

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (No. 2) 1995

EXPLANATORY MEMORANDUM

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



TABLE OF CONTENTS

	Page
GENERAL OUTLINE	1
FINANCIAL IMPACT STATEMENT	3
NOTES ON CLAUSES	4
SCHEDULE	5
Part 1 - Amendments of the <i>Administrative Appeals Tribunal Act 1975</i>	5
Part 2 - Amendments of the <i>Administrative Decisions (Judicial Review) Act 1977</i>	10
Part 3 - Amendments of the <i>Bankruptcy Act 1966</i>	10
Part 4 - Amendments of the <i>Family Law Act 1975</i>	12
Part 5 - Amendments of the <i>Federal Court of Australia Act 1976</i>	13
Part 6 - Amendments of the <i>Federal Proceedings (Costs) Act 1981</i>	14
Part 7 - Amendments of the <i>Foreign Judgments Act 1991</i>	14
Part 8 - Amendments of the <i>Freedom of Information Act 1982</i>	15
Part 9 - Amendment of the <i>Judges' Pensions Act 1968</i>	16
Part 10 - Amendments of the <i>Jurisdiction of Courts (Cross-vesting) Act 1987</i>	16
Part 11 - Amendments of the <i>Privacy Act 1988</i>	16
Part 12 - Amendments of the <i>Service and Execution of Process Act (1992)</i>	19
Part 13 - Amendment of the <i>Superannuation Act 1976</i>	21
Part 14 - Amendments of the <i>Taxation Administration Act 1953</i>	22

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (No. 2) 1995

GENERAL OUTLINE

This Bill makes amendments of both a minor policy nature and a minor technical nature, including removing gender-specific language, to legislation within the Attorney-General's portfolio and related amendments to other legislation.

The Bill will

- (i) amend the *Administrative Appeals Act* 1975 to:
 - establish a Small Taxation Claims Tribunal;
 - provide for costs awards in the AAT; and
 - remove gender-specific language;
- (ii) amend the *Bankruptcy Act* 1966 and the *Family Law Act* 1975 to provide:
 - for the conferral of jurisdiction so that either the Federal or Family Court can handle all aspects of a case where the bankruptcy of one spouse affects the family law entitlements of the other;
 - that either Court may transfer the case to the other Court where it is more appropriate for the other Court to hear the matter or it is otherwise in the interests of justice for the other Court to do so; and
 - that prior to the distribution of the estate of the bankrupt to the creditors the non-bankrupt spouse be able to retrieve from the assets of the bankrupt any property he or she may be entitled to when both direct and indirect contributions made towards the acquisition, conservation or improvement of the property and towards non-economic contributions made to the welfare of the family as a whole are recognised;
- (iii) amend the *Federal Court of Australia Act* 1976 to provide for the method of conversion of Australian currency and New Zealand currency with respect to the enforcement of certain New Zealand judgments;
- (iv) amend the *Foreign Judgments Act* 1991 to provide for the method of conversion of Australian currency and foreign currency with respect to the enforcement of certain foreign judgments;

- (v) amend the *Freedom of Information Act 1982* to:
- allow exemption from the operation of the FOI Act and certain aspects of the *Privacy Act 1988* for documents in relation to the commercial activities of the Indigenous Land Corporation; and
 - allow exemption from the operation of the FOI Act for documents in relation to the commercial activities of the Department of Administrative Services;
- (vi) amend the *Judges' Pensions Act 1968* to provide that a retired judge is entitled to receive the pension and hold judicial office in relation to a Territory, provided that the judicial office is not remunerated on a full-time basis;
- (viii) amend the *Jurisdiction of Courts (Cross-vesting) Act 1987* to provide that the Act will apply to the Australian Capital Territory on the same basis as it applies to the States and the Northern Territory;
- (ix) amend the *Privacy Act 1988* to:
- insert a definition of the term "guarantee";
 - give the Privacy Commissioner the power to determine that an agency is a credit provider for the purposes of the Act;
 - allow an overdue payment under a guarantee to be listed on the guarantor's credit information file; and
 - give the Privacy Commissioner a specific power to copy and retain documents produced to him or her under section 44 of the Act.
- (x) amend the *Service and Execution of Process Act 1992* to provide that:
- 'magistrate' includes a bail justice under the *Magistrates Court Act 1989* of Victoria;
 - 'warrant' includes a warrant issued under the Act;
 - the Act excludes a State or Territory law relating to service or execution within the State or Territory of process, including judgments, of another State or Territory;
 - the time an interstate defendant in a civil proceeding has to enter an appearance is the longer of 21 days or the period within which an appearance could be entered if the process had been served within the State of issue;

- the procedures in the Act relating to persons under restraint who are arrested under an interstate warrant do not apply where the person is under restraint only in the State or Territory which issued the warrant; and
 - an order made by a magistrate under section 83 of the Act cannot be challenged other than by an application for review under section 86 of the Act;
- (xi) amend the *Superannuation Act 1976* to allow a member of the Tribunal who is member or pensioner under the *Superannuation Act 1990* to hear applications for review under the Act;
- (xii) amend the *Taxation Administration Act 1953* consequentially upon the establishment of the Small Taxation Claims Tribunal; and
- (xiii) correct minor drafting errors in the *Administrative Decisions (Judicial Review) Act 1977* and the *Federal Proceedings (Costs) Act 1981*.

FINANCIAL IMPACT STATEMENT

The Bill will not have a significant financial impact.

NOTES ON CLAUSES

Clause 1 - Short title

1. Clause 1 provides for the Act to be cited as the *Law and Justice Legislation Amendment Act (No. 2) 1995*.

Clause 2 - Commencement

2. Clause 2 provides for the commencement of the Act. Subclause 2(1) provides, in effect, that, subject to any exceptions mentioned in the section, the Act will commence on Royal Assent.
3. Subclause 2(2) provides that Items 1, 5, 7, 8, 10 to 12 and 58 to 67 in the Schedule will commence on a day to be fixed by Proclamation.
4. Subclause 2(3) provides, in effect, that if there has been no Proclamation under subclause 2(2) within 6 months of Royal Assent, the items listed in subsection 2(2) will commence on the day after the expiration of the 6 month period.
5. Subclause 2(4) provides that if Item 31 in Schedule 2 to the *Law and Justice Legislation Amendment Act (No. 1) 1995* has not commenced before this Act receives Royal Assent, Item 13 in the Schedule will commence on the same day and immediately after the commencement of Item 31 in Schedule 2 to the *Law and Justice Legislation Amendment Act (No. 1) 1995*. This is because Item 13 repeals and replaces Item 31 and subclause 2(4) is intended to ensure that Item 31 commences before Item 13.
6. Subclause 2(5) provides that if Item 43 in Schedule 1 to the *Law and Justice Legislation Amendment Act (No. 1) 1995* has not commenced before this Act receives Royal Assent, Item 14 in the Schedule will commence on the same day and immediately after the commencement of Item 43 to Schedule 1 of the *Law and Justice Legislation Amendment Act (No. 1) 1995*. This is because Item 14 repeals and replaces Item 43 and subclause 2(5) is intended to ensure that Item 43 commences before Item 14.

Clause 3 - Amendments

7. Clause 3 provides that the Acts referred to in the Schedule are amended in accordance with the applicable items in the Schedule and also provides that other items in the Schedule have effect according to their terms.

SCHEDULE

Part 1 - Amendments of the *Administrative Appeals Tribunal Act 1975*

Item 1 - Subsection 3(1)

8. Item 1 inserts in subsection 3(1) of the *Administrative Appeals Tribunal Act 1975* a definition of 'Small Taxation Claims Tribunal'.

Items 2 - 4 - Subsections 7(1) and 16(4) and paragraph 16(4)(b)

9. These items remove gender-specific language.

Item 5 - Subsection 19(3A)

10. Item 5 amends subsection 19(3A) so that the Treasurer is now only to be notified of proposed appointments to the Taxation Appeals Division, rather than consulted. A full consultation requirement is considered unnecessary.

Item 6 - Subsection 21A(3)

11. This item removes gender-specific language.

Item 7 - After Part III

12. Item 7 inserts new Part IIIAA in the *Administrative Appeals Tribunal Act 1975* to establish the Small Taxation Claims Tribunal. However, rather than establishing a separate structure, the Taxation Appeals Division of the Administrative Appeals Tribunal (AAT) will be known as the Small Taxation Claims Tribunal when it is exercising powers under Part IIIAA of the Act. It is intended that the Small Taxation Claims Tribunal will be able to provide a cheaper and less formal means of resolving disputes between the small taxpayer and the Commissioner of Taxation. There will be an emphasis on mediation as a form of dispute resolution. As part of the current AAT structure, it will also be able to draw on the resources and expertise of the Taxation Appeals Division and all the powers of the AAT and that Division can be exercised by the Small Taxation Claims Tribunal.

Definitions

13. New subsection 24AA contains definitions of 'determined amount', 'lower application fee', 'standard application fee' and 'taxation decision'. The determined amount of tax in dispute, which will determine whether a matter is heard in accordance with the new Part IIIAA, will be \$5000 unless a higher amount is set, some time in the future, by the regulations.

Matters must involve less than the determined amount to be heard by the Small Taxation Claims Tribunal. Taxation decisions are the types of decisions the Tribunal considers. The remaining definitions are included for the purposes of new sections 24AC and 24AD.

Review of taxation decisions to be heard before the Taxation Appeals Division

14. New section 24AB ensures that, unless otherwise provided by the new Part, there is a presumption that all applications for review of taxation decisions will be heard before the Taxation Appeals Division.

Small Taxation Claims Tribunal to hear tax disputes involving less than the determined amount

15. New subsection 24AC(1) provides that the Taxation Appeals Division will be known as the Small Taxation Claims Tribunal where the amount of tax in dispute is less than the determined amount and the applicant
 - states that the amount of tax in dispute is less than the determined amount in the original application for review; or
 - notifies the Tribunal before the start of the hearing that the amount of tax in dispute is less than the determined amount.
16. If the applicant chooses not to state the amount of tax in dispute then the matter will be heard in the manner of an ordinary tax appeal. This allows the taxpayer to elect whether the matter will be dealt with as a small claims matter or not.
17. If the disputed amount is less than the determined amount, but this is only discovered at a later stage of proceedings, then sub-paragraph 24AC(1)(b) allows the applicant to notify the Tribunal in writing of this fact. In such circumstances, the Taxation Appeals Division will operate as the Small Taxation Claims Tribunal. Such a notification, to be effective, can only take place before the hearing has commenced.
18. New subsection 24AC(2), when read with paragraph 24AC(1)(b), ensures that applicants to the Tribunal who had already lodged small claims prior to the commencement of the new provisions will be entitled to a hearing by the Small Taxation Claims Tribunal provided the hearing of their application has not already commenced in the Taxation Appeals Division.
19. New subsection 24AC(3) provides for a refund of the difference between tribunal application fees where a matter is “transferred” to the small claims jurisdiction under subsection 24AC(1)(b). The standard application fee is currently prescribed by the regulations as \$300. It is proposed that the lower application fee for matters to be heard before the

Small Taxation Claims Tribunal will be prescribed as \$50, which will be non-refundable. The Tribunal will still be able to waive payment of the lower application fee in cases of hardship in accordance with the regulations.

What happens if the Small Taxation Claims Tribunal considers that the tax in dispute is not less than the determined amount

20. New subsection 24 AD(1) provides that the Small Taxation Claims Tribunal may order that a matter cease to be one to which the new Part applies. This can occur where the Tribunal decides that the amount of tax in dispute is not less than the determined amount. Such a matter would then continue to be heard by the AAT but in the Taxation Appeals Division in the manner of an ordinary tax appeal.
21. New subsection 24AD(2) ensures that if the Tribunal makes the kind of order referred to in subsection (1), review by the Taxation Appeals Division cannot proceed until the difference between the application fees is paid. This will ensure that applications are not 'pending' for an indefinite period merely because an applicant has not paid the difference between the required fees. If the payment is not made within the period directed or prescribed, the matter may be dismissed by the AAT. However, if the payment is made at a later date the AAT has the discretion to reinstate the matter and may make appropriate directions.
22. New subsection 24AD(3) provides for a situation where the fees for a "transferred matter" have been wholly or partially waived. It will ensure that the Taxation Appeals Division can proceed to hear such a matter even though the fee has not been paid, in the case where it has been wholly waived, or some of the fee has not been paid, in the case where the balance has been waived.
23. New subsection 24AD(4) allows the Taxation Appeals Division to hear matters together where an application (or applications) to the Administrative Appeals Tribunal is related to a small taxation claims application (or applications). Such a hearing will not be before the Small Taxation Claims Tribunal. The decision to hear matters together involving the same applicant, before the Taxation Appeals Division, will be made by the Registrar, District Registrar or Deputy Registrar. The Registrar, District Registrar or Deputy Registrar may order that only one standard application fee is payable for applications which are to be heard together.

Item 8 - After subsection 34A(1)

24. Item 8 inserts new subsection 34A(1A). New subparagraph 34A(1A)(a) applies where an application is made for review of a taxation decision

which states that the amount in dispute is less than the determined amount or, otherwise, as soon as a notification under paragraph 24AC(1)(b) is given. The section requires the Tribunal to present applicants with a statement about the procedures which will be followed in small claims matters. It is envisaged that the statement will include information about the informal nature of proceedings before the Tribunal and may summarise any relevant directions given under section 33(1) of the *Administrative Appeals Tribunal Act 1975*. That section allows the President, or delegates of the President, to make directions about the procedures of the AAT. The proceedings before the Small Taxation Claims Tribunal will be conducted with as little formality and technicality, and with as much expedition, as possible.

25. New subparagraph 34A(1A)(b) requires the Tribunal to consider and recommend the use of mediation in proceedings before the Small Taxation Claims Tribunal. If the Tribunal decides that mediation is appropriate in a particular matter it must raise the issue, and suggest to parties that they use mediation as a means of resolving the dispute. Parties will still have to consent to a referral by the Tribunal to mediation, but the Tribunal will be obliged to make such a referral where there is consent.

Item 9 - Subsection 37(1)(b)

26. Item 9 removes gender-specific language.

Items 10 - 12 - Paragraphs 45(1)(a) and 45(1)(b) and Subsection 45(1)

27. The amendments to paragraphs 45(1)(a) and 45(1)(b) and new paragraph 45(1)(c) require the President, or a presidential member if such a member is presiding at the hearing of a matter in the Small Taxation Claims Tribunal, to consider the interests of an applicant to the Small Taxation Claims Tribunal before a referral to the Federal Court is made on a matter of law. New paragraph 45(1)(c) ensures that the financial and other interests of the small claimant are considered in matters where the Tribunal is considering or a party, usually the Commissioner of Taxation, is seeking to have a legal point settled by the Federal Court.

Procedure for taxing costs

Item 13 - Section 69A

28. Item 13 repeals existing section 69A, which is being inserted by Item 31 of the *Law and Justice Legislation Amendment Act (No. 1) 1995* (see paragraph 5 above) and substitutes a new section 69A. This section provides a mechanism for determining costs where the Tribunal awards costs against a party or a representative of a party. New subsection 69A(1)

provides that where the payer and payee are unable to agree on the amount of costs, the President may direct the Tribunal to tax or settle the amount of costs, or direct that the costs be taxed by the Registrar, a District Registrar or a Deputy Registrar.

29. New subsection 69A(2) allows either the payer or the payee to apply to the Tribunal for a review of the amount taxed by the Registrar, a District Registrar or a Deputy Registrar.
30. New subsection 69A(3) sets out the Tribunal's powers on a review in similar terms to the general description of Tribunal powers in subsection 43(1).
31. New subsection 69A(4) provides for an amount of costs ordered by the Tribunal to be paid to be recoverable as a debt due to the payee. This will allow the debt to be recovered in a court which has jurisdiction and overcomes the Tribunal's inability to enforce such an order itself.

Power of Tribunal to award costs

Item 14 - After section 69B

32. Item 14 inserts new section 69C. New section 69C provides the Tribunal with a discretion to award costs when the conduct of the case is such as to deliberately cause another party to incur additional costs which would not otherwise have been incurred. Examples of the conduct which may give rise to the exercise of the discretion are listed in new subsection 69C(2):
 - failure to comply with an order or direction;
 - adjournments made necessary by the action or inaction of the party; and
 - reading sections 69C(2) and (3) together, vexatious conduct of proceedings whether or not that conduct has resulted in the application being dismissed under section 42B.
33. New subsection 69C also allows the Tribunal to provide specifically for the payment of costs by the representative of the party in appropriate cases.
34. The power to award costs where there has been an abuse of process as outlined above is not directed at unrepresented litigants who, because of their unfamiliarity with Tribunal procedures, may cause delays. It is aimed at those parties, or their representatives, who deliberately use the

procedures of the Tribunal to their own advantage and thereby cause the other party to incur unnecessary costs.

Part 2 - Amendments of the *Administrative Decisions(Judicial Review) Act 1977*

Item 15 - Schedule 1

35. Item 15 corrects mistakes in lettering the paragraphs in Schedule 1 of the Act.

Part 3 - Amendments of the *Bankruptcy Act 1966*

Item 16 - After section 30

36. Item 16 inserts new section 30A which deals with family law property proceedings and bankruptcy proceedings which affect the same property. Subsection 30A(1) gives the Federal Court the power to make any orders, declarations or grant any remedies that are available in family law property proceedings under Part VIII of the Family Law Act.
37. New subsection 30A(2) provides that a person who is entitled to make an application under Part VIII of the Family Law Act may apply to the Federal Court for it to exercise its powers under subsection 30A(1). However, the Court can also exercise the powers on its own motion. An application may be made where there are bankruptcy proceedings before the Federal Court that could impact upon any current or future property proceedings under the Family Law Act. This would occur where the respondent in property proceedings is, or could be, the bankrupt or judgment debtor. The right to appear in the bankruptcy proceedings will allow a spouse, or former spouse, to obtain property orders either before the making of a sequestration order, or before any consequent distribution of the bankrupt spouse's property by the trustee in bankruptcy.

Item 17 - After section 35A

38. Item 17 inserts new section 35B. New subsection 35B(1) includes the Family Court of Western Australia in the definition of "Family Court". The Family Court of Western Australia is a Commonwealth-funded State Court which exercises the jurisdiction of the Family Court of Australia in Western Australia.
39. New subsection 35B(2) provides the mechanism for the transfer of pending applications from the Federal Court to the Family Court. Where the existence of family law proceedings has been drawn to the Court's attention under new section 30A, or by some other means, it may be that both applications should be dealt with in the Family Court rather than

the Federal Court. Such a transfer may be of the Federal Court's own motion, or on the application of either party. This is designed to ensure that when bankruptcy and family law matters interact, the most appropriate Court hears both applications.

40. New subsection 35B(3) provides the basis for the Family Court's jurisdiction to hear a bankruptcy application which has been transferred to it by the Federal Court. It also gives the Family Court the jurisdiction in any associated matters, and those matters in which the Federal Court would have had jurisdiction in the original bankruptcy proceedings. This additional Federal Court jurisdiction does not extend to any associated jurisdiction which the Federal Court may have had under section 32(1) of the *Federal Court of Australia Act 1976* (which is the Federal Court's own jurisdiction in associated matters).
41. Subsection 35B(3) also provides the Family Court with the power to make orders and grant remedies which could have been made or granted by the Federal Court in the bankruptcy proceedings. If the Family Court does make such orders, they may be enforced in the same way as Federal Court orders. However, appeals from a decision of the Family Court in a transferred matter will not lie to the Federal Court as with other types of cross-vested jurisdiction. Rather, the appeal provisions of the Family Law Act will apply.
42. New subsection 35B(4) ensures that, where any difficulty arises in the process of making orders which the Federal Court could have made, the Family Court has the ancillary power to make directions and other appropriate orders necessary to resolve the problem.
43. New subsection 35B(5) prohibits an appeal from the decision of the Federal Court to transfer a matter to the Family Court.

Item 18 - After subsection 116(2)

44. Item 18 inserts new subsections 116(2AA) and 116(2AB). New subsection 116(2AA) prevents a person's interest in property under an order or declaration of the Family Court being subsumed into the estate of a bankrupt. By providing that the property which was the subject of the order is exempt from the operation of subsection 116(1), it removes it from the property which is divisible amongst all creditors of the bankrupt. This exemption applies to a property declaration under section 78 or a property order under section 79 of the Family Law Act which is made before the distribution of divisible property amongst creditors. The requirement that the assets in the estate have not been distributed will also ensure that the bankrupt's creditors are not unfairly disadvantaged.

45. New subsection 116(2AB) allows the trustee to obtain a copy any orders or declaration made in related property proceedings. This provision will ensure that trustees in bankruptcy have access to crucial information regarding the extent of the property which may form the divisible property of a bankrupt.

Part 4 - Amendments of the *Family Law Act 1975*

Item 19 - After section 79A

46. Item 19 inserts new section 79B. New subsection 79B(1) provides the mechanism for the transfer of pending Part VIII applications from the Family Court to the Federal Court. This could follow the intervention of a creditor of one of the parties in the property proceedings, or after one of the parties instigates, or the Court is otherwise made aware of, a bankruptcy application in the Federal Court. In such circumstances it may appropriate that both the family law property proceedings and the bankruptcy application should be dealt with by the Federal Court rather than the Family Court. Such a transfer may be of the Court's own motion or on the application of either party. This will ensure further that when bankruptcy and family law matters interact, the most appropriate Court hears both applications.
47. New subsection 79B(2) provides the basis for the Federal Court's jurisdiction to hear the family law property proceedings which may be transferred to it by the Family Court. It also gives the Federal Court the jurisdiction in any associated matters, and also those matters in which the Family Court would have had jurisdiction in the original proceedings.
48. It also provides the Federal Court with the power to make orders and grant remedies which could have been made or granted by the Family Court in the Part VIII property matter. If the Federal Court does make such orders they may be enforced in the same way as Family Court orders. However, appeals from a decision of the Federal Court in a transferred matter will not lie to the Family Court as with other types of cross-vested jurisdiction. Rather, the appeal provisions of the Federal Court of Australia Act will apply.
49. New subsection 79B(3) ensures that, where any difficulty arises in the process of making orders the Family Court could have made, the Federal Court has the ancillary power to make directions and other appropriate orders necessary to resolve the problem.
50. New subsection 79B(4) prohibits an appeal from the decision of the Family Court to transfer a matter to the Federal Court.

Item 20 - Subsection 94(3)

51. Item 20 ensures that the appeal provisions of the Family Law Act do apply to proceedings transferred under new section 79B.

Part 5 - Amendments of the *Federal Court of Australia Act 1976*

Item 21 - Subsection 32W(5)

52. Section 32W deals with registration of New Zealand judgments in the Federal Court. Item 21 provides that subsection 32W(5) must be read subject to subsection 32W(6).

Item 22- Paragraph 32W(5)(b)

53. Item 22 omits existing paragraph 32W(5)(b) and substitutes new paragraph 32W(5)(b). New paragraph 32W(5)(b) provides that the exchange rate is the exchange rate prevailing on the second business day before the day on which the application for registration of the judgment is made. This is necessary to enable the judgment creditor time to obtain the necessary evidence from authorised foreign exchange dealers.

Item 23 - After subsection 32W(5)

54. Item 23 inserts new subsections 32W(5A) and 32W(5B) which are modelled on subsections 41(2B) and 41(2C) of the *Bankruptcy Act 1966*. New subsection 32W(5A) provides that for the purposes of paragraph 32W(5)(b) the 'equivalent amount in Australian currency' should be the average of the rates at which Australian dollars might have been bought in New Zealand dollars at 11am, or another time if prescribed, on the conversion day, from 3 authorised foreign exchange dealers selected by the judgment creditor. By virtue of section 37 of the *Acts Interpretation Act 1901*, 11am would be interpreted as being 11am in whichever State or part of the Commonwealth the provision is being interpreted.
55. New subsection 32W(5B) provides that a business day in paragraph 32W(5)(b) is a day on which foreign exchange dealers selected by the judgment creditor publish rates at which Australian dollars may be bought in New Zealand currency.

Item 24 - Subsection 32W(7)

56. Subsection 32W(7) provides that the amount payable under a registered judgment should include costs of and incidental to registration. Item 24 provides that the costs incidental to registration include the cost of obtaining evidence from foreign exchange dealers.

Item 25 - Section 32W

57. Item 25 inserts a new subsection 32W(8) which will provide a definition of 'authorised foreign exchange dealer'.

Part 6 - Amendment of the *Federal Proceedings (Costs) Act 1981*

Item 26 - Schedule

58. The *Law and Justice Legislation Amendment Act (No. 1) 1995* inserts a fee for the Administrative Appeals Tribunal into the Schedule in the Act, but does not amend the heading to reflect this. Item 21 corrects this drafting error.

Part 7 - Amendments of the *Foreign Judgments Act 1991*

Item 27- Subsection 6(11)

59. Section 6 of the Act deals with applications for, and the effect of, registrations of foreign judgments. Item 27 provides that subsection 6(11) must be read subject to subsection 6(12).

Item 28 - Paragraph 6(11)(b)

60. Item 28 provides that the exchange rate is the exchange rate prevailing on the second business day before the day on which the application for registration of the judgment is made. This is necessary to enable the judgment creditor time to obtain the necessary evidence from authorised foreign exchange dealers.

Item 29 - After subsection 6(11)

61. Item 29 inserts new subsections 6(11A) and 6(11B) which are modelled on subsections 41(2B) and 41(2C) of the *Bankruptcy Act 1966*. New subsection 6(11A) provides that for the purposes of paragraph 6(11)(b) the 'equivalent amount in Australian currency' should be the average of the rates at which Australian dollars might have been bought in the foreign currency in which the judgment is expressed at 11am in the morning, or another time if prescribed, on the conversion day, from 3 authorised foreign exchange dealers selected by the judgment creditor. By virtue of section 37 of the *Acts Interpretation Act 1901*, 11am would be interpreted as being 11am in whichever State or part of the Commonwealth the provision is being interpreted.
62. New subsection 6(11B) provides that a business day in paragraph 6(11)(b) is a day on which foreign exchange dealers selected by the judgment creditor publish rates at which Australian dollars may be bought in the foreign currency in which the judgment is expressed.

Item 30 - Paragraph 6(15)(a)

63. Section 6(15) provides that the amount payable under a registered judgment should include costs of and incidental to registration. Item 30 provides that the costs incidental to registration include the cost of obtaining evidence from foreign exchange dealers.

Item 31 - Section 6

64. Item 31 inserts a new subsection 6(16) which will provide a definition of 'authorised foreign exchange dealer'.

Part 8 - Amendments of the *Freedom of Information Act 1982*

Item 32 - Schedule 2 (Division 1 of Part II)

65. Item 32 amends Division 1 of Part II of Schedule 2 to include the Indigenous Land Corporation in relation to documents in respect of its commercial activities.
66. The purpose of the amendment is to remove the commercial activities of the Indigenous Land Corporation from the operations of both the *Freedom of Information Act 1982* (FOI Act) and certain aspects of the *Privacy Act 1988*. Subsection 7(2) of the FOI Act provides that persons, bodies and departments specified in Part II of Schedule 2 are exempt from the operation of the Act in relation to the documents referred to in that Schedule in relation to them.
67. Paragraph 7(1)(a), in conjunction with subsection 7(2), of the *Privacy Act 1988* provides that, in relation to the acts or practices of a body or agency in Division 1 of Part II of Schedule 2 of the FOI Act, that body or agency is not subject to the Information Privacy Principles contained in section 14 of the *Privacy Act 1988*, nor is it subject to the performance of the Privacy Commissioner's functions (in relation to interferences with privacy) under section 27 of that Act. The effect of this amendment is that the Indigenous Land Corporation will not be subject to these aspects of the *Privacy Act 1988*. However, it will still have to comply with the Tax File Number Guidelines to the extent that it receives and deals with Tax File Number information. This amendment will not affect the credit reporting regime in Part IIIA of the *Privacy Act 1988*.

Item 33 - Schedule 2 (Division 2 of Part II)

68. Item 33 amends Division 2 of Part II of Schedule 2 to include the Department of Administrative Services in relation to documents in respect of its commercial activities. Inclusion in Division 2 of Part II of Schedule 2 of the FOI Act does not affect the operation of the *Privacy Act 1988*.

69. The purpose of the amendment is to remove the commercial activities of the Department of Administrative Services from the operations of the *Freedom of Information Act 1982* (FOI Act). Subsection 7(2) of the FOI Act provides that persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of the Act in relation to the documents referred to in that Schedule in relation to them.

Part 9 - Amendment of the *Judges' Pensions Act 1968*

Item 34 - Subsection 5(1)

70. Under existing subsection 5(1) of the Act a judge is taken not to have retired so long as he continues to hold any office as a Judge or any judicial office in relation to a Territory.
71. Item 34 omits existing subsection 5(1) and inserts new subsection 5(1). New subsection 5(1) will provide that a judge is not taken to have retired so long as he or she continues to hold any office as a Judge or holds any judicial office in relation to a Territory that is remunerated otherwise than on a part-time basis.

Part 10 - Amendments of the *Jurisdiction of Courts (Cross-vesting) Act 1987*

Items 35 - 38 - Subsection 3(1) and paragraphs 4(1)(c) and 4(1)(d)

72. The purpose of these amendments is to provide that the Act will apply to the Australian Capital Territory on the same basis as it applies to the States and the Northern Territory. The Australian Capital Territory has already enacted its own cross-vesting legislation which will commence at the same time as these amendments.
73. Items 35 to 38 insert references to the Australian Capital Territory wherever references to the Northern Territory occur in the Act.

Part 11 - Amendments of the *Privacy Act 1988*

Item 39 - Subsection 6(1)

74. Subsection 6(1) of the Act provides for the interpretation of a number of expressions used generally throughout the Act.
75. Item 39 inserts in subsection 6(1) a definition of the term "guarantee", which is defined to include an indemnity given against the default of a person in making payments under a loan.

Item 40 - Subparagraph 11B(1)(c)(ii)

76. Item 40 makes a minor technical amendment to subparagraph 11B(1)(c)(ii).

Item 41 - Subsection 11B(1)

77. Subsection 11B(1) of the Act sets out the persons or bodies that are credit providers for the purposes of the Act. Item 41 inserts a new paragraph 11B(1)(d).
78. Paragraph 11B(1)(d) provides that an agency (defined in subsection 6(1)) is a credit provider if:
- (i) it carries on a business or undertaking that involves it making loans; and
 - (ii) it is determined by the Privacy Commissioner to be a credit provider for the purposes of the Act.
79. It is intended that this provision will apply only in relation to agencies that provide credit on a commercial basis.

Item 42 - After subsection 11B(1)

80. Item 42 inserts in section 11B a new subsection (1A). Subsection 11B(1A) provides that in relation to the credit provider activities of an agency that is determined to be a credit provider under paragraph 11B(1)(d), Part IIIA of the Act has effect despite anything in Part III of the Act or in the *Freedom of Information Act 1982*. This amendment is to ensure that the regime in Part IIIA of the Act, which is specifically tailored to credit reporting, overrides the broader use and disclosure provisions contained in the Information Privacy Principles in Part III, and in the *Freedom of Information Act 1982*.

Item 43 - Subsection 11B(3)

81. Item 43 makes a consequential amendment to subsection 11B(3) to ensure that a determination under the new paragraph 11B(1)(d) must be made by notice in writing published in the Gazette. In addition, the effect of subsection 11B(4) is that such a notice is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Item 44 - After paragraph 18E(1)(b)

82. Section 18E deals with the permitted contents of an individual's credit information file. Item 44 inserts in subsection 18E(1) a new paragraph (ba) to permit credit reporting agencies, in certain circumstances, to

record on a guarantor's credit information file details of an overdue payment under the guarantee.

83. Paragraph 18E(1)(ba) allows this information to be listed on the file only if the information is a record of an overdue payment by the individual as guarantor under a guarantee given against default by a person in repaying all or any of an amount of credit obtained by that person from a credit provider, and the following conditions are all satisfied in relation to the overdue payment:
- (i) the credit provider is not prevented under any law of the Commonwealth, a State or a Territory from bringing proceedings against the guarantor to recover the amount of the overdue payment;
 - (ii) the credit provider has given the guarantor notice of the borrower's default that gave rise to the obligation of the guarantor to make the payment;
 - (iii) 60 days have elapsed since the day on which the notice was given; and
 - (iv) the credit provider has, in addition to the giving of the notice, taken steps to recover the amount of the overdue payment from the guarantor.

Item 45 - Subsection 18E(7)

84. Item 45 makes a consequential amendment to subsection 18E(7) to ensure that a credit reporting agency is permitted to open a credit information file in respect of a guarantor when it has information that is a record of an overdue payment under the guarantee.

Item 46 - Subsection 18F(1)

85. Section 18F sets out the time periods within which a credit reporting agency must remove personal information from an individual's credit information file.
86. Item 46 makes a consequential amendment to subsection 18F(1) to pick up new paragraph 18E(1)(ba). This will ensure that credit reporting agencies delete from individuals' credit information files any information that is a record of an overdue payment under a guarantee within 1 month of the end of the maximum permissible period for the keeping of information of that kind. New subsection 18F(2A) prescribes the relevant periods.

Item 47 - After subsection 18F(2A)

87. Item 47 inserts in section 18F a new subsection (2A). Subsection 18F(2A) prescribes the maximum permissible periods for the keeping of information that is a record of an overdue payment under a guarantee. It provides that the maximum permissible periods are:

- (i) where the credit reporting agency was informed of the overdue payment before 25 February 1992 (the date of commencement of Part IIIA of the Act) - 5 years from that date; or
- (ii) where the credit reporting agency was informed of the overdue payment on or after the date of commencement of subsection 18F(2A) - 5 years from the date on which the agency was informed of that overdue payment.

Item 48 - After subsection 44(2)

88. Item 48 inserts in section 44 a new subsection (2A). Subsection 44(2A) will clarify the Commissioner's powers in relation to the copying and retention of documents produced to him or her under section 44 of the Act.

89. Subsection 44(2A) provides that where documents are produced to the Commissioner in accordance with a requirement under subsection 44(1), the Commissioner:

- (i) has the power to take possession of, and make copies of, or take extracts from, the documents;
- (ii) has the power to retain possession of the documents for any period that is necessary for the purposes of the investigation to which the documents relate; and
- (iii) during the period referred to in (ii) - must permit a person who would be entitled to inspect any of the documents if they were not in the Commissioner's possession to inspect, at all reasonable times, any of those documents that the person would be entitled to inspect.

Part 12 - Amendments of the *Service and Execution of Process Act 1992*

Item 49 - Subsection 3(1) (definition of "magistrate")

90. Item 49 amends the definition of 'magistrate' to include a person appointed as a bail justice under section 120 of the *Magistrates Court Act 1989* of Victoria or a person who is a bail justice because of holding a prescribed office within the meaning of section 121 of that Act. This will

enable some persons arrested in Victoria under an interstate warrant to be brought before a magistrate more quickly.

Item 50 - Subsection 3(1) (definition of "warrant")

91. Item 50 amends the definition of 'warrant' to include warrants issued under the Service and Execution of Process Act itself. This corrects a drafting oversight in the Act.

Item 51 - Subsection 8(4)

92. Section 8 of the Act deals with the effect of the Act on court or tribunal decisions and the operation of other laws. Item 51 omits existing subsection 8(4) and replaces it with new subsection 8(4).
93. Existing subsection 8(4) provides that the Act operates to the exclusion of a law of a State (including a Territory) with respect to the service or execution in another State of process, including judgments, of the first-mentioned State to which the Act applies.
94. New subsection 8(4) in effect re-enacts existing subsection 8(4) but also provides that the Act operates to the exclusion of a law of a relevant State with respect to the service or execution in that State of process (including judgments) of another State. This amendment corrects a drafting omission in the Act.

Item 52 - Subsection 17(1)

95. Item 52 omits existing subsection 17(1) and replaces it with new subsection 17(1). New subsection 17(1) provides, in effect, that a defendant served interstate with initiating process in a civil proceeding has the longer of 21 days, or the period which would have been allowed had the process been served in the State of issue, in which to enter an appearance.

Item 53 - Subsection 84(1)

96. Item 53 amends subsection 84(1) to require that where a person who has been apprehended under an interstate warrant is brought before a magistrate, the magistrate must find out whether he or she is a person under restraint and, if so, under the law of which State or States the person is under restraint.
97. A 'person under restraint' is defined in subsection 3(1) of the Act to include a person who is on bail, parole or probation, or who has been conditionally released, or is serving a period of home detention or periodic detention or who is subject to a form of community service order.

98. This amendment is ancillary to the insertion of section 84(1A).

Item 54 - After subsection 84(1)

99. Item 54 inserts a new subsection 84(1A). The effect of the amendment is that where a magistrate is satisfied that a person arrested under an interstate warrant is under restraint only in the State in which the warrant was issued subsections 84(2)-(10) do not apply in relation to the person. Those subsections protect the interests of a State or States under whose law a person is under restraint when that person is arrested under an interstate warrant. That protection is not needed where the State seeking return of the person under the warrant is the only State under whose law he or she is under restraint.

Item 55 - After section 86

100. Item 55 inserts new section 86A. New section 86A provides that where a magistrate makes an order under section 83 with respect to a person who has been apprehended under an interstate warrant, a court may not entertain a challenge to the order, otherwise review the order or make an order affecting the carrying out of the order except on an application to the Supreme Court of the State in which the order was made under section 86 and by the exercise of the powers conferred on that Court under that section. The new section is intended to prevent the purported use of common law powers to frustrate the intention of the Act as shown in section 83.

Item 56 - Application

101. Item 56 is a transitional provision relating to the amendment made by Item 50 to the definition of 'warrant'. The amendment will apply to every warrant issued before this item commences, where the person named in the warrant has not been apprehended before that commencement, as well as to every warrant issued after that commencement.

Part 13 - Amendment of the *Superannuation Act 1976*

Item 57 - Section 154

102. Item 57 inserts new subsection 154(8). This subsection will widen the pool of Administrative Appeals Tribunal members who are eligible to hear applications for review of decisions made under the *Superannuation Act 1976*.
103. Section 154(7) currently requires that at least one member of the tribunal which hears such an application be an eligible employee or pensioner under the *Superannuation Act 1976*. New subsection 154(8) will also allow

that criteria to be satisfied by a member or pensioner of the scheme established under the *Superannuation Act 1990*.

Part 14 - Amendments of the *Taxation Administration Act 1953*

Item 58 - Section 2

104. Item 58 makes a consequential amendment to the Taxation Administration Act by introducing a definition of "Small Taxation Claims Tribunal" which is identical to the definition in the Administrative Appeals Tribunal Act.

Items 59 - 62 - Sections 2 and 14ZO, Subsection 14ZX(4) and Subparagraph 14ZZ(a)(i)

105. Items 59 - 62 make consequential amendments to the Taxation Administration Act which have the effect that references to the Small Taxation Claims Tribunal are included where there are now references to the AAT.

Item 63 - Section 14ZZE

106. Item 63 omits existing section 14ZZE and substitutes a new section 14ZZE. New section 14ZZE reverses the current presumption that taxation matters before the AAT will be heard in private unless the taxpayer elects otherwise. An application to the Tribunal, other than the Small Taxation Claims Tribunal, will be heard in private if the applicant requests. However, where there is no request the presumption will be that such matters are heard in public.
107. This amendment will also introduce a consistency between tax matters and the existing presumption in all other matters that AAT hearings are public. In particular, applications in small taxation claims matters will be heard in public unless an applicant can convince the Tribunal otherwise. The existing sections do permit the Tribunal to make orders to ensure privacy in appropriate circumstances. In small taxation claims matters resolved by mediation rather than by a hearing the issue should not arise.

Items 64 - 67 - Paragraphs 14ZZH(a) and 14ZZK(a) and Subsections 14ZZL(1) and 14ZZL(2)

108. Items 64 - 67 make consequential amendments to the Taxation Administration Act so that references to the Small Taxation Claims Tribunal are included where there are now references to the AAT.