

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

BANKRUPTCY AMENDMENT BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General and Minister for Justice - the
Honourable Daryl Williams AM QC MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY
THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

Outline

The Bankruptcy Amendment Bill 1996 proposes amendments to the *Bankruptcy Act 1966* (the Act) that are consequential on the proposed enactment of the Bankruptcy (Estate Charges) Bill 1996 and the Bankruptcy (Registration Charges) Bill 1996.

At present fees and charges are imposed by Rules made under the Act. With the enactment of the Bankruptcy Legislation Amendment Bill 1996, these fees and charges would have been imposed under regulations made for that purpose. With the proposed introduction of a new interest charge and proposed changes to the way in which existing fees and charges are calculated in respect of realisations and registration of trustees these charges will require enactment of new legislation imposing these charges as proposed and this will require amendment of the Act to give effect to these changes.

The bill proposes the removal of references to prescribed fees and their replacement with references to the appropriate proposed Charges Bill.

Additional provisions are also proposed to provide for administration of the proposed Charges Bills, in particular to allow for orderly collection of the charges by the Inspector-General in Bankruptcy on behalf of the Commonwealth.

Provisions are also proposed to allow for extensions of time in which to pay charges and the remission of penalties and charges in appropriate circumstances.

The opportunity has been taken to streamline administration of accounts held by registered trustees by allowing them to consolidate trust account monies into a single account if they wish to do so and they will no longer be required to issue receipts for monies paid into accounts in all cases. They will also no longer be required to furnish accounts to the Official Receiver at the conclusion of an administration.

The Inspector-General will be responsible for ensuring the provisions of the *Bankruptcy Act 1966*, the proposed *Bankruptcy (Estate Charges) Act 1996* and the *Bankruptcy (Registration Charges) Act 1996* are complied with and appropriate powers to allow this to occur are contained in the bill.

Short Title

The Bankruptcy Amendment Bill 1996 (the bill), when enacted, will be known as the *Bankruptcy Amendment Act 1996*.

Commencement

2. Subject to the following, the bill, if enacted, commences on the day on which it receives Royal Assent.
3. As there will be four bills that will have an effect on the *Bankruptcy Act 1996* before the Parliament at the same time it is proposed that the bills, if enacted, will commence in the following sequence.
4. It is proposed that the *Bankruptcy Legislation Amendment Act 1996* will commence prior to this bill, if enacted. Because of this, all amendments proposed by the bill are expressed as if that Act had been enacted.
5. Schedules 1 and 3 of the bill will commence on the commencement of the *Bankruptcy (Estate Charges) Act 1996*. That is, the Amendment Bill and the proposed (Estate Charges) Bill, if enacted will commence on the same day.
6. Schedule 2 of this bill which makes amendments to the *Bankruptcy Legislation Amendment Act 1996* will commence immediately after that Act receives the Royal Assent.

Schedule 1- Amendment of the Bankruptcy Act 1996

Investment of money in common fund

7. Section 20D of the Act provides that monies in the Common Fund not immediately required for the purposes of this Act may be invested by the Official Trustee in, among other things, public securities. Subsection 20D(8) defines public securities to include a variety of investments. It has been accepted that this list does not include investment in bank bills, which usually attract a higher rate of return than other investments listed. Accordingly, in order to maximise the returns available to Consolidated Revenue from interest, item 1 proposes amending subsection 20D(1) to include bank bills as a public security in which monies may be invested.

Charges for registration of persons as trustees

8. Division 1 of Part VIII provides for the registration of persons as trustees in bankruptcy. The scheme requires a person to make an application to the Inspector-General to be registered as a trustee. An application charge is payable

and, if a committee decides that the applicant should be registered, a registration charge is payable.

9. These charges are imposed by regulation prescribed under the Act. It is proposed that these charges will be imposed, instead, in the proposed new *Bankruptcy (Registration Charges) Act 1996* (The Registration Charges Act). As a consequence of this, amendments are needed to remove references to fees prescribed in the regulations and to replace them with references to charges imposed by the *Bankruptcy (Registration Charges) Act 1996*. Items 3,6,7 and 8 give effect to these proposed amendments.

10. Items 4 and 10 propose amendments to sections 154A and 155E to make it clear that an application is not properly made unless it is in the approved form and it is accompanied by any information or documents prescribed by the regulations, and the charge imposed in the proposed Registration Charges Act.

Remuneration of Official Trustee

11. Section 163 provides that the Official Trustee of the estate of a bankrupt shall be remunerated as prescribed. It is intended that the Official Trustee may administer arrangements under a debt agreement or deal with property under a debt agreement. In those cases the Official Trustee would be remunerated. Item 11 proposes the addition of a note to section 163 to make clear that the regulations prescribing remuneration can relate to all situations in which the official Trustee does work under the Act, including as trustee of a bankruptcy or administrator of a debt agreement.

Trustee to pay monies into bank account

12. Sub-section 169(1) of the *Bankruptcy Act 1966* (the Act) provides that a trustee of the estate of a bankrupt must pay all monies received by him or her on account of the estate to the credit of a bank account kept in the name of the estate. This means that a trustee other than the Official Trustee has to open a separate account in respect of each estate that he or she administers. Amendments proposed to subsection 169(1) provide that it will no longer be necessary for the trustee to open separate accounts for each estate.

13. Item 13 proposes the repeal of subsection 169(1) and insertion of provisions that require registered trustees to pay all money received on account of the estate to the credit of an interest bearing account that complies with any requirements specified.

14. There is no requirement that the trustee seek out the best rate of interest available but the trustee must hold monies in an account on which interest will accrue if the account is operated in the way proposed by the trustee. For example, if there are conditions attached to earning interest and the trustee does not intend to comply with those conditions, he or she will not have invested monies in an interest bearing account.

15. Proposed subsection (1A) provides that the trustee may pay money received into a single account for each estate or a consolidated account for a number of estates administered by him or her. If monies are held in a single account, the trustee may hold monies relating to any administrations under the Act in the same account. Although the term "estate of a bankrupt" is used in this

section, the effect of sections 210, 231(4), 237(4), and 243(3) of the Act is that the proposed provisions extend to arrangements arising under Part X of the Act.

16. Proposed subsection (1B) provides that the trustee is entitled, in his or her personal capacity, to each payment of interest on the account, less an amount equal to bank fees or charges paid or payable during the period to which the interest relates. Proposed arrangements in the Bankruptcy Estate Charges Bill 1996 will, if enacted, require the trustee to pay an amount of interest to which the trustee is entitled to the Commonwealth as a charge.

17. Proposed subsection (1C) provides that that portion of the interest to which the trustee is not entitled forms part of the estate or estates. This portion will be equal to the amount of bank fees and charges and will, therefore, be available to the estate for payment of those fees and charges. As the amounts paid in respect of fees and charges do not relate to income earned by the estate the estate is not entitled to an income tax deduction in respect of those amount paid, however no income tax is payable in respect of these amounts.

18. Interest on money in the bank account is not subject to taxation except as provided for in Part 2 of the *Bankruptcy (Estate Charges) Act 1996* (proposed subsection (1D)).

Trustee to keep record of payments, etc

19. Section 171 provides that the trustee of the estate of the bankrupt shall make out a receipt in respect of each payment into the estate. This is considered to be an unnecessary paperwork burden on trustees and it is proposed that this requirement be discontinued. Item 14 proposes that the trustee of the estate must issue a receipt in respect of a payment into the estate only if asked to do so by the person making the payment. Proposed subsection 171(2) requires the trustee to obtain a receipt for a payment made out of the estate wherever practicable.

Investment of surplus funds

20. Section 172 provides that the trustee may invest amounts that are in excess of the amount that the trustee considers is needed for the time being to meet demands in respect of the estate in various income earning investments. It is proposed that this section be repealed as no longer necessary (item 15).

Books to be kept by trustee

21. Section 173 is proposed to be amended by item 16 by the insertion of a penalty amount for failing to comply with the section. Proposed amendments to section 175 will result in trustees no longer being required to provide accounts to the Official Receiver. In view of this it is considered that failing to keep proper accounts should be the subject of a penalty to ensure compliance in the public interest.

Trustee's audit

22. Subsection 175(1) requires the trustee of the estate of a bankrupt to furnish an account to the Official Receiver forthwith after the final dividend has been distributed in respect of the estate. This requirement places a heavy

paperwork burden on trustees and it is considered to be unnecessary. Item 17 proposes the repeal of the subsection and substitution of new provisions relating to the audit of a trustee's accounts.

23. Proposed subsection 175(1) provides that the Inspector-General may on his or her own initiative, or at the request of a creditor or the bankrupt, audit an account referred to in section 173. Item 18 provides a penalty for failing to produce books required for the audit. Item 19 applies these provisions to both registered trustees and the Official Trustee.

24. Section 173 requires trustees to keep such accounts and records as are necessary to exhibit a full and correct account of the administration of the estate. Item 16 imposes a penalty for failure to keep proper accounts and records as required.

25. In addition to these proposed powers, the Inspector-General has wide ranging powers conferred under section 12 of the Act to undertake enquiries and investigations with respect to a range of matters arising under the Act. Instead of accounts being provided to the Official Receiver in respect of each estate, a program of routine and random audits of books will be conducted by the Inspector General to ensure compliance with the Act.

Part XV - provisions relating to the Bankruptcy (Charges) Act 1996

26. Item 20 inserts a new Part XV to give effect to administrative arrangements required as a result of the proposed new Charges Act.

Interpretation

27. Clause 278 defines terms that are used in this Part.

Administration of, and powers and functions in relation to, the Bankruptcy (Estate Charges) Act

28. Clause 279 provides that the Inspector-General has the general administration of the Bankruptcy Estate Charges Act (the Estate Charges Act) proposed. The Inspector General has the same powers under the Estate Charges Act as he or she has under sections 12 and 77AA the Act.

29. These sections provide that the Inspector General may make inquiries and investigations in relation to a wide range of matters under the Act (section 12), and exercise the powers of an Official Receiver, and the Official Receiver is entitled to access to all premises and books for any purpose of the Act.

Deferred payment of interest charge or realisations charge

29. Clause 280 provides that a person may defer payment of the interest charge or realisations charge payable under the Estate Charges Act until either the amount reaches an amount of \$50 or the account is closed (subsection (4)). This will allow trustees to avoid having to draw cheques for small amounts and will make the processing of payments by the Insolvency and Trustee Service, Australia (ITSA) more cost effective.

30. A person must notify the Inspector General if he or she intends deferring the payment of either charge as otherwise a penalty for late payment will accrue, (proposed subsection 280(3)).

31. In this section **trustee account** means an account under section 169 or under a relevant section relating to monies held in accordance with provisions in Part X of the Act.

Late payment penalty - interest charge and realisations charge

32. Clause 281 imposes a penalty of 20% per year on any amounts of interest charge or realisations charge that remain unpaid after the time for payment of the charge. Proposed sub section (2) provides that the person liable to pay the late payment penalty (which will be the trustee) is personally liable to pay the penalty and is not entitled to be reimbursed out of the estate or the bankrupt's property in respect of the penalty amount.

Extension of time for payment - interest charge and realisations charge

33. Clause 282 proposes provisions relating to extensions of time for payment of interest and realisations charge. Subclause (1) provides that the Inspector-General may, in a particular case, extend the time for payment of interest charge or realisations charge.

34. The person liable to pay the charge must apply in writing to the Inspector General, setting out the reasons for the application (paragraphs (a) and (b)). The Inspector General's decision on the application is to be in writing (paragraph (c)) and an application may be made to the Administrative Appeals Tribunal for review of the Inspector-General's decision to refuse an application or to grant a lesser extension than was applied for (paragraph (d)).

35. Applications for extension of time are expected to be granted only in exceptional circumstances such as , for example, where the trustee is unable to make the payment on time due to circumstances beyond his or her control such as prolonged illness or sudden infirmity.

Remission of interest charge, realisations charge and late payment penalty.

36. Clause 283 provides for the remission on an amount of interest charge, realisations charge, or late payment penalty that is payable but has not been paid if the Inspector General thinks that failure to remit the amount would cause a person hardship and it is appropriate to remit the amount. It will only be in exceptional circumstances that it would be appropriate, such as in the case of a genuine and unavoidable error on behalf of the trustee.

37. The person liable to pay the charge must apply in writing to the Inspector-General, setting out the reasons for the application (paragraphs (a) and (b)). The Inspector-General's decision on the application is to be in writing (paragraph (c)) and an application may be made to the Administrative Appeals Tribunal for review of the Inspector-General's decision to refuse an application or to grant a lesser extension than was applied for (paragraph (d)).

Recovery of interest charge, realisations charge and late payment penalty

38. Clause 284 provides that an interest charge, realisations charge or late payment penalty that is due and payable may be recovered by the Commonwealth as a debt due to the Commonwealth.

Payments by cheque or money order

39. Clause 285 relates to a situation where a person pays an interest charge, realisation charge or registration charge by cheque or money order. Subclause 285(1) provides that the amount of charge is to be taken not to have been paid until the cheque or payment order is paid by the bank or other person on which it is drawn. Subclause 285(2) provides that for the purposes of working out whether a person is liable to a late payment penalty in respect of a charge, in a case where the person has paid by cheque or money order which has been paid by the bank or other person on which it is drawn, then the person is to be taken to have paid the charge on the date they gave the cheque to the Commonwealth. The effect of this provision is to prevent a person becoming liable for a late payment penalty between the date of giving the cheque and the date of its clearance by the financial institution on which it is drawn.

Regulations may deal with other matters

40. Clause 286, deals with matters that may be included in the regulations. The regulations may include such matters as the methods by which charge and late payment penalty may be paid, refunds of charge or late payment penalty, crediting amounts overpaid against later amounts owing, specification of forms to be used and information to be provided in relation to the payment of charge or late payment penalty (subclause (1)).

41. The regulations may also provide for the making of payments using EFTPOS, credit or debit cards (sub clause (2)).

42. Subclause 286(3) provides for a standing appropriation of the CRF to enable refunds of money in accordance with any regulations made relating to payments.

Regulations

43. Section 315 provides that the Governor General may make regulations prescribing various matters. Item 21 proposes an amendment to include an additional matter in respect of which regulations may be made.

44. Proposed paragraph 315(2)(j) provides that regulations may be made in respect of the making of other requests or applications under the Act or the presentation or lodgement of other documents under the Act.

Schedule 2 - Amendment of the Bankruptcy Legislation Amendment Act 1996

45. Item 1 of Schedule 2 proposes the repeal of items 309 and 310 of the *Bankruptcy Legislation Amendment Act 1996*.

Schedule 3 - Transitional Provisions

Bank accounts and investments under sections 169,172 and 210

46. Item 1 of Schedule 3 provides transitional arrangements for monies held in bank accounts that do not meet the requirements of the proposed new provisions.

47. If a trustee holds money in a non complying account then the trustee must pay money into an account that does comply with the new provisions as soon as practicable after the commencement of this schedule.

48. If the trustee held public securities as an investment under section 172 then he or she must convert the securities into money and pay the monies into complying account. However, this item does not require the trustee to close a fixed term deposit or convert securities into money before the term ends.

Transition to realisations charge

49. Item 2 provides that the Governor General may make regulations dealing with the transition from fees imposed by old rules 179 and 181 to the realisations charge imposed by Part 3 of the *Bankruptcy (Estate Charges) Act 1996*.

50. The proposed regulations will provide for the continuation of fees imposed at the rate applicable before the commencement of the Estate Charges Act in respect of realisations made prior to the commencement of the Estate Charges Act and at the new rate on realisations made after that date.

51. Terms used in the item are defined.





9 780644 480321