

## **Bankruptcy Regulations 1996 No. 263**

### EXPLANATORY STATEMENT

Statutory Rules 1996 No. 263

Issued by the Authority of the Attorney-General and Minister for Justice

*Bankruptcy Act 1966*

Bankruptcy Regulations

The *Bankruptcy Legislation Amendment Act 1996* (the Amendment Act) changed the power to make subordinate legislation under the *Bankruptcy Act 1966* (the Act), giving the Governor-General power to make regulations with respect to various matters provided for under the Act other than the practice and procedure of Courts exercising jurisdiction in bankruptcy. The amendments to the Act are contained in Schedules 1 and 2 of the Amendment Act, which is expected to be proclaimed to commence on 16 December 1996. Subsection 4(1) of the *Acts Interpretation Act 1901* provides that where an Act amends another Act so that the other Act as amended will confer power to make regulations, then the power may be exercised and anything may be done for the purpose of enabling the exercise of the power before the amending Act comes into operation as if it had come into operation.

Accordingly, subsection 315(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Bankruptcy Regulations follow the Part numbering scheme of the Act. For example, Part 11 of the Bankruptcy Regulations has the same heading as Part XI of the Act. Regulations are numbered by reference to the Part in which they are found.

Details of the regulations are set out in the Attachment.

## Attachment

### PART 1 - PRELIMINARY

#### Citation - Regulation 1.01

The regulations are known as the Bankruptcy Regulations, and are made by the GovernorGeneral under the power to do so contained in section 315 of the *Bankruptcy Act 1966* (the Act).

#### Commencement - Regulation 1.02

Regulation 1.02 provides for the commencement date of the Bankruptcy Regulations to be 16 December 1996. That date is the commencement date of Schedules 1 and 2 of the Amendment Act. Accordingly, the Bankruptcy Regulations apply in relation to the Act as amended in accordance with Schedules 1 and 2 of the Amendment Act.

#### Interpretation -Regulation 1. 03

Subregulation 1.03 defines various terms for the purposes of the regulations. Those definitions are as follows:

**"Act"**. A reference to "the Act" in the regulations is a reference to the *Bankruptcy Act 1966*.

**"commencement date"** means the date on which Schedule 1 of the Amendment Act is to be proclaimed to commence, namely 16 December 1996.

**"contribution"** Sections 139P and 139Q of the Act require a bankrupt to pay to the trustee an amount from their income where the income exceeds the threshold amount above which a contribution must be paid. Such payments will be referred to in the regulations as a contribution.

**"CPI rate"** A number of monetary amounts specified in the regulations are subject to indexation for inflation in accordance with the consumer price index. The CPI rate is the annual average of the All Groups Consumer Price Index.

**"Criminal Code"** A reference to "the Criminal Code" in the regulations is a reference to the Criminal Code set out in the Schedule to the *Criminal Code Act 1995*.

**"registered liquidator"** A reference to a "registered liquidator" in the regulations has the same meaning as a reference to a "registered liquidator" in the Corporations Law.

**"taxing officer"** A reference to "taxing officer" has the same meaning as in section 167 of the Act. A taxing officer is a person appointed by the Inspector-General to review bills of costs given to trustees.

**"the court"** A reference to "the court" in relation to a judgment or order means the court which gave the judgment or made the order.

**"the Index"** A reference to the "the Index" means the National Personal Insolvency Index established by these regulations.

**"working day"** A reference to a "working day" in a particular place is a reference to a day that is not a public or bank holiday a Saturday or a Sunday.

Subregulation 1.03(2) provides that a reference to a form by number in the regulations is a reference to a form of that number in Schedule 1 of the regulations.

## PART 2 - ADMINISTRATION

### Section 20J of the Act -prescribed rate of interest on moneys in Common Fund Regulation 2.01

Section 20B provides for an account known as the Common Investment Fund into which all moneys received by the Official Trustee are paid. In some circumstances, referred to in section 20J of the Act, the Official Trustee is entitled to interest on moneys held in the Common Investment Fund. Regulation 2.01 prescribes an interest rate of 7% per year under section 20J(2) for moneys in the Common Fund.

## PART 3 - COURTS

### Paragraph 29(5)(b).of the Act - -prescribed countries - Regulation 3.01

The court has a duty to act in aid of, and auxiliary to, the courts of the external Territories and of "prescribed countries" in bankruptcy matters. For these purposes, certain countries are prescribed under subsection 29(5). The subsection also allows for further countries to be prescribed. Regulation 3.01 prescribes Jersey, Malaysia, Papua New Guinea, Singapore, Switzerland and United States of America.

## PART 4 - PROCEEDINGS IN CONNECTION WITH BANKRUPTCY

### Application for bankruptcy notice - Regulation 4.01

A creditor who has obtained a judgment or prescribed order, may, upon application to the Official Receiver, obtain for service on the debtor a bankruptcy notice in the prescribed form requiring the debtor to pay the amount owing under the judgment or order. Regulation 4.01 sets out the documents that a person seeking the issue of a bankruptcy notice will be required to lodge with the Official Receiver. The documents include a duly completed draft bankruptcy notice, and a certified copy of the judgment or award against the debtor.

### Form of bankruptcy notices - Regulation 4.02

The notice which the Official Receiver may issue under subsection 41(1) is prescribed under the regulations. Regulation 4.02 prescribes the bankruptcy notice. It is set out in Form 1.

### Inspection of bankruptcy notices - Regulation 4.03

Regulation 4.03 limits who may inspect a bankruptcy notice lodged with an Official Receiver. After the issue of a creditor's petition on the debtor's failure to comply with a bankruptcy notice, that notice is then open for public inspection.

### Judgment or order in foreign currency -Regulation 4.04

Regulation 4.04 applies in relation to a judgment or order that is expressed in a foreign currency. The conversion rate is the relevant opening telegraphic transfer rate of the Commonwealth Bank of Australia applicable two working days before the application is lodged. This regulation replicates former subsections 41(2A), (2B) and 2C of the Act. Case law predating those subsections was to the effect that a bankruptcy notice founded on a judgment expressed in a foreign currency was invalid unless it specified an equivalent amount of Australian dollars.

## *Division 2 - Petitions*

### Copy of petition to be given to Official Receiver - Regulation 4.05

Regulation 4.05 requires a creditor presenting a petition under Part IV of the Act to give a copy of the petition to the Official Receiver within 3 days of presentation. This is to ensure particulars can be entered in the National Personal Insolvency Index (see below under Part 13 for details).

### Control of debtor's property before sequestration - Regulation 4.06

Under subsection 50(1) of the Act a creditor may apply to the Court after presentation of a creditor's petition but before sequestration, for a direction that either the Official Trustee or a specified registered trustee take control of the debtor's property. Regulation 4.06 requires the creditor who applied for a direction or order to serve specified documents on the Official Receiver within 7 days of the issue of the direction.

### Expenses of the trustee before sequestration - Regulation 4.07

Where a direction or order has been made under subsection 50(1) of the Act and the amount deposited with the trustee is insufficient to meet fees and expenses, the trustee may, on application under subsection 50(1) may either request the creditor who made the application or apply to the Court for an order directing that creditor who made the application to deposit an additional sum with the trustee. Subregulation 4.07(2) sets out the circumstances when a creditor will be eligible to obtain a refund of the amount deposited by him or her to meet fees and expenses of the trustee.

### Application for damages where petition dismissed - Regulation 4.08

Where an order has been made under subsection 50(1) and the creditor's petition is subsequently dismissed, the debtor may, within 21 days after it is dismissed, apply to the Court for an assessment of damages payable by the creditor.

### Subsection 50(5) of the Act -prescribed modifications of the applied provisions Regulation 4.09

Regulation 4.09 modifies section 81 of the Act for the purposes of subsection 50(5) of the Act to enable a trustee who has been directed under subsection 50(1) to take control of property or to examine a person summoned under subsection 50(2).

### Acceptance of debtor's declaration - Regulation 4.10

Under section 54A of the Act, a debtor may present a declaration of intention to present a debtor's petition. Under subparagraph 54C(a)(ii) of the Act, where an Official Receiver accepts such a declaration, he or she must sign it and give a copy to the debtor. Regulation 4.10 permits the Official Receiver to give a copy of the declaration to the debtor by facsimile transmission.

### Prescribed information to be supplied by Official Receiver to debtor - Regulation 4.11

Before accepting a declaration of intention to present a debtor's petition under section 54C, a debtor's petition under section 55, a debtor's petition in respect of a partnership under subsection 56B, a debtor's petition against joint debtors under subsection 57(1), the Official Receiver must supply the debtor with information prescribed by the regulations. Regulation 4.11 prescribes the information the Official Receiver must supply to the debtors.

Subregulation 4.11(3) prevents an Official Receiver accepting a debtor's petition under section 55, 56B or 57, or a debt agreement under subsection 185E(1) of the Act unless the debtor gives a written acknowledgment that he or she has received and read the prescribed information.

Subregulation 4.11(4) directs the Official Receiver to give the prescribed information to a debtor who either presents a petition or posts it without having given that written acknowledgment.

Subregulation 4.11(5) provides an appropriate alternative procedure for signing of the acknowledgment where the debtor is blind, partially sighted, illiterate or partially literate.

The purpose of the requirement under this regulation is to ensure that debtors consider all the possible alternatives to bankruptcy before proceeding with lodgment of the petition.

#### Debtor's petition - filing of trustee's consent - Regulation 4.12

Regulation 4.12 requires that a debtor who is filing a debtor's petition and where there is in force a consent of a registered trustee under section 156A, must lodge with that petition a copy of the instrument of consent.

#### Notice to partners of referral to Court of petition by other partners against the partnership - Regulation 4.13

Section 56C of the Act directs the Official Trustee to refer a debtor's petition against a partnership to the Court where not all partners have petitioned for bankruptcy or where at least one partner has had a creditor's petition issued against him or her. Regulation 4.13 provides that the Official Receiver must give, to the partner who has not joined in the petition, written notice that the petition has been referred to the Court and stating the date, time and place of the hearing of the petition.

#### Notification by trustee to creditors - Regulation 4.14

Under this regulation, the trustee of a bankrupt must give to each of the bankrupt's creditors a notice stating the fact and date of bankruptcy and a summary of the statement of affairs within 28 days after receiving the bankrupt's statement of affairs. Previously, the 28 day period commenced from the date of the bankruptcy, however, the trustees were unable to comply with the requirement to notify creditors if the bankrupt had not filed a statement of affairs. The new regulation will overcome this difficulty.

By subregulation 4.14(2), if the trustee does not receive the statement of affairs within 609 days after bankruptcy, the trustee must give to each known director a statement setting out what the trustee knows of the bankrupt's affairs.

#### Exercise of proxy by trustee's representative at meeting - Regulation - 4.15

Regulation 4.15 empowers a person appointed, under subsection 63B(1) of the Act to represent a trustee at a meeting, to exercise any proxy exercisable by the trustee had the trustee been present at the meeting.

#### Lodgment of proxies by fax - section 64M of the Act - Regulation 4.16

Regulation 4.16 enables an instrument appointing a proxy to be lodged with the trustee by facsimile transmission and to be circulated by the trustee to creditors under subsection 64M(2).

### Inspection and copying of statement of affairs, composition or scheme of arrangement - Regulation 4.17

This regulation allows a person who states in writing that he or she is a creditor of a bankrupt, to inspect and copy the bankrupt's statement of affairs, composition or scheme of arrangement.

### Proposal and report for a composition or arrangement - Regulation 4.18

Subsection 73(2) of the Act provides that, where a trustee has called a meeting of creditors, he or she must send a copy of the bankrupt's proposal and a report to the creditors before the meeting. Regulation 4.18 provides that the proposal and report must be sent to each creditor so as to arrive at least 7 days before the meeting.

### Meetings of creditors - modification of Division 5 of Part IV of the Act - Regulation 4:19

Section 76A of the Act applies Division 5 of Part IV of the Act to meetings of creditors under Division 6 of Part IV of the Act as far as they are capable of being applied and with any modifications provided for in the regulations. Division 5 of Part IV of the Act is a comprehensive code for the conduct of meetings in bankruptcy. Division 6 of Part IV of the Act deals with proposals by bankrupts for compositions or arrangements with creditors. Regulation 4.19 provides that the manner in which Division 5 of Part IV is modified is as specified in items 1 - 12 of Schedule 2 of the regulations. Accordingly, the following provisions of Division 5 of Part IV of the Act are modified in their application to meetings of creditors under Division 6 of Part IV of the Act in the manner described below.

#### Explanation of modifications made by Schedule 2

Item 1. Section 64B (Certain matters to be included in notice of meeting). Section 64B sets out certain matters to be included in a notice of meeting. The section is modified by adding new modified subsection 64B(6) which imposes further requirements on the trustee. The first is to attach to the notice of meeting documents referred to in subsection 73(2), ie, a copy of the proposal accompanied by a report on it. The second is to attach a copy of the bankrupt's statement of affairs, or the summary of it if the meeting is the first meeting of creditors held during the administration of the estate.

Item 2. Section 64E (Notice about voting by proxy). Section 64E is modified by replacing it with a new modified section 64E. Modified section 64E(1) requires the trustee to attach to the notice a form for use in appointing a proxy and expressing under subsection 73(5) the creditor's assent to, or dissent from the bankrupt's proposal. Modified subsection 64E(2) provides that the notice must advise the creditors that, if the creditor wishes to appoint a person to represent the creditor at the meeting as the creditor's proxy, the creditor must complete the proxy appointment form. The creditor must also either arrange for the proxy to give the completed proxy form to the trustee before the meeting or send it to the trustee in accordance with section 64D of the Act.

Modified subsection 64E(3) requires that the notice tell the creditors that if the creditor wishes to use the form to express his or her assent to or dissent from the bankrupt's proposal, the creditor must arrange for the form to be given to the trustee before the meeting.

Item 3. Section 64G (Agenda to be set in notice of meeting). Section 64G, in both its modified form and unmodified forms is a comprehensive list of matters to be set out in the agenda to be included in the notice of meeting. The section is modified by replacing paragraphs 64G(g) and (k) with new modified paragraphs 64G(g) and (k) respectively.

New modified paragraph 64G(g) requires that a consideration of the bankrupt's proposal for a composition or scheme of arrangement be included in the agenda.

New modified paragraph 64G(k) requires that the agenda include a proposal of either a special resolution accepting the bankrupt's proposal for a composition or a scheme of arrangement or any other relevant motion.

Item 4. Section 64R (Tabling of bankrupt's statement of affairs). Section 74R is modified by replacing it with new modified section 64R. Modified subsection 64R(1) requires the President to ask at the meeting whether each creditor or creditor's representative has a copy of the bankrupt's proposal and a report on it.

Modified subsection 64R(2) requires the President then to ask, if the meeting is the first meeting of the creditors, each creditor or representative whether the creditor or representative has a copy of the bankrupt's statement of affairs.

Modified subsection 64R(3), read with modified section 64R(5), requires the trustee to give the creditor or representative a copy of the proposal, the report or the statement of affairs (or a summary of it) as soon as practicable if the creditor or representative does not have a copy.

If the trustee cannot give a creditor or representative a copy of the proposal, report on statement of affairs (or a summary of it) within a reasonable time, modified subsection 64R(4) requires that the meeting be adjourned to a time and place decided by the meeting.

Item 5. Section 64S (Statement and questions) Section 64S, which is generally to do with the process of statements and questions at the meeting, is modified by replacing subsection 64S(1) with new modified subsections 64S(1) and (1A). The President of the meeting is required under modified subsection 64S(1) to invite the bankrupt to make a statement outlining to the meeting his or her proposal. Modified subsection 64S(1A) requires the President then to ask the trustee to comment on his or her report on the bankrupt's proposal.

Item 6. Section 64T (Motions). Section 64T is modified by replacing it with new modified section 64T. Modified subsection 64T(1) requires the President to call for a special resolution to approve the bankrupt's proposal for a composition or scheme of arrangement. If a motion is either not proposed or, if proposed, not passed, modified subsection 64T(2) allows the President to close the meeting.

Item 7. Section 64U (Remuneration of registered trustee). Section 64U, which generally deals with the remuneration of the registered trustee, is modified by substituting new modified subsections 64U(1), (8) and (9). Modified subsection 64U(1) requires the President, upon 3 contingencies occurring, to ask the trustee of the composition or scheme of arrangement to state the basis on which the trustee wishes to be remunerated. The three contingencies are that, first, the meeting has passed a special resolution accepting the bankrupt's proposal; secondly, a registered trustee has consented to be the trustee of the composition or scheme of arrangement; and, thirdly, the President has told the meeting that provision for remuneration of the trustee may be included in the instrument setting out the terms of the composition or scheme.

Modified subsection 64U(8) requires the President, upon 2 contingencies occurring, to ask the trustee to lay before the meeting a statement of the amount of remuneration drawn by the trustee from the funds of the bankrupt's estate before the meeting was held. The 2 contingencies are that, first a special resolution accepting the bankrupt's proposal has been passed at the meeting; and, secondly, the trustee of the bankruptcy is a registered trustee. Modified subsection 64U(9) obliges the trustee to comply with the President's request.

Item 8. Section 64V (Appointment of committee of inspection). Section 64V, dealing with the appointment of a committee of inspection is omitted as unnecessary.

Item 9. Section 64W (Other business). Section 64W, dealing with other business at the meeting, is omitted as unnecessary.

Item 10. Section 64X (Next meeting). Section 64X, dealing with the procedure for setting the date of the next meeting, is omitted as unnecessary.

Item 11. Section 64ZB (Manner of voting). Section 64ZB, dealing with the manner of voting at the meeting, is modified by inserting new modified subsection 64ZB(1A) which allows a creditor to vote on a bankrupt's proposal for a composition or scheme of arrangement by giving the trustee a written note at least 2 clear days before the meeting.

Item 12. Section 64ZE (Joint bankruptcies). Section 64ZE, dealing with joint bankruptcies, is omitted as unnecessary.

## PART 5 - CONTROL OVER PERSON AND PROPERTY OF DEBTORS AND BANKRUPTS

### Where debtor or bankrupt arrested - Regulation 5.01

Regulation 5.01 provides that where there is an arrest as permitted under section 78 of the Act, the arresting officer must immediately notify a Federal Court Registrar of the arrest.

## PART 6 - ADMINISTRATION OF PROPERTY

### *Division 1 - Order of payment of debts*

### Priority payments under section 109 of the Act - prescribed matters - Regulation 6.01

Claims in a bankrupt estate that are entitled to priority payment are set out in section 109. Paragraph 109(1)(a) of the Act provides that the first priorities relate to the costs of the petitioning creditor, if any, and other costs and charges associated with the administration of the estate. Under subregulation regulation 6.01(1), the order of those priorities is set out in Schedule 3. That Schedule contains 8 times substantially reflecting rule 40 of the Bankruptcy Rules which are superseded by these regulations. The Schedule is self-explanatory and therefore the comments in this Explanatory Statement are only where there is a substantial divergence from rule 40.

Those significant differences are first, insertion of item 1 by which a realisation charge payable becomes the priority claim on the estate; secondly, insertion of item 2(c) affording a priority to repayment of an advance to the trustee for any proper purpose except remuneration; and, thirdly, the fact the reasonable expenses of a committee of inspection (see item 7) as determined by the trustee, rather than the Court as was the case under the Bankruptcy Rules.

### Maximum amount payable to employee - Regulation 6.02

Paragraph 109(1)(e) of the Act allows the maximum priority payment to employee creditors to be varied by regulation. Regulation 6.02 provides a new base amount of \$3,100 which is to apply to bankruptcies occurring in the period from the commencement of these regulations until the end of 30 June 1997. For bankruptcies occurring on or after 1 July 1997, the amount is calculated in accordance with subregulation 6.02(2) which provides for annual CPI increases and the rounding down of the result to the nearest multiple of \$50.



## *Division 2 - Property available for payment of debts*

### Household property -Regulation 6.03

Under paragraph 116(2)(b) of the Act, a bankrupt can retain household property of a kind described in the regulations. The Act prior to the Amendment Act made no provision for household property to be prescribed. Regulation 6.03 lists as exempt household property that which is reasonably necessary for the domestic use of the bankrupt's household. It then lists household items, which are considered essential items. The test of whether items are exempt or not will remain a subjective assessment, with the trustee having to consider the special needs of the household and other specified factors. Special needs are listed in subregulation 6.03(5) and include the ages and medical needs of the household, its geographic locality and whether the items can be profitably sold for the benefit of creditors.

### Property divisible amongst creditors - prescribed amounts - Regulation 6.04

Paragraph 116(2)(c) of the Act enables a bankrupt to retain property used by him or her to earn income from personal exertion. Subregulation 6.04(1) limits the value of such property to \$2,600 for the year ending 30 June 1997. By subregulation 6.04(2), that sum will increase in later years in accordance with the CPI, subject only to being rounded down to the nearest \$50 each year.

Paragraph 116(2)(ca) of the Act allows a bankrupt to retain property of a stated value which is used as his or her main means of transport. Subregulation 6.04(3) limits the value of such property to \$5,000 for the year ending 30 June 1997. By subregulation 6.04(4), that sum will increase in later years in accordance with the CPI, subject only to being rounded down to the nearest \$50 each year.

## *Division 3 - Apportionment of property*

### Interpretation -Regulation 6.05

**"actuary"** A reference to an "actuary" in the regulations has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

**"accumulation fund"** A reference to an "accumulation fund" in the regulations has the same meaning as in the Superannuation Industry (Supervision) Regulations.

**"approved deposit fund"** A reference to an "approved deposit fund" in the regulations has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

**"defined benefit fund"** A reference to a "defined benefit fund" in the regulations has the same meaning as in the Superannuation Industry (Supervision) Regulations.

**"member"** A reference to a "member" in the regulations in relation to a regulated superannuation fund means a person who is a member of a fund, receives a pension from a fund or has a deferred entitlement to receive a benefit from a fund and, in relation to an approved deposit fund, is a depositor in the fund.

**"pension RBL"** A reference to "pension RBL" in the regulations means the bankrupt's pension RBL worked out under section 140ZD of the *Income Tax Assessment Act 1936*

**"preserved component"** A reference to a "preserved component" in the regulations means a bankrupt's interest in a fund that consists of preserved benefits that are ascertained under the Superannuation Industry (Supervision) Regulations

**"regulated superannuation fund"** a reference to "regulated superannuation fund" in the regulations has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*

**"restricted non-preserved component"** A reference to a "regulated nonpreserved component" in the regulations means the component of a bankrupt's interest in a fund that consists of restricted non-preserved benefits ascertained under the Superannuation Industry (Supervision) Regulations

**"unrestricted non-preserved component"** A reference to an "unrestricted nonpreserved component" in the regulations means the components of a bankrupt's interest in a fund that consists of unrestricted non-reserved benefits under the Superannuation Industry (Supervision) Regulations

**"withdrawal benefit"** A reference to a "withdrawal benefit" in the regulations has the same meaning as in the Superannuation Industry (Supervision) Regulations

Method of apportionment - subsection 116(6) of the Act - Regulation 6.06

*Purposes and application*

Subsection 116(2) sets out property which is not divisible amongst creditors. Paragraph 116(2)(d) includes the interest of a bankrupt in a regulated superannuation fund and specified payments received by the bankrupt on or after the date of bankruptcy. Subsection 116(5) is to assist in working out how subsection 116(1) (property which is divisible amongst creditors) extends to some property described in paragraph 116(2)(d). Subsection 116(6) of the Act allows regulations to be made for determining how items of property are to be apportioned for the purposes of paragraph 116(5)(b). Regulation 6.06 is made under subsection 116(6). It applies in respect of property of a bankrupt that is covered by paragraph 116(2)(d) of the Act and where the value of the bankrupt's property exceeds the value of the pension RBL.

*One item of property - life assurance or endowment assurance*

Subregulation 6.06(2) provides in effect that if the bankrupt's property consists of only 1 item and is in the form of a policy of life insurance or endowment assurance or is proceeds of a policy of that kind received on or after bankruptcy, subsection 116(1) of the Act extends to the proportion of that property that exceeds the amount of the bankrupt's pension RBL.

*One item of property - payment from regulated superannuation fund or approved deposit fund*

Subregulation 6.06(3) provides in effect that if the bankrupt's property consists of only 1 item and is in the form of a payment from a regulated superannuation fund or an approved deposit fund, being a payment that is received by the bankrupt on or after the date of bankruptcy and is not a pension within the meaning of the *Superannuation Industry (Supervision) Act 1993* subsection 116(1) of the Act extends to the proportion of that property that exceeds the amount of the bankrupt's pension RBL.

*One item of property - interest in regulated superannuation fund or approved deposit fund*

Subregulation 6.06(4) provides in effect that if a bankrupt's property consists of only one item and is in the form of an interest in a regulated superannuation fund or an approved deposit fund subsection 116(1) of the Act extends to the components of the property in the order prescribed in the subregulation until the value of the bankrupt's residuary interest in the property equals the value of the bankrupt's pension RBL. An example in the regulations illustrates the operation of the subregulation.

#### *More than 1 item of property*

Similarly subregulation 6.06(5) provides in effect that, where the bankrupt's property consists of more than 1 item, subsection 116(1) of the Act extends to the items in the order prescribed by the regulations paragraphs (a) - (k) until the value of the bankrupt's residuary interest in the property equals the value of the bankrupt's pension RBL. Method of working out value of property - subsection 116(7) of the Act Regulation 6.07

Regulation 6.07 is made under subsection 116(7) of the Act for the purposes of subsection 116(5). Broadly, it provides valuation rules for specified kinds of property a part of which might be divisible property under subsection 116(1).

Subregulation 6.07(2) values a bankrupt's interest in a policy of life assurance or endowment assurance as the amount available in cash on voluntary termination of the policy at the date of bankruptcy.

Subregulation 6.07(3) values a bankrupt's interest in an accumulation fund or an approved deposit fund at the value of the bankrupt's withdrawal benefit in the fund at the date of bankruptcy.

Subregulation 6.07(4) values the bankrupt's, interest in a defined benefit fund as the withdrawal benefit of the bankrupt in the fund at the date of bankruptcy.

Subregulation 6.07(5) enables the amount of the withdrawal benefit to be determined by an actuary for the purposes of subregulation 6.07(4) where the withdrawal benefit is not an immediately payable lump sum.

#### Evidentiary certificate of trustee - subsection 116(8) of the Act - Regulation 6.08

Regulation 6.08 is made for the purposes of subsection 116(8) of the Act. Under subsection 116(8) the regulations may provide for the trustee of a superannuation fund or an approved deposit fund to issue a written evidentiary certificate of the value of the bankrupt's interest in the fund at the date of bankruptcy.

Subregulation 6.08(2) sets out the particulars that must be included in a written certificate given by the trustee of the fund given in response to a request from the bankrupt's trustee. Those particulars are the withdrawal benefit of the bankrupt in the fund at the date of bankruptcy and the amount of each payment paid to the bankrupt and the date of each payment.

Subregulation 6.08(3) gives the trustee of a fund 28 days to provide the evidentiary certificate of the bankrupt's interest, or a longer period if the trustee in bankruptcy so allows. Subregulation 6.08(4) allows such a certificate to be accepted by a court as prima facie evidence of its contents

#### *Division 4 - Undervalued transactions*

### Transfers exempt from being void against trustee - Regulation 6.09

Subsection 120(1) of the Act makes certain transfers of property by a person who later becomes a bankrupt void as against the trustee. Paragraph 120(2)(d) of the Act exempts from the scope of subsection 120(1) of the Act property of the kind described in the regulations. Regulation 6.09 describes property where the cost of its recovery would be likely to exceed its value to the creditors as such property.

### *Division 5 - Realisation of property*

#### Disclaimer of onerous property - Regulation 6.10

Subsections 133(1) and (1A) enable a trustee to disclaim, by notice, any property or contract of the bankrupt that has vested in the trustee on bankruptcy. Regulation 6.10 sets out the particulars which are to be included in a notice of disclaimer.

Subregulation 6.10(2) ensures that all parties who have an interest in the property being disclaimed or who are a party to any contract being disclaimed receive notice of the disclaimer.

### *Division 6 - Fringe benefits: modification of the FBTA Act*

Introductory note: Section 139L of the *Bankruptcy Act 1966* (the Act) defines "income" for the purposes of the compulsory income contribution regime established under Division 4B of Part VI of the Act. Subparagraph (a)(v) of the definition of income provides, in part, that income includes:

the value of a benefit that:

(A) is provided in any circumstances by any person (the provider) to the bankrupt; and

(B) is a benefit within the meaning of the *Fringe Benefits Tax Assessment Act 1986*, as in force at the beginning of 1 July 1992;

being that value as worked out in accordance with the provisions of that Act but subject to any modifications of any provisions of that Act made by the regulations under this Act.

Accordingly, the Bankruptcy Regulations will make modifications, particularly by Schedule 4, to valuation provisions in the *Fringe Benefits Tax Assessment Act 1986* for the purposes of the above-quoted extract from the definition of "income" in paragraph 139L(a)(v) of the Act.

#### Interpretation - Regulation 6.11

Regulation 6.11 states that the term "FBTA Act" will refer to the *Fringe Benefits Tax Assessment Act 1986* as in force at the beginning of 1 July 1992. This shorthand term is used from this point on in this document.

#### Definition of "income" - section 1:39L of the Act - Regulation 6.12

Subregulation 6.12(1) will modify the FBTA Act for the purposes of the definition of income found in paragraph 139L(a)(v) of the Act. The modifications are in Schedule 4 to these regulations: see the notes which follow under the heading Schedule 4.

Subregulation 6.12(2) will modify, for bankruptcy purposes, 8 expressions used in the FBTA Act. Some terms used in the FBTA Act such as "year of tax", "taxable value of a benefit", and "declaration date", are not relevant for the purposes of the Act. The FBTA Act accordingly must be modified to introduce terminology relevant to a bankruptcy context. The 8 modifications are:

- a reference in the FBTA Act to a year of tax is to be taken to be a reference to the contribution assessment period. (CAP). A CAP is defined in section 139K of the Act to be a period which begins on the start of a person's bankruptcy and ends on the anniversary of that commencement. Each further 1 year period until the person is discharged from bankruptcy is also a CAP.

- a reference in the FBTA Act to the taxable value of a benefit is to be taken to be a reference to the value of that benefit for the purposes of the Act. Where a bankrupt receives a benefit, including one of a kind which would be a fringe benefit under the FBTA Act if it were provided to a person by his or her employer, its value must be included by the trustee of the bankrupt's estate in the bankrupt's assessed income for the CAP in which the bankrupt enjoyed the benefit.

- a reference in the FBTA Act to the declaration date, which is the date of lodgment by an employer of a return of the employer's fringe benefits taxable amount, is to be taken to be a reference to the date that occurs 21 days after the end of a CAP in relation to a bankrupt. Section 139U of the Act provides that within 21 days after the end of a CAP, the bankrupt must give to the trustee a statement of his or her income for the completed CAP, and a statement indicating what income the bankrupt expects to derive during the next CAP.

- a reference in the FBTA Act to a declaration to be given to an employer is to be taken to be a reference to a declaration to be given to a trustee for bankruptcy purposes.

- a reference in the FBTA Act to a form approved by the Commissioner of Taxation is to be taken, for bankruptcy purposes, to be a reference to a form approved by the InspectorGeneral in Bankruptcy.

- a reference to an employer or to the employer is to be taken as a reference to any person other than the bankrupt.

- a reference to an employee or to the employee is to be taken to be a reference to a bankrupt, or to the bankrupt, as the case requires.

- a reference to the employment of the employee or to an associate of the employee, however expressed, is to be disregarded.

Subregulation 6.12(3) provides to the effect that the modifications in subregulations 6.12(1) and (2) do not apply to the case where a bankrupt's employer provides a fringe benefit to the 'bankrupt in relation to the bankrupt's employment by the employer, but that this is so only where that employer is not effectively controlled, directly or indirectly, by the bankrupt.

#### Schedule 4

Schedule 4 concerns the valuation of benefits provided to a bankrupt and its purpose is to enable the calculation of the: value of benefits assessed as forming part of the income of a bankrupt during a contribution assessment period. Schedule 4 modifies the FBTA Act to ensure that its valuation rules work appropriately when applied in a bankruptcy context. This Schedule is substantially to the same effect as Schedule 1B of the Bankruptcy Rules and which was inserted

in them by subrule 45L(2) in 1992. Each of the modifying items is explained briefly in the following notes.

Item 1. Section 7 (Car benefits). Item 1.1 modifies subsections 7(1) to (4) of the FBTA Act by omitting them and substituting new modified subsection 7(1). Unmodified section 7 provides for the calculation of the value of a car benefit received by a person and which has been provided by the person's employer, New modified subsection 7(1) provides to the effect that no employment relationship need exist between the bankrupt and the car benefit provider for the value of the benefit to be income for the purposes of the Act.

Item 2. Section 8 (Exempt car benefits). Item 2.1 omits subsections 8(1) and (2) of the FBTA Act to ensure that a car benefit cannot be an exempt benefit when provided to a bankrupt.

Item 3. Section 9 (Taxable value of car fringe benefits - statutory formula). Section 9 of the FBTA Act provides a method for calculating the taxable value of a car fringe benefit by the application of a formula in which the base value of the car, the statutory fraction and the number of days during the year in which the car benefit was provided are multiplied. The product is then divided by the number of days in the year of tax. From this amount is deducted any amount that the recipient of the car benefit has expended in relation to the car.

Item 3.1 in Schedule 4 provides a definition of the term "statutory fraction" in substitution for that contained in the FBTA Act. The definition of "statutory fraction" relates to the first contribution assessment period (CAP), and to subsequent CAPs. In relation to the first CAP, the statutory fraction is:

- \* where the annualised number of kilometres travelled by the car in the year preceding bankruptcy was more than 40,000-0.07
- \* where the annualised number of kilometres travelled by the car in the year preceding bankruptcy was not less than 25,000 and not more than 40,000-0.11
- \* where the annualised number of kilometres travelled by the car in the year preceding bankruptcy was not less than 15,000 and not more than 24,999-0.20
- \* in any other case-0.26.

For each subsequent contribution assessment period, the statutory fraction is:

- \* where the annualised number of whole kilometres travelled by the car in the previous contribution assessment period was more than 40,000 - 0.07;
  - \* where the annualised number of whole kilometres travelled by the car in the previous contribution assessment period was not less than 25,000 and not more than 40,000- 0.11;
- where the annualised number of whole kilometres travelled by the car in the previous contribution assessment period was not less than 15,000 and not more than 24,995-0.20;
- \* in any other case-0.26.

Item 3.2 substitutes, for the definition of "annualised number of whole kilometres" in paragraph 9(2)(d) of the FBTA Act, a definition appropriate for bankruptcy purposes. For bankruptcy purposes, the annualised number of whole kilometres will be calculated as follows:

\* if the bankrupt has records showing the number of kilometres travelled by the car during the previous year-that number of kilometres;

\* if the bankrupt does not hold records showing the distance travelled by the car in the previous year, then the number calculated in accordance with a formula whereby the number of whole kilometres travelled by the car during the holding period, which is that part of a CAP for which the car was held by the provider, is multiplied by the number of days in the CAP. The product is divided by the number of days in the holding period, and the result is the annualised number of whole kilometres.

Item 3.3 omits sub-subparagraph 9(2)(e)(ia)(B) of the FBTA Act which, for FBT purposes, enables the recipient of a car fringe benefit to give documentary evidence of his or her expenses in relation to the car to his or her employer. A bankrupt will be required to supply information relating to any expenses he or she has incurred in relation to a car provided to him or her in a form approved by the Inspector-General.

Item 3.4 inserts 2 examples illustrating how the formula for ascertaining the value of a car benefit to a bankrupt works in the first CAP, and in the next CAP.

Item 4. Section 10 (Taxable value of car fringe benefits - cost basis). Section 10 of the FBTA Act enables an employer to elect an alternative basis, called the cost basis, to the statutory formula set out in section 9 on which the taxable value of car fringe benefits provided by the employer will be calculated. This alternative method of calculation will not be available in determining the value of a car benefit for the purposes of assessing a bankrupt's income during a CAP, and item 4.1 therefore modifies the FBTA Act for bankruptcy purposes by the deletion of section 10.

Item 5. Section 10A (No reduction of operating cost in a log book year of tax unless log book records and odometer records are maintained). Section 10 of the FBTA Act entitles an employer to a reduction in the operating cost of a car on account of business journeys undertaken by the car only where log books and odometer records are maintained. As the operating cost method of assessing the value of a car fringe benefit is not going to be used for bankruptcy purposes, section 10A is unnecessary and item 5.1 omits it.

Item 6. Section 10B (No reduction of operating cost in a non-log book year of tax unless log book records and odometer records are maintained in log book year of tax). Section 10B; of the FBTA Act provides for the reduction of operating costs in certain circumstances if log book and odometer records are maintained. As the operating costs method of calculating the value of car benefits is not going to be used for bankruptcy purposes, item 6.1 omits section 10B.

Item 7. Section 10C (Nominated business percentage to be reduced if it exceeds business percentage established during applicable log book period or if it is unreasonable). Section 10C of the FBTA Act relates to the operating cost method of ascertaining the value of a car fringe benefit. This method is not going to be used. for bankruptcy purposes, so item 7.1 omits section 10C.

Item 8. Section 11 (Calculation of depreciation and interest). Section 11 of the FBTA Act also relates to the operating cost method of ascertaining the value of a car fringe benefit. This method is not going to be used for bankruptcy purposes, so item 8.1 omits section 11.

Item 9. Section 12 (Depreciated value). Section 12 of the FBTA Act deals with calculation of the depreciated value of a car, and applies in relation to determining the value of a car benefit under the operating cost method. This method will not be used for bankruptcy purposes, so item 9.1 omits section 12.

Item 10. Section 13 (Expenditure to be increased in certain circumstances) Item 10.1 omits a reference in subsection 13(1) of the FBTA Act to "the operating cost of a car for the purposes of section IV. It does so because the operating cost method of ascertaining the value of a car fringe benefit is not going to be used for bankruptcy purposes. Item 11. Section 22A (Taxable value of in-house expense payment benefits). The FBTA Act creates a category of benefit called "expense payment benefits" and draws a distinction between "in-house" and "external" expense payment benefits. This distinction is not necessary in the bankruptcy context. Item 11.1 therefore omits section 22A of the FBTA Act which provides a mechanism for assessing the value of "inhouse" expense payment benefits.

Item 12. Section 23 (Taxable value of external expense Payment fringe benefits). Section 23 of the FBTA Act provides that the taxable value of external expense payment fringe benefits is the full amount of the payment made by the provider of the benefit in the discharge of the recipient's liability, whether the payment is made directly to the person in whose favour the liability arises, or is made by way of reimbursement to the recipient. Where the recipient makes a contribution to the payment of the expense in question, that payment does not increase the value of the benefit. This formula is to be used in valuing all expense payment benefits received by a bankrupt for the purposes of assessing the bankrupt's income during a CAP. Item 12.1 amends section 23 to remove the word "external" so that the formula will apply to all expense payment benefits received by a bankrupt, and also to avoid drawing a distinction between in-house and external benefits for bankruptcy purposes.

Item 13. (Taxable value of non-remote housing fringe benefits). The FBTA Act draws a distinction between remote and non-remote area housing benefits and each is treated differently for tax purposes. It will not be necessary for bankruptcy purposes to draw such a distinction. For the purpose of assessing the income of the bankrupt during the CAP, the formula for assessing the value of nonremote area housing benefits will be applied to all housing benefits received by bankrupts. Item 13.1 replaces section 26 of the FBTA Act with modified section 26 which provides that the value of a housing fringe benefit in relation to a CAP is the portion of the market value of the recipient's current housing right that exceeds the recipient's rent.

Item 14. Section 28 (Indexation factor for valuation purposes - no-remote housing). Section 28 of the FBTA Act provides an indexation formula for determining the taxable value of non-remote area housing. This provision is unnecessary for bankruptcy purposes, and accordingly, item 14.1 omits it.

Item 15. Section 29 (Taxable value of remote area accommodation). Section 29 of the FBTA Act specifies the method whereby the taxable value of remote area housing fringe benefits is to be ascertained. For bankruptcy purposes, no distinction is to be drawn between remote and non-remote housing fringe benefits and, accordingly, item 15.1 omits section 29 as it is unnecessary.

Item 16. Section 29A (Indexation factor for remote area accommodation). Section 29A of the FBTA Act sets out an indexation factor to be used in determining the taxable value of remote area accommodation. This section is unnecessary in the bankruptcy context, since no distinction will be drawn between remote and non-remote area accommodation fringe benefits. Item 16.1 thus omits section 29A.

Item 17. Section 31 (Taxable value of living-away-from-home allowance fringe benefits). Section 31 of the FBTA Act specifies the taxable value of living-away-from-home allowance fringe benefits. The taxable value of the benefit is the amount of the allowance less so much of it as is reasonable to compensate for the cost of accommodation away from home and for increased expenditure on food. Item 17.1 adds subsection 31(2) which will define the term "deducted home consumption expenditure" in relation to the "exempt food component" of a living-away-from-home allowance. The "deducted home consumption expenditure" is to be taken to be an



amount of 542 per week for a person 12 years of age or more and \$21 for a person less than 12 years old. This is the same as the "statutory food amount" specified in section 136 of the FBTA Act. The item also includes an example to show how the value of a living-away-from-home allowance benefit is to be calculated.

Item 18. Section 32 (Airline transport benefits). Section 32 of the FBTA Act provides that, where air transport is provided to an employee of an airline operator or an employee of a travel agency on a free or discounted basis, the provision of the transport and any incidental services is deemed to be a fringe benefit. Item 18.1 makes a technical drafting amendment to subparagraph 32(b)(ii)(B) consequent upon the substantive amendment made by item 18.2 to omit paragraph 32(c) of the FBTA Act. That paragraph limits the benefit to air transport provided subject to standby restrictions that customarily apply in relation to the provision of airline transport to employees of the airline industry. Whether or not the bankrupt's stand-by travel rights are subordinate to those of other airline passengers is not to be relevant to the valuation of the benefit thus derived.

Item 19. Section 36 (Taxable value of board fringe benefits). A board fringe benefit arises where the provider provides a "board meal" to the recipient. Section 36 of the FBTA Act sets out a formula for determination of the taxable value of a board benefit. Item 19.1 substitutes a modified section 36 containing a formula whereby the value of a board benefit is to be taken to be \$35 in relation to the year that began on 1 July 1992 or a CAP period beginning on 1 July 1992. In subsequent years, the value of such a benefit is to be \$35 increased by the All Groups Consumer Price Index.

Item 20. Section 37 (Reduction of taxable value - "otherwise deductible" rule). Section 37 provides for a reduction of the taxable value of a board fringe benefit in circumstances, where the recipient would otherwise be entitled to an income tax deduction in relation to any expenditure incurred by the recipient. This reduction of value is not relevant for bankruptcy purposes, so item 20.1 omits section 37.

Item 21. Division 11 of Part III (Property fringe benefits). Item 21.1 omits Division 11 of Part III of the FBTA Act which deals with property fringe benefits. The fringe benefits under the Division arise out of a disposal of the provider's interest in the property to the recipient. Any such property would be afteracquired property which would vest in the trustee of the estate of the bankrupt.

Item 22. Section 46 (year of tax in which residual benefits taxed). Section 46 of the FBTA Act sets down rules for determining in which year of tax residual fringe benefits, that is, benefits other than those falling in the specific categories of benefit which the FBTA Act creates, should be taxed. Item 22.1 substitutes a section 46 with a provision for attributing residual fringe benefits received by a bankrupt over a period of two or more CAPs.

Under new modified section 46, where a residual fringe benefit is provided over two or more CAPs, the benefit will be subject to assessment for income contribution in each of the periods in which it was received.

Item 23. Section 48 (Taxable value of in-house non-period residual fringe benefits). The FBTA Act draws a distinction between "in-house" and "external" residual fringe benefits, and also between "period" and "nonperiod" residual benefits. All residual benefits are to be treated in the same manner for bankruptcy purposes and, accordingly, it is unnecessary to draw such distinctions. Item 23.1 omits section 48 which sets out rules for determining the value of in-house, non-period residual benefits.

Item 24. Section 49 (Taxable value of in-house period residual fringe benefits). Item 24.1 omits section 49 for the same reason that item 23.1 omits section 48.

Item 25. Section 50 (Taxable value of external non-period residual fringe benefits). Item 25.1 replaces section 50 of the FBTA Act with a modified section 50 for use in ascertaining the value of residual fringe benefits for bankruptcy purposes. The new modified section 50 provides that the value of a residual fringe benefit in relation to a CAP is the cost to the provider of providing the benefit, reduced by the amount of the recipient's contribution.

Item 26. Section 51 (Taxable value of external period residual fringe benefits). Item 26.1 omits section 51 of the FBTA Act for the same reason as items 23.1 and 24.1 respectively omit sections 48 and 49.

Item 27. Division 14 of Part III (Reduction of taxable value of miscellaneous fringe benefits). Division 14 of Part III of the FBTA Act provides for the reduction of the taxable value of miscellaneous fringe benefits, a reduction irrelevant in a bankruptcy context. Item 23.1 thus omits Division 14.

Item 28. Division 14A (Amortisation of taxable value of fringe benefits relating to remote area home ownership schemes). Division 14A of Part HI of the FBTA Act deals with amortisation of remote area housing fringe benefits and is irrelevant in a bankruptcy context. Item 28.1 thus omits Division 14A.

Item 29. Division 14B (Reducible fringe benefits relating to remote area home ownership repurchase schemes). Division 14B of Part 1H of the FBTA Act deals with reducible fringe benefits relating to remote area home ownership repurchase schemes and is irrelevant in a bankruptcy context. Item 29.1 thus omits Division 14B.

Item 30. Section 136 (Interpretation). Section 136 of the FBTA Act defines a large number of terms used in the Act. Item 30 amends section 136 to insert definitions necessary to enable the FBTA Act provisions to apply in a bankruptcy context and to provide some exemptions.

\* By item 30.1, a definition of "contribution assessment period" is inserted. This term will have the same meaning as it does under the *Bankruptcy Act 1966*.

\* Item 30.2 replaces the FBTA Act definition of "family member", a term which, in that Act is defined in relation to an employee. The modified definition defines family member in relation to a bankrupt, as well as in relation to an employee.

\* Item 30.3 modifies the FBTA Act definition of "fringe benefit" by substituting a new definition of that term. The new definition has two components. The first makes clear that a fringe benefit in relation to a bankrupt, means any benefit provided at any time during a contribution period. The second provides a number of exceptions to that general principle, being benefits the value of which will not constitute income for the purposes of section 139L of the Act. Briefly, the exceptions relate to those provided: on a *bona fide* domestic basis between spouses; under a maintenance order as defined; by way of a court order for the bankrupt's costs in litigation; by the payment of educational expenses of a child of the bankrupt or his or her spouse; by set off, within the Australian Taxation Office, of a tax refund against the bankrupt's tax debt(s); under specified paragraphs of the definition of "fringe benefit" in the FBTA Act; and in the form of lodging or occasional use of a vehicle, to the value of up to \$250 a week, if provided by a close relative and in the provider's principal place of residence.

\* Item 30.4 inserts new modified subsection 136(1A) in the FBTA Act. In effect, the new subsection substitutes, for references to "the employee, or by a relative of the employee" in

parts of the subsection 136(1) definition of "fringe benefit", references to "the bankrupt". This is a technical drafting modification to allow the FBT Act provisions being applied by the regulations to work effectively in a bankruptcy context.

#### *Division 7 - Contributions by bankrupt*

##### Interpretation - Regulation 6.13

Regulation 6.13 defines various terms for the purposes of the regulations as follows:

**"contributing bankrupt"** A reference to a "contributing bankrupt" is a reference to a bankrupt who is liable to make contributions under the Act.

**"contribution"** A reference to a "contribution" is a reference to a contribution payable or paid under section 139P or 139Q of the Act.

##### Contributions by bankrupt - modes of payment - Regulation 6.14

A bankrupt who is obliged to make contributions to his or her bankrupt estate may do so in a variety of ways. Acceptable methods of payment are set out in subregulation 6.14. Apart from conventional methods as there stated, they include any other method authorised in writing by the trustee. Such authorisation may be varied or cancelled by the trustee on reasonable notice in writing to the bankrupt under subregulation 6.14(3).

Subregulation 6.14(2) provides that if payment is made by cheque, the payment occurs when the cheque is cleared or the amounts credited to the trustee's account.

If any charges are incurred by the trustee in connection with the receipt of the contribution, subregulation 6.14(4) allows the trustee to reimburse himself or herself from the bankrupt's estate.

##### Contributions to cease on death of the bankrupt - Regulation 6.15

If a contributing bankrupt dies, the bankrupt's estate is only liable for a contribution that accrued up to the date of death. However, no refund is payable regarding contributions paid before the date of death.

##### Reasons for application to Official Receiver to vary contributions - Regulation 6.16

Subsection 139T(1) of the Act allows a bankrupt, in certain circumstances, to apply to the Official Receiver for a determination to vary the bankrupt's contributions under the contribution assessment scheme. Subsection 139T(2) of the Act sets out the reasons, most of which concern hardship, for which an application may be made under subsection 139T(1). Paragraph 139T(2)(f) allows for the making of regulations prescribing any other reason. Regulation 6.16 prescribes such a reason as being that a circumstance has occurred in relation to the bankrupt or a dependent of the bankrupt that, in the opinion of the Official Receiver, is of an exceptional nature and imposes an excessive financial burden on the bankrupt. The Senate Legal and Constitutional Legislation Committee in its report on the Bankruptcy Legislation Amendment Bill 1995 suggested that the income contribution scheme should be monitored to ensure hardship cases do not arise. This regulation will enable hardship cases to be dealt with on discretionary grounds as well as the other specific grounds set out in the Act.

##### Certificate of outstanding contribution - Regulation 6.17

Section 139W deals with the assessment of a bankrupt's income and contribution for the purposes of the income contribution scheme. Subregulation 6.17(1) allows a trustee to give a certificate stating, first, that the trustee has made an assessment under subsection 139W(1) or (2) of the Act; secondly, the amount of the contribution to which the assessment relates and that the bankrupt is liable to pay; thirdly, that the trustee has given notice to the bankrupt setting out particulars of the assessment under subsection 139W(4) of the Act; and, fourthly, the respective dates of the assessment and the notice.

In proceedings against the bankrupt for recovery of the amount, or part of the amount, of a contribution, subregulation 6.17(2) provides that the certificate, first is evidence that the bankrupt is liable to pay the amount of contribution stated in the certificate; and, secondly, may be tendered in evidence without further proof

#### Discharged bankrupt to give information if contribution unpaid - Regulation 6.18

Regulation 6.18 imposes certain obligations where, first a person is discharged from bankruptcy; secondly, immediately before being discharged he or she was a contributing bankrupt (under the contribution assessment scheme); and, thirdly, after the discharge he or she remains liable, under section 139R of the Act, in respect of a contribution that is due, and unpaid. (Section 139R provides that any liability under the contribution assessment scheme is not affected by the fact of the discharge having occurred.) The obligation on the person is to give notice in writing, at once, to the trustee in relation to the bankruptcy of any change in the particulars set out in the person's statement of affairs in relation to the bankruptcy or those notified by the person under section 80 of the Act. (Section 80 requires notification by the bankrupt of changes in name, address or day-time telephone number.)

Failure to comply with this regulation is an offence attracting a penalty of 10 penalty units.

#### *Division 8 - Notice under section 139ZL of the Act*

#### Notice under section 139ZL of The Act not to refer to protected money - Regulation 6.19

Section 139ZL of the Act provides that where a bankrupt is liable to pay to the trustee a contribution, the Official Receiver may issue a written notice requiring a person to make the payment. Regulation 6.19 exempts money that is protected under the law of the Commonwealth, State or Territory from being included in such a notice.

#### Notice under section 139ZL of die Act: notice of ceasing or commencing employment -Regulation 6.20

Subregulation 6.20(1) requires an employer of a bankrupt who has received a notice under 139ZL of the Act to notify the trustee in writing if the bankrupt is no longer employed by him or her. The ex-employer must give notice in writing to the trustee of the date the bankrupt terminated their employment with them. The notice must be given with 21 days of the cessation of the employment.

Failure to comply with this subregulation is an offence attracting a penalty of 2 penalty units.

Subregulation 6.20(2) requires a bankrupt, within 21 days after commencing employment with an employer, to give notice in writing to the trustee stating 3 things. The first is the employer's name and postal address. The second is the address of the place where the bankrupt is employed. The third is the amount of the bankrupt's average gross weekly income from the employment.

Failure to comply with this subregulation is an offence attracting a penalty of 2 penalty units.

#### *Division 9 - Distribution of property*

##### Minimum amount of dividend - Regulation 6.21

Subsection 140(9) of the Act provides that, where a dividend to a creditor would be less than \$10, or such larger amount as is prescribed by the regulations, the trustee need not pay that dividend. Regulation 6.21 prescribes \$25 as that larger amount.

##### Manner of declaring a final dividend - Regulation 6.22

Subsection 145(3) imposes certain obligations, on the trustee, concerning the giving notice to creditors prior to declaring a final dividend. Such notice must be provided in the prescribed manner. Sub regulation 16.01(1) prescribes the manner of giving notice as being in accordance with subregulation 16.01(1) (see below).

### PART 7 - DISCHARGE AND ANNULMENT

##### Trustee to inform the Official Receiver of return of bankrupt to Australia Regulation - 7.01

Section 149B of the Act allows the trustee or Official Receiver to file a notice of objection to the discharge of a bankrupt. Subsection 149D(1) of the Act sets out the grounds on which the notice of objection may be made. If such an objection is made on the grounds in either paragraph 149D(1)(a) or (h) of the Act the bankrupt returns to Australia and the registered trustee becomes aware of such return, the trustee must notify the Official Receiver, in the manner set out in subregulation 7.01(2).

Subregulation 7.01(2) requires the registered trustee, within 7 days of becoming aware that the bankrupt has returned to Australia, to give notice in writing to the Official Receiver of the bankrupt's return. The notice must also state the date on which the bankrupt returned, or the date on which the trustee became aware that the bankrupt had returned. Failure to comply with this subregulation is an offence attracting a penalty of 1 penalty unit.

The regulation is necessary because the period of bankruptcy, in a case where such an objection has been entered, is calculated by reference to the date of the bankrupt's return to Australia.

##### Trustee to inform the Official Receiver of cancellation of objection - Regulation 7.02

Regulation 7.02 provides that a registered trustee must advise the Official Receiver if an objection to a discharge is cancelled or varied by the Administrative Appeals Tribunal under section 149Q of the Act. The notice must be in writing, and given within 7 days of the registered trustee being notified of the decision of the AAT. A penalty of 1 penalty unit is prescribed for noncompliance.

The Regulation is necessary since cancellation of an objection may bring about the result that the bankrupt is discharged from bankruptcy, a fact which must be recorded on the National Personal Insolvency Index (see below under Part 13 for details).

### PART 8 - TRUSTEES

#### *Division 1 - Application for registration, or extension of registration, as a trustee*

### Documents to accompany application for registration - Regulation 8.01

Section 154A of the Act allows an individual to apply, by way of specified procedures, to the Inspector-General to be registered as a trustee. Paragraph 154A(3)(a) of the Act requires the application to be accompanied by, among other things, any information or documents prescribed by the regulations. Regulation 8.01 prescribes, in general, the documents and information required.

In particular, where an applicant is relying on a qualification referred to in paragraph 8.02(1)(a) of the regulations, he or she must provide an original statement in accordance with subregulation 8.01(2), certified by the appropriate officer of the relevant university, college of advanced education or other tertiary institution, and 2 references containing the particulars referred to in subregulation 8.01(3).

Subregulation 8.01(2) requires the statement of qualifications, as required by subregulation 8.01(1), to set out the relevant qualifications of the applicant and state that the qualification represents both a course of study in accountancy of not less than 3 years' duration and a course of study in commercial law of not less than 2 years' duration.

Subregulation 8.01(3) sets out the required content of the references as required by subregulation 8.01(1).

### Qualifications, experience, knowledge and abilities of applicants - Regulation 8.02

An application under section 154A of the Act is processed by a committee in accordance with section 155 of the Act. Subsection 155A(2) requires the committee to decide that the applicant should be registered if the committee is satisfied of the matters set out in paragraphs 155A(2)(a) to (e). Paragraph 155A(2)(a) requires the applicant to possess any further qualifications, experience, knowledge and abilities prescribed by the regulations. Regulation 8.02 specifies those matters.

In particular, subregulation 8.02(1) specifies 3 matters. The first is the completion of the academic requirements for the award of a degree, diploma or similar qualification from an Australian university or college of advanced education or other Australian tertiary institution of an equivalent standard, being a degree, diploma or similar qualification granted to a person who has completed both a course of study in accountancy of not less than 3 years' duration and a course of study in commercial law of not less than 2 years' duration. The second is engagement in relevant employment (defined in subregulation 8.02(3)) on a full-time basis for a total or not less than 2 years in the preceding 5 years. The third is the ability to perform satisfactorily the duties of a registered trustee. A note to subregulation 8.02(1) adverts to subsection 155A(3) of the Act which provides that, if a committee considering the application considers that the applicant is suitable to be registered as a trustee, it may decide that the applicant should be registered even if it is not satisfied that the applicant has the qualifications, experience, knowledge and abilities prescribed in subregulation 8.02(1).

Subregulation 8.02(2) defines "relevant employment" as possessing 3 characteristics: first, that it involves assisting a liquidator or registered trustee in the performance of his or her duties as a liquidator or registered trustee; secondly, that it involves provision of advice about bankruptcy matters; and thirdly, that it provides experience in insolvency administrations outside bankruptcy, including administration of receiverships, the winding up of corporations and any other similar functions.

### Subsection 155C(2) of the Act prescribed particulars of applicant for registration as a trustee - Regulation 8.03

Section 155C of the Act requires the Inspector-General to register an applicant as a trustee if certain things as set out in subsection 155C(1) have been done. Subsection 155C(2) of the Act provides for the process of registration of the applicant by entering in the National Personal Insolvency Index (the Index) the details relating to the applicant that are prescribed in the regulations. Regulation 8.03 prescribes those details as: the applicant's full name, and any alias; the applicant's business address; the applicant's occupation; and the date on which details of the applicant are entered on the Index.

#### Extension of registration - proof of insurance - Regulation 8.04

Section 155D of the Act allows for the extension of the registration of a trustee. Regulation 8.04 requires a person who applies for such an extension to provide proof, of a kind reasonably acceptable to the Inspector-General, that the applicant has insurance against liabilities the applicant may incur in carrying out the functions of a registered trustee, ie, professional indemnity insurance.

#### *Division 2 - Application for change, or removal of conditions on practising as a registered trustee*

#### Documents to accompany application for change or removal of conditions Regulation 8.05

Subsection 155A(5) of the Act allows the committee to impose conditions on a person's practice as a registered trustee. Subsection 155E(1) of the Act allows a person to apply to the Inspector-General for the conditions to be removed. Paragraph 155E(3)(a) of the Act requires the application to be accompanied by, among other things, any information or documents prescribed by the regulations. Regulation 8.05 prescribes those matters. In particular, regulation 8.05 requires that the application must have with it 2 written references. Each of those references must set out the particulars referred to in subregulation 8.01(3), state the referee's reasons for supporting the application and be signed by the referee.

#### *Division 3 - Appointment as trustee of estate*

#### Certificate of appointment under subsection 156A(3) of the Act - Regulation 8.06

Where a registered trustee becomes, under section 156A of the Act the trustee of an estate or of joint and separate estates, regulation 8.06 requires the Official Receiver to give the registered trustee a certificate to that effect.

#### *Division 4 - Trustee's remuneration*

#### Fixed remuneration - prescribed rates under subsections 162(2) and (3) of the Act - Regulation 8.07

Subsection 162(2) of the Act provides that the where the remuneration of the trustee is to be a commission, the rate of the commission should not exceed the rate prescribed by the regulations. Subregulation 8.07(1) prescribes 3 rates. First, if the moneys received by the trustee do not exceed \$30,000, the rate is 10%. Secondly, if the moneys received by the trustee exceed \$30,000 but do not exceed \$50,000, the rate is 10% of the first \$30,000 plus 7.5% of the balance. Thirdly, if the moneys received by the estate exceed \$50,000, the commission is \$4,500 plus 5% in respect of the excess over \$50,000.

Where the trustee carries on the bankrupt's business, subsection 162(3) of the Act allows the trustee to be paid a commission, at the rate prescribed by the regulation, on the amount by

which the estate is increased by reason of the carrying on of that business by the trustee or under the trustee's supervision. Subregulation 8.07(2) prescribes that rate as being 2.5%.

#### Other remuneration 1 prescribed rates under subsections 162(4) of the Act Regulation 8.08

Subsection 162(4) of the Act provides that, where the remuneration of the trustee is not fixed by the creditors or the committee of inspection, the trustee is to be remunerated as prescribed by the regulations. Regulation 8.08 prescribes that rate of remuneration. It is set at 85% of the scale of charges set out in the document known as the "IPAA Guide to Hourly Rates - effective 1 November 1996", published by the Insolvency Practitioners Association of Australia.

#### Taxation of trustee's remuneration and costs - preliminary - Regulation 8.09

Where the trustee of the estate of a bankrupt claims remuneration under section 162 of the Act, subregulation 8.09(1) allows the bankrupt or a creditor who is dissatisfied with the amount of the claim to request a taxing officer to tax the claim. The expression "taxing officer" is defined in subregulation 1.03(1) by reference to its meaning in section 167 of the Act. By subsection 167(9), a "taxing officer" is a person appointed by the Inspector-General for the purposes of section 167 of the Act. The subregulation requires that, where such a claim is made, it be done by notice in writing lodged within 14 days of being notified in writing of the amount of the claim. Subregulation 8.09(2) then requires the taxing officer to seek from the trustee a bill of costs in accordance with regulation 8.10. Subregulations 8.09(3) and (4) set out further procedures in relation to the bill of costs and taxation, including that a trustee who fails to comply with subregulation 8.09(2) forfeits remuneration. Subregulation 8.09(5) permits a trustee who is aggrieved by the operation of subregulation 8.09(4) to apply to the Court for relief.

#### Bill of costs -Regulation 8.10

Subregulation 8.10 sets out the required form and content of a bill of costs for the purposes of subsection 167(1) or regulation 8.09. Subregulation 8.10(2) provides that if a bill of costs complies substantially but not strictly with subregulation 8.10(1), it is taken for those purposes to be duly lodged. However, if the taxing officer requires a trustee to rectify the bill of costs in accordance with any direction that the taxing officer thinks fit and the trustee defaults, the bill ceases to be taken as duly lodged.

#### Taxation - hearing - Regulation 8.11

Subregulations 8.11(1) to (4) set out the procedures to be followed at a taxation of costs for the purposes of subsection 167(1) of the Act or regulation 8.09. Subregulation 8.11(5) provides that the fee for the taxation is payable by the person requesting the taxation and that such fee is payable within 7 days of receipt of the account.

#### Remuneration of Official Trustee - Regulation 8.12

Subsection 163(1) of the Act provides that where the Official Trustee is the trustee of the estate of a bankrupt, the Official Trustee shall be remunerated as prescribed by the regulations. Regulation 8.12 prescribes such remuneration as those fees and charges specified in regulation 16.07 and Schedule 10 of the regulations. For details, see the respective notes on that regulation and on that Schedule.

#### *Division 5 - Registered trustee ceasing to be trustee of an estate*

#### Notice of removal of trustee of estate - Regulation 8.13



The effect of this regulation is that, where the Court, under subsection 156A(5) or 179(1) of the Act removes the trustee from office, or where the creditors do so under section 181 of the Act the Official Receiver is to be notified as soon as practicable by, as the case requires, the applicant to the Court for the removal or the new trustee appointed by the creditors.

Subregulation (2) requires the notification to be written and sets out the detail to be supplied to the Official Receiver. Failure to comply with this subregulation is an offence attracting a penalty of 1 penalty unit.

#### Notice of finalisation of administration; entry on Index - Regulation 8.14

Subregulation 8.14(1) requires a registered trustee, within 7 days of finalising the administration of an estate, to give notice of that finalisation to the Official Receiver. Failure to comply with this subregulation is an offence attracting a penalty of 1 penalty unit.

Subregulation 8.14(2) obliges the Official Receiver to enter promptly on the Index that the administration has been finalised if the Official Receiver receives notification under subregulation 8.14(1) or the estate was administered by the Official Trustee.

#### *Division 6 - Transitional*

#### Applications under former subsection 162(5) of the Act - Regulation 8.15

Subsection 162(5) of the Act, prior to the commencement of Schedule 1 of the Amendment Act, allowed the Registrar, on application by a creditor or the trustee, to review the amount of the trustee's remuneration and confirm, reduce or increase it. Subregulation 8.15(1) provides for the case where an application has been lodged under subsection 162(5) before the commencement of the regulations and the review has not commenced. If both these circumstances exist, the subregulation requires that the review be undertaken by the taxing officer. Subregulation 8.15(2) provides, however, that the rules and procedure that applied in relation to a review under former subsection 162(5) of the Act are to apply as nearly as practicable in relation to a review under subregulation 8.15(1).

### PART 9 - DEBT AGREEMENTS

#### Modifications of the Act -meetings of affected creditors - Regulation 9.01

Subsection 185A(2) of the Act applies Division 5 of Part IV of the Act in relation to any meeting called by the Official Trustee under paragraph 185A(1)(a) of the Act. That Division is a comprehensive code for the conduct of meetings in bankruptcy. Paragraph 185A(1)(a) obliges the Official Trustee, wherever required by Part 9 of the Act to process a proposal relating to a debt agreement, to call a meeting of the affected creditors who are known to the Official Trustee to allow them to consider the proposal. Subsection 185A(2) also allows for the, making of regulations to modify the provisions of Division 5 of Part IV of the Act Regulation 9.01 provides that the manner in which that Division is modified is as specified in Schedule 5 of the regulations. That Schedule comprises 22 items. Accordingly, the following sections of the Act are modified, in their application in relation to any meeting called by the Official Trustee under paragraph 185A(1)(a) of the Act, in the manner described below.

#### Explanation of modifications made by Schedule 5

Item 1. Section 63A (Definitions). Several definitions in subsection 63A(1) are modified. The definition 'Joint bankruptcy' is omitted. The definition of "meeting" is modified to mean "a meeting of creditors". The definition "minutes secretary" is omitted. These modifications are

made to accommodate the concept of debt agreements as provided for in new Part IX of the Act.

Item 2. Section 63B (Trustee's representative). Section 63B is modified by inserting a new modified subsection 63B(1A) which allows the trustee, by signed writing, to delegate to a particular person or class of persons, the trustee's powers to conduct meetings.

Item 3. Section 64 (Trustee to convene meetings) Section 64 is modified by replacing it with a new modified section 64. Modified subsection 64(1) requires the trustee, if he or she calls a meeting of affected creditors to consider a proposal relating to a debt agreement, to give at least ~ 5 working days notice of the proposed meeting to the affected creditors known to the trustee. Modified subsection 64(2) requires that the notice set out the time, date and place of the meeting. Modified subsections 64(3), (4) and (5) set out comprehensive procedures for setting up a meeting if the proposed meeting time or place is not convenient to a majority of the affected creditors. Modified subsection 64(6) allows for notices under section 64 to be provided by writing or electronic transmission or, in the case of notice under modified subsection 64(3) by an affected creditor as to the inconvenience of the time or place of the meeting as referred to above, by oral means (either in person or by telephone).

Item 4. Section 64A (Persons to whom notice of meeting is to be given). Section 64A is modified by replacing it with new modified section 64A. Modified section 64A provides that in the following provisions of the Subdivision (ie, Subdivision A), a reference to a notice is taken to be a reference to a notice under modified subsection 64(1) or modified paragraph 64(4)(b) of the Act.

Item 5. Section 64B (Certain matters to be included in notice of meeting). Section 64B is modified by omitting subsections 64B(3) and (4) and inserting new modified subsection 64B(3). Section 64B in its unmodified form sets out the matters for inclusion in a notice of meeting for the creditors' meeting. Section 64B is modified to better suit the requirements of a meeting of creditors intending to arrive at a debt agreement as provided for under new Part IX of the Act. Modified subsection 64B(3) requires that the notice include, first a statement of the purpose of the meeting and, secondly, a summary of the debt agreement proposal, variation proposal or termination proposal (as the case requires).

Item 6. Section 64G (Agenda to set out in notice of meeting). Section 64G is modified by replacing it with new modified section 64G. The unmodified section 64G sets out a comprehensive list of matters for inclusion in the agenda to be set out in the notice of meeting. Such a comprehensive list would be too prescriptive in the context of a debt agreement under new Part IX of the Act. Moreover, notification of the proposed debt agreement is already a requirement under new modified subsection 64B(3). Accordingly, modified section 64G simply requires the trustee to make a written agenda available to each of the affected creditors at the meeting.

Item 7. Section 64K (Notice of meeting). Subsection 64K(1) is modified so as to provide that the trustee will preside at the creditors' meeting.

Item 8. Section 64L (Appointments of minutes secretary). The comprehensive provisions in the unmodified section 64L, requiring the appointment of a minutes secretary, are not necessary for the purposes of arriving at a debt agreement as contemplated under new Part IX of the Act. Therefore, section 64L is modified by replacing it with new modified section 64L which simply imposes an obligation on the trustee to ensure that an accurate record in writing of the proceedings (including voting) at the meeting is made.

Item 9. Section 64N (Quorum). Section 64N in its unmodified form provides rules about quorums at meetings. Subsection 64N(7) is modified so that references in it to a trustee include a trustee's delegate as provided for in new modified subsection 63A(IA) inserted by item 2.

Item 10. Section 64P (Election of person to Preside at meeting). Section 64P in its unmodified form sets out the procedures for the election of the person to preside over a creditors' meeting. Section 64P is omitted by the modifications as it is contemplated that the trustee will preside over the full course of the creditors' meeting.

Item 11. Section 64Q (Whether holding of meeting is convenient to majority of creditors). Section 64Q in its unmodified form sets out a procedure for determining whether the time, place and date of the meeting are convenient for the majority of creditors. Section 64M is omitted by the modifications because there is a procedure for resolving such matters provided for in new modified subsection 64(4).

Item 12. Section 64R (Tabling of bankrupt's statement of affairs). Section 64R is modified to tailor the section to the circumstances of debt agreements. Modified subsection 64R(1) requires the trustee to lay the debtor's statement of affairs and debt agreement proposal before the creditors' meeting and explain the proposal to those affected creditors at the meeting. A consequential modification is made to subsection 64R(2) so as to require the trustee, if requested by a creditor or creditor's representative, to give to that person a copy of the statement of affairs, or a summary of it and a copy of the debt agreement proposal as soon as reasonably practicable.

Item 13. Section 64S (Statements and questions). A reference to "President" in Division 5 of Part IV in its unmodified form, means, in relation to a meeting, the person duly elected under the Division. Because Division 5 in its modified form contemplates, as described above, that the trustee will preside over the meeting, section 64S is modified by substituting the term "trustee" for the term "President".

Item 14. Section 64T (Motions). For the same reasons expressed above under item 13 regarding section 64S, the term "trustee" is substituted for the term "President".

Item 15. Section 64U (Remuneration of registered trustee). Section 64U in its unmodified form concerns the remuneration of the registered trustee. In its modified form, section 64U provides to the effect that the remuneration of a person (other than the Official Trustee) who is dealing with property under a debt agreement is payable only in accordance with the debt agreement's terms. This regulation complements section 185Z of the Act.

Item 16. Section 64V (Appointment of committee of inspection). Division 5A of Part IV of the Act allows for the creation of a committee of inspection to advise and superintend the trustee. In its unamended form, section 64V requires the President to advise the meeting of its right to establish a committee of inspection. This item omits the section because the administration of debt agreements is expected to be insufficiently complex to warrant a committee of inspection to oversee the person administering it.

Item 17. Section 64W (Other business).

This item omits section 64W, which in its unmodified form deals with the other business of a creditors' meeting, because a creditors' meeting held to consider a debt agreement proposal can have no other business.

Item 18. Section 64X (Next meeting). Section 64X in its unmodified form concerns setting up another meeting. It is expected that most debt agreement proposals will either be accepted or

rejected at the first creditors' meeting called to consider them. However, this does not preclude creditors from voting for a further meeting or to adjourn the original meeting as provided for in section 64Y of the Act.

Item 19. Section 64Y (Adjournment of meeting). Subsection 64Y(1) is modified particularly to remove unnecessary references to the President and minutes secretary. New modified paragraph 64Y(1)(b) provides to the effect that, at an adjourned meeting of creditors, unfinished business of the original meeting must be completed. Also, by item 19.2, because the requirements for a notice of meeting are set out in subsection 64(1) of the Act, subsection 64Y(2) is modified, for the sake of consistency, to require any notice of an adjourned meeting to be in accordance with modified subsection 64(1).

Item 20. Section 64Z (Duties of minutes secretary). Because it is the role of the trustee to ensure that an accurate record in writing of the proceedings at the meeting is made, section 64Z, which in its unmodified form concerns the duties of minutes secretary, is omitted by this item.

Item 21. Section 64ZA (Entitlement to vote). Section 64ZA in its unmodified form concerns voting entitlements on any motion proposed at a meeting or an amendment to such a motion. In its unmodified form the section also applies, by virtue of paragraph 64ZA(b), to the election of a person to preside at a meeting. Because, as noted at item 13 above, it is the trustee who continues to preside over the creditors' meeting and there is no election of a President, the section is modified by omitting paragraph 64ZA(b). Also because there is no President or minutes secretary, subsection 64ZA(7) is redundant and is therefore omitted by this modification.

Item 22. Section 64ZB (Manner of voting). By this item, for the reasons outlined above under item 1.9, the term "trustee" is substituted in subsection 64ZB(4) and subparagraphs 64ZB(7)(b)(i), (h) and (v) for the term "President", and an unnecessary reference to "minutes secretary" is omitted from subsection 64ZB(4).

## PART 10 - ARRANGEMENTS WITH CREDITORS WITHOUT SEQUESTRATION

### Form of consent to exercise powers given by an authority under section 188 of the Act - Regulation 10.01

Regulation 10.01 provides that a registered trustee or solicitor who gives a consent under subsection 188(5) of the Act must sign an approved form of consent and give a copy of it to the Official Receiver within 14 days of signing it.

### Modification of Part X of the Act - joint debtors - Regulation 10.02

Section 187A of the Act applies Part X of the Act in relation to joint debtors, whether partners or not. Part X of the Act concerns arrangements between debtors and creditors where there is no bankruptcy of the debtor. Section 187A also allows for the making of regulations to tailor the application of Part X of the Act. Regulation 10.02 provides that the manner in which Part X is modified is as specified in items 1 - 7 of Part 1 of Schedule 6 of the regulations. Accordingly, the following sections of the Act are modified in their application in relation to joint debtors, whether partners or not, in the manner described below.

### Explanation of modifications made by Part 1 of Schedule 6

Item 1. Section 187A (Application of Part to joint debtors). Section 187A is modified by inserting 5 new modified subsections. Modified subsection 187A(2) provides that in the application of Part

X to joint debtors, whether partners or not, the term "joint debtor" is substituted for the term "debtor" throughout the Part. Modified subsection 187A(2) also provides for some other associated substitutions. Modified subsection 187A(3) provides that subsection 187A(2) does not apply where specific modifications of Part X by the Bankruptcy Regulations otherwise require. Modified subsection 187A(4) provides that a reference to joint debtors is taken to include a reference to any of the joint debtors. Modified subsection 187A(5) provides that, in spite of modified subsection 187A(2), a reference to the affairs, or examinable affairs, of a debtor is to be read as a reference to the separate affairs, or separate examinable affairs, of a joint debtor.

Item 2. Section 188 (Debtor may authorise trustee or solicitor to call meeting of creditors etc.). To make section 188 properly applicable in relation to joint debtors, whether partners or not, section 188 necessarily is modified in several ways not accomplished by the general modifications in subsection 187A(2). Subsection 188(1) is modified by making it clear that each of the joint debtors, and not the joint debtors collectively, must desire that his or her affairs be dealt with under Part X for section 188 to operate in relation to joint debtors. Subsection 188(4) is further modified in a way that modified subsection 187A(2) does not adequately achieve.

Item 3. Section 188A (Statement of debtor's affairs and proposal for dealing with them). Section 188A, as modified by subsection 187A(2), would leave it unclear as to whether the obligation is on each of the debtors, or on the debtors collectively, to give the controlling trustee a statement of the debtors' affairs and a proposal for dealing with them under Part X. Therefore the subsection is modified to make it clear that each joint debtor must do those things individually.

Item 4. Section 189AB (Charge over debtor's property). Section 189AB is modified by inserting new modified subsection 189AB(1A). This and a modification to subsection 189AB(1) make it clear that the charge(s) as created by modified subsections 189AB(1) and (1A) is (are) over the joint property of the joint debtors and over the separate property of each joint debtor. Consequential modifications are made to subsections 189AB(2) and (3).

Item 5. Section 189A (Report by controlling trustee). A similar consequential modification is made to paragraph 189A(1)(a) so as to impose an obligation on the controlling trustee to prepare a report on the joint estates and on the separate estates of each of the joint debtors.

#### Statement of debtor's affairs etc - section 188A of the Act - Regulation 10.03

Section 188A of the Act provides for the manner in which the debtor must give to the controlling trustee a statement of the debtor's affairs and a proposal for dealing with them. Regulation 10.03 provides that, when the controlling trustee receives that statement and proposal under section 188A, that trustee must promptly give a copy of that statement and proposal to the Official Receiver.

#### Documents for meeting in accordance with section 194 of the Act - Regulation 10.04

Section 194 of the Act specifies when the creditors' meeting provided for under section 188 of the Act is to be called. Regulation 10.04 specifies the things that the controlling trustee must give to each of the creditors at least 10 days before the meeting. They are, first, a notice of meeting in writing; secondly, a copy of the controlling trustee's report prepared in accordance with subsection 189A(1) of the Act in relation to the debtor's affairs; and, thirdly, a copy of the controlling trustee's statement prepared in accordance with subsection 189B(1) of the Act in relation to special resolutions expected to be passed at the creditors' meeting.

#### Modification of Division 5 of Part IV of the Act - meeting of debtor's creditors Regulation 10.05

Section 196 of the Act applies Division 5 of Part IV of the Act in relation to a meeting called under an authority under section 188 as if the debtor who signed the section 188 authority were bankrupt and as if the controlling trustee were the trustee in bankruptcy. That Division is a comprehensive code for the conduct of meetings in bankruptcy. Section 188 of the Act concerns procedures for a debtor, who wants his or her affairs to be dealt with under Part X of the Act without his estate being sequestrated, to authorise a trustee or solicitor to call a meeting of creditors. Section 196 also allows for the making of regulations to modify the applied provisions of Division 5 of Part IV. Regulation 10.04 provides that the manner in which that Division is modified is as specified in items 1 - 6 of Part 2 of Schedule 6 of the regulations. Accordingly, the following provisions of the Act are modified, in their application in relation to a meeting called under a section 188 authority, in the manner described below.

#### Explanation of modifications made by Part 2 of Schedule 6

Item 1. Section 63A (Definitions). Subsection 63A(1) (definition of "joint bankruptcy") is modified to add new modified paragraph 63A(1)(e) thereby including within the definition of "joint bankruptcy" the situation arising out of the signing, by joint debtors for the purposes of section 188 or 223, of a joint authority for the administration of the their joint estate.

Item 2. Section 64G (Agenda to be set out in notice of meeting). Paragraph 64G(g) is modified by replacing it with new modified paragraph 64G(g) which requires that one of the items, for inclusion in the agenda for the first meeting as set out in the notice of meeting, will be 3 documents. The first is the statement of the debtor's affairs and the proposal for dealing with them as required by section 188A. The second is the report by the controlling trustee as required by section 189A. The third is the written statement by the controlling trustee as required by section 189B.

Item 3. Section 64R (Tabling of bankrupt's statement of affairs). Subsection 64R(1) is modified by replacing it with new modified subsection 64R(1) which requires the President to ask the trustee to lay on the table the documents referred to in modified paragraph 64G(g). Subsection 64R(2) is similarly modified by making the requirement on the trustee - to comply as soon as reasonably practicable with a request of any of the creditors or their representatives to be provided with the documents - apply in respect of those same documents.

Item 4. Section 64U (Remuneration of registered trustee). Subsection 64U(1) is modified by replacing it with new modified subsection 64U(1) which requires the President to ask the trustee to state the basis on which he or she wishes to be remunerated. This is to occur at the first meeting called under an authority under section 188 of the Act that is attended by the controlling trustee or, where the creditors have passed a special resolution under paragraph 204(1)(b) or (c) of the Act by the trustee of a deed of assignment, a deed of arrangement or a composition.

Item 5. Section 64V (Appointment of committee of inspection). Section 64V is modified by adding new modified subsection 64V(2) which requires the President also to tell the creditors and their representatives that, in the case of a composition, there can be no committee of inspection.

Item 6. Section 64ZE (Joint bankruptcies). Section 64ZE is modified by adding new modified subsection 64ZE(R) which provides that section 64ZE applies in relation to an arrangement under Part X in the case of a deed of arrangement or a deed of assignment only where, first a joint estate forms part of the property that is the subject of the resolution establishing the deed and, secondly, the deed does not specifically provide for distribution of the joint estate.

Application of section 64M of Part IV of the Act - meeting of debtor's creditors Regulation 10.06

Section 64M, being in Division 5 of Part IV of the Act, may be modified by virtue of section 196 of the Act in its application to a meeting called under a section 188 authority. Regulation 10.06 modifies section 64M in its application to such a meeting by allowing an instrument appointing a proxy to be lodged with the controlling trustee by facsimile transmission. It also allows for an instrument so lodged to be circulated by the controlling trustee under subsection 64M(2) of the Act.

#### Modifications of Part VIII of the Act - controlling trustees , Regulation 10.07

Section 210 of the Act provides that Part VIII of the Act applies in relation to the controlling trustee in relation to a debtor as if the debtor were a bankrupt and the controlling trustee were the trustee of the estate of the bankrupt debtor. Part VIII of the Act is a comprehensive code concerning trustees' activities under the Act. Section 210 of the Act also allows for the making of regulations to tailor the provisions of Part VIII in their application to controlling trustees. Regulation 10.06 provides that those modifications are as specified in items 1 - 9 of Part 3 of Schedule 6 of the regulations. Accordingly, the following provisions of the Act are modified, in their application in relation to the controlling trustee in relation to a debtor, in the manner described below.

#### Explanation of modifications made by Part 3 of Schedule 6

Item 1. New Division 1A - Interpretation. Part VIII of the Act is modified by inserting new modified Division 1A which comprises new section 154AA. That modified section provides that, in Part VIII in its application to Part X of the Act, a reference to a registered trustee is taken to include a reference to a controlling trustee and to a trustee of a deed of assignment a deed of arrangement or a composition.

Item 2. Section 156A (Consent to act as trustee). Section 156A in its unmodified form relates to the consent of a trustee to act as a trustee. Section 156A is modified by omitting the section. This is because any relevant application of Part VIII of the Act, in relation to the controlling trustee in relation to a debtor, would also be in the circumstances where there would be an arrangement between the debtor and creditors without sequestration and Part X of the Act would apply. Sections 188 and 156A, which are contained within Part X of the Act, effectively require consent, making section 156A redundant in relation to the controlling trustee in relation to a debtor.

Item 3. Section 157 (Appointment of trustees). Subsection 157(1) in its unmodified form concerns the appointment of a trustee when a debtor becomes bankrupt. The subsection is modified so as to apply to the circumstances of the debtor who is not a bankrupt. Accordingly, modified subsection 157(1) allows creditors to appoint a registered trustee when both the following contingencies obtain. The first is where the Official Trustee is, under section 188 or 192 the controlling trustee in relation to a debtor, or, under Part X the trustee of a deed of arrangement, deed of assignment or composition. The second is where the creditors wish to appoint in place of the Official Trustee either a registered trustee or a solicitor as the controlling trustee, or a registered trustee as the trustee of the deed of arrangement, deed of assignment or composition.

Item 4. Section 158 (Appointment of more than one trustee etc). Section 158 is modified to apply to a debtor who is not bankrupt. Accordingly, modified section 158 provides that the creditors may appoint 2 or more controlling trustees jointly, or jointly and severally.

Item 5. Section 159 (Vacancy in office of trustee). Section 159 is omitted in the modifications. This is because modified section 160 requires the Official Trustee to act as the trustee when the

position of trustee is vacant. Also, under modified section 157, there is a procedure for the appointment of a registered trustee in place of the Official Trustee.

Item 6. Section 160 (Official Trustee to be trustee when no registered trustee is trustee). The section is modified by replacing it with new modified section 160 which provides that the Official Trustee is to act as a trustee under Part X during any period when that position otherwise would be vacant.

Item 7. Section 161 (Trustee may act in official name). Section 161 is modified by inserting new modified sub-section 161 (1A) which provides that modified section 161 does not apply in relation to a trustee of a deed of arrangement or a deed of assignment under Part X. This is because such a trustee has an equivalent power under section 219 of the Act.

Item 8. Section 180 (Resignation of trustee) Section 180 is modified by limiting the reference to "trustee of an estate" to a trustee other than a controlling trustee under Part X. The resignation procedure for a controlling trustee is provided for in subsection 192(1) of the Act

Item 9. Section 181 (Removal of trustee). Section 181 is modified to empower creditors, by resolution, to remove a controlling trustee or the trustee of a deed of assignment, a deed of arrangement or a composition. The creditors may also at the meeting or a subsequent meeting appoint another trustee to replace the removed trustee.

#### Meeting if trustee does not execute deed - Regulation 10.08

Section 217 of the Act allows for matters concerning meetings under that section to be in prescribed in the regulations. Subregulation 10.08 sets out when such meetings are to be called and when the parties are to be notified of a forthcoming meeting. Subregulation 10.08(2) provides that the notice must set out the terms of any proposed resolution under subsection 217(1) of the Act that is known to the person giving the notice.

#### Notification of deed of assignment or deed of arrangement or special resolution accepting a composition - Regulation 10.09

Paragraph 218(1)(a) of the Act requires the trustee of a deed of assignment or a deed of arrangement entered into under Part X of the Act to notify each creditor of the debtor as soon as practicable after the debtor and the trustee have executed the deed. Subsection 218(2) of the Act requires the trustee, as soon as practicable after a special resolution accepting a composition is passed under section 204 of the Act to notify each creditor of the debtor that the special resolution has been passed. Regulation 10.09 provides that the notification required by each of those provisions must be in writing and in accordance with regulation 16.01 (concerning service of documents). If the notification is about a deed of assignment or a deed of arrangement it must also state that the deed has been signed by the debtor and the trustee.

#### Sequestration order, or order avoiding a deed or composition - notice to Official Receiver - Regulation 10.10

Regulation 10.10 imposes obligations regarding the provision of notice to the Official Receiver of certain Court Orders.

In particular, where the Court makes a sequestration order under subsection 221(1) or 222(7) of the Act subregulation 10.10(2) requires the applicant for the order to give notice in writing to the Official Receiver of the making of the order.



Similarly, where the Court makes an order under subsection 222(2) or (4) of the Act in respect of a deed or composition or a provision of a deed or composition, subregulation 10.10(3) requires the applicant for the order to give a copy of it to the Official Receiver.

Subregulation 10.10(4) requires a notice or copy of an order required by regulation 10.10 to be given as soon as reasonably practicable and in any event, within 3 working days. Failure to comply with regulation 10.10 is an offence attracting a penalty of 1 penalty unit.

Subregulation 10.10(1) provides that the obligations in regulation 10.10 do not apply if the applicant is the Official Receiver, the Official Trustee, the Inspector General or a person authorised by the Inspector-General under subsection 221(1) or 222(4) of the Act.

#### Application of section 64M of the Act to meeting called under section 223 of the Act - Regulation 10.11

Section 223A of the Act provides that Division 5 of Part IV of the Act applies in relation to a meeting called under section 223 as if the debtor who signed the authority under section 188 were bankrupt and the person who called the meeting were the trustee in the bankruptcy. Section 223A also allows for the making of regulations to tailor the application of the provisions of Division 5 of Part IV to a section 223 meeting. In that context, regulation 10.11 provides for the modification of section 64M (which is within Division 5 of Part IV) by allowing an instrument appointing a proxy to be lodged by facsimile transmission and by allowing an instrument so lodged to be circulated under subsection 223(2) of the Act.

#### Modifications for the purposes of section 231 of the Act - deeds of assignment Regulation 10.12

Subsection 231(2) of the Act specifies a number of provisions of the Act to apply in relation to deeds of assignment as if: first a creditor's petition had been presented against the debtor by whom the deed was executed on the day on which the special resolution requiring the execution of the deed was passed; secondly, a sequestration order had been made against him or her on that petition on the day on which he or she executed the deed; and, thirdly, the trustee of the deed were the trustee in his or her bankruptcy. Subsection 231(2) also allows for the making of regulations to modify the applied provisions specified in subsection 231(2). Subregulation 10.11(1) provides that such modifications are to be those set out in item 1 of Part 4 of Schedule 6 of the regulations. Accordingly, the following section of the Act is modified, in its application in relation to deeds of assignment, in the manner described below.

#### Explanation of modifications made by Part 4 of Schedule 6

Item 1. Section 113 (Apprenticeship etc. claims). Subsection 113(1) of the Act in its unmodified form, as applied by subsection 231(2) of the Act provides to the effect that where, at the day on which the special resolution requiring the execution of the deed of assignment was passed, a person was apprenticed, or was an articled clerk, to the debtor, the deed of assignment or, in the case of the debtor's petition, the presentation of the petition, is a complete discharge of the apprenticeship or articles, if the apprentice or clerk so elects and gives written notice to the trustee. Subsection 113(1) is modified by item 1 to provide to the same effect but in relation to the day on which the deed of assignment was executed.

Subsection 231(4) of the Act provides that Part VIII of the Act applies in relation to a trustee of a deed of assignment as if the debtor by whom the deed was executed were a bankrupt and the trustee of the deed were the trustee in bankruptcy. Part VIII of the Act is a comprehensive code concerning trustees' activities under the Act. Subsection 231(4) allows for the making of regulations to modify the applied provisions of Part VIII. Subregulation 10.11(2) specifies the modifications as being those listed in items 1 - 9 of Part 3 of Schedule 6 of the regulations. The

following provisions of Part VIII of the Act, in their application in relation to a trustee of a deed of assignment, are modified in the manner described below.

Item 1. New Division 1A - Interpretation. See the explanatory notes for regulation 10.07.

Item 2. Section 156A (Consent to act as trustee). See the explanatory notes for regulation 10.07.

Item 3. Section 157 (Appointment of trustees). See the explanatory material about the modified sections in the notes for regulation 10.07.

Item 4. Section 158 (Appointment of more than one trustee etc.). See the explanatory material about the modified sections in the notes for regulation 10.07.

Item 5. Section 159 (Vacancy in office of trustee). See the explanatory material about the modified sections in the notes for regulation 10.07.

Item 6. Section 160 (Official Trustee to be trustee when no registered trustee is trustee). See the explanatory material about the modified sections in the notes for regulation 10.07.

Item 7. Section 161 (Trustee may act in official name). See the explanatory material about the modified sections in the notes for regulation 10.07.

Item 8. Section 180 (Resignation of trustee). See the explanatory material about the modified sections in the notes for regulation 10.07.

Item 9. Section 181 (Removal of trustee). See the explanatory material about the modified sections in the notes for regulation 10.07.

Certificate relating to realisation of divisible property and non-availability of dividends, or payment of final dividend - Regulation 10.13

Subregulation 10.13(1) provides that, where the trustee of a deed of assignment is satisfied that the divisible property of the debtor has, so as far as practicable, been realised and no dividend is payable to the creditors, the trustee must; if requested in writing by the debtor to do so, give to the debtor, within 7 days, a certificate to that effect signed by the trustee.

Subregulation 10.13(2) provides that a certificate under subregulation 10.13(1) is evidence of the facts stated in it and may be tendered in evidence without further proof. Subregulation 10.13(3) provides that where the trustee of a deed of assignment gives a certificate under either subsection 232(1) of the Act or subregulation 10.13 (1), the trustee must within 7 days, give a copy of it to the Official Receiver.

Failure to comply with this regulation is an offence attracting a penalty of 1 penalty units.

Modification for the purposes of section 237 of the Act - deeds of arrangement Regulation 10.14

Subsection 237(2) of the Act specifies a number of provisions of the Act to apply in relation to a deed of arrangement as if a sequestration order had been made against the debtor on the day on which he or she executed the deed and the trustee of the deed were the trustee in the debtor's bankruptcy. Subsection 237(2) also allows for the making of regulations, to modify the applied provisions specified in subsection 237(2). Subregulation 10.14(1) provides that the manner in which those provisions are modified is as specified in items 1 - 8 of Part 5 of Schedule

6 of the regulations. Accordingly, the following sections of the Act are modified in their application in relation to a deed of arrangement in the manner described below.

#### Explanation of modifications made by Part 5 of Schedule 6

Item 1. Section 113 (Apprenticeship etc. claims). Subsection 113(1) of the Act in its unmodified form, as applied by subsection 237(2) of the Act provides to the effect that where, at the day on which the special resolution requiring the execution of the deed of arrangement was passed, a person was apprenticed, or was an artied clerk, to the debtor, the deed of arrangement or, in the case of the debtor's petition, the presentation of the petition, is a complete discharge of the apprenticeship or articles, if the apprentice or clerk so elects and gives written notice to the trustee. Subsection 113(1) is modified by item 1 to provide to the same effect but in relation to the day on which the deed of arrangement was executed.

Item 2. Section 133 (Disclaimer of onerous property). Section 133 is modified to add new modified subsection 133(12A) which provides that modified section 133, as applied by subsection 237(2) of the Act in relation to a deed of arrangement, extends only in relation to property of the debtor that the deed of arrangement vests in, or makes available to, the trustee.

3. Section 134 (Powers exercisable at discretion of trustee). Subsection 134(1) is modified by adding new modified paragraph 134(1)(ba) which empowers a trustee to carry on a debtor's business in accordance with an authorisation under new modified subsection 134(5) of the Act.

New modified subsection 134(5) of the Act provides that, where a deed of arrangement under Part X assigns the business to the trustee, the deed may authorise the trustee to carry on a debtor's business and specify the period during which, and the conditions (if any) subject to which, the trustee may do so.

New modified subsection 1.34(6) empowers the creditors to vary or terminate an authority under subsection 134(5) by passing a special resolution to that effect at a meeting called for the purpose.

New modified subsection 134(7) is added to provide that modified section 134, as applied by subsection 237(2) of the Act in relation to a deed of arrangement, extends only in relation to property of the debtor that the deed of arrangement vests in, or makes available to, the trustee.

Item 4. Section 135 (Powers exercisable by the trustee with permission). Section 135 is modified to add new modified subsection 135(5) which provides that modified section 135, as applied by subsection 237(2) of the Act in relation to a deed of arrangement, extends only in relation to property of the debtor that the deed of arrangement vests in, or makes available to, the trustee.

Item 5. Section 136 (Right to pay off mortgagees). Section 136 is modified to add new modified subsection 136(3) which provides that modified section 136, as applied by subsection 237(2) of the Act in relation to a deed of arrangement, extends only in relation to property of the debtor that the deed of arrangement vests in, or makes available to, the trustee.

Item 6. Section 137 (Right of trustee to inspect goods held as security). Section 137 is modified to add new modified subsection 137(4) which provides that modified section 137, as applied by subsection 237(2) of the Act in relation to a deed of arrangement, extends only in relation to property of the debtor that the deed of arrangement vests in, or makes available to, the trustee.

Item 7. Section 138 (Limitation of trustee's power in respect of copyright etc.). Section 138 is modified to add new modified subsection 138(1A) which provides that modified section 138, as

applied by subsection 237(2) of the Act in relation to a deed of arrangement, extends only in relation to property of the debtor that the deed of arrangement vests in, or makes available to, the trustee.

Item 8. Section 139 (Protection of trustees from personal liability in certain cases). Section 139 is modified to add new modified subsection 139(5) which provides that modified section 139, as applied by subsection 237(2) of the Act in relation to a deed of arrangement extends only in relation to property of the debtor that the deed of arrangement vests in, or makes available to, the trustee.

Subsection 237(4) of the Act applies a number of provisions of the Act to the trustee of a deed of arrangement as if the debtor by whom the deed was executed were bankrupt and the trustee of the deed were the trustee in his or her bankruptcy. Subsection 237(4) also allows for the making of regulations to modify the applied provisions specified in that subsection. Subregulation 10.14(2) provides that those provisions are modified as specified in items 1 - 9 in Part 3 of the Schedule 6 of the regulations. Accordingly, the following sections of the Act, in their application in relation to deeds of arrangement, are modified and in the manner described below.

Item 1. New Division 1A - Interpretation. See explanatory material for regulation 10.07.

Item 2. Section 156A (Consent to act as trustee). See explanatory material for regulation 10.07.

Item 3. Section 157 (Appointment of trustees). See explanatory material for the modified sections in the notes for regulation 10.07.

Item 4. Section 158 (Appointment of more than one trustee etc). See explanatory material for the modified sections in the notes for regulation 10.07.

Item 5. Section 159 (Vacancy in office of trustee) See explanatory material for the modified sections in the notes for regulation 10.07.

Item 6. Section 160 (Official Trustee to be trustee when no registered trustee is trustee' See explanatory material for the modified sections in the notes for regulation 10.07.

Item 7. Section 161 (Trustee may act in official name). See explanatory material for the modified sections in the notes for regulation 10.07.

Item 8. Section 180 (Resignation of trustee). See explanatory material for the modified sections in the notes for regulation 10.07.

Item 9. Section 181 (Removal of trustee). See explanatory material for the modified sections in the notes for regulation 10.07.

Certificate that provisions of deeds of arrangement have been carried out - copy to Official Receiver -Regulation 10.15

Subsection 237A(1) of the Act imposes an obligation on the trustee of a deed of arrangement in certain circumstances to provide a certificate to the debtor. Regulation 10.15 provides that the trustee must within 7 days of the giving of the certificate to the debtor give a copy of it to the Official Receiver. Failure to comply with this subregulation is an offence attracting a penalty of 1 penalty unit.

## Modifications for the purposes of section 243 of the Act - compositions Regulation 10.16

Subsection 243(3) of the Act specifies a number of provisions of the Act to apply in relation to a trustee of a composition under Part X of the Act as if the debtor by whom the composition was made were a bankrupt and the trustee of the composition were the trustee in his bankruptcy. Subsection 243(3) allows for the making of regulations to modify the applied provisions specified in that subsection. Regulation 10.15 provides for the modifications as listed in items 19 of Part 3 of Schedule 6 and items 1 and 2 of Part 6 of Schedule 6 of the regulations. The following sections, of the Act, in their application in relation to a trustee of a composition under Part X of the Act are modified accordingly and in the manner described below.

Item 1. New Division 1A - Interpretation. See explanatory material for regulation 10.07.

Item 2. Section 156A (Consent to act as trustee). See explanatory material for regulation 10.07.

Item 3. Section 157 (Appointment of trustees). See explanatory material for regulation 10.07.

Item 4. Section 158 (Appointment of more than one trustee etc.). See explanatory material for regulation 10.07.

Item 5. Section 159 (Vacancy in office of trustee). See explanatory material for regulation 10.07.

Item 6. Section 160 (Official Trustee to be trustee when no registered trustee is trustee. See explanatory material for regulation 10.07.

Item 7. Section 161 (Trustee may act in official name). See explanatory material for regulation 10.07.

Item 8. Section 180 (Resignation of trustee). See explanatory material for regulation 10.07.

Item 9. Section 181 (Removal of trustee). See explanatory material for regulation 10.07.

## Explanation f modifications made by Part 6 of Schedule 6

Item 1. Section 162 (Additional remuneration of trustee). Subsections 162(1) and (6) are each modified to remove references to the role of the committee of inspection. There is no role for such a committee in a composition.

Subsection 162(2) is modified so as to reflect the role of a trustee of a composition under Part X of the Act. Accordingly, modified subsection 162(2) makes it clear that the reference to commission is a reference to a commission upon moneys received. by the trustee for distribution to creditors.

Item 2. Section 177 (Control of creditors over trustee). Section 177 is modified to remove the reference to die role of the committee of inspection: see the note to item 1.

## Certificate that terms of composition have been carried out - copy to the Official Receiver - Regulation 10.17

Subsection 243A(1) of the Act requires tie trustee of a composition in certain circumstances to provide a certificate to the debtor. Regulation 10.17 provides that the trustee must within 7 days of the giving of the certificate to the debtor give a copy of it to the Official Receiver. Failure to comply with this subregulation is an offence attracting a penalty of 1 penalty unit.

Controlling trustee to give Official Receiver copy of special resolution and certain particulars for the Index - Regulation 10.18

Section 204(1)(c) allows creditors, at a meeting called in pursuance of an authority under section 188 of the Act, by special resolution, to accept a composition. Where this happens, subregulation 10.18(1) requires the controlling trustee to give to the Official Receiver, within 7 days after the date of the resolution, a copy of the resolution. Also to be given is a notice in writing specifying a number of particulars for entry in the Index. They are the date of the resolution, the debtor's full name and any alias, the debtor's address, and the debtor's occupation if any. In addition, in the case of a resolution concerning a deed of arrangement, deed of assignment or composition, the name of each registered trustee of the deed or composition who has been nominated under subsection 204(4) of the Act must be given to the Official Trustee. Failure to comply with this subregulation is an offence attracting a penalty of 1 penalty unit.

Subregulation 10.18(2) provides that the regulation does not apply to the Official Trustee.

PART 11 - ADMINISTRATION OF ESTATES OF DECEASED PERSONS IN BANKRUPTCY

Statement of affairs and of administration of estate - Regulation 11.01

Subsection 246(1) of the Act requires, among other things and in certain circumstances, the legal personal representative of a deceased person to make out a statement of a deceased person's affairs and of his or her administration of the deceased person's estate. The matters to be specified in that statement are described in regulation 11.01.

Subsection 247(1) of the Act allows a person administering the estate of a deceased person to present a petition for an order for the administration of the estate under Part XI of the Act, such petition to be accompanied by a statement of the deceased person's affairs and of his or her administration of the deceased person's estate. The matters to be specified in that statement are described in regulation 11.01.

Modifications of the Act - administration of estates of deceased persons - regulation 11.02

Subsection 248(1) of the Act applies a number of provisions of the Act in to proceedings under Part XI of the Act and the administration of estates of deceased persons under that Part. The subsection allows for the making of regulations to modify the applied provisions. Regulation 11.02 provides for those modifications as listed in items 1 - 48 of Schedule 7 of the regulations. The following sections of the Act, in their application in relation to proceedings under Part XI of the Act and administration of estates under that Part are modified accordingly and in the manner described below.

Explanation of modifications made by Schedule 7

Item 1. Section 49 (Change of petitioners). Section 49 is modified by substituting the term "deceased debtor's estate" for the word "debtor".

Item 2. Section 50 (Taking control of debtor's property before sequestration) Section 50 is modified by a number of alterations such as substituting the term "deceased debtor's estate" for the term "debtor's property". Subsection 50(6) is added to make is clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 3. Section 63A (Definitions) Section 63A, the definitions provision for Division 5A of Part IV of the Act, is modified to introduce a definition of legal personal representative" to mean, in relation to a deceased debtor, either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 4. Section 64A (Persons to whom notice of meeting to be given). Section 64A, regarding persons to whom notice of meeting must be given, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 5. Section 64B (Certain matters to be included in notice of meeting). Section 64B, regarding certain matters to be included in notice of meeting, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 6. Section 64G (Agenda to be set out in notice of meeting). Section 64G, regarding the agenda to be set out in the notice of meeting, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 7. Section 64J (Preparation of attendance record). Section 64J, regarding the preparation of attendance record, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 8. Section 64K (Opening of meeting). Section 64K, regarding the .opening of the meeting, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 9. Section 64L (Appointment of minutes secretary). Section 64L, regarding the appointment of a minutes secretary, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 10. Section 64P (Election of person to preside at meeting). Section 64P, regarding the election of a person to preside at the meeting of creditors, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 11. Section 64S (Statement and questions). Section 64S, regarding statements and questions at the meeting of creditors, is modified so as to make it applicable to the circumstances, of the debtor being deceased.

Item 12. Section 64Z (Duties of minutes secretary). Section 64Z, regarding the duties of the minutes secretary, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 13. Section 64ZC (Appointment of proxies). Section 64W, regarding the appointment of proxies, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 14. Section 73 (Composition or arrangement). Section 73, regarding the making of a composition or a scheme of arrangement, is modified so as to make it applicable to the circumstances of the debtor being deceased. Subsection 73(6) is added to make is clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 15. Section 74 (Annulment of administration). Section 74 in its unmodified form provides that where, a meeting of creditors accepts a proposal for a composition or scheme of

arrangement put forward by a bankrupt, the bankruptcy is annulled on the date of acceptance. Section 74 is modified so as to make it applicable to the circumstances of the debtor being deceased by providing that where a special resolution under subsection 73(4) takes effect on the date on which it is passed to annul the administration of the estate to which it relates. Modified subsection 73(2) requires the trustee of the estate, as soon as practicable after the date of annulment, to give the Official Receiver a certificate regarding certain details of the estate. Modified subsection 73(3) in turn requires the Official Receiver to enter those matters in the official records.

Item 16. Section 75 (Effect of composition or- scheme of arrangement). Section 75, regarding the effect of a composition or scheme of arrangement, is modified so as to make it applicable to the circumstances of the debtor being deceased. Accordingly, subsection 75(2) is omitted and subsection 75(4) is modified. Also subsections 75(6), (7) and (8) are omitted and a new modified subsection (6) is added to make it clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 17. Section 81 (Discovery of bankrupt's property etc.). Section 81, regarding the discovery of bankrupt's property etc., is modified so as to make it applicable to the circumstances of the debtor being deceased. Accordingly, subsection 81(1) is omitted and new subsections 81(1) and (1AA) are added. Paragraph 81(1B)(b) is modified. Subsection 81(1AA) is omitted. Subsection 81(12) is modified.

Item 18. Section 82 (Debts provable in bankruptcy). Section 82, regarding debts provable in bankruptcy, is modified so as to make it applicable to the circumstances of the debtor being, deceased. Accordingly subsections 82(1) and 82(1A) are modified and paragraph 82(8)(b) is modified.

Item 19. Section 87 (Deduction of discounts). Section 87, regarding deduction of discounts, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 20. Section 88 (Apportionment to principal and interest of payments made before bankruptcy). Section 88, regarding the apportionment of principal and interest of payments made before bankruptcy, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 21. Section 95 (Proof in respect of distinct contracts). Section 95, regarding proof in respect of distinct contracts, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 22. Section 99 (Application to the Court where creditor or bankrupt considers proof wrongly admitted). Section 99, regarding application to the court where creditor or bankrupt considers a proof of debt has been wrongly admitted, is modified so as to make it applicable to the circumstances of the debtor being, deceased. Subsection 99(1A) is added to make it clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 23. Section 109 (Priority payments). Section 109, regarding priority payments, is modified so as to make it applicable to the circumstances of the debtor being deceased. Accordingly paragraphs 109(1)(a) is modified. Paragraphs 109(1)(b) is omitted.

Item 24. Section 109A (Debts due to employees). Section 109A, regarding debts due to employees, is modified so as to make it applicable to the circumstances of the debtor being



deceased. Accordingly subsection 109A(1) is modified. Subsection 109A(2) is modified. Subsection 109A(2A) is added to make it clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 25. Section 110 (Application of estates of joint debtors) Section 110, regarding the application of estates of joint debtors, is omitted because it is not applicable to circumstances where the debtor is deceased.

Item 26. Section 114 (Payment of liabilities). Section 114, regarding the payment of liabilities etc. incurred under terminated deed etc., is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 27. Section 116 (Property divisible among children). Section 116, regarding property divisible among creditors, is modified so as to make it applicable to the circumstances of the debtor being deceased. Accordingly new subsection 116(1A) is added to provide that a reference in subsection 116(1) to the discharge of a bankrupt is taken to be a reference to the termination of the administration under Part XI of the estate of the deceased person. Paragraphs 116(2)(c) and 116(2)(ca) are omitted. Paragraph 116(2)(g) is replaced by new modified paragraphs 116(2)(g) and (h). Subsection 116(2B) is modified and subsection 116(2C) is omitted.

Item 28. Section 117 (Policies of insurance against liabilities to third parties). Section 117, regarding policies of insurance against liabilities to third parties, is modified so as to make it applicable to the circumstances of the debtor being deceased. Accordingly paragraph 117(1)(b) is modified.

Item 29. Section 118 (Execution by creditor against property of debtor who becomes bankrupt). Section 118, regarding execution by any creditor against the property of a debtor who becomes a bankrupt, is modified so as to make it applicable to the circumstances of the debtor being deceased. Accordingly paragraphs 118(11)(a) and (b) are modified to ensure that a purchaser of property at a sheriff's sale, or at forced sale by a creditor holding a charge over the property, acquires good title to it if the debtor either thereafter becomes bankrupt, or dies and the debtor's estate becomes bankrupt.

Item 30. Section 119 (Duties of sheriff after receiving notice of presentation of petition etc). Section 119, regarding duties of Sheriff after receiving notice of presentation of petition etc., is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 31. Section 119A (Duties of Sheriff after receiving notice of bankruptcy etc). Section 119A, regarding duties of Sheriff after receiving notice of bankruptcy etc., is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 32. Section 122 (Avoidance of preferences). Section 122, regarding avoidance of preferences, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 33. Section 123 (Protection of certain transfers of property). Section 123, regarding protection of certain transfers of property against relation back etc., is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 34. Section 124 (Protection of certain payments to bankrupt etc). Section 124, regarding protection of certain payments to bankrupt etc., is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 35. Section 125 (Certain accounts of undischarged bankrupt). Section 125, regarding certain accounts of undischarged bankrupts, is modified so as to make it applicable to the circumstances of the debtor being deceased

Item 36. Section 126 (Dealings with undischarged bankrupt) Section 126, regarding dealings with undischarged bankrupt in respect of after acquired property, is omitted because it is not applicable to circumstances where the debtor is deceased.

Item 37. Section 127 (Limitation of time for making of claims by trustee etc). Section 127, regarding, limitation of time for making of claims by trustee etc., is modified so as to make it applicable to the circumstances of the debtor being deceased. Accordingly new subsection 127(1A) is added to provide that a reference in subsection 127(1) to the date on which a person became bankrupt is taken to be a reference to the date on which administration of a deceased person's estate commenced.

Item 38. Section 134 (Powers exercisable at discretion of trustee). Section 134, regarding powers exercisable at discretion of trustee, is modified so as to make it applicable to the circumstances of the debtor being deceased. Subsection 134(1AA) is added to make is clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 39. Section 135 (Further powers exercisable by trustee). Section 135, regarding further powers exercisable by, the trustee, is modified so as to make it applicable to the circumstances of the debtor being deceased. Subsection 135(2) is added to make is clear that the term "legal personal representative" in relation to a deceased. debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 40. Section 138 (Limitation on trustee's Dower in respect of copyright, patents etc). Section 138, regarding limitation on trustee's power in respect of copyright, patents etc., is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 41. Section 139ZL (Official Receiver may require person to make payments). Section 139ZL, regarding: the Official Receiver requiring persons to make payments, is modified so as to make it applicable to the circumstances of the debtor being deceased. Subsection 139ZL(6A) is added to make it clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 42. Section 139ZO (Official Receiver may require payment). Section 139ZQ, regarding the Official Receiver requiring payment, is modified so as to make it applicable to the circumstances of the debtor being deceased. Subsection 139ZQ(5A) is added to make it clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 43. Section 143 (Provision to be made for creditors residing at a distance etc.). Section 143, regarding provision to be made for creditors residing at a distance etc., is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 44. Section 146 (Distribution of dividend where bankrupt fails to file statement of affairs). Section 146, regarding distribution of dividends where bankrupt fails to file statement of affairs, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 45. Section 156A (Consent to act as trustee). Section 156A, regarding consent to act as trustee, is modified so as to make it applicable to the circumstances of the debtor being deceased.

Item 46. Section 161B (Trustee's remuneration - minimum entitlement). Section 161B, regarding trustee's minimal entitlement to remuneration, is modified so as to make it applicable to the circumstances of the debtor being deceased. Subsection 161B(2A) is added to make it clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 47. Section 162 (Trustee's remuneration - general). Section 162, regarding trustee's general entitlement to remuneration, is modified so as to make it applicable to the circumstances of the debtor being deceased. Subsection 162(3A) is added to make it clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

Item 48. Section 170 (Trustee to give Official Trustee and bankrupt information etc.). Section 170, regarding the trustee giving the Official Receiver information, is modified so as to make it applicable to the circumstances of the debtor being deceased. Subsection 170(2A) is added to make it clear that the term "legal personal representative" in relation to a deceased debtor means either the executor under the deceased debtor's will or the administrator under letters of administration or court order.

## PART 12 - UNCLAIMED DIVIDENDS OR MONEYS

### Statement where moneys paid into Consolidated Revenue Fund - Regulation 12.01

Subsection 254(2) of the Act requires a trustee to pay certain moneys into the Consolidated Revenue Fund. Subregulations 12.01(1) and (2) specify the details required in the statement to accompany the payment required by subsection 254(2) of the Act.

Subsection 254(2A) of the Act requires, in specified circumstances, the Official Trustee, or an Official Receiver or a trustee to pay moneys into the Consolidated Revenue Fund. Subregulation 12.01(3) sets out the details required in the statement to accompany the payment required by subsection 254(2A) of the Act.

Subregulation 12.01(4) requires a registered trustee giving a statement in accordance with the requirements of subregulations or 12.01(1) or (2), to provide a copy of the statement, within 7 days of its provision to the relevant officer in Consolidated Revenue Fund, to the Official Receiver.

## PART 13 - NATIONAL PERSONAL INSOLVENCY INDEX

### *Division 1 - Preliminary*

#### Interpretation - Regulation 13.01

Regulation 13.01 defines "BIOS" to mean Bankruptcy Index Online System as maintained before the commencement date by Registrars in Bankruptcy.

#### Establishment and maintenance of the Index - Regulation 13.02

Subsection 5(1) of the Act allows for the establishment of the Index under the regulations. Subregulation 13.02(1) establishes an electronic index to be known as the National Personal Insolvency Index (the Index), for the operation of which the Inspector-General has responsibility as set out in subregulation 13.02(2). Subregulation 13.02(3) obliges each Official Receiver to assist in maintaining the Index.

### *Division 2 - Information to be entered on the Index*

#### What Information is to be entered on the Index? - Regulation 13.03

Subregulation 13.03(1) specifies what information must be entered on the Index.

In respect of each bankruptcy occurring on or after the commencement date of the regulations, paragraph 13.03(1)(a) requires that information of the kind specified in Schedule 8 must be entered on the Index. Schedule 8 is set out in tabulated format. The entry at column 5 of each vertical row of the table describes the information to be entered in the Index. Other matters are described, as set out in columns 1 - 4, with respect to the corresponding description, in column 5, of the information to be entered in the Index. These other matters are: the provision of the Act from which the column 5 information emanates (column 1); the document from which information may be entered in the Index (column 2); the person who must give the document to the Official Receiver (column 3); and the period in which the document must be provided to the Official Receiver (column 4).

Paragraph 13.03(1)(b) of the regulations requires that the information on BIOS in respect of bankruptcies including completed bankruptcies must also be entered on the Index.

By paragraph 13.03(1)(c) of the regulations, in respect of each registered trustee the trustee's full name and any alias, the trustee's business address, the trustee's occupation, the date on which such details are entered on the Index, and the date (if any) of termination of the trustee's registration as trustee, must all be entered on the Index.

In respect of each application for registration as a registered trustee, paragraph 13.03(1)(d) requires 4 things to be entered on the Index. They are the applicant's full name and any alias, the applicant's business address (or if none, his or her residential address), the applicant's occupation, and the date on which details in respect of the applicant are entered on the Index.

Paragraph 13.03(1)(e) requires that, in respect of each debtor specified in subregulation 13.03(4), 4 things must be entered on the Index. They are the debtor's full name and any alias, the debtor's address, the debtor's occupation (if any), and the date on which details in respect of the debtor are entered on the Index.

Paragraph 13.03(1)(f) requires that any information received, under the regulations, by the Official Receiver for entry on the Index or required, under the regulations, to be entered on the index must be so entered. For example, regulation 10.18 (see above) requires the Official Receiver to be notified in writing specifying certain particulars for entry in the Index.

Subregulation 13.03(2) provides that the requirement under subregulation 13.03(1)(a) extends to bankruptcies that occurred before the commencement date and which were not completed before the commencement date.

Subregulation 13.03(3) describes, for the purposes of paragraph 13.03(1)(e), the 5 classes of debtor in respect of whom the information specified in paragraph 13.03(1)(e) must be entered on the Index. Subregulation 13.03(4) amplifies the description of one of those classes.

Subregulation 13.03(5) provides that the requirements of subregulation 13.03(1) are subject to any decision of the Inspector-General under paragraph 13.04(3)(a) and any order or direction of the Administrative Appeals Tribunal or the Federal Court of Australia. As to the decision, order or direction mentioned, paragraph 13.04(3)(a) deals with decisions by the Inspector-General about requests that certain information be not entered on the Index or that Index information be corrected; and the Administrative Appeals Tribunal and the Federal Court of Australia have review powers regarding such decisions: see the notes to regulation 13.04 and 13.05.

Subregulation 13.03(6) requires the Official Receiver to correct, without delay, any entry containing information that in any particular is contrary to or inconsistent with a decision, order or direction of a kind mentioned in subregulation 13.03(5) or is inaccurate or misleading.

#### Application for certain information not to be on the Index - Regulation 13.04

Subregulation 13.04 allows a debtor or a bankrupt to apply in writing to the Inspector-General for information not to be entered on, or to be removed from, the Index on the grounds either that, the inclusion of the information would jeopardise, or be likely to jeopardise, the person's safety or, in the case of information already entered on the Index, it is inaccurate or misleading.

Subregulation 13.04(2) requires that an application under subregulation 13.04(1) contain full particulars of the grounds relied upon in support of it.

Subregulation 13.04(3) specifies how the Inspector-General must deal with an application made under regulation 13.04. Notice in writing of the decision of the Inspector-General must be provided to the applicant without delay and must set out the reasons for the decision. If the decision is adverse to the applicant, the notice must also advise the applicant of his or her rights to apply to the Administrative Appeals Tribunal for a review of the decision.

Subregulation 13.04(4) specifies that a person's name and date of birth cannot be removed by from the Index by the mechanisms set out in regulation 13.04.

#### Application to the AAT - Regulation 13.05

A person who is aggrieved by a decision under paragraph 13.04(3)(a) may apply to the AAT for a review of the decision.

### *Division 3 - Miscellaneous*

#### Inspection of the Index - Regulation 13.06

Regulation 13.06 provides procedures (including the payment of any applicable fee) for inspection of the Index. In particular, subregulation 13.06(1) provides that, on payment of any applicable fee, a person may inspect the Index, take an extract of information entered on the Index and obtain a copy of the extract.

Subregulation 13.06(2) vests in any person the right on payment of any applicable fee, to apply in writing to the Official Receiver and be provided with an extract from the Index.

Subregulation 13.06(3) provides that, if an application is lodged in accordance with subregulation 13.06(2), the Official Receiver must conduct the search and with 14 days of receiving the application, either send the requested extract to the applicant, or notify the applicant in writing that the requested extract is not on the Index.

By subregulation 13.06(4), regulation 13.06 is made subject to regulation 13.09, which provides that access to the Index is subject to the control of the InspectorGeneral

#### Copy to be evidence - Regulation 13.07

Subregulation 13.07(1) provides that a copy of a document, which qualifies under subregulation 13.07(2), is prima facie evidence of the information on the Index that is stated in it and may be admitted in evidence in specified proceedings without further proof. Subregulation 13.07(2) provides to the effect that a document qualifies if it purports to be an extract of information on the Index and it does not appear to the Court to have been altered in a way that is likely to affect the information.

#### Immunity from defamation - Regulation 13.08

Subregulation 13.08(1) gives the Inspector-General, and any officer acting at the direction or with the authority of the Inspector-General, immunity from action for defamation arising out of any publication of material, or of extracts of material, from the Index. By subregulation 13.08(2), a similar immunity extends to any officer if publication by the officer was done in the course of that officer's duty as an officer and in good faith. Immunity is extended also, by subregulation 13.08(3), to persons providing material for entry in the Index if they do so in good faith and under a function or duty under the regulations or another Commonwealth law. The Commonwealth and the Official Trustee are extended immunity by subregulation 13.08(4). Subregulation 13.08(5) provides that the generality of subregulation 13.08(1) is not affected by subregulations 13.08(2) or (3). Finally, by subregulation 13.08(6), nothing in regulation 13.08 affects any other ground of defence in defamation proceedings.

#### Access to the Index - Regulation 13.09

Regulation 13.09 gives the Inspector-General control over access to the Index. Thus, notwithstanding regulation 13.06, which enables a person to inspect the Index on payment of the prescribed fee, the Inspector-General might formulate other arrangements for access to the Index, for example, by arranging for contractors to provide the information. Thus the Inspector-General may decide that the Index cannot be inspected by a member of the public, except through a particular method. It is common for information such as that contained in the Index to be publicly disseminated through information brokers, who have electronic access to the information, and are able to provide it to interested persons who request the information by telephone. The broker then carries out the relevant search, and provides the information directly to the person requesting it, and then pays the relevant statutory fee on behalf of that person. This is done, for example, by many State Land Titles Offices and by the Australian Securities Commission in relation to its ASCOT database of information relating to companies.

#### Information extracted from the Index to be evidence - Regulation 13.10

As well as being evidence of what is in the Index (see the notes to regulation 13.07), information extracted from the Index is, by regulation 13.10, prima facie evidence of the truth of the information itself

### PART 14 - OFFENCES UNDER THE ACT

#### Apprehension under a warrant - notification to Registrar in certain cases Regulation 14.01

Section 264B of the Act confers powers for the Court, a Registrar or a magistrate to issue a warrant for the apprehension of a person who fails to obey a summons. Subsection 264B(3) of

the Act provides that a warrant issued under subsection 264B(1) of the Act may authorises arrest; detention and the bringing of a person before the Court, a Registrar or a magistrate. Regulation 14.01 provides that, when a warrant is issued under subsection 264B(1) and the person executing it considers that it is impractical to bring the apprehended person forthwith before the Court, a Registrar or a magistrate, the person executing the warrant must immediately notify the Registrar of the apprehension and of the date and time when the person considers that it will be practicable to bring the apprehended person before the Court, a Registrar or a magistrate.

#### Registrar to act on notification; direction to person executing warrant Regulation 14.02

Regulation 14.02 specifies what must be done by the Registrar upon receiving the notification as required by subregulation 14.02(1). The Registrar must fix a date, time and place for the apprehended persons to be brought before the Court, the Registrar or a magistrate, and direct the; person who gave the notification to the Registrar accordingly. Subregulation 14.02(2) requires the time and date for the appearance of the apprehended person to be the earliest practicable in the Registrar's opinion. Subregulation 14.02(3) requires the person directed under paragraph 14.02(1)(b) to comply with the direction.

### PART 15 - REGISTRATION OF REGISTERED TRUSTEES

#### *Division 1 - Preliminary*

#### Interpretation - Regulation 15.01

For the purposes of Part 15 of the regulations, regulation 15.01 defines 3 terms as follows:

"member" includes the chairperson

"chairperson" means the chairperson of the committee

"committee" means a committee convened under subsections 155(1), 155E(4) or 155H(2) of the Act.

#### *Division 2 - Committee that considers applications and involuntary termination of registration*

#### Trustee chosen from the Insolvency Practitioners Association of Australia Regulation 15.02

Subsections 155(1), 155E(4) and 155H(2) of the Act require the InspectorGeneral to convene a committee in certain circumstances. Paragraph 155(2)(c), 155E(5)(c) and 155H(3)(c) of the Act require that one of the members on such a committee must be a registered trustee chosen by the Insolvency Practitioners Association of Australia. Regulation 15.02 requires that the person so chosen must also have practised as a registered trustee for at least 5 years.

#### Chairperson of a committee - Regulation 15.03

Regulation 15.03 provides that the chairperson of a committee is the InspectorGeneral or a person, being a member of the committee, appointed by the Inspector-General.

#### Resignation of chairperson -Regulation 15.04

A chairperson, other than the Inspector-General, may resign by giving written notice to the Inspector-General. The resignation takes effect from the time of its receipt by the Inspector-General.

#### Resignation of members - Regulation 15.05

Regulation 15.05 permits a member of the committee to resign from it by giving notice in writing to the Inspector-General. The notice takes effect when the Inspector-General receives the notice.

#### Removal of members from a committee - Regulation 15.06

Subregulation 15.06(1) empowers the Inspector-General to terminate the appointment a member of a committee in any of the circumstances set out in that subregulation.

Subregulation 15.06(2) empowers the Inspector-General to terminate the appointment of a member of another committee convened to consider an application under subsection 154A(1) (individual applying, to the Inspector-General to become a registered trustee) or subsection 155E(1) (individual applying to the Inspector-General for practice conditions to be removed) if both of the following circumstances occur, first, that the member is either a close relative of the applicant or has a financial or personal relationship with the applicant and, secondly, that the Inspector-General believes that the relationship may affect the impartiality of the member.

Subregulation 15.06(3) empowers the Inspector-General to terminate the appointment of another member of a committee convened under subsection 15511(2) (consideration of involuntary termination of appointment) to consider whether a trustee should continue in the same circumstances as set out in the notes to subregulation 15.06(2).

#### Convening of a replacement committee - Regulation 15.07

Regulation 15.07 requires the Inspector-General to convene a new committee in specified circumstances. They are, broadly, where its membership is reduced for any reason and it has not made the decision it was convened to make.

#### General procedures of a committee - Regulation 15.08

Regulation 15.08 sets out the general principles of procedure by which the committee must conduct itself. In particular, subregulation 15.08(1) provides that subject to the Act and to Division 2 of Part 15 of the regulations, a committee may determine its own procedure.

Subregulation 15.08(2) requires a committee to observe the rules of natural justice.

Subregulation 15.08(3) provides that a committee is not bound by any rules of evidence but may inform itself on any matter as it sees fit. Subregulation 15.08(4) requires a committee to keep a written record of its decisions.

#### Procedure at committee meetings - Regulation 15.09

Regulation 15.09 specifies further procedural details for committee meetings. In particular, subregulation 15.09(1) provides that, subject to regulation 15.09, all members of a committee must be present in order to constitute a quorum for a meeting of the committee. Subregulation 15.09(2) provides for majority decisions of a committee. Subregulation 15.09(3) allows a member to participate in a meeting by telephone. Subregulation 15.09(4) deems a person who participates in a meeting by telephone to be present at that meeting. Subregulation 15.09(5) allows, but does not compel, the committee to keep minutes of proceedings at its meetings.



### Resolutions without meeting - Regulation 15.10

Regulation 15.10 allows committee resolutions to be passed by procedures set out in subregulations 15.10(1) and (2). Subregulation 15.10(1) provides that, if the majority of the members of the committee sign a document containing a statement that they are in favour of a resolution in the terms set out in the document, the resolution is taken to have been passed at a meeting of the committee on the day on which the document is signed. If the members signed the document on different days, the resolution is taken to have been passed on the day on which the document is signed by the member who, by adding his or her signature, makes up the majority.

Subregulation 15.10(2) provides that 2 or more separate documents that are identical in all material respects, each of which is signed by 1 or more members, are taken for the purposes of subregulation 15.10(1) to constitute a single document.

### Inquiries by the committee - Regulation 15.11

Subregulation 15.11(1) empowers the committee to make inquiries of any applicant to decide whether that person should be registered. Similarly, subregulation 15.11(2) allows the committee to make inquiries to decide what conditions should apply to a person's registration and subregulation 15.11(3) permits the committee to make inquiries of any person to assist it to make decisions about conditions of practice of a registered trustee. Subregulations 15.11(4) and (5) confine the inquiries to those that are reasonable, or that the Chairperson believes are appropriate, for the purpose of giving the committee enough information to make the relevant decision under subregulation 15.11(1), (2) or (3). Subregulation 15.11(6) requires the committee to exercise, in respect of decisions made under subsections 155A(1), 155F(1) or 155I(1) of the Act, natural justice principles.

### *Division 3 - Interviews*

#### Notice of interview - Regulation 15.12

Regulation 15.12 specifies a number of pre-interview procedures which apply if a committee is required to interview an applicant under subsection 155(3) or 155E(6) of the Act. In particular, subregulation 15.12(1) requires the Inspector-General or officer of the Department on the committee, after relevant consultation with the other members, to fix a date, time and place for the interview and give written notice of that date, time and place to the applicant and to the other members.

Subregulation 15.12(2) imposes the same obligations if a committee is required to interview a trustee under regulation 15.14.

#### Applicant interviews - Regulation 15.13

Regulation 15.13 specifies a number of procedures to be followed at interviews under subsections 155(3) or 155E(6) of the Act. The procedures relate to such matters as telephone interviews, an applicant failing to attend an interview, and what the committee may ask the applicant. Subregulations 15.13(6) and (7) prevent the committee from interviewing an applicant under subsection 155(3) or 155E(6) of the Act before the Inspector-General has received the information, documents and applicable fee in relation to the application that are prescribed for the purposes of those subsections.

#### Involuntary termination of registration - interview - Regulation 15.14

Regulation 15.14 specifies procedures for interviews to be conducted if the Inspector-General is required under subsection 155H(2) of the Act to convene a committee to consider whether a trustee should continue to be registered.

#### *Division 4 - Procedure of Committee*

##### Report of committee decision - Regulation 15.15

Subsections 155A(6), 155F(2) and 155I(4) of the Act require the committee to give to the Inspector-General a report of its decision under the respective section and the reasons for its decision. Subregulation 15.15(1) provides further details of the required form and content of the reports. Subregulation 15.15(2) detail the manner in which the report is to be provided by the committee to the applicant or the trustee, and the Inspector-General. A committee report must be provided within 14 days after the committee makes its decision.

##### Disclosure of interests - Regulation 15.16

Where certain decisions under the Act are to be made by a committee, regulation 15.16 requires committee members to disclose the interests specified in subregulation 15.16(1). Subregulation 15.16(2) requires the member, as soon as practicable after becoming aware of the identity of the applicant or trustee, to disclose the nature of the member's relationship with the applicant to the other members of the committee and to the Inspector-General.

##### Confidentiality ~ Regulation 15.17

Regulation 15.17 imposes confidentiality requirements on the committee, requiring it specifically to take all reasonable measures to protect from unauthorised use or disclosure information provided to in confidence.

##### Evidence of -proceedings at committee meetings - Regulation 15.18

Under Regulation 15.18, a copy of minutes of proceedings at a committee meeting, signed by the Chairperson of the committee, is evidence of the proceedings as recorded in the minutes and may be tendered in evidence without further proof.

##### Time for deciding matters under subsection 155I(1) of the Act - Regulation 15.19.

Section 155I of the Act concerns decisions to involuntarily terminate the registration of a registered trustee. Regulation 15.19 requires a committee deciding a matter under that section to come to a decision within 60 days of being convened.

## PART 16 - MISCELLANEOUS

### *Division 1 - Provisions concerning documents (including inventories).*

#### Service of documents - Regulation 16.01

Subregulation 16.01(j) lists the various means by which a document may be served on a person as required by the Act or the regulations. Subregulation 16.01(2) describes when a document, served in accordance with the means as listed in subregulation 16.01(1) is taken to have been received. In addition to the traditional modes of service personally or by post, documents will be able to be served at document exchange facilities and electronically where these facilities exist.

### Filing or lodgment of documents - Regulation 16.02

Subregulation 16.02(1) sets out the manner in which a document, required or permitted by the Act or the regulations to be filed or lodged with the Inspector-General or Official Receiver, may be so filed or lodged. Subregulation 16.02(2) provides that a document filed or lodged in the manner set out in subregulation 16.02(1) is taken to be filed or lodged when it is actually received in the office of the Inspector-General or the Official Receiver (as the case requires) and not earlier.

### Inventory by trustee taking possession of, or attaching, property - Regulation 16.03

Regulation 16.03 requires a trustee who takes possession of property under the Act, to make an inventory of it promptly and give a signed and dated copy of the inventory to any person who has custody of the property or of part of the property.

### *Division 2 - Fees*

#### *Subdivision A - General provisions*

### Schedule 9 - fees to be taken by the Official Receivers - Regulation 16.04

Under subregulation 16.04(1), fees are payable in accordance with Schedule 9 of the regulations regarding specified matters. That Schedule provides for a fee of \$300 for the filing of specified documents about Part X matters and for the issue of a bankruptcy notice, and lesser fees for file searching and copying of documents.

### Document filed by Inspector-General or Official Receiver - fee not payable Regulation 16.05

This regulation provides that no Fee is payable on an application to, or the filing of a document in, the Court by the Inspector-General or the Official Receiver.

### Payment of fees - Regulation 16.06

Subregulations 16.06(1) and (2) provide to the effect that documents are not to be lodged with, or dealt with by, the Official Receiver, and nor is the Official Receiver to do any matter or thing, until the applicable fee is paid.

### Fees payable to the Official Trustee - Regulation 16.07

Under subregulation 16.07(1), fees specified in Schedule 10 of the regulations are payable as remuneration to the Official Trustee under subsection 163(1) of the Act regarding the matters listed in that Schedule. Broadly put, the matters listed are routine, minor processes involved in the day-to-day administration of an estate by the Official Trustee. There is no cap on those fees, but subregulation 16.07(2) provides for a minimum fee of \$265.

Subregulation 16.07 (3) sets out the fees payable to the Official Trustee where it acts as the trustee of the estate of a bankrupt, or of a deceased bankrupt estate under Part XI of the Act or where, under Part X of the Act, it acts as a controlling trustee or the trustee of a Part X arrangement. Subject to regulation 16.08, the scale of fees as set out in paragraphs 16.07(3)(c) to (c) is determined by reference to a prescribed amount. Broadly, the fees vary with the size of realisations in an estate. If the prescribed amount is \$4,000 or less, they comprises the whole of that amount. If it exceeds \$4,000, they are \$4,000 plus 15% of the excess of the prescribed

amount over \$4,000. If it exceeds \$50,000, they are \$10,900 plus 10% of the excess of the prescribed amount over \$50,000.

Subregulation 16.07(4) provides that the "prescribed amount" on which fees are charged is to be calculated is to be determined using a formula:

'amount realised - (business costs + securities)',

and defines each term in that formula.

Subregulation 16.07(5) makes clear that, ordinarily, the expression "amount realised" in subregulation 16.07(4) will include amounts which have vested in the Official Trustee under section 58 of the Act, but which have been applied by another person in paying the bankrupt's debts, thus preventing the Official Trustee from realising the amount so applied.

Similarly, paragraph (a) of subregulation 16.07(6) makes clear that "amount realised" will include amounts offered, and accepted by creditors, under Division 6 of Part IV of the Act. That Part provides for the annulment of a bankruptcy if creditors accept a composition or scheme of arrangement in full settlement of a bankrupt's debts. However, by paragraph (b) of subregulation 16.07(6), the "amount realised" is not to include amounts paid to the trustee by creditors under an indemnity for costs or under section 50 of the Act.

By subregulation 16.07(7), the Official Trustee is to be paid a fee of 2.5% of the amount the Official Trustee receives from carrying on a bankrupt's business, or the business of a debtor whose property has passed into the Official Trustee's control under section 50 of the Act.

The fee for time sent by the Official Trustee or an officer assisting the Official Trustee in exercising control of property under section 50 of the Act by the Court's direction is set by subregulation 16.07(8) at hourly rates appropriate to the level of officer doing the work. The same rates apply to the Official Trustee's work in administering a debt agreement made under section 185H of the Act, or in administering property under a debt agreement.

Subregulation 16.07(9) provides that the fees in subregulations 16.07(7) and (8) are additional to those in subregulation 16.07(3).

#### "Prescribed amount" - restriction on amount of fee payable - Regulation 16.08

This regulation caps the fee payable under paragraph 16.07(3)(c), (d) or (e). By subregulation (1), the "prescribed amount" is not to exceed the total of the debts of the estate or debtor and the costs of administration of the estate.

Subregulation 16.08(2) defines the terms "debts" as meaning, by paragraphs (a) to (c), the total of the petitioning creditor's taxed costs, the proved debts and the interest accrued after the date of bankruptcy on interest-bearing debts. The subregulation also defines "costs of administration" and excludes from that cost any realisation charge paid or payable by the Official Trustee under an Act and any fees paid or payable to the Official Trustee under regulation 16.07 or to the Official Receiver under Subdivision C of Division 2 of Part 16 of the regulations.

#### Fees in respect of the Index - Regulation 16.09

This regulation sets out the fees payable for inspecting, searching or extracting information from the National Personal Insolvency Index that ITSA maintains.

### Waiver or remission of fees by Inspector-General - Regulation 16.10

The Inspector-General is empowered by this regulation to waive any fee (subregulation 16.10(1)) on grounds of undue hardship or other exceptional circumstances (subregulation 16.10(2)). The decision to waive must be notified in writing to the person concerned and to the officer to whom the fee otherwise would be payable (subregulation 16.10(3)). Subregulation 16.10(4) defines "fee" as meaning any fee payable, apart from regulation 16.04 fees, under Subdivision A of Division 2 of Part 16. Also excluded from the waiver power are fees payable under Subdivision B of Division 2 of Part 16.

### *Subdivision B - Fees for the purposes of specific provisions of the Act*

### Application to the AAT - Regulation 16.11

This regulation allows a person dissatisfied with a decision of the Inspector-General under regulation 16.10 to apply for a review by the Administrative Appeals Tribunal.

### Prescribed fees of Official Receiver and fees payable on taxation - Regulation 16.12

This regulation prescribes the hourly fee rates payable to the Official Receiver for the purposes of subsection 163A(2) (by subregulation 16.12(1)) or 167(1) of the Act or regulation 8.09 (by subregulation 16.12(2)). The rates prescribed in subregulation 16.12(3) are the same as those in subregulation 16.07(8).

### Inspection and copying - documents filed under Part X of the Act, and statements of deceased debtor's affairs - Regulation 16.13

The prescribed inspection and copying fees payable for the purposes of subsections 226(3) and (4) and 246(5), and regulation 4.17, are set out in regulation 16.13.

### *Division 3 - Temporary provisions*

Introductory note: This Division is intended as a temporary Division to be repealed after the proposed bankruptcy revenue measures come into force. Its purpose is to continue the effect of a fee scheme at present provided for in the Bankruptcy Rules beyond the effective repeal of those Rules on the commencement of Schedules 1 and 2 of the *Bankruptcy Legislation Amendment Act 1996*.

### Where account is given after distribution of final dividend - paragraph 175(a) of the Act - Regulation 16.14

This regulation prescribes the fee payable to the Official Receiver under paragraph 175(1)(a) of the Act. That paragraph requires a registered trustee to lodge with the Official Receiver when the administration of the estate is finalised, an account of the trustee's receipts and payments in the administration of the estate. The fee is payable under subregulation 16.14(1), at the rates set out in subregulation 16.14(3), on the "prescribed amount" calculated in accordance with subregulation 16.14(4) or (5). Broadly, that amount is the receipts in the estate but, by subregulation 16.14(5), deduction is permitted of amounts: paid to secured creditors; paid by the trustee in carrying on the bankrupt's business; and of any surplus in the estate.

### Fees payable by Official Trustee - Regulation 16.15

By this regulation, the Official Trustee must pay to the Official Receiver fees comparable with those payable by registered trustees under regulation 16.14. Where the Official Trustee acts as trustee of a bankrupt estate, or as a controlling trustee, or trustee of a Part X arrangement under the Act, the fees are payable when, in respect of an estate, a dividend is declared or the Official Trustee ceases to act as trustee. The fee is payable on the prescribed amount worked out in accordance with subregulation 16.14(5).

#### "Prescribed amount" - restriction on amount of fee payable - Regulation 16.16

This regulation caps the amount on which a fee is payable under subregulation 16.14(3) by limiting the "prescribed amount". Under subregulation 16.16(1), it is not to exceed the total of the debts of the estate or debtor and the costs of administration of the estate. Subregulation 16.16(2) defines the terms "costs of administration" and "debts" as used in subregulation 16.16(1).

#### Trustee's account - prescribed form - Regulation 16.17

By this regulation, form 2 (set out in Schedule 1 of the regulations) is prescribed as the form for use by trustees, in accordance with paragraph 175(1)(a) of the Act. That paragraph requires the trustee of an estate to lodge with the Official Receiver, forthwith on payment of a final dividend, an account of the receipts and payments in the estate. Regulation 16.14 provides that a person who gives such an account to the Official Receiver must pay the appropriate fee in accordance with that regulation.

#### *Schedules to these Regulations*

Explanatory note: There are 10 Schedules to the regulations.

Schedule 1 contains 2 prescribed forms. Form 1, the Bankruptcy Notice, is for use by persons applying to the Official Receiver for the issue of such a notice in relation to a debtor. Its content is self explanatory. Form 2 is based on Form 33 of the Bankruptcy Rules. It is a statement of receipts and payments in the administration of an estate under the Act and is expected to be repealed as unnecessary when proposed bankruptcy revenue measures come into force. Its significance lies in the fact that its lodgment is the trigger for the fees payable by registered trustees under regulation 16.13.

The purposes and contents of Schedules 2 to 10 are explained in the body of the text of this Explanatory Statement. The list below sets out the number(s) of the regulations relevant to the respective Schedules. The notes appearing under the respective regulation number(s) explain the material in the respective Schedules.

Schedule 2: Regulation 4.19

Schedule 3: Regulation 6.01

Schedule 4: Regulation 6.12

Schedule 5: Regulation 9.01

Schedule 6: Regulations 10.02,10.05, 10.07, 10.12, 10.14 and 10.16

Schedule 7: Regulation 11.02

Schedule 8: Regulation 13.03

Schedule 9: Regulation 16.04

Schedule 10: Regulation 8.12 and 16.07