



Facsimile Transmission: 02 6277 5794

Ms Jackie Morris
A/g Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Ms Morris,

Inquiry into the Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006

I refer to the above inquiry and to the call for submissions in relation to the *Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006* ('the Bill').

The Business Law Section of the Law Council of Australia, through its Insolvency and Reconstruction Law Committee, ('the Committee') welcomes the opportunity to provide the following comments in relation to the Bill.

Executive Summary

1. The Law Council supports the introduction of amendments to the *Bankruptcy Act 1966* ('the Act') intended to remove a potential loophole highlighted by the decision of the High Court of Australia in *Cook v Benson* (2003) 214 CLR 370.
2. The proposed amendments contained in the Bill generally reflect the previous submissions of the Committee. In the circumstances the Committee generally supports the proposed amendments.
3. There are a number of particular provisions in respect of which minor technical amendments may be warranted to avoid unintended consequences
4. The Bill does not address the apparent inconsistency contained within the Act in that protection is not afforded to benefits paid from a superannuation fund to a member prior to bankruptcy while such benefits are protected if paid after the date of bankruptcy.

GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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General Response

Since the decision of the High Court of Australia in *Cook v Benson* there has been a widely recognised loophole within the Act which allows insolvent individuals to dispose of their assets to an arms length superannuation fund without fear of having such funds clawed back upon bankruptcy under either section 120 or section 121 of the Act. The Committee supports the move to close this possible loophole.

The Committee opposed the original proposal for reform which was presented through the initial consultative process undertaken by the Inspector-General in Bankruptcy. This was on the basis that it was overly complex and appeared to conflict with the fundamental policy objective of protecting a bankrupt's interest in a superannuation fund from being available to creditors. In this regard the Committee does not consider there is any inconsistency in policy objectives in firstly protecting a bankrupt's interest in a superannuation fund from being available for creditors while recognising that an insolvent debtor is prohibited from disposing of his or her assets to a superannuation fund with the objective of defeating creditor claims.

Through the Bankruptcy Reform Consultative Forum (Forum) the Committee submitted that the possible loophole could be overcome through a simple amendment to section 121 of the Act. In particular it was suggested that an amendment be introduced by which a superannuation fund was deemed not to have provided any consideration for contributions made to it for the purposes of that section. This would eliminate the operation of paragraph 121(4)(a) upon which the trustee of an arms length superannuation fund could rely in order to defeat any claim of the trustee in bankruptcy.

Proposed section 128B is reflective of the submissions of the Committee and is supported.

Section 128C arguably may have limited impact by virtue of the proposed paragraph 128C(1)(d). In this regard it will only capture transfers of property in which a bankrupt already had an entitlement in which case section 128B ought to apply. For the avoidance of doubt the Committee supports the introduction of this provision.

The Committee supports the introduction of the "freezing notices" contained in Part 2 of the Bill as a practical means of preventing bankrupts from circumventing recovery proceedings by a trustee in bankruptcy.

Particular Issues

1. The proposed amendments contained in clauses 10, 11 and 13 of the Bill refer to "a provision that facilitates compliance with ... section 128C...". Sections 128B and 128C are empowering provisions that enable a court to set aside specific transfers. They do not of themselves require "compliance" with anything.
2. The proposed amendments contained in clauses 19 and 20 of the Bill require a trustee in bankruptcy to refund certain amounts to the trustee of the superannuation fund. This should be limited to the extent of the funds recovered by the trustee in bankruptcy so as to avoid a personal impost on the trustee in bankruptcy where the fund has suffered losses. Commercially this may not be an issue as a trustee will unlikely commence proceedings without verifying the extent of the funds held to the credit of the member and the likely refunds to be made.

Other Matters

1. It is understood the superannuation industry may have sought greater particularisation of the means by which the superannuation trustee would be required to remit money. It is submitted that the proposed amendment to section 139ZQ (clause 32 of the Bill), alternatively the

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sanction of the Court upon setting aside a transaction, will be sufficient protection to superannuation trustees. Alternatively Regulation 6.22B of the Superannuation Industry Supervision Regulations will operate as a mechanism to permit payments in satisfaction of claims by a trustee in bankruptcy.

2. Section 116(2)(d) of the Act protects a bankrupt's interest in a superannuation fund from vesting in a trustee in bankruptcy up to the specified cap. However if a member's interest in a fund vests in the person, who immediately thereafter goes bankrupt, such interest will be available to creditors. From a policy perspective there does not appear to be any reason for this distinction. To the extent it is recognised this is an unfortunate anomaly it is appropriate it be addressed in the Bill.

We trust these comments have been of some assistance. Should you require any clarification or further assistance please contact Mr Michael Lhuede who represents the Committee on the Forum on 03 8665 5506.

Yours sincerely,


Peter Webb
Secretary-General

19 January 2007