras 59(1)(a) and (b)).

(b) The trustee in the earlier bankruptcy will lodge with the trustee in the later bankruptcy a proof of debt in respect of any unpaid expenses or proved debts in the earlier bankruptcy. This claim will rank equally with the ordinary unsecured creditors in the later bankruptcy. The trustee in the earlier bankruptcy will also have the right, without the consent of the trustee in the later bankruptcy, to amend his proof of debt to take in expenses or proved debts in the earlier bankruptcy which come to his notice after he has lodged his proof of debt (proposed para 59(1)(c)).

(c) The trustee in the earlier bankruptcy will retain his rights in respect of antecedent transactions (proposed para 59(1)(d)) but subsequent income payments (present s-sec 131 (2)) will go to benefit the later bankrupt estate (proposed para 59(1)(e)).

(d) The trustee in the earlier bankruptcy must hold any undistributed after-acquired property on notice of the presentation of a creditor's petition (Bill - proposed s-sec 59(2)) or on notice of reference of a debtor's petition to the

Court (Bill - proposed s-sec 59(3)). If the person becomes bankrupt again, such property forms part of the later bankrupt estate (Bill - proposed s-sec 59(4)).

93. Present s. 59 will continue to apply in relation to the estate of bankrupts who, before the commencement of the new provisions, had again become bankrupts - see Bill s-cl. 35(2) and (3). Similar amendments are made where a Part XI administration order is made in relation to an undischarged bankrupt (see Bill cl. 142 amending s. 250 and ex memo paras 287 to 290).

Cl. 36: Stay of legal proceedings

94. The Court will be able to stay any legal process, whether civil or criminal, against the person or property of the debtor in respect of a provable debt and to discharge him out of custody imposed because of failure to pay a provable debt (Bill cl. 36). The purposes of these amendments are:-

- to overcome the use of criminal procedures to collect provable debts when bankruptcy proceedings have intervened;

- to ensure that legal proceedings against bankrupts for the recovery of provable debts are brought pursuant to the Bankruptcy Act;

- to ensure that bankrupts are not held in custody for the non-payment of debts provable in bankruptcy; and

- to remove any uncertainty as to the ambit of the present s. 60.

(See Commissioner for Motor Transport v. Train (1972) 127 C.L.R. 396 and D. St. L. Kelly: Debt Recovery in Australia pp. 160 and 161).

Amendments to Division 5 (first meeting of creditors, public examination and committee of inspection)

95. Cls. 37 and 38 contain amendments to Division 5 of Part IV.

Cl. 37: first meeting of creditors

96. The Official Receiver will now be able to decide, in any bankruptcy, whether it is desirable to hold a first meeting of creditors, although he will be obliged to call such a meeting if requested to do so by a creditor (Bill cl. 37).

Cl. 38: public examination of bankrupt

97. Present s. 69 (dealing with the public examination of the bankrupt) has been revised (Bill cl. 38). The most important changes are as follows:-

(a) The public examination will be held on the application of the Official Receiver (proposed s-sec 69(3)).

(b) The power of a Registrar or magistrate to adjourn a public examination is widened and clarified (proposed s-sec 69(5)).

(c) The bankrupt, the trustee (being either the Official Trustee or a registered trustee) or a creditor are entitled to be legally represented at a public examination (proposed s-secs 69(8) and (9) - cf. present s-secs 69(5) and (6)).

(d) The Official Trustee will be able to be represented by an Official Receiver (proposed s-sec 69(10)).

(e) The Registrar may dispense with unnecessary public examinations (proposed s-secs 69(13) and (14). At present a public examination is required in all cases unless dispensed with on grounds of physical or mental disability or by direction of the Court (such directions are rare) or unless the bankruptcy is a small bankruptcy and a creditor or the trustee has not demanded one. Rule 34 will be amended to require the Registrar, in exercising his discretion to dispense with the public examination of any bankrupt, to have regard to all the circumstances of the case and to various particular matters such as whether the bankrupt has made full disclosure, whether he has been bankrupt before, the number and nature of his debts, and whether there are issues of public interest (cf s. 6 of U.K. Insolvency Act 1976). This amendment will eliminate time consuming but useless examinations.

(f) The wording of provisions relating to evidence by way of transcript has been clarified (proposed s-sec 69(18) - see also proposed s. 225 - Bill cl. 148).

98. See also Bill cl. 41 which amends s.81 (examination of bankrupt and third parties) and cl. 155 which inserts new provisions to ensure that examinations under ss. 69 and 81 can be conducted in a proper manner (proposed ss. 264A to 264E).

Amendments to Division 6 (Composition or arrangement with creditors)

Cl. 39: Approval by Court

99. When the Court is annulling a bankruptcy under section 74, all of the acts of and dispositions of property by the trustee are validated, and surplus property is revested in the bankrupt or such other person as the Court appoints (Bill cl. 39). Previously this was a general provision contained in s. 154.

AMENDMENTS TO PART V

(CONTROL OVER PERSON AND PROPERTY OF DEBTORS AND BANKRUPTS)

100. Cls. 40 and 41 of the Bill amend Part V of the Bankruptcy Act dealing with certain controls over the person and property of debtors and bankrupts (present ss. 77 to 81).

Cl. 40: Arrest of debtor or bankrupt

101. The provision in present para 78(1)(c) enabling the Court to issue a warrant for the arrest of a bankrupt who fails to attend his public examination is omitted (Bill cl. 40). This matter is now dealt with elsewhere (see Bill cl. 155 inserting proposed s. 264B which provides for a warrant to issue for the arrest of any person who fails to attend for an examination under ss. 69 and 81).

Cl. 41: discovery of bankrupt's property

102. Present s. 81 (dealing with examinations concerning the bankrupt or his trade dealings, property or affairs) is revised (Bill cl. 41). The most important changes are as follows:-

(a) The power of the Court or the Registrar to impose conditions as to costs when issuing a summons for the examination of a person will be restricted to cases where the application for the examination is made by a creditor (proposed s-sec 81(1)). At present this can only be done when an application is made by a trustee and may result in a hindrance to the due administration of the estate.

(b) The Court, the Registrar or a magistrate will have clearer and wider powers to adjourn such examinations (proposed s-sec 81(4) - this differs from proposed s-sec 69(5) because only a Registrar or a magistrate can conduct a s. 69 examination). This will achieve more consistency in the conduct of examinations.

(c) The powers in relation to such examinations have been clarified (proposed s-sec 81(5), (6) and (7)).

(d) Costs can be ordered out of an estate (proposed s-sec 81(14)).

(e) Where appropriate, the provisions in the proposed s. 81 have been brought into line with the provisions in the proposed s. 69: e.g. s.81 examinations will now be held in public (proposed s-sec 81(2)).

(f) The present s-sec 81(2) dealing with failure to attend after the tender of a reasonable sum for expenses has been replaced by proposed new offence provisions dealing with all examinations - see particularly proposed para 264A(1)(a) and proposed s-sec 264B(2) (see Bill cl. 155 and ex memo para 313).

AMENDMENTS TO PART VI (ADMINISTRATION OF PROPERTY)

103. Cls. 42 to 71 of the Bill amend Part VI of the Act dealing with the administration of the property of the bankrupt (present ss. 82 to 148).

Amendments to Division 1 (proofs of debt)

104. Background: The debts and liabilities which can be paid out of a bankrupt estate are called 'provable debts' and a bankrupt is released from these debts and liabilities upon his discharge (s. 153). Division 1 of Part VI states what debts and liabilities are provable debts and outlines the procedure to be followed by creditors in lodging their claims (called 'proofs of debt').

Maintenance

105. Background: Many persons with valid claims for arrears of maintenance are, or may be, prevented from proving for these claims in the bankruptcy. Courts have, in many cases, held that moneys due under a maintenance order may not be proved in bankruptcy because the courts administering maintenance legislation have such wide discretions whether or not to enforce payment that the amount is incapable of valuation. The maintenance creditor at present can only lodge a proof of debt if a judgement has been entered, prior to the date of the bankruptcy, for arrears of maintenance (Re Morris (1974) 22 F.L.R. 460). In addition, those persons who are entitled to prove in the bankruptcy for maintenance are thereby prevented from exercising any of their enforcement remedies under the general law (see present ss. 58 and 60 - there are isolated exceptions, e.g. where there was a continuing garnishee in force).

106. It is considered that, because of the social significance of maintenance obligations, all current arrears of maintenance prior to the date of bankruptcy should be provable in the bankruptcy, without thereby affecting the ability of a maintenance creditor to exercise all the enforcement remedies (other than imprisonment) that are provided by the general law. This will enable a maintenance creditor to continue receiving payments from a bankrupt maintenance debtor and at the same time to receive dividends from the trustee of the bankrupt estate. In practice, the only limitation on this right will be that the maintenance creditor will not be entitled to receive from either or both sources more than 100 cents in the dollar on the arrears claim provable in the bankruptcy (see present s. 107).

107. Amendments: Accordingly, the present Bill contains a series of amendments dealing with maintenance obligations:-

(a) There are new definitions of maintenance agreement and maintenance order (see Bill cl. 3).

(b) Any person with a claim for maintenance may exercise any other rights which that person has outside the Bankruptcy Act (see Bill cl. 34);

(c) Maintenance payable under an agreement registered or approved by a court (in accordance with the Family Law Act) or under an order will constitute a provable debt within the meaning of present s. 82 where that maintenance is:-

(i) arrears of periodical sums that were payable within 12 months before the date of bankruptcy; or

(ii) a lump sum payable before the date of bankruptcy.

(see Bill cl. 42);

(d) Maintenance or maintenance payments will be excluded from those provisions of the Bankruptcy Act which enable the trustee of the estate of a bankrupt or debtor:-

(i) to recover a preferential payment to a creditor or otherwise to avoid a payment made to a creditor within the relation-back period whether as a result of the issue of execution or otherwise (see Bill para 57(1)(c) - proposed para 122); or

(ii) to retain property handed over to him by a sheriff in the course of proceedings for the enforcement of a claim for maintenance (see Bill cl. 55 - proposed s-secs 119(2), 118(10) and 119A(2); and cl. 109 - proposed s-sec 205A (10)).

(e) A transaction will not be avoided as a preference under s. 122 if it is based on a maintenance agreement or maintenance order (see Bill para 57(1).

(f) The powers of the Court to release a discharged bankrupt from liability under a maintenance order are extended and clarified so that they apply to arrears of maintenance (whether payable by order or agreement) but not to the maintenance obligation itself (see Bill cl. 75).

(g) the provisions binding all creditors in relation to Part X proceedings (s.s. 228, 233 and 238) will not prevent a maintenance creditor from enforcing any remedy against the Part X debtor or his property in respect of a maintenance obligation (see Bill cls. 124, 127 and 132).

(h) the provisions relating to the vesting of property on the making of an order for the administration in bankruptcy of a deceased estate (present s. 249) will not prevent a maintenance creditor from enforcing remedies against the deceased estate or against non-divisible property of the deceased estate in respect of a maintenance obligation (see Bill para 141(1)(e)).

108. These amendments will deal with provisions in the present Act which have been a source of potential hardship for deserted spouses and others holding orders for maintenance.

Cl. 42: Debts provable in bankruptcy

109. The debts that are provable in a bankruptcy (present s. 82) will now include maintenance payable under an agreement registered or approved by a court (under the Family Law Act) or under an order where that maintenance is:-

(i) arrears of periodical sums that were payable within 12 months before the date of bankruptcy; or

(ii) a lump sum payable before the date of bankruptcy.

(Bill cl. 42 - see also ex memo paras 105 to 108).

Cls. 43 and 44: Proofs of debt

110. A proof of debt will not need to be verified by statutory declaration unless so required by the trustee (Bill cl. 43 - at present all proofs must be verified by affidavit). The amendment will provide greater administrative efficiency and be more convenient for creditors: over half the proofs of debt that are lodged agree with the amount shown by the bankrupt in his statement of affairs.

111. Similar amendments are made in relation to proofs in relation to a group of employees where separate proofs are not required (Bill cl. 44). The amendments ensure that different types of proof of debt will be subject to consistent requirements.

Cl. 45: Wrongly admitted proof

112. The provision allowing an appeal from a decision of a trustee admitting a proof of debt (s. 99) is amended so that a trustee cannot apply to the Court (Bill cl. 45). This is consequential upon the amendments to s.102 so that a trustee can vary his decision to admit or reject a proof of debt (see Bill cl. 47 - see also cl. 48 which makes a similar consequential amendment to s. 104 dealing with the general rights of appeal against a decision of a trustee in relation to proofs).

Cl. 46: Inspection, etc. of proofs

113. A creditor who has lodged a proof of debt will now be able to obtain a written statement of all other creditors who have lodged proofs, the amount claimed and the amount admitted (Bill cl. 46). This will overcome the present problem that a creditor has in obtaining timely notice of other creditors and the amounts they are claiming in an estate without attending at the office of the trustee and conducting a search.

Cl. 47: Admission or rejection of proofs

114. Background: Once a trustee has admitted or rejected a proof of debt in whole or in part he is functus officio (present s. 102 - subject to his right to apply to the Court under s.99, and subject to an application for review under s. 104). From time to time he would be willing to reverse or vary his decision, if he had the power to do so, because of fresh evidence, because of a misinterpretation of facts or of law or because of a decision (such as in Re Morris (1974) 22 F.L.R. 460) which affects what the trustee has done in another estate.

115. Amendment: A trustee will be able to revoke or amend an admission or rejection of a proof of debt when he considers there is sufficient reason for doing so (Bill cl. 47). This amendment will avoid unnecessary applications to the Court. A creditor who benefits from such action will not be entitled to disturb the distribution of any dividends declared before the trustee revoked or amended the decision (proposed s-sec 102(6)). Such actions by a trustee will still be reviewable by the Court (see Bill cl. 45 amending present s.99 and cl. 48 amending present s. 104).

Cl. 48: Appeal against decision of trustee in respect of proof

116. The provision enabling an appeal against any decision of a trustee in relation to a proof (s. 104) is amended consequentially upon the amendments to s. 102 which enable a trustee to vary his decision to admit or reject a proof of debt (Bill cl. 48 - see also cl. 45 which makes a similar amendment to s.99 which deals with appeals against the wrong admission of proof).

Cl. 49: Costs of Appeal

117. The present exemption of the Official Receiver from personal liability for the costs of an appeal concerning a proof of debt (present s. 105) is transferred to the Official Trustee (Bill cl. 49) who otherwise has the same personal liability as an individual trustee (see Bill cl.12 - proposed s-sec 18A(1)).

Cl. 50: Oaths

118. The Official Trustee will not be able to administer oaths in relation to proofs of debt (Bill cl. 50 - an individual Official Receiver will still be able to administer an oath (s. 262)).

Amendment to Division 2 (Order of payment of debts)

Cl. 51: Priority payments

119. Background: All debts proved in a bankruptcy rank equally except as otherwise provided by the Bankruptcy Act (s. 108).

120. Amendments: The provisions setting out the classes of claims which are entitled to be paid in priority to ordinary debts (s. 109) have been re-drafted (Bill s-cl. 51(1)). The main changes are as follows:-

(a) The priority claim for the petitioning creditor's deposit is omitted consequent upon the repeal of s.48 (see Bill cl. 27). (See Bill s-cl. 51(3) for a transitional provision in relation to existing deposits.)

(b) The taxed costs due to a solicitor in relation to the calling of a meeting under Part X (arrangements with creditors without sequestration) will receive the same priority as would the costs and remuneration due to a controlling trustee if the trustee had called the meeting (proposed s-para 109(1)(b)(ii)).

(c) The priority claim for wages will be increased from $600 to $1,500 per employee (proposed para 109(1)(e)) and the present limit of $2,000 upon a claim for workers' compensation will be removed (proposed para 109(1)(f)). This amendment in relation to wages will accord with s. 292 of the companies legislation relating to the liquidation of corporate bodies. It is considered unlikely that any employee dealing genuinely at arms length with his employer would let his salary or wages accrue overdue to a figure in excess of $1,500. This amendment also accords with the minimum action considered necessary by Commonwealth and State Ministers for Labour in their 1972 resolution on the priority to be

accorded to payment of Commonwealth taxes and charges vis-a-vis employee entitlements in winding-up proceedings and bankruptcies.

(d) The Crown priority in respect of income tax and social services contribution is omitted. This is in line with the Government's decision to abolish all remaining Crown priorities in the Commonwealth sphere except in relation to tax instalment deductions and withholding tax on dividends and interest remitted overseas and to seek the abolition of all remaining Crown priorities in the State sphere.

(e) Loans made to an employer, who later becomes bankrupt, for the purpose of paying wages or other entitlements of employees (and so applied) will be entitled to the same priority as the employee would have had (this will bring the bankruptcy legislation into line with the companies legislation) (proposed s-secs 109(2) and (3). The entitlement will also apply to loans by spouses (proposed s-sec 109(4)).

(f) The priority in respect of a claim for workers' compensation that is given by para 109(1)(g) will not extend to confer any right of priority upon a statutory body which pays a claim (e.g. under the uninsured liability scheme provided for in s.18C of the N.S.W. Workers' Compensation Act 1926-1975) and which seeks to recover the amount paid from the estate of the uninsured bankrupt employer (Bill proposed s-sec 109(6)). The claim of the statutory body will rank pari passu with the ordinary debts.

(g) Creditors who indemnify the trustee against costs incurred in litigation to realise assets will receive the same priority as they already receive if an indemnity is given to enable the recovery or preservation of assets (Bill proposed s-sec 109(10)).

(h) Present s-sec 109(4) is amended so as to maintain consistency with other provisions such as Bill cl.21 (proposed s-sec 109(8)).

Deferred Claims

121. Background: In a bankruptcy administration certain claims are deferred until other claims have been paid. While the matter is not beyond doubt, the better view seems to be that these deferred claims are presently payable in the following order:-

- Claims by a spouse of the bankrupt in respect of property lent or made available to the bankrupt (s.111);

- payments of interest exceeding the statutory rate (s-sec 112(2) - at present 8% but to be increased to 12% or such other rate as is prescribed - see Bill para 53(1)(a));

- interest after the date of bankruptcy (present para 148(c));

- claims by persons entitled under covenants, contracts and transfers that are void against the trustee under s. 120 (s-secs 120(4) and (6)); and

- claims by trustees of earlier bankruptcies in respect of the unsatisified proofs of debts payable under the earlier bankruptcies (para 59(1)(c)).

(see Rose pp. 178-180).

122. Several problems arise in relation to the order of priority of these deferred claims:-

(a) There is some doubt whether the order is as stated above.

(b) The wording of the provisions relating to deferred claims (other than claims by trustees of earlier bankruptcies) seems to require that when there is a deferred claim under one of these provisions (but only when there is such a claim) debts on voluntary bonds or covenants should be separated out and postponed to everything except a return of surplus to the bankrupt. Administration in an estate involving such a deferred claim and a claim on a voluntary bond or covenant would require different priorities from a normal administration. To work out the priorities involved could be a practical impossibility. The postponement of voluntary bonds or covenants is also anomalous as, under the English Bankrutpcy Act, they have been for many years entitled to rank pari passu with debts for valuable consideration.

(c) The new proposals for the application of assets between the competing bodies of creditors where there is a second or subsequent bankruptcy (Bill

s-cl. 35(1)) make it inappropriate to defer claims by trustees of earlier bankruptcies.

123. Amendments: The provisions relating to deferred claims are amended so that:-

(a) The doubts as to the order of priority are removed.

(b) The anomalies in relation to claims on voluntary bonds or covenants are removed. (The possible abuse of such bonds or covenants will continue to be controlled by ss. 120 to 122).

(c) The claim of the trustee of an earlier bankruptcy will now rank equally with the claims of other ordinary creditors.

124. These amendments are set out in Bill:-

- s-cl. 35(1): proposed s-para 59(1)(c)(i);
- cl. 52;
- cl. 53; and
- cl. 56.

Cl. 52: Postponement of spouses' claims

125. The provision postponing a spouse's claims for money or property lent or made available to the bankrupt (s. 111) is amended to remove doubts about the order of priority of deferred debts (Bill cl. 52 - see also ex memo para 121 to 124).

Cl. 53: Interest on debts

126. The maximum rate of interest allowed on a provable debt is increased from 8% (present s-sec 112(1) to 12% or such other rate as is prescribed (Bill para 53(1)(a)). This amendment will bring the rate of provable interest more into line with current commercial rates and, in the future, allow the rate to be adjusted by regulation to reflect changes in commercial rates.

127. To remove doubts as to the priority status of claims for interest above the prescribed rate on provable debts, it is made clear that such claims will be postponed until all the claims of ordinary creditors (including claims by a spouse under s. 111 have been paid (Bill para 53(1)(b)). (See also ex memo paras 121 to 124).

Amendments to Division 3 (Property available for payment of debts)

Cl. 54: Property divisible amongst creditors

128. Background: Certain property of the bankrupt is not divisible amongst the creditors of that bankrupt (present s-sec 116(2)).

129. Amendment: To achieve consistency with the terms of other monetary limitations in the Act and to enable account to be taken of changing monetary values, it will be possible to increase by regulation:-

(a) the value of the tools of trade which may be retained by a bankrupt (at present $500)(Bill para 54(1)(a));

(b) the value of the policies of annuities or proceeds of such policies which can be retained by a bankrupt (at present $1,200 per annum in the aggregate)(Bill para 54(1)(b); proposed paras 116(1)(f) and (fa)).

130. There will also be the following further changes in relation to the divisible property of a bankrupt:-

(a) The minimum period of time that a policy of life assurance or endowment assurance (including policies for pure endowment) must have been in force to qualify for exclusion from the divisible property will now be calculated by reference to the commencement of the bankruptcy and not by reference to the date of the bankruptcy (the present test). The proceeds of such policies

will also be excluded if they are received at any time after the period commencing 12 months prior to the date of the bankruptcy (at the moment they are only excluded if they are received on or after the date of the bankruptcy) (Bill para 54(1)(b); proposed paras 116(2)(d) and (e));

(b) To enable full effect to be given to the Government's rural reconstruction policies there will also be excluded from the divisible property any loans or grants to farmers made pursuant to the States Grants (Rural Reconstruction) Act 1971, the State & N.T. Grants (Rural Adjustment) Act 1976 and the States & N.T. Grants (Rural Adjustment) Act 1979 (Bill para 54(1)(e); proposed paras 116(2)(k) and (m) - see also Bill cls. 144 and 145 amending the provisions providing for the staying of bankruptcy proceedings against certain farmers); and

(c) There will also be excluded the traceable proceeds of such assurance policies, of such loans or grants or of any damages or compensation protected by present para 116(2)(g) (Bill para 54(1)(e) - proposed paras 116(2)(n) and (o) and Bill para 54(1)(d) - proposed s-secs 116(3) and (4)).

131. In addition, other provisions have been amended to retain for the bankrupt the proceeds of any execution or attachment levied against property exempted by s.116 from distribution amongst his creditors (see Bill cl. 55 - proposed s-secs 118(4) and 119A(5); and cl. 109 - proposed 205A(9)).

132. The Treasurer has agreed to a review of the Life Insurance Act 1945. The results of this review are unlikely to be available for some considerable time and it has been decided to proceed now with the amendments to paras 116(2)(d) to (f). When the review of the Life Insurance Act 1945 is completed, the Government will be considering all the provisions relating to insurance and superannuation in the Bankruptcy Act.

Cl. 55: Executions, attachment, etc., and duties of sheriff

133. The provisions relating to executions and attachments before bankruptcy (present s. 118) and the duties of a sheriff after receiving notice of the presentation of a petition or of a bankruptcy (present s. 119) have been amended (Bill cl. 55). These amendments are embodied in the following proposed sections:-

- s. 118: execution by creditor against property of debtor who becomes bankrupt etc.;

- s. 119: duties of sheriff after receiving notice of presentation of petition etc.; and

- s. 119A: duties of sheriff after receiving notice of bankruptcy, etc.

Each of these proposed sections is discussed in turn. (See also Attachment D for a comparative table of the present and proposed provisions). The transitional provisions are set out in Bill s-cls. 55(2) to (6).

Cl. 55: proposed s. 118: Execution by creditor against property of debtor who becomes a bankrupt etc.

134. The major amendments to the present provisions relating to executions and attachments before bankruptcy (present s. 118) are as follows:-

(a) There will be now brought into the estate of the bankrupt all execution moneys received by a creditor as the result of an execution or attachment either within six months prior to the presentation of the petition or after the date of such presentation no matter when proceedings for attachment or execution were commenced (proposed s-sec 118(1) - under present s-sec 118(1) these moneys are only brought into the estate if the proceedings were commenced within six months prior to the presentation of the petition or after the date of such presentation). This will ensure that there is equity between creditors and will bring s. 118 into line with s. 119 (relating to the duties of the sheriff) which covers not only executions issued within 6 months before the presentation of the petition but also executions outside that period which are incomplete when the sheriff receives notice of the presentation of the petition. The provision will also cover payments made to avoid a seizure or sale.

(b) The rights after bankruptcy of a creditor with a charge or charging order will be maintained (proposed s-secs 118(1) and (3) omit the reference to 'charges' and 'charging orders' in present s-secs 118(1) and (2)). This will ensure that s. 118 does not affect the security interest of a creditor with a 'charge' or 'charging order'

which arose more than 6 months before the presentation of the petition. It is considered that s. 118 should not affect the security interest which the creditor with a 'charge' or 'charging order' has at the commencement of the period referred to in present sub-para 118(1)(a)(i) except to the extent that, as each equates to some extent with execution, his powers of enforcement should be suspended on written notice of presentation of a petition until that petition is finally disposed of. On sequestration, this would allow disposition of the property the subject of the 'charge' or 'charging order' in collaboration with the creditor with the security interest in the property to the best advantage of that creditor and the creditors generally.

(c) Charges or charging orders obtained within 6 months prior to the presentation of the petition or after the date of such presentation will be rendered void as against the trustee (proposed s-sec 118(9)). This will place involuntary 'charges' or 'charging orders' obtained within that period in the same position as to avoidance as voluntary charges created by the bankrupt are under s. 122.

(d) The trustee will be required to hand over to the bankrupt such of the amounts received by the trustee under s-sec 118(1) as represents the proceeds of an execution or attachment levied against property of the debtor exempted by s. 116 from distribution amongst his creditors (proposed s-sec 118(4)). This will preserve the interest of the bankrupt in moneys which are exempted by

s. 116 from distribution amongst his creditors (similar provisions are contained in proposed s-secs 119A(5) and 205A(9)).

(e) A creditor will still be prohibited from taking further action under an attachment, charge or charging order while a creditor's petition (or a debtor's petition which has been referred to the Court by the Registrar) is pending (proposed s-sec 118(5) - present s-sec 118(3)). In addition, he will have to notify the person liable to pay any debt that has been attached of the existence of the petition. This will make the present prohibition on the creditor more effective.

(f) An attachment for debt will be suspended until any petition is withdrawn or dismissed or has lapsed (proposed s-sec 118(6)). This will ensure that the income of the bankrupt is retained by him except where the Court makes an order under s. 131.

(g) Proceedings taken in relation to the payment of maintenance will not be covered by s.118 (proposed s-secs 118(2) and (10)). This will enable maintenance creditors to retain the benefit of any proceedings taken by them in reltion to maintenance (see ex memo paras 105 to 108).

Cl. 55: proposed s. 119: duties of sheriff after receiving notice of presentation of petition

135. The present provisions (in s. 119) relating to

the duties of a sheriff after receiving notice of the presentation of a creditor's petition have been amended. The major amendments are as follows:-

(a) The provision will now cover the proceeds of an attachment for debt where those proceeds are required to be paid into a court by the garnishee (proposed para 119(3)(b)).

(b) The trustee will be required:-

(i) to pay to the bankrupt any moneys that represent the proceeds of an execution or attachment levied against property of the debtor exempted by s. 116 from distribution amongst his creditors; and

(ii) to hand over to the bankrupt any property taken in execution that is exempted by s. 116 from distribution amongst his creditors.

(c) Where property or money is handed over to the bankrupt's estate, any costs incurred by <u>any</u> creditor in the execution or attachment will be a first charge on that property or money (proposed s-sec 119(5) - see also proposed s-sec 119A(2) which deals with the position after an actual bankruptcy). This will ensure fair treatment in relation to costs incurred for all creditors whose rights may be affected by s. 119 (under present s-sec 119(4) only the petitioning creditor gets this benefit).

Cl. 55: proposed s. 119A; Duties of sheriff after receiving notice of bankruptcy

136. The present provisions (in s. 119) relating to the duties of a sheriff or other appropriate officer of the court after receiving notice of a bankruptcy have been amended as follows:-

(a) A creditor deprived of the benefit of an execution or attachment by virtue of s. 119 will be able to prove in the bankrupt estate for the amount he has been deprived of (proposed s-sec 119A(4)). This will ensure that a person deprived of the benefit of an execution or attachment is not debarred by operation of law from proving in the bankruptcy. A sheriff to whom a writ of execution has been delivered has authority from the judgement creditor to receive payment from the debtor and to give a discharge (Re Leslie; Rae v. Samuel Taylor 20 A.B.C. 125 at 128-9). Hence, where the debtor has paid the amount of the debt to the sheriff to avoid seizure or sale of his property, then, unless the courts were able to find that a right to prove for the debt is conferred by implication in s. 119, the creditor would no longer have a subsisting debt to prove in the bankruptcy.

(b) The trustee will be required to hand over to a maintenance creditor any moneys or property received by the trustee under present s-sec 119(3) (proposed s-sec 119A(1) where the moneys or property have been taken in execution or by attachment in respect of a judgement relating to maintenance (proposed s-sec 119A(6)). This will enable maintenance creditors to retain the benefit

of any proceedings taken by them in relation to maintenance (see ex memo paras 105 to 108).

Cl. 56: avoidance of voluntary and marriage settlements

137. The period within which a voluntary or marriage settlement can be avoided (under present s-secs 120(1), 120(2) or 120(3) will be fixed by reference to the commencement of the bankruptcy rather than by reference to the date when the settlor 'becomes a bankrupt'. (Bill paras 56(1)(a) to (c)). This will provide a consistent approach to the time from which transactions may be subject to avoidance under the Bankruptcy Act (this approach is also consistent with judicial decisions under earlier legislation).

138. Claims by a person entitled under a covenant or contract that is avoided by s-sec 120(3) or s-sec 120(5) will be paid after the payment of claims by a spouse deferred under s. 111; claims for interest before bankruptcy that is in excess of the statutory rate and claims for interest after the date of bankruptcy on interest bearing debts (Bill paras 56(1)(d) and (e)). This will remove any doubts as to the order of priority of postponed debts (see ex memo paras 121 to 124).

Cl. 57: avoidance of preferences

139. Background: Where, within 6 months prior to the presentation of the petition on which the sequestration order was made, the bankrupt has entered into a transaction in favour of a creditor which has the effect of giving that creditor a preference, priority or advantage over other creditors, the trustee of the bankrupt estate can, in

certain circumstances, have the transaction set aside and recover the money or property concerned for the benefit of the creditors generally (present s. 122).

140. Amendments: The provisions relating to the recovery of these preferences have been altered. The amendments are that the provisions:-

(a) will now apply to those transactions which take place on the day on which the petition was presented (Bill para 57(1)(a) - see also ex memo para 88);

(b) will apply to a payment or transfer of property by a joint debtor in favour of either a joint or a separate creditor (Bill para 57(1)(b)). This will enable the trustee to recover the money or property concerned and return it to the joint or separate estate from which it came.

(c) will not apply to payments made in respect of debts for maintenance (Bill paras 57(1)(e) and (h) - see also ex memo paras 105 to 108 which deal generally with the treatment in the Bill of maintenance obligations).

(d) will apply to a person whose transaction is unenforceable because of other legislation (e.g. money lending legislation) and who is therefore not a 'creditor' within the meaning of the section (Bill para 57(1)(h)). Such a person should not retain the advantage of a preference because of an accident of language.

Cl. 58: protection of certain transactions against relation back etc.

141. Background: Transactions in good faith etc without notice of the commission of an act of bankruptcy, including the payment of fines and certain taxes, made on or before the date of bankruptcy, are not invalidated by the 'relation back' of the trustee's title(present s. 123).

142. Amendment: This protection has been varied so that it will now not apply to transactions which take place on the day of the bankruptcy (Bill para 58(1)(a)) - this amendment is consequential on the amendment of s.58 to provide that property acquired by a bankrupt on the day on which he becomes a bankrupt will now vest in the Official Trustee as after-acquired property (see Bill para 34(1)(f) and ex memo para 90).

Cl. 59: protection of certain dispositions

143. Background: Certain dispositions of the bankrupt's property to the bankrupt or to his order are protected from recovery by the trustee if they meet the conditions set out in s.124

144. Amendments: Section 124 will be amended to remove the protection given to certain dispositions which occur on the day on which a person becomes a bankrupt - the amendment is consequential upon the amendment to provide that property acquired by a bankrupt on the day on which he becomes a bankrupt will now vest in the Official Trustee as after-acquired property (see Bill para 34(1)(f) and ex memo 90).

Cl. 60: dealings in respect of after-acquired property

145. Present s-sec 126(1) (concerning dealings with an undischarged bankrupt) is amended:-

(a) to remove the protections given to certain transactions which occur on the day on which a person becomes a bankrupt (Bill para 60(1)(a) - consequential on amendment to s. 58 - (see Bill para 34(1)(f)); and

(b) consequential on the transfer to the Official Trustee of the trustee functions of each Official Receiver (Bill para 60(1)(b)).

Cl. 61: limitation of time for making claims by trustee etc

146. A trustee will not be able to take any action to avoid an antecedent transaction (under s. 120 - voluntary or marriage settlements, or under s. 122 - preferences) after 6 years from the date on which the bankrupt became bankrupt (Bill cl. 61 - proposed s-secs 127(2) and 127(4)). This will ensure that the time within which these substantive rights can be exercised does not vary in different parts of Australia (see Re Lehrain (1975) 24 F.L.R. 407 at 412 and Judiciary Act 1903 s. 79). However, there will be no time limitation on the right of a trustee to take action to set aside a fraudulent disposition of property (under s. 121) (Bill cl. 61 - proposed s-sec 127(3) - this conforms with the Clyne Committee Report para 173).

Amendments to Division 4 (Realization of property)

147. Cls. 62 to 68 of the Bill amend Division 4 of Part VI (present ss. 129 to 139) dealing with the realization of property.

Cl. 62: trustee to take possession of bankrupt's property

148. Where money, being in the nature of capital as distinct from income, is payable to a bankrupt or deceased bankrupt under a Commonwealth, State or Territory law, and that money represents divisible property, it will be possible for it to be paid direct to the trustee without having to pass through the hands of the bankrupt or the legal personal representative (Bill cl. 62 - see Re Buckle (1969) 16 F.L.R. 460). Without such a provision, the trustee cannot demand direct payment even though he is entitled to the property for the benefit of the creditors. The intent of the new provision is to enable the trustee in bankruptcy to obtain such moneys before the bankrupt can obtain and dispose of the moneys. Any such payment will be a valid discharge to the person making the payment as against the bankrupt (proposed s-sec 129(4)(c)).

Cl. 63: income of bankrupt

149. The provisions relating to the income of the bankrupt (s. 131) are amended (Bill cl. 63):-

(a) A Court order under that section may now be directed to the bankrupt's employer or to any other person from whom the bankrupt is entitled to receive income (Bill para 63(1)(a)) rather than just to the bankrupt as is the case at present. This will provide a more efficient means of collection. An order under the section will cease to operate on the discharge of the bankrupt unless he is undischarged from a later bankruptcy (proposed s-sec 131(6)). An employer or other person who complies with such an order will be protected (proposed s-sec 131(7)).

(b) The Court will be able to relieve a person subject to such an order from payment of arrears (Bill para 63(1)(b) - proposed s-sec 131(5)).

(c) The provisions relating to a discharge by order of the Court are also amended to ensure that orders of discharge cannot be suspended subject to a condition that the bankrupt make payments from his income for more than three years (see Bill para 73(2)(e) - proposed s-secs 150(7) and (8)).

Cl. 64: vesting and transfer of property

150. Present s-sec 132(4) dealing with the vesting and transfer of property when an Official Receiver is trustee has been omitted (Bill cl. 64) consequential on the transfer of these trustee functions to the Official Trustee (see ex memo paras 40 to 44).

Cl. 65: disclaimer of onerous property

151. Background: The trustee of a bankrupt estate can, under certain conditions, disclaim property that would otherwise form part of the estate where that property has too many liabilities or restrictions attached to it for it to be of any value to the creditors (s. 133).

152. Amendments: The provisions relating to the disclaimer of onerous property will be amended (as from the date of Assent):-

(a) The type of property which may be disclaimed is redefined so that it includes contracts, the profitability of which may be in doubt because the property is unsaleable or not readily saleable,

even if those contracts are not actually unprofitable at the time of the disclaimer (Bill paras 65(a) to (c)). This will assist the trustee (subject to the control of the Court) in dealing with contracts which involve difficulties and risks that would render their completion inadvisable.

(b) A notice to a lessor (and any sub-lessee or mortgagee) of intention to disclaim a lease must be given by prescribed form and will, if sent by certified mail, (and in the absence of contrary evidence) be deemed to have been given when it would have been delivered in the ordinary course of post (Bill para 65(d)). This will provide a convenient means of service which still protects the interests of the person being notified (similar provisions have been included elsewhere: proposed s-secs 84(5), 84(6), 85(2D) and 133(6A)).

(c) The leave of the Court will be required to disclaim a contract other than an unprofitable contract (Bill para 65(e)).

(d) An application to a trustee requiring him to decide whether to disclaim must be given by prescribed form and will, if sent by certified mail (and in the absence of contrary evidence), be deemed to have been made when it would have been delivered in the ordinary course of post (Bill para 65(f)).

Cls. 66: powers exercisable by trustee without permission

153. The powers exercisable at the discretion of a trustee without permission (s. 134) are amended:-

(a) Wherever there is, at present, a monetary limit of $10,000 on these powers, it is increased to $20,000 or such greater amount as is prescribed (Bill paras 66(a) and 66(f)). This takes account of changes in money values; a consequential amendment is made to s.135 (powers exercisable by trustee with permission - see Bill para 67(a)).

(b) The trustee will now have a discretion to mortgage or charge property of the bankrupt having a value not exceeding $20,000 in order to pay the debts of the bankrupt (Bill para 66(b)). At present the trustee can only do this, regardless of the value of the property, when so authorised by the Court or the creditors - see present para 135(1)(d), which is now amended consequentially (see Bill para 67(b)).

(c) The trustee will be able at his own discretion to employ the bankrupt up to the time of the first meeting of creditors in the same way that he can be employed after the first meeting if the creditors so resolve, and to pay the bankrupt out of the estate for such employment (Bill para 66(c) and (d)). This employment will be subject to the overall control of the Court (Bill para 66(e)).

154. The amendments are designed to give the trustee a greater discretion and thus facilitate the administraion of the estate.

Cl. 67: powers exercisable by Trustee with permission

155. Certain powers of a trustee can be exercised only with the permission of the creditors if the value of the property concerned exceeds $10,000 (paras 135(1)(a), (f),

(g) and (h)). This value will be increased to $20,000 or such greater amount as is prescribed (Bill cl. 67): this is consequential upon the increases in the monetary limits on certain powers that can be exercised by a trustee without permission (see Bill cl. 67).

Cl. 68: protection of trustee from personal liability in certain cases

156. The bankrupt estate will not be liable for any loss or damage sustained by third parties as a result of the seizure or sale of property by the trustee, provided the trustee had no notice of a claim by such a third party and was not guilty of negligence (Bill cl. 68). Under the present s. 139 the estate is only liable for any loss or damage sustained by a person claiming the goods as distinct from any loss or damage sustained, for example, by the person to whom the goods were sold (in such cases the trustee is personally liable).

Amendments to Division 5 (Distribution of property)

157. Cls. 69 to 71 of the Bill amend Division 5 of Part VI dealing with the distribution of dividends from bankrupt estates (present ss. 140-148).

Cl. 69: declaration and distribution of dividends

158. The provisions relating to the declaration and distribution of dividends (present s. 140) will be amended in relation to dividends declared after the commencement of the amendments (Bill cl. 69):-

(a) A trustee will be required to give notice of his intention to declare a dividend to all possible creditors only in respect of the first dividend

(proposed s-secs 140(3))(instead of in respect of each dividend as at present). When the trustee becomes aware of a creditor after the first dividend, he will still be required to notify that creditor before the next dividend (proposed s-sec 140(5)). This will reduce administrative costs.

(b) Notices will now be sent not to each creditor but to each person who, to the knowledge of the trustee, claims to be or might claim to be a creditor (proposed para 140(3)(b) and proposed s-sec 140(5) - a similar change is made for notice of the final dividend: see Bill cl. 70). This will provide a clear definition of the persons entitled to notice of intended dividends (see also in re Armstrong Whitworth Securities (1947) 2 All E.R. 479).

(c) When the time fixed (in the notice of intention to declare a dividend) for lodging proofs of debt has expired, the trustee will formally declare the dividend. The trustee will then pay the dividend after the expiration of 21 days from the date of the declaration of the dividend (proposed s-sec 140(7)). These amendments will:-

(i) remove existing uncertainty by distinguishing between the declaration of a dividend and the payment of a dividend; and

(ii) provide a pause in the administrative process to enable creditors to approach the trustee to vary his decision in relation to the admission or rejection of a proof of debt

(see Bill cl. 47) or to exercise their rights (under ss. 99 and 104) to appeal against the trustee's decision.

160. Moneys held in the Common Investment Fund will be regarded as available for dividend (see Bill cl.16 - proposed s-sec 20B(7) - see also ex memo paras 50 to 53).

Cl. 70: final dividend

161. The notice of intention to declare a final dividend (s-sec 145(1)) will now be sent to each person who, to the knowledge of the trustee, claims to be or might claim to be a creditor but has not proved his debt (Bill cl. 70). This changes the description of persons entitled to receive such a notice consequential upon the amended description of persons entitled to notices of intention to declare other dividends (see Bill cl. 69 - proposed para 140(3)(b) and proposed s-sec 140(5)).

Cl. 71: no action for dividend

162. The Court may order the trustee to pay a dividend and, in appropriate cases, to pay interest and costs personally (Bill cl. 71 - re-draft of present s. 147 to clarify its meaning).

AMENDMENTS TO PART VII (DISCHARGE OF BANKRUPTS)

163. Cls. 72 to 76 of the Bill amend Part VII of the Act dealing with the discharge of bankrupts (present ss. 149 to 154). Under this Part there are two ways in which a bankrupt can be discharged from bankruptcy:-

- automatic discharge after five years (s. 149) or

- discharge by order of the Court.

(The Part also contains one of the two provisions enabling the Court to annul a bankruptcy - s. 154 - the other such provision is s.74).

Cl. 72 : Automatic discharge

164. The provisions relating to discharge from bankruptcy by operation of law (present s. 149) are expanded (Bill cl. 72) to incorporate the following provisions:-

(a) The qualifying time for automatic discharge is reduced from 5 years to 3 years (proposed s-sec 149 (1)), with an appropriate adjustment for persons who are already undischarged bankrupts immediately before this amendment (proposed s-sec 149 (2)). (cf the recommendation of the Law Reform Commission in its report No. 6 : Insolvency : the regular payment of debts paras 120 to 137).

(b) A debtor who has become bankrupt again prior to discharge from an earlier bankruptcy will have to apply to the Court for a discharge (proposed paras 149(3)(a) and (b)). This will provide more control over persons involved in multiple bankruptcies.

(c) The grounds on which an objection to automatic discharge may be lodged are specified (proposed s-sec 149(4)). This will fill a gap in the existing legislation.

(d) A creditor may only withdraw an objection to automatic discharge with the approval of the Court (proposed s-sec 149(6)). This will prevent possible abuse of present procedures.

(e) There will be a time limit of 5 years on the operation of an objection to automatic discharge unless the court otherwise orders (proposed s-sec 149(7)).

(f) An Official Receiver will be able to enter on the prescribed form an objection to a statutory discharge even where the Official Trustee is not the trustee (proposed para 149(3)(c)). This will enable the Official Receiver to discharge his public policy duties (e.g. to prevent agreements between bankrupts and trustees or creditors which are not in the public interest).

(g) The Court will be able, at any time prior to discharge, to order that the automatic discharge provisions shall <u>not apply</u> to a bankrupt (proposed s-sec 149(12)).

Cl. 73 : discharge by the Court

165. The provisions relating to discharge of a bankrupt by the Court (present s. 150) are also modified (Bill cl. 73):-

(a) A bankrupt will able to apply to the Court for a discharge at any time after his public examination has been concluded or dispensed with (these are the only grounds available under the present paras 150(1)(a) and (b)) or, if neither of those events has occured, 12 months after the date of the bankruptcy (Bill para 73(1)). This will enable a discharge without public examination now that public examinations will be discretionary in most cases.

(b) The Court will not be able to suspend a bankrupt's discharge subject to a condition that the bankrupt make contributions out of his future income for a period extending beyond the expiration of 5 years from the date on which he became a bankrupt (proposed s-sec 150(8)). This will conform with the proposed amendment to s. 131 (relating to payment of income) which will ensure that any order for payment of income ceases on the discharge of the bankrupt (Bill para 73(2)(e) - see also Bill cl. 74 dealing with the effect of fraudulent settlements on discharge).

(c) The Court will still be able to suspend an order of discharge with or without conditions (present s-sec 150(5)) but the period of suspension will be limited where there are no adverse matters (proposed s-secs 150(9) and (10) - to be

consistent with the automatic discharge provisions). The Court will, however, be able to refuse an order of discharge.

(d) References to the Official Receiver as a trustee are replaced by references to the Official Trustee (Bill paras 73(2)(a) to (c).

(e) The Court may, at any time while the operation of an order of discharge is suspended, rescind or vary the order (proposed s-sec 150(11)). This will give the Court a power to act when the conditions it has imposed in relation to an order of discharge are not complied with.

Cl. 74 : effect of fraudulent settlement on discharge

166. Where the Court suspends the operation of an order of discharge because of marriage settlements made, or convenanted or contracted to be made, by the bankrupt (s. 151) and it is a condition of the suspension that the bankrupt should contribute from his income, the suspension and the conditions will both cease to operate on the expiration of 5 years from the date of bankruptcy (Bill cl. 74 - this amendment is consistent with proposed s-sec 150(7) contained in Bill para 73(2)(e)).

Cl. 75 : effect of order of discharge on maintenance obligations

167. The provisions setting out the effect of an order of discharge (present s. 153) are amended in relation to maintenance obligations:-

(a) An order of discharge will not now release a bankrupt from a maintenance agreement (Bill para 75(1)(a)). At present only a maintenance order is saved.

(b) It is made clear that the Court, when making an order of discharge, has the power only to discharge the liability to pay arrears of maintenance but not to discharge the maintenance order or agreement itself (Bill para 75(1)(b)).

(c) The definition of 'maintenance' (present s-sec 153(6)) is omitted (Bill para 75(1)(c)). Both 'maintenance order' and 'maintenance agreement' are defined in Bill para 3(2)(e).

Cl. 76 : power to annul bankruptcy

168. The provisions enabling the Court to annul a bankruptcy where the Court is satisfied as to certain matters (present s. 154) are amended:-

(a) The power of annulment will be exercisable whenever the proved unsecured debts have been paid in full or acquitted (Bill para 76(a) - proposed para 154(1)(b)). At present it is not clear whether the power arises then or only after all unsecured debts have been paid in full or

acquitted (see, however, More v. More (1962) Ch. 424). This will overcome problems that can arise where there are creditors who cannot be found or identified.

(b) The reference to s. 74 in s-sec 154(2) (which validates certain transactions) has been omitted - there will now be a separate validating provision in s. 74 itself (see Bill cl. 39).

(c) References to The Official Receiver in Bankruptcy are omitted (Bill para 76(c)) following the transfer of each Official Receiver's trustee functions to the Official Trustee.

AMENDMENTS TO PART VIII (TRUSTEES)

169. Cls. 77 to 98 of the Bill amend Part VII of the Act dealing with the appointment, remuneration, accounts, control etc. of trustees of bankrupt estates (present ss. 155 to 184).

Amentments to Division 1 (Appointment and official name)

170. Cls 77 to 81 of the Bill amend Division 1 dealing with the appointment of trustees and their official name (present ss. 155 to 161).

Cl. 77 : registration of persons as trustees

171. There is an amendment to s-sec 155(6) consequent upon the Official Trustee taking over the trustee functions of each Official Receiver (Bill cl. 77).

Cl. 78 : appointment of trustees

172. The provisions relating to the appointment of trustees (s. 157) are amended:-

(a) to take account of the fact that an Official Receiver will no longer be the first trustee of an estate (Bill para 78(a));

(b) to provide that only a creditors' appointment takes effect from the date of the Registrar's certificate of appointment (Bill para 78(b));

(c) to require objections to an appointment to be lodged with the relevant Registrar rather than with the Court (as is the case at present) (Bill paras 78(c) and (d)). This takes account of the fact that such documents are, in fact, filed with the Registrar and not with the Court (similar amendments are contained in Bill cl. 20); and

(d) to enable the Registrar to issue a certificate of appointment where a trustee is appointed by the Court and to ensure that the appointment takes effect from a date fixed by the Court (Bill para 78(e)).

Cls 79 to 81 : other amendments to Division 1

173. Division 1 of Part VIII is also amended:-

(a) to ensure that the Official Trustee cannot be appointed (under s. 158) as one of a number of joint trustees (Bill cl 79); this is necessary because of the special banking and investment requirements flowing from the creation of the Common Investment Fund; and

(b) to take account of the transfer to the Official Trustee of the trustee functions of each Official Receiver (Bill cls. 80 and 81).

Amendments to Division 2 (remuneration and costs)

174. Cls 82 to 85 of the Bill amend Division 2 of Part VIII dealing with the remuneration and costs of a trustee of a bankrupt estate (present ss. 162 - 167).

Cl. 82 : Remuneration of trustee

175. The provisions relating to the remuneration of a registered trustee (s. 162) are amended:-

(a) It will be possible to prescribe the percentage of realisations able to be taken by a trustee as remuneration, both in the ordinary realisation of an estate and in carrying on a business (Bill para 82(1)(a)). This will enable the provision of a more equitable basis for calculating the trustee's remuneration.

(b) The Registrar will be able to fix the trustee's remuneration where it is not fixed by the creditors. (Bill para 82(1)(a). This will provide a means of fixing the trustee's remuneration where the creditors have not done so.

(c) The Registrar will be able, of his own motion, to review a trustee's remuneration (Bill para 82(1)(b)). This will provide wider control over a trustee's remuneration.

(d) They will not apply to the Official Trustee (they do not currently apply to an Official Receiver).

Cl. 83 : remuneration of Official Trustee

176. The provision relating to the remuneration of the Official Receiver (s. 163) is replaced by a new provision relating to the remuneration of the Official Trustee (Bill cl. 83). This remuneration will be paid into the Consolidated Revenue Fund.

Cl. 84 : Two or more trustees acting in succession

177. The Provisions relating to the remuneration of trustees acting in succession (s. 164) are amended:-

(a) to take account of the transfer of the trustee functions of each Official Receiver to the Official Trustee (Bill paras 84(a) and (c));

(b) to make it clear that the Registrar is determining the trustees' remuneration rather than the manner in which that remuneration will be determined (Bill paras 84(c) and (d)).

Cl. 85 : taxation of costs

178. Background: All bills of costs and charges must be taxed before they can be paid by the trustee unless they are under $100 or unless payment has been authorised by a special resolution of creditors (s. 167).

179. Amendments: The Provisions relating to the taxation of bills are amended (Bill cl. 85):-

(a) Bills will be able to be taxed by any taxing officer (Bill para 85(1)(b) and not only by the taxing officer for the Bankruptcy District where the trustee resides as is the case at present.

(b) Bills of costs will not require taxation

(i) if the bill is less than $300 or such greater amount as is prescribed (proposed para 167(2)(a) - present para 167(2)(a) only enables a bill of costs for less that

$100 to be paid without taxation); this will enable account to be taken of changing money values;

(ii) if the amount claimed does not exceed the amount prescribed by regulation for the particular type of work done (proposed para 167(2)(b)); or

(iii) if the bill was taxed in another jurisdiction (proposed para 167(2)(c)); this will avoid the present uncertainty regarding whether double taxation is necessary.

(Bill para 85(1)(b)).

(c) The provisions relating to the taxation of costs prior to a final dividend and to appeals from the decision of a taxing officer (present s-secs 167(6) to (8)) will now apply to costs payable by the trustee out of the estate pursuant to a court order (Bill para 85(1)(c)). This will provide uniform rules in relation to all bills of costs (including petitioning creditor's costs).

(d) The definition of 'taxing officer' (present s-sec 167(9)) is redrafted to clarify its meaning (Bill para 85(1)(d)).

Amendments to Division 3 (Accounts and audit)

180. Cls 86 to 91 of the Bill amend Division 3 of Part VIII dealing with the keeping of accounts by a trustee and the audit of those accounts (present ss. 168 - 176).

181. Details of the amendments are as follows:-

(a) The provisions relating to the payment of moneys (s. 169) into bank accounts will not apply to the Official Trustee (Bill cl 86 - see Bill cl. 17 for the special banking requirements applicable to the Official Trustee).

(b) A registered trustee must give the Official Receiver such information as is necessary to enable the Official Receiver to perform his statutory duties (Bill cl. 87 - amending present s-sec 170(1)).

(c) The general provisions relating to the investment of surplus funds (present s. 172) will not apply to trust moneys held by the Official Trustee (Bill cl. 88 - consequential on cl. 17 which requires the Official Trustee to invest moneys held by it in the Common Investment Fund).

(d) Creditors will have the right to inspect, at all reasonable times, accounts and records which a trustee keeps (under present s. 174) when carrying on a bankrupt's business. (Bill cl. 89). This will clarify a creditor's right of access to these documents and is consistent with the rights of access of a creditor under s. 173 to the accounts and records of an estate. (The new

definition of 'books' in cl. 3 of the Bill makes it necessary to ensure that creditors do not have a right of access to documents which are not accounts or records).

(e) The provisions relating to audit of a trustee's accounts (s. 175) will not apply to the Official Trustee (Bill cl. 90). They do not now apply to a trustee who is an Official Receiver. The Official Trustee's accounts will be subject to audit by the Auditor-General (see Bill cl. 171 - proposed s-sec 313(1)).

Cl. 91 : Court may order trustee to make good loss sustained by negligence etc.

182. Background: At present, the Registrar can approach the Court to make good a loss sustained by the estate only if a trustee 'has been guilty' of misfeasance, negligence or wilful default (present s. 176).

183. Amendment: The Registrar will now be able to approach the Court for an order that the trustee make good a loss sustained by reason of the malfeasance, misfeasance, negligence or wilful deafult of, or breach of trust by, the trustee where it appears to him that the trustee has been guilty of such conduct (Bill cl. 91). The amendments will make the language of the provision more appropriate to that of civil wrongs (see Bill cl. 111 which contains similar amendments in relation to a controlling trustee appointed under Part X).

Amendment to Division 4 (control over trustees)

Cl. 92 : control of trustees by Court

184. In conducting an enquiry into the conduct of a trustee (s. 179) the Court may examine an Official Receiver if the Official Trustee is trustee of the estate (Bill cl. 92).

Amendments to Division 5 (vacation of office)

185. Cls. 93 to 98 of the Bill amend Division 5 of Part VIII (present ss. 180-184) dealing with vacation of office and the release of a trustee from his obligations.

Cl. 93 : Resignation of trustee

186. The Court will be able, on such terms and conditions as it considers just, to accept the resignation of a registered trustee from the office of trustee (Bill cl. 93.)

Cl. 94 : Removal of Trustee

187. The Court or the creditors will be able to remove a registered trustee from the office of trustee (Bill cl. 94). This distinguishes the registered trustee from the Official Trustee who can be replaced only if the creditors, by resolution, appoint another trustee, and who reverts to the trusteeship if there is for any reason a vacancy in the office (s. 160).

Cl. 95 : Bankruptcy of trustee

188. When a registered trustee dies, the personal

representative of his estate will be obliged to notify the Registrar of the death (Bill cl. 95).

Cl. 96 : Release of registered trustee by the Court

189. The person administering the estate of a deceased registered trustee will be able to apply for a release by the Court even if he is not the legal personal representative of the deceased trustee (Bill cl. 96 - proposed s-sec 183(6)). This will cover cases of informal administration of the estate of a deceased registered trustee without a grant of probate or administration. The provisions relating to the release of the trustee by the Court (s. 183) will not apply to the Official Trustee. The amendments will come into force with Assent to the Bill (Bill s-cl. 96(2)).

Cl. 97 : Release of registered trustee by operation of law

190. The provision relating to the release of a trustee by operation of law after seven years (present s-sec 184(4)) will not apply to the Official Trustee (Bill para 97(a)). That body is dealt with separately (Bill cl. 98).

191. The provision in relation to release seven years after the filing of all accounts required under the 1924 Act (present s-sec 184(2)) is omitted (Bill para 97(b)). Because of effluxion of time, it is no longer necessary - any releases by virtue of its provisions will remain in force (see Acts Interpretation Act, para 8(c)).

Cl. 98 : Release of Official Trustee

192. The Official Trustee will be able to obtain an order from the Court to protect it and the Consolidated Revenue Fund from liability for any act done or default made prior to a date fixed in the order (Bill cl. 98 - proposed s. 184A). Interested persons will be able to appear before the Court (proposed s-sec 184A(4)) and the Court will be able to revoke an order obtained by fraud or by suppression or concealment of a material fact (proposed s-sec 184A(6)).

REPEAL OF PART IX (SMALL BANKRUPTCIES)

193. Cl. 99 of the Bill repeals Part IX of the Act dealing with small bankruptcies (present ss. 185 and 186).

194. Background: The Court can order that the estate of a bankrupt be administered as a small bankruptcy under Part IX 'where it appears to the Court that a bankrupt's liabilities do not exceed four thousand dollars' (present s-sec 185(1)).

195. The main difference between a normal administration and administration as a small bankruptcy is that in a small bankruptcy it is not normally necessary:-

(a) to hold a first meeting of creditors (present para 186(1)(a)); or

(b) to conduct a public examination (present para 186(1)(b)).

(Other provisions of the Act are excluded by the Rules (para 186(1)(c) - see r. 74).)

196. To simplify bankruptcy administration generally it is now proposed to give Official Receivers and Registrars a certain amount of discretion to dispense, in appropriate cases, with

(a) the first meeting of creditors (see Bill cl. 37 - amending s. 64); or

(b) particular public examinations (see Bill cl. 38 - amending s. 69 - see particularly proposed s-sec 69(13)).

197. The conferring of these general discretions renders the statutory provisions in Part IX unnecessary.

AMENDMENTS TO PART X
(ARRANGEMENTS WITH CREDITORS WITHOUT SEQUESTRATION)

198. Cls. 100 to 135 of the Bill amend Part X of the Act dealing with arrangements with creditors without sequestration (present ss. 187 to 243).

199. Background: Part X of the Act Provides for three types of arrangement that can be made by an insolvent debtor with his creditors without proceeding to a sequestration order:-

(a) deed of assignment;

(b) deed of arrangement; or

(c) composition.

(hereafter referred to generally as 'Part X arrangements' - for summary of similarities and differences between Part X arrangements see Rose pp. 221-223 and McDonald, Henry and Meek's paras 962 to 965).

200. The number of Part X arrangements over the last three years has been as follows:-

Year ending	Number of Arrangements	% of total administrations
30 June 1977	256	10.4%
30 June 1978	327	9.5%
30 June 1979	528	12.0%

201. There are various advantages in Part X arrangements which allow more freedom to the parties than is permitted under an ordinary bankruptcy (see Rose pp. 202 and 203). However, in its practical application Part X of the Act has presented a number of difficulties. Amendments are proposed to render Part X more workable, and among other things, it is proposed:-

(a) to ensure that joint debtors whether partners or not can take advantage of Part X (Bill cl. 101);

(b) to give the Registrar greater control over the remuneration which a trustee or a controlling trustee may receive (Bill cl. 104 - proposed s. 193);

(c) to extend the powers of the Court to adjudicate upon the validity of Part X arrangements or of particular provisions in such arrangements (Bill cl. 117);

(d) to enable the Registrar to refer the validity of a particular Part X arrangement or of a provision in that arrangement to the Court for its consideration (Bill cl. 117); and

(e) to extend to Part X arrangements (other than compositions the general provisions of the Act (ss. 70 to 72) relating to committees of inspection (Bill paras 125(1)(a) and 130(1)(a)).

Amendments to Division 1 (Interpretation)

Cl. 100 : Interpretation

202. The special interpretation provisions (s. 187) for Part X are amended (Bill cl. 100):-

(a) The divisible property for the purposes of a deed of assignment will exclude property acquired after but on the same day as the execution of the deed (Bill para 100(a)). This will ensure that the concept of after-acquired property for purposes of Part X is consistent with the general Provisions of the Bankruptcy Act (see also Bill para 34(1)(f), and para 103(c) - proposed s-sec 190(5)).

(b) The Official Trustee will be included in the definition of a controlling trustee (a trustee authorised by a debtor to take control of his property for the purposes of Part X) (Bill paras 100(b) and (c) - see Bill cl. 104 - proposed s-sec 192(3)).

(c) A 'debtor' for the purposes of Part X will include persons with temporary liquidity problems (Bill para 100(d)). This will enable such persons to enter into Part X arrangements with their creditors if they wish.

Cl. 101 : Application of Part X to joint debtors

203. Part X will now apply, subject to such modifications and adaptations, if any, as are prescribed by the rules, to joint debtors, whether partners or not (Bill cl. 101). This will remove uncertainty as to the application of Part X to joint debtors and ensure that two or more joint debtors, whether carrying on business in partnership or not, may take advantage of Part X.

204. It is envisaged that Rules will be made dealing specifically with joint meetings of creditors and joint statements of affairs having regard to the three types of Part X arrangements (see also ex memo para 214).

Amendments to Division 2 (Meeting of creditors and control of debtor's property)

205. Background: The provisions of Part X are invoked by a debtor either authorising a registered trustee to call a meeting of his creditors and take control of his property (present para 188(1)(e)) or authorising a solicitor to call a meeting of his creditors (present para 188(1)(f)). Cls. 102 to 112 of the Bill contain a series of amendments to Division 2 of Part X which deals with the calling of this meeting and the control of the debtor's property (present ss. 188 to 212).

Cl. 102 : authority to call meeting of creditors

206. The form of authority from the debtor to call the meeting will now be prescribed (Bill para 102(a)). The present form of authority is set out in the Third Schedule to the Act which will be repealed (see Bill cl. 173). It is considered more appropriate for all forms to be prescribed by the Rules rather than set out in the Act itself. A similar change is made in relation to the form for a deed of assignment (see Bill cl. 113).

207. In addition, a controlling trustee or solicitor calling a meeting under s. 188 shall file his consent to the authority under s. 188 and a copy of the authority within 7 days of consenting to act under that authority (Bill para 102 (b)).

Cl. 103 : trustee's and solicitor's duties and powers

208. The provisions relating to the trustee's and solicitor's duties and powers (s. 190) are amended:-

(a) The language is modified so that it is consistent with the possibility that the controlling trustee may be the Official Trustee (Bill para 103(a) - see also Bill cls. 104, 106, and 108 which contain other amendments to take account of this possibility).

(b) A controlling trustee will be able, with the debtor's consent and for the purpose of performing his duties or exercising his powers, to obtain such advice or assistance as he reasonably considers desirable (Bill para 103(b)). This will overcome doubts that have been expressed as to the power of a controlling trustee to obtain, for example, legal advice or assistance.

(c) The concept of after-acquired property will become consistent with the rest of the Act (Bill para 103(c) - see also Bill para 34(1)(f) and ex memo para 90).

Cl. 104 : proposed s-secs 192(3) and (4) : death etc. of trustee to whom authority is given

209. The Official Trustee will be able to act as controlling trustee where the registered trustee who is acting as controlling trustee has died, has ceased to be a registered trustee (see Bill cl. 95) or is incapable of exercising his powers, unless or until the debtor authorises another registered trustee to act as controlling trustee and that trustee consents to so act (Bill cl. 104 - proposed s-secs 192(3) and (4)). This will provide continuity of control over the debtor's property where there is a vacancy in the office of controlling trustee: at present there is no new controlling trustee until the debtor signs a new authority.

Cl. 104 : proposed s. 193 : remuneration of controlling trustee

210. The remuneration of a controlling trustee will be governed by the same provisions (present ss. 162-166) as apply to the trustee of a bankrupt estate subject to such modifications and adaptations as are prescribed by regulation (Bill cl. 104).

211. This amendment will achieve consistency in relation to remuneration of trustees of bankrupt estates, trustees of Part X arrangements and controlling trustees under Part X (present s. 193 merely provides for the remuneration of a controlling trustee to be determined by a resolution of creditors).

Cl. 105 : calling of meeting

212. The provisions relating to the calling of the meeting of creditors (s. 194) once the authority has been signed by the debtor are amended:-

(a) At least 14 (instead of 7) days' notice must in future be given to creditors of the calling of such a meeting (Bill para 105(1)(a)). This will overcome complaints from some large creditors that the present provision does not allow them sufficient time to identify the debtor and arrange representation at the meeting.

(b) An inadvertent misdescription of the trustee calling the meeting in present s-secs 194(2), (3) and (4) is rectified (Bill paras 105(1)(b) and (d)).

(c) Additional advertising of such meetings will be able to be prescribed (e.g. in the Commonwealth Gazette) (Bill para 105(1)(c)).

Cl. 106 : debtor to attend meeting

213. The Official Trustee, when it is acting as controlling trustee, may be represented at a meeting under s. 188 by an Official Receiver or by a person authorised by an Official Receiver (Bill cl. 106).

214. The Rules will be amended to ensure that joint debtors, whether partners or not, will be required to present to the meetings of their joint and separate creditors a joint statement of affairs and separate statement of affairs for each debtor. These amendments are consequential on the application (by Bill cl. 101) of Part X to joint debtors, whether partners or not.

Cl. 107 : quorum

215. The quorum provisions (s. 202) are amended by substituting 'controlling trustee' for 'registered trustee' (Bill cl. 107).

Cl. 108 : minutes of meeting

216. Where the Official Trustee is acting as controlling trustee and an Official Receiver, or a person authorised by an Official Receiver, attends a meeting pursuant to s. 188, that Official Receiver or that authorised person may sign the minutes of the meeting if the chairman dies or otherwise becomes incapable of signing them (Bill para 108(a) - proposed s-sec 203(2A)). The signed minutes of a meeting pursuant to s. 188 must then be filed with the Registrar within 21 days after the meeting by the controlling trustee or solicitor who called the meeting (Bill para 108(b) - proposed s-sec 203(4)).

Cl. 109 : Provisions staying executions etc. and dealing with proceeds of executions

217. Background: The sheriff (or other appropriate court officer) is required to stay an execution or retain the proceeds as the case may be for specified periods where he has received notice of various matters under Part X (the signing of an authority by a debtor; the calling of a meeting; the adjourning of a meeting; or the passing of special resolutions requiring the debtor to execute a Part X deed or present a debtor's petition or accepting a composition). If a debtor executes a Part X deed the property or moneys are paid to the trustee of the deed. If the creditors accept a composition the property or moneys are paid to the debtor or as he directs (present s. 205).

218. The present provisions have been replaced (Bill cl. 109) by two new sections dealing with the duties of a sheriff (or other appropriate court officer):-

- after receiving notice of the signing of an authority etc. (proposed s. 205); and

- after receiving notice of the entering into of a Part X arrangement (proposed s. 205A).

219. The major amendments are outlined below (a table comparing the present and proposed provisions is at Attachment 'D'). Appropriate transitional provisions are contained in Bill s-cls 109(2) to (5).

Cl. 109 : Proposed s. 205 : duties of sheriff etc. after receiving notice of signing of authority etc.

220. The provisions (in s. 205) relating to the duties of a sheriff (or other appropriate court officer) after his is notified that an authority has been signed, a meeting called or a special resolution passed under s. 204 are amended (Bill cl 109 - proposed s. 205). The major amendments are:-

(a) The provisions will now apply to attachments of debts as well as executions against property (see e.g., proposed s-para 205(1)(a)(ii), s-para 205(1)(b)(ii) and para 205(3)(b)). Similar amendments are made to s. 119 which deals with the duties of a sheriff after receiving notice of the presentation of a petition (see Bill cl. 55 : proposed s-paras 119(1)(a)(ii) and (b)(ii)).

(b) The provisions will not apply to executions or attachments in relation to maintenance obligations (proposed s-secs 205(2) and 205(4) - see also ex memo para 105).

(c) The costs of execution where real property is not sold (present para 205(6)(b) will also be a first charge on that property if the sheriff refrains from selling under s-sec 119(1) because of notice of the presentation of a petition or if the debtor becomes a bankrupt (proposed s-sec 205(6)). This will give the benefit of the charge to all creditors whose rights may be affected by s. 205.

Cl. 109 : Proposed s. 205A : duties of sheriff etc. after Part X arrangement entered into

221. The provisions (in s. 205) relating to the duties of the sheriff or other appropriate court officer after he is notified that a Part X arrangement has been entered into are amended (Bill cl. 109 - proposed s. 205A) so that there are now separate provisions for the three types of Part X arrangements:-

(a) Under a deed of assignment a debtor assigns all his divisible property (see definition in s. 187) to his trustee - in these cases, the money or property is paid or delivered to the trustee (proposed s-sec 205A(1)).

(b) Under a deed of arrangement the debtor arranges his affairs 'with a view to the payment, in whole or in part, of his debts' (s. 187). This does

not necessarily mean that he makes all his property available. Accordingly, the provisions relating to deeds of arrangement distinguish between property, proceeds or moneys:-

(i) which are not subject to the provisions of the deed: such property etc. is delivered etc. to the debtor or as he directs (proposed s-sec 205A(2)):

(ii) which are subject to the provisions of the deed: such property etc. is delivered etc. to the trustee of the deed (proposed s-sec 205A(3)).

(c) Under a composition the creditors agree either to accept payment by instalments or to accept something less than payment in full in discharge of their debts. It may or may not involve the transfer of property (s. 187). Accordingly, the provisions relating to compositions distinguish between property, proceeds or moneys:-

(i) which are not subject to the terms of the composition: such property etc. is delivered etc. to the debtor or as he directs (proposed s-secs 205A(4) and (5));

(ii) which are subject to the terms of the composition: such property etc. is delivered etc. to the trustee of the composition (proposed s-secs 205A(6) and (7)).

222. Other changes to the existing provisions are as follows:-

(a) The provisions cover attachments of debts as well as executions against property (a similar coverage is contained in proposed s. 119A).

(b) Where a composition is accepted the property proceeds or money cannot be handed over until the expiry of the appeal period of 21 days allowed by s. 239 (to apply to set aside a composition) or until any such application has been withdrawn or dismissed, whichever is the later (proposed s-secs 205A(5) and 205A(7)). Under s. 239 the Court can make a sequestration order. As s.109 (which, in a bankruptcy, prescribes an order of priority for payment of claims) does not apply to compositions, it is undesirable that property or money be handed over, especially to the debtor, whilst there is a possibility that the composition may be set aside and a sequestration order made.

(c) A creditor deprived of the benefit of an execution or attachment (by virtue of s. 205A) will be able to prove under the Part X arrangement for the amount he has been deprived of (proposed s-sec 205A(10)). This will ensure that a person deprived of the benefit of an execution or attachment is not debarred by operation of law from proving under the Part X arrangement. A similar amendment is made where a creditor is deprived of the benefits of an execution or attachment after a bankruptcy (proposed s-sec 119A(4)).

(d) A trustee under a deed of assignment will be required to hand over to the debtor such of the property or moneys received by the trustee (under proposed s-sec 205A(1)) as represents the proceeds of an execution or attachment levied against property of the debtor which does not constitute property divisible amongst his creditors (proposed s-sec 205A(11)). This will preserve the interest of the debtor under a deed of assignment in moneys and property which are exempted (by s-sec. 116(1)) from distribution amongst his creditors.

(e) A maintenance creditor will be entitled to receive property or moneys given (under proposed s-secs 205A(1), (2) or (4)) to someone else following an execution or attachment in respect of a maintenance obligation (proposed s-sec 205A(12)). This will enable maintenance creditors to retain the benefit of any proceedings taken by them in relation to maintenance. A similar provision is made where property or money is given to the trustee in bankruptcy following an execution or attachment for a maintenance obligation (proposed s-sec 119A(6)).

Cl. 110 : controlling trustee's bank accounts

223. The Official Trustee is exempted from the banking requirements applicable to a controlling trustee (Bill cl. 110 - the special banking requirements applicable to the Official Trustee are set out in Bill cl. 17 and are related to the Common Investment Fund).

Cl. 111 : controlling trustee's accounts

224. The audit provisions relating to a controlling trustee's accounts are amended consequential on the amended definition of 'books' (see Bill para 3(1)(a) - ex memo para 24). These provisions will not apply to the Official Trustee when acting as controlling trustee (The Official Trustee is subject to separate audit provisions - see Bill cl. 171).

Cl. 112 : control by Court over controlling trustee

225. The Registrar will be able to apply to the Court where it appears to him (e.g. from an account furnished or from an audit of such an account) that there may have been a malfeasance, misfeasance, negligence or wilful default or breach of trust on the part of a controlling trustee (Bill cl. 112 - proposed s. 212 - at present he can apply to the Court only if he believes the trustee 'has been guilty' of misfeasance etc.) This will make the language of s. 212 more appropriate to civil wrongs and will bring s. 212 into line with the proposed amendment to s. 176 (see Bill cl. 91 - s. 176 contains provisions relating to trustees of bankrupt estates, of deceased bankrupt estates, and of Part X arrangements which are similar to those in s. 212).

226. The Court will now be able to remove an offending controlling trustee or to make some other appropriate order (Bill cl. 112 - proposed ss. 212A and 212B - cf. ss. 178 and 179 which contain similar provisions in relation to trustees of bankrupt estates, of Part X arrangements and deceased bankrupt estates). In the course of conducting such an inquiry the Court will be able to examine an Official Receiver if the Official Trustee is the controlling trustee.

Amentments to Division 3 (General Provisions)

227. Cls 113 to 123 of the Bill amend Division 3 of Part X which contains general provisions applicable to all Part X arrangements (present ss. 213 to 227).

Cl. 113 : form of deeds

228. The form of a deed of assignment will now be prescribed by the rules (Bill cl. 113). The present form of the deed is set out in the Fourth Schedule, which will be repealed (see Bill cl. 173). It is considered more appropriate for all forms to be prescribed by the Rules rather than set out in the Act itself. A similar change is made in relation to the form of authority by the debtor to call a meeting of his creditors (see Bill cl. 102).

Cl. 114 : failure of trustee to execute a deed

229. The provisions (s. 217) relating to the failure of a trustee to execute a deed have been redrafted so as to clarify the language and meaning of the provisions (Bill cl. 114). The proposed s-sec 217(1) now refers to a meeting called 'in accordance with the rules'. Although ss 196 to 203 will provide for the procedure at such meetings (see Bill cl. 119) there will still be no provision in the Act for the calling of such meetings after the initial meeting pursuant to s. 188. Provision will however be made in the rules (compare rr 92 and 93 relating to the calling of meetings in a bankruptcy under Part IV).

Cl. 115 : notification of compositions

230. The trustee of a composition at present notifies each creditor and advertises in the Gazette (present s-sec 218(2)). Where a special resolution accepting the composition has been passed after the commencement of the Amendment he will also be required (Bill cl. 115):-

(a) to advertise the composition in such other manner, if any, as is prescribed; and

(b) to file with the Registrar a copy of the statement of affairs referred to in s. 195 (dealing with the attendance of a debtor at the meeting referred to in ss. 194 and 195 and called for the purposes of Part X).

231. This amendment will provide the same publicity and information for the benefit of creditors in the case of a composition under Part X as is presently required for deeds under Part X (s-sec 218(1)).

Cl. 116 : filling of vacancy in office of trustee

232. The Court will be able to appoint the Official Trustee to act as trustee where there is a vacancy in the office of a trustee under a Part X arrangement (Bill cl. 116 - consequential on the Official Trustee taking over the trustee functions of each Official Receiver).

Cl. 117 : power of Court to rule on validity of Part X arrangements

233. Background: Where there is doubt as to the validity of a Part X arrangement, an application can be

made to the Court for an order as to whether or not it is void (s. 222).

234. Amendments: The following amendments have been made to this provision:-

(a) The Registrar will also be able to apply to the Court (without personal liability for costs) for a declaration under s-sec 222(2) that a Part X arrangement is or is not void (Bill para 117(a)). This will enable early consideration by the Court of the validity of a Part X arrangement so that there is certainty as to the rights of all affected parties. There is likely to be a limited number of occasions upon which it would be wholly beneficial to all the persons whose rights or liabilities are likely to be affected by a deed or composition that the Registrar should be able to invoke the jurisdiction of the Court under s. 222. Cases have come under notice in which a minority group of creditors has felt unable to take any effective action to protect its interests. The existence of the proposed power in the Registrar will enable the Registrar, in an appropriate case, to examine the validity of any deed or composition and, if necessary, have the matter determined by the Court.

(b) The Court will be able to declare any particular provision of a Part X arrangement to be inoperative (Bill paras 117(b) to (d)). This will ensure that an invalid provision which is capable of severance does not vitiate an otherwise valid deed or composition.

(c) The Court will be able, in the course of any other proceedings involving a Part X arrangement, to direct the Registrar to make an application under s. 222 for an order declaring:-

(i) that the deed or composition is or is not void; or

(ii) that a provision of it is or is not inoperative, (Bill para 117(a)). This will avoid a situation where the Court, not given the power to give such a direction, might be required to enforce a Part X arrangement which it would otherwise declare void or to enforce a provision of a Part X arrangement which it would otherwise declare inoperative. (See, for example Gee v. Schmutter (1971) 123 C.L.R. 503 where the High Court gave directions that the trustee carry out those provisions of the deed which Barwick C.J. had cited as an example of provisions that might be inoperative as being inconsistent with the Bankruptcy Act).

235. Proceedings under the proposed amendments will be held in open court (see Bill para 19(b)). This will maintain uniformity with the publicity requirements of present para 31(1)(j) in relation to proceedings that can presently be taken under s. 222.

Cl. 118 : calling of meetings other than the first meeting

236. The provision dealing with the calling of a meeting where there is 'no such trustee' (present s-sec 223(3)) is amended to make it clear that the alternative course of a creditor calling a meeting is available only if there is a vacancy in the office of trustee of a deed of assignment, a deed or arrangement or a composition. It does not apply where there is a vacancy in the office of controlling trustee (compare s-sec 223(1)).

Cl. 119 : application of provisions relating to first meetings to other meetings

237. It will now be provided that the practice and procedures to apply to meetings after the first meeting in an administration under this Part will be the same as those which apply to first meetings (ss. 196 to 203), subject to such modifications and adaptations as may be prescribed by the rules (Bill cl. 119).

Cl. 120 : Validity of acts where deed terminated

238. The provision validating acts etc. where a Part X arrangement is declared void or terminated (s. 224) is amended to omit the reference to the termination of a deed of arrangement by the death of the debtor (Bill cl. 120 - this is a consequential amendment on the amendment to s. 235 so that, in future, a deed of arrangement will not be terminated by the death of the debtor - see Bill cl. 128 and ex memo para 254).

Cl. 121 : notice that deed or composition declared void or terminated

239. The trustee of a composition or deed of arrangement will be required to give notice to the Registrar of the termination of the composition or deed and, where the termination of the deed is by a special resolution, the trustee will be required forthwith to file a copy of the special resolution (Bill cl. 121 - proposed s-secs 224A(1) and (2) - no similar provision is required in relation to a deed of assignment, which cannot be terminated).

240. The Registrar will be required to give notice by advertisement (Bill cl. 121 - proposed s-sec 224A(3)):-

(a) if a Part X arrangement has been declared void (under s. 222);

(b) if a deed of arrangement or a composition is terminated (a deed of assignment cannot be terminated); or

(c) if a composition is set aside (under s. 230).

These amendments will ensure that the fact that a Part X arrangement is void, terminated or set aside is publicised.

Cl. 122 : evidence of deed, resolution etc.

241. Background: Various provisions of the Act provide that certain documents are to be evidence of certain matters (present s-sec 225(4), s-sec 232(2), s.257, s. 260) or are to be conclusive evidence of certain matters (present s-secs 225(2) and (3), s. 261). It is considered that such documents should only be prima facie evidence of those matters so as to prevent injustice due to accidental error. This was suggested by Lukin J. in Re Thompson (1936) 9 A.B.C. 231 where he said @ pp. 233-4 (in relation to the equivalent to present s. 225 in the 1924 Act):-

> 'Perhaps the use of the term 'prima facie' would have been more conducive to a proper and legal performance of the duties and compliance with the statutory conditions prescribed and would have enabled the Court to correct the Chairman's decision where obviously wrong.'

Such an accidental error occurred in Re Davis ex p. Hammond (No. 1) (1970) A.L.R. 838). The various provisions are amended accordingly (see Bill cls. 122, 126, 149, 150, 152) and any new documents that are to be evidence of certain matters will also be only prima facie evidence (see Bill cls. 131, 135).

242. Amendments: A certificate under s. 225 as to the passing of certain resolutions at a meeting of creditors called to consider a possible Part X arrangement (following the execution by a debtor of an authority under s. 188) will now be only prima facie evidence of the matters stated in that certificate (Bill para 122(1)(a)). The minutes of such a meeting will now also be prima facie evidence (Bill para 122(1)(b)).

Cl. 123 : creditor may inspect deeds

243. The provisions relating to the inspection etc. of deeds (s. 226) are amended (Bill cl. 123):-

(a) A person who states in writing that he is a creditor will also be able to inspect, to make copies of and to take extracts from any document filed with the Registrar (including a statement of affairs) without paying a fee (proposed s-sec 226(3) - at present a fee is required for these documents).

(b) the provisions will now also apply to compositions (proposed s-secs 226(2) and 226(3)).

244. These amendments will ensure that, in relation to the inspection and copying of documents, creditors under Part X arrangements are treated in the same manner as creditors in a bankruptcy.

Amendments to Division 4 (Special provisions applicable to deeds of assignment)

245. Cls. 124 to 126 of the Bill amend Division 4 of Part X which contains special provisions applicable to deeds of assignment (present ss. 228 to 232).

246. Background: A deed of assignment is a deed by which a debtor assigns all his divisible property for the benefit of his creditors. The deed itself is a statutory discharge of all debts that would be provable in a bankruptcy (s. 230). The administration under a deed of assignment is substantially similar to the administration in a bankruptcy.

Cl. 124 : deed of assignment to bind all creditors

247. S. 228 of the Act (which binds all creditors to the provisions of a deed of assignment once it is executed) is amended so as to permit a creditor for maintenance to pursue alternative remedies for recovery. This amendment is in keeping with the treatment accorded maintenance creditors elsewhere in the Bill (see ex memo paras 105 to 108 and Bill cls. 127 and 132 which contain similar provisions in relation to deeds of arrangement and compositions respectively.)

Cl. 125 : application of general provisions of Act to deeds of assignment

248. Background: To facilitate the regulation of deeds of assignment certain general provisions of the Bankruptcy Act are applied to them subject to such modifications and adaptations (if any) as are prescribed by the Rules (see r. 82) or set out in the applying provisions (s. 231).

249. Amendment: The general provisions that apply to a deed of assignment are extended to include:-

(a) actions by a bankrupt partner's trustee (s. 61) and actions on joint contracts (s. 62) (Bill para 125(1)(a)). This will deal with problems which could arise if a debtor under a deed of assignment has been in partnership or has been a joint contractor;

(b) committees of inspection (ss. 70 to 72) (Bill para 125(1)(a)). This will assist trustees and provide a suitable legislative framework within which a committee of inspection may operate (these committees are appointed at the moment on an unofficial basis); and

(c) objections to the appointment of a trustee ((s-secs 157(6) and (7))-(Bill para 125(1)(b)).

(See also Bill cl. 129 which applies the same provisions to deeds of arrangement).

Cl. 126 : certificate relating to release

250. Certificates (issued after Assent to the Bill) relating to the realization of the divisible property and the payment of the final dividend (s. 232) will now only be prima facie evidence (Bill cl. 126 - see also cls. 131 and 135 where similar certificates are provided for in relation to deeds of arrangement and compositions and are made prima facie evidence and also ex memo para 241).

Amendments to Division 5 (Special provisions applicable to deeds of arrangement)

251. Cls 127 to 131 of the Bill amend Division 5 of Part X which contains special provisions applicable to deeds of arrangement (present ss. 233 to 237).

252. Background: A deed of arrangement is a deed (other than a deed of assignment, a deed in respect of a composition or a deed executed for the purposes of a proclaimed law) providing for the arrangement of the affairs of a debtor with a view to the payment, in whole or in part, of his debts (s. 187). A deed of arrangement is usually used for business debtors; it can contain a clause assigning some or all of the debtor's property; it does not discharge a debtor's legal obligation to pay his debts unless it contains a clause granting such a discharge (s. 234).

Cl. 127 : deed of arrangement to bind of all creditors

253. S. 233 of the Act (which binds all creditors to the provisions of a deed of arrangement once it is executed) is amended so as to permit a creditor for maintenance to pursue alternative remedies for recovery. This amendment is in keeping with the treatment accorded maintenance creditors elsewhere in the Bill (see also ex memo paras 105 to 108, and Bill cls. 124 and 132 which contain similar provisions in relation to deeds of assignment and compositions, respectively).

Cls. 128 and 129 : termination of deed of arrangement

254. The provision for the automatic termination of a deed of arrangement on the death of a debtor (present para

235(a)) is omitted (Bill cl. 128). This will prevent confusion and possible loss of assets, especially where a business is being carried on under the supervision of the trustee. (A consequential amendment is made to present para 224(b) - see Bill cl. 129). It will still be possible, if this is considered desirable, to include in the deed a specific provision for termination on the death of the debtor.

255. Alternatively, a person administering the estate of a deceased debtor who is subject to a deed of arrangement will now be able to make application (under s. 236) for the Court to terminate the deed (Bill cl. 129).

Cl. 130 : Application of general provisions of Act to deeds of arrangement

256. Background: To facilitate the regulation of deeds of arrangement, certain general provisions of the Act are applied to them subject to such modifications and adaptations (if any) as are prescribed by the Rules (r. 83) or set out in the applying provisions (s. 237).

257. Amendment: The general provisions that apply to a deed of arrangement are extended to include:-

(a) actions by a bankrupt partner's trustee (s. 61) and actions on joint contracts (s. 62) (Bill para 130(1)(a)). This will deal with problems which could arise if a debtor under a deed of arrangement has been in partnership or has been a joint contractor;

(b) committees of inspection (ss. 70 to 72) (Bill para 130(1)(a)). This will assist trustees and provide a suitable legislative framework within which a committee of inspection may operate (these committees are appointed at the moment on an unofficial basis); and

(c) objections to the appointment of a trustee (s-secs 157(6) and (7)) (Bill para 130(1)(b)).

(See also Bill cl. 125 which applies the same provisions to deeds of assignment).

Cl. 131 : certificate by trustee that terms of deed carried out

258. The trustee of a deed of arrangement will be able to give a certificate that all property assigned by the deed has been realised and the terms of the deed have been carried out (Bill cl. 131). Such a certificate will be prima facie evidence of the facts stated in it (proposed s-sec 237A(2)). This will assist a debtor who has entered into a deed of arrangement, the terms of which have been carried out, in establishing a basis for the granting of further credit. There will now be similar provisions in this respect in relation to all Part X arrangements (see Bill cls. 126 and 135).

Amendments to Division 6 (Special provisions applicable to compositions)

259. Cls. 132 and 135 of the Bill amend Division 6 of Part X which contains special provisions applicable to compositions (present ss. 238 to 243).

260. Background: A composition may or may not be by deed. It is a statutory contract by which the creditors agree to accept payment of their debts by instalments or to accept, in full satisfaction of their debts, less than the full amount of those debts (s. 187). By its very nature a composition is a contractual release of a debtor's legal obligations to pay his debts once he has performed all his obligations under it.

Cl. 132 : Composition to bind all creditors

261. S. 238 of the Act (which binds all creditors to the provisions of a composition once it is accepted) is amended so as to permit a creditor for maintenance to pursue alternative remedies for recovery. This amendment is in keeping with the treatment accorded maintenance creditors elsewhere in the Bill (see ex memo paras 105 to 108, and Bill cls. 124 and 127 which contain similar provisions in relation to deeds).

Cl 133 : Court may terminate a composition

262. The Court will now have the additional power of making an order terminating a composition where the debtor dies and also in circumstances where the debtor dies and the person administering his deceased estate fails to carry out or comply with the composition (Bill cl. 133). This will remedy a defect in s. 242 which appears to assume that if the debtor dies the composition is incapable of completion.

Cl. 134 : Application of general provisions of Act to compositions

263. Background: To facilitate the regulation of compositions, certain general provisions of the Bankruptcy Act are applied to them subject to such modifications and adaptations (if any) as are prescribed by the Rules (r. 84) or set out in the applying provision (s. 243).

264. Amendments: The general provisions that apply to a composition are extended (Bill cl. 134) to include the provisions enabling a creditor to object to an appointment of a trustee (present s-secs 157(6) and (7)).

Cl. 135 : Certificate that terms of composition carried out

265. Where the terms of a composition have been carried out, the trustee will be able to give a certificate to that effect (Bill cl. 135). Such a certificate will be prima facie evidence of the facts stated in it (proposed s-sec 243A(2)). These new provisions will assist a debtor whose creditors have accepted a composition, the terms of which have been carried out, in establishing a basis for the granting of further credit. There will now be similar provisions in this respect in relation to all Part X arrangements (see Bill cls. 126 and 131).

AMENDMENTS TO PART XI (ADMINISTRATION OF DECEASED ESTATES IN BANKRUPTCY)

266. Cls. 136 to 143 of the Bill amend Part XI of the Act (present ss. 244 to 253) which makes provision for the administration in bankruptcy of the estate of a deceased person where that estate is insolvent.

267. Background: The number of orders for the administration of deceased estates in the last six years is as follows:-

1973/74	-	18
1974/75	-	9
1975/76	-	13
1976/77	-	10
1977/78	-	12
1978/79	-	14

268. Proceedings under Part XI can be commenced either on the petition of a creditor (ss. 244 and 245) or on the petition of the person administering the estate of the deceased debtor (s. 247). Once the Court makes an order that the estate be administered in bankruptcy, the administration is similar in many ways to the administration of the estate of a living bankrupt (s. 248).

269. The amendments to the Part (particularly in relation to ss. 248 and 249) are largely intended to remove some of the remaining inconsistencies between the provisions relating to bankruptcy and the provisions relating to the administration of deceased estates in bankruptcy.

Cl. 136: Administration under this Part upon petition by creditor

269A. Under the exsiting Bankruptcy Act, a creditor cannot present or petition for the administration in bankruptcy of the estate of a deceased person for a debt or debts of less than $500. That figure has remained unchanged since the legislation came into operation on 4 March 1968. The minimum amount required to found such a creditor's petition will be increased from the present $500 to $1000 and will thereby take account of changing money values. (A similar amendment is made in respect of a creditor's petition for a sequestration order against a living debtor - Bill cl. 26 : ex memo para 70A).

Cl. 137 : Filing of Statement of Affairs

270. Where an order is made for the administration of the estate of a deceased person upon a creditor's petition (ss. 245 and 246), the legal personal representative of the deceased person will have 28 days after he is notified of the order by the Official Receiver in which to file a statement of affairs (Bill cl. 137). Under present s. 246 he has 28 days from the making of the order and there is no obligation on anyone to notify him of the making of the order.

Cl. 138 : Commencement of Part XI administration

271. Background: Unlike the situation in an ordinary bankruptcy, the property divisible among the creditors in a Part XI administration does not generally include property disposed of prior to the making of the order for administration (i.e. there is no 'relation back' doctrine for these estates).

272. Amendments: The commencement of the administration of a deceased estate under Part XI will be deemed to have relation back to, and to have commenced at (Bill cl. 138 - proposed s. 247A):-

(a) if the petition was served before the deceased's death (s. 245) : the earliest act of bankruptcy within the 6 months immediately preceding the presentation of the petition;

(b) if the deceased was insolvent at the date of his death: the earliest act of bankruptcy within the 6 months before his death or, if there were no such acts, the date of his death;

(c) if the deceased was solvent at his death: the date of the petition.

This means that the doctrine of relation back will only apply to estates which were insolvent at the date of death. This provision is also relevant to the new provisions relating to the divisible property of the deceased estate (see Bill cl. 141).

Cl. 139 : Application of general provisions of Bankruptcy Act to Part XI administrations

273. Background: To facilitate the administration of deceased estates under Part XI, certain general provisions of the Bankruptcy Act are applied to such administrations subject to such modifications and adaptations (if any) as are set out in the Rules (r. 90) or the applying provisions (s. 248).

274. Amendments: The general provisions that apply to the administration of a deceased estate under Part XI are expanded to include (Bill cl. 139):-

(a) The new provisions relating to the lapsing of a petition (proposed s-secs 52(4) to (5) - see Bill cl. 29). This will overcome problems caused by dilatory creditors. As a consequence of the repeal of s. 48 (see ex memo para 71) a creditor will not be required to lodge a deposit when filing a petition against the estate of a deceased person.

(b) The complete provisions relating to executions, attachments etc. before bankruptcy (s. 118 and 119 - see Bill cl. 55 and ex memo paras 133 to 136) and the complete provisions relating to the avoidance of preferences (s. 122 - see Bill Cl. 57 and ex memo para 133). Under present s-sec 248(2), these provisions apply only to proceedings, transactions etc. which take place after the presentation of the petition. (r. 90, which seeks to apply s. 122 so as to void any preferential transaction within 6 months prior to the presentation of the petition, is probably invalid because of its inconsistency with the present s-sec 248(2)). These amendments will bring the administration of deceased bankrupt estates into line with the administration of ordinary bankrupt estates so far as the operation of ss. 118 and 122 is concerned.

(c) The provisions which alleviate the position of persons dealing with a debtor during the period between the commencement of the bankruptcy and

the date of the bankruptcy (in Part XI matters this will be the date of the order for administration) (ss. 123 and 124). These amendments are consequential on the full application of ss. 118 and 122 to Part XI estates.

Cl. 140 : Consolidation of Proceedings

275. Where an order has been made for the administration of a deceased estate under Part XI and the deceased debtor was a partner of, or a joint debtor with, one or more other persons who are bankrupt or whose estates are being administered under Part XI, the Court may consolidate the proceedings upon such terms as it thinks fit (Bill cl. 140 - proposed s-secs 248A(1) to (3)). The general provisions as to the aplication of the joint assets to joint debtors, etc. (s. 110) will apply (proposed s-sec 248A(4)).

276. The Court will be able, for the purpose of determining what property is available for distribution in the joint estate (Division 3 of Part VI), to declare (proposed s-sec 248A(5)) that specified dates are:-

(a) the date on which the petitions are to be deemed to have been presented (this will in some cases be relevant in determining the 'commencement of the bankruptcy' - see s. 115 and proposed s. 247A);

(b) the date of the bankruptcy in respect of each estate (this will determine issues which affect the property that is available for the payment of the debts - see s. 58 and Bill s-cl. 34(1) discussed in ex memo s-para 90(c) and ex memo paras 279 to 282).

277. These new provisions will provide the same facilities for the administration of deceased estates involving partners or joint debtors as are contained in relation to bankruptcies of two or more partners or joint debtors (see Bill cl. 30 - ex memo paras 75 to 79).

Cl. 141 : Vesting of property after administration order

278. Official Trustee. The provisions relating to the vesting of property on the making of an order for administration (s. 249) are amended to take account of the change of name of the Official Trustee (Bill para 141(1)(a)) and the transfer of each Official Receiver's trustee functions to that body (Bill paras 141(1)(b) to (d)).

279. Divisible Property: Background: Included in the property available to the trustee of a Part XI estate (see Rose pp. 199 and 200) is 'the divisible property' of the estate (present s-sec 249(6)). This property is limited, largely, to property remaining in the estate on the day the order for administration is made and to certain property acquired by or devolving on the estate after that date. In contrast, in an ordinary bankruptcy (s. 116) the divisible property includes all property vested in the debtor at the 'commencement of the bankruptcy': namely, at the date of the earliest act of bankruptcy committed by the debtor within the six months period prior to the presentation of the petition or, where no act of bankruptcy was so committed, the date of presentation of the petition. The present restriction is contrary to the Clyne Committee Report (para 353) and leaves unfettered the title of the debtor, or his legal personal representative, to deal with the assets comprising the estates even after presentation of the petition.

280. Divisible Property: Amendments: To overcome these problems, additional categories of property may form part of the divisible property of the estate where an order for administration is made after the commencement of these amendments (Bill para 141(f)). Irrespective of when the administration is deemed to have commenced, the property which is presently included in the divisible property of the estate (present s-sec 249(6)) will still be included in the divisible property of the estate (proposed paras (a) to (d) of s-secs 249(6) to (8)). The exemptions remain unchanged.

281. What other property (if any) is included in the divisible property of the estate will depend on the time at which the administration is deemed to have commenced:-

(a) Where the administration of the deceased estate is deemed to have commenced before the death of the deceased there will also be included in the divisible property of the estate:-

(i) property which formed part of the estate of the deceased person upon his death or which was acquired by, or devolved on, him after his death and before the order for administration was made (see particularly the periods specified in proposed paras 249(6)(a) to (d));

(ii) where the deceased had an interest in jointly owned property: the value of any improvements made by the deceased within 2 years before the commencement of the administration (proposed para 249(6)(e) - see also ex memo para 282): and

(iii) property that belonged to or vested in the deceased and powers that were exercisable by the deceased after the commencement of the administration and before his death (proposed paras 249(6)(f) and (g) - this property is included only where the administration is deemed to have commenced before the death of the deceased).

(b) Where the administration of a deceased estate is deemed to have commenced on the death of the deceased person the divisible property of the estate will also include:-

(i) property which formed part of the estate of the deceased person upon his death or which was acquired by or devolved upon him after his death and up to the date of the order for administration (see particularly the periods specified in proposed paras 249(7)(a) to (d)); and

(ii) where the deceased had an interest in jointly owned property which passes by survivorship: an amount equal to the value of any improvements made by or at the expense of the deceased person within two years before his death (proposed para 249(7)(e) - see also ex memo para 282)

(c) Where the administration of a deceased estate is deemed to have commenced after the death of the deceased person, there will be no change in the divisible property of the estate (proposed s-sec 249(8)).

282. In the absence of the proposed provisions relating to the interests of a deceased debtor in a joint tenancy (proposed paras 249(6)(e) and 249(7)(e)), the interest of a deceased debtor in property held in joint tenancy could form part of his bankrupt estate rather than pass to the other joint owners. The Bankruptcy Act should not affect the operation of State laws of succession in relation to interests in property owned in joint tenancy. Such interests should therefore be excluded from the divisible property of the debtor. To limit the injustice that may be caused by such an exemption, yet still give creditors reasonable access to the assets of the deceased, it is appropriate to acknowledge that in such circumstances improvements made by the debtor to the jointly owned property are akin to voluntary settlements and that they should be treated in a similar fashion, e.g., their value should be included in the divisible property for the benefit of the creditors where the improvements were made within the two years prior to the commencement of the administration (proposed paras 249(6)(e) and 249(7)(e)). The value of these improvements will be determined as at the date of death (proposed s-sec 249(9)). If the property in question is still held by the surviving joint tenant at the date of the order for administration, it will become subject to a charge as from that date in favour of the trustee for the amount which is payable to him (see Bill cl. 142 - proposed s. 249A).

283. In addition, maintenance creditors will be able to pursue alternative remedies for recovery (Bill para 141(1)(e) - proposed s-sec 249(4A)). This amendment is in keeping with the treatment accorded maintenance creditors elsewhere in the Bill (see ex memo paras 105 to 108).

284. The amendments in cl. 141 of the Bill will prevent the dissipation of assets and equate the position with respect to divisible property more closely to that applying with ordinary bankrupt estates. (These amendments tie in with proposed s. 247A relating to the definition of 'the commencement of the bankruptcy' - see Bill cl. 138).

285. Result of all amendments: As a result of all these amendments, the property available to the trustee of the deceased bankrupt estate will, in general terms, be as follows:-

(a) The 'divisible property of the estate':-

(i) All the property that formed part of the estate on the commencement of the administration (see proposed s. 247A) with the same exemptions as at present (proposed paras 249(6)(a) and (f), 249(7)(a) and 249(8)(a));

(ii) 'After-acquired' property: property acquired by the estate after the death of the person subject to the same exceptions in respect of the other divisible property of the estate (proposed paras 249(6)(b), 249(7)(b) and 249(8)(b)).

(iii) The capacity to exercise all such powers as the deceased's personal representative could have enforced for the benefit of the estate at any time

before an order of release (proposed paras 249(6)(c), 249(7)(c) and 249(8)(c)). Where the administration commences before the date of death it will also include powers that might have been exercised by the deceased after the commencement but prior to his death (proposed para 249(6)(g).

(iv) Any real property devised by the will of the deceased and which, under any State or Territory law, vested directly, or directly upon registration, in the devisee, but only if the order under Part XI is made within 12 months of the deceased's death (s. 251).

(b) Proceeds of certain executions, attachments, etc., and property and moneys held by sheriffs and courts in the course of certain unfinished executions (proposed ss. 118, 119 and 119A as applied by s. 248 - see Bill cl. 139).

(c) Property or money the subject of voidable transactions (ss. 120, 121 and 122 as applied by s. 248 - see Bill cl. 139.).

Cl. 142 Proposed s. 249A : Charge over property owned in joint tenancy

286. A charge will be created over property owned in joint tenancy for the amount owing to the deceased estate for the value of any improvements made by the deceased that are included in the divisible property of the estate (Bill cl. 142 - proposed s. 249A).

Cl. 142 Proposed s. 250 : Second Bankruptcy

287. Background: Where an undischarged bankrupt dies leaving debts incurred since he became bankrupt, proceedings may be taken against his estate under Part XI. The provisions relating to such an administration (s. 250) are similar to those in an ordinary bankruptcy (s. 59 - amended by Bill cl. 35 - see ex memo paras 91 to 93).

288. Amendments: The provisions adjusting the rights of the competing bodies of creditors in relation to the bankrupt's assets (s. 250) are amended in relation to the estates of deceased persons where the order for administration is made after the Assent to the Bill (Bill cl. 142 - proposed S. 250):-

(a) Property which was acquired by or devolved on either the person after he became a bankrupt but before his death or his estate after his death, but before the subsequent order is made for the Part XI administration and which remains undistributed at the date of the presentation of the petition for the administration of his deceased estate in bankruptcy will, on the Part XI administration order being made, be divested from the trustee in the earlier bankruptcy and be vested in the trustee in bankruptcy of the deceased estate (proposed paras 250(1)(a) and (b)).

(b) The trustee in the earlier bankruptcy will lodge with the trustee in the administration of the deceased estate a proof of debt in respect of any unpaid expenses or proved debts in the earlier

bankruptcy. This claim will rank equally with the ordinary unsecured creditors in the Part XI administration. The trustee in the earlier bankruptcy will be entitled to amend his proof of debt (proposed para 250(1)(c)).

(c) The trustee in the earlier bankruptcy will retain his rights in respect of antecedent transactions (proposed para 250(1)(d)).

(d) The trustee in the earlier bankruptcy must hold any undistributed after-acquired property on notice of the presentation of a petition under Part XI and hand such property over to the trustee of the deceased bankrupt estate upon the making of the order for administration (proposed s-secs 250(2) and (3)).

(e) After acquired property is specially defined to take account of the fact that the bankrupt estate is that of a deceased person (proposed s-sec 250(6) - see also proposed s-sec 249(10) which contains a similar definition).

289. The amendments will give more equitable rights to competing bodies of creditors than are at present provided for and bring the provisions of s. 250 into line with the proposed amendments to s. 59.

290. The present provisions will continue to apply generally in relation to the estates of deceased bankrupts where the order for administration of the deceased estate was made before the Assent to the Bill (see Bill s-cls. 142(2) to (4)).

Cl. 143 : Termination of administration

291. A new provision is included in relation to the annulment of orders of administration (Bill cl. 143):-

(a) The Court will be able to annul an order for administration under Part XI if:-

(i) all the unsecured proved debts are paid in full or legal acquittance is obtained; or

(ii) the Court is satisfied that it should not have been made.

(proposed s-sec 252A(1)). This will make available in the case of deceased estates in bankruptcy rights and procedures corresponding to those provided by s. 154 (annulment of bankruptcy) in the case of ordinary bankrupt estates.

(b) Any acts done prior to the order of annulment will be validated (proposed s-sec 252A(2)). This will protect any transactions that took place before the annulment (similar protection is contained in s-sec 154(2) and proposed s-sec 74(6)).

(c) Upon an order for annulment the property remaining in the estate vests in the legal personal representative or such other person as the Court directs (proposed s-sec 252A(2) - see also proposed s-sec 74(7)).

292. Applications for annulment will be dealt with in open Court (see Bill Cl. 19 and ex memo paras 59 and 60)). This will maintain uniformity with the publicity requirement of present para 31(1)(c) in relation to applications (under ss. 150 and 154) for a discharge or annulment of an ordinary bankruptcy.

AMENDMENTS TO PART XIA (FARMERS'DEBTS ASSISTANCE)

293. Cls. 144 to 146 of the Bill amend Part XIA of the Act which provides for the stay of bankruptcy proceedings against certain farmers or certain farming partnerships (present ss. 253A to 253F).

294. Background: Part XIA enables the Court to stay all proceedings under a petition for bankruptcy (other than a petition by the debtor against himself) where an order for a stay of proceedings against the debtor has been made under a proclaimed State or Territory law providing financial assistance for discharging all or part of the debts of 'farmers' within the meaning of the Loan (Farmers' Debt Adjustment) Act 1935 (present ss. 253A to 253F). Several States have legislated for the making of 'protection orders' or certificates, in respect of persons who have applied for such financial assistance which have the effect of staying legal proceedings under State laws against them (subject to certain exceptions).

295. Agreements have now been made with the States for the making of loans to persons for purposes of debt reconstruction, farm build-up and rehabilitation under the States Grants (Rural Adjustment) Act 1976.

Cl. 144 : New Rural Reconstruction Legislation

296. The provisions of Part XIA will now be extended to cover persons receiving financial assistance from a State or Territory where stay or protection orders have been made or certificates given under a State or Territory law pursuant to an Agreement authorised by:-

(a) The State Grants (Rural Reconstruction) Act 1971; and

(b) The State Grants (Rural Reconstruction) Act 1976 (Bill cl. 144).

297. These amendments will enable full effect to be given under the bankruptcy legislation to the objectives of all the Government's rural reconstruction legislation.

Cl. 145 : Registrar to notify relevant authority of pending proceedings

298. The obligation of the Registrar to notify the person administering the State law by or under which a stay order is in force (s. 253D) is amended consequentially (Bill cl. 145) to take account of the amendments that are made in relation to debtors' petitions against partners (see Bill cl. 33) and the new provisions relating to debtors' petitions against joint debtors who are not partners (see Bill cl. 33: proposed s-sec 57(8)). These amendments will ensure that the relevant State authorities are informed of such petitions so that they can appear if they wish (see Bill Cl. 145).

Cl. 146 : Relevant authority entitled to be heard on application

299. The provision enabling the State authorities administering the rural reconstruction legislation to be heard (s. 253F) is amended:-

- to take account of drafting changes to s.56 dealing with debtors' petitions against partnerships; and

- to extend its application to a debtor's petition by joint debtors who are not partners.

(Bill cl. 146).

AMENDMENTS TO PART XII (UNCLAIMED DIVIDENDS OR MONEYS)

300. Cl. 147 of the Bill amends Part XII of the Act dealing with the payment of unclaimed dividends or moneys into the Consolidated Revenue Fund (present s. 254).

Cl. 147 : payment of unclaimed dividends or money

301. These provisions are amended to take account of the change of name of the Official Trustee (Bill para 147(1)). They also provide for (small) amounts of money being held by the Official Trustee pursuant to an order of the Court under s. 50 (interim receiverships) to be paid into the Consolidated Revenue Fund if it is not reasonably practicable to pay them to the person entitled to them (Bill para 145(1)(b) - proposed s-sec 254(2A)).

AMENDMENTS TO PART XIII (EVIDENCE)

302. Cls 148 to 153 of the Bill amend Part XIII of the Act dealing with evidentiary matters (present ss. 255 to 262).

Cl. 148 : transcript of evidence etc.

303. The provisions relating to the recording of evidence (present s. 255) have been amended:-

(a) Any evidence etc. will now be able to be recorded by means of a steno-type machine or sound recording apparatus (proposed s-sec 255(2) and (3) - while the present s. 255 envisaged that this could be done, its precise wording raised some doubts).

(b) The provisions have been re-drafted to remove some difficulties of interpretation.

(c) A magistrate will have the same reporting support that is available to a Registrar (proposed s-sec 255(3)). This will assist magistrates when conducting examinations under ss 69 and 81.

(d) A document purporting to be a transcript or a copy of a transcript of the record of evidence which bears a certificate, signature or seal that purports to have been given or affixed as prescribed will be deemed to be a transcript and to have been duly prepared (proposed s-sec 255(10)).

304. The amendments will facilitate the reporting of proceedings and the proof of transcripts in subsequent proceedings.

Cl. 149 : evidence of matters stated in Gazette notices

305. A copy of a Gazette containing any notice inserted pursuant to a requirement of the Principal Act will now be specified to be only prima facie evidence of the matters stated in the notice (Bill cl. 149). This will prevent injustice due to accidental error (see also ex memo para 241).

Cl. 150 : evidence of proceedings at meetings

306. The minutes of proceedings at meetings of creditors or of committees of inspection (s. 257) will now be specified to be only prima facie evidence of those proceedings (Bill cl. 150). This will prevent injustice due to accidental error (see also ex memo para 241).

Cl. 151 : evidence of bankruptcy document

307. Bankruptcy documents will also be receivable in evidence (s. 259) if marked with the stamp of the Registrar (Bill cl. 151). This amendment is consequential on the new provision for each Registrar to have a stamp (see Bill cl. 8 - proposed s. 14A).

Cl. 152 : evidence as to bankruptcy and appointment of trustee

308. The Registrar will now be specifically empowered to sign and issue certificates as to

- the date on which a person became a bankrupt

- the date on which a person was discharged from bankruptcy or the date on which a bankruptcy was annulled; and

- the appointment of trustees.

(Bill cl. 152 - proposed s-sec 260(1)).

309. This will overcome a judicial view that the present Act contains no provisions empowering the Registrar to issue these certificates (Shillito v. Gurney, McInerny J., unreported hearing 25/11/1970). In addition, such certificates will now only be prima facie evidence (proposed s-sec 260(2)). This will prevent injustice due to accidental error - see also ex memo para 241).

Cl. 153 : swearing of affidavits

310. Affidavits will now also be able to be sworn outside Australia (present s-sec 262(2)) before a Commissioner of the High Court (Bill cl. 153 - this will bring the Act into line with the Federal Court of Australia Act s. 45). A Commissioner of the High Court holds a commission from the Chief Justice to administer oaths and take affirmations (s. 22 of the High Court Procedure Act) : a register of commissioners is kept at the Principal Registry of the High Court in Sydney.

AMENDMENTS TO PART XIV (OFFENCES)

311. Cls 154 to 158 of the Bill amend Part XIV of the Act dealing with offences (present ss. 263 to 277).

Cl. 154 : false proofs of debt

312. A new offence is created in relation to false or misleading statements or particulars in a proof of debt (Bill cl. 154 - proposed s. 263B). This is necessary because of the amendment to the present s. 84 (Bill cl. 43 - see also ex memo para 110) which no longer requires a proof of debt to be sworn unless the trustee requires it.

Cl. 155 : Conduct of examinations

313. New offences are created in relation to examinations under ss. 69 and 81 and the new power to examine witnesses under s. 50 (interim receivership - Bill cl. 28) (Bill cl. 155). They are:-

(a) Failure, after summons, to attend for examination (under ss. 50, 69 and 81) or to appear as a witness before the Court (proposed s. 264A - cf Courts Martial Appeal Act s. 43); a person who fails to attend after a summons can be apprehended provided that, if that person is not a bankrupt appearing for examination under s. 69, a warrant shall not issue unless a reasonable sum for expenses was tendered to that person. (proposed s. 264B);

(b) refusal to be sworn or to give evidence (proposed s. 264C - cf. Courts Martial Appeal Act 1955 s. 45);

(c) prevarication or evasion in the course of an examination (proposed s. 264D);

(d) improper conduct during an examination (proposed s. 264E - cf Courts Martial Appeal Act s. 46).

314. These amendments will provide adequate sanctions to ensure that examinations under ss. 50, 69 and 81 can be conducted in a proper manner.

Cl. 156 : obtaining credit without disclosing bankruptcy

315. The amount for which a bankrupt may incur credit without incurring a penalty (s. 269) is raised from $200 to $500. This amendment takes account of changing money values and is consistent with other amended monetary limitations (e.g. the amount which will support a creditor's petition) in the Act. New penalties are introduced (Bill para 154(c)) which make it an offence for a bankrupt to do the following things without disclosing to the party with whom he is dealing that he is an undischarged bankrupt:-

(a) to obtain goods or services for the value of $500 or more by means of a bill of exchange, cheque or promissory note;

(b) to enter into a hire purchase agreement, leasing contract or chattel mortgage for an amount of $500 or more;

(c) to obtain goods and services by promising to pay an amount of $500 or more; or

(d) to obtain an amount of $500 or more by contracting to supply future goods or services.

316. These amendments will allow a bankrupt reasonable freedom to acquire consumer goods but will at the same time protect the community. Their main purpose is to ensure adequate disclosure of the fact of bankruptcy to protect persons dealing with the bankrupt and to ensure that the requirements of disclosure are not vitiated by nice questions as to the circumstances which do or do not result in the obtaining of credit (which is the present test).

Cl. 157 : leaving Australia to defeat creditors

317. Background: A bankrupt is guilty of an offence if he leaves or prepares to leave Australia, with intent to defeat or delay any creditor, within 12 months before he becomes bankrupt (present para 272(a)). It is considered that the offence should be extended back beyond the commencement of the twelve months prior to bankruptcy. It is possible for a debtor to become a bankrupt at least eighteen months after the commission of the act of bankruptcy on which the petition is based (the combined effect of para 44(1)(c) - (act of bankruptcy to be within six months prior to presentation of petition) and s-sec 52(4) - (petition to lapse twelve months after presentation unless extended)).

318. Amendments: The period within which the offence can be committed is changed to the period running from six months before the presentation of the petition to the date of bankruptcy (Bill cl. 157 : proposed paras 272(a) and (b)). This amendment will render the provisions more effective and the period within which the offence may be committed will be in line with other substantive provisions which deal with events and transactions

occurring within the 6 months prior to the presentation of the petition (e.g. para 40(1)(c) makes it an act of bankruptcy for a debtor to depart or remain out of Australia with intent to defeat or delay his creditors within the six months before the presentation of the petition).

319. The penalty will be increased from 'imprisonment for a period not exceeding one year' to 'imprisonment for a period not exceeding three years'. This amendment will bring the offence within some of the extradition treaties which provide reciprocal extradition for offences where the penalty is death or more than one year's imprisonment (see e.g. Article II Treaty on Extradition between Australia and the United States of America incorporated as a schedule to Statutory Rules 1976, No. 185). It will also increase the penalty to that provided for other comparable bankruptcy offences (for example, concealing property with intent to defraud creditors - s-sec 263(1); obtaining property by fraud - s-sec 265(5); obtaining credit without disclosing bankruptcy - s-sec 269(1); etc.).

Cl. 158 : time for commencing summary proceedings

320. Amendment: The provisions relating to the time within which summary proceedings must be brought (present s. 274) are repealed (Bill cl. 158). This will overcome difficulties produced by the present provision and enable the matters covered by it to be governed by s. 21 of the Crimes Act, which provides general limits as to the time within which proceedings may be instituted.

321. Consequences of amendment: This will mean that:-

(a) Where the maximum term of imprisonment provided for the offence exceeds six months (i.e., all the offences provided for in Part XIV other than s. 276) the prosecution can be commenced at any time (Crimes Act para 21(1)(a)).

(b) Where the maximum term of imprisonment provided for the offence does not exceed six months (e.g., ss. 80 and 182) the prosecution can be commenced at any time within one year after the commission of the offence (Crimes Act para 21(1)(c)).

AMENDMENTS TO PART XV (TRANSITIONAL PROVISIONS)

322. Cls. 159 to 165 of the Bill amend Part XV of the Act which contains various transitional provisions in relation to the 1924 Act (present ss. 278 to 300).

Cl. 159 : Statements of affairs

323. The provision relating to the filing of a statement of affairs following a sequestration order under the 1924 Act (present s-sec 278(2)) has been omitted (Bill cl. 159). This provision is no longer required because of the effluxion of time.

Cl. 160 : Orders under the repealed Act to continue to have force

324. Orders under the 1924 Act can now be rescinded, varied or suspended (Bill cl. 160 - proposed s-sec 279(2)) or enforced (proposed s-sec 279(2A)) whether or not they are continued in force under s-sec 279(1). This will enable the Court, for example, to rescind, vary or suspend an order for discharge which has become effective prior to the 1968 Act (at present this cannot be done: see Re McDonald (1969) 14 F.L.R. 262)

Cls. 161 and 162 : Provisions no longer required

325. Provisions relating to the following matters have been omitted:-

(a) the vesting of certain property in the Official Receiver in Bankruptcy (present s. 283) (Bill cl. 161);

(b) the continued operation (present s. 286) of the provisions enabling the issue of creditors' petitions on acts of bankruptcy committed under the 1924 Act (Bill cl. 161); and

(c) the continued operation (present s-sec 288 (3)) of the provisions in the 1924 Act (s-secs 98(5) - (7)) setting out the procedures to be followed where any doubt arises as to the identity of any person appearing in the title to any property with any bankrupt (Bill Cl. 162).

326. These provisions are no longer required because of the effluxion of time.

Cls. 163 and 164 : Official Trustee

327. Background: There are current provisions which ensure that the relevant provisions of the 1924 Act continue to apply to arrangements under Part XI of the 1924 Act (present s. 292) and to deeds of arrangement registered under Part XII of the 1924 Act (present s. 293). Among these are provisions dealing with the filling of a vacancy in the office of a trustee under a composition, scheme of arrangement or deed of assignment under Part XI (s. 184 of the 1924 Act) or under a deed of arrangement registered under Part XII (s. 203A of the 1924 Act). These two provisions both contain references to the "official receiver". Amendments to these provisions are now required as a consequence of the transfer to the Official Trustee of the trustee functions of each Official Receiver.

328. Amendments: The Provisions relating to the continuing application of Part XI of the 1924 Act to arrangements under that Part (present s. 292) are amended so that references to the "official receiver" in s. 184 of the 1924 Act are read as references to the Official Trustee (Bill cl. 163).

329. The provisions relating to the continuing application of Part XII of the 1924 Act to deeds of arrangement registered under that Part (present s. 293) have been amended so that references to the "official receiver" in s. 203A of the 1924 Act are read as references to the Official Trustee (Bill cl. 164).

Cl. 165 : Bankruptcy Suitors' Fund

330. The provision relating to the closing of the Bankruptcy Suitors' Fund (present s. 294) has been repealed (Bill cl. 165). This provision is no longer required because of the effluxion of time.

AMENDMENTS TO PART XVI (MISCELLANEOUS)

331. Cls 166 to 172 of the Bill amend Part XIV of the Act dealing with a series of miscellaneous matters (present ss. 301 to 315).

Cl. 164 : payment of costs

332. Background: The present provisions (s. 305) enabling the Commonwealth to pay the costs of certain inquiries and proceedings have been found to be unduly restrictive. For example:-

(a) They do not extend to cases where it is not possible to determine, other than by proceedings before the Court, whether or not moneys held by a trustee are part of the estate and hence available to meet the costs of such proceedings.

(b) A trustee may not have adequate funds to defend an action brought against the estate. Where the action is one that clearly ought to be defended the trustee is placed in a very difficult situation if none of the creditors is financially strong enough to accept the risks involved in giving an indemnity to the trustee for the costs of the action.

(c) Apparently acceptable indemnities for costs may be obtained from creditors but unforseen developments so prolong the proceedings and thereby increase the costs that they exceed the amount available to the trustee under the indemnities.

(d) There is no present provision enabling the Official Receiver, pursuant to his statutory functions under s. 19, to make inquiries and conduct examinations of persons other than the bankrupt when he is investigating possible offences committed by a bankrupt and there are no funds in the estate.

333. Amendments: The present provisions relating to the payment of costs by the Commonwealth (s. 305) are amended (Bill cl. 166):-

(a) Applications can now also be made by the Official Receiver.

(b) The provisions will now also apply to the continuance or defence of proceedings by, and to costs awarded against, the trustee. This will enable the provisions of s. 305 to cover all the various situations likely to arise in administering an estate in bankruptcy.

(c) The Commonwealth will be able to be reimbursed out of property preserved for the estate as well as property recovered or obtained. This will extend the Commonwealth's right of reimbursement.

(d) The Minister will be able to terminate any approval, to add conditions at any time, and to vary conditions at any time. (See 'by instrument' in proposed s-sec 305(1) and Acts Interpretation Act s-sec 33(3) which provides that where an Act confers a power to make, grant

or issue an instrument such a power, in the absence of a contrary intention, includes the power to repeal, rescind, revoke, amend or vary the instrument). This will enable the Minister to have regard to any changes in circumstances since he gave his approval.

Cl. 167 : protection against liability for actionable statements of persons engaged in bankruptcy proceedings

334. Background: There is often a special need for a full disclosure of facts in bankruptcy proceedings without any fear of liability for defamation so as to assist in the recovery of assets and the investigation of the conduct and dealings of the bankrupt. However, at the moment a fear of liability for defamation may prevent full disclosure by:-

(a) persons taking part in proceedings before a Registrar or magistrate;

(b) Official Receivers reporting upon their investigations under s. 19; and

(c) trustees reporting on the conduct of bankrupts.

New provisions are proposed to overcome these difficulties and assist in the administration of the Act (Bill cl. 167).

335. Amendments: Registrars or magistrates, and persons appearing before them, will be given the same protection against civil liability as they would have if the proceedings were civil proceedings in the High Court (Bill cl. 167 - proposed s. 306A - similar protection is provided in the Copyright Act s. 171 and the Trade Practices Act s. 158).

336. Official Receivers will be given qualified privilege in any report filed with the Registrar under s. 19 (which sets out the duties of an Official Receiver) (Bill cl. 165 : proposed s. 206B). This will ensure that

in the performance of his duties under s. 19 an Official Receiver is not inhibited by concern about civil liability for defamation (cf. s. 167B of the existing State and Territory companies legislation). The same measure of qualified privelege will be given to registered trustees who are required by present para 175(1)(b) to report on the conduct and affairs of bankrupts (Bill cl. 167 - proposed s. 306c).

Cl. 168 : service of notices

337. It will be possible to serve a trustee who carries on business at more than one address at any of those addresses (Bill cl. 168).

Cl. 169 : publication of notices

338. The provisions dealing with the publication of notices of bankruptcies (present s. 310) are amended (Bill cl. 169):-

(a) An advertisement of a discharge will include the date of the bankruptcy (Bill para 169(b)). This will prevent misleading advertising.

(b) The requirement to advertise discharges which took effect upon the expiration of three years from the commencement of the 1966 Act (4 March 1971) will be removed as from 4 March 1971 (Bill para 169(c) : proposed s-sec 310(3A)). This will overcome the impossibility of determining those bankrupts who were discharged on the expiration of the three year period (the numbers involved could exceed 10,000 persons).

(c) Account will be taken of the fact that an order for administration of a deceased estate under Part XI can now be annulled (Bill para 169(d)).

Cl. 170 : destruction of old documents

339. The Registrar will be able to allow the destruction of accounts and records prior to the expiration of the period of 25 years presently provided in s. 312 (Bill cl. 170). This will remove an excessive storage burden on trustees, including the Official Trustee (ss. 173 and 174 require the trustees to keep accounts and records). The destruction of accounts and records except in accordance with the provision will be prohibited (Bill para 170(b)).

Cl. 171 : audit of accounts

340. All appropriate accounts and records kept by public officials will be subject to audit by the Auditor-General (Bill cl. 171), including:-

(a) the accounts and records of each common fund account and the Common Fund Equalization Account (see Bill cl. 17); and

(b) any accounts which may be authorised by the Inspector-General (see Bill cl. 16).

341. This will ensure that all accounts kept by the Official Trustee, by a Registrar or by an Official Receiver are subject to audit by the Auditor-General.

Cl. 172 : Rules and regulations : Indexes

342. Background: Following amendments made in December 1954 to the Rules under the 1924 Act and administrative directions by the then Inspector-General in Bankruptcy, there came into existence a record known as the index of proceedings. This index lists alphabetically the names of persons who have become bankrupt and contains information such as date of bankruptcy and date of discharge from bankruptcy or annulment of bankruptcy. Corresponding information relating to persons who have entered into Part X arrangements is also included in the index. This index enables persons entering into substantial transactions to determine whether or not the person with whom they are dealing is an undischarged bankrupt or is subject to the control of a registered trustee under a Part X arrangement. The index was expanded by incorporation into it of information relating to proceedings prior to December 1954 from other records which had been kept prior to that date. Copies of the index are available on microfiche for inspection at each Registrar's office.

343. Although the Rules refer to the indexes (e.g. s-r. 21(1)) there is no provision in the present Act for the creation or maintenance of such an index. More importantly, there is no right to inspect the index of proceedings maintained under the 1924 Act. The index of proceedings kept under the 1924 Act has been continued under the present Act by administrative direction of the Inspector-General (pursuant to present s. 20) and Registrars, in fact, allow public search of the whole index.

344. It is desirable to give statutory authority to the present practice and to give an appropriate right of inspection in relation to proceedings under the 1924 Act as well as in relation to proceedings under the present Act.

345. Amendments: The Governor-General's rule-making power under the Act (s. 315) is extended (Bill cl. 172) so that rules can be made in relation to:-

- the keeping of records of proceedings;
- the keeping of indices; and
- the inspection of those records and indices.

346. These rules, when made, will provide a legal basis for the index of proceedings and will clarify the right of search in relation to the index and the records. It is not intended at this stage that bankruptcy notices should be available for public inspection (see s. rule 200(3)).

Cl. 173 : repeal of Third and Fourth Schedules

347. The Third and Fourth Schedules to the Act which prescribe the form for authorities under s. 188 and the form for deeds of assignment are repealed (Bill cl. 173). These forms will now be prescribed (see Bill s-cl. 102(a) and cl. 113). The prescribing of forms is a matter more properly dealt with in the Rules.

OTHER PROVISIONS

Cl. 174 : Formal and other minor amendments

348. A series of formal and other minor amendments are set out in the Schedule to the Bill (Bill cl. 174).

Cl. 175 : transitional provision : trusteeship

349. All trusteeships held by an Official Receiver immediately prior to the amendments to the Act coming into force will transfer to the statutory corporation 'the Official Trustee in Bankruptcy' immediately upon the amendments coming into force (Bill cl. 175).

Cl. 176 : Court may resolve difficulties

350. Where any difficulty arises in the application of any of the amendments in the Bill, the Court will be able, on the application of any interested person, to make such orders as it thinks fit to resolve the difficulty or to apply the amentment (Bill cl. 176 - cf. Act s. 300)

ATTACHMENT A

Transfer of Official Receiver's trustee functions

351. The following amendments are consequential on the transfer of each Official Receiver's trustee function to the Official Trustee:-

Bill	Act: provision amended	Nature of provision	Ex memo Reference
12	18	Incorporation of the Official Trustee	40 to 44
28	50	Control of property before sequestration	72
34(1)(a) to (d)	58(2)	Registration of transmission of property vesting in trustee	90
49	105	Costs of appeal in relation to proof of debt	117
50	106	Trustee may administer oaths etc.	118
60	126	Dealings with an undischarged bankrupt	145

64	132(4)	Vesting and transfer of property when an Official Receiver is trustee	150
73(2)(a) to (c)	150(3)	Hearing of application for discharge by the Court	165
76(c)	154(2) & (3)	Validation of acts and transmission of property following annulment	168
77	155(6)	Registration of persons as trustees	171
78(a)	157(2)	Obligations of Official Receiver where registered trustee appointed.	172
80	159	Calling meeting of creditors where trusteeship vacant	173
81	160	Trustee when there is no registered trustee	173
82	162(7)	Provisions for remuneration of registered trustees do not apply	175(d)
83	163	Remuneration of Official Trustee	176
84	164	Remuneration of trustees acting in succession	177(a)

86	169(4)	Payment of moneys into Bank accounts	181(a)
87	170(1)	Provision of information to Official Receiver	181(b)
91	175(7)	Trustee's account and audit	181(f)
96	183	Release of trustee by Court	189
97	184	Release of trustee by operation of law	190 & 191
117	220	Vacancy in office of trustee under Part X	232
141(1)(b) to (d)	249(1)(b) 249(2)	Vesting and transmission of property on making Part XI order	278
163	292	Application of Part XI of 1924 Act to existing arrangements under that Part	327 & 328
164	293	Application of Part XII of 1924 Act to deeds registered under that Part	329
171	313(1)	Audit by Auditor-General	341
175		Existing trusteeships transfer to Official Trustee.	349

ATTACHMENT "B"

Change of Name to "Official Trustee in Bankruptcy"

352. The following amendments are consequential on the change of the name of the statutory corporation from "The Official Receiver in Bankruptcy" to the "Official Trustee in Bankruptcy":-

Bill	Act: provision amended	Nature of provision	Ex memo Reference
12	18	Incorporation of the Official Trustee	40 to 44
34(1)(a) & (b)	58(1)	Vesting of property upon bankruptcy	90(a) & (c)
141(1)(a)	249(1)(a)	Vesting of divisible property after order under Part XI	278
147	254(1)	Payment of unclaimed moneys into Consolidated Revenue	301

ATTACHMENT "C"

Common Investment Fund

353. The following amendments are consequent on the creation of the Common Investment Fund:-

Bill	Act: provision amended	Nature of provision	Ex memo Reference
16	Proposed 20A to 20J	creation of fund	53
79	158	appointment of more than one trustee	173
88	172	investment of surplus funds	181(c)
110	210(4)	banking requirements applicable to a controlling trustee	223
171	313(1)	audit by Auditor-General	340

ATTACHMENT "D"

Comparative tables for provisions staying executions etc. and regulating distribution of proceeds

354. Present s. 118 : executions, attachments etc. before bankruptcy

Present provision and summary of contest	Proposed provision and major changes
118(1): obligations of creditor where debtor becomes bankrupt	118(1): Does not cover enforcement of charge or charging order
No equivalent	118(2): s-sec 118(1) no longer applies to execution or attachment in relation to a maintenance obligation.
118(2): creditor may prove	118(3): no change
No equivalent	118(4): trustee must give to bankrupt any moneys received as a result of executions or attachments in relation to property which would have been protected under s-sec. 116(1) if the debtor had been bankrupt immediately before the execution or attachment.

118(3) Duties of creditor when notified of petition.	118(5) & (6): creditor must also notify person owing debt which is attached, whereupon attachment is suspended until petition dealt with.
118(4): creditor can still perform contract of sale	118(7): person owing debt can also still pay it.
118(5): creditor in breach of s-sec. 118(3) is guilty of contempt	118(8): same but relates to breach of s-sec. 118(5)
No equivalent	118(9): charge or charging order obtained after period commencing six months before petition is void as against trustee.
No equivalent	118(10): S-sec. s 188(5) and (9) do not apply to attachments or to charges or charging orders in relation to a maintenance obligation.
118(6): pruchaser in good faith acquires good title	118(11): no change
118(7): definition of charge and charging order	118(12): no change

355. Present s. 119 : duties of sheriff etc. after receiving notice of presentation of petition etc.

Present provision and summary of content	Proposed provision and major changes
119(1): duties of sheriff in relation to executions when notified of petition	119(1): also covers attachments
No equivalent	119(2): s-sec 119(1) does not apply to execution or attachment in relation to a maintenance obligation.
119(2): duties of registrars etc. in relation to executions when notified of petition	119(3): also covers attachments
No equivalent	119(4): s-sec 119(3) does not apply to execution or attachment in relation to a maintenance obligation.
119(3): duties of sheriff etc. in relation to executions after notified of bankruptcy.	119A(1): will also cover attachments

119(4)(a): costs of execution of charge on property or money handed to trustee	119A(2): will also cover attachments
119(4)(b): costs of execution charge on real property sheriff has refrained from selling	119(5): no change
119(5): moneys may be retained to cover charge under s-sec 119(4)	119A(3): will now only apply to charge under s-sec. 119A(2)-(present para 119(4)(a)
No equivalent	119(6): failure by sheriff will not affect title of purchaser in good faith
No equivalent	119A(4): execution or attachment creditor will be able to prove as an unsecured creditor where execution or attachment moneys handed over (similar provision in proposed s-sec. 205A(8)

No equivalent	119A(5): trustee must hand back property or moneys received as a result of executions or attachments in relation to property which would have been protected under s-sec (116(1) if the debtor had been bankrupt immediately before the execution or attachment
No equivalent	119A(6): maintenance creditor will be entitled to receive property or moneys given to trustee
No equivalent	119A(7): failure by sheriff will not affect title of purchaser in good faith

356. Present s. 205 ; duties of sheriff etc. after receiving notice of signing of authority under s. 188 etc.

Present provision and summary of content	Proposed provision and major change
205(1): duties of sheriff in relation to executions when notified of signing of authority under s. 188 etc.	205(1): also covers attachments
No equivalent	205(2): sec. 205(1) does not apply to execution or attachment in relation to a maintenance obligation.
205(2): duties of registrar etc. in relation to executions when notified of signing of s. 188 authority etc.	205(3): also covers attachments
No equivalent	205(4): sec. 205(3) does not apply to execution or attachment in relation to a maintenance obligation.
205(3): (circumstances in which execution can proceed)	205(5): also covers attachments

Present provision and summary of content	Proposed provision and major change
205(4): handing over property or proceeds after deed executed	205A(1): also covers attachments
	205A(1): also covers sales or payments whether before or after the execution of the deed
205(5): handing over to debtor property or proceeds after composition accepted	205A(2): also covers attachments
	205A(2): applies only where property or money are not subject to composition.
205(5): handing over to debtor property or proceeds after composition accepted	205A(3): prohibits handing over until no possibility of action to set aside composition.
205(5): handing over to debtor property or proceeds after composition accepted	205A(4): also covers attachments

Present provision and summary of content	Proposed provision and major changes
	205A(4): applies where property or money are subject to composition (then handed to trustee)
205(5): handing over to debtor property or proceeds after composition accepted	205A(5): prohibits handing over until no possibility of action to set aside
205(6)(a): circumstances in which the costs of execution are a charge where sheriff refrains from selling real property	205A(6): also covers refraining by the sheriff under s-sec 119(1)
205(7): retention of moneys to satisfy charge	205A(7): now only applies to s-sec 205A(6) and not to s-sec 205(6).
205(8): failure of sheriff does not affect title of purchaser in good faith	205(7) and 205A(11): no change
No equivalent	205A(8): execution or attachment creditor may prove as an unsecured creditor where execution or attachment moneys paid over.

Present provision and summary of content	Proposed provision and major changes
No equivalent	205A(9): Trustee of deed of assignment must hand back property proceeds or money which would have been protected by s-sec 116(1) if deed had been executed before execution or attachment.
No equivalent	205A(10): creditor in respect of maintenance obligation entitled to receive back property, or moneys given to some-one else.

ATTACHMENT "E"

Bankruptcy Act Amendment Bill 1979
Explanatory Memorandum

Table of Authorities and other References

358. The following are referred to in this ex memo:-

Paragraph		
4	-	D.J. Rose 'Lewis's Australian Bankruptcy Law' (1978) 7th Edition
24	-	Queen Victoria Memorial Hospital v Thornton 87 C.L.R. 144.
63	-	Re Edgar (1973) 2 A.L.R. 649
63	-	Re Deriu 16 F.L.R. 420
66	-	Re Pannowitz 6 A.L.R. 287
86	-	Re Pepper (1969) 14 F.L.R. 828
94	-	Commissioner for Motor Transport (NSW) v Train (1972) 127 C.L.R. 396
94	-	Debt Recovery in Australia (D St.L. Kelly) pp. 160 and 161
105 & 114	-	Re Morris (1974) 22 F.L.R. 460

Paragraph

136(a)	-	Re Leslie: Rae v Samuel Taylor 20 ABC 125 at pp. 128-9
121	-	Rose pp. 178 - 180
146	-	Re Lehrain (1975) 24 F.L.R. 407 at p. 412
146	-	Judiciary Act 1903 s. 79
146	-	Clyne Committee Report para 173
148	-	Re Buckle (1969) 16 F.L.R. 460
158(b)	-	Re Armstrong Whitworth Securities Co. (1947) 2 All E.R. 479
164(a)	-	L.R.C. Report No. 6 - Insolvency: the regular payment of debts (paras. 120 to 127)
168(a)	-	More v More (1962) Ch. 424
199	-	Rose pp. 221 - 223
199	-	McDonald, Henry & Meek's 'Australian Bankruptcy Law and Practice' (5th Edition) paras 962 to 965
234(c)	-	Gee v Schmutter (1971) 123 C.L.R. 503
241	-	Re Thompson (1936) 9 ABC 231

Paragraph

241 - Re Davis ex. p. Hammond (No. 1) (1970) A.L.R. 838

279 - Rose pp. 199-200

279 - Clyne Committee Report para 353

309 - Shillito v Gurney (unreported 25/11/70)

324 - Re McDonald (1969) 14 F.L.R. 262

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