

CHAPTER 2

OVERVIEW OF THE BILL

2.1 Schedule 1 of the Bill contains amendments relating to recovery of superannuation contributions made with the intention to defeat creditors. Schedule 1 is divided into two Parts: Part 1 contains the substantive amendments which have the effect of rendering certain contributions void; Part 2 is concerned with the recovery of void contributions.

2.2 Part 1 of Schedule 1 will commence on 28 July 2006. Part 2 of Schedule 1 will commence on a single day to be fixed by Proclamation. However, if any of the provisions in Part 2 of Schedule 1 do not commence within six months of Royal Assent, they will commence on the first day after the end of that six-month period.

2.3 Schedule 2 contains the amendments relating to the treatment of rural support grants and minor technical amendments to clarify or improve the operation of the Bankruptcy Act.

Schedule 1 – amendments relating to superannuation contributions

Part 1 – Amendments commencing on 28 July 2006

Amendments to Bankruptcy Act 1966

2.4 Item 6 of the Bill inserts new 'Subdivision B – Superannuation contributions' into the Bankruptcy Act. This subdivision contains the substantive provisions which outline when a superannuation contribution made prior to bankruptcy will be void against a trustee in bankruptcy. The purpose of the provisions is to enable the recovery of superannuation contributions made to defeat the bankrupt's creditors. There will be two types of recoverable contributions:

- contributions made by a person who later becomes a bankrupt (see section 128B); and
- contributions made by a third party for the benefit of a person who later becomes a bankrupt (see section 128C).

2.5 These are discussed further below.

Superannuation contributions made to defeat creditors – contributor is a person who later becomes a bankrupt

2.6 New section 128B describes when a superannuation contribution made by the person who later becomes bankrupt is void against the bankruptcy trustee. This section is based on existing section 121 (transfers to defeat creditors).

2.7 Subsection 128B(1) sets out the conditions which must be satisfied for a superannuation contribution to be void. This subsection is essentially the same as subsection 121(1) with modifications to apply it only to superannuation contributions. Those modifications are the limitations in paragraph 128B(1)(a) that it applies only to a transfer which is made by way of a contribution to an eligible superannuation plan and paragraph 128B(1)(d) that the transfer occurs on or after 28 July 2006. The term 'eligible superannuation plan' is defined in new section 128N.¹

2.8 Subsections 128B(2), (3) and (4) deal with ways of showing that the transferor's main purpose in making the contribution was to defeat creditors. Subsection 128B(2) allows that purpose to be inferred if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent. This replicates existing subsection 121(2). Subsection 128B(3) provides that, in determining whether the transferor had the requisite purpose in making the contribution, regard must be had to that person's pattern of contributions and whether, in light of any such pattern, the contribution in question is out of character.

2.9 According to the EM, it is not intended that an 'out of character' contribution will automatically be assumed to have been made with the intention to defeat creditors. Rather, an 'out of character' contribution could indicate that the transferor was aware of impending insolvency and, as such, the transferor should be put on notice that they may be required to explain the purpose to a court's satisfaction.²

2.10 Subsection 128B(6) is designed to protect the rights of another person who acquires property from the transferee in good faith and for at least market value consideration. This is in line with existing subsection 121(8).

Superannuation contributions made to defeat creditors – contributor is a third party

2.11 New section 128C describes when a superannuation contribution made by a third party for the benefit of a person who later becomes bankrupt is void against a trustee in bankruptcy. This provision is designed largely to cover arrangements under which a person who later becomes bankrupt agrees that money which would ordinarily be paid directly to them should instead be paid to a superannuation plan for that person's benefit. The EM states that the most common example would be payments made by that person's employer, such as under a salary sacrifice arrangement.³

2.12 Subsection 128C(1) will provide the circumstances in which such a contribution is void against the bankruptcy trustee. In particular, the transfer will be void only:

1 See the discussion of section 128N below.

2 p. 5.

3 p. 6.

- where the bankrupt was a party to the arrangements which resulted in the transfer (paragraph 128C(1)(c); and
- if the money or property transferred would probably have been available as part of the bankrupt's divisible property in the event of bankruptcy (paragraph 128C(1)(d)).

2.13 Subsections 128C(2) and (5) will provide that a benefit that is payable in the event of the death of a person is to be disregarded. The EM explains that this is designed to address two situations:

- The bankrupt's employer makes a contribution to a super fund for the benefit of the bankrupt's spouse. Under the governing rules of the fund, the bankrupt is a reversionary beneficiary in the event of the spouse's death. This provides a contingent benefit to the bankrupt at the time the contribution is made. The effect of the subsections is that this contingent benefit is disregarded for the purposes of subsection 128C(1) – this means there is effectively no benefit to the bankrupt and the bankruptcy trustee cannot recover the contributions made for the benefit of the spouse. It would be inappropriate to recover contributions made by a third party for the benefit of someone other than the bankrupt under these provisions.
- The bankrupt's employer makes a contribution to a super fund for the benefit of the bankrupt. The bankrupt's spouse/children become beneficiaries in the event of the bankrupt's death. Without subsection (2), it may be open to the bankrupt to argue that the contribution was made not only for his/her benefit and, as a result, escape the operation of the provision (even though the contribution was made principally for his/her benefit). The effect of subsection (2) is that the contingent benefit to the spouse/children is disregarded and the trustee is entitled to rely on the fact that the contribution was made to provide a benefit to the bankrupt only.⁴

2.14 Subsections 128C(3), (4), (5) and (6) deal with ways of showing that the transferor's main purpose in making the contribution was to defeat creditors. Subsection 128C(3) allows that purpose to be inferred if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent. This replicates existing subsection 121(2) of the Bankruptcy Act.

2.15 Subsection 128C(4) provides that, in determining whether the transferor had the requisite purpose in making the contribution, regard must be had to that person's pattern of contributions and whether, in light of any such pattern, the contribution in question is out of character. According to the EM, it is not intended that an 'out of character' contribution will automatically be assumed to have been made with the intention to defeat creditors. Rather, an 'out of character' contribution could indicate that the transferor was aware of impending insolvency and, as such, the transferor

4 pp 6-7.

should be put on notice that they may be required to explain the purpose to a court's satisfaction.⁵

Time for making claims by trustee

2.16 New subsection 128D(1) will provide that an action under section 128B or 128C may be commenced by the bankruptcy trustee at any time. This is in line with existing subsection 127(4) of the Bankruptcy Act.⁶

Definitions

2.17 Section 128N will provide a number of definitions for the purposes of the new Subdivision B. The EM states that these definitions are largely to clarify that certain terms used in the new Subdivision will be interpreted consistently with superannuation and related legislation.⁷

2.18 The key definition is that of 'eligible superannuation plan' which is defined to mean any of the following:

- (a) a regulated superannuation fund (which has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*);
- (b) an approved deposit fund (which has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*);
- (c) a Retirement Savings Account (RSA);
- (d) a public sector superannuation scheme (which has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*).

2.19 Section 128N will also include a definition of 'scheme'. The EM states that the term is defined very widely and is deliberately intended to cover any type of arrangement which a person enters into to convert money or property which would have been available to creditors in the event of bankruptcy into an interest in superannuation.⁸

Other amendments

2.20 Item 3 will make it clear that superannuation contributions which are void under the new sections 128B or 128C form part of the property available for distribution among the bankrupt's creditors.

5 p. 7.

6 Note that subsections 128D(2) and (3) clarify transitional arrangements in relation to the commencement of certain provisions.

7 p. 8.

8 p. 7.

2.21 Item 4 will make it clear that superannuation contributions which are void under the new sections 128B or 128C are not protected from the doctrine of relation-back.⁹ Section 123 currently provides that, subject to sections 118 to 122 (inclusive), payments, transfers, assignments and contracts made prior to bankruptcy in good faith and in the ordinary course of business remain valid where the other party to the transaction was not aware at the time that a petition had been presented against the debtor. The amendment made by Item 4 will make that protection also subject to the new sections 128B and 128C.

2.22 Item 5 will make it clear that a superannuation contribution made with the intention to defeat creditors is void, notwithstanding that it was made pursuant to a maintenance agreement or maintenance order. This is consistent with existing subsection 123(6).

2.23 Items 7 and 8 will amend provisions relating to objections to discharge. A superannuation contribution which is void under new section 128B or 128C has the same character as a transfer which is void under section 121, having been made with the intention to defeat creditors, and should give rise to equivalent grounds for objecting to the bankrupt's discharge.

2.24 Item 10 amends section 302A of the Bankruptcy Act.¹⁰ Section 302A provides that a provision in a provident, benefit, superannuation, retirement or approved deposit fund that has the effect that:

- (a) any part of the beneficial interest of a member or depositor is cancelled, forfeited, reduced or qualified; or
- (b) the trustee or another person is empowered to exercise a discretion relating to such a beneficial interest to the detriment of a member or depositor;

is void if the member or depositor becomes a bankrupt, commits an act of bankruptcy or executes a personal insolvency agreement under the Bankruptcy Act.

2.25 The EM states that this (and similar) provisions are designed to prevent debtors from arranging their affairs so that certain rights that they may hold cease upon bankruptcy and do not become available for the benefit of their creditors.¹¹

9 The doctrine of relation-back is an expression of the retrospective operation of bankruptcy. According to the doctrine, bankruptcy starts earlier than the actual date that a debtor or creditor applied for bankruptcy. The bankruptcy is taken to have 'related back to' the time of the earliest act of bankruptcy, up to six months before the petition was presented (s 115, Bankruptcy Act). From that time on, transactions involving the debtor can later be set aside. Some transactions are protected from relation-back under the Bankruptcy Act (ss 123 & 124): Butterworths Australian Legal Dictionary, p. 1004.

10 Items 11, 12 and 13 make similar provisions in respect of equivalent terms and conditions of an RSA as defined by the *Retirement Savings Accounts Act 1997*; and equivalent provisions in a trust deed.

2.26 According to the EM, the effect of the amendment to be made by Item 10 is to provide that such a provision is not void pursuant to section 302A if it does so in order to facilitate compliance with the new sections that void certain contributions to superannuation plans that have been made to defeat creditors. A provision in a fund that provides for payment of monies to a bankruptcy trustee pursuant to the new recovery provisions would be expected to cancel that part of the bankrupt's interest in the fund that corresponds to the amount paid to the trustee. If this did not occur other members of the fund would be unfairly disadvantaged.¹²

Part 2 – Amendments commencing on Proclamation

2.27 The amendments contained in Part 2 deal with processes relating to the recovery of superannuation contributions which are void against the trustee under new sections 128B and 128C. These amendments will commence on a single day to be fixed by Proclamation to allow time for necessary supporting regulations to be made.

2.28 Item 16 will amend subsection 116(1) to add to the list of types of property which are divisible among the bankrupt's creditors. That divisible property will include amounts paid to the bankruptcy trustee under the new provisions relating to the recovery of void superannuation contributions.

2.29 Item 17 will amend paragraph 116(2)(d) to make it clear that amounts paid to the trustee pursuant to a court order under the new section 139ZU (order relating to roll-over of superannuation interests etc) form part of the property available for distribution among the bankrupt's creditors.

2.30 Items 19 and 20 will insert subsections 128B(5A) and 128C(7A) respectively to ensure that, where a superannuation contribution is void, the trustee of the superannuation fund does not bear any loss resulting from fees, charges and taxes paid in respect of that contribution.

Superannuation account-freezing notice

2.31 Item 21 will insert new section 128E which will allow the Official Receiver to issue a superannuation account-freezing notice under certain conditions. This notice is designed to prevent the member of the superannuation fund dealing with their interest in the fund which could result in the void contribution not being recovered by the bankruptcy trustee. The power to issue this notice is in line with existing powers exercised by the Official Receiver to assist trustees.¹³

2.32 Subsection 128E(2) will provide that the Official Receiver may, by written notice, direct the trustee of an eligible superannuation plan not to cash or debit or

11 p. 9.

12 p. 9.

13 For example, under sections 77C, 139ZL and 139ZQ.

permit the cashing, debiting, roll-over, transfer or forfeiture of the whole or part of the superannuation interest other than where this is necessary to comply with provisions of the Bankruptcy Act or for the purposes of charging costs against, or debiting costs from, the superannuation interest or for the purposes of giving effect to a family law payment split.

2.33 Section 128F will provide for the revocation of superannuation account-freezing notices in various circumstances.

2.34 Section 128G will provide that a copy of any superannuation account-freezing notice or revocation notice must be given to the trustee of the bankrupt's estate and to the member of the eligible superannuation plan.

Consent of Official Receiver to the cashing of a superannuation interest

2.35 Section 128H will provide a mechanism for a member of an eligible superannuation plan to request consent from the Official Receiver to the cashing, debiting, roll-over, transfer or forfeiture of all or part of the member's interest where a superannuation account-freezing notice is in force in relation to that member's interest.

2.36 Note that before giving consent under this section, the Official Receiver must consult the trustee of the bankrupt's estate (subsection 128H(6)). According to the EM, the purpose of consultation is to ensure the Official Receiver is informed about any recovery risk which may arise if consent is given. The Official Receiver would normally be expected to give consent where the value of the member's interest which the member is seeking consent to deal with exceeds the amount the bankruptcy trustee would expect to recover. The Official Receiver may also give consent where the member wishes to roll-over the amount for investment reasons and advises the Official Receiver of the details of the new fund(s) – this will allow the Official Receiver to issue a new superannuation account-freezing notice in relation to the interest in the receiving fund(s). Another matter which may be relevant to the Official Receiver's decision is the likelihood that the trustee will be able to pay all creditors' claims relying on assets other than superannuation.¹⁴

2.37 Certain decisions by the Official Receiver relating to consent is subject to review by the Administrative Appeals Tribunal in certain circumstances (see subsections 128H(7) and 128H(8)).

Power of court to set aside superannuation account-freezing notice

2.38 Section 128J will allow a court to set aside a superannuation account-freezing notice where it is satisfied that the Official Receiver did not have reasonable grounds to believe that the conditions upon which a notice may be issued existed.

Judicial enforcement of superannuation account-freezing notices

14 p. 13.

2.39 Section 128K will provide a mechanism for judicial enforcement of a superannuation account-freezing notice. This enforcement mechanism can apply either to a potential or actual breach of a notice and remedies are available for both situations.

Protection of trustee of eligible superannuation plan

2.40 Section 128L is designed to protect the trustee of an eligible superannuation plan who complies with their obligations under these amendments. In particular:

- a trustee of an eligible superannuation plan who complies in good faith cannot be exposed to civil or criminal liability as a result of that compliance; (subsection 128L(1));
- anything done (or not done) by the trustee of a regulated superannuation fund or the trustee of an approved deposit fund to comply in good faith is taken not to be in breach of the *Superannuation Industry (Supervision) Act 1993* (subsection 128L(2)).¹⁵

Rolled-over superannuation interests

2.41 New section 139ZU will deal with the situation where there is a void superannuation contribution under section 128B or 128C but the member has rolled over that contribution to one or more other eligible superannuation plans.

2.42 The EM states that it would be inappropriate to require the trustee of an eligible superannuation plan to pay money to the bankruptcy trustee where the contribution in question is no longer in that plan. Section 139ZU will provide a court with a broad discretion to make orders in relation to other superannuation interests held by the member. It will not be necessary for the trustee to trace the original void contribution. However, there must be a void contribution under section 128B or 128C to trigger a court's discretion under section 139ZU. In addition, the court can make an order in relation to another superannuation interest only where it finds that all or part of that interest can be attributed to the original void contribution which has been rolled-over or transferred by the member.¹⁶

2.43 Subsection 139ZU(1) sets out the conditions that must be met before a court can make an order for the payment of money by the trustee of an eligible superannuation plan. Where a court is satisfied that these conditions are met, it can make an order directing the trustee of the other eligible superannuation plan (that is, the one to which money or property has been transferred) to pay to the bankruptcy trustee a specified amount. The EM states that, in determining the specified amount to be repaid, the court should consider whether the trustee of the other eligible superannuation plan has debited any fees, charges and taxes and ensure that the trustee

15 Subsection 128L(3) will provide equivalent protection to the provider of an RSA.

16 pp 14-15.

of that plan does not suffer any loss by ensuring the specified amount does not include such amounts.¹⁷

2.44 Subsection 139ZU(2) will provide that the court must not make an order unless it is satisfied that it is in the interests of the bankrupt's creditors to do so.

2.45 Subsection 139ZU(4) will provide that, for the purposes of paragraph (1)(b), a benefit that is payable in the event of the death of a person is to be disregarded.¹⁸

2.46 Subsection 139ZU(6) will provide that it is immaterial whether the roll-over or transfer occurred directly or indirectly through one or more interposed eligible superannuation plans. According to the EM, this reinforces the notion that the trustee does not have to trace the original void contribution through a number of transfers or roll-overs. It will be sufficient for the trustee to establish that there were transfers or roll-overs and request the court to exercise its discretion in relation to another interest or interests held by the beneficiary.¹⁹

2.47 Subsection 139ZU(8) will provide that, at the hearing of the application, the trustee of the other eligible superannuation plan and the beneficiary may appear, adduce evidence and make submissions. The EM states that the trustee of the other eligible superannuation plan will also be able to make submissions about the effect of any proposed order on other members of that plan. That trustee can also request the court to consider whether the payment of any fees, charges and taxes in relation to the member's interest should affect the amount it may be required to pay to the bankruptcy trustee.²⁰

Schedule 2 – other amendments

Payments made under rural support schemes

2.48 Items 5 to 7 of Schedule 2 will implement a regime to protect certain payments made under certain rural support schemes from seizure under the Bankruptcy Act

2.49 The EM explains that a number of rural grants are currently afforded the status of non-divisible property under the Bankruptcy Act. For example, grants pursuant to the Dairy Exit Program ('Dairy Exit') and the Farm Help Re-establishment Grant Scheme ('Farm Help').

2.50 The Bankruptcy Act does not currently explicitly provide that classes of rural grants may be prescribed by regulation as non-divisible property. The current

17 p. 15.

18 The discussion of subsection 128C(2) above explains the rationale for this provision.

19 p. 16.

20 p. 16.

non-divisible property status of Farm Help, Dairy Exit and other grants is provided for in the Bankruptcy Act and therefore can only be modified by primary legislation.

2.51 The EM explains that amendments to existing rural grant schemes may necessitate changes to the provisions providing for their protection in bankruptcy. Existing rural grant schemes may be modified without the passage of fresh primary legislation which might be used as a vehicle to modify the Bankruptcy Act. Future rural grant schemes may also come into existence without the passage of fresh primary legislation which might be used to insert protective provisions into the Bankruptcy Act.²¹

2.52 Grant schemes may be introduced (or amended) and payments to primary producers commenced within a short period. Rapid introduction (or amendment) of schemes may be necessitated by the circumstances giving rise to the creation (or amendment) of the schemes. Accompanying protections under the Bankruptcy Act for those payments must therefore also be capable of being introduced rapidly.

2.53 The EM states that it is desirable that any appropriate protections can be put in place or take effect before payments are made under the relevant grant schemes. This will assist in ensuring that all of those recipients whose financial circumstances are most dire (those who are already in bankruptcy or whose bankruptcy is imminent) will receive the benefit of the financial assistance provided by the Federal Government. This will also provide certainty to persons dealing with the recipients of these payments as to whether any grant funds will be available to creditors upon bankruptcy.²²

2.54 The EM states that in such circumstances, a regulation-making power is required to put in place or to amend, in a timely manner, adequate and appropriate protections for certain kinds of rural grants.²³

Inspector-General's role and functions

2.55 Items 2 and 3 of Schedule 2 will amend subsection 20H(5) of the Bankruptcy Act to ensure it accurately reflects the Inspector-General's role in relation to payments into the Consolidated Revenue Fund.²⁴

2.56 Items 11 to 18 of Schedule 2 will amend section 299 of the *Proceeds of Crime Act 2002* to ensure it accurately reflects the Inspector-General's role in relation to Confiscated Asset Accounts determinations.²⁵

21 p. 18.

22 p. 18.

23 p. 18.

24 See EM, p. 17, for further explanation.

25 See EM, p. 19, for further explanation.