

1985

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

BANKRUPTCY AMENDMENT BILL 1985

EXPLANATORY MEMORANDUM

(Circulated by authority of
the Minister representing
the Attorney-General,
Senator the Honourable Gareth Evans, Q.C.)

OUTLINE

1. The Bankruptcy Amendment Bill 1985 (hereinafter referred to as 'the Bill') makes amendments to the Bankruptcy Act 1966 following a review of the operation of the Act, and following the decision by the Government to modify the legislative implementation of the Review of Commonwealth Functions ("RCF") decision in this area.

2. Those amendments resulting from the review of the operation of the Act are designed to:

- . achieve greater uniformity with comparable provisions of the Companies Act 1981, particularly in the area of priority of debts and registration and control of trustees;
- . enhance the special protection already accorded to maintenance creditors;
- . remove anomalies from the Act; and
- . improve the administration of the Act, particularly in the area of appointment to statutory offices under the Act. At present such appointments are made by the Governor-General. It is proposed that such appointments be made by the Secretary to the responsible Ministry of State.

3. The substantive provisions of the Bill will come into operation on such date or dates as are fixed by Proclamation. This is to permit the preparation of Rules which are needed to supplement some of the amendments to the Act.

FINANCIAL IMPACT STATEMENT

4. The amendments proposed by the Bill will result in an increase in the number of estates administered by the Official Trustee in Bankruptcy. It is estimated that no more than 42 extra staff will be required to absorb the extra workload.

5. This demand for extra resources will be partly offset by an expected increase in revenue from the Common Investment Fund and from official fees.

6. Further the estimated increase in staff will be fully offset by the completion of work of a temporary task force of 47 employees presently working in the Official Receivers' Offices.

7. This results in the following calculation:

	Cost of 42 additional staff (salaries and overhead costs)	\$1,275,616
<u>Less</u>	Additional official fees \$282,538	
and	Common Investment Fund revenue \$124,000	<u>\$ 406,528</u>
NET COST		\$ 869,088

8. Savings resulting from the conclusion of the work of the Task Force amount to \$1,646,384. Accordingly there will be no nett increase in staffing levels and there will be a nett saving over current levels of expenditure.

9. The financial impact is not expected to be felt until mid-1986. Accordingly there will be no financial impact in the current fiscal year, or the fiscal year 1985/86.

INTRODUCTION

10. The Bankruptcy Amendment Bill 1985 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 initiated by the previous Government. Other amendments are designed to modify the legislative implementation of the Review of Commonwealth Functions ("RCF") decision in this area, that is, the changes effected by the Commonwealth Functions (Statutes Review) Act 1981.

11. The purpose of this Explanatory Memorandum is to explain these amendments, which are in the first instance outlined briefly (paras 6 to 23 below). The clauses of the Bill are then dealt with sequentially.

BANKRUPTCY ACT 1966

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

13. The Bankruptcy Act 1966 repealed the Bankruptcy Act 1924-1965 (hereinafter 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)
- Australian Federal Police (Consequential Amendments) Act 1979 (No. 155 of 1979)
- Bankruptcy Amendment Act 1980 (No. 12 of 1980)
- Australian Federal Police (Consequential Amendments) Act 1980 (No. 70 of 1980)
- Commonwealth Functions (Statutes Review) Act 1981 (No. 74 of 1981)
- Statute Law (Miscellaneous Amendments) Act 1981 (No. 176 of 1981)
- Income Tax (Payments for Work) (Consequential Amendments) Act 1983 (No. 18 of 1983)
- Australian Government Solicitor (Consequential Amendments) Act 1984 (No. 10 of 1984)

(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

14. Apart from Act No. 12 of 1980, these Acts were concerned with specific issues and did not involve any general review of bankruptcy legislation. The amendments effected by Act No. 12 of 1980 resulted from a review conducted by the then Department of Business and Consumer Affairs. That review took account of administrative deficiencies in the Act as it then stood, judicial decisions, submissions from professional bodies and developments overseas.

15. However, on 16 July 1981, the then Minister for Business and Consumer Affairs, Mr John Moore, released a list of detailed proposals for further amendment of the Act. The Minister invited comment on the proposals from members of the public. This invitation was renewed in a Media Release of 11 October 1981.

16. Following the change of government in March 1983, the Attorney-General, Senator Gareth Evans Q.C., authorised continuation of work on the review of the Act. The amendments which are proposed in this Bill, and which arise from the review of the Act, are largely intended:

- . to improve the administration of the Act;
- . to enhance the special protection already accorded to maintenance creditors;
- . to achieve greater uniformity with parallel provisions of the Companies Act 1981;
- . to remove anomalies in the Act which have become apparent since Act No. 12 of 1980.

17. The remaining amendments result from the decision by the government to modify the legislative implementation of the RCF decision in this area. This Explanatory Memorandum will briefly outline each group or class of amendments before dealing with each clause sequentially.

ADMINISTRATION OF THE ACT

18. Those provisions of the Act dealing with appointment to statutory offices are to be amended to enable appointments to be made by the Secretary to the responsible Ministry of State. At present the Act provides that such appointments are made by the Governor-General. It is considered inappropriate for the Executive Council to be burdened with the making of relatively routine appointments.

PROTECTION OF MAINTENANCE CREDITORS

19. Act No. 12 of 1980 amended sections 58 & 82 of the Bankruptcy Act. The effect of the amendment was to permit a maintenance creditor to lodge a claim (a proof of debt) with the trustee of a bankrupt estate in respect of certain arrears of maintenance owing under a maintenance order or maintenance agreement. This would permit the maintenance creditor to share in any distributions (dividends) from the bankrupt estate. At the same time the creditor could pursue other remedies, outside bankruptcy, to satisfy the debt (e.g. attachment of wages). Of course the creditor was not permitted to receive more than the total sum owing.

20. Inadvertently it seems the protection thus granted to maintenance creditors may not extend to creditors for arrears of maintenance payable under an enforcement process. This apparent anomaly will be removed by the amendment proposed to the definition of "maintenance order".

21. Other amendments will remove existing doubt over the right of a maintenance creditor to use the Bankruptcy Act to enforce a maintenance obligation, e.g. by issuing a Bankruptcy Notice.

UNIFORMITY WITH THE COMPANIES ACT 1981

22. A series of amendments are proposed to section 109 of the Act, which deals with priority payments. Essentially these changes are designed to achieve greater uniformity with the parallel provisions applying in the event of the winding up of a company.

23. A further series of amendments is proposed to the provisions of the Act dealing with the registration and supervision of trustees in bankruptcy. The proposed amendments will specify experiential requirements of an applicant for registration as a trustee. The requirements are based on the similar provisions in the Companies Act 1981 relating to registration as a liquidator or auditor.

24. The amendments propose a system of triennial reporting by registered trustees in bankruptcy. Again this is based on the parallel requirement for triennial reporting imposed on liquidators and auditors by the Companies Act 1981.

REMOVAL OF ANOMALIES

25. The need to amend various sections of the Act became apparent soon after Act No. 12 of 1980 came into effect. For example, Act No. 12 introduced a new Division 2 into Part II of the Act, dealing with the Common Investment Fund. Experience has revealed shortcomings in secs. 20B and 20H of that Division.

26. Judicial decisions and experience have revealed shortcomings in various other sections, e.g. section 12, section 64, sub-section 69(20) and section 125. Amendments are proposed to remove these anomalies.

MODIFICATION OF THE RCF DECISION

27. Act No. 74 of 1981, the Commonwealth Functions (Statutes Review) Act 1981, effected a large number of amendments designed to transfer to the private sector a significant proportion of the workload involved in administering bankrupt estates.

28. Essentially the RCF decision rendered it necessary that a private trustee administer any estate where the divisible assets exceeded \$10,000. This was effected by making it mandatory for a petitioning creditor and petitioning debtor to obtain the consent to act as trustee from a registered trustee, unless the divisible assets were less than \$10,000 in value.

29. The amendments proposed by this Bill are designed to make it optional - rather than mandatory - for such a consent to be obtained. Accordingly it will continue to be possible for a registered trustee to be the trustee of an estate from the commencement of the bankruptcy. However, it is expected that the level of involvement of registered trustees will decline from the present figure of approximately 20% of all new estates. The creditors will still have the power to remove the Official Trustee as trustee and appoint a private trustee in his stead, by passing a resolution at the first or a subsequent meeting of creditors.

BANKRUPTCY AMENDMENT BILL 1985

30. The remainder of this Explanatory Memorandum deals sequentially with the clauses of the Bill.

Cl. 1 : Short Title

31. The Bill, when enacted, will be cited as the Bankruptcy Amendment Act 1985. (Bill sub-clause 1(1)). The Bankruptcy Act 1966 is referred to in the Bill as the Principal Act. (Bill sub-clause 1(2)).

Cl. 2 : Commencement

32. A number of the amendments proposed by this Bill will require consequential changes to the Bankruptcy Rules. For this reason the changes proposed by this Bill will commence on a day to be fixed by Proclamation.

Cl. 3 : Interpretation

33. Cl. 3 enlarges the definition of "maintenance order" in sub-section 5(1) of the Act. The expression "maintenance order" presently appears in sub-section 58(5A), and sub-section 82(1A) of the Act. The proposed amendment to the definition of the term will make more clear that the special protection accorded by sub-sections 58(5A) and 82(1A) extends to arrears of maintenance owing under an enforcement process.

Cl. 4 : Functions of Inspector-General

34. Clause 4 proposes a series of amendments to sec. 12, the general effect of which will be to enlarge the functions of the Inspector-General in Bankruptcy. A duty is presently imposed upon the Inspector-General - by para. 12(1)(b) of the Act - to inquire into and investigate the conduct of the trustee. This is insufficiently wide as, in particular circumstances, it may not allow an investigation of the administration of an estate, nor an investigation of the affairs of a debtor or bankrupt.

35. Accordingly cl. 4 will introduce new paras 12(1)(b) and 12(1)(ba) into the Act. Para 12(1)(b) will extend the present duty by permitting an inquiry into the conduct and actions of the trustee. Para 12(1)(ba) will create a new discretionary duty to investigate the conduct, trade dealings, property and affairs of a debtor or bankrupt. This will allow investigations to occur particularly where the trustee has not conducted an investigation pursuant to sec. 19 of the Act.

36. Clause 4 will also amend para. 12(1)(c) of the Act. The Inspector-General is required by that paragraph to obtain reports on the operation of the Act from Registrars, Official Receivers and other officers. The proposed amendment will require the Inspector-General to obtain such reports from registered trustees. The reports sought by the Inspector-General are used mainly to provide information for the Annual Report on the Operation of the Act, which is required pursuant to sec.314 of the Act. The proposed sub-sec. 12(1A) will require the registered trustee to comply with a request for a report forthwith.

37. Clause 4 also introduces a new sub-section 12(1B). This will allow for the report showing the result of the investigation or inquiry to be filed with the Registrar. The Bill also amends sec. 306 B of the Act by extending the protection conferred by that section to reports of the Inspector-General filed under sub-section 12(1B). (See cl. 36 of the Bill).

38. The proposed para. 12(2)(d) which is inserted by cl. 4 will enable the Inspector-General to engage the services of an Official Receiver to carry out an investigation on his behalf.

Cl. 5 : Registrars and Deputy Registrars

39. Levels of bankruptcies have increased greatly over the past several years, although a decline of approximately 8% occurred Australia wide in 1984. However, the rate of increase in each bankruptcy district has varied markedly. The rate of increase has also tended to fluctuate dramatically during the year. Accordingly, it has proved difficult to accurately forecast peaks of bankruptcy work.

40. As the levels of work vary it is necessary to adjust the number of Deputy Registrars in Bankruptcy accordingly.

41. At present, the procedure for varying the number of Deputy Registrars, involving a determination by Proclamation by the Governor-General, is both time consuming and inflexible. It impedes the ability of the Department to adjust to the varying demands of workload. The proposed amendment, by increasing flexibility, will improve the administration of the Act.

Cl. 6 : Appointment of Inspector-General, Registrars etc

42. This proposed amendment will expedite appointments as Inspector-General, Registrar, Deputy Registrar and Official Receiver. The proposed amendment will reduce the burden of work upon Executive Council.

43. The Secretary, Attorney-General's Department, presently makes a number of appointments to offices pursuant to powers delegated to him under sub-section 17(2) of the Law Officers Act 1964.

Cl. 7 : Acting Inspector-General and Acting Official Receivers

44. The amendment proposed to sec. 17 is consequential upon the amendment proposed to sec. 16. As the Act stands at present permanent appointments as Inspector-General, Registrar and Official Receiver are made by the Governor-General - sec. 16 - whilst acting appointments to such positions are made by the Minister - sec. 17 and sec. 17A. The proposed amendments will result in permanent appointments pursuant to sec. 16, and acting appointments pursuant to secs. 17 and 17A, being made by the Secretary.

Cl. 8 : Acting Registrars and Acting Deputy Registrars

45. The amendment proposed to sec. 17A reflects the amendments proposed to sec. 16 and sec. 17. As a result of the proposed amendment an appointment as acting Registrar or acting Deputy Registrar will be made by the Secretary.

Cl. 9 : The Official Trustee in Bankruptcy

46. As the Act presently stands there is no clear statement imposing a duty or conferring a power on Official Receivers to act in the name of and on behalf of the Official Trustee in Bankruptcy, which is a body corporate. Sub-sections 18(9) and 18(10) do permit Official Receivers to act on behalf of the body corporate, but only in respect of actions of the body corporate requiring an opinion, belief or state of mind.

47. The proposed amendment will make clear the right of the body corporate to act through its members, the Official Receivers.

Cl. 10 : Duties etc. of Trustees and Official Receiver

48. Section 19 of the Act sets forth the duties of the trustee. For example, para. 19(1)(c) relates to the duty to investigate and report. The duty is however a discretionary duty. Some registered trustees have shown a marked disinclination to perform the discretionary duty to investigate and to report the results thereof.

49. Accordingly, cl. 10 will insert into sec. 19 new sub-sec. 19(1C) which will confer upon the Official Receiver a reserve duty to investigate and report where the trustee has indicated he does not intend to do so. This will ensure that an investigation of the matters specified in paras. 19(1)(c) is conducted in every estate where it is desirable to do so.

50. The Bill proposes - at cl.21 - an amendment to sec. 69 of the Act ["Public Examination of Bankrupt"] to enable the Official Receiver - as well as the trustee - to apply for a summons for a public examination. Accordingly cl. 10 makes consequential amendments to sec. 19 insofar as the duties of advertising and taking part in the public examination are concerned. Cl. 10 will amend para. 19(1)(e) - requiring the trustee to advertise the public examination - by limiting the duty to those occasions where the trustee has applied for the public examination.

51. Cl. 10 also inserts new sub-sec 19(1A). This duty applies to the Official Receiver where the Official Receiver has applied for a public examination. The duty reflects the duty imposed on the trustee by para. 19(1)(e) where the examination is held on the application of the trustee.

52. Finally cl. 10 - by sub-cl. 10(d) - inserts a new para. 19(1)(h) which imposes upon the trustee a duty to take reasonable steps to ensure that the bankrupt complies with sec. 54 of the Act. Sec. 54 imposes upon the bankrupt a duty

to file a statement of his affairs. In default the bankrupt may be found guilty of contempt of court [sub-sec. 54(3)]. Some registered trustees adopt the view that the duty to file such a statement of affairs is placed upon the bankrupt and therefore the trustee has no duty to require him to do so. This is an undesirable approach. The statement of affairs is, in most cases, an indispensable first step in an investigation of a bankrupt's affairs. Consequently sub-cl. 10(d) proposes a new para. 19(1)(h) which will require the trustee to take reasonable steps to ensure that a statement of affairs is filed.

Cl. 11 : The Common Investment Fund

53. As sub-section 20B(5) is presently worded it requires one bank account to be maintained for each Bankruptcy District. This creates an unnecessary workload where a number of Districts are administered by the same Official Receiver. For example, the three Districts in the State of Queensland are administered by one Official Receiver, but three bank accounts must be maintained. The proposed amendment will reduce the inefficiency associated with the present form of words in sub-section 20B(5).

Cl. 12 : Payment of Moneys into and out of Equalization Account

54. The Equalization Account is basically a conduit for interest earned by the Common Investment Fund. The interest is payable either to Consolidated Revenue or to a person entitled thereto pursuant to sub-sections 20J(2) or 20J(4).

55. One of the functions of the Common Investment Fund Investment Board (created by sec. 20C) is to determine what amount of money should be paid from the Equalization Account to Revenue, and what amount should be retained to meet possible calls under sub-sections 20J(2) or 20J(4).

56. Legal advice has been obtained that the present wording of sub-section 20H(4) does not satisfactorily achieve this purpose. The sub-section permits the Minister to direct the intervals at which the Board shall make a determination. This provision is regarded as defective as there is no power to direct when the first determination shall be made and from which the intervals will commence to run. The proposed amendment will correct this anomaly.

Cl. 13 : Acts of Bankruptcy

57. This clause is designed to enhance the special protection accorded to maintenance creditors. The proposed amendment has been developed from a recommendation of the Joint Select Committee on the Family Law Act at para. 5-83 of its 1980 report. ["Family Law in Australia: A report of the Joint Select Committee on the Family Law Act" July 1980]. The proposal will permit a maintenance creditor to issue a Bankruptcy Notice based upon an order enforcing arrears of maintenance. The reason for the 12 month limitation (in sub-para. 40 (3)(f)(i)) arises from the well established rule applied by Courts exercising jurisdiction under the Family Law Act. Under this rule, the Court will not, in general, exercise its discretion to enforce arrears of maintenance more than 12 months old at the date upon which the application for enforcement is brought: Reid v. Reid (1978) F.L.C.90-529. Therefore it would not be appropriate that arrears more than 12 months old, which may not be enforceable under the Family Law Act, should be used to found a Bankruptcy Notice.

Cl. 14 : Conditions on which Creditor May Petition

58. The present wording of sec. 44 entrenches in the Act the sum of \$1000 as the required "threshold debt" for the presentation of a creditor's petition.

59. The "threshold debt" was last reviewed in 1980 when, by Act 12 of 1980, it was increased from \$500 to \$1000.

60. Since that review inflation has exceeded 36%. Accordingly it is felt that an increase in the "threshold debt" to \$1500 will reflect the change in monetary values since 1980.

Cl. 15 : Proceedings and Order on Creditor's Petition

61. This proposed amendment will restore section 52 to its form immediately prior to the amendment effected by Act No. 74 of 1981. It will no longer be mandatory for a petitioning creditor to either obtain the consent of a registered trustee, or to satisfy the Court as to the value of the divisible assets of the debtor. Following the proposed amendment it will be optional to file a trustee's consent in any estate, irrespective of the value of the divisible assets. This is the effect of sec. 156A of the Act.

Cl. 16 : Bankrupt's Statement of Affairs

62. Pursuant to the amendments proposed in this Bill to sec. 19 of the Act the Official Receiver will have certain duties of investigation and reporting in estates administered by registered trustees. In order that the Official Receiver may make an informed exercise of his discretion under the proposed sub-sec. 19(1C) (see Cl.10 of the Bill) it is necessary that the Official Receiver should be provided with a copy of the statement of affairs. The amendment to sec. 54 which is proposed by cl. 16 will impose such a duty upon the registered trustee.

Cl. 17 : Debtor's Petition

63. The amendment of sec. 55 proposed by cl. 17 is consequential upon the decision to modify the RCF decision. It will no longer be mandatory to file a trustee's consent where the assets are likely to exceed \$10,000 in value. Pursuant to sec. 156A it will be optional to file such a consent. Further, the creditors have the power, under section 157, to appoint a registered trustee in place of the Official Trustee by passing a resolution at a meeting of creditors.

64. The proposed sub-sec 55(5) - sub-cl. 17(c) of the Bill - will ensure that the Official Receiver receives a copy of the statement of affairs where the trustee is a registered trustee.

Cl. 18 : Debtor's Petition Against Partnership

65. This proposal also is consequent upon the decision to modify the RCF decision. It will no longer be mandatory for a petitioning debtor to file a trustee's consent along with the debtor's petition.

66. The proposed sub-sec. 56(9) - sub-cl. 18(c) of the Bill - reflects the proposed sub-sec. 55(5). It will ensure that the Official Receiver receives a copy of the statement of affairs where the trustee is a registered trustee.

Cl. 19 : Debtor's Petition by Joint Debtors who are not Partners

67. The proposed amendment to sec. 57 reflects the amendments proposed to sec. 55 and sec. 56. The effect of the proposal is to modify the changes made by Act No. 74 of 1981. It will no longer be mandatory for a petitioning debtor to file a trustee's consent along with the debtor's petition. The proposed sub-sec. 57(6) reflects the proposed sub-sec. 55(5) and 56(9).

Cl. 20 : First Meeting of Creditors

68. The amendment proposed to section 64 is intended to improve the administration of the Act by requiring the holding of a first meeting of creditors once the Statement of Affairs has been filed, rather than within a certain time from the bankruptcy irrespective of whether a Statement of Affairs has been filed.

69. Section 54 requires the filing of a Statement of Affairs within 14 days of the notification of the bankruptcy. The penalty for failure is contempt of court: Sub-section 54(3).

70.. It is usually impossible to hold a meeting prior to the Statement of Affairs being filed as the Statement provides the details of the bankrupt's creditors, i.e. the persons entitled to attend and vote at the meeting. The proposed amendment to para. 64(2)(a) will reduce the number of instances in which the trustee is required to apply (pursuant to sub-section 64(2)(b)) for an extension of time for holding the first meeting. Such applications must now be made whenever the Statement of Affairs is not filed in time for the meeting to be convened within the prescribed period.

Cl. 21 : Public Examination of Bankrupt

71. The amendments proposed to section 69 are intended to achieve 2 aims:

- . to modify the RCF decision by permitting the Official Receiver to apply for the public examination of a bankrupt irrespective of whether the Official Trustee is the trustee of the bankrupt estate. The holding of a public examination is one of the major elements of

an investigation under the Act. The proposed amendment is therefore consequential upon the new reserve duty to investigate which is cast upon the Official Receiver by the proposed sub-sec. 19(1C). See Cl. 10 of the Bill; and

- . At present, pursuant to para.69(20)(a) of the Act, the transcript or notes of an examination may be used in evidence in proceedings "against the bankrupt". Thus the transcript or notes may be used in subsequent proceedings for an offence. However, if the bankrupt applies for discharge from bankruptcy under sec.150 of the Act, the transcript or notes may not be used in evidence because such an application is brought by the bankrupt and is not a proceeding "against the bankrupt." The amendment proposed by sub-cl.21(c) will remove this anomaly.

72. A similar form of words to those appearing in para. 60(20)(a) also appears in para. 81(17)(a). Section 81 is a section permitting the examination of third persons as well as the bankrupt. Cl. 22 proposes a similar amendment to para. 81(17)(a).

Cl. 22 : Discovery of Bankrupt's Property

73. The proposed amendment to para. 81(17)(a) is similar in purpose to the amendment proposed to para. 69(20)(a), discussed in paras. 71 and 72 of this Explanatory Memorandum.

74. The proposal will ensure that the notes or transcript of an examination held under section 81 may be used in proceedings other than those which are "against the person".

75. The amendment of sub-sec. 81(1) proposed by sub-cl. 22(a) will enable the Official Receiver to apply for a summons under the section in those estates administered by registered trustees. This will facilitate performance of the duty to investigate cast upon the Official Receiver by the proposed sub-sec. 19(1C) - see sub-cl. 10(e) of the Bill.

Sub-Clause 23(a) : Priority Payments : Costs of Audit under s.175

76. The amendment proposed to para. 109(1)(a) is the first of a series of amendments designed to achieve greater uniformity with parallel provisions of the Companies Act 1981.

77. Section 175 of the Bankruptcy Act permits the Registrar in Bankruptcy to cause an audit to be carried out of a trustee's periodic account (sub-section 175(2)) or of a trustee's accounts and records (sub-section 175(4)). The proposed amendment will ensure that the costs of such an audit are included with the other costs of the administration of the bankruptcy as a first priority.

78. Section 422 of the Companies Act 1981 permits the auditing of the accounts of a liquidator. Paragraph 441(a) of the Companies Act 1981 provides for the cost of such an audit to be given a first priority. Para. 441(a) is as follows:

"(a) first, the costs, charges and expenses of the winding up, including the taxed costs of an applicant payable under section 366, the remuneration of the liquidator and the costs of any audit carried out under section 422;"

Sub-Clause 23(b) : Priority Payments: Liabilities During Controlling Trusteeship

79. Sub-para. 109(1)(b)(i) accords a priority to "liabilities" incurred during a prior period of control under Part X of the Act, and to the remuneration due to the controlling trustee.

80. There is some ambiguity surrounding the word "liabilities". It is unclear whether that word includes the costs and disbursements of the controlling trustee, as well as debts provable in the bankruptcy incurred by the controlling trustee. Therefore the expression "costs, charges and expenses" is added to sub-para. 109(1)(b)(i) to remove this doubt.

81. The proposal will also achieve greater uniformity with the parallel provisions of the Companies Act 1981. The relevant paragraph is para. 441(b) which is as follows:

"(b) If the winding up was preceded by the appointment of a provisional liquidator - second, the costs, charges and expenses, properly and reasonably incurred by the provisional liquidator during the period of his appointment and the remuneration of the provisional liquidator;"

Sub-Clause 23(c) : Priority Payments : Liabilities Incurred Under a Prior Part X Arrangement.

82. Para. 109(1)(c) should be read in conjunction with sec.114 of the Act. The effect of the proposal is to limit the priority available under sub-sec.109(1)(c) to claims in respect of a Deed of Arrangement, Deed of Assignment, or Composition which has been terminated within the two month period prior to the bankruptcy.

83. This proposal has the virtue of approximating the situation under the Companies Act where a winding up has been preceded by a period of official management.

84. In respect of liabilities arising from a prior Part X arrangement, but which was terminated in excess of two months prior to the bankruptcy, then such liabilities are provable in the bankruptcy but do not rank as a priority.

Sub-Clause 23(d) : Priority Payments : Leave Entitlements to \$1500

85. This proposal will add a reference to "extended leave" in para. 109(1)(e). In a corporate insolvency the priority for amounts due in respect of leave of absence is conferred by para. 441(g) of the Companies Act 1981 which is in the following terms:

"(g) seventh, all amounts due on or before the relevant date to or in respect of an employee of the company (whether remunerated by salary, wages, commission or otherwise), in respect of leave of absence, being amounts due by virtue of an industrial instrument;"

Sub-sec. 5(1) of the Companies Act defines "leave of absence" in this way:

" 'leave of absence' means long service leave, extended leave, recreation leave, annual leave, sick leave or any other form of leave of absence from employment."

Sub-Clause 23(e) : Priority Payments : Workers Compensation

86. Para. 109(1)(f) is read subject to the provisions of sub-sections 109(5) and 109(6). The purpose of the amendment to para. 109(1)(f) is two fold:

- to bring the provision into line with the corresponding provisions of the Companies Act 1981; and

- . to simplify the administration of a bankrupt estate by providing for compensation to be payable in a lump sum, rather than periodically.

87. The corresponding provisions of the Companies Act are paragraph 441(f) and sub-section 5(1) which are as follows:

"(f) sixth, all amounts due in respect of injury compensation, being compensation the liability for which arose before the relevant date;"

"'injury compensation' means compensation payable under any law relating to workers compensation."

88. The amendment proposed to para. 109(1)(f) will achieve uniformity with the Companies Act provisions. Sub-clause 23(h), which inserts a new sub-section 109(6A), will achieve the second purpose of simplifying the administration of a bankrupt estate.

Sub-Clause 23(f) : Priority Payments : Leave Entitlements

89. The proposal to insert the words "extended leave" in sub-section 109(1)(g) is put forward for the reasons outlined in para. 85 of this Explanatory Memorandum.

Sub-Clause 23(g) : Priority Payments : Workers Compensation (Interpretation)

90. This proposed amendment should be read in conjunction with the amendment to sub-section 109(1)(f) proposed by sub-clause 23(e), and discussed in paras. 86-88 above. The changed wording in sub-section 109(6) whereby the words "workers compensation" replace the words "compensation for personal injury arising out of, or in the course of, employment" is in "plain English" and does not reflect any change in policy or administration.

Sub-Clause 23(h) : Priority Payments : Workers Compensation
(Commutation to Lump Sum)

91. Again, this proposed amendment should be read in conjunction with the amendment to para. 109(1)(f) proposed by sub-clause 23(e) and discussed in paras 86-88 above. The new sub-section 109(6A) will reflect the provisions of sub-section 448(2) of the Companies Act 1981 which is as follows:

"(2) Where injury compensation is payable by way of periodical payments, the amount of that compensation shall, for the purposes of paragraph 441(f), be taken to be the lump sum for which those periodical payments could, if redeemable, be redeemed under the law under which the periodical payments are made."

The expression "injury compensation" used in sub-section 448(2) is defined in sub-section 5(1) of the Companies Act. The definition is set out in para. 87 above.

Sub-Clause 23(j) ; Priority Payments : Property Recovered
Following an Indemnity for Costs from the Creditors

92. Sub-clause 23(j) proposes a new sub-section 109(10). The new sub-section will more closely approximate the situation applying in the winding up of a company. Section 450 of the Companies Act is as follows:

"Where in any winding up -

- (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of moneys or the giving of indemnity by creditors; or

- (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered.

the Court may make such orders as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them."

93. The net result of the amendment is that when a creditor indemnifies a trustee, and property and/or expenses are recovered, the Court may make an order that the indemnifying creditor(s) receives a priority in the distribution of the expenses as well as in the distribution of the property.

Cl. 24 : Debts Due to Employees

94. Clause 24 proposes a new sec. 109A. Essentially the new section will reflect the provisions of sec. 443 of the Companies Act 1981 which is as follows:

"443 (1) Where a contract of employment with a company being wound up was subsisting immediately before the relevant date, the employee under the contract is, whether or not he is a person referred to in sub-section (2), entitled to payment under section 441 as if his services with the company had been terminated by the company on the relevant date.

(2) Where, for the purposes of the winding up of a company, a liquidator employs a person whose services with the company had been terminated by reasons of the winding up, that person shall, for the purpose of calculating any entitlements to payment for leave of absence, be deemed, while the liquidator employs him for those purposes, to be employed by the company.

- (3) Subject to sub-section (4), where, after the relevant date, an amount in respect of long service leave or extended leave becomes due to a person referred to in sub-section (2) in respect of the employment so referred to, the amount is a cost of the winding up.
- (4) Where, at the relevant date, the length of qualifying service of a person employed by a company that is being wound up is insufficient to entitle him to any amount in respect of long service leave or extended leave but, by the operation of sub-section (2) he becomes entitled to such an amount after that date, that amount -
 - (a) is a cost of the winding up to the extent of an amount that bears to that amount the same proportion as the length of his qualifying service after that relevant date bears to the total length of his qualifying service; and
 - (b) shall, to the extent of the balance of that amount, be deemed to be an amount referred to in paragraph 441(g)."

95. The new sec. 109A should be read in conjunction with paras. 109(1)(e) and (g), which are equivalent to paras. 441(e) and (g) of the Companies Act 1981.

96. The need for the inclusion in the Bankruptcy Act of a provision equivalent to sec. 443 of the Companies Act is highlighted by the decision of the Supreme Court of Victoria in Re Matthew Bros. (In Liq.) [1962] VR 262. That decision, which would seem to be applicable to a person employed by a trustee in bankruptcy, is commented upon in McDonald, Henry and Meek "Australian Bankruptcy Law and Practice" 5th ed. at para. 515:

"The Supreme Court of Victoria has held in relation to the provisions of the Victorian Companies Act that payment in lieu of long service leave payable to employees whose employment was continued on in the course of winding up was part of the costs, charges and expenses of and incidental to the winding up and should be paid in the priority accorded to such costs, charges and expenses: Re Matthew Bros. (In Liq.) [1962] V.R. 262."

97. The court further held in Re Matthew Bros. that the total amount of the long service leave was a cost, charge or expense of the winding up. Therefore, if the decision is applied to the Bankruptcy Act, the total amount due to an employee who came within the section would be given priority under Bankruptcy Act para. 109(1)(a). This would occur irrespective of the fact that the major period of service occurred before the bankruptcy. It also has the effect of negating the operation of para. 109(1)(g) in respect of those employees who continue in employment after the bankruptcy.

98. The proposed amendment will rectify the apparent anomaly highlighted by the decision in Re Matthew Bros. by providing that only that proportion of the long service leave which represents service after the date of bankruptcy is properly claimable as a cost, charge or expense of the bankruptcy. The payment due in respect of the period worked before the date of the bankruptcy would then be claimable under para. 109(1)(g) of the Bankruptcy Act.

Cl. 25 : Certain Accounts of Undischarged Bankrupts

99. Sec. 125 is designed to prevent a bankrupt dissipating moneys held in a bank account, which moneys may belong to his bankrupt estate. The proposed amendment will remove the anomaly whereby sec. 125 presently applies to bank accounts, but not to accounts held with other similar financial institutions, such as building societies, credit unions, and co-operative societies.

Cl.26 : Vesting and Transfer of Property

100. Sec.132 provides for the vesting of property in a trustee where that trustee replaces an earlier trustee. This provision therefore removes the need for the subsequent trustee to apply to the Court for a formal vesting order. However the terms of sec.132 do not appear to include the Official Trustee in Bankruptcy where it becomes trustee pursuant to sec. 160 of the Act upon there being a vacancy in the office of trustee. In such cases the Official Trustee would need to apply for a vesting order in order to perfect his title to any property. The proposed amendment will remove this anomaly by extending the application of sec.132 to the Official Trustee in Bankruptcy, as well as to registered trustees.

Cl.27 : Protection of Trustee From Personal Liability in Certain Cases

101. The proposed change to sub-sec. 139(3), by inserting a reference to "extended leave", is consequent upon the similar amendments made to para. 109(1)(e) and para. 109(1)(g) of the Act.

Cl. 28 : Discharge by the Court

102. By virtue of the decision to modify the RCF initiative, the Official Receiver will have a reserve duty to investigate and report in bankruptcies administered by a registered trustee. Accordingly, where an application for discharge is made by a bankrupt whose estate is administered by a registered trustee, it may be that the Court would wish to hear and put questions to the Official Receiver. The amendment of sub-sec. 150(4) proposed by cl. 28 gives effect to this.

C1. 29 : Registration of Natural Persons as Trustees

103. At present sec. 155 is silent on the qualifications which are necessary for registration as a trustee. It has been left to the Court to determine whether a person has the necessary qualifications to warrant registration as a trustee. It is thought that the necessary qualifications for registration should be set out in the Act for the following reasons:

- (a) the amendments would achieve as far as possible consistency with the Companies Act rules relating to the registration of liquidators;
- (b) the adoption of a uniform approach by courts exercising jurisdiction in bankruptcy to applications for registration under sec. 155 is to be favoured; and
- (c) it seems desirable that prospective applicants for registration as a trustee in bankruptcy should be given some indication in the Act as to the criteria to be satisfied for registration.

104. The Companies Act specifies the qualifications for registration as a liquidator. The relevant provisions of that Act (sub-sec. 20(2)) require applicants for registration as liquidators to: -

- (a) either be a member of the Institute of Chartered Accountants in Australia, the Australian Society of Accountants or any other prescribed body (Companies Act sub-para. 20(2)(a)(i)); or
- (b) hold a degree, diploma or certificate from a prescribed university or another prescribed institution in Australia and to have passed examinations in such subjects, under whatever name, as the appropriate authorities of the university or

other institution certify to the NCSC to represent a course of study in accountancy of not less than 3 years' duration and in commercial law (including company law) of not less than 2 years' duration (CA sub-para. 20(2)(a)(ii)); or

- (c) possess other qualifications and experience that, in the NCSC's opinion, are equivalent to those specified in paras (a) and (b) above (CA sub-para. 20(2)(a)(iii)).

105. It will be seen that the requirements in the new sub-sec. 155(3A) are equivalent to the provisions of the Companies Act.

106. The proposed sub-sec. 155(3B) and para. 155(3A)(b) specify matters disqualifying a person from registration viz. being an insolvent under administration and being a person convicted of certain criminal offences. Once again, these provisions are modelled upon provisions of the Companies Act. The definition of "insolvent under administration" in the new sub-sec. 155(8) (Sub-cl. 29(1)(e) of the Bill) is modelled on the definition of the same term in sub-sec. 5(1) of the Companies Act. The disqualification of persons convicted of certain offences reflects sub-sec. 20(4) and sec. 227 of the Companies Act.

107. Two new sub-secs, 155(5B) and 155(5C), confer upon the Court a power to cancel or suspend the registration of the trustee. The new sub-sec. 155(5B) is a clarification of the existing sub-sec. 155(5) with the addition of a power to suspend, as well as to cancel, registration. The new sub-sec. 155(5C) confers a specific power to cancel or suspend registration for failure to comply with the proposed new section 161A, to be inserted by cl.31, and which is discussed below at paras. 110 to 112.

108. The new sub-sec 155 (5A) proposed by sub-cl.29(1)(c) will require trustees to update the amount of the bond entered into pursuant to sub-sec 155(2) of the Act as it now stands, or pursuant to sub-sec. 155(3A) of the Act as proposed to be amended, when the prescribed amount of the bond is varied. At present rule 61 of the Bankruptcy Rules prescribes the sum of \$100,000 as the amount of the bond. However the majority of trustees presently registered are bonded to the amount of \$4,000 only, which was the prescribed amount until 1980.

Cl. 30 : Gazettal of Registration etc.

109. Cl. 30 proposes a minor amendment which will ensure that orders of suspension, as well as orders of cancellation, are notified in the Gazette.

Cl. 31 : Triennial Statements by Registered Trustees

110. Cl. 31 proposes a new sec. 161A. The effect of the new provision is to require registered trustees to lodge, every 3 years, a statement containing such information as is prescribed.

111. It is proposed that the information to be supplied will be equivalent to the information which must be supplied by liquidators and auditors pursuant to sec.26 of the Companies Act and Form 12 of Schedule 2 to the Companies Regulations. Form 12 requires the following details:

- (a) the personal particulars of the liquidator/auditor;
- (b) the full address of the place of business of the liquidator/auditor;
- (c) information regarding any disciplinary or legal proceedings pending or taken against the liquidator/auditor;

- (d) a note of any resignation or removal from office;
- (e) a statement indicating whether the person completing the form is still conducting audits or liquidations; and
- (f) a statement indicating whether the person completing the form has ceased to act as a liquidator/auditor.

It is also proposed that trustees be required to provide evidence of a bond of the prescribed amount from time to time. At the moment, r.61 of the Bankruptcy Rules prescribes \$100,000 as the amount of the bond.

112. The proposed amendment is considered to be desirable for 4 reasons:

- (a) it would ensure the register of trustees kept by Registrars in Bankruptcy would be "up to date" in showing details that are current of trustees who are still practising as such;
- (b) Registrars would be able to review at regular intervals the amount and quality of work being done by trustees;
- (c) it would mean that, in this respect, the obligations of auditors and liquidators and those of trustees would be consistent; and
- (d) trustees will be required to maintain the amount of the bond provided pursuant to sec.155 at a reasonable amount.

Cl. 32 : Control of Trustees by the Court

113. The effect of the amendment to sec.179 is to permit the Inspector-General in Bankruptcy, as well as the Registrar, a creditor, or the bankrupt, to apply for an order under sec. 179.

114. Under sec.12 of the Bankruptcy Act the Inspector-General has powers of investigation. However the Act does not confer upon the Inspector-General any power to act, should his investigations reveal a need to act. The proposed amendment will arm the Inspector-General with a power to take action on matters arising from his power to investigate.

Cl.33 : Effect of Authority to Registered Trustee Under Section 188

115. The change proposed by cl.33 will remove an anomaly in the Act as it now stands. Sub-sec 189(1) details the manner in which the control over a debtor's property, effected by giving an authority under sec. 188, may be terminated. Para 189(1)(a) enables the creditors to terminate the control by passing a resolution under sec.204, which is a resolution passed at a meeting called pursuant to the sec. 188 authority. Consequently the creditors could not so resolve at a meeting called pursuant to sec.223 of the Act. The proposed amendment will remove this anomaly.

Cl. 34 : Controlling Trustee's Accounts

116. There appear to be no good reasons for refusing to allow the costs of an audit under sec. 211 of the Act to be met out of the estate being administered. The proposed amendment will make sec. 211 equivalent to sec. 175 (which relates to the auditing of the accounts of the trustee of a bankrupt estate).

Cl. 35 : Administration of Estates Under this Part upon
Petition by a Creditor

117. The proposal in cl. 35 reflects the proposal in cl. 14, which relates to creditors' petitions against a debtor. This is discussed in paras. 58 to 60 of this Explanatory Memorandum.

Cl. 36 : Protection in Respect of Reports

118. Sec. 306B was amended by Act No. 74 of 1981 by replacing the reference to "Official Receiver" with the word "trustee". As a consequence of the modification of the RCF decision, it is necessary to extend the protection conferred by sec. 306B to reports filed by persons other than the trustee. As sec. 19 is to be amended to confer a reserve reporting role upon the Official Receiver, the amendment to sec. 306B is consequent upon this amendment. Similarly the reports filed by the Inspector-General pursuant to sec. 12 will also be protected under sec. 306B.

