

Superannuation Australia  
(a fully owned subsidiary of Taxpayers Australia)  
PO Box 292  
East Kew VIC 3102

19 January 2007

Ms Jackie Morris  
A/g Committee Secretary  
Legal and Constitutional Affairs Committee  
Parliament House  
Canberra ACT 2600

Dear Ms Morris,

Further to your letter dated 8 December 2006 please find attached comments from Superannuation Australia in relation to the Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006.

Thank you for the opportunity to comment on this amendment to the legislation.

A brief overview of Taxpayers Australia is also attached for your information. Superannuation Australia is a fully owned subsidiary of that entity.

Yours sincerely,

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Superannuation Australia

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**Superannuation Australia's comments on the *Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006.***

**Executive Summary**

Superannuation Australia's main concern in relation to the proposed legislation is that it is quite possible for the bankruptcy trustees to get it wrong when they recover those superannuation contributions that were made prior to bankruptcy. Unfortunately as often happens the bankrupt may be none the wiser as to impending bankruptcy and this could lead to the loss of those superannuation contributions when in fact there was no intention on the part of the bankrupt to defeat potential claims by creditors when the contributions were actually made.

**Comments by Superannuation Australia**

The Bill before the Senate will enable bankruptcy trustees to recover superannuation contributions made prior to bankruptcy where the intention was to defeat the claims of creditors, to exempt from such claims certain rural support grants and for minor amendments to improve the operation of the Bankruptcy Act 1966.

A reading of the proposed amendment would suggest that the intent is clearly to allow bankruptcy trustees to target those who made superannuation contributions prior to bankruptcy with the intention of defeating subsequent claims by creditors. This is summed up with reference to the following parts of the amendment.

Subdivision B Superannuation Contributions, 128 B (1) (a),(b),(c)(i),(ii) and (d) describe the transfers that are void under this amendment and 128B(2) shows when the main purpose of the transfer if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was or was about to become insolvent.

128B (3) (a) and (b) determine whether the transferor's main purpose was a transfer that would be void under this amendment by examining whether a pattern of contributions had been established 3(a) and whether the transfer was out of character with this pattern 3(b). In addition 128B (4) indicates that 3(a) and 3(b) do not limit the ways of establishing the transferor's main purpose in making the transfer. From 128(5) a rebuttal presumption arises that the transferor was or was about to become insolvent.

**Our concern**

Clearly the intent of the amendment is to catch those contributions that are made with the intention of defeating bankruptcy claims. In many situations this is likely to be relatively easily established and the contributions then deemed to be void. We have no real issue with that situation. However this will not always be the case and the concern we have is where contributions that are made at a time preceding bankruptcy are necessarily deemed to be made with the intention of defeating creditor claims. This could be a significant problem for the future with this amendment.

Although the focus of the amendment is defeating bankruptcy claims it is hamstrung by the fact that in some circumstances it would be difficult if not impossible to adequately prove that there was no intent to defeat creditors particularly where contributors are dependent upon third parties to advise them about their financial status or likely future insolvency. Many businesses may teeter “on the brink” for an extended period before going under or indeed before fully recovering and flourishing. Categorical statements about the future of a business are not always going to be played out in practice in the future.

In addition, patterns of contribution may be easily and apparently arbitrarily changed without any intention of defeating creditor claims by the contributor.

The benefit of the doubt in the matter of the intent of the contributor should go with the contributors where such doubt exists.

This concludes the comments from Superannuation Australia.

Some background on Taxpayers Australia Inc

*Taxpayers Australia Inc (formerly Australian Taxpayers Association) was established in 1919. It is a not-for-profit organisation committed to educating, informing and representing business and individual taxpayers alike. It is not affiliated with any political party or pressure group, and regularly makes submissions to the Government on taxation and superannuation issues on behalf of its members and all Australian taxpayers. The organisation is represented on major industry consultative forums with the Australian Taxation Office.*

*It aims to educate and inform taxpayers and to bring to members relevant and up to date information via expert publications, online information, through the media and via seminars on tax and superannuation.*

*Taxpayers Australia Inc provides this information in plain English. Its members include tax and business advisers, accountants, tax agents, financial planners, business people, investors, students, academics and individual taxpayers. It is also a founding member of both The World Taxpayers Association and The Asia Pacific Taxpayers Union.*

*Superannuation Australia is a fully owned subsidiary of Taxpayers Australia and is responsible for the superannuation aspects of the group.*