



The Voice of Super

File Name: 200703

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
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Canberra ACT 2600

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19 January 2007

Dear Committee Secretary,

The Association of Superannuation Funds of Australia Ltd (ASFA) is pleased to make this submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the *Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006*.

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our members, which include corporate, public sector, industry and retail superannuation funds, account for more than 5.7 million member accounts and over 80% of superannuation savings.

For a period of time there has been uncertainty in the operation of the bankruptcy laws with respect to contributions made to superannuation funds for or on behalf of persons who are bankrupt or insolvent. The need for legislative amendments was highlighted by the decision in *Cook v Benson* [2003] HCA 36 (19 June 2003).

ASFA, when considering its position on policy initiatives and on laws impacting on superannuation, tests the proposals against specified criteria. In the context of the proposed changes to the bankruptcy laws the relevant criteria are:

- There is an appropriate, efficient and clear regulatory regime that brings a degree of certainty to the operation of the law.
- There is an effective and low cost mechanism for resolving member problems and disputes.
- There is a legislative and regulatory regime that does not create distortion and ensures a level playing field among market participants.

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ASFA considers that the proposed amendments to the *Bankruptcy Act 1966*, in so far as they relate to superannuation, satisfy the above criteria.

It is noted that the Bill has addressed the significant concerns raised by ASFA in its response to the *Consultation Paper: The Effect of Bankruptcy on Superannuation Contributions*.

ASFA is supportive of the Bill for the following reasons:

In most circumstances the sole requirement on a superannuation fund trustee is to respond to a notice issued by the Official Receiver.

There is no expectation or requirement for a superannuation fund trustee to be involved in legal proceedings concerning the bankruptcy. However, the superannuation fund trustee may take legal action (Section 128J) to contest a notice issued. This would principally occur where a fund trustee believes that a void superannuation contribution does not form a part of the member's benefit in the fund.

There are clear timeframes set out for specific actions that a superannuation fund trustee must take.

There is specific recognition that a void contribution amount may have been subject to fees, charges and taxes.

There is implicit recognition that the void contribution amount may also have been reduced through transfers or negative investment earnings.

The trustee of an eligible superannuation plan is protected (Section 128L) from civil and criminal action and regulatory breaches where it acts in good faith and in accordance with notices and orders issued under the Act.

There are, however, several areas of concern that ASFA considers should be addressed:

1. Subsections 128B(5A) and 128C(7A) seek 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. We strongly support this policy objective. It achieves this through a two-step process:
 - The superannuation fund trustee is first required to pay the total amount of the void contribution, as specified in the section 139ZQ notice, to the trustee in bankruptcy.
 - The bankruptcy trustee is then required to pay to the superannuation fund an amount equal to the fees, taxes and charges debited in respect of the contribution.

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Effectively the process outlined above requires the superannuation fund trustee to pay out an amount merely to receive part of that amount back again.

As it is only the superannuation fund trustee that is aware of the fees, taxes and charges debited in respect of contributions and the trustee must calculate the amount in order to seek recompense from the trustee in bankruptcy, it would be simpler if the law permitted the superannuation fund trustee to pay only the net amount and to advise the trustee in bankruptcy of the reason for the reduction in the payment.

This change would also overcome a potential problem that can arise through the interaction of the provisions in Subsection 139ZQ(1)(c) and those of subsections 128B(5A) and 128C(7A). Currently, as these provisions are structured the following could occur:

A void contribution of \$10,000 is received by the fund.

Contributions tax, fees and charges totaling \$1,600 are then deducted, leaving a withdrawal benefit of \$8,400.

Later, the superannuation fund is ordered to pay \$10,000 to the trustee in bankruptcy.

Under Subsection 139ZQ(1)(c)(v) the fund pays \$8,400 (the withdrawal benefit).

Under either subsection 128B(5A) or 128C(7A) (whichever is appropriate), the trustee in bankruptcy is required to pay \$1,600 to the superannuation fund (even though this amount has already been deducted from the member's account).

The result is that the net amount recovered by the trustee in bankruptcy is \$6,800 (rather than \$8,400) and the superannuation fund has, in effect, been "paid twice".

The above result would be avoided if subsection 128B(5A) and 128C(7A) permitted the trustee to pay to the trustee in bankruptcy an amount net of fees, taxes and charges in respect of the void contribution.

ASFA recommends that Item 19 (subsections 128B(5A)) and Item 20 (Subsection 128C(7A)) be redrafted to enable the superannuation fund trustee to pay to the trustee in bankruptcy an amount net of fees and charges.

2. The effect of serving a *superannuation account-freezing notice* on a trustee is to prevent all account activities, subject to listed exceptions. One such exception is (section 128E(2)(e)) "for the purpose of charging costs against, or debiting costs from, the superannuation interest".

The term "costs" should be separately defined for the purposes of this provision to specifically permit the superannuation fund trustee to continue to deduct costs associated with the provision of death and disability

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benefits in respect of the member. Failure to do so could result in the loss of insurance cover for the member. ASFA does not consider it appropriate for this to occur, particularly where the payment would not jeopardize the trustee in bankruptcy's interest.

ASFA recommends that a definition of "costs" be inserted in section 128N to permit the ongoing deduction of fees and charges associated with the provision of insurance cover.

3. A further impact of serving a *superannuation account-freezing notice* is to prevent a trustee from winding up a fund and transferring the member's benefit to another fund. Potentially, such a restriction impacts not just the member covered by the account freezing order but all accounts (i.e. all members) in the fund. ASFA is concerned that the serving of a *superannuation account-freezing notice* could unnecessarily prevent legitimate activities of the fund, for instance a successor fund merger or transfer, that could adversely affect thousands of member, apart from the bankrupt.

Section 128H permits a member whose account is subject to a *superannuation account-freezing notice* to apply to the Official Receiver for permission to, amongst other things, roll-over the benefit. ASFA believes the right to seek such permission should be extended to a superannuation fund trustee.

ASFA recommends that the provision in section 128H be extended to permit the superannuation fund trustee holding the interest to similarly make application.

4. Subsection 128E(5) states that a *superannuation account-freezing notice* comes into force when the notice is given to the trustee. There needs to be recognition that delays will occur between the receipt of a notice by the trustee and the actioning of the notice by the fund's administration staff, particularly in the situation of a fund with hundreds of thousands of members.

ASFA recommends that section 128E be amended to provide protection for a trustee where an account transaction occurs between the serving of the notice and the actioning of the notice and there has not been an unreasonable delay in actioning the notice.

ASFA also has concerns about the capacity of the industry to implement the necessary changes to administration systems, processes and procedures within a short timeframe. Superannuation funds have limited available resources to implement the necessary changes over the next six to twelve months because resources are currently applied to implementation of the simplified superannuation proposals and the anti-money laundering/counter terrorism financing changes, both of which come into force during 2007. ASFA therefore requests that, in consideration of the considerable changes already faced by superannuation funds and their administrators, that the substantive proposals

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commence on 1 January 2008. We recognise however, that the regime must apply to contributions made on or after 28 July 2006.

If you have any questions or comments on this submission, please feel free to contact myself or Robert Hodge, Principal Policy Adviser on 02 9264 9300.

Yours sincerely,

Dr Brad Pragnell
Director, Policy and Best Practice

Federal Secretariat

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