
CHAPTER 13:

THE SUPERANNUATION INDUSTRY (SUPERVISION) CONSEQUENTIAL AMENDMENTS BILL 1993

AMENDMENT OF THE *BANKRUPTCY ACT 1966*

Introduction

13.1 This Amendments Bill affects the property that is available to creditors and that which is protected in bankruptcy; includes pensions as defined in the SIS Bill as 'income' for the purposes Part VI of the *Bankruptcy Act 1966*, and makes certain provisions in governing rules of superannuation funds and approved deposit funds void.

Property available to creditors and property that is protected

13.2 Section 116(1) of the *Bankruptcy Act 1966* (the Act) provides for the property of a bankrupt that is available for division among the bankrupt's creditors. Section 116(2) of the Act lists property of a bankrupt that is not available for division among a bankrupt's creditors.

13.3 Section 116(2) is amended by the Superannuation Industry (Supervision) Consequential Amendments Bill 1993. These amendments have two major effects. First, the requirement that policies of life assurance or endowment assurance that are protected by section 116(2) must have been in force for two years before the commencement of bankruptcy; and the requirement that similarly protected policies for annuities must have been in force for at least five years before the date of bankruptcy are

removed. Second, the new paragraph (2)(d) broadens the property that is not available for division among a bankrupt's creditors to include superannuation policies, the interest of the bankrupt in, or payment from, a regulated superannuation fund or approved deposit fund. However, there is a limit on the amount that can be protected by the new section 116(2)(d). The proposed section 116(5) limits the amount protected by section 116(2)(d) to the pension Reasonable Benefit Limit (RBL). The pension RBL is determined in accordance with section 140ZD of the *Income Tax Assessment Act 1936*. The RBL for the 1994-95 year of income is \$800 000 and is indexed for each subsequent year.

13.4 The Committee is concerned that the removal of the time limits may provide a means by which bankrupts can avoid creditors.

Part IV of the Bankruptcy Act 1966

13.5 Division 4B of this Part requires a bankrupt who derives income during the bankruptcy to pay contributions towards the bankrupt's estate and enables the recovery of certain money and property for the benefit of the bankrupt's estate. This Amendments Bill adds to the definition of 'income' pensions within the meaning of the SIS Bill.

13.6 This Part of the Act allows a trustee in bankruptcy to assess a threshold amount as necessary income for the bankrupt and the amount received in excess of that figure divided by two must be paid to the trustee for creditors. When taken in totality the proposed changes restrict a bankrupt from taking advantage of the generous provisions relating to the period before bankruptcy.

Certain governing rules to be void

13.7 The Bill proposes that a new section be inserted into the Act to void any provisions in the governing rules of a superannuation fund of an ADF which have the effect of cancelling, forfeiting, reducing or qualifying a beneficial interest of a member who becomes a bankrupt, who commits an act of bankruptcy or who executes a deed of assignment or arrangement. The Committee notes that in *Re Bond; Ex parte Ramsay* (Hill J, Federal Court of Australia, 30 November 1992) a forfeiture clause which purported to defeat benefits to which a member had become absolutely entitled was

held to be void. The Committee also notes that this decision has been appealed and a decision has been reserved by the Full Federal Court. The Committee supports the amendment.

Submissions

13.8 The Committee received one submission concerning the provisions dealing with bankruptcy in the Superannuation Industry (Supervision) Consequential Amendments Bill 1993.⁸²

Breach of the sole purpose test

13.9 Mr Tony Marks of Macquarie Investment Management Limited raised the issue of whether or not a trustee would be in breach of the sole purpose test if the trustee made a payment of a benefit to someone other than a member of a dependant⁸³. The Committee notes that the legislation does not deal with this matter explicitly. Clause 58(1)(b)(v) of the SIS Bill however provides that an 'ancillary purpose' includes 'the provision of such other benefits as the Commissioner approves in writing.' It is anticipated that the Commissioner would use this discretion in circumstances where a creditor sought to have access to that part of a bankrupt's superannuation above the RBL. Alternatively, the trustee could pay the bankrupt member their entitlement and the trustee in bankruptcy could subsequently access the amount through the usual means.

'the value of the property'

13.10 Mr Marks also raised the issue of the definition of the term 'the value of the property'. He submitted that it is of particular importance for there to be some certainty concerning the method of evaluation that is to be used and the point in time at which the evaluation is to occur. He submitted that the date that an individual is declared bankrupt would provide certainty as well as avoiding complex and disputable calculations.

⁸² SIS Sub No 85

⁸³ *ibid*

Recommendation 13.1:

The Committee recommends that the Consequential Amendments Bill be amended to include a definition of 'the value of the property', which outlines a method of valuation and specifies a point in time at which the valuation is to occur.

13.11 Mr Marks raised a number of other points relating to taxation matters. Although these issues will need to be addressed, they fall beyond the scope of the Committee's current terms of reference.