Investment & Financial Services Association Ltd

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22 January 2007

Jackie Morris
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006

IFSA appreciates the opportunity to contribute to the Senate Legal and Constitutional Affairs Committee Inquiry into the Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006.

IFSA is a national not-for-profit organisation which represents the retail and wholesale funds management, superannuation and life insurance industries. IFSA has over 120 members who are responsible for investing over $920 billion on behalf of more than nine million Australians. Members' compliance with IFSA Standards and Guidance Notes ensures the promotion of industry best practice.

First and foremost, IFSA strongly endorses the Government's decision to allow bankruptcy trustees to recover only those contributions that have been made with the intention to defeat creditors. We support the decision not to proceed with earlier proposals that would have allowed bankruptcy trustees to recover "excessive" contributions as these would have been unnecessarily complex.

The attached submission raises the following matters for the Committee's consideration as part of their inquiry into the Bill.

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IFSA would be pleased to discuss the issues raised in this submission further with the Committee. Please don't hesitate to contact myself or Stephanie Lee if you require further information of if you have any queries.

Yours sincerely

Richard Gilbert
Chief Executive Officer

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE BANKRUPTCY LEGISLATION AMENDMENT (SUPERANNUATION CONTRIBUTIONS) BILL 2006

The following issues have been identified by IFSA as requiring further consideration and in cases amendment to the Bill as suggested.

Requests for information from bankruptcy trustees

While the legislation is silent on this issue, we anticipate that bankruptcy trustees and the Official Receiver will be able to request information from superannuation trustees in relation to individual members' accounts.

The information requirements should be flexible enough to accommodate the different types of information held by different funds, and to provide the trustees of superannuation funds with some flexibility in how the information is provided. It should therefore not be prescribed by law.

Freezing members' accounts

Exceptions to freezing of members' accounts: administration fees and insurance premiums

Under the provisions of the Bill the Official Receiver will have the power to issue a superannuation account-freezing notice, which is designed to prevent the member of the superannuation fund dealing with their interest in the fund in such a manner that could result in the void contributions not being recovered by the bankruptcy trustee. However, certain "costs" can continue to be debited.

Section 128E(2)(e) of the Bill allows superannuation trustees to continue to charge costs from the superannuation interest while a "superannuation account-freezing notice" is in place. "Costs" are defined in section 128N as including transaction costs, government charges, taxes and duties and charges relating to investment management. This section also includes a provision allowing the regulations to prescribe additional costs.

It is not clear that these costs will cover normal account administration fees and / or insurance premiums. IFSA therefore believes there is the need for changes to the Bill, providing clarification that administration fees and insurance premiums which are imposed on a person's superannuation interest will fall within the definition of "costs", and can continue to be recovered from a superannuation interest which is the subject to an account-freezing notice.

Successor fund transfers and eligible rollover funds

Section 128H provides that, upon request from the member of a superannuation fund (who is or is about to become bankrupt), the Official Receiver, after consulting the bankruptcy trustee, can consent to the cashing, debiting, roll-over, transfer or forfeiture of all or part of the superannuation interest where an account-freezing notice is in force in relation to that interest. Funds subject to the notice may for example be rolled over for investment reasons (e.g. to secure a better investment in an alternative superannuation fund) or be cashed for use by the member if relevant SIS cashing restrictions are satisfied.

The major issue with this provision is that it only operates if the member of the superannuation fund requests that his or her superannuation benefits be cashed, debited, rolled-over, transferred or forfeited. The Bill does not provide for the situation where the Trustees of superannuation funds wish to cause benefits to be transferred without member consent under either the successor fund transfer or the eligible rollover fund (ERF) provisions of the SIS Act and SIS Regulations.

This will have practical implications for the Trustees of superannuation funds involved in fund migrations which rely on the use of the successor fund transfer provisions. As the Bill currently stands, the transfer of benefits to a successor fund (or to an ERF) when the benefits are subject to an account-freezing notice, would effectively require the relevant member to request the written consent of the Official Receiver to permit the funds to be transferred. This is both impractical and inconsistent with the underlying rationale of successor fund transfers and of transfers to an ERF.

The same issue was recognised and addressed under the Family Law Act superannuation provisions, at least in relation to successor fund transfers.

We consider that the Bill needs to incorporate provisions similar to s90MLA of the *Family Law Act 1975*. That section effectively allows for the transfer of a family law payment flag to a successor fund. To achieve this in the bankruptcy context, it would be necessary for s128E(2) to be amended to authorise payment to the receiving trustee under a successor fund transfer, with the expression "successor fund transfer" being defined in similar terms to the definition in s90MLA(3) of the Family Law Act.

It would also be necessary to amend s128E to ensure that the restrictions under that section are passed on to the receiving trustee in the successor fund transfer. This could involve imposing a prerequisite to the successor fund transfer of the interest of the affected member, that the transferring trustee gives a copy of the account-freezing

notice to the receiving trustee, and that on the transfer proceeding in these circumstances, the receiving trustee would be taken to have received the account-freezing notice from the Official Receiver and be subject to the restrictions under it. For the purposes of s128E(5), the notice would be taken to have come into force in respect of the receiving trustee at the time of the transfer.

Similar provisions to this should also be incorporated to allow for a Trustee of a superannuation fund who has been served with an account-freezing notice, to initiate transfers to an ERF (ie on the basis that the trustee of the ERF similarly assumes the restrictions under the account-freezing notice from the transfer time).

The Official Receiver's consent under s128H is currently proposed to apply where there is a request from the member of the superannuation fund and hence has no current relevance to successor fund transfers or ERFing. Successor fund transfers and ERFing operate without the need for member consent and we submit that they should also operate without the need for any consent of the Official Receiver. To introduce such a consent requirement would mean imposing a significant and unnecessary new impediment to such transfers.

The mechanism referred to above is based on the Family Law Act provisions and would provide adequate safeguards.

Timeframe for giving effect to a freezing notice

The Bill provides that the order takes effect on the day it is received by the trustee. IFSA believes that some provision needs to be made for the necessary timeframe required for the fund's administrator taking the necessary steps to implement the freeze on the fund's system after the notice is issued. An additional period after receipt of the notice needs to be specified (a minimum of 5 business days).

Retention of fees by the superannuation trustee

The Bill contains two separate provisions (128B(5A) and 128C(7A)) which enable the superannuation trustee to retain fees and other deductions such as tax that have been deducted from a contribution. This outcome is achieved by a two-step process, whereby the superannuation trustee is required to remit the full contribution to the bankruptcy trustee, and for the bankruptcy trustee to then pay to the superannuation trustee the amount of the fees, charges and taxes.

We suggest that a simpler approach would be to require the super trustee simply to remit to the bankruptcy trustee an amount net of fees, taxes and charges in respect of the void contribution.

Complying with an order under s128K(1)(b)

Section 128K provides a mechanism for judicial enforcement of an account-freezing notice. Section 128K(1) provides that, where the Court is satisfied that the Trustee of a superannuation plan has breached, or is proposing to breach, the account-freezing

notice, the Court may make an order directing the Trustee to comply with the notice. In addition, the Court may make an order directing the Trustee to pay to the bankruptcy trustee an amount not exceeding the void superannuation contributions (s128K(1)(b)). This is intended to cover the situation where the account-freezing notice has been breached, the member has withdrawn their benefits and the bankruptcy trustee is unable to recover the void contributions.

Whilst the Trustee of the superannuation fund might be considered to be at fault in having breached or "proposing to breach" an account-freezing notice, this needs to be considered in the context of the considerable difficulties raised by an account-freezing notice that comes into effect immediately on service on the Trustee. The comments at *Timeframe for giving effect to a freezing notice* above relate to this issue.

In addition, the effect of the court order could be to require a payment by the Trustee, even where there are monies of the relevant member remaining in the superannuation fund. It seems that in such a case the Trustee may not be able to use the member's superannuation balance to satisfy the payment. This is because the terms of s128K do not indicate that the payment obligation under such an order can be applied against the member's benefit, if any benefit remains in the fund. In a case where the money has already been paid out, that would not be possible and it therefore seems intended that the order will create a separate debt owed by the Trustee of the superannuation fund to the bankruptcy trustee.

Whilst it may seem unlikely that there will be a Court order in circumstances where the relevant benefits remain in the fund, the Bill does allow for this. We propose changes to the Bill such that it is made clear that the amount of a payment pursuant to the Court order can be deducted from the relevant member's benefit in the fund (if any) and that this is to be taken as a discharge of the trustee's obligation to the member in relation to the amount paid.

Payments to bankruptcy trustees – tax implications

The Bill is silent on the intended tax implications of a payment to a bankruptcy trustee. We seek clarification from the Government on the intended tax treatment and would be happy to engage with Treasury and/or the ATO in discussions on this issue.

Jurisdiction of the Superannuation Complaints Tribunal

Clause 128L of the Bill protects the trustee against civil or criminal proceedings in relation to compliance with orders under the Bankruptcy Act.

Consideration also needs to be given to the potential for a member or beneficiary to make a complaint to the Superannuation Complaints Tribunal or another External Disputes Resolution Scheme. While it might be reasonable for a complaint to be made in relation to an error made by a trustee in complying with an order – eg refunding too much to a bankruptcy trustee – a member or beneficiary should not be able to make a complaint in relation to actions taken by the Trustee (or another party on its behalf) to comply with an order made under the Bankruptcy Act.

Information to be included in court orders

IFSA believes that court orders should state the amount of money in question, should set out the payment instructions for the superannuation trustee and the tax status of the contribution.

Amendments commencing on Proclamation

Implementation of the necessary changes to administration systems, processes and procedures will necessarily take time. The ability of the industry to deal with this change at the present time, or at any time before 1 July 2007, is very restricted due to the extensive work that is required to implement the 'Simpler Superannuation' initiatives announced as part of the 2006 Budget. Furthermore, the Bill giving effect to these announcements has only very recently been released and some of the regulations are not yet available. Further pressure on resources is being experienced due to the requirements to implement the Anti-Money Laundering and Counter-Terrorism Funding legislation.

For these reasons, IFSA is of the strong view that date of proclamation should be no earlier than 1 January 2008 to give the superannuation industry the necessary time to implement the required changes.

Superannuation in hierarchy of asset retrieval

IFSA advocates that superannuation should be the last asset class of bankrupts to be accessed in order to pay creditors. Access to superannuation should be available only if there are insufficient other assets to meet the bankrupt's liabilities to creditors. This is consistent with the Government's retirement income policy objectives.