

CHAPTER 1

INTRODUCTION

Background

1.1 On 7 December 2006, the Senate referred the Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006 (the Bill) to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report by 8 February 2007.

1.2 The Bill proposes to amend the *Bankruptcy Act 1966* (Bankruptcy Act), the *Payment Systems and Netting Act 1998*, and the *Proceeds of Crime Act 2002* to:

- allow bankruptcy trustees to recover superannuation contributions made prior to bankruptcy with the intention of defeating the claims of creditors;
- provide for certain rural support grants to be exempt from the property available to pay creditors in cases of bankruptcy; and
- make minor technical amendments to clarify or improve the operation of the Bankruptcy Act.

1.3 The principal purpose of the major amendments proposed by the Bill is to allow bankruptcy trustees to recover superannuation contributions made with the intention of defeating creditors. As jointly announced by the Attorney-General and the Minister for Revenue & Assistant Treasurer on 27 July 2006, these amendments will apply to superannuation contributions made on or after 28 July 2006.¹ The effect of the amendments will be that payments to superannuation plans to defeat creditors will be recoverable in the same way as other payments or transfers to defeat creditors.

1.4 According to the Explanatory Memorandum (EM), these amendments will:

- allow a bankruptcy trustee to recover the value of contributions to an eligible superannuation plan made by a bankrupt to defeat creditors (along the lines of current section 121 of the Bankruptcy Act);
- allow the trustee to recover contributions made by a person other than the bankrupt for the benefit of the bankrupt where the bankrupt's main purpose in participating in the arrangement was to defeat creditors;
- ensure that consideration given by the superannuation trustee for the contribution will be ignored in determining whether the contribution is

1 The Hon. Philip Ruddock MP, Attorney-General and The Hon. Peter Dutton MP, Minister for Revenue & Assistant Treasurer, 'Government Closes Superannuation Loophole in Bankruptcy', 27 July 2006, at <http://assistant.treasurer.gov.au/pcd/content/pressreleases/2006/056.asp> (accessed 11 December 2006).

recoverable by the bankruptcy trustee, thus overcoming the effect of the High Court's decision in *Cook v Benson*;²

- allow a court to consider the bankrupt's historical contributions pattern and whether any contributions were 'out of character' in determining whether they were made with the intention to defeat creditors;
- provide that a superannuation fund will not have to repay any fees and charges associated with the contributions or any taxes it has paid in relation to the contributions; and
- give the Official Receiver the power to issue a notice to the superannuation fund or funds that are holding the contributions that will put a freeze on the funds, in order to prevent the bankrupt from rolling them over into another fund or otherwise dealing with them in circumstances where the trustee is entitled to recover them.³

1.5 In his Second Reading Speech, the Minister for Justice and Customs stated that:

The amendments provide an appropriate balance between the need to encourage people to save for retirement and the need to protect creditors from unscrupulous debtors who can currently attempt to avoid paying their debts by converting wealth into superannuation in the lead up to bankruptcy. They will allow superannuation contributions to be recovered only where there has been deliberate action by the bankrupt to avoid paying creditors.

The amendments have been developed following extensive public consultation. The approach taken by these amendments avoids the complexity of earlier proposals and is consistent with the Government's plan to simplify and streamline superannuation.⁴

Conduct of the inquiry

1.6 The committee advertised the inquiry in *The Australian* newspaper on 12 December 2006, and invited submissions by 19 January 2007. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 160 organisations and individuals.

2 [2003] HCA 36. In *Cook v Benson*, the High Court ruled that superannuation entitlements rolled over to other superannuation funds by a person who subsequently became bankrupt were not subject to the bankruptcy 'clawback' provisions under sections 120 and 121 of the Bankruptcy Act. This was because Mr Benson's transfer of his superannuation entitlements was deemed to be supported by valuable consideration and therefore not subject to recovery by creditors.

3 p. 2.

4 Senator the Hon. Chris Ellison, Minister for Justice and Customs, *Senate Hansard*, 7 December 2006, p. 1.

1.7 The committee received 15 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.8 The committee held a public hearing in Canberra on 23 January 2007. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at <http://aph.gov.au/hansard>.

Acknowledgement

1.9 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.10 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

