

1984

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

BANKRUPTCY AMENDMENT BILL 1984

EXPLANATORY MEMORANDUM

(Circulated by authority of
the Attorney-General
Senator the Honourable Gareth Evans)

BANKRUPTCY AMENDMENT BILL 1984

EXPLANATORY MEMORANDUM

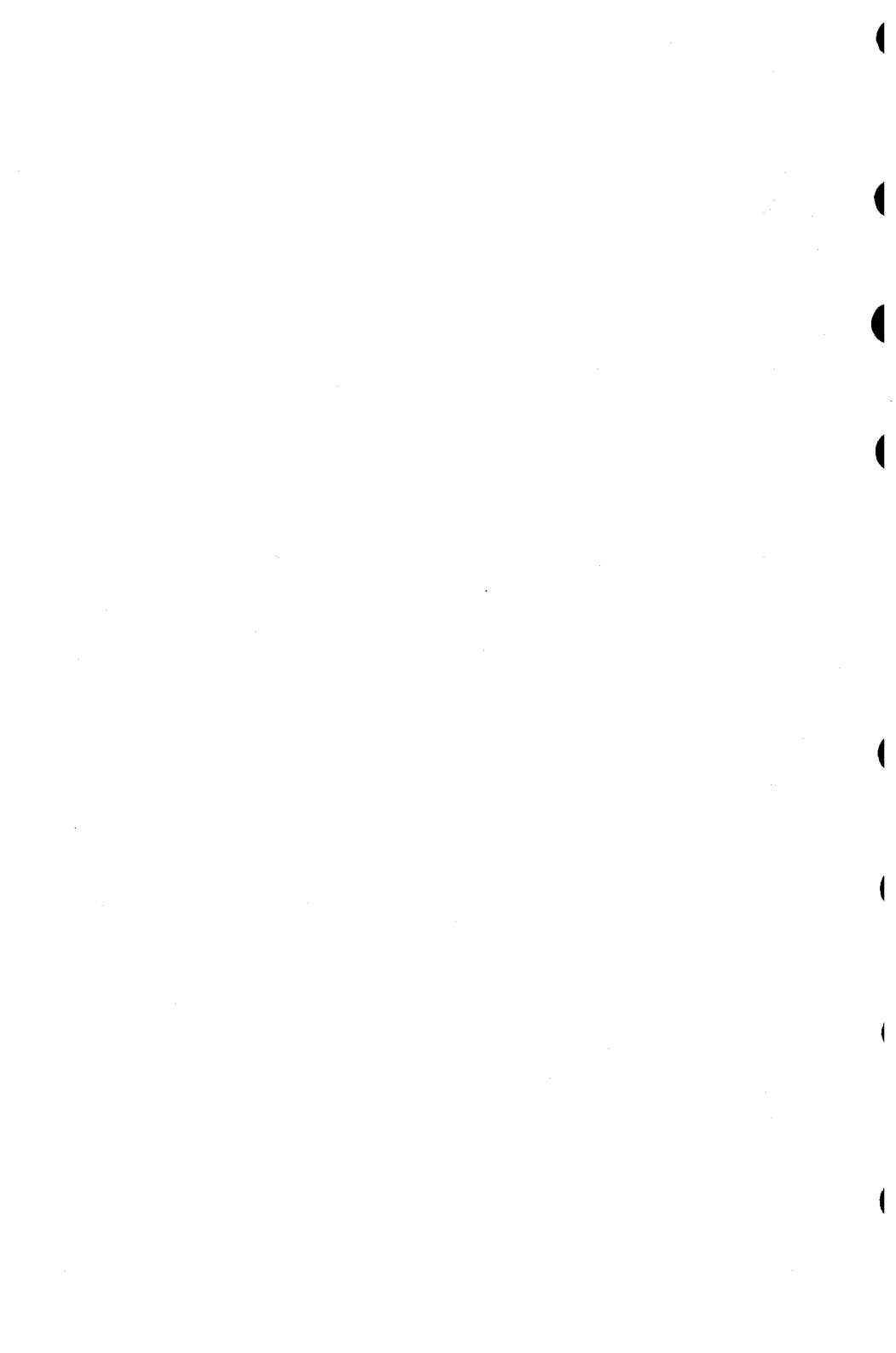
CORRIGENDUM

The following paragraphs replace the corresponding paragraphs on page 11 of the Explanatory Memorandum for the Bankruptcy Amendment Bill 1984:

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

44. 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



BANKRUPTCY AMENDMENT BILL 1984

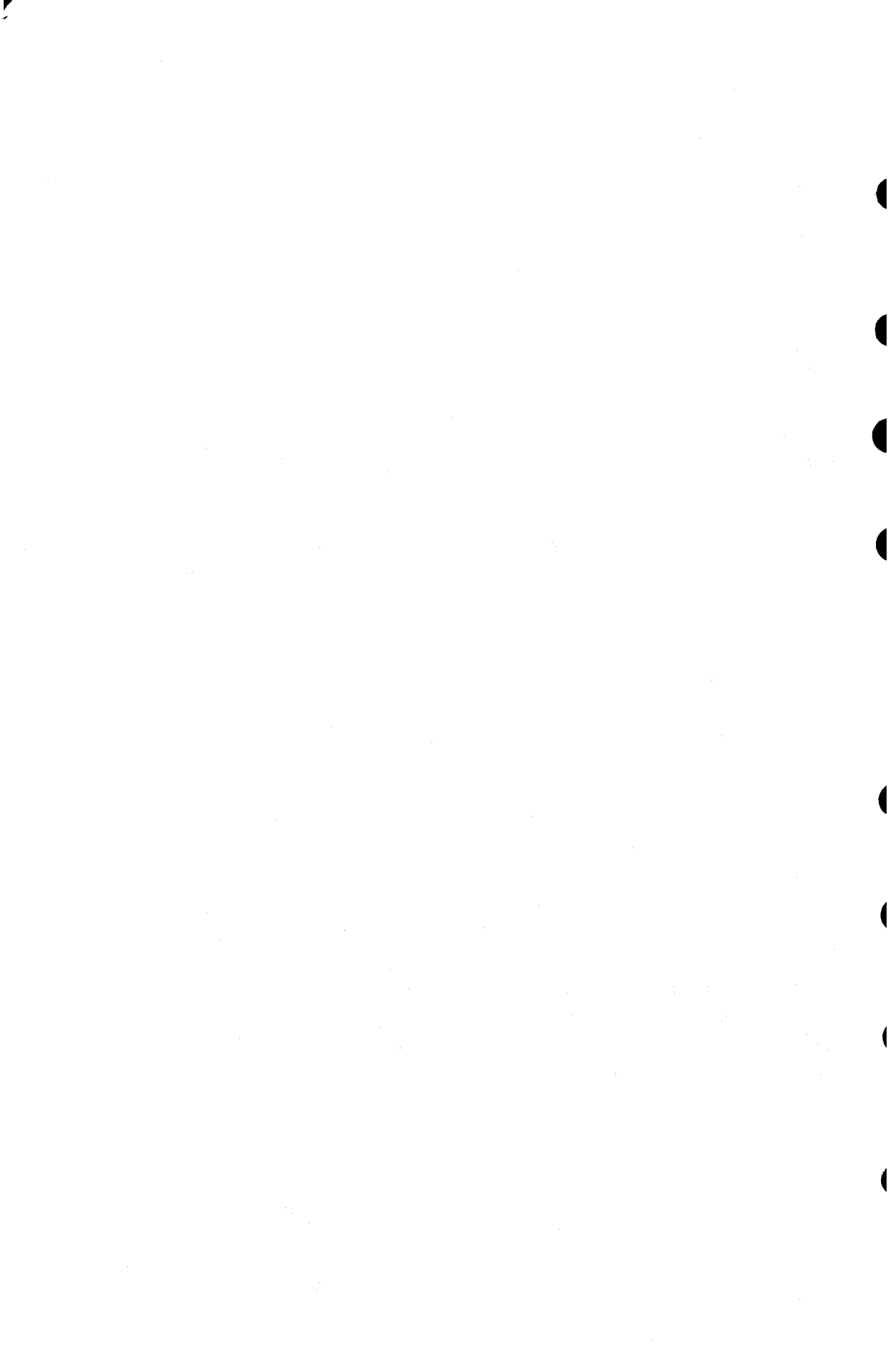
CONTENTS

<u>ITEM</u>	<u>Paragraph</u>
Outline	1
Introduction	4
Bankruptcy Act 1966	6
Review of Bankruptcy Legislation	8
Administration of the Act	12
Protection of Maintenance Creditors	13
Uniformity with the Companies Act 1981	16
Removal of Anomalies	19
Reversal of the RCF Decision	21
 BANKRUPTCY AMENDMENT BILL 1984	 24
Cl. 1 : Short Title	25
Cl. 2 : Commencement	26
Cl. 3 : Interpretation	27
Cl. 4 : Functions of Inspector-General	28
Cl. 5 : Registrars and Deputy Registrars	29
Cl. 6 : Appointment of Inspector-General, Registrars etc.	32
Cl. 7 : The Official Trustee in Bankruptcy	34
Cl. 8 : Duties etc. of Official Receiver	36
Cl. 9 : The Common Investment Fund	37
Cl. 10 : Payment of Moneys into and out of Equalization Account	38
Cl. 11 : Acts of Bankruptcy	41
Cl. 12 : Conditions on Which Creditor May Petition	42
Cl. 13 : Court May Direct Official Trustee to Take Control of Property Before Sequestration	45
Cl. 14 : Proceedings and Order on Creditor's Petition	46

<u>ITEM</u>	<u>Paragraph</u>
Cl. 15 : Bankrupt's Statement of Affairs	47
Cl. 16 : Debtor's Petition	48
Cl. 17 : Debtor's Petition Against Partnership	49
Cl. 18 : Debtor's Petition by Joint Debtors who are not Partners	50
Cl. 19 : Vesting of Property Upon Bankruptcy	51
Cl. 20 : First Meeting of Creditors	52
Cl. 21 : Public Examination of Bankrupt	55
Cl. 22 : Discovery of Bankrupt's Property	57
Cl. 23 : Debts Provable in Bankruptcy	59
Cl. 24 : Priority Payments	60
- Costs of Audit Under sec. 175	60
- Liabilities During Controlling Trusteeship	63
- Liabilities Incurred Under a Prior Part X Arrangement	66
- Leave Entitlements to \$1500	69
- Workers Compensation	70
- Leave Entitlements	73
- Workers Compensation (Interpretation)	74
- Workers Compensation (Commutation to Lump Sum)	75
- Property Recovered Following an Indemnity for Costs from the Creditors	76
Cl. 25 : Debts Due to Employees	78
Cl. 26 : Certain Accounts of Undischarged Bankrupts	83
Cl. 27 : Vesting and Transfer of Property	84
Cl. 28 : Protection of Trustee From Personal Liability in Certain Cases	85
Cl. 29 : Discharge by the Court	86
Cl. 30 : Registration of Natural Persons as Trustees	88
Cl. 31 : Gazettal of Registration etc.	94

ITEMParagraph

Cl. 32	:	Repeal of Sec. 156A	95
Cl. 33	:	Appointment of More Than One Trustee etc.	96
Cl. 34	:	Official Trustee to be Trustee When there is no Other Trustee	97
Cl. 35	:	Triennial Statements by Registered Trustees	98
Cl. 36	:	Control of Trustees by the Court	101
Cl. 37	:	Removal of Trustee	103
Cl. 38	:	Effect of Authority to Registered Trustee Under Sec. 188	104
Cl. 39	:	Controlling Trustee's Accounts	105
Cl. 40	:	Administration of Estates Under this Part Upon Petition by a Creditor	106
Cl. 41	:	Protection in Respect of Reports	107
Cl. 42	:	Transitional	108



OUTLINE

1. The Bankruptcy Amendment Bill 1984 (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 reverse 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 Permanent Head of 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.

INTRODUCTION

4. The Bankruptcy Amendment Bill 1984 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 reverse 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.

5. 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

6. The present Bankruptcy Act was passed by the Commonwealth Parliament in 1966 and came into operation on 4 March 1968, following a comprehensive report that was compiled in 1962 by a committee under the Chairmanship of the late Sir Thomas Clyne. ("Report of the Committee 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').

7. 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)
- 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)

(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

8. 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.

9. 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.

10. 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.

11. The remaining amendments result from the decision by the government to reverse 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

12. Those provisions of the Act dealing with appointment to statutory offices are to be amended to enable appointments to be made by the Permanent Head of the responsible Ministry of State. At present the Act provides that such appointments are made by the Governor-General. These changes will avoid the not inconsiderable administrative inconvenience involved in the preparation of material for Executive Council. Also it is not regarded as appropriate that Executive Council should have the workload of making relatively routine appointments.

PROTECTION OF MAINTENANCE CREDITORS

13. Act No. 12 of 1980, by section 42, amended section 58 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. 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.

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

15. 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

16. 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.

17. 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.

18. 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

19. 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.

20. 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.

REVERSAL OF THE RCF DECISION

21. 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.

22. Essentially the RCF decision rendered it necessary that a private trustee administer any estate where the divisible assets exceeded \$10,000.

23. The amendments proposed by this bill are designed to restore the situation applying prior to Act No. 74 of 1981. In the first instance, the Official Trustee in Bankruptcy will be the trustee in all bankruptcies. The creditors will still have the power to remove the Official Trustee as trustee and appoint a private trustee in his stead.

BANKRUPTCY AMENDMENT BILL 1984

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

Cl. 1 : Short Title

25. The Bill, when enacted, will be cited as the Bankruptcy Amendment Act 1984. (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

26. 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

27. 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 orders for arrears of maintenance.

Cl. 4 : Functions of Inspector-General

28. The Inspector-General in Bankruptcy is presently empowered to obtain reports on the operation of the Act from Registrars, Official Receivers and other officers. The proposed amendment will empower 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. It is necessary that the Inspector-General be empowered to seek reports from registered trustees in order to ensure the completeness and accuracy of the information in the Annual Report.

Cl. 5 : Registrars and Deputy Registrars

29. Levels of bankruptcies have increased greatly over the past several years. 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.

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

31. 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

32. 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 and will reduce the time absorbed in preparing documentation for Executive Council.

33. 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. Consequently the proposed change does not involve the creation of a precedent.

Cl. 7 : The Official Trustee in Bankruptcy

34. 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. Sub-sections 18(9) and 18(10) do permit Official Receivers to act on behalf of the Official Trustee, but only in respect of actions of the latter involving an opinion, belief or state of mind.

35. The proposed amendment will, for example, authorise Official Receivers to sign and seal documents on behalf of the Official Trustee in Bankruptcy.

Cl. 8 : Duties etc. of Official Receiver

36. The proposed amendment will restore the situation applying prior to the amendment effected by Act No. 74 of 1981. It will restore the duty of the Official Receiver to perform functions irrespective of whether the Official Trustee is the trustee of the estate. The amendment has the particular virtue of providing an avenue for external reporting in relation to estates administered by registered trustees.

Cl. 9 : The Common Investment Fund

37. 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 administrative inconvenience associated with the present form of words in sub-section 20B(5).

Cl. 10 : Payment of Moneys into and out of Equalization Account

38. 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).

39. One of the functions of the Investment Board 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).

40. 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. 11 : Acts of Bankruptcy

41. This clause is one of those amendments 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 arises from the well established rule, "the 12 month 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. 12 : Conditions on Which Creditor May Petition

42. 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.

43. In a time of quickly changing money values it is regarded as unwise that such amounts should be entrenched in the Act.

44. Also the proposed amendment will bring section 44 into line with other provisions of the Act which leave amounts to be varied by regulation, e.g. sub-sections 31(1)(h), 109(1)(e), 116(2)(fa) and (f), 134(1), 134(1)(da), 134(2), 135(1), 135(1)(da) and 167(2).

Cl. 13 : Court May Direct Official Trustee to Take Control of Property Before Sequestration

45. This proposed amendment is consequent upon the decision to reverse the RCF decision in this area. It will restore section 50 of the Act to its form applying prior to the amendment effected by Act No. 74 of 1981.

Cl. 14 : Proceedings and Order on Creditor's Petition

46. 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 necessary 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.

Cl. 15 : Bankrupt's Statement of Affairs

47. This proposed amendment will restore section 54 to its form prior to the enactment of Act No. 74 of 1981. The proposal is consequent upon the decision to reverse the RCF decision. The proposed change will apply only to sequestration orders made after the commencement of the amendment.

Cl. 16 : Debtor's Petition

48. This proposal will restore section 55 to its form prior to the enactment of Act No. 74 of 1981. The amendment is consequential upon the decision to reverse the RCF decision. In the first instance the Official Trustee in Bankruptcy will become trustee upon a debtor's petition being accepted under section 55. 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.

Cl. 17 : Debtor's Petition Against Partnership

49. This proposal also is consequent upon the decision to reverse the RCF decision. In the first instance, the Official Trustee in Bankruptcy will become the trustee of the estate upon a debtor's petition being accepted under sec. 56 of the Act.

Cl. 18 : Debtor's Petition by Joint Debtors who are not Partners

50. The proposed amendment to sec.57 reflects the amendments proposed to sec. 55 and sec.56. The effect of the proposal is to reverse the changes made by Act No. 74 of 1981. In the first instance, the Official Trustee in Bankruptcy will become the trustee upon the acceptance of a debtor's petition under sec.57.

Cl. 19 : Vesting of Property Upon Bankruptcy

51. This proposed amendment reverses the amendment to sec.58 effected by Act No. 74 of 1981. Due to the reversal of the RCF decision the Official Trustee in Bankruptcy will become, at the moment of bankruptcy, the trustee in every bankruptcy. This is the effect of sec. 160 of the Act.

Cl. 20 : First Meeting of Creditors

52. The proposed amendments to section 64 are intended to achieve two aims:

- . to reverse the RCF decision by substituting the words "Official Receiver" for the word "trustee" in sub-sections 64(1) and 64(2) (b). As a result it will become the duty of the Official Receiver to convene the first meeting of creditors in an appropriate case; and
- . 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.

53. 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).

54. 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 sub-section 64(2) (a) will reduce the need for the trustee 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

55. Once again the amendments proposed to section 69 are intended to achieve 2 aims:

- . to reverse 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; and
- . to remove an anomaly whereby the transcript or notes of the examination have been held not to be admissible in an application for discharge from bankruptcy brought by a bankrupt, as such an application was not a proceeding "against the bankrupt" within the meaning of sub-section 69(20) (a).

56. A similar form of words to those appearing in sub-section 60(20) (a) also appears in sub-section 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 sub-section 81(17) (a).

Cl. 22 : Discovery of Bankrupt's Property

57. The proposed amendment to sub-section 81(17) (a) is similar in purpose to the amendment proposed to sub-section 69(20) (a), discussed in paras. 55 and 56 of this Explanatory Memorandum.

58. 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".

Cl. 23 : Debts Provable in Bankruptcy

58. The proposed change will ensure that a maintenance creditor who has presented a petition based upon arrears of maintenance will be able to prove in the bankruptcy for the whole of the debt, notwithstanding that some or all of the arrears may have accrued outside the one year period in sub-sec. 82(1A). The amendment effected by this clause is consequential upon the amendment to sec. 40 by cl. 11.

Sub-Clause 24(a) : Priority Payments : Costs of Audit under s.175

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

61. 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.

62. 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 24(b) : Priority Payments: Liabilities During Controlling Trusteeship

63. Sub-section 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.

64. 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-section 109(1) (b) (i) to remove this ambiguity.

65. 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 24(c) : Priority Payments : Liabilities Incurred
Under a Prior Part X Arrangement.

66. Sub-sec 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, composition or scheme of arrangement which has been terminated within the two month period prior to the bankruptcy.

67. 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.

68. 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 24(d) : Priority Payments : Leave Entitlements to
\$1500

69. This proposal will add a reference to "extended leave" in sub-section 109(1) (e). 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 24(e) : Priority Payments : Workers Compensation

70. Sub-clause 109(1)(f) is read subject to the provisions of sub-section 109(5) and 109(6). The purpose of the amendment to sub-section 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.

71. 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."

72. The amendment proposed to sub-section 109(1)(f) will achieve uniformity with the Companies Act provisions. Sub-clause 24(h), which inserts a new sub-section 109(6A), will achieve the second purpose of simplifying the administration of a bankrupt estate.

Sub-Clause 24(f) : Priority Payments : Leave Entitlements

73. The proposal to insert the words "extended leave" in sub-section 109(1)(g) is put forward for the reasons outlined in para. 69 of this Explanatory Memorandum.

Sub-Clause 24(g) : Priority Payments : Workers Compensation (Interpretation)

74. This proposed amendment should be read in conjunction with the amendment to sub-section 109(1)(f) proposed by sub-clause 24(e), and discussed in paras. 70-72 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 24(h) : Priority Payments : Workers Compensation (Commutation to Lump Sum)

75. Again, this proposed amendment should be read in conjunction with the amendment to sub-section 109(1)(f) proposed by sub-clause 24(e) and discussed in paras 70-72 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. 71 above.

Sub-Clause 24(j) ; Priority Payments : Property Recovered Following an Indemnity for Costs from the Creditors

76. Sub-clause 24(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."

77. 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. 25 : Debts Due to Employees

78. Clause 25 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)."

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

80. 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."

81. 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) of that Act. 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.

82. The proposed amendment attempts to rectify the apparent anomaly created 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. 26 : Certain Accounts of Undischarged Bankrupts

83. 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.27 : Vesting and Transfer of Property

84. 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.28 : Protection of Trustee From Personal Liability in Certain Cases

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

Cl. 29 : Discharge by the Court

86. By virtue of the amendments reversing the RCF decision the Official Trustee in Bankruptcy will, initially, become the trustee in all bankruptcies. Thereafter a registered trustee may be appointed by the creditors, pursuant to sec. 157, to replace the Official Trustee.

87. Accordingly, where a registered trustee has been appointed, and the bankrupt applies to the Court for discharge from bankruptcy, it will be necessary for both the Official Receiver (on behalf of the Official Trustee) and the registered trustee to provide a report to the Court pursuant to sub-section 150(3). The proposed amendment reflects this change. The proposed amendments will apply in respect of applications for discharge made after the commencement of the proposed amendments.

Cl. 30 : Registration of Natural Persons as Trustees

88. 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.

89. 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)).

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

91. The proposed sub-sec. 155(3B) and sub-sec. 155(3A) (a) (iii) (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) 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.

92. 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 sec. 161A, to be inserted by cl.35, and which is discussed below at paras. 98 to 100.

93. The new sub-sec 155 (5A) proposed by sub-cl.30(c) will require trustees to update the amount of the bond entered into pursuant to sub-sec 155(1) of the Act 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. 31 : Gazettal of Registratlon etc.

94. Cl. 31 proposes a minor amendment which will ensure that orders of suspension, as well as orders of cancellation, are notified in the Gazette.

Cl. 32 : Repeal of section 156A

95. Sec. 156A was inserted by Act No. 74 of 1981. The sole purpose of the section is to implement the RCF decision. In light of the decision to reverse the RCF decision sec. 156A becomes redundant. Cl.42 inserts a transitional provision applying to this repeal. As a result consents which have been filed but, at the date of commencement of the amendments, have not "crystallised" into an appointment as trustee will be preserved.

Cl. 33 : Appointment of More Than One Trustee etc.

96. The omission of sub-sec.158(3), proposed by cl.33, is consequent upon the repeal of sec. 156A effected by cl.32.

Cl.34 : Official Trustee to Be Trustee When There is no Other Trustee

97. The change proposed by cl.34 will restore sec.160 to its form prior to the amendment effected by Act No.74 of 1981. The change is consequent upon the decision to reverse the RCF decision.

Cl. 35 : Triennial Statements by Registered Trustees

98. Cl. 35 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.

99. 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 the currency of a bond of the prescribed amount. At the moment, r.61 of the Bankruptcy Rules prescribes \$100,000 as the amount of the bond.

100. 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;
- (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. 36 : Control of Trustees by the Court

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

102. 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.37 : Removal of Trustee

103. The amendment of sec.181 is consequent upon the repeal of sec.156A effected by cl.32.

Cl.38 : Effect of Authority to Registered Trustee Under Section 188

104. The change proposed by cl.38 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. 39 : Controlling Trustee's Accounts

105. 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. 40 : Administration of Estates Under this Part upon Petition by a Creditor

106. The proposal in cl. 40 reflects the proposal in cl. 12, which relates to creditors' petitions against a debtor. This is discussed in paras. 42 to 44 of this Explanatory Memorandum.

Cl. 41 : Protection in Respect of Reports

107. Sec. 306B was amended by Act No. 74 of 1981. As a consequence of the reversal of the RCF decision, it is necessary to restore sec. 306B to its form prior to the enactment of Act No. 74 of 1981. As sec. 19 is to be amended to transfer the reporting role to the Official Receiver, the amendment to sec. 306B is consequent upon this amendment.

Cl. 42 : Transitional

108. Cl. 42 provides machinery to ensure that there is no gap created due to the changes proposed by this Bill. There are detailed provisions relating to the repeal of sec. 156A, as discussed in para. 95 of this Explanatory Memorandum.

