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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BANKRUPTCY LEGISLATION AMENDMENT (DEBT AGREEMENTS) BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

BANKRUPTCY LEGISLATION AMENDMENT (DEBT AGREEMENTS) BILL 2007

SECTION 1 - GENERAL OUTLINE

1. The amendments to be made by this Bill are designed to improve the operation of debt agreements under Part IX of the *Bankruptcy Act 1966*.
2. The objects of this Bill are to:
 - (a) provide for enhanced regulation of debt agreement administrators;
 - (b) specify the duties of a debt agreement administrator;
 - (c) encourage creditors to make decisions based on the debtor's capacity to pay;
 - (d) provide more effective means of dealing with default by the debtor; and
 - (e) simplify, streamline and clarify a range of provisions to improve the operation of the legislation.
3. Schedule 1 contains provisions relating to the registration of debt agreement administrators. These amendments will commence on Royal Assent to enable existing and prospective administrators to be registered prior to 1 July 2007. This will ensure they are able to administer debt agreements which will be subject to new rules from that date – most importantly, the Official Receiver will not be able to accept debt agreement proposals nominating an unregistered debt agreement administrator from that date unless the administrator is administering no more than 5 active debt agreements.
4. Schedule 2 contains amendments which apply in relation to debt agreement proposals and resulting debt agreements from 1 July 2007. This Schedule contains all the amendments other than those relating to registration of administrators.

Financial Impact Statement

5. The amendments will increase the compliance and regulation responsibilities of the Insolvency and Trustee Service Australia (ITSA). This requires additional funding to be provided to ITSA. This funding is approximately \$0.2m in 2006-07 and approximately \$1.8m per year for 2007-08 and later years. Of this, approximately \$0.12m will be recovered in fees and charges in 2006-07 resulting from application and registration fees payable by debt agreement administrators. Approximately \$1.0m will be recovered in fees and charges in 2007-08 and later years resulting from application of the realisations charge to debt agreements (dealt with in the Bankruptcy (Estate Charges) Amendment Bill 2007), fees payable to the Official Trustee for administering debt agreements and ongoing application and registration fees payable by debt agreement administrators.

Regulation Impact Statement

Issues

6. Debt agreements were introduced in 1996 as a relatively low cost, informal and flexible alternative to bankruptcy. They were primarily intended for use by consumer debtors with lower levels of income and debt. They have proven to be very popular in recent years and there are currently about 8000 proposals made each year.

7. It was originally intended that debt agreements could be administered by anyone including the debtor personally or a friend or family member. However, in practice, most debt agreements are administered by a commercial administrator who charges a fee for the service. Debt agreement administrators are largely unregulated.

8. Although debt agreements now represent in the order of 20% of new personal insolvency administrations each year, the failure rate is high. About one-third are formally terminated and about one-third are not successfully completed but are not formally terminated.

9. Creditors have expressed a significant lack of confidence in the system which derives largely from their lack of confidence in debt agreement administrators who are involved in informing and advising debtors about their options as well as in administering the agreements once made. In particular, the concerns relate to the active promotion of debt agreements without proper consideration of other options, uncertainty about whether the debtor is making the best possible offer in the circumstances and the sustainability of offers made by many debtors. Administrators charge for setting up a debt agreement which provides a financial incentive to have the agreement accepted by creditors regardless of whether it is viable in the long term. Where the debt agreement fails, the debtor is usually in a worse financial position than at the start of the process.

10. There is currently no requirement for administrators to be licensed. However, since May 2003, the Inspector-General in Bankruptcy has had the power to declare an administrator ineligible for failing to perform their duties properly. Since May 2003, there have been 10 administrators declared ineligible which is significant when there are only about 40 active administrators currently operating.

Objectives

11. The broad objective of the amendments to be made by this Bill is to restore creditor confidence in the system by ensuring that debt agreements are used in appropriate cases and that there are capable administrators who can assist debtors and properly account for and handle money on behalf of creditors.

12. More particularly, the aims of the reforms are:

- to ensure debtors are properly informed and make a realistic assessment of what they can offer creditors;
- to ensure creditors are fully informed about offers made by debtors and to encourage creditors to view debt agreements as an offer by the debtor to reach a collective agreement based on their ability to pay rather than an attempt to meet the competing demands of individual creditors; and
- to ensure administrators have the necessary capabilities to perform their duties.

Options

13. In relation to regulation of administrators, the options which were considered were to:

- maintain the status quo which allows the Inspector-General to declare an administrator ineligible in certain circumstances; or

- introduce a registration requirement for administrators to ensure they have the necessary capabilities prior to administering agreements.

14. The first option has been in place since May 2003 and has not proven to be effective in addressing the significant community concerns which now exist. It allows anyone to administer debt agreements until they are found to be unsuitable. By the time the Inspector-General has concluded investigations and made a decision, debtors may have suffered considerable losses and creditors have not received the payments to which they are entitled. In addition, the current regime does not cover the pre-agreement activity undertaken by most administrators. Any failure to perform this pre-agreement activity properly contributes to the failure of debt agreements if the debtor is not properly informed. Administrators who are performing have suffered damage to their reputations based on the failure of those who have been found to be incompetent. There have been attempts to establish a Debt Agreement Practitioners Association to set standards but this has not been successful. Administrators recognise and support the need for a more formal regulatory framework which ensures only those with the required level of competence can enter the industry. In the absence of any suitable body to accredit or license these practitioners, this role is best undertaken by the Inspector-General and they will support this framework.

15. In addition to the registration framework, the amendments will also require an administrator to take fees proportionately over the life of the agreement and not in priority to creditors. This amendment is designed to remove the financial incentives currently inherent in the system which encourage administrators and their agents to focus on getting the debtor's proposal accepted by creditors without proper regard to the debtor's ability to afford the promised payments and awareness of all options available to them.

16. An alternative to legislative reforms relating to fees is to encourage administrators to change their practices in this area. The Insolvency and Trustee Service Australia (ITSA) has facilitated dialogue between administrators and creditors in an attempt to resolve this issue administratively. However, this has not been successful and, in practice, many agreements fail early with the administrator being the only person to have received any payments. In such cases, the creditor is entitled to recover the full amount of their debt and the debtor has made no progress in getting out of financial difficulty – in fact, the debtor is generally worse off because they now have less money to pay creditors and are likely to owe more to creditors as further interest charges will apply.

17. In addition to these legislative measures, ITSA will continue to work with practitioners and other stakeholders to improve the way in which debt agreements are operating in practice.

Impact

18. The registration framework proposed will involve some additional costs, the impact of which will be detailed in a revised Cost Recovery Impact Statement to be published by ITSA prior to 1 July 2007.

Consultation

19. The amendments were developed following a comprehensive review of the operation of debt agreements conducted by ITSA and the Attorney-General's Department in late 2005.

That review involved extensive public consultation. It also included targeted consultation with the key stakeholder groups with an interest in debt agreements – debt agreement administrators, creditors and financial counsellors. The Attorney-General announced details of the proposed reforms in March 2006 for further public consultation. The Attorney-General subsequently announced final details of the amendments on 27 July 2006.

20. There is widespread support for the proposals to license debt agreement administrators and set out more clearly their duties in the Act. Administrators themselves see this as the most effective means of improving professional standards within their industry.

21. Creditors and financial counsellors support the proposed rules relating to administrators' fees as they expect these reforms to remove the financial incentives which are currently acting against the interests of vulnerable debtors. Administrators have some concerns about the proposal to prevent them taking fees in priority to creditors on the basis that it could affect their cash flow and affect the sustainability of their businesses. However, many administrators are already operating in this way without any difficulty.

Implementation and review

22. ITSA proposes to continue working closely with key stakeholders, particularly administrators, to provide information and education about the new arrangements. That consultation commenced soon after the Attorney-General announced the amendments on 27 July 2006 and will continue until the amendments have been fully implemented. This will be necessary to ensure administrators have a comprehensive understanding of their duties and how these relate to the registration and compliance process. ITSA already facilitates discussions between administrators and creditors to identify areas where current practices could be changed or improved. The reforms will provide a focus for these discussions but they are not the complete solution. In tandem with implementing the reforms, ITSA will continue to facilitate this dialogue as many current issues are better dealt with by exchange of information and changes to practice rather than further regulation. For example, the reforms relating to administrators' fees will not address ongoing concerns that creditors are not getting value for money. Instead of attempting to prescribe or cap these fees, the concerns are better dealt with by creditors and administrators gaining an insight into mutual expectations and the services actually provided by administrators.

23. There will be a review of the effectiveness of these arrangements three years after they take effect. Typically, debt agreements are designed to run for a minimum of three years which means any earlier review would not properly consider the effect the reforms have had on returns to creditors and the rate of failure of debt agreements.

Section 2 - Policy objectives

24. The principal purpose of the amendments to be made by this Bill is to improve the operation of debt agreements under Part IX of the *Bankruptcy Act 1966*.

25. Debt agreements are an important feature of the personal insolvency system. They provide debtors with unmanageable debt who can afford to make some payments to creditors with an opportunity to do so. Many debtors want to consider making a debt agreement as it gives them an opportunity to recover a damaged financial reputation and avoid bankruptcy.

26. When debt agreements were introduced in 1996, it was envisaged that they could be administered by anyone including the debtor personally or a relative or friend. However, in practice, practically all debt agreements are administered by a fee-for-service provider who may or may not provide other services. This has led to calls for greater regulation of that industry to ensure vulnerable debtors are protected and proper standards of practice are met.

27. The reforms proposed are designed to ensure that debt agreements continue to be available as a viable means of dealing with unmanageable debt. They will ensure that debtors are properly informed about all options and that debt agreements are used by debtors for whom they are a suitable option. The reforms will also ensure that there are high calibre debt agreement administrators available to assist debtors in assessing their options and that debt agreement administrators also meet high standards in relation to handling money and administering the agreements.

28. The proposed reforms have been developed following a comprehensive review of the operation of debt agreements conducted by the ITSA and the Attorney-General's Department in late 2005. Details of the proposed reforms were announced on 29 March 2006 for further public consultation.

29. The overall purpose of the amendments is to:

- provide a system of registration of debt agreement administrators based on their ability to perform duties as set out in the Act;
- remove financial incentives for debt agreement administrators by ensuring they focus on developing proposals which are affordable and in the interests of both debtors and creditors;
- encourage creditors to make decisions on debt agreement proposals based on the debtor's capacity to pay rather than what rate of return they expect to receive;
- ensure creditors have sufficient reliable information to make informed decisions about debtors' proposals;
- provide more effective mechanisms for dealing with default by the debtor; and
- simplify, streamline and clarify the provisions to make debt agreements work more effectively.

30. The amendments will generally apply in relation to a debt agreement proposal given on or after 1 July 2007. The Inspector-General will be able to register administrators prior to that date (following Royal Assent).

Section 3 - Notes on sections

Section 1 - Short Title

31. The Bankruptcy Legislation Amendment (Debt Agreements) Bill 2007 (the Bill) proposes amendments to the *Bankruptcy Act 1966*. Section 1 of the Bill provides that, when the Bill has been enacted, it will be known as the *Bankruptcy Legislation Amendment (Debt Agreements) Act 2007*.

Section 2 - Commencement

32. Section 2 will provide a table setting out when the amendments to be made by the Bill will commence. Sections 1 to 3 and anything else not covered by this table will commence on the day on which the Bill receives Royal Assent.

33. Schedule 1 will commence on the day after the Bill receives Royal Assent.

34. Schedule 2 will commence on 1 July 2007.

Section 3 – Amendments

35. Proposed section 3 is a drafting device to allow all the amendments proposed to be made to the Act to be set out in Schedules. The items in the Schedules will amend the Act and will have effect according to their terms. Notes on the Schedule items follow.

SCHEDULE 1 – AMENDMENTS COMMENCING ON THE DAY AFTER ROYAL ASSENT

36. Item 1 will amend the definition of ‘approved form’ in section 5 of the Act. The purpose of this amendment is to clarify that these forms attract the operation of sections 46 and 46AA of the *Acts Interpretation Act 1901*.

37. Items 2 to 6 will amend section 12 to support the Inspector-General in Bankruptcy’s regulatory role in relation to debt agreement administrators.

38. Item 7 will amend section 20B by inserting new subsection 20B(7). Section 20B forms part of the separate regime that governs the handling and banking of monies by the Official Trustee. The new subsection will remove any doubt as to the authority of the Official Trustee to pay out debt agreement or personal insolvency agreement monies from the Common Investment Fund established pursuant to section 20B.

Registered trustees as debt agreement administrators

39. Items 8 to 11 will amend section 155A which relates to applications for registration as a trustee. It is possible for a registered trustee to administer debt agreements. There will be no requirement for a trustee to be separately registered as a debt agreement administrator to do this. However, the conduct of a registered trustee who administers debt agreements should be relevant to their registration as a trustee. Section 155A details the requirements which must be met for a person to be registered as a trustee.

40. Items 8 and 10 will amend paragraphs 155A(2)(e) and 155A(4)(d) to provide that a person cannot become a registered trustee if that person has had his or her registration as a trustee cancelled within the previous 10 years on the basis that he or she failed to properly carry out the duties of a debt agreement administrator.

41. Items 9 and 11 will amend paragraph 155A(2)(f) and subsection 155A(4) to provide that a person cannot become a registered trustee if that person has had his or her registration as a debt agreement administrator cancelled under section 186MA within the previous 10 years on the basis that he or she failed to properly carry out the duties of a debt agreement administrator.

42. Item 12 will insert paragraph 155H(1)(fa) to provide that an Inspector-General can require a registered trustee to show cause why he or she should continue to be registered where the Inspector-General believes that, if the trustee is or was the administrator of a debt agreement, the trustee has failed to properly carry out the duties of a debt agreement administrator.

43. Item 13 will insert a new definition of 'basic eligibility test' in subsection 185(1). This is relevant for the purposes of section 186A which will define who is eligible to apply for registration as a debt agreement administrator.

44. Item 14 will insert a new definition of 'debt agreement activities' in subsection 185(1). This is relevant for the purposes of section 186G which will make it a condition of a company's registration as a debt agreement administrator that each individual who has overall management responsibility for the company's debt agreement activities must be a registered debt agreement administrator (see paragraph 74).

45. Item 15 will insert a new definition of 'externally-administered body corporate' in subsection 185(1) (see paragraph 54). This is relevant for the purposes of subsection 186A(3) which sets out the basic eligibility test for a company to be registered as a debt agreement administrator. The definition will provide that the term has the same meaning as in the *Corporations Act 2001* and is intended to cover all forms of external administration relating to a company's insolvency.

46. Item 16 will insert a new definition of 'insolvent under administration' in subsection 185(1). This is relevant to the basic eligibility test for an individual who wishes to be registered as a debt agreement administrator (see paragraph 52)

47. Item 17 will insert a new definition of 'registered debt agreement administrator' in subsection 185(1).

48. Item 18 will insert a new heading 'Division 7 – General provisions relating to debt agreements' to reflect the new structure of Part IX.

Registration of debt agreement administrators

49. Item 19 will insert a new heading 'Division 8 – Registration of debt agreement administrators etc' immediately before the provisions relating to registration of

administrators. The new Division also includes all the provisions relating to registration of administrators.

50. The new Division 8 will set out the process for becoming registered as a debt agreement administrator. The key features of the registration system will be:

- an administrator who is administering more than 5 active debt agreements at any time will be required to be a registered debt agreement administrator;
- a registered administrator can be either an individual or a company;
- a person (including a company) who passes the basic eligibility test can apply for registration;
- registration will be on the basis of demonstrated ability to perform the duties of a debt agreement administrator;
- decisions on registration will be made by the Inspector-General in Bankruptcy;
- registration will last for three years and can be renewed;
- there will be fees payable for applying to become registered and for maintaining registration every three years; and
- the Inspector-General will be able to cancel a person's registration in certain circumstances.

Section 186A – basic eligibility test

51. Section 186A will set out the basic eligibility test which must be passed by a person wishing to apply for registration as a debt agreement administrator. These requirements are based on existing regulation 9.04 which provides for circumstances in which a person is ineligible to act as a debt agreement administrator. That regulation will be repealed once the eligibility and registration requirements are moved into the Act.

52. Subsection 186A(1) will set out the basic eligibility test for individuals. It will provide that a person passes the test at a particular time unless:

- (a) at any time during the previous 10 years the person was an insolvent under administration (defined in subsection 185(1)) or a party (as debtor) to a debt agreement; or
- (b) at any time during the previous 10 years, the individual was convicted of an offence involving fraud or dishonesty; or
- (c) at the time, the person is disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*; or
- (d) at any time during the previous 10 years, the person's registration as a liquidator was cancelled under subsection 1292(2) or (3) of the *Corporations Act 2001* – those provisions generally relate to failure to properly perform the duties of a liquidator; or
- (e) at any time during the previous 10 years, the person's registration as a trustee ceased under section 155I for a reason specified in paragraph 155H(1)(a), (aa), (b), (e), (f), (fa) or (g); or
- (f) at any time during the previous 10 years, the person's registration as a debt agreement administrator was cancelled under section 186K on the ground that they contravened a condition that applied in relation to that registration or they failed to properly carry out the duties of an administrator in relation to a debt agreement; or

- (g) at any time during the previous 10 years, the individual's registration as a debt agreement administrator was cancelled as a result of an order under section 185ZCA; or
- (h) at any time during the previous 10 years, a declaration was made under section 186M in relation to the person – that is a declaration that an administrator who was not registered (for example, where the person was administering not more than 5 agreements) is ineligible to be an administrator; or
- (i) at any time during the previous 10 years, a determination in relation to the person was made under subregulation 9.06(3) of the *Bankruptcy Regulations 1996* as in force before the commencement of this section – that is a declaration under the regulatory regime which applies until these amendments take effect that an administrator is ineligible to be an administrator.

53. Subsection 186A(2) will provide that subparagraph (1)(a)(i) does not apply in relation to a bankruptcy that has been annulled under section 153B. This will mean that a person whose bankruptcy was annulled by the Court on the basis that the person ought not to have been made bankrupt will not be prevented from applying for registration as a debt agreement administrator.

54. Subsection 186A(3) will set out the basic eligibility test for companies. It will provide that a company passes the test at a particular time unless:

- (a) at any time during the previous 3 three years, the company was an externally administered body corporate – that term is defined in subsection 185(1); or
- (b) at any time during the previous 10 years, the company was convicted of an offence involving fraud or dishonesty; or
- (c) at any time during the previous 3 years, the company's registration as a debt agreement administrator was cancelled under section 186L because the company contravened a condition that applied in relation to that registration or the company failed to properly carry out the duties of an administrator in relation to a debt agreement; or
- (d) at any time during the previous 10 years, the company's registration as a debt agreement administrator was cancelled as a result of an order under section 185ZCA; or
- (e) at any time during the previous 10 years, a declaration was made under section 186M in relation to the company – that is a declaration that an administrator who was not registered (for example, where the person was administering not more than 5 agreements) is ineligible to be an administrator; or
- (f) at the time, a director of the company does not pass the basic eligibility test; or
- (g) at any time during the previous 10 years, a determination in relation to the company was made under subregulation 9.06(3) of the *Bankruptcy Regulations 1996* as in force before the commencement of this section.

Section 186B – Application for registration as a debt agreement administrator

55. Section 186B will set out the process for applying for registration. Subsection (1) will provide that an application may be made by an individual or a company. Other entities (such as partnerships and trusts) will not be able to become registered. Subsection (2) will provide that an application must be in the approved form, be accompanied by such information and documents (if any) as are specified in the regulations and be accompanied by the appropriate

application fee. If the application is to renew an existing registration, the application must be made before the expiry of the existing registration.

56. Paragraph 186B(2)(c) provides for the payment of an application fee. The amount of that fee will be determined by the Minister by legislative instrument. This is consistent with other fees and charges payable under bankruptcy legislation. Fees and charges are determined on a cost recovery basis and will be reviewed at least biennially. This regime was introduced for all fees and charges payable under bankruptcy legislation from 1 July 2006 – the amendments were made by the *Bankruptcy Legislation Amendment (Fees and Charges) Act 2006*.

Section 186C – Inspector-General must approve or refuse to approve registration application

57. Section 186C will provide that the Inspector-General must approve or refuse to approve an application for registration within 60 days of receiving it.

58. Subsection 186C(2) will deal with new applications from individuals. It will provide that the Inspector-General must approve an application where the applicant passes the basic eligibility test, has the ability (including the knowledge) to satisfactorily perform the duties of a debt agreement administrator and has such qualifications and experience (if any) as are prescribed by the regulations. Otherwise, the Inspector-General must refuse to approve the application.

59. Subsection 186C(3) will deal with applications for renewal of an individual's registration. In those cases, there will be no new testing of the applicant's ability, knowledge or qualifications.

60. Subsection 186C(4) will deal with new applications from companies. It will provide that the Inspector-General must approve an application where the applicant passes the basic eligibility test and has the ability to satisfactorily perform the duties of a debt agreement administrator. Otherwise, the Inspector-General must refuse to approve the application.

61. Subsection 186C(5) will deal with applications for renewal of a company's registration. As with individuals, there will be no new testing of the applicant's ability.

62. Subsection 186C(6) will provide that in deciding whether to approve an application for registration, the Inspector-General must have regard to any relevant guidelines in force under section 186Q. These guidelines, if issued, will be a legislative instrument. They may, for example, set out further details relating to the application process and how the Inspector-General will make an assessment of the applicant's ability (including knowledge in relation to individuals). As these guidelines are explicitly made relevant to making decisions on applications for registration, they will also be relevant in reviewing those decisions.

63. Subsection 186C(7) will provide that if the Inspector-General refuses to approve an application for registration, the Inspector-General must give the applicant a written notice of the refusal and the reasons for it.

64. Subsection 186C(8) will provide that a decision by the Inspector-General to refuse to approve an application for registration is reviewable by the Administrative Appeals Tribunal.

65. Subsection 186C(9) will allow the Inspector-General to impose conditions on a person's registration. These may be relevant where, for example, there is some doubt as to the applicant's ability in a particular area but the Inspector-General does not believe this is sufficient grounds to refuse the application.

66. Subsection 186C(10) will require the Inspector-General to notify the applicant in writing if conditions are imposed. Subsection 186C(11) will provide that a decision under subsection (9) is reviewable by the Administrative Appeals Tribunal.

Section 186D – Registration as a debt agreement administrator

67. Section 186D will deal with the consequences of the Inspector-General approving an application for registration as a debt agreement administrator. These are based on the system already in place for registered trustees.

68. Subsection 186D(1) will require the payment of a registration fee. The Inspector-General will not register the applicant unless that fee has been paid.

69. Subsection 186D(2) will require the Inspector-General to register the applicant as a debt agreement administrator by entering their details in the National Personal Insolvency Index (NPII). The regulations will prescribe which details relating to the applicant are to be recorded in the NPII.

70. Subsection 186D(3) will require the Inspector-General to give the applicant a certificate of registration.

Section 186E – Duration of registration as a debt agreement administrator

71. Section 186E will provide that, where a person is first registered as a debt agreement administrator, that registration will last for 3 years beginning when the person's details are entered on the NPII. Where the registration is by way of renewal, the registration will remain in force for 3 years beginning immediately after the administrator's existing renewal expires.

Section 186F – Conditions of registration – general

72. Section 186F will allow the Inspector-General to impose specified conditions on a person's registration as a debt agreement administrator. The Inspector-General must do so by giving written notice to the administrator. This is consistent with the provisions applying to registered trustees.

73. The ability to impose conditions pursuant to section 186F or subsection 186C(9) gives the Inspector-General some flexibility where an administrator broadly meets the requirements to be registered or, having been registered, engages in conduct which is inconsistent with their duties but not to the extent required to cancel their registration. Examples of conditions would include further training in a particular area in which the administrator's conduct is deficient, a bar on administering new debt agreements whilst remedial action is being taken to address any deficiencies or providing regular information to the Inspector-General about the progress of debt agreements (for example, where the administrator has failed in his or her duties to report to creditors).

74. Section 186G will provide that it must be a condition of registration of a company as a debt agreement administrator that each individual who takes overall responsibility for the company's debt agreement activities shall be either a registered debt agreement administrator or a registered trustee in respect of which there is no declaration of ineligibility in force.

75. The purpose of this provision is to ensure that a suitably qualified and experienced person is responsible for the debt agreement activities of a debt agreement administrator company.

Section 186H – Application to change or remove registration conditions

76. Section 186H will apply where the Inspector-General has imposed conditions on an administrator's registration under subsection 186F(2). Subsection 186H(1) will allow the administrator to apply to the Inspector-General for the conditions to be changed or removed. This may be appropriate, for example, where the conduct which gave rise to the imposition of conditions has been rectified and the Inspector-General is satisfied that it is unlikely to occur again. It may also be appropriate where the conditions related to the administrator's knowledge of a particular aspect of debt agreement administration and the administrator has taken steps to acquire or update that knowledge.

77. Subsection 186H(2) will require an application to change or remove conditions to be in the approved form and be accompanied by such information and documents (if any) as are specified in the regulations.

78. Subsection 186H(3) will require the Inspector-General, having considered an application under subsection (1), to decide that the conditions should not be changed or removed or decide that the conditions should be modified. The term 'modifications' in this section is defined in section 5 of the Act. By virtue of that definition a decision by the Inspector-General to modify a condition may include a decision to remove a condition completely.

79. Subsection 186H(4) will provide that, where the Inspector-General decides that the conditions should not be changed, the Inspector-General must give written notice of that decision to the administrator along with reasons for that decision.

80. Subsection 186H(5) will provide that, where the Inspector-General decides that the conditions should be modified, the Inspector-General must give written notice of that decision to the administrator along with reasons for that decision.

81. Subsection 186H(6) will provide that a decision of the Inspector-General under this section is reviewable by the Administrative Appeals Tribunal.

Section 186J – Surrender of registration as a debt agreement administrator

82. Section 186J will allow a registered debt agreement administrator to request that the Inspector-General accept the surrender of their registration. This may occur, for example, where the administrator wishes to retire or sell their business.

83. Subsection 186J(2) will require the request to be made to the Inspector-General in writing. Subsection 186J(3) will require the request to be made in the approved form.

84. Subsection 186J(4) will provide that the person ceases to be registered as a debt agreement administrator only when the Inspector-General accepts the request. The surrender of an administrator's registration can have serious consequences if not properly managed. The Official Trustee will become the administrator by default of all active debt agreements unless and until another administrator is appointed. However, it will be important to ensure the agreements are being properly managed and all records relating to those agreements have been properly kept to ensure a seamless administration for debtors and creditors. Prior to accepting an administrator's request under this section, the Inspector-General will need to be satisfied that appropriate arrangements are in place to ensure continuity of the administrations (which may include pre-arranged transfer of active agreements to another administrator rather than the Official Trustee). The Inspector-General may also seek to establish that the administrator is not making the request to avoid having their registration cancelled (for example, where the administrator has not properly carried out their duties in relation to debt agreements on hand). There is likely to be some onus placed on the administrator to satisfy the Inspector-General that their affairs are in proper order before a request under this section will be accepted.

85. Subsection 186J(5) will provide that, where the Inspector-General accepts an administrator's request under this section, the Inspector-General must remove the person's registration details from the NPII. Once the accept is requested, the person is also required to surrender to the Inspector-General their certificate of registration – subsection 186N(1) (see paragraph 103 for further explanation of this requirement).

Section 186K – Cancellation of an individual's registration as a debt agreement administrator

86. Section 186K will set out the circumstances in which an individual's registration as a debt agreement administrator will be cancelled and the process for such cancellation.

87. Subsection 186K(2) will provide that the Inspector-General must cancel an individual's registration if that person no longer passes the basic eligibility test (see subsection 186A(1)). Cancellation will be mandatory in these circumstances. This is because the person no longer meets the fundamental requirements to be registered (for example, the person has become bankrupt or is convicted of an offence involving fraud or dishonesty).

88. Subsection 186K(3) will set out other circumstances in which the Inspector-General *may* cancel an individual's registration as an administrator. It will also set out the process to be followed in these circumstances. The process is similar to that applying to registered trustees and is based on the existing process for declaring a debt agreement administrator ineligible under regulation 9.06. The circumstances which will trigger this process are:

- (a) the individual no longer has the ability (including the knowledge) to satisfactorily perform the duties of a debt agreement administrator; or
- (b) the individual has failed to properly carry out the duties of a debt agreement administrator; or
- (c) the individual no longer has the qualifications or experience prescribed by the regulations for the purposes of subparagraph 186C(2)(e); or
- (d) the individual has contravened a condition of their registration.

89. In those circumstances, the Inspector-General may ask the individual to give a written explanation as to why they should continue to be registered. Subsection 186K(4) will provide that, if the Inspector-General does not receive an explanation within 28 days or the explanation given is unsatisfactory, the Inspector-General may cancel the individual's registration as an administrator. The Inspector-General will also have the option of imposing conditions on the person's registration under section 186F as an alternative to cancelling their registration.

90. Subsection 186K(5) will require the Inspector-General to give the individual a written notice of a cancellation under subsection (2) or (4) along with reasons for that decision.

91. Subsection 186K(6) will provide that, where the Inspector-General cancels an individual's registration under this section, the Inspector-General must remove their registration details from the NPII.

92. Subsection 186K(7) will provide that, in deciding whether or not to cancel an individual's registration, the Inspector-General may have regard to any guidelines in force under section 186Q. These guidelines may provide further detail as to the process for making decisions and the matters to be taken into account in determining whether the circumstances described in subsection (3) exist along with the seriousness of those circumstances. The guidelines would also be relevant in reviewing any decision to cancel an individual's registration.

93. Subsection 186K(8) will provide that a decision to cancel an individual's registration as a debt agreement administrator will be reviewable by the Administrative Appeals Tribunal.

Section 186L – Cancellation of a company's registration as a debt agreement administrator

94. Section 186L will set out the circumstances in which a company's registration as a debt agreement administrator will be cancelled and the process for such cancellation.

95. Subsection 186L(2) will provide that the Inspector-General must cancel a company's registration if that person no longer passes the basic eligibility test (see subsection 186A(3)). Cancellation will be mandatory in these circumstances. This is because the company no longer meets the fundamental requirements to be registered (for example, the company becomes an externally-administered body corporate or is convicted of an offence involving fraud or dishonesty or a director of the company no longer passes the basic eligibility test).

96. Subsection 186L(3) will set out other circumstances in which the Inspector-General *may* cancel a company's registration as an administrator. It will also set out the process to be followed in these circumstances. The circumstances which will trigger this process are:

- (a) the company no longer has the ability to satisfactorily perform the duties of a debt agreement administrator; or
- (b) the company has failed to properly carry out the duties of a debt agreement administrator; or
- (c) the company has contravened a condition of the company's registration.

97. In those circumstances, the Inspector-General may ask the company to give a written explanation as to why it should continue to be registered. Subsection 186L(4) will provide

that, if the Inspector-General does not receive an explanation within 28 days or the explanation given is unsatisfactory, the Inspector-General may cancel the company's registration as an administrator. The Inspector-General will also have the option of imposing conditions on the company's registration under section 186G as an alternative to cancelling their registration.

98. Subsection 186L(5) will require the Inspector-General to give the company a written notice of a cancellation under subsection (2) or (4) along with reasons for that decision.

99. Subsection 186L(6) will provide that, where the Inspector-General cancels a company's registration under this section, the Inspector-General must remove its registration details from the NPII.

100. Subsection 186L(7) will provide that, in deciding whether or not to cancel a company's registration, the Inspector-General may have regard to any guidelines in force under section 186Q. These guidelines may provide further detail as to the process for making decisions and the matters to be taken into account in determining whether the circumstances described in subsection (3) exist along with the seriousness of those circumstances. The guidelines would also be relevant in reviewing any decision to cancel a company's registration.

101. Subsection 186L(8) will provide that a decision to cancel a company's registration as a debt agreement administrator will be reviewable by the Administrative Appeals Tribunal.

Section 186M – Inspector-General may declare a person ineligible to act as an administrator

102. Section 186M will allow the Inspector-General to declare that a debt agreement administrator who is not registered and is not a registered trustee is ineligible to administer debt agreements. This may occur in relation to an administrator who is not required to be registered because he or she is administering not more than 5 debt agreements. The process to be followed in these cases mirrors that which applies in relation to cancellation of a registered administrator's registration.

Section 186N – Return of certificate of registration

103. Section 186N will require a person (being an individual or a company) who is a registered debt agreement administrator to return their certificate of registration to the Inspector-General where they have surrendered their registration or their registration is cancelled. The section will provide that failure to return the certificate in these circumstances is an offence.

Section 186P – Cessation of registration as a debt agreement administrator – no refund of fees

104. Section 186P will provide that a person (being an individual or company) whose registration as a debt agreement administrator ceases is not entitled to a refund of any part of the fees paid in relation to that registration.

Section 186Q – Guidelines relating to Inspector-General's powers

105. Section 186Q will allow the Inspector-General to issue guidelines for the purposes of a number of provisions relating to registration of debt agreement administrators. These guidelines will be in the form of a legislative instrument and will be relevant to making decisions under:

- subsection 186C(6);
- subsection 186K(7);
- subsection 186L(7); and
- subsection 186M(5) – declaring an unregistered administrator ineligible.

106. The guidelines will attract the provisions of the *Legislative Instruments Act 2003* including the requirement to register them on the Federal Register of Legislative Instruments, the need for consultation as they are developed and the automatic ‘sunsetting’ after 10 years if they are not reissued.

Fees and charges – section 316

107. Section 316 empowers the Minister to make legislative instruments determining the fees payable for a range of purposes under the Act. These fees are determined on a cost recovery basis and will be reviewed at least biennially to ensure that the fees are based on the cost of providing the services to which they relate.

108. Item 20 will amend section 316 to include a power for the Minister to determine, by legislative instrument, fees payable in relation to registration of debt agreement administrators on the same basis as other fees payable under the Act.

Transitional provision – approval of form

109. Items 21 to 23 will provide that the modification of the definition of ‘approved form’ will not affect the continuity of any pre-existing approvals; that the amendments to section 20B will apply to payments made before, at or after the commencement of the amendment; and that certain provisions in respect of the registration system in Schedule 1 will have effect as if the provisions in Schedule 2 relating to the duties of a debt agreement administrator had commenced at the time that these transitional provisions took effect.

SCHEDULE 2 – AMENDMENTS COMMENCING ON 1 JULY 2007

110. Item 1 will amend the definition of “administrator” to reflect the changes to the processes for replacing an administrator where the existing administrator dies, surrenders his or her registration or has his or registration cancelled. These changes will be effected by the insertion of the new section 185ZB and are explained further in paragraphs 235 to 239.

111. Item 2 will insert a new subsection 12(1E) which will provide that, if a prospective administrator signs a certificate for the purposes of subsection 185C(2D) then, notwithstanding that that person is not yet the administrator of the agreement and may never become the administrator, the administrator’s conduct in relation to the certificate is taken to be ‘conduct of an administrator that relates to a debt agreement’.

112. The effect of this amendment will be that breaches of the administrator’s obligations

in respect of the certificate will then attract the operation of paragraph 12(1)(bb) which provides that the Inspector-General may conduct such investigations and enquiries as he or she thinks fit in respect of such conduct.

113. This item will also insert a new subsection 12(1F) which provides that conduct in respect of the duty of an administrator to notify the Official Receiver that an agreement has ended (as provided for in the new subsections 185N(5) and (6) as inserted by item 49) is also deemed to relate to the conduct of an administrator that relates to a debt agreement, notwithstanding that this obligation only arises once an agreement is no longer in force.

114. Breaches of this duty will therefore also attract the operation of various provisions dealing with breaches of the duties of administrators.

115. Items 3 and 4 will amend subsections 155A(2) and 115A(4) to provide that a person must not be registered as a trustee in the event that he or she has had their registration as a debt agreement administrator cancelled, within 10 years before making the application for registration, as a result of an order under section 185ZCA. Section 185ZCA is inserted by item 67 and empowers the court to direct that the Inspector-General cancel a person's registration as a debt agreement administrator.

116. The new sections 185EA and 185EC (which are not located in Division 1 of Part IX) are being inserted in substitution of the former sections 185A and 185B (which are located in Division 1). A consequence of this is that the current title for Division 1 of Part IX no longer accurately describes the scope of the Division. Item 5 amends the title to the more general title "Introduction".

117. Items 6 and 15 amend the structure of section 185 by removing the separation of the section into subsections. They effect no substantive change to the law.

118. Item 7 will define the term "account-freezing notice" as a notice under the new subsection 186LB(2). The effect of that provision is explained further at paragraphs 247 to 254.

119. Item 8 will insert a new definition of 'applicable deadline' that replaces the former subsection 185(2).

120. The former subsection provided for a 25 working day period for processing a proposal in respect of a debt agreement. The new definition removes the reference to working days, the calculation of which depended on the public holidays in the bankruptcy district in which the relevant proposal was accepted for processing. The debtor and creditors in respect of a proposal may be situated in a location in which different public holidays apply. The definition did not therefore adjust processing periods for the benefit of creditors or debtors, but rather for the Official Receiver. The new provision simplifies the applicable time period to 35 days, unless the Official Receiver accepts the proposal in December, in which event a 42 day processing period applies.

121. The new definition alters the time period for voting upon a termination proposal from 25 working days to 14 days or 21 days if the proposal is given in December. The consideration by creditors of a termination proposal is significantly more straightforward than the consideration of a proposal for the establishment or variation of a debt agreement. The

current voting period of 25 working days for terminations is unnecessarily long and extends the life of debt agreements that should be promptly brought to an end.

122. The definition of ‘applicable deadline’ is relevant to sections 185EC, 185MC and 185PC in determining the time at which certain proposals to establish, vary or terminate an agreement are deemed to have been accepted.

123. Item 9 will insert the new definition of ‘bank’. This term is used in the new sections 185LD and 186LA to 186LE which deal with bank accounts maintained by debt agreements. The definition is identical to that provided for in subsection 169(5) in respect of bankruptcy trustee trust accounts.

124. Item 10 will repeal the current definition of ‘debtor’. The current definition is used as a mechanism to ensure that only insolvent debtors are able to propose the establishment of a debt agreement. This requirement will now form part of the test in subsection 185C(1), as explained in paragraph 132. This definition is therefore being repealed as being redundant. Its repeal will effect no substantive change to the current law.

125. Item 11 will define the term ‘designated 6-month arrears default’ as having the meaning provided for in the new subsection 185LC(3). The effect of that provision is explained below at paragraph 191.

126. Item 12 will amend the definition of ‘frozen debt’. This amendment is part of a group of amendments that ensures that the class of creditors who can potentially be bound by an agreement and be subject to the stay on proceedings once an agreement is established is identical to the class of creditors who are provided the opportunity to vote on a debt agreement proposal and who are prevented from enforcing their agreement during the processing of the proposal. The amendment does so by making reference to the defined term ‘provable debt’ which is used throughout the Part.

127. Item 13 will amend the definition of ‘provable debt’ currently used throughout Part IX. This item will amend the definition of this term so that it only encompasses certain debts in existence at the time that a proposal to establish an agreement is recorded on the NPII.

128. The definition prior to these amendments refers to the time at which a subsequent debt agreement was registered on the NPII. This resulted in the anomalous situation whereby creditors whose debts arose after the acceptance of the proposal for processing would not be included in the list of creditors provided by the debtor and would generally not have the opportunity to vote on the proposal but would subsequently be bound by the subsequent agreement, have their debts released and be subject to the stay upon proceedings during the life of the agreement.

129. Item 14 will amend the definition of ‘working day’ from a definition that applied specifically to proposals to a definition of more general application throughout the Part.

130. The effect of item 15 is explained at paragraph 117.

131. Item 16 will repeal sections 185A and 185B. These sections are replaced by sections 185EA and 185EB which are explained at paragraphs 158 to 161 and paragraphs 163 to 169.

132. Item 17 will amend subsection 185C(1) by inserting a requirement that a debtor be insolvent in order to file a debt agreement proposal. This complements the repeal of the definition of ‘debtor’ explained at paragraph 123 and represents no substantive change to the current law.

133. Item 18 will insert a new paragraph in subsection 185C(2) which will require a debt agreement proposal to be in the approved form. This requirement will provide more consistency in the information given to creditors many of whom are asked to vote on thousands of proposals each year and will ensure that debtors address all relevant issues as part of any proposal.

134. Item 19 will insert new paragraphs (d) to (j) in subsection 185C(2). These paragraphs specify certain mandatory terms which must be contained in any proposal for a debt agreement.

135. The new paragraph (d) will require all proposals to provide that all provable debts in relation to an agreement rank equally. Currently a debt agreement may provide for the distribution of funds to creditors other than in proportion to the debts owed to them. This creates additional complexity in the terms of debt agreements and in the subsequent administration of those agreements. This complexity adds to the costs of administration. It also creates an opportunity for creditors with larger debts and therefore more voting power to require agreements to provide them with more than their proportional share of any distributions, thereby unfairly disadvantaging small creditors. The amendments will address these concerns.

136. The new provisions will also specify that a creditor cannot receive more than 100c in the dollar. The new paragraph (e) is based on section 107 which currently applies to bankruptcies. It is designed to address problems that may arise if payments are also made to creditors outside of the debt agreement.

137. The new paragraph (f) provides that the amount of a provable debt in relation to the agreement is to be ascertained as at the time when the acceptance for processing of the original proposal to establish the debt agreement was recorded on the NPIL. This amendment will remove the necessity for administrators to recalculate the amounts owed to each creditor over the life of the agreement, by effectively freezing the quantum of their claims at the time the acceptance of the original proposal was recorded on the NPIL.

138. The new paragraphs (g) and (h) will specify the manner in which the entitlement of secured creditors to any distributions must be calculated. The effect of these paragraphs is that a secured creditor’s entitlement to a distribution is limited to the unsecured portion of their claim. This must be read subject to the new paragraph (f).

139. Item 20 will insert additional subsections into section 185C in relation to the contents of a debt agreement proposal.

140. The new subsection (2A) will provide that a debt agreement cannot provide for the transfer of non-monetary property to a creditor. The amendment is designed to ensure that creditors are not forced to take non-monetary payments under an agreement. Agreements that provide for payment of non-monetary amounts are also undesirable as they may provide an opportunity for avoiding the operation of those provisions dealing with remuneration and the

payment of interest charge and realisations charge. Amending the Part to address the issues surrounding non-monetary payments would add an unnecessary level of complexity to the regime. These amendments will continue to allow the debtor to make a proposal for the transfer of property to an administrator who can then realise that property for the benefit of creditors.

141. The new subsection (2B) will provide that a proposal must be accompanied by an explanatory statement in the approved form. This document will provide a vehicle for debtors to state certain relevant information and explain why they believe their proposal should be accepted. This explanation will be provided to creditors as part of the processing of the proposal (as provided for in the new section 185EA inserted by item 32). Although the document is a separate form it may in practice form part of the proposal document (as provided for in the new subsection (2C) or part of the debtor's Statement of Affairs (as provided for in the new subsections 185D(3) and 185D(4) inserted by item 24).

142. The new subsection (2D) will provide that an administrator (other than a person administering their own proposal – see the new section 185E(1) at item 25 which deals with the presentation of proposals by such debtors) must certify that the debtor has received a copy of the prescribed information, that the administrator has reasonable grounds for believing that the debtor will be able to discharge their obligations under the agreement, that the administrator has reasonable grounds for believing that the information required to be set out in the debtor's statement of affairs has been so set out and that the information required to be set out in the debtor's subsection (2B) explanatory statement has been so set out. This amendment is designed to ensure that debtors are properly informed, are entering into an agreement that they will be able to comply with and have properly completed the relevant forms.

143. The new subsection (2E) will provide that there can not be joint debt agreement proposals. Significant injustice may result from joint agreements where an agreement is terminated due to default by one debtor but not the other. The complexities arising from the existence of joint proposals impede the objective of the debt agreement regime of providing a simple low cost solution to debtors who wish to avoid bankruptcy.

144. The new subsection (2F) provides that there may be conditional proposals, as opposed to conditional agreements. A proposal may specify a condition that must be satisfied within 7 days of the deadline for approval by creditors of the proposal. If a proposal is conditional then, notwithstanding that creditors may have purported to accept the proposal, an agreement will not come into effect if the condition is not met. The primary objective of this provision is to enable to the submission of proposals that are conditional upon the acceptance of another proposal.

Example: Two spouses may concurrently file separate debt agreement proposals. They may do so as they are seeking to relieve the family unit from the burden of their shared joint debts. The entry of only one of them into a debt agreement will not achieve this outcome. Each proposal may state that it is conditional upon the other's proposal being accepted by creditors. One spouse's proposal is accepted but the other's is not. Neither proposal results in the establishment of a debt agreement.

145. The time period for satisfying the condition is limited to 7 days to reduce the period in which there is any uncertainty in respect of the outcome of the processing of the proposal.

146. Item 21 inserts the new subsection 185C(3A). This amendment provides that the remuneration of a debt agreement administrator is to be specified in the debt agreement. It must be expressed as a fixed percentage of the total amounts payable by the debtor under the agreement in respect of provable debts. The debt agreement administrator is entitled to take as remuneration the specified percentage of each payment made by the debtor.

147. Item 22 will insert a new subsection 185C(4A) which will provide that a bankruptcy annulled pursuant to section 153B is not taken into account in determining whether a debtor is prohibited pursuant to subparagraph 185C(4)(a)(i). A debtor is currently prohibited by subparagraph 185C(4)(a)(i) from giving a debt agreement proposal to the Official Receiver in the event that they have been a bankrupt at any time in the previous 10 years. Section 153B provides that the court can annul a bankruptcy if the relevant bankruptcy order should not have been made or the relevant debtor's petition should not have been presented or accepted. In circumstances where a person was bankrupt but the bankruptcy was annulled by the court because they should not have become bankrupt, it is appropriate that that debtor not be subsequently precluded from proposing a debt agreement.

148. Item 23 will provide any affected creditor with the right to inspect or obtain a copy of the debtor's statement of affairs. Creditors currently have the right to access this document where a debtor is subject to bankruptcy, a controlling trustee authority or a personal insolvency agreement.

149. Item 24 will insert the new subsection 185D(3) which creates an equivalent provision to that currently contained in subsection 55(11), which provides that those parts of the statement of affairs that are stated as not being available to the public cannot be accessed by a creditor. These parts of the statement of affairs may contain personal information about the debtor or the debtor's family. The new 185D(4) is also inserted which creates an equivalent provision to that currently contained in subsection 55(12), which provides that access can also be denied to parts of a statement of affairs if doing so may jeopardise a person's safety. Item 24 will also insert new subsections 185D(5) which provides that the explanatory statement accompanying a proposal as provided for in the new subsection 185C(2B) may be set out in the same document as the debtor's statement of affairs. This will enable the avoidance of unnecessary duplication between the two documents.

150. Item 25 will substitute a new subsection 185E(1) which provides that the Official Receiver must ensure that a debtor who is their own administrator has received a copy of the prescribed information. In respect of such debtors, the current law is retained as stated in the former subsection 185E(1). For circumstances where the debtor is not their own administrator the new subsection 185C(2D) applies which will impose an equivalent obligation on the administrator.

151. Item 26 will replace the former subsection 185E(2) with a new subsection 185E(2). The effect of the amendment will be to require the Official Receiver to be satisfied that the requirements of section 185C as amended have been complied with before accepting a debt agreement proposal for processing. The new subsection will also require the Official Receiver to be satisfied that the Statement of Affairs accompanying the proposal is in order.

152. Item 27 will insert a new subsection 185E(2AA) which will provide that the Official Receiver must not accept a proposal for processing unless the proposal was given to the

Official Receiver within 14 days after the day on which the debtor signed the proposal. The purpose of this amendment is to minimise the likelihood that the information provided to the Official Receiver and creditors no longer accurately reflects the affairs of the debtor. The actual date that the debtor signs the proposal is the relevant date for the purpose of this section. It is irrelevant that the debtor or a third party dates the document other than at the date that the document was signed.

153. Item 28 will repeal the current subsection 185E(2A) and replace it with a new subsection 185E(2A). This new subsection will provide that if a proposal specifies an administrator who is not a registered administrator and is not a registered trustee then the Official Receiver may only accept the proposal for processing if the administrator passes the basic eligibility test. This may occur when a debtor nominates a person who administers or is nominated to administer not more than 5 agreements. Such persons are not required to be registered.

154. Item 29 will insert the new subsections 185E(2B) and 185E(2C), which provide that the Official Receiver cannot accept a proposal for processing unless the named administrator is either a registered administrator, a registered trustee who has not been declared to be ineligible to administer debt agreements or the administrator of 5 or less debt agreements (and would not become the administrator of more than 5 agreements if creditors accepted the proposals submitted for processing) and has not been declared ineligible.

155. Item 30 will amend subsection 185E(5) to clarify that the reference to processing a proposal is a reference to processing the proposal in accordance with section 185EA.

156. Item 31 will repeal the former subsection 185E(6) which specified the information that a creditor must send to the Official Receiver when signifying their acceptance or rejection of a proposal. The new subsection 185EA(3) inserted by item 32 provides that creditors must signify their acceptance or rejection of a proposal in the approved form. This form will specify the information that must be provided to the Official Receiver. Subsection 185E(6) is therefore being removed to enable the information requirements of the Official Receiver to be tailored in a more flexible way by amendments to the approved form.

157. This item will also remove the requirement for the Official Receiver to provide each creditor with a summary of the debtor's statement of affairs. The new information requirements are detailed in the new subparagraph 185EA(2)(a)(ii) explained at paragraph 160 and the new section 185EB explained at paragraph 162.

158. Item 32 will insert the new sections 185EA, 185EB and 185EC which replace the former sections 185A and 185B. These provisions relate to the processing of a debt agreement proposal.

159. The new subsection 185EA(1) will require the Official Receiver to write to each creditor asking that they indicate whether the proposal should be accepted. This subsection is based on the former subsection 185A(1) and replaces the former subsections 185A(1) and (2). The option to call a meeting of creditors to consider a proposal will be removed. This provision was rarely, if ever, used. Due to the nature of debt agreement proposals and general lack of complexity in the affairs of the debtors proposing them, the issues that arise in respect of debt agreement proposals can be resolved more efficiently and conveniently by written correspondence than at a meeting of creditors.

160. The new paragraph 185EA(2)(a) will replace the requirement for the Official Receiver to provide creditors with a summary of the statement of affairs (formerly in paragraph 185E(6)(b)) and the requirement to explain the proposal (formerly in paragraph 185A(3)(a)) with a requirement to provide creditors with a copy of the proposal and a copy of the new subsection 185C(2B) explanatory statement.

161. The new paragraphs 185EA(2)(b) and (c) will provide for a continuation of the current law as contained in paragraphs 185A(3)(b) and (c).

162. The new section 185EB will provide creditors with a right to inspect or obtain a copy of the approval or rejection forms of other creditors. This maintains consistency with the other provisions of the Act which enable creditors to inspect the voting forms of other creditors. It is an important mechanism to maintain transparency in the processing of proposals and to enable creditors to assess the entitlement of other creditors to approve/reject proposals and to participate in any distributions under an agreement.

163. The new section 185EC will replace the former section 185B and will deal with acceptance of a debt agreement proposal.

164. The former subsections 185B(1) and (2) which related to meetings of creditors will not be replicated due to the removal of creditors' meetings as a method of approving proposals.

165. The new subsection 185EC(1) will replace the former subsection 185B(3). The requirement for the passage of a proposal will be amended to replace the requirement for a special resolution (a majority by number and more than 75% by value) to an ordinary resolution (a simple majority by value only). This will allow the creditors with the greatest commercial interest to determine the outcome of the proposal approval process.

166. The new subsection 185EC(2) will have the same effect as the former subsection 185B(4). The new section uses the new defined term 'applicable deadline' which is inserted in section 185 by item 8.

167. The former subsection 185B(5) provided that if a debt was assigned to a creditor the assignee could only vote for the amount of consideration paid for the assignment of the debt. The new subsection (3) will modify this rule so that it only applies to assignments to creditors who are related entities of the debtor. This amendment seeks to achieve the objective of the provision to prevent manipulation of voting through the purchase of debts by parties associated with the debtor, while minimising the effect of the provision on bona fide arms length creditors who may assign debts for other commercial reasons. The term 'related entity' is defined in section 5 of the Act. A related entity includes a person who is a relative of the debtor, a body corporate in respect of which the debtor or one of the debtor's relatives is a director, and a person who is a member of a partnership in which the debtor is also a partner.

168. The new subsection 185EC(4) will provide that the quantum of creditor's claims, for the purpose of assessing their value when determining whether a proposal has been approved or rejected by creditors, is their value as at the time that the acceptance of the debt agreement proposal is registered on the NPII. The Act was previously silent as to the time at which the

quantum of debts was assessed. The use of the date at which the proposal was recorded on the NPII aligns the date with the date used to determine which debts are affected by the debt agreement and the date for quantification for distribution purposes. The material provided to substantiate their approval or dissent may therefore be used in determining the entitlement of each creditor to a distribution. This date is also prior to the time at which creditors signify their approval or rejection of the proposal, so that in doing so creditors will not have to estimate a value at some future time.

169. The new subsection 185EC(5) will provide that a secured creditor may only vote for the unsecured portion of their claim. This provision will merely clarify the existing law and is not intended to effect any substantive change to the debt agreement regime.

170. This item will insert the new section 185ED which enables an Official Receiver to cancel the processing of a debt agreement in limited circumstances. These include where a debtor's statement of affairs or explanatory statement are materially inaccurate or materially misinform the creditors of the affairs of the debtors.

171. Cancellation may also take place if the Official Receiver becomes aware that a creditor has been omitted, irrespective of whether the omission might have a material effect on the outcome of the processing of the proposal. Creditors have a fundamental right to be informed and to participate in the debt agreement approval process. If a creditor is omitted from the debtor's statement of affairs, they may be excluded from the list of creditors to whom the Official Receiver will send a notice of the proposal. They may thereby be prevented from properly considering the proposal and from making an informed choice to vote for or against the proposal. Irrespective of whether the assent or dissent of that creditor can be established as being likely to have a material impact upon the outcome of the processing of the proposal, the Official Receiver may cancel the processing of the proposal. The Official Receiver must notify the debtors and affected creditors of the decision to cancel the processing of the proposal and the reasons for doing so.

172. If a proposal is cancelled the debtor can submit a new proposal. The Official Receiver can then process the proposal, ensuring that the omitted creditors participate in the approval process and that all creditors are informed of any relevant information previously omitted.

173. If the processing of a proposal is cancelled the debtor may apply to the Administrative Appeals Tribunal for review of the Official Receiver's decision to cancel.

174. Item 33 will amend the time at which this freeze on enforcement of debts by a creditor ends to align its cessation with the time at which the processing of a proposal ends, as modified by various amendments to the relevant provisions. Section 185F currently prevents creditors, the sheriff or any other person entitled to retain or deduct money that is owing to debtor from continuing enforcement during the processing of a debt agreement proposal.

175. The amendments do not replicate the former paragraph 185F(1)(e), which related to resolutions at creditor's meetings, which will be removed.

176. Item 34 will insert a new subsection 185F(3) which will provide that the freeze on enforcement during processing does not prevent the enforcement of a liability under a proceeds of crime law. Currently this exception only applies to the stay on proceedings and enforcement that arises once a debt agreement has been made. The extension of the exception

removes this anomaly between the two kinds of stay on enforcement.

177. Item 35 will repeal the former paragraph 185G(a) which provided that a proposal would lapse in the event that a meeting of creditors was called but creditors failed to pass a resolution approving the proposal by the deadline. This subsection is no longer relevant given the amendments removing the use of a meeting to approve or reject debt agreement proposals.

178. Item 36 will insert the word 'applicable' before the word 'deadline' in paragraph 185G(b), reflecting that 'applicable deadline' is now a defined term.

179. Item 37 will amend section 185H to provide that a debt agreement will be deemed to be made once accepted and an unconditional agreement is recorded on the NPII. This is aligned with the time at which the amended section 185F freeze ceases to have effect. The NPII should thereby always accurately record whether an agreement has come into effect.

180. Item 38 will amend paragraph 185I(b) to provide that the parties to a debt agreement include all creditors with provable debts for the purpose of Part IX. This applies the amended definition of 'provable debt' in section 185. This definition limits the creditors who are bound by a debt agreement to those creditors who were owed debts that would have been provable if the debtor had become bankrupt when the acceptance of the debt agreement proposal for processing was recorded on the NPII. The former paragraph 185I(b) provided that the parties to a debt agreement included all creditor to whom the debtor owed debts immediately before the debt agreement was made.

181. In part, this amendment clarifies what is currently understood to be the current law - that only creditors who are owed debts that are potentially provable are bound by a debt agreement.

182. The amendment also simplifies the operation of the Part by aligning the relevant dates for determining which creditors are bound by an agreement to the date used for quantifying the debts owed for voting and distribution purposes. It also ensures that creditors whose debts arise after the processing of the debt agreement has commenced, and who may not be notified of the processing of the proposal and given an opportunity to vote upon the proposal, will not be bound by the agreement. The amendment will also avoid the potential for creditors to vote upon a proposal in the expectation of receiving a certain rate of return, but subsequently be entitled to a lesser rate due to the creation of new debts by the debtor during the processing period.

183. Item 39 will repeal section 185J, which is replaced by the new section 185NA inserted by item 50.

184. Item 40 will amend paragraph 185K(1)(c) to provide that the stay upon proceedings and enforcement during the period that a debt agreement is in force will only apply to creditors with provable debts for the purpose of the section.

185. Item 41 will insert a new subsection 185K(3) to extend the stay upon enforcement during the period during which an agreement is in place to any possible actions by a sheriff or a person entitled to retain or deduct money that is or will be owing to the debtor. The stay during the processing of a proposal currently extends to such actions. The purpose of this amendment is to remove an unintended anomaly and ensure that the nature of the stays during

processing and during the life of an agreement is consistent.

186. Item 42 will repeal section 185L which currently addresses how funds are to be distributed if a debt agreement does not specify how they are to be distributed. This item will repeal this section as the distribution of monies under an agreement is now governed by the new paragraph 185C(2)(d) explained at paragraph 134 to 138.

Duties of debt agreement administrators

187. Item 43 will insert a new Division 3A into Part IX. This Division will define the general duties of debt agreement administrators (section 185LA); and specific duties in respect of notifying creditors of three month arrears default by the debtor (section 185LB), notifying the Official Receiver of a designated 6-month arrears default by the debtor (section 185LC), the banking of debt agreement funds (section 185LD) and the keeping and transfer of records (sections 185LE and 185LF). The Division will also clarify that certain other duties are considered to be duties of an administrator in relation to a debt agreement (section 185LG).

188. The new section 185LA will provide that the duties of an administrator of a debt agreement include dealing with property in accordance with the agreement and giving information about the administration to the debtor or a creditor who is a party to the agreement if the request for the information is reasonable. Similar duties to provide information exist in respect of bankruptcy in sections 19 and 170.

189. The new section 185LB will require an administrator to notify creditors of a '3-month arrears default' by the debtor. A 3-month arrears default occurs if the debtor was in arrears at all times throughout a 3-month period.

190. This section will provide a minimum statutory notification requirement and will not prevent administrators from adopting more rigorous notification standards, in addition to the statutory requirements.

191. The new section 185LC will provide that an administrator must notify the Official Receiver within 10 working days of a designated 6-month arrears default by the debtor. Such a default will occur if a debtor has made no payments for a period of 6 months or has failed to complete the agreement within 6 months of the time specified in the agreement for its completion. This new section should be read in conjunction with the new section 185QA that is inserted by item 56 (explained at paragraph 224 and 225). These new provisions will provide a mechanism to automatically terminate an agreement when the agreement has been effectively abandoned by the debtor, without requiring the delay and costs of processing a termination proposal. The purpose of this new section is to ensure that abandoned but unterminated debt agreements do not remain in limbo indefinitely.

192. The new section 185LD will provide that an administrator must pay all debt agreement funds into a single interest bearing account. The account must bear the name of the administrator and include the words "- Debt Agreement Administration Trust Account". This will enable accounts holding debt agreement monies to be more readily identified by the Inspector-General in the performance of its regulatory functions. It will also assist in the identification of monies to which the new section 185Y, as inserted by item 62, will apply. Only debt agreement funds may be deposited into this account.

193. Subsection 185LD(3) will provide that the debt agreement administrator will be personally entitled to any interest on the account. This provision should be read in conjunction with the proposed amendments to the *Bankruptcy (Estate Charges) Act 1996* which provide that the administrator will be subject to a charge equal to the interest on the account less specified deductions.

194. Subsection 185LD(4) will provide that the interest on money in the account is not subject to taxation under a law of the Commonwealth, a State or a Territory except as provided in Part 2 of the *Bankruptcy (Estate Charges) Act 1997*. This is required to avoid the imposition of taxes on monies which must in any event be accounted for to the Commonwealth.

195. The regulations will be able to prescribe further requirements in respect of the banking of debt agreement funds.

196. The new section 185LD will enable accounts holding debt agreement funds to be more readily identified by the Inspector-General and, in conjunction with the new sections 186LA to 186LE, provide greater security to debtors and creditors. This section is modelled on section 169 which currently applies in respect of bankruptcies.

197. Section 185LD will not apply to a person who is not a registered debt agreement administrator or a registered trustee. To extend its operation to such debtors would be unnecessarily onerous, difficult to regulate and would have limited value in safeguarding the debt agreement funds from misappropriation.

198. This section will not apply to the Official Trustee, which must comply with a separate regime contained in Part II of Division 2 of the Act.

199. The new subsection 185LE(1) will require a debt agreement administrator to keep sufficient records as are necessary to give a full and correct account of the administration of each debt agreement. This obligation is based on the current obligation imposed upon administrators by regulation 9.06(1)(a).

200. The subsection will also provide the Inspector-General with the power to access the administrator's records and compel the administrator to answer an inquiry in relation to an agreement, in order to facilitate its regulatory functions pursuant to the Act.

201. The new subsection 185LE(2) will require an administrator who is entitled to be remunerated under a debt agreement to conduct bank reconciliations of their debt agreement trust account at least once every 45 days.

202. The new section 185LF will impose a duty upon an outgoing administrator to provide an incoming administrator with an account of the receipts and payments in each administration. This section is modeled on section 164 which currently applies to trustees in bankruptcy.

203. The new subsection 185LG(1) will clarify that the duties of an administrator in relation to a debt agreement include any duties of an administrator that do not relate to a specific agreement. This provision is inserted so that breaches of such duties attract the

consequences of breaching the duties of an administrator in relation to a debt agreement, such as possible deregistration and the making of orders pursuant to section 185ZCA.

204. Subsection 185LG(2) will provide that an administrator is explicitly required to ensure that any subsection 185C(2D) certificate they sign is correct and that this is also considered to be a duty of an administrator in relation to a debt agreement, notwithstanding that an agreement has not yet been entered into and may never be successfully entered into.

205. Subsection 185LG(3) will provide that the duty of a debt agreement administrator to notify the Official Receiver that an agreement has ended is also a duty of an administrator in relation to a debt agreement, notwithstanding that at the time that the duty arises the particular agreement has ended. It will also provide that the duties of a debt agreement administrator provided for in the preceding section 185LF are also a duty of an administrator in relation to a debt agreement.

Procedures for dealing with proposals to vary debt agreements

206. Items 44 to 48 will make amendments dealing with the procedures for varying debt agreements. Proposals to vary a debt agreement will now be processed pursuant to the new section 185MA. Previously the processing was in accordance with the former section 185B. These amendments will remove any previous uncertainty as to the extent to which the processing of such a proposal was to be in accordance with the provisions dealing with the processing of a proposal for establishing a debt agreement proposal. Item 37A will insert the new subsections 185M(1A) to (1C), which will require variation proposals to be in an approved form and accompanied by an explanatory statement (which may form part of the approved form for a variation proposal).

207. Item 45 will amend subsection 185M(2) to specify that the Official Receiver must not accept a proposal to vary a debt agreement unless it complies with with the new subsections 185M(1A) and (1B).

208. Item 46 will remove the note from section 185M that indicates that a variation proposal is processed pursuant to section 185B.

209. Item 47 will amend a reference in subsection 185M(3) to section 185B to a reference to the new section 185MB.

210. Item 48 will insert the new section 185MA. The manner in which variation proposals are processed pursuant to that section is similar to the manner in which proposals to establish a debt agreement are processed under the new section 185EA. In particular, a variation proposal must also be accompanied by an explanatory statement, although the approved form of that statement may differ from that accompanying a proposal to establish an agreement (or accompanying a proposal to terminate an agreement).

211. Item 48 will also insert the new section 185MB which is identical to the new section 185EB, except that it relates to proposals to vary an agreement rather than a proposal to establish an agreement.

212. Item 48 will also insert the new section 185MB. It will set out what is required for the variation proposal to be accepted. Other than referring to variation proposals and the

provisions relating to variation proposals, it is identical to section 185EB which specifies what is required for a proposal to establish a debt agreement to be accepted.

213. The new subsection 185MC(4), which will specify the time at which the value of creditors' claims are assessed, has an identical effect to the equivalent provision in respect of establishing a debt agreement. The subsection uses the term 'debt agreement proposal' which, due to its definition in section 5 of the Act, refers to the original proposal to establish the agreement and not the variation proposal. The value of creditors' claims for the purpose of accepting or rejecting the variation proposal is therefore the same as their value at the time that the acceptance for processing of the original proposal was recorded on the NPII and not the time the acceptance of the variation proposal was recorded. The 'freezing' of the value of creditors' debts at the time that the acceptance of the original proposal was recorded on the NPII significantly simplifies the processing of proposals and significantly removes the potential for manipulation of voting through the debtor making direct payments outside of the agreement to specified creditors. In the absence of direct payments, as creditors will be paid proportionally to the quantum of their debts, the relative voting strengths of creditors would not be expected to alter significantly over time.

214. The new section 185MD will provide that the Official Receiver may withdraw a proposal to vary an agreement from processing. It is based upon the new section 185ED which enables the Official Receiver to cancel the processing of a proposal to establish an agreement. The grounds upon which a withdrawal may be based are limited to deficiencies in the explanatory statement accompanying the variation proposal, including through material changes having occurred in the circumstances of the debtor. Identical notification and review provisions apply.

Notification of end of debt agreement

215. The fact that a debt agreement has been completed by the debtor must be recorded on the NPII. In order for the NPII to be updated, the debt agreement administrator must notify the Official Receiver that the relevant agreement has come to an end.

216. Item 49 will insert the new subsections 185N(5) and (6) which require such notification in the approved form within 5 working days of the completion of an agreement.

Release of debtor from debts

217. Item 50 will insert the new section 185NA which provides for the release of the debtor from provable debts (for the purpose of Part IX) upon the completion of the agreement. The release does not release any person other than the debtor from liability or any debts that would not be released by bankruptcy.

218. As this provision will incorporate the defined term 'provable debts' the relevant date for determining which debts are released is the time that the acceptance of the original proposal was recorded on the NPII.

219. Section 185J, which is being repealed by these amendments (see paragraph 183) currently provides that the release occurs at the time that the establishment of the debt agreement was recorded on the NPII and the relevant date for determining which debts were released was also the time that the establishment of the debt agreement was recorded on the

NPII.

Procedures for dealing with proposals to terminate debt agreements

220. Items 51 to 55 are amendments dealing with the procedures for dealing with proposals to terminate debt agreements.

221. These items will amend section 185P and will have the same effect as the amendments provided for in items 44 – 48 (see paragraphs 206 to 214), except that they relate to a proposal for terminating an agreement, rather than a proposal to vary an agreement.

222. Item 55 will insert the new sections 185PA, 185PB, 185PC and 185PD which are equivalent to the new sections 185MA, 185MB 185MB and 185MD inserted by item 48 (see paragraph 210 to 213), except that they relate to a proposal for terminating an agreement, rather than a proposal to vary an agreement.

Terminating a debt agreement – designated 6-month arrears default

223. Item 56 will repeal section 185QA which deals with termination in the event that certain proceeds of crime orders have been made against the debtor or their property. The circumstances in which a termination could be sought pursuant to section 185QA fall within the scope of the circumstances under which termination may be sought under section 185P. The section is therefore being repealed as superfluous.

224. The new section 185QA will provide that, if a debt agreement administrator notifies the Official Receiver pursuant to section 185LC of a designated 6-month arrears default (as defined in section 185 inserted by item 11 and read in conjunction with 185LC inserted by item 43), and the Official Receiver is satisfied that such a default has occurred, the Official Receiver must declare in writing that the agreement is terminated and record the termination on the NPII.

225. Upon the termination being recording on the NPII the agreement is terminated.

226. The purpose of the section is detailed at item 43 above (see paragraph 191), in respect of the new section 185LC.

227. Item 57 will repeal the note to section 185S. That note refers to section 185J which is being repealed by item 39 (see paragraph 183).

228. Item 58 will insert the new subsections 185U(5) and (6) which will provide a power for the court to make ancillary orders including compensation orders upon declaring an agreement void. These subsections are modelled on subsections 222(8) and (9) which provide a similar power to the court when setting aside a personal insolvency agreement. The purpose of these provisions is to allow the Court to make any orders necessary to place the parties in the position in which they would have been had they not entered into the agreement. By virtue of proposed subsection 185U(6), this could include orders for compensation.

229. Item 59 will repeal the note to section 185V. That note refers to section 185J which is being repealed by item 39. (see paragraph 183)

230. Item 60 will repeal the note to subsection 185W(2). That note refers to section 185Y which is being repealed by item 62 (see paragraph 232).

231. Item 61 will insert a new section 185XA that provides that nothing in Part IX affects the rights of a secured creditor to realise or otherwise deal with their security. The insertion of this provision is necessitated by the repeal by item 39 of subsection 185J(3) which provided that the release of a debtor's debts does not affect the secured creditors' rights. It will also remove any uncertainty as to whether other provisions in the Part might affect the rights of secured creditors.

232. Item 62 will repeal the current section 185Y which enables the Official Receiver to delegate proposal processing functions to a registered trustee. This provision is very seldom used. The regulatory cost associated with monitoring the few matters processed under delegation exceeds the costs that would be borne by the Official Receiver in processing these proposals itself. The presence of economies of scale and greater efficiencies obtained through substantial investments in information technology enable the more efficient processing of agreements by the Official Receiver. Processing by the Official Receiver will ensure that manner that proposals are processed and creditors 'votes' are assessed will be consistent across all proposals.

233. The new section 185Y will clarify that debt agreement monies are monies held on trust.

234. Item 63 will repeal the current section 185Z. Subsection 185Z(1) will be replaced with the new section 185Z, which has the same effect as the former subsection other than being stated to be subject to new subsections 185C(3) and (3A) which are explained in paragraph 146 which deals with item 21. The former subsection 185Z(2) related to delegated processing under section 185Y which is to be repealed. This subsection is therefore being repealed.

Official Trustee to replace an administrator who dies etc

235. Item 64 will repeal the current section 185ZB and insert a new section 185ZB to provide a single mechanism for replacing an administrator who dies or whose registration ceases through cancellation or surrender.

236. There are currently different mechanisms for dealing with a vacancy in administrator arising from the death of an administrator (the current section 185ZB) and from the ineligibility of an administrator (regulation 9.05).

237. The new provision will provide that where the vacancy arises from death, deregistration, ineligibility or court order, the Official Trustee automatically becomes the replacement administrator. The Official Trustee must notify creditors that it has become the administrator and if the Official Receiver intends to appoint another administrator in its place.

238. The current section 185ZC, which currently only applies in the event of the death of a former administrator, will then apply irrespective of how the Official Trustee became the replacement administrator pursuant to 185ZB. This provision empowers the Official Receiver to appoint a replacement administrator, if it is not intended that the Official Trustee will administer an agreement itself.

239. Items 65 and 66 will make minor amendments to section 185ZC to reflect that the Official Trustee and not the Official Receiver is the replacement administrator.

Court may order administrator to make good loss caused by breach of duty

240. Item 67 will insert new sections 185ZCA and 185ZCB. These provisions are closely based on the current sections 176 and 179 of the Act respectively, which empower the courts to make various orders in respect of bankruptcies and trustees in bankruptcy. The new provisions differ in substance only to the extent necessary to apply them to debt agreements and debt agreement administrators.

241. These provisions are intended to provide that a party adversely affected by a breach of duty by an administrator or by the conduct of an administrator may have recourse to the courts for a remedy.

242. Item 68 will correct the grammar used in section 185ZD only and does not alter the meaning of the provision.

243. Item 69 will amend section 185ZD to clarify that any remuneration paid to prior administrators must be deducted from the specified total entitlement to remuneration pursuant to the agreement in determining the entitlement of a replacement administrator to remuneration in accordance with a debt agreement.

244. Item 70 will provide that the new section 186E, which deals with the duration of the registration of an administrator, is subject to the power of the court in new section 185ZCA to direct the cancellation of an administrator's registration.

245. Item 71 will insert new sections 186LA to 186LE. The purpose of these sections is to assist the Inspector-General to determine whether debt agreement funds have been properly dealt with and, if necessary, to safeguard any funds held at a financial institution pending the outcome of any process to determine whether to declare ineligible or deregister an administrator. These provisions will not apply to administrators who are not required to be registered or to a registered trustee.

246. The new section 186LA will provide the Inspector-General with the power to direct a financial institution at which debt agreement monies are held to provide information in respect of any accounts in which such monies are or were kept. The Inspector-General may only exercise this power if a 'show cause' notice has been issued to the administrator pursuant to sections 186K, 186ML or 155H(1). It is an offence for a financial institution to fail to comply with such a direction. The maximum penalty of 60 penalty units is consistent with the penalty that applies by virtue of section 267B in the event that a person fails to comply with an information gathering notice issued by an Official Receiver pursuant to section 77C.

247. The new section 186LB will provide the Inspector-General with the power to direct a financial institution to freeze an account in which debt agreement monies are held pending the outcome of a process to determine whether to declare ineligible or deregister the relevant administrator.

248. The account holder must be provided with a copy of the freezing notice. However,

any failure to do so does not affect the validity of the notice.

249. The freeze may last for 42 days or such lesser time as the Inspector-General specifies. However the period of the freeze may be extended by the court upon the application of the Inspector-General.

250. The freeze does not prevent deposits into the account or withdrawals with the consent of the Inspector-General. Such consent may be conditional. A refusal by the Inspector-General to give consent is reviewable by the Administrative Appeals Tribunal.

251. The freeze does not prevent the withdrawal of amounts in respect of bank fees or any taxes that the bank is liable to pay in respect of the account. The regulations may provide for further categories of withdrawals that are exempted from the freeze.

252. The new section 186LC will provide that the court may revoke a freezing notice upon the basis that the Inspector-General lacked authority to issue the notice.

253. The new section 186LD will provide for the judicial enforcement of freezing notices.

254. The new section 186LE is designed to protect a financial institution from criminal or civil liability in respect of any acts or omission it does in good faith in connection with or incidental to its compliance with a freezing notice.

255. Item 72 will insert new subsections 186N(6A) and (6B) which provide that a person commits an offence if they fail to return to the Inspector-General, without a reasonable excuse, a certificate of registration in the event that their registration was cancelled at the direction of the court under new section 185ZCA. Item 73 makes consequential amendments to section 186N(7). A certificate of registration is evidence that a person is registered to act as a debt agreement administrator. The amendments are designed to ensure that persons who are not entitled to so act do not retain such certificates.

Unclaimed dividends

256. Items 74, 75 and 76 will amend section 254, which currently applies to bankruptcies, to extend its application to debt agreement administrations. The effect of this amendment is to require debt agreement administrators, who hold debt agreement monies that are unclaimed or are not intended to be distributed, to pay these monies to the Commonwealth. The section provides a mechanism for a person who subsequently claims an entitlement to those monies to seek a refund of those monies.

Offences

257. Items 77 and 78 will amend section 263C to remove any reference to Part IX from the offence of making a false claim about a creditor's entitlement to vote. This provision relates to the submission of false claims to a trustee. Under the amended Part IX voting forms will always be submitted to the Official Receiver and not to a trustee. Division 137 of the Criminal Code (Cth), which in part deals with the provision of false or misleading information or documents to a Commonwealth entity, is sufficiently broad to apply to false claims about a creditor's entitlement submitted to the Official Receiver in the course of the processing of a proposal in respect of a debt agreement.

258. Item 80 will amend section 267 to extend the offence of making a false declaration by a debtor to an explanatory statement pursuant to the new subsections 185C(2B), 185M(1B) and 185P(1B).

Application of amendments

259. Item 80 is a transitional provision which will provide that the amendments made by this Schedule will apply to proposals for the establishment of a debt agreement that are given after 1 July 2007 and to any agreements made as the result of an acceptance of such a proposal.