

Senate Standing Committee on Legal and Constitutional Affairs

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

PUBLIC HEARING
TUESDAY, 23 JANUARY 2007

Questions on notice in relation to technical issues raised in submissions

1. Please respond to issues raised in the submission from the Financial Planning Association of Australia (Submission 12) as follows:
 - Treasury's consideration of the Retirement Benefit Limit issue (p. 1); and
 - all issues raised on p. 2.

RBL reference in section 116

The Government has not yet announced a response to this issue.

Tax implications for funds withdrawn

Generally superannuation benefits paid from a superannuation fund are Eligible Termination Payments (ETP) and are subject to a range of taxation treatments depending on the character of the benefits. However, the Australian Taxation Office advises that amounts recovered by bankruptcy trustees under the Bankruptcy Act are not an ETP and consequently these amounts are not subject to ETP tax.

Interaction with superannuation splitting under the Family Law Act

The amendments will not protect payments subject to superannuation splitting under the Family Law Act. If the contribution was made with the intent to defeat creditors using any available vehicle under the Family Law Act, the provisions in the Bill will override the effectiveness of that arrangement as long as the bankruptcy trustee proves the relevant intent.

Under the Bankruptcy Act and Family Law Act, the bankruptcy trustee can become a party to family law proceedings to protect the interests of creditors. This includes an ability to apply to have family law orders set aside in some circumstances.

Delayed payment of death benefits

The executor could make an application under section 128H in place of a deceased bankrupt.

Fund administrator to charge bankruptcy trustee

This would be inconsistent with bankruptcy policy which allows the Official Receiver to issue notices requiring information to be given by third parties who cannot charge

for providing that information. It is likely that the new provisions will be used very rarely so the impost on fund administrators will not be significant.

Effect of withdrawals on other fund members

Members of small superannuation funds are usually trustees of these funds. Under current law all superannuation fund trustees must act honestly in all matters concerning the entity. Trustees are also required to formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the fund, including, among other things, liquidity of the fund's investments having regard to its expected cash flow requirements.

2. Please respond to issues raised in the submission from the Investment & Financial Services Association (Submission 13) as follows:

- exceptions to freezing members' accounts – administration fees and insurance premiums (pp 3-4);

The definition of 'costs' includes charges relating to the management or investment of fund assets or RSA assets. It is considered that this definition clearly includes normal administration fees associated with management of the account.

Insurance premiums may relate to a range of products. It would not be appropriate to provide a general carve-out for all such premiums as some may be considered discretionary spending which is not directly related to the provision of the superannuation product. The definition of 'costs' in section 128N includes a power to make regulations to extend the definition and the Government will consider more detailed representations from the superannuation industry when they are made.

- successor fund transfers and eligible rollover funds, namely suggestion at p. 4 that the Bill should incorporate provisions similar to section 90MLA of the *Family Law Act 1975*;

In the rare cases in which this situation occurs, it can be dealt with administratively by arranging with the Official Receiver to revoke the freezing notice and issue a new notice on the successor fund. This will ensure the bankruptcy trustee is aware of what is happening to the void contribution(s) and is involved in matters affecting its recovery.

- timeframe for giving effect to a freezing notice (p. 5);

It would be inappropriate to defer the effectiveness of a freezing notice. The bankrupt must be given a copy of the notice and a delayed effect would create an obvious loophole by providing time for the bankrupt to rollover or transfer the contributions. If the superannuation fund trustee acts in accordance with the notice and in good faith, they are protected by section 128L. As long as the trustee acts expeditiously to implement the notice, they are not exposed to any liability.

- retention of fees by the superannuation trustee (p. 5);

In practice, this is what currently happens in relation to sections 120 and 121. The bankruptcy trustee will not know how to calculate these amounts – impractical to require bankruptcy trustee to determine net amount and limit recovery to this. The trustee/Official Receiver will accept the net amount as complying with the notice.

- payments to bankruptcy trustees – tax implications (p. 6);

Generally superannuation benefits paid from a superannuation fund are Eligible Termination Payments (ETP) and are subject to a range of taxation treatments depending on the character of the benefits. However, the Australian Taxation Office advises that amounts recovered by bankruptcy trustees under the Bankruptcy Act are not an ETP and consequently these amounts are not subject to ETP tax.

- jurisdiction of the Superannuation Complaints Tribunal (p. 6).

The Bill currently provides trustees of superannuation funds protection from civil and criminal action where they act in good faith and in accordance with the *Bankruptcy Act 1966*. Treasury will work with the superannuation industry and the relevant complaints handling bodies to determine whether further protection needs to be given to superannuation trustees in these circumstances.

3. Please respond to the recommendation by the Association of Superannuation Funds (Submission 6) that Item 19 of the Bill be redrafted to enable the superannuation fund trustee to pay to the trustee in bankruptcy an amount net of fees and charges (p. 3).

In practice, this is what currently happens in relation to sections 120 and 121. The bankruptcy trustee will not know how to calculate these amounts – it would be impractical to require the bankruptcy trustee to determine net amount and limit recovery to this. The trustee/Official Receiver will accept the net amount as complying with the notice.

4. Please respond to issues raised by the Law Council (Submission 7) as follows:

- the apparent inconsistency in the protection of benefits paid before and after the date of bankruptcy (pp 1 & 3);

This Bill reflects current bankruptcy policy. The Bill is designed to address particular avoidance behaviour and does not deal with more general issues about the treatment of superannuation interests in bankruptcy. The issue raised by the Law Council raises broader questions about what property is available to creditors and it is inappropriate to consider it in the context of these amendments.

- the references in clauses 10, 11 and 13 of the Bill (p. 2);

The trustee may apply to Court for a declaration that a contribution is void under these provisions. A payment by the superannuation fund in these circumstances would be made under these sections and the superannuation fund would be 'complying' with the order in making the payments.

- placing a limit on refunds by the trustee in bankruptcy to the trustee of the superannuation fund.

It is implicit in the provision that the bankruptcy trustee could only be required to refund money from the amount recoverable from the superannuation fund. No clarification is required.

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Questions on notice arising from the hearing

1. Does ITSA believe the existing legislation is adequate for dealing with non-complying superannuation funds or will this new legislation apply?

Section 116 provides that a bankrupt's interest in a regulated superannuation fund is not divisible among creditors. Therefore, if a bankrupt has an interest in a non-complying (or unregulated) superannuation fund, it is not protected. This means the bankrupt's interest in the fund is available to creditors. It is not necessary for the trustee to rely on provisions such as those in the Bill to recover that interest because the interest vests in the trustee on bankruptcy and is divisible among creditors.

It is possible that a person may contribute money to a trust which is not actually a superannuation fund but is intended to provide for retirement savings (or some other asset protection purpose). These payments and the trust which receives them would be treated in the same way as other transfers under the Bankruptcy Act. Undervalued transfers or transfers to defeat creditors would be void against the trustee. The provisions of Division 4A of Part VI may also apply where a trust controlled by the bankrupt has accumulated wealth using the bankrupt's resources.

The existing law is sufficient to deal with these funds.

2. What is the policy for exempting only certain rural grants from divisible property in bankruptcy?

The Government first implemented an exemption of this type in 1971 when the *States Grants (Rural Reconstruction) Act 1971* was introduced. This was a policy decision made in relation to payments under that particular scheme. The Government has subsequently made similar policy decisions in relation to a number of other rural grants schemes. The issue of exempting these payments in bankruptcy has not arisen in relation to other schemes.

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25 January 2007