



19 January 2007

The Secretary
Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Morris

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

I refer to your letter dated 8 December 2006, inviting AXA Australia to make a submission to the above inquiry.

AXA is a leading provider of superannuation and other financial services to retail clients in Australia.

While AXA has no particular views on the legislation's stated purpose, we are conscious of the impact that additional administrative requirements have on the costs borne by members of superannuation funds.

In providing comments, AXA's primary goal is to minimise the work required to modify systems and procedures in order to accommodate what are anticipated to be relatively rare transactions; particularly as the passage of this legislation will deter individuals from using superannuation to frustrate creditors.

If you have any queries in relation to the attached submission or would like to discuss any of the comments raised, please contact Greg Mullins, Compliance Manager, Superannuation and Insurance, on 03 9616 3083.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M. Ickeringill', with a stylized flourish at the end.

Milena Ickeringill
Group General Counsel and Company Secretary



**Submission to the Senate Standing
Committee on Legal and Constitutional
Affairs
Inquiry into the Bankruptcy Legislation
Amendment (Superannuation
Contributions) Bill 2006**

Introduction

AXA is a leading provider of superannuation and other financial services to retail clients in Australia. This submission addresses several key areas of the Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006 Bill affecting the operations of superannuation fund trustees.

Requests for information

While not directly addressed by the Bill, AXA anticipates that bankruptcy trustees and the Official Receiver will be able to request information from superannuation trustees in relation to individual members' accounts. AXA has no particular objection to this process, but would not want to see the specific information, or the form in which it is to be provided, prescribed by legislation or regulation. The information requirements need to be flexible enough to accommodate the different types of information held by different funds, and to provide the trustees of superannuation funds with some flexibility in how the information is provided.

Freezing member accounts

AXA acknowledges that the capacity to freeze an account is integral to the legislation, but is concerned that this requirement will have the single greatest impact on superannuation funds' administration systems, processes and procedures. Clause 128F(2)(e) currently permits that 'charges' can continue to be debited. 'Changes' is defined by Clause 128N. The Bill should also explicitly allow insurance premiums to continue to be deducted. A forced loss of insurance could have adverse consequences for the member and his or her dependants in the event of their death or disablement.

A better alternative to the current construction of Section 128F, which freezes all account activity but provides exceptions, would be to enable the Official Receiver to make an order which prevents the trustee of a superannuation fund from processing any request or direction from the member to transfer, roll over or pay a benefit (including a spouse contribution split) from his/her superannuation account. These actions are a complete list of the actions a member could use to try and defeat the Official Receiver's order, and such an order would avoid the possibility of unintentionally prohibiting other legitimate transactions.

As the Bill currently stands it would, for example, prevent a superannuation fund trustee from winding up the fund, as winding up the fund would normally involve transferring member benefits to another superannuation fund. This would not be a reasonable outcome as it could expose all members of the superannuation fund to additional costs. The interest of a bankrupt's creditors could be protected in such a circumstance by including a requirement in a freezing order that the Official Receiver be advised if the benefit is transferred or otherwise disposed of by a decision of the superannuation fund trustee.

The Bill provides that the order takes effect on the day that it is received by the superannuation fund trustee. Some provision needs to be made for the necessary delay that will occur between the receipt of the notice and the superannuation fund's administrator taking the necessary steps to implement the freeze on the fund

administration system. Either an additional period after receipt of the notice needs to be specified (a minimum of 5 business days) or the superannuation fund trustee needs to be provided with some protection in the event that a transaction occurs on an account within a 'reasonable period' after receipt of the notice but before the order has been implemented.

Retention of fees by the superannuation fund trustee

There are two separate provisions in the Bill which ensure that the superannuation fund trustee is able to retain fees and other deductions such as the tax that has been deducted from a contribution.

The first provision is contained in clause 139ZQ and provides that the superannuation fund trustee is liable to pay the lesser of the value of the contribution or the withdrawal benefit. As the withdrawal benefit is net of fees, charges and taxes incurred by (or in respect of) the member, payment of the withdrawal benefit will in all cases ensure that the superannuation fund trustee is able to retain its fees. This is a relatively straightforward provision.

The second provision is contained in clauses 128B(5A) and 128C(7A). The operation of these clauses requires the superannuation fund trustee to remit the full contribution to the bankruptcy trustee, and for the bankruptcy trustee to then pay to the superannuation trustee the amount of the fees, charges and taxes.

This is a clumsy and inefficient mechanism. As the onus is on the bankruptcy trustee to refund the amount of fees, it will be required to seek information regarding the fees from the superannuation fund trustee – **even though it has no express power under the Bill to do so**. The superannuation fund trustee will have to determine the up front and ongoing fees incurred on the contribution. If fixed dollar amounts such as insurance premiums have been deducted from the account balance these will need to be pro-rated against the contribution in proportion to the account balance. The contribution may have been invested in the fund for a long period and across various portfolios with different investment costs incurred. The calculation of the fees, charges and other deductions attributable to a specific contribution is not a standard system facilitated transaction. The separate manual calculation of such fees is complex and time consuming.

The stated purpose in the Explanatory Memorandum for clauses 128B(5A) and 128C(7A) is *'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'* (paragraph 64). The clauses are not required for this purpose, as this is achieved by 139ZQ.

The removal of clauses 128B(5A) and 128C(7A) from the Bill would not prevent the Bill from achieving its stated purpose. It would, however, remove the administrative complexity that these clauses introduce for both superannuation fund trustees and bankruptcy trustees, and avoid unintended consequences.

Payment of benefits – discharge of the superannuation trustee's obligation

The Bill needs to make it clear that the payment of any amount to the bankruptcy trustee is a full and complete discharge of the superannuation fund trustee's obligations to the member and/or any beneficiary of the member in respect of that amount.

The Bill is also silent on whether a payment to a bankruptcy trustee is to be subject to tax in the manner that a superannuation benefit payment would normally be taxed. AXA submits that a payment to a bankruptcy trustee should be processed as a normal eligible termination payment (ETP), and, as such, be subjected to tax. Such treatment would be consistent with the general principle that contributions which have received a tax deduction are subjected to tax when paid as a benefit.

Payment to a bankruptcy trustee would not meet the proposed definition of 'superannuation benefit' under the Simpler Super Tax Bill. If such payments are not subject to ETP tax there is still potentially an incentive to use deductible contributions to a superannuation fund to secure an immediate tax benefit and then later, if required, pay creditors a higher amount than they would receive if the funds were available from ordinary 'after tax' income. Payment as an ETP is likely to act as an additional deterrent to any person using superannuation to frustrate creditors (even temporarily) and will minimise the work required by superannuation fund trustees to implement the measures.

Jurisdiction of the Superannuation Complaints Tribunal

Clause 128L of the Bill protects the superannuation fund trustee against civil or criminal proceedings in relation to compliance with orders under the Bankruptcy Act.

Consideration also needs to be given to the potential for a member or beneficiary to make a complaint to the Superannuation Complaints Tribunal or another disputes resolution scheme. While it might be reasonable for a complaint to be made in relation to an error made by a superannuation fund trustee in complying with an order – eg refunding too much to a bankruptcy trustee – a member or beneficiary should not be able to make a complaint in relation to actions taken by the superannuation fund trustee (or another party on its behalf) to comply with an order made under the Bankruptcy Act.

Amendments commencing on Proclamation

Implementation of the necessary changes to superannuation administration systems, processes and procedures will necessarily take time. The ability of the industry to deal with this change at the present time, or at any time before 1 July 2007, is very restricted due to the extensive work that is required to implement the 'Simpler Superannuation' initiatives announced with the 2006 Budget. The taxation amendment bill which gives effects to these initiatives has only very recently been released and some of the regulations are not yet available. Further pressure on resources is being experienced due to requirements to implement the Anti-Money Laundering and Counter- Terrorism Funding legislation.

AXA submits that the provisions should not commence before 31 December 2007 to give the superannuation industry the necessary time to make the required changes.