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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CIVIL LAW AND JUSTICE (OMNIBUS AMENDMENTS) BILL 2015

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
Senator the Hon George Brandis QC)

CIVIL LAW AND JUSTICE (OMNIBUS AMENDMENTS) BILL 2015

GENERAL OUTLINE

1. The purpose of the Bill is to make minor, technical and uncontroversial amendments to civil justice legislation. This will improve the operation and clarity of civil justice legislation administered by the Attorney-General's portfolio.
2. The Bill is an omnibus bill which will primarily amend the *Administrative Appeals Tribunal Act 1975*, the *Bankruptcy Act 1966*, the *Evidence Act 1995*, the *Federal Circuit Court of Australia Act 1999*, the *Federal Court of Australia Act 1976* and the *International Arbitration Act 1974*.
3. The Bill will also make consequential amendments to the *A New Tax System (Family Assistance) Act 1999*, the *Child Support (Registration and Collection) Act 1988*, the *Family Law Act 1975*, the *Freedom of Information Act 1982*, the *James Hardie (Investigations and Proceedings) Act 2004*, the *Paid Parental Leave Act 2010*, the *Proceeds of Crime Act 2002*, the *Public Interest Disclosure Act 2013*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973*.
4. Amendments to the *Administrative Appeals Tribunal Act 1975* will:
 - ensure all persons who are parties to a review receive notice that an application for review has been made
 - clarify that the Tribunal may make orders that certain information is not to be disclosed to the parties
 - provide flexibility in prescribing the method of giving documents or things for the purposes of proceedings
 - enable the President to authorise any member of the Tribunal to exercise power to dismiss applications under subsection 39A(18) of the Act, and
 - ensure that in matters with more than one non-governmental party (such as child support reviews), if the applicant withdraws the application, another party may seek to have it reinstated.
5. Amendments to the *Bankruptcy Act 1966* will:
 - clarify the confidentiality requirements relating to statements of affairs
 - change the requirement for a bankrupt to lodge certain requests with the Official Receiver to the Inspector-General
 - remove the requirement for the Inspector-General in Bankruptcy to notify the Official Receiver of certain decisions
 - impose time limits for applications to the court to review certain decisions of the Official Receiver, and
 - remove a reference to a repealed provision in section 225 of the Act.

6. Amendments to the *Evidence Act 1995* will:
 - move the journalist privilege provisions from Division 1A of Part 3.10 to new Division 1C of Part 3.10 so that the Act accords with the Parliamentary Counsel's Committee Protocol on Drafting National Uniform Legislation.
7. Amendments to the *Federal Circuit Court of Australia Act 1999* will:
 - provide an arrester, who is authorised by the Act, or a warrant issued under the Act or the Rules of Court, with the power to use reasonable force to enter premises to execute an arrest warrant, and
 - repeal an obsolete reference and improve readability of the Act.
8. Amendments to the *Federal Court of Australia Act 1976* will:
 - streamline and enhance the jury empanelment process
 - enhance the pre-trial process for indictable offences, and
 - repeal obsolete provisions, correct legislative oversights and improve the accuracy of the Act.
9. Amendments to the *International Arbitration Act 1974* will:
 - correct the heading of Part II to better reflect its contents
 - simplify provisions for enforcement of foreign arbitral awards and improve compliance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
 - apply confidentiality provisions to arbitral proceedings on an opt-out rather than opt-in basis, and
 - repeal an obsolete section.

FINANCIAL IMPACT STATEMENT

10. There is no financial impact associated with this Bill.

REGULATORY IMPACT STATEMENT

11. There is no regulatory impact associated with this Bill. The Office of Best Practice Regulation advised that a Regulatory Impact Statement is not required for this Bill.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Civil Law and Justice (Omnibus Amendments) Bill 2015

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

12. The Bill is an omnibus bill which will make minor, technical and uncontroversial amendments to the following Acts: the *Administrative Appeals Tribunal Act 1975*, the *Bankruptcy Act 1966*, the *Evidence Act 1995*, the *Federal Circuit Court of Australia Act 1999*, the *Federal Court of Australia Act 1976* and the *International Arbitration Act 1974*.

13. The Bill will also make consequential amendments to the *A New Tax System (Family Assistance) Act 1999*, the *Child Support (Registration and Collection) Act 1988*, the *Family Law Act 1975*, the *Freedom of Information Act 1982*, the *James Hardie (Investigations and Proceedings) Act 2004*, the *Paid Parental Leave Act 2010*, the *Proceeds of Crime Act 2002*, the *Public Interest Disclosure Act 2013*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973*.

14. Amendments to the *Administrative Appeals Tribunal Act 1975* will:

- ensure all persons who are parties to a review receive notice that an application for review has been made
- clarify that the Tribunal may make orders that certain information is not to be disclosed to the parties
- provide flexibility in prescribing the method of giving documents or things for the purposes of proceedings
- enable the President to authorise any member of the Tribunal to exercise power to dismiss applications under subsection 39A(18) of the Act, and
- ensure that in matters with more than one citizen party, if the applicant withdraws the application, another party may seek to have it reinstated.

15. Amendments to the *Bankruptcy Act 1966* will:

- clarify the confidentiality requirements relating to statements of affairs
- change the requirement for a bankrupt to lodge certain requests with the Official Receiver to the Inspector-General
- remove the requirement for the Inspector-General in Bankruptcy to notify the Official Receiver of certain decisions
- impose time limits for applications to the court to review certain decisions of the Official Receiver, and
- remove a reference to a repealed provision in section 225 of the Act.

16. Amendments to the *Evidence Act 1995* will:
 - move the journalist privilege provisions from Division 1A of Part 3.10 to new Division 1C of Part 3.10 so that the Act accords with the Parliamentary Counsel’s Committee Protocol on Drafting National Uniform Legislation.
17. Amendments to the *Federal Circuit Court of Australia Act 1999* will:
 - provide an arrester, who is authorised by the Act, or a warrant issued under the Act or the Rules of Court, with the power to use reasonable force to enter premises to execute an arrest warrant, and
 - repeal an obsolete reference and improve readability of the Act.
18. Amendments to the *Federal Court of Australia Act 1976* will:
 - streamline and enhance the jury empanelment process
 - enhance the pre-trial process for indictable offences, and
 - repeal obsolete provisions, correct legislative oversights and improve the accuracy of the Act.
19. Amendments to the *International Arbitration Act 1974* will:
 - correct the heading of Part II to better reflect its contents,
 - simplify provisions for enforcement of foreign arbitral awards and improve compliance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,
 - apply confidentiality provisions to arbitral proceedings on an opt-out rather than opt-in basis, and
 - repeal an obsolete section.

Human rights implications

20. The Bill engages the following human rights:
 - the right to an effective remedy – article 2(3) of the International Covenant on Civil and Political Rights (ICCPR)
 - the right to life; the right to security of the person; and the prohibition on torture and cruel, inhuman or degrading treatment or punishment – article 6 of the ICCPR; article 9 of the ICCPR; and article 7 of the ICCPR and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
 - the right to a fair and public hearing – article 14(1) of the ICCPR
 - the right to privacy – article 17(1) of the ICCPR, and
 - the right to freedom of opinion and expression – articles 19(1) and (2) of the ICCPR.

The right to an effective remedy

Administrative Appeals Tribunal Act 1975

21. Items 1 to 4 of Schedule 1 of the Bill will amend the Administrative Appeals Tribunal Act to provide that other people may be made a party to a review and require notification that an application has been made. The amendments also provide that a party to a proceeding, other than the applicant or the decision maker, may request the Tribunal to reinstate an application that has been dismissed.

22. Article 2(3) of the ICCPR requires the Government to ensure that, where a person's rights or freedoms are violated under the ICCPR, they have access to an effective and enforceable remedy determined by competent judicial, administrative or legislative authorities.

23. The Administrative Appeals Tribunal (the AAT) performs a critical role in the review of government decisions by performing a merits review function which is an administrative process created by statute. In reviewing administrative decisions, the role of the Tribunal is to ensure the correct or preferable decision is made based on the information before it.

24. These amendments will promote the right to an effective remedy by ensuring that persons with an interest in an AAT matter are given a reasonable opportunity to engage with the merits review process.

The right to life; the right to security of the person; and the prohibition on torture and other cruel, inhuman or degrading treatment or punishment

Federal Circuit Court of Australia Act 1999

25. Item 37 of Schedule 1 of the Bill will amend the Federal Circuit Court of Australia Act to provide an arrestee, who is authorised by the Act, or a warrant issued under the Act or the Rules of Court, with the power to use such force as is necessary and reasonable in the circumstances to enter premises to execute an arrest warrant.

26. Currently, the *Federal Circuit Court Rules 2001* provide that the Federal Circuit Court may issue a warrant where a respondent who is required to attend court fails to attend court on the date fixed for attendance. There is, however, uncertainty about whether reasonable force can be used to enter premises to execute an arrest warrant. This means that circumstances can arise where an arrest warrant is unable to be executed because an arrestee is inside premises. This can delay the Court process and burden the justice system.

27. The proposed amendments engage the right to security of the person in article 9 and the right to life in article 6 of the ICCPR and require the provision of reasonable measures to protect a person's physical security. They also engage the prohibition on torture and cruel, inhuman or degrading treatment or punishment in article 7 of the ICCPR and in CAT.

28. The proposed amendments seek to achieve the legitimate objective of ensuring an arrestee is able to be arrested and brought promptly before the Court in circumstances where they may otherwise attempt to evade arrest by staying inside premises.

29. The proposed new power is reasonable and proportionate to this objective. Police officers, court sheriffs and deputy court sheriffs (the arresters) will be the only persons able to exercise this power and will only be able to enter premises using such force as is necessary and reasonable in the circumstances if they reasonably believe the arrestee is on premises.

30. Moreover, new section 113A(4) of the Federal Court of Australia Act, which will be inserted by item 37 of the Bill, will provide significant safeguards to prevent arresters using more force than is necessary in the course of arresting the arrestee. For example, it will provide, among other things, that in the course of arresting the arrestee, the arrester must not:

- use more force, or subject the arrestee to greater indignity, than is necessary and reasonable to make the arrest, and
- must not do anything that is likely to cause the death of, or grievous bodily harm to, the arrestee unless the arrester reasonably believes that doing that thing is necessary to protect life or prevent serious injury to another person.

31. Arresters who do not adhere to the safeguards provided in this item may face criminal charges, particularly if they are found to have used more force than is reasonably necessary to make the arrest.

32. These amendments will not change the already established grounds and procedures for arrest and detention.

33. These amendments are consistent with the rights to life, security of the person and the prohibition on torture and cruel, inhuman and degrading treatment and punishment because they are aimed at the legitimate and lawful objective of bringing a person who is the subject of an arrest warrant before the Court. Furthermore, these amendments are reasonable, necessary and proportionate to the objective of achieving the efficient administration of justice.

The right to a fair and public hearing

34. Article 14(1) of the ICCPR sets out the right to a fair and public hearing and requires that that all persons are equal before courts and tribunals and that they have right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

Administrative Appeals Tribunal Act 1975

35. As described above, items 1 to 4 of Schedule 1 of the Bill will amend the Administrative Appeals Tribunal Act to provide that other people may be made a party to a review and require notification that an application has been made. The amendments also provide that a party to a proceeding, other than the applicant or the decision maker, may request the Tribunal to reinstate an application that has been dismissed.

36. These amendments promote the right to a fair hearing by ensuring that persons with an interest in a matter are given a reasonable opportunity to engage with the Administrative Appeals Tribunal (the AAT) review process.

37. Item 2 will engage the right to a fair and public hearing by clarifying the existing power for the AAT to make orders preventing the publication or disclosure of information relating to a proceeding, to make it clear that such orders may apply to all parties to an AAT review.

38. The amendment is reasonable, necessary and proportionate. There will be strong reasons for confidentiality in respect of certain information before the Tribunal. For example, in child support reviews, there may be safety reasons why information relating to the address of one or both parties should be suppressed. Similarly, there may be national security reasons why certain information should not be disclosed to either party. The AAT's discretion to make non-disclosure orders is governed by subsection 35(5) of the AAT Act, which requires the Tribunal to balance the importance of hearings being conducted in public and that evidence or documents should be made available to the public or to all the parties, with any reasons in favour of confidentiality. This limitation ensures that the Tribunal's exercise of its non-disclosure powers is proportionate, and only exercised where necessary.

International Arbitration Act 1974

39. The International Arbitration Act is part of a global framework supporting international commercial arbitration, by providing for the conduct of arbitral proceedings, the recognition and enforcement of foreign arbitral awards, and for the judicial supervision of arbitration in over 150 countries. This framework allows parties to international arbitration agreements to resolve their disputes in a manner of their choosing, subject to the limitations of domestic and international law.

40. Items 56 to 64 of Schedule 1 of the Bill will amend the International Arbitration Act to make arbitral proceedings confidential unless parties opt out, broaden the circumstances in which enforcement of an award may be resisted, clarify mechanical aspects of the Act making it easier to use, and increase the number of countries from which arbitral awards will be recognised and enforced. It also expands the powers of domestic courts to ensure that the enforcement of awards can be resisted on the basis of incapacity of a party, fairly and by all parties.

41. Parties under the International Arbitration Act are predominantly commercial entities. However, it is possible that parties may be individuals. The amendments promote the right to a fair hearing because they seek to ensure that arbitral awards can be more broadly enforced and that all parties have equal access to grounds for resisting enforcement. These measures serve to make arbitration in Australia fairer and more efficient, promoting the right to have civil rights and obligations determined fairly and independently.

42. The amendment to make proceedings confidential unless parties opt out (as opposed to the current regime in which parties must agree that proceedings will be confidential) may limit the public nature of a hearing. However, the purpose of the amendment is to ensure that, in line with community expectations and international best practice, arbitral proceedings are confidential unless the parties agree to conduct their arbitration in another manner. The amendment is reasonable and proportionate as parties are able to opt-out of confidentiality requirements if they wish for their proceedings to be public.

The right to privacy

43. Article 17 of the ICCPR provides for the right not to be subjected to arbitrary or unlawful interference with privacy. In order for the interference with privacy not to be 'arbitrary', any interference must be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality to the end sought and necessity in the circumstances.

Bankruptcy Act 1966

44. Under the Bankruptcy Act, a bankrupt is required to provide a statement of affairs to the Official Receiver and to the trustee. This statement outlines personal and financial information to allow the trustee to administer a bankruptcy. Parts of this statement are considered confidential and will not be made available to the public.

45. The Bill will include amendments to the Bankruptcy Act to clarify that sections 54 and 55 of the Act do not prevent disclosure of the confidential parts of a statement of affairs where disclosure is required by law. Such disclosure will include: disclosure to a government agency where required under a statutory information-gathering power, and tabling the statement at a creditor's meeting in accordance with section 64R of the Act.

46. The interference with privacy in these circumstances is not arbitrary. It is in pursuit of a legitimate objective, namely for the Official Receiver to comply with legal requirements during a bankruptcy administration. The interference is reasonable to achieving this objective as it appropriately balances the need for a bankrupt person's privacy with the requirements of disclosure by law. Further, by limiting disclosure to circumstances where such disclosure is required by law, rather than allowing for public disclosure, the interference with privacy interests of a bankrupt person is reasonable and proportionate.

Federal Circuit Court of Australia Act 1999

47. Item 37 of Schedule 1 of the Bill will amend the Federal Circuit Court of Australia Act to provide an arrester, who is authorised by the Act, or a warrant issued under the Act or the Rules of Court, with the power to use such force as is necessary and reasonable in the circumstances to enter premises to execute an arrest warrant.

48. Currently, the *Federal Circuit Court Rules 2001* provides that the Federal Circuit Court may issue a warrant where a respondent who is required to attend court, fails to attend court on the date fixed for attendance. However, there is uncertainty about whether reasonable force can be used to enter premises to execute an arrest warrant. This means that circumstances can arise where an arrest warrant is unable to be executed because an arrestee is inside premises. This can delay the Court process and burden the justice system.

49. While the proposed amendments do limit the right to privacy, the amendments are aimed at the legitimate objective of ensuring an arrestee is able to be arrested and brought promptly before the Court in circumstances where they may otherwise attempt to evade arrest by staying inside premises.

50. The amendments are also reasonable and proportionate to this objective. The arresters will not be able to enter a dwelling house between 9 pm one day and 6 am the next day unless

they reasonably believe that it would not be practicable to arrest the arrestee there or elsewhere at another time, for example where an arrestee is actively seeking to evade arrest (proposed subsection 113A(3)). This limitation prevents unnecessary interference with an arrestee's place of residence or dwelling, and recognises that the purpose of arresting an arrestee is to bring them before the Court, which is unlikely to be sitting between the hours of 9 pm and 6 am.

51. These amendments do not amount to an arbitrary interference with privacy because they are aimed at the legitimate and lawful objective of bringing a person who is the subject of an arrest warrant before the Court. Moreover, they are reasonable, necessary and proportionate to the objective of achieving the efficient administration of justice.

The right to freedom of opinion and expression

Administrative Appeals Tribunal Act 1975

52. Item 2 will engage the right to freedom of opinion and expression in article 19 of the ICCPR by clarifying the existing power for the Administrative Appeals Tribunal (the AAT) to make orders preventing the publication or disclosure of information relating to a proceeding, to make it clear that such orders may apply to all parties to an AAT review.

53. The amendment is reasonable, necessary and proportionate. There will be strong reasons for confidentiality in respect of certain information before the Tribunal. For example, in child support reviews, there may be safety reasons why information relating to the address of one or both parties should be suppressed. Similarly, there may be national security reasons why certain information should not be disclosed to either party.

54. The Tribunal's discretion to make non-disclosure orders is governed by subsection 35(5) of the AAT Act, which requires the Tribunal to balance the importance of hearings being conducted in public and that evidence or documents should be made available to the public or to all the parties, with any reasons in favour of confidentiality. This limitation ensures that the Tribunal's exercise of its non-disclosure powers is proportionate, and only exercised where necessary.

Conclusion

55. The Bill is compatible with human rights because it promotes rights, and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

NOTES ON CLAUSES

PRELIMINARY

Clause 1—Short title

56. This clause provides that when the Bill is enacted, it may be cited as the *Civil Law and Justice (Omnibus Amendments) Act 2015*.

Clause 2—Commencement

57. This clause sets out when various provisions of the *Civil Law and Justice (Omnibus Amendments) Act 2015* are to commence, as set out in the table.

58. Subclause 2(1) provides that each provision of the Act specified in column 1 of the table in subclause 2(1) commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

59. Item 1 in the table provides that sections 1 to 3, which concern the formal aspects of the Act, as well as anything in the Act not elsewhere covered by the table, will commence on the day the Act receives the Royal Assent.

60. Item 2 in the table provides that schedule 1 of the Act will commence the day after the Act receives the Royal Assent.

61. The note at the end of the table explains that the table relates only to the provisions of the Act as originally enacted. The table will not be amended to deal with any later amendments of the Act.

62. Subclause 2(2) provides that any information in column 3 of the table in subclause 2(1) is not part of the Act. It also clarifies that information may be inserted in column 3, or information in it may be edited, in any published version of the Act.

Clause 3—Schedules

63. Clause 3 provides that each Act specified in a schedule to the Act is amended as set out in the applicable items in the schedule and any other item in a schedule has effect according to its terms. This is a technical provision to give operational effect to the amendments contained in the schedules.

SCHEDULE 1—AMENDMENTS

GENERAL OUTLINE

64. Schedule 1 will primarily amend the *Administrative Appeals Tribunal Act 1975*, the *Bankruptcy Act 1966*, the *Evidence Act 1995*, the *Federal Circuit Court of Australia Act 1999*, the *Federal Court of Australia Act 1976* and the *International Arbitration Act 1974*.

65. Schedule 1 will also make consequential amendments to the *A New Tax System (Family Assistance) Act 1999*, the *Child Support (Registration and Collection) Act 1988*, the *Family Law Act 1975*, the *Freedom of Information Act 1982*, the *James Hardie (Investigations and Proceedings) Act 2004*, the *Paid Parental Leave Act 2010*, the *Proceeds of Crime Act 2002*, the *Public Interest Disclosure Act 2013*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973*.

Administrative Appeals Tribunal Act 1975

66. Amendments to the *Administrative Appeals Tribunal Act 1975* will:

- ensure all persons who are parties to a review receive notice that an application for review has been made
- clarify that the Tribunal may make orders that certain information is not to be disclosed to the parties
- provide flexibility in prescribing the method of giving documents or things for the purposes of proceedings
- enable the President to authorise any member of the Tribunal to exercise power to dismiss applications under subsection 39A(18) of the Act, and
- ensure that in matters with more than one non-governmental party (such as child support reviews), if the applicant withdraws the application, another party may seek to have it reinstated.

Item 1: At the end of subsection 29AC(1)

67. This item will insert new paragraph 29AC(1)(c) into the *Administrative Appeals Tribunal Act*.

68. New paragraph 29AC(1)(c) will provide that, in addition to the applicant and the person who made the decision, the Registrar must notify any other person who is made a party to the proceeding by virtue of another Act that authorises the making of an application for review to the Tribunal.

69. This item is intended to ensure that all persons who are parties to a review receive notice of an application being made.

Item 2: Subsection 35(4)

70. Subsection 35(4) of the *Administrative Appeals Tribunal Act* allows the Tribunal to make non-publication and non-disclosure orders. Existing subsection 35(4) could be interpreted to mean the Tribunal cannot make such an order applying to both parties. There may be situations where this order would be necessary, for instance where a third party

provides material which contains information that the Tribunal believes should not be distributed to either party.

71. This item will clarify that the Tribunal may make a non-publication or non-disclosure order to a person, including some or all of the parties to a proceeding.

Item 3: Subsection 39A(18)

72. Subsection 39A(18) of the Administrative Appeals Tribunal Act allows a presidential member or senior member to dismiss an application for review of a security assessment if the applicant fails to proceed with the application or comply with a direction of the Tribunal within a reasonable time.

73. Item 3 will amend subsection 39A(18) to replace the reference to ‘presidential member or senior member’ with ‘the President or authorised member’. This is consistent with the approach in similar provisions throughout the Act as amended by the *Tribunals Amalgamation Act 2015*.

Item 4: Subsections 42A(8) and (8A)

74. The dismissal powers in subsection 42A(1A) of the Administrative Appeals Tribunal Act assume that it is typically the applicant who will withdraw from proceedings. However, because of the passage of the Tribunals Amalgamation Act, the Tribunal will deal with more applications involving two or more non-governmental parties, especially in child support. It may be the case that while the applicant decides to withdraw the proceeding, another party wishes to continue it and should be entitled to do so.

75. This item will provide that where the Tribunal has dismissed an application under subsection 42A(1B), a party to the proceeding (other than the applicant or the decision maker) may request the Tribunal to reinstate the application. The amendment will provide for this request to be made within 28 days after notification of the dismissal is received. It will also provide that a party can request there be an extension of time within which to make a request for reinstatement.

Item 5: Section 68

76. Section 68 of the AAT Act provides that a document or thing required by the AAT Act or another enactment to be lodged with or given to the AAT, or to a person, must be lodged or given in a manner prescribed by regulation or, if the regulation does not prescribe a manner, in accordance with a practice direction issued by the President of the AAT. The drafting of section 68 could be interpreted as meaning that the manner can only be prescribed in practice directions where the Regulation is silent on the issue.

77. Item 5 will repeal section 68 and substitute a new provision which would ensure the manner for lodging or giving documents or things to the Tribunal, or to a person, may be prescribed by regulation, in a practice direction, or a combination of both. This provides flexibility to set out these procedures in the most effective way.

Item 6: Savings provision

78. Item 6 is a savings provision which ensures that the amendment to section 68, inserted by item 5 above, does not affect a direction or regulation in force immediately before the amendment commences.

A New Tax System (Family Assistance) (Administration) Act 1999

Item 7: Section 129

79. This item will repeal section 129 of the A New Tax System (Family Assistance) (Administration) Act which will be inserted by the *Tribunals Amalgamation Act 2015* on 1 July 2015.

80. Section 129 modifies the application of the *Administrative Appeals Tribunal Act 1975* by providing that when an applicant applies for AAT second review, the reference to the person who made the decision, is a reference to each person who was a party to the first review (other than the applicant who has applied for AAT second review).

81. The repeal of section 129 is necessary because this Bill will introduce paragraph 29AC(1)(c) which will provide that the Tribunal must give notice of receiving an application, to any person who is made a party to the review by another enactment that authorised the application.

82. As both provisions will achieve the same outcome, section 129 will become redundant.

Bankruptcy Act 1966

Items 8 and 9: subsections 54(6) and 55(11)

83. Subsections 54(6) and 55(11) of the Bankruptcy Act provides that the Official Receiver must ensure confidential information in a bankrupt's statement of affairs is not made available to 'any person other than the bankrupt (or an agent of the bankrupt)'.

84. Items 8 and 9 will insert subsections to clarify that the provisions do not prevent disclosure of the confidential parts of a statement of affairs where disclosure is required by law. For example, where a government agency uses statutory information-gathering powers to seek the information.

Items 10, 11, 12, 14, 15, 16, 21, 22 and 23: Paragraph 139ZA(3)(a), Subsection 139ZA(4), Subsection 139ZA(5), Paragraph 139ZIO(3)(a), Subsection 139ZIO(4), Subsection 139ZIO(5), Paragraph 149K(3)(a), Subsection 149K(4) and Subsection 149K(5).

85. Section 139ZA of the Bankruptcy Act requires a bankrupt to lodge a request for review with the Official Receiver's office if they are seeking a review of their income contribution assessment. Similarly, sections 139ZIO and 149K relate to lodging a request for review with the Official Receiver's office for:

- a) a determination under the supervised account regime, and
- b) an objection to discharge from bankruptcy.

86. The relevant provisions require the Official Receiver to endorse and then send the request on to the Inspector-General, who will conduct the review.

87. It is unnecessary for such review requests to come through the Official Receiver because they do not require any action by the Official Receiver. Items 10, 11 and 12 will remove this process from section 139ZA. Items 14, 15 and 16 will remove this process from section 139ZIO. Items 21, 22 and 23 will remove this process from section 149K.

Items 13, 17 and 18: Subsection 139ZE(1), Paragraph 139ZIS(1)(d) and Paragraph 139ZIS(1)(e)

88. Section 139ZE of the Bankruptcy Act requires the Inspector-General to notify a bankrupt, trustee and the Official Receiver of review decisions (including decisions refusing to review) relating to income contribution assessment. Similarly, section 139ZIS relates to notification for review decisions relating to the supervised account regime.

89. Item 13 will remove the requirement from section 139ZE for the Inspector-General to notify the Official Receiver of review decisions relating to income contribution assessment as notification is unnecessary. Item 18 will remove the similar requirement from the supervised account regime in section 139ZIS, and item 17 will make a minor consequential amendment to remove the word ‘and’.

Items 19 and 20: After subsection 139ZM(1) and After subsection 139ZS(1)

90. Section 139ZL of the Bankruptcy Act allows the Official Receiver to require certain persons other than the bankrupt, by notice, to make a payment or payments towards the discharge of the liability of a bankrupt. Section 139ZM allows the third party to apply to the Federal Court to set aside such a notice.

91. Similarly, sections 139ZQ and 139ZS provide for a requirement for third party payments in relation to voidable transactions, by notice, and for applications to the Federal Court to set aside such a notice.

92. There is currently no time limit for making applications of this kind to the Federal Court. This is inconsistent with other provisions in the Act and can cause undue delays for the Official Receiver and for the administration of a bankruptcy.

93. Items 19 and 20 will impose a 60-day time limit for applications of this kind to the Federal Court. This time limit is consistent with other provisions in the Act.

Item 24: Subsection 225(4)

94. Currently, subsection 225(4) of the Bankruptcy Act states that ‘The minutes of a meeting held under this Part signed in accordance with section 203 are *prima facie* evidence of the proceedings at the meeting’ (emphasis added).

95. Section 203 was repealed in 1996. Item 24 will remove this outdated reference from section 225.

Child Support (Registration and Collection) Act 1988

Item 25: Section 96B

96. This item will repeal section 96B of the Child Support (Registration and Collection) Act, which will be inserted by the *Tribunals Amalgamation Act 2015* on 1 July 2015, and will substitute current subsection 96B(1) as a new section 96B.

97. Current subsection 96B(2) modifies the application of the *Administrative Appeals Tribunal Act 1975* by providing that when an applicant applies for AAT second review, the reference to the person who made the decision, is a reference to each person who was a party to the first review (other than the applicant who has applied for AAT second review).

98. The repeal of subsection 96B(2) is necessary because this Bill will introduce paragraph 29AC(1)(c) which will provide that the Tribunal must give notice of receiving an application, to any person who is made a party to the review by another enactment that authorised the application.

99. As both provisions will achieve the same outcome, subsection 96B(2) will be redundant.

Evidence Act 1995

Item 26: Division 1A of Part 3.10 (heading)

100. This item will move the journalist privilege from Division 1A of Part 3.10 to new Division 1C of Part 3.10 of the Evidence Act.

101. This will provide consistency with the numbering of the *Evidence Act 1995* (NSW).

102. It is appropriate to leave gaps in the numbering of the divisions and sections because the journalist privilege is a departure from the Model Uniform Evidence Bill, and the Commonwealth Evidence Act does not include Division 1A or Division 1B of the Model Uniform Evidence Bill. This is consistent with Paragraph 6.1.2 of the Parliamentary Counsel's Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Item 27: Section 126G (heading)

103. This item will renumber the definitions section of Division 1C of Part 3.10 of the Evidence Act to new section 126J.

104. This will provide consistency with the numbering of the NSW Evidence Act.

105. This form of drafting is consistent with paragraph 6.1.2 of the Parliamentary Counsel's Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Item 28: Section 126H (heading)

106. This item will renumber section 126H of the Evidence Act to new section 126K and also update its title to: ‘Journalist privilege relating to identity of informant’

107. This numbering and updated title will provide consistency with the numbering of the NSW Evidence Act.

108. This form of drafting is consistent with paragraph 6.1.2 of the Parliamentary Counsel’s Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Item 29: Section 131A (heading)

109. This item will amend the heading of section 131A of the Evidence Act to refer to Division 1C instead of Division 1A.

110. This is required because of the insertion of item 26 above, which will move the journalist privilege from Division 1A of Part 3.10 to new Division 1C of Part 3.10. This will provide consistency with the numbering of the NSW Evidence Act.

111. This form of drafting is consistent with paragraph 6.1.2 of the Parliamentary Counsel’s Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Item 30: Subsections 131A(1) and (1A)

112. This item will remove the reference to section 126H in subsections 131A(1) and (1A) of the Evidence Act and replace them with a reference to section 126K.

113. This is required because of the insertion of item 28 above which will renumber section 126H to new section 126K. This will provide consistency with the numbering of the NSW Evidence Act.

114. This form of drafting is consistent with paragraph 6.1.2 of the Parliamentary Counsel’s Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Item 31: Subsection 131A(1A)

115. This item will remove the reference to subsection 126H(1) in subsection 131A(1A) of the Evidence Act and replace it with a reference to subsection 126K(1).

116. This is required because of the insertion of item 28 above which will renumber section 126H to new section 126K. This will provide consistency with the numbering of the NSW Evidence Act.

117. This form of drafting is consistent with paragraph 6.1.2 of the Parliamentary Counsel’s Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Item 32: Section 131B (heading)

118. This item will remove the reference to Division 1A in the heading of section 131B of the Evidence Act and replace it with a reference to Division 1C.

119. This is required because of the insertion of item 26 above, which will move the journalist privilege provisions from Division 1A of Part 3.10 to new Division 1C of Part 3.10. This will provide consistency with the numbering of the NSW Evidence Act.

120. This form of drafting is consistent with paragraph 6.1.2 of the Parliamentary Counsel's Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Item 33: Section 131B

121. This item will remove the reference to Division 1A in section 131B of the Evidence Act and replace it with a reference to Division 1C.

122. This is required because of the insertion of item 26 above, which will move the journalist privilege provisions from Division 1A of Part 3.10 to new Division 1C of Part 3.10. This will provide consistency with the numbering of the NSW Evidence Act.

123. This form of drafting is consistent with paragraph 6.1.2 of the Parliamentary Counsel's Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Family Law Act 1975

Item 34: Paragraph 69ZX(4)(a)

124. This item will remove the reference to subsection 126H(1) of the *Evidence Act 1995* in paragraph 69ZX(4)(a) of the Family Law Act and replace it with a reference to subsection 126K(1) of the Evidence Act.

125. This is required because of the insertion of item 28 above which will renumber section 126H to new section 126K. This will provide consistency with the numbering of the NSW Evidence Act.

126. This form of drafting is consistent with paragraph 6.1.2 of the Parliamentary Counsel's Committee Protocol on Drafting National Uniform Legislation, which provides that the numbering of uniform legislation should be consistent.

Federal Circuit Court of Australia Act 1999

Item 35: Section 5

127. This item will insert the definitions of *conveyance*, *dwelling house*, *police officer* as follows:

128. *Conveyance* includes a vehicle, vessel and an aircraft.

129. *Dwelling house* includes a conveyance, or a room in accommodation, in which people ordinarily retire for the night.

130. *Police officer* means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

131. *Premises* includes a place and a conveyance.

132. These definitions will assist with the correct interpretation of new section 113A inserted by item 37 below.

Item 36: Section 31

133. This item will remove the redundant reference to section 19E of the *Family Law Act 1975* in section 31 of the Federal Circuit Court of Australia Act and replace it with a reference to section 13F of the Family Law Act.

134. Section 19E of the Family Law Act was repealed by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. Section 13F of the Family Law Act is equivalent to previous subsection 19E(1).

135. The item will also include a statement explaining that section 20A of the Federal Circuit Court of Australia Act does not affect section 31. Section 20A currently says that Part 4, which section 31 is within, does not apply to proceedings under the Family Law Act. However, section 31 says that the Rules of the Court may make provision for, or in relation to, the making of certain applications under the Family Law Act. Therefore, current section 31 is incompatible with section 20A.

Item 37: After section 113

136. This item will insert a new section 113A into the Federal Circuit Court of Australia Act titled: ‘Making arrests under this Act or warrants’.

137. New section 113A will provide an arrester, who is authorised by the Act, or a warrant issued under the Act or the Rules of Court, with the power to use such force as is reasonable and necessary in the circumstances to enter premises to execute an arrest warrant.

138. Currently, the *Federal Circuit Court Rules 2001* provides that the Federal Circuit Court may issue an arrest warrant where a respondent who is required to attend court, fails to attend court on the date fixed for attendance. However, there is uncertainty about whether reasonable force can be used to enter premises to execute such a warrant. This means that circumstances can arise where a warrant is unable to be executed because an arrestee is inside premises. This can delay the Court process and burden the justice system. New section 113A will provide certainty about whether a power of entry into premises exists, for the purposes of executing a warrant.

139. New subsection 113A(1) makes clear that new section 113A applies to a limited class of persons, known as the arresters, who are authorised by the Act, or a warrant issued under the Act or the Rules of Court, to arrest another person, known as the arrestee. The class of persons is restricted to the Sheriff and a Deputy Sheriff of the Federal Circuit Court, the

Sheriff and a Deputy Sheriff of a court of a State or Territory, and a police officer as defined in item 35 above.

140. New subsection 113A(2) will provide that if the arrester reasonably believes the arrestee is on premises, the arrester may enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the arrestee or arresting the arrestee. For example, this would allow an arrester to force open a door in order to enter premises to execute a properly issued arrest warrant under the Federal Circuit Court of Australia Act or the Rules of Court.

141. New subsection 113A(3) will provide that the arrester must not enter a dwelling house between 9 pm one day and 6 am the next day unless the arrester reasonable believes that it would not be practicable to arrest the arrestee there or elsewhere at another time. This provision prevents the unnecessary or unreasonable interference with privacy, noting that the purpose of the provision is to bring persons before court, while balancing the need for arresters to be able to take reasonable steps to arrest a person who they are authorised to arrest.

142. Consistent with the amendments to section 5 of the Federal Circuit Court of Australia Act inserted by item 35 of this Schedule, *dwelling house* will be defined to include a conveyance or a room in accommodation in which people ordinarily retire for the night. *Conveyance* will be defined in section 5 of the Act, as amended by item 35 of this Schedule, to include a vehicle, vessel and aircraft.

143. New subsection 113A(4) will provide that in the course of arresting the arrestee, the arrester must not use more force, or subject the arrestee to greater indignity, than is necessary and reasonable to make the arrest or to prevent the arrestee's escape after the arrest. It will also provide that the arrester must not do anything that is likely to cause the death of, or grievous bodily harm to, the arrestee unless the arrester reasonably believes that doing that thing is necessary to protect the life or prevent serious injury to another person (including the arrester).

144. New subsection 113A(4) will also provide that if the arrestee is attempting to escape arrest by fleeing, the arrester must not do anything that is likely to cause the death of, or grievous bodily harm to, the arrestee unless the arrester reasonably believes that doing that thing is necessary to protect life or prevent serious injury to another person (including the arrester), and the arrestee has, if practicable, been called on to surrender and the arrester reasonably believes that the arrestee cannot be arrested in any other way.

145. New subsection 113A(4) recognises Commonwealth criminal law policy, as set out in 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (the Guide), that legislation should only allow an authorised officer to use such force against persons as is necessary and reasonable to execute a warrant. The limitations imposed on the use of force by this subsection represent situations of unreasonable force, or force that is disproportionate and could result in death or grievous bodily harm.

146. New subsection 113A(4) ensures that the use of force should only be used by an arrester when arresting an arrestee who does not wish to voluntarily accompany the arrester to the Court, in compliance with a properly issued arrest warrant under the Federal Circuit Court of Australia Act or the Rules of Court. New subsection 113A(4) will not authorise the

use of force that was unreasonable or excessive in the circumstances, such as force which results in serious physical injury in circumstances where the arrestee was complying with instructions from the arrester and voluntarily accompanying the arrester.

147. New subsection 113A(5) will provide that when arresting the arrestee, the arrester must inform the arrestee of the grounds for the arrest. This ensures that the arrestee is made aware of the existence of a properly executed warrant and is informed of the grounds on which he or she is being arrested.

148. New subsection 113A(6) will provide that it is sufficient if the arrestee is informed of the substance of the grounds for the arrest, not necessarily in precise or technical language. This reflects that it is the substance of the grounds of the arrest that are important, rather than the precise words that are used to describe the grounds. This ensures that arresters have flexibility in how they describe the grounds of arrest and are not required to use particular formulations of words.

149. New subsection 113A(7) will provide that new subsection 113A(5) does not apply if the arrestee should, in the circumstances, know the substance of the grounds for the arrest, or the arrestee's actions make it impracticable for the arrester to inform the arrestee of the grounds for the arrest. The combination of subsections 113A(5) and 113A(7) will ensure that as far as is practicable, the arrestee will be kept fully informed about the reasons for their arrest bearing in mind that some arrests involving the use of force may be incompatible with a clear description of the grounds for arrest, such as where the arrestee is trying to evade arrest or is verbally abusive and aggressive.

150. The above powers are modelled on section 55A of the *Federal Court of Australia Act 1976*, which itself is modelled on sections 3ZB, 3ZC and 3ZD of the *Crimes Act 1914*, to ensure that they include appropriate limits and safeguards for arresters in conducting arrests under the Federal Circuit Court of Australia Act or the Rules of Court.

Item 38: Application provision

151. This item will provide that new section 113A, inserted by item 37, applies in relation to arrests authorised by the Federal Circuit Court of Australia Act, after the commencement of that section, or authorised by warrants issued under the Federal Circuit Court of Australia Act after commencement of that section.

152. This will ensure that new section 113A does not have retrospective application.

Federal Court of Australia Act 1976

Item 39: Section 4

153. This item will insert a definition of 'Roll' into the interpretation section of the Federal Court of Australia Act.

154. 'Roll' will have the same meaning as in the *Commonwealth Electoral Act 1918* which provides that 'Roll' means an Electoral Roll under the Commonwealth Electoral Act.

155. This definition is necessary for the amendment of subsection 23DG(1) of the Act, inserted by item 44 below.

Item 40: Subsections 23BH(1) and (2)

156. This item will repeal subsections 23BH(1) and (2) of the Federal Court of Australia Act and replace them with new subsections.

157. New subsection 23BH(1) will provide that the prosecutor may, in accordance with the Rules of Court, amend or replace an indictment in relation to an accused at any time when no date has been set for the start of the trial of the accused, or the 90 day period ending on the date set for the start of the trial has not started.

158. The note below new subsection 23BH(1) will state that a trial starts when the accused is arraigned before a jury, as is set out in subsection 23FA(2) of the Federal Court of Australia Act.

159. New subsection 23BH(2) will state that if the 90 day period ending on the date set for the start of the trial has started, or the trial has started, the prosecutor may only amend or replace the indictment with the leave of the Court.

160. The need for these amendments reflects the fact that there is a three month time limit for filing an indictment (see section 23BF of the Federal Court of Australia Act) and that the prosecution may need to refine its case as the pre-trial process proceeds. However, there is a risk that the prosecutor may make a substantial change to the indictment shortly before a trial is due to commence. There may be nothing the Court can do to prevent unfairness other than to adjourn the trial, or stay the proceedings if there is an abuse of process. This amendment will ensure the Court has proper powers to control the pre-trial process.

Item 41: Subsection 23BH(3) (heading)

161. This item will remove the heading of subsection 23BH(3) of the Federal Court of Australia Act. Because of the amendments to subsections 23BH(1) and (2), the subsection headings in section 23BH are no longer required as the provisions follow a logical order.

Item 42: Section 23CA

162. This item will repeal section 23CA of the Federal Court of Australia Act and substitute it with a new section 23CA.

163. New section 23CA will provide that if the Court notifies the prosecutor and the accused in writing of a pre-trial hearing in relation to an indictment filed in the Court, the prosecutor and the accused must attend a pre-trial hearing, and the accused must enter a plea to each count on the indictment that relates to the accused, unless the accused has already done so in a previous pre-trial hearing. The note at the end of section 23CA will remain the same.

164. Subsection 23CA(1) currently requires the Court to make an order directing the prosecutor and the accused to attend a pre-trial hearing as soon as practicable after an indictment has been filed.

165. The current requirement for a court order at this stage is a formality which serves no purpose and could cause delay in arranging a pre-trial hearing. The delay could cause unfairness, especially if an accused is in custody.

Item 43: Subparagraph 23CE(b)(ii)

166. This item will amend subparagraph 23CE(b)(ii) of the Federal Court of Australia Act so that before the words ‘a written summary’, the words ‘if the prosecutor cannot obtain such a signed statement’ will be inserted.

167. Paragraph 23CE(b) forms part of the disclosure regime and currently requires the prosecution to give the defence, for each witness the prosecution calls, either a signed statement by the witness that sets out the evidence the witness is to give at trial, or a written summary of the evidence the witness is to give at trial.

168. This amendment will make it clear that that the prosecutor can only provide a written summary of the evidence the witness is to give at the trial if the prosecutor does not hold a signed statement by the witness, and cannot obtain such a signed statement, that sets out the evidence the witness is to give at the trial. This will ensure that whenever possible, the defence will be provided with the most accurate account of the witness statements for witnesses the prosecution proposes to call at trial.

Item 44: Subsection 23DG(1)

169. This item will repeal subsection 23DG(1) of the Federal Court of Australia Act and replace it with a new subsection 23DG(1).

170. New subsection 23DG(1) will provide that the Sheriff may prepare a written jury roll for a jury district by combining the Rolls, as on the day the Sheriff begins the preparation, for each electoral division that forms part of the jury district.

171. Subsection 23DG(1) currently states that the Sheriff may prepare a written jury roll for a jury district. However, it does not prescribe who is to form part of a jury roll for a jury district. New subsection 23DG(1) will clarify exactly who is to form part of a jury roll for a jury district.

172. As inserted by item 39 above, ‘Roll’ will have the same meaning as in the *Commonwealth Electoral Act 1918* which provides that ‘Roll’ means an Electoral Roll under the Commonwealth Electoral Act.

Item 45: Subsection 23DV(2)

173. This item will repeal subsection 23DV(2) of the Federal Court of Australia Act and replace it with a new subsection.

174. New subsection 23DV(2) will provide that potential jurors from the jury panel who are not empanelled under section 23DU are taken to be excused by the Court from serving on the jury at the earlier of the closing of the session of court at which the jury delivers its verdict on all counts or a judgement of acquittal under subsection 23FH(2) is delivered, or the day after the end of the three month period starting on the day on which a jury is first empanelled as the jury for the trial.

175. The purpose of new subsection 23DV(2) is to ensure that, where a jury is dismissed by the Court within three months of its empanelment, the Sheriff may draw a new jury from the list of potential jurors that was developed for the purposes of the trial. This will save the Court significant time and resources and ultimately lead to a more efficient resolution of the proceedings.

Item 46: Subsection 23EL(1)

176. This item will repeal subsection 23EL(1) of the Federal Court of Australia Act.

177. Subsection 23EL(1) is unnecessary because subsection 23EL(3) provides the Court with a broad discretion to discharge a jury in the interests of justice. The discretion provided to the Court in subsection 23EL(3) covers situations that may be enlivened by subsection 23EL(1) in which the Court may determine the composition of the jury to be unsatisfactory.

178. The removal of subsection 23EL(1) aligns with the government's clearer laws initiative.

Item 47: Paragraph 23EM(2)(a)

179. This item will repeal paragraph 23EM(2)(a) of the Federal Court of Australia Act and replace it with a new paragraph.

180. New paragraph 23EM(2)(a) will provide that subsection 23EM(1) will not apply if the jury is discharged under subsection 23EL(3) or (5) during the three month period starting on the day on which a jury is first empanelled for the trial under section 23DU.

181. The three month time frame reflects the time in which a new jury may be formed from an existing jury panel, as inserted by item 45 above.

182. The inclusion of references to subsection 23EL(3) or (5) reflects the fact that it is not appropriate for the Court to order a new trial of an accused in relation to a count in the indictment if the jury is discharged for the reasons provided by these subsections within three months of the jury's empanelment. This is to allow the Court to form a new jury from an existing jury panel within three months of the jury's empanelment, as inserted by item 45 above.

Item 48: Subsection 23EM(3)

183. This item will repeal subsection 23EM(3) of the Federal Court of Australia Act and replace it with a new subsection.

184. New subsection 23EM(3) will provide that if the jury is discharged under subsection 23EL(3) or (5) during the three month period starting on the day on which a jury is first empanelled for the trial under section 23DU, the Court may direct an officer of the Court to start the process for empanelling a new jury under section 23DU from the same jury panel and give any other direction the Court thinks it convenient to give in relation to that process.

185. Providing the Court with the ability to give a direction reflects the fact that potential jurors who were suitable for an original trial, may become unsuitable for a subsequent trial. For example, they may be convicted of a crime.

186. The note at the end of the subsection will provide examples of the types of directions the Court may give.

187. This item compliments item 45 above to allow the Court to draw potential jurors from an existing jury panel within three months of the empanelment of an original jury, so that the Court does not need to go through the entire process of forming a jury from the beginning if a jury must be dismissed under subsection 23EL(3) or (5).

Item 49: Paragraph 23EM(5)(a)

188. This item will repeal paragraph 23EM(5)(a) of the Federal Court of Australia Act and replace it with a new paragraph.

189. New paragraph 23EM(5)(a) will provide that any person previously empanelled as a juror in the trial, including any person discharged otherwise than under subsection 23EJ(1) before the direction under paragraph (3)(a) was given, and any potential juror in the trial discharged before the direction under paragraph (3)(a) was given, cannot be empanelled on the new jury and remain discharged.

190. This will ensure that jurors deemed ineligible to serve on the first jury, cannot be empaneled for a new jury. This is because the circumstances deeming the potential jurors ineligible for the first jury will also apply to a new jury.

Item 50: Paragraph 23GB(2)(b)

191. This item will replace the reference to “paragraph 23CA(1)(b)” in paragraph 23GB(2)(b) of the Federal Court of Australia Act and substitute it with a reference to “paragraph 23CA(b)”. This is required because of the amendment to section 23CA inserted by item 42 above.

Item 51: Paragraph 30AE(4)(a)

192. This item will repeal paragraph 30AE(4)(a) of the Federal Court of Australia Act.

193. Paragraph 30AE(4)(a) relates to orders of a kind which are not appropriate in criminal appeal proceedings because in a criminal appeal there is no basis for a court to join additional parties.

Item 52: Paragraph 30AL(a)

194. This item will remove the word “indictable” from paragraph 30AL(a) of the Federal Court of Australia Act, to ensure that any time spent on bail does not count toward the service of a sentence in any circumstances.

195. This amendment is necessary because the Court could potentially grant bail pending the hearing of an appeal in a summary matter where the defendant has been sentenced to a term of imprisonment. Time spent on bail should not count towards the service of the sentence in any circumstances, and not just where the appellant was convicted of an indictable offence.

Item 53: Paragraphs 30BF(2)(b) and (5)(b)

196. This item will remove the word “Judge”, wherever it occurs, from paragraphs 30BF(2)(b) and (5)(b) of the Federal Court of Australia Act and replace it with the words “Judge or magistrate”.

197. These provisions give the Court power to remit a matter for further hearing if it upholds an appeal from a summary prosecution. The current provisions are phrased in terms of the matter being remitted to “the Judge” who handled the prosecution. However, the Federal Court could be hearing an appeal from a judgment by a state or territory magistrate who is not a Judge.

198. This amendment will clarify that the Court does have power to remit a matter to a magistrate if it upholds an appeal in a summary prosecution.

Item 54: Application provision

199. This item will insert an application provision that will provide that the amendments to section 30BF of the Federal Court of Australia Act, as inserted by item 53 above, apply in relation to an appeal allowed by the Court on, or after, the day the amendments commence, regardless of when the appeal was brought by a party.

200. This will make it clear that the amendments to section 30BF will not apply to appeals under paragraphs 30BF(2)(b) and (5)(b) which were allowed by the Court before the commencement of the amendments.

Freedom of Information Act 1982

Item 55: Subsection 61A(1)(table item 1)

201. This item will repeal table item 1 of subsection 61A(1) of the Freedom of Information Act 1982 which will be inserted by the *Tribunals Amalgamation Act 2015* on 1 July 2015.

202. Subsection 61A(1) modifies the application of the *Administrative Appeals Tribunal Act 1975* by providing that when an applicant applies for AAT second review, the reference to the person who made the decision, is a reference to each person who was a party to the first review (other than the applicant who has applied for AAT second review).

203. The repeal of subsection 61A(1)(table item 1) is necessary because this Bill will introduce paragraph 29AC(1)(c) which will provide that the Tribunal must give notice of receiving an application, to any person who is made a party to the review by another enactment that authorised the application.

204. As both provisions will achieve the same outcome, subsection 61A(1)(table item 1) will become redundant.

International Arbitration Act 1974

Item 56: Part II (heading)

205. This item will amend the heading of Part II of the International Arbitration Act to better reflect its content. The new heading will read: *Part II—Enforcement of foreign arbitration agreements and awards*

206. Part II of the Act implements the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the ‘Convention’).

207. Section 7 of Part II regulates the enforcement of foreign arbitration agreements and section 8 of Part II regulates the enforcement of arbitral awards. Currently, the heading of Part II refers to ‘foreign awards’ but does not refer to the enforcement of international arbitration agreements.

208. The amended heading will assist users of the Act to more easily navigate its provisions.

Items 57 and 58: Subsection 8(4) and Application provision

209. Subsection 8(4) of the International Arbitration Act provides that foreign arbitral awards may not be enforced where the award was made in a country which is not a party to the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the ‘Convention’) at the time enforcement is sought. This is the case unless the party seeking enforcement is at that time domiciled or ordinarily resides in Australia or another country which is a party to the Convention.

210. These items will remove this restriction and allow enforcement of foreign awards in Australia regardless of the country in which they are made. As such, they will improve compliance with the Convention by broadening the scope of application of the enforcement provisions under the Act.

Item 59: Paragraph 8(5)(a)

211. Paragraph 8(5)(a) of the International Arbitration Act allows a party to an arbitration agreement to apply to a court to resist enforcement of an award only on the basis of the incapacity of the award debtor. An award debtor cannot apply to resist enforcement on the basis of the incapacity of another party to the arbitration agreement.

212. This item will allow a party to rely on the incapacity of any party to the arbitration agreement in a plea for refusal of enforcement, rather than the legal incapacity of the award debtor only. This item will make enforcement proceedings fairer for all parties and improve the Act’s consistency with the Convention.

Items 60 to 63: Subsection 22(2) (heading), After paragraph 22(2)(c), Subsection 22(3), and Application provision

213. These items will make international arbitration proceedings conducted in Australia confidential by default rather than requiring parties to specify that proceedings are to be confidential, subject to certain public interest exceptions.

214. Privacy and confidentiality are considered to be amongst the most attractive features of arbitral proceedings when compared to litigation. Confidentiality provisions in sections 23C to 23G of the International Arbitration Act operate on an opt-in basis as set out in subsection 22(3) of the Act. These items will make the confidentiality provisions operate on an opt-out basis. They will also align international commercial arbitral proceedings seated in Australia with domestic proceedings conducted under the State and Territory Commercial Arbitration Acts.

Item 64: Section 30

215. This item will remove a section from the International Arbitration Act which the Federal Court found to be redundant and a source of confusion.

James Hardie (Investigations and Proceedings) Act 2004

Item 65: Subsection 3(1) (paragraph (a) of the definition of *professional confidential relationship privilege*)

216. This item will remove the reference to Division 1A of the Evidence Act 1995 in the definition of professional confidential relationship privilege in subsection 3(1) of the James Hardie (Investigations and Proceedings) Act and replace it with a reference to Division 1C of the Evidence Act.

217. This is required because of the insertion of item 26 above, which will move the journalist privilege provisions from Division 1A of Part 3.10 of the Evidence Act 1995 to new Division 1C of Part 3.10 of the Evidence Act. This will provide consistency with the numbering of the ACT, NSW and Vic Evidence Acts.

Paid Parental Leave Act 2010

Item 66: Section 239

218. This item will repeal section 239 of the Paid Parental Leave Act which will be inserted by the *Tribunals Amalgamation Act 2015* on 1 July 2015.

219. The repeal of section 239 is necessary because this Bill will introduce paragraph 29AC(1)(c) of the *Administrative Appeals Tribunal Act 1975* which will provide that the Tribunal must give notice of receiving an application, to any person who is made a party to the review by another enactment that authorised the application.

220. As both provisions will achieve the same outcome, section 239 will be redundant.

Proceeds of Crime Act 2002

Item 67: Section 388 (paragraph (a) of the definition of *professional confidential relationship privilege*)

221. This item will remove the reference to Division 1A of the Evidence Act 1995 in the definition of professional confidential relationship privilege in section 388 of the James Hardie (Investigations and Proceedings) Act and replace it with a reference to Division 1C of the Evidence Act.

222. This is required because of the insertion of item 26 above, which will move the journalist privilege provisions from Division 1A of Part 3.10 of the Evidence Act to new Division 1C of Part 3.10 of the Evidence Act. This will provide consistency with the numbering of the ACT, NSW and Vic Evidence Acts.

Public Interest Disclosure Act 2013

Item 68: Subsection 23(2)

223. This item will remove the reference to subsection 126H of the Evidence Act 1995 in subsection 23(2) of the Public Interest Disclosure Act and replace it with a reference to subsection 126K of the Evidence Act.

224. This is required because of the insertion of item 28 above which will renumber section 126H of the Evidence Act to new section 126K of the Evidence Act. This will provide consistency with the numbering of the ACT, NSW and Vic Evidence Acts.

Social Security (Administration) Act 1999

Item 69: Section 180 (table item 1)

225. This item will repeal table item 1 of section 180 of the Social Security (Administration) Act which will be inserted by the *Tribunals Amalgamation Act 2015* on 1 July 2015.

226. Section 180 (table item 1) modifies the application of the *Administrative Appeals Tribunal Act 1975* by providing that when an applicant applies for AAT second review, the reference to the person who made the decision, is a reference to each person who was a party to the first review (other than the applicant who has applied for AAT second review).

227. The repeal of section 180 (table item 1) is necessary because this Bill will introduce paragraph 29AC(1)(c) which will provide that the Tribunal must give notice of receiving an application, to any person who is made a party to the review by another enactment that authorised the application.

228. As both provisions will achieve the same outcome, section 180 (table item 1) will be redundant.

Student Assistance Act 1973

Item 70: Section 321

229. This item will repeal section 321 of the Student Assistance Act which will be inserted by the *Tribunals Amalgamation Act 2015* on 1 July 2015.

230. Section 321 modifies the application of the *Administrative Appeals Tribunal Act 1975* by providing that when an applicant applies for AAT second review, the reference to the person who made the decision, is a reference to each person who was a party to the first review (other than the applicant who has applied for AAT second review).

231. The repeal of section 321 is necessary because this Bill will introduce paragraph 29AC(1)(c) which will provide that the Tribunal must give notice of receiving an application, to any person who is made a party to the review by another enactment that authorised the application.

232. As both provisions will achieve the same outcome, section 321 will be redundant.