

PRESENTATION TO AMP

BANKRUPTCY LEGISLATION AMENDMENT (SUPERANNUATION CONTRIBUTIONS) ACT [2007]

Amendments to the *Bankruptcy Act* (Assented to on 15 April 2007) will allow bankruptcy trustees to recover superannuation contributions made prior to bankruptcy with the intention to defeat creditors. The amendments will apply to superannuation contributions made on or after 28 July 2006. The amendments also facilitate the recovery of void superannuation contributions by building on existing administrative recovery powers exercised by Official Receivers and providing Courts with the power to make orders for payment by superannuation fund trustees in appropriate circumstances.

The main provisions of the legislation are retrospective to 28 July 2006 and those provisions relate to enforcement of the new Section 128B and Section 128C. However, other provisions, such as ability to issue notices under Section 139ZQ do not come into effect until 16 October 2007.

The amendments arose out of a number of decisions concerning persons who paid substantial amounts into superannuation funds prior to becoming bankrupt. In particular the matters of the *Official Trustee and Bankruptcy – v – Trevor Newton Small Superannuation Fund Pty Limited & Anor* [2001] FCA 1267 and High decision in *Cook - v – Benson* (2003) 214CLR 370.

The decisions at first instance in both of these matters were decided at around the same time. However, although the Bankruptcy Trustee was successful in the Trevor Small matter, Mr Benson's trustee was unsuccessful in the High Court.

Section 120 and Section 121 of the Bankruptcy Act

There are a number of provisions for the recovery of property of a Bankrupt which relate to avoiding transactions during various periods prior to bankruptcy and avoiding transactions designed to defeat creditors.

Section 120 of the Bankruptcy Act

Transfer of property for less than market value is subject to attack by a bankruptcy trustee.

Section 120 of the Bankruptcy Act provides:

1. A transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferors bankruptcy if:
 - a. the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and
 - b. the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.

There are exemptions under Section 120 including payment of taxes, liabilities under maintenance agreements and/or orders, transfers of property under debt agreements (pursuant to the Bankruptcy Act) and in respect of personal property or property exempt under regulation.

There is a defence within Section 120 to the effect that a transfer is not void if:

- a. In the case of a transfer to a related entity of the transferor (such as a wife or business associate);
 - i. the transfer took place more than 4 years before the commencement of the bankruptcy; and
 - ii. the transferee proves that, at the time of the transfer, the transferor was solvent, or
- b. In any other case:
 - i. the transfer took place more than 2 years before the commencement of the bankruptcy; and
 - ii. the transferee proves that at the time of the transfer, the transferor was solvent.

Rebuttable presumption provisions of insolvency are set out in Section 120. For instance, there is a presumption of insolvency of the transferor if at the time of the transfer, the transferor, failed to keep books, accounts and records as are usual and proper in relation to the business carried out by the transferor. Also if the transferor failed to maintain proper books, accounts and records.

Section 120 also provides that the trustee in bankruptcy must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void under the section. Consideration is defined in Section 120.

Section 121 of the Bankruptcy Act

Section 121 deals with transfers to defeat creditors. For example, a transfer for less than market value at the time a debtor was insolvent to prevent creditors enforcing rights against the property. Section 121 provides that:

1. A transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferor's bankruptcy. This is provided:
 - a. the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and
 - b. the transferors main purpose in making the transfer was:
 - i. to prevent the transferred property from becoming devisable amongst the transferors creditors; or
 - ii. to hinder or delay the process of making property available for division amongst the transferors creditors.

Subsection 2 of Section 121 says

“the transferors main purpose in making the transfer is taken to be the purpose described in paragraph(b) above 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.

Subsection 3 says that Subsection 2 does not limit the ways of establishing main purpose of a transferors making a transfer.

A transfer however, is not void if the transferee acted in good faith.

Subsection 4 says that despite the provisions of subsection 1, a transfer of property is not void against the trustee if:

- a. the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and
- b. the transferee did not know and could not reasonably have inferred, that the transferors main purpose in making the transfer was the purpose described in paragraph (1)(b); and
- c. the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, was about to become, insolvent.

Section 121 also contains rebuttable presumptions of insolvency.

Subsection 4A provides that a rebuttable presumption arises that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:

- a. had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or
- b. having kept such books, accounts and records has not preserved them.

A trustee in bankruptcy is required to refund any consideration paid in respect of a void transaction. Subsection 5 states that the trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

Subsection 6 provides that the following have no value as consideration:

- a. The fact that the transferee is related to the transferor;
- b. If the transferee is the spouse or de facto spouse of the transferor – the transferee making a deed in favour of the transferor;
- c. The transferees promise to marry, or to become the de facto spouse of, the transferor;
- d. The transferee's love or affection for the transferor.
- e. If the transferee is the spouse of the transferor – the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the Family Law Act 1975.

There are exemptions to transfers of property with respect to debt agreements under the Bankruptcy Act.

Subsection 8 of Section 121 says that the rights of a person who acquired property from the transferee in good faith and for at least the market value of the property is not affected by the provisions of Section 121.

“transfer of property” is defined to include payments of money and a person who does anything that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to another person. The market value of property is defined to be its market value at the time of the transfer.

Section 121 has been reviewed in a number of decisions. Of particular interest is the High Court decision in *Peldan –v- Anderson* [2006] HCA48. The High Court in that decision placed the following construction on 121(1).

“(1) a transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferors bankruptcy if:

- (a). The property [*in the hands of the transferor prior to the act taken to be the transfer*] would probably have become part of

the transferors estate or would probably have been available to creditors if the property [*in the hands of the transferee after the act taken to be the transfer*] had not been [*taken to have been*] transferred....”

The purpose of the words in italics are to ensure that the paragraph is not at odds with Section 121(9)(b). The effect of this construction is to emphasise that the focus is not upon whether the “transferred property” would have become part of the transferors estate in bankruptcy, but upon whether the result would have occurred in respect of the transferors property as defined in the Act.

The new sections 128B and section 128C are based upon section 121 of the Bankruptcy Act.

A review of both the *Official Trustee and Bankruptcy - v – Small and Cook – v – Benson* cases, is important to understand why the bankruptcy legislation has recently been amended in respect of superannuation contributions made prior to persons becoming bankrupt.

Case Study 1.

Official Trustee and Bankruptcy – v – Trevor Newton Small Superannuation Fund Pty Limited & Anor

The judgment in this case confirmed that payments made by a debtor prior to bankruptcy to a superannuation fund trustee are subject to the provisions of the Bankruptcy Act, in particular sections 116, 120 and 121.

The matter involved three payments totalling \$263,674.00 made by a barrister, Trevor Newton Small before the date he became bankrupt, to the Trevor Newton Small Superannuation Fund Pty Limited as trustee for his superannuation fund. The Bankrupt and his accountant were directors of the trustee of the Fund. An amount of \$92,900.00 was paid in the period after the bankrupt committed his act of bankruptcy and two payments totalling \$170,774.00 were made within two years before the date of bankruptcy.

The Court considered the following issues:

- (a) Whether the payments were void pursuant to section 121 of the Bankruptcy Act or did section 116(2)(d) protect the payments:

The Court held that there was a distinction between “interest in a fund” and a “payment into a fund”. Section 116(2)(d)(iii)(A) protects an interest in a regulated fund. A payment to a fund may give rise to an interest in a fund which is protected, however the trustee of the bankruptcy estate was not precluded from challenging the validity of the payment into the fund that gave rise to that interest.

- (b) Payment to fund in “relation back period”.

The Court held that the \$92,900.00 payment made to the fund was within the “relation back” period defined in section 115 of the Bankruptcy Act, had vested in the official trustee and as a consequence the Bankrupt had no authority to part with those moneys. It was held that the trustee of the fund (of which the bankrupt was a director), would have been aware of the lack of authority, and derived no title to the money. There was no protection under section 123. In essence, those funds had notionally become part of the Bankrupt’s estate and the trustee could recover that amount.

- (c) Payments to fund before commencement of relation back

The Court held that payments totalling \$170,774.00 were made at the time that Mr Small was insolvent. This was because at the time of the payments the ATO had a judgment against Mr Small in the amount of \$391,778.00 and Mr Small had admitted he could not pay all his creditors. The Court found as a matter of fact that the Bankrupt’s “main purpose” in making the payments to the Superannuation Trustee must be taken to have been to prevent the money from becoming divisible

amongst his creditors in contravention of section 121(1) of the Bankruptcy Act.

(d) Did the exemption in 121(4) apply?

Section 121(4)(c) provides that a transfer of property is not void against the trustee if the transferee could not reasonably have inferred that at the time of the transfer the transferor was or was about to become insolvent. Because the transferee was a company of which the bankrupt and his accountant were directors, the Court found the trustee of the fund must have been aware of Mr Small's insolvency.

(e) **Was there consideration?**

If the superannuation fund trustee had provided consideration to Mr Small for the payments (excluding the first payment of \$92,900.00) the fund trustee would be entitled pursuant to section 121(5) to be paid the value of consideration which it gave. The Court agreed with the official trustee's submission that the onus was on the superannuation trustee company to prove what, if any, consideration was given. The court followed the decision in *Cook – v – Benson* (which had been decided by a single judge at that time), and agreed that the promises, guarantees and management fees that the superannuation trustee provided were not provided as consideration for the contributions made by Trevor Small. On that basis the trustee in bankruptcy was not required to pay the superannuation trustee any moneys from the moneys that the superannuation trustee was required to repay the bankruptcy trustee after making adjustment for income tax payable by the superannuation fund trustee.

Case Study 2

Cook - v- Benson

It was the last of the issues referred to above, that of consideration, which became the issue to be determined by the High Court.

It should be noted however, that the particular sections of the *Bankruptcy Act* being considered in both the *Trevor Small* and the *Benson* matters were different. The form of the “clawback” provisions considered in the *Cook –v- Benson* case had in fact been amended, and a different but similar provision was being considered in the *Trevor Small* case. Essentially, however the decision of what, for the purposes of the relevant sections, was “consideration” would have the same results in either case.

Mr Benson was employed by Industrial Sales & Service (Tasmania) Pty Limited (“**ISAS**”). During the period of his employment contributions were made to ISAS’s superannuation fund on behalf of Mr Benson. ISAS was wound up in June 1990, and because of his termination of employment, Mr Benson obtained a vested interest in a benefit in the superannuation fund of \$91,192.36. Mr Benson authorised payment of a large part of those funds to each of three entities as “roll-overs”:

- | | | | |
|-------|------------|---|--------------|
| (i) | L & G | - | \$20,000.00 |
| (ii) | Prudential | - | \$40,000.00 |
| (iii) | Mercantile | - | \$20,000.00. |

At the time of the “rollover” Mr Benson was in his 40s, so that if the funds had not been “rolled over” they would have been taxed.

Mr Benson became a bankrupt in July 1992. His bankruptcy trustee sought to recover payments totalling \$80,000.00 pursuant to section 120 and 121 of the Bankruptcy Act. The crucial question was whether an exception within section 121 could be relied upon by Mr Benson, being whether entities to which the money was paid were “purchasers... in good faith and for valuable consideration”.

The trial judge and the Full Court concluded that the payments were in fact dispositions of property to which section 120 of the Act could apply. The trial judge based his conclusion on clause 13(b) of the relevant superannuation deed. However, the Full Court relied on clause 25 of that deed. On the more important question, the majority of the Full Court (Beaumont & Kiefel JJ) concluded that the exception in section 120 (and

section 121) operated so that each of the corporate respondents should be regarded as having given “valuable consideration” for their portion of the \$80,000.00.

Interestingly, the trial judge who was the dissenting judge in the Full Court (Hely J) found that the respondents were not purchasers for valuable consideration, because the benefit which accrued to Mr Benson derived from the terms of the trust upon which life policies acquired with the \$80,000.00 were settled, rather than from the provision by those respondents of valuable consideration for the acquisition of the policies in question. The majority of Full Court allowed Mr Benson’s appeal.

The majority of the High Court (Justice Kirby dissenting) held that the corporate entities had undertaken to provide Mr Benson with the rights and benefits to which he would, in due course, be entitled under the rules of each superannuation fund. Those rights and benefits constituted substantial and valuable consideration for Mr Benson’s contributions to each fund. The Court held that section 120(1)(a) (a repealed version of this section) did not refer to a “purchaser” in the limited sense of a purchase and sale, but to a person who in a commercial sense provides a quid pro quo. Since the respondents had provided valuable consideration (in the relevant commercial sense) in return for Mr Benson’s contributions, there was no reason to deny to them the character of a purchaser.

The effect of the decision of the High Court was to enable persons to pay moneys into superannuation funds within a short time before becoming bankrupt and effectively place those funds out of the hands of the bankrupt’s creditors.

Government’s response to the decision in *Cook v Benson*

About six months after the decision in *Cook -v- Benson* the Federal Government proposed amendments to the Bankruptcy Act. The object was to ensure that certain superannuation contributions could be recovered by bankruptcy trustees to avoid creditors being defeated by persons paying moneys into superannuation funds for that purpose. Ultimately, and after public notification and consultation, the government decided that the response to the High Court’s decision in *Cook –v- Benson* was a little more complex than expected. That is, when considered with a person’s legitimate right to pay moneys into a superannuation fund for the purposes of preparation for retirement. Ultimately the legislation makes it clear that only contributions made to a

superannuation fund in an attempt to defeat creditors, are the subject of the amendments (section 128A). The legitimate accumulation of superannuation benefits are not available to trustees in bankruptcy.

There are some areas which will make application of the amendments problematic. This is particularly so in light of the recent amendments to superannuation legislation. Those changes, as well published, will allow significant contributions to a superannuation fund up to 1 July 2007 and for a three year period after that date. That is, the Taxation Amendment (Simplified Superannuation) Bill 2006 enables the contribution of \$1,000,000.00 to a superannuation fund before 1 July 2007 and up to \$450,000.00 over a three year period after 1 July 2007.

Further, section 116(5)(b) of the Bankruptcy Act provided for the protection of a bankrupt's superannuation benefits, up to the pension reasonable benefit limit (RBL) (which was as much as \$1,356,291.00). The Tax Amendments (Simplified Superannuation) Bill 2006 abolishes the RBL. As a result it is proposed that section 116(5)(b) be repealed to avoid any contradiction between the Bankruptcy Act and the amendments to superannuation legislation.

Section 116(5) provided a limited protection for superannuation interests under section 116(2) to the level of the members pension RBL that peaked at \$1,356,291.00 for the 2006/2007 year. That is, if a bankrupt member had a lump sum benefit in excess of the pension RBL, the trustee in bankruptcy was able to make claims for such additional amounts in excess of the RBL, as that interest was not protected by section 116(5) of the Bankruptcy Act. After July 2007 it is intended that section 116(5) – (9) are to be deleted by the Superannuation Legislation Amendment (simplification) Act 2007 and relevant regulations will no longer be applicable. Therefore, if a bankrupt member has a lump sum benefit, the total benefit is protected against the trustee in bankruptcy because the RBL regime is abolished after that date. However, such protection is to be in effect considered subject to the new provisions under sections 128B and 128C.

Division 4B requires a bankrupt to receive a (pension) within the meaning of the SIS Act to contribute to the trustee in bankruptcy if the pension exceeds a fresh hold amount. This amount is derived from the rate of pension payable under the Social Security Act 1991 and is 3.5 times the maximum basic rate of pension for a person with no dependence. The fresh hold increases if the bankrupt has dependence. "Pension" in the SIS includes allocated, complying and account – based pensions. There have

been no effective changes to the limitation on bankruptcy protection for pension benefits. The anomaly between the protection afforded to lump sum benefits and pension benefits continues. Any person receiving a commutable pension is likely to commute same if that person potentially could become a bankrupt. Of course, not all pensions are commutable.

It remains to be seen how the interaction between the bankruptcy clawback provisions and the superannuation regime operates in practice. There are no decided cases on the new provisions of the Bankruptcy Act.

Superannuation Contribution Provisions

Central Provisions

A new Subdivision B at the end of Division 3 of Part VI has been added to the *Bankruptcy Act*. This deals with superannuation contributions. The two aspects of the new Subdivision are:

- (a) contribution(s) made by a person who later becomes a bankrupt;
- (b) contribution(s) made by a third party for the benefit of a person who later becomes bankrupt.

Contributions to Defeat Creditors

The new section 128B says that a contribution to a superannuation fund by a person who later becomes a bankrupt is recoverable if:

- (a) the contribution would probably have become part of the person's bankrupt estate or would have been available to the person's creditors, and
- (b) the main purpose for the making of the contribution was to prevent the funds being divided amongst that person's creditors or to hinder or delay the process of making the property available to creditors, and

- (c) the contribution took place on or after 28 July 2006.

Main Purpose

Section 128B(2) provides that the transferor's main purpose in making the transfer is taken to be to prevent the transferred property from becoming divisible amongst creditors, or to hinder or delay the process of making that property available, 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.

Section 128B(3) provides that in determining the transferor's main purpose in making the transfer for the purposes described in Section 128B(2) regard must be had to:

- (a) whether, during any period ending before the transfer, the transferor had established a pattern of making contributions to one or more eligible superannuation plans; and
- (b) if so, whether the transfer, when considered in the light of that pattern, **is out of character**.

Section 128B(4) says that sub-sections (2) and (3) do not limit the ways of establishing the transferor's main purpose in making the transfer.

The Second Reading speech contains this example of contributions which are out of character:

“If the Bankrupt had no history of making substantial superannuation contributions but made such contributions shortly before becoming bankrupt, this may indicate that the contributions were made to defeat creditors.”

Rebuttable Presumption of Insolvency.

Section 128B(5) provides the following rebuttable presumption.

“ . . . that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:

- (a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor’s business transactions and financial position;*
- (b) having kept such books, accounts and records, has not preserved them.”*

Sub-section (6) of 128B says that Section 128B does not affect the rights of a person who acquired property from the transferee in good faith and for at least the market value of the property.

The meaning of *transfer of property* and *market value* is defined in sub-section (7) to mean:

- (a) **transfer of property** includes a payment of money; and
- (b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and
- (c) the **market value** of property transferred is its market value at the time of the transfer.

Section 128C provides for contributions made to defeat creditors where the contributor is a third party.

Section 128C provides:

- “1. If:
 - (a) a person (the transferor) transfers property to another person, (the transferee); and

- (b) the transfer is by way of a contribution to an eligible superannuation plan for the benefit of a person who later becomes a bankrupt (the beneficiary); and
- (c) the transferor did so under a scheme to which the beneficiary was a party; and
- (d) the property would probably have become part of the beneficiary's estate or would probably have been available to creditors if the property had not been transferred; and
- (e) the beneficiary's main purpose in entering into the scheme was:
 - (i) to prevent the transferred property becoming divisible amongst the beneficiary's creditors; or
 - (ii) to hinder or delay the process of making property available for division amongst the beneficiary's creditors; and
- (f) the transfer occurred on or after 28 July 2006;

the transfer is void against the trustee in the beneficiary's bankruptcy.

An example given in the Second Reading speech of such a transfer is:

"In addition, this will apply to contributions made by a third party for the bankrupt's benefit where the bankrupt was complicit in an arrangement with that third party to defeat creditors. This may occur, for example, where the bankrupt had entered into a salary sacrifice arrangement with his or her employer to build up superannuation assets in the lead up to bankruptcy instead of other assets which would have been available to pay creditors.."

Limits to Recoverable Contributions

Under sub-section 128C(2) there are limits on the contributions that may be recovered by the trustee in bankruptcy. This is where the person dies and the spouse, and/or the bankrupt's children are the beneficiary of the superannuation payment.

There are other circumstances in which contributions to super funds are made by third parties and employers which could not be regarded to defeat creditors. For example an employer complying with its obligations under the *Superannuation Guarantee* regime under the provisions of the *Superannuation Guarantee (Administration) Act 1992*.

Main Purpose in Third Party Transactions

Sub-section 128C(3) provides that the beneficiary's main purpose in entering into the scheme is taken to be the purpose of preventing the property from becoming divisible amongst the beneficiary's creditors or to hinder or delay the process of making the property available, if it can reasonably be inferred from all the circumstances that, at the time when the beneficiary entered into the scheme, the beneficiary was, or was about to become, insolvent.

In a similar way to sub-section 128B(3), sub-section 128C(4) says that the main purpose in entering into the scheme is determined with regard to:

- (a) whether, during any period ending before the scheme was entered into, the transferor had established a pattern of making contributions to one or more eligible superannuation plans for the benefit of the beneficiary; and
- (b) if so, whether the transfer, when considered in the light of that pattern, is out of character.

Sub-section 128C(6) provides that sub-sections (3) and (4) do not limit the ways of establishing the beneficiary's main purpose in entering into a scheme.

Presumed Insolvency in Third Party Transactions

There is also a rebuttable presumption in sub-section 128C(7) of insolvency in respect to the proper keeping of books and records.

Section 128C(8) protects those who acquired property from the transfer in good faith and for at least the market value of the property. The definition of transfer of property and market value are the same as those to section 128B.

No Limitation Periods for making claims

Section 128D provides that any action under section 128B or 128C may be commenced by the trustee in Bankruptcy at any time.

Statutory Notices

The Official Receiver has the power to enforce the Bankruptcy Act by the issue of statutory demands on behalf of a bankruptcy trustee in the form of a notice under Section 139ZQ requiring repayment of moneys equal to the value of the property received by a person where the Official Receiver is of the opinion that the person has received a preference or a transfer at less than market value.

Notices under 139ZQ in respect of transactions which are void pursuant to section 128B or 128C can be issued after the commencement of the legislation and in respect of transactions which occurred before the legislation commences. Such notices may be issued after 16 October 2007.

Objections to Discharge

Sections 149A and 149D have been amended to extend the grounds upon which a trustee in bankruptcy may object to the discharge of a bankrupt so as to include where there have been void transfers pursuant to sections 128B and 128C.

Taxes, fees or charges

Additional provisions provide that any tax, fee or charge payable on amounts recovered under section 128B and 128C are refunded, by the trustee in bankruptcy, to the superannuation trustee who made the payment. These provisions are to commence on a day fixed by Proclamation or 16 October 2007, whichever comes first.

Section 128B (5A) says:

“If:

- (a) as a result of sub-section (1), a transfer made by way of contribution to an eligible superannuation plan is void against the trustee in the transferor’s bankruptcy; and
- (b) *any of the following amounts was debited from the contribution:*
 - (i) *an amount in respect of tax in respect of the contribution;*
 - (ii) *a fee, or a charge, in respect of the contribution; and*
- (c) *in compliance with a section 139ZQ notice that relates to the transfer, the trustee of the eligible superannuation plan pays an amount to the trustee in the transferor’s bankruptcy; and*
- (d) *the amount paid in compliance with section 139ZQ notice exceeds the amounts so debited;*

the trustee in the transferor’s bankruptcy must pay to the trustee of the eligible superannuation plan an amount equal to the amount so debited.

Similar provisions will apply in section 128C for third party contributions (see section 128C(7)).

The amounts to be recovered under section 128B and 128C are the gross contributions. If contributions were by way of salary sacrifice a 15% tax would have

been applied to that contribution and may well have been paid long before recovery action had started. Further, in the case of an excessive contribution in terms of the allowable limit a tax of 46.5% may have been applied and paid. The trustee of the superannuation fund is liable for those taxes. Further, amounts may have been deducted from these contributions by way of fees and charges. The trustee in bankruptcy must pay the superannuation fund trustee any amounts that have been taken out of the contributions where there is a recovery under these new sections, in compliance with any notice under section 139ZQ.

The trustee in bankruptcy may only receive the gross amount contributed to a superannuation fund in an effort to defeat a person's creditors. It is this gross amount that is the property that, under the provisions, is properly available to the creditors. However, the requirement that the trustee in bankruptcy repay the superannuation fund trustee the amounts otherwise deducted must come from some source, most likely that source will be the amounts recovered from the superannuation fund or other amounts recovered in respect of the particular bankruptcy.

If a self-managed superannuation fund trustee is only required to return the net amount of superannuation contributions for which a notice under section 139ZQ or the new section 139ZU applies they are in a position to determine the amount of fees, taxes or charges, to be deducted from this amount. In those circumstances, it is possible that such trustees may decide that the amount of fees, taxes or charges be deducted from any amount returned to the trustee in bankruptcy. The requirement to return the gross amount of the contributions to which section 128B and 128C apply avoid to this outcome.

Superannuation Account-Freezing Notice

Pursuant to Section 128E the Official Receiver may, issue an order to prevent a bankrupt from dealing with their superannuation fund where the Official Receiver has reasonable grounds to believe that contributions have been made to which the new sections 128B or 128C apply.

Section 128E provides as follows:

This section applies in relation to a member of an eligible superannuation plan if the Official Receiver has reasonable grounds to believe that:

- (a) a transaction is void against the trustee of a bankrupt's estate under section 128B or section 128C; and
- (b) either:
 - (i) the whole or a part of the member's superannuation interest is attributable to the transaction; or
 - (ii) the trustee of the bankrupt's estate has made an application for a section 139ZU order that relates to the transaction and the members superannuation interest."

Freezing notices

The Official Receiver may, by written notice (a superannuation account – freezing notice) given to the trustee of the eligible superannuation plan, direct the trustee of the plan not to:

- (a) cash or debit; or
- (b) permit the cashing, debiting, rolling-over, transfer or forfeiture of;

the whole or any part of the superannuation interest except:

- (c) for the purposes of complying with a notice under section 139ZQ; or
- (d) for the purposes of complying with that order under section 139ZU; or
- (e) for the purposes of charging costs against, or debiting costs from, the superannuation interest; or
- (f) for the purposes of giving effect to a family law payment split; or

- (g) in accordance with the written consent of the Official Receiver given under section 128H; or
- (h) for the purposes of complying with an order under paragraph 128K(1)(b); or
- (i) for the purposes of complying with an order under section 139ZT(2); or
- (j) in such circumstances (if any) as are specified in the regulations.

The superannuation account – freezing notice must set out the facts and circumstances because of which the Official Receiver considers that the Official Receiver has reasonable grounds to believe that:

- (k) the transaction is void against the trustee of the bankrupt estate under section 128B or 128C; and
- (l) either:
 - (i) the whole or a part of the member superannuation interest is attributable to the transaction; or
 - (ii) the trustee of the bankrupt's estate has made an application for a section 139ZU order that relates to the transaction and the member superannuation interest.

When Official Receiver may give freezing notice (128E(4)).

The Official Receiver may give a superannuation account-freezing notice:

- (a) if the Official Trustee is the trustee of the bankrupt's estate – on the initiative of the Official Receiver;

- (b) if a registered trustee is the trustee of the bankrupt's estate – on application of the registered trustee.

When freezing notice comes into force (128E(5)).

The superannuation account-freezing notice comes into force when the notice is given to the trustee of the eligible superannuation plan.

Section 128F of the Act deals with the revocation of the superannuation account-freezing Notice issued under section 128E. A Notice under this section is revoked when:

1. The Official Receiver gives written notice.
2. The superannuation fund complies with a section 139ZQ notice;
3. The superannuation fund complies with a new section 139ZU notice;
4. If no 139ZQ or 139ZU Notice has been issued, within 180 days after a freezing-Notice was issued under section 128E;
5. If an application for a notice under section 139ZQ or 139ZU has been revoked or set aside by the Court, or
6. At the initiative of the Official Receiver where they are also the trustee in bankruptcy, or
7. By the Official Receiver at the request of the bankrupt's registered trustee or by the bankrupts themselves.

Consent of Official Receiver to cashing, debiting, roll-over, transfer or forfeiture of a superannuation interest

Section 128H provides that a consent from the Official Receiver is required for the cashing, debiting, roll-over, transfer, forfeiture of a superannuation benefit at the request of the bankrupt, while a superannuation account-freezing notice is in force.

Sub-section 128H(6) requires the Official Receiver to consult with the trustee of the bankrupt's estate.

It is possible under the superannuation regulations for persons to seek withdrawals up to \$10,000.00 to alleviate hardship. This could still apply in the event of a bankruptcy, however, it is unclear whether any withdrawal benefits become available to a trustee in bankruptcy for distribution to creditors if withdrawn by a bankrupt.

Judicial enforcement of Superannuation Account – Freezing Orders

Section 128K will provide that if the Court is satisfied that the trustee of an eligible superannuation plan has breached, or is proposing to breach, a superannuation account-freezing notice, the Court may, on application of the trustee of the relevant bankrupt estate, make orders including directing the trustee of the plan to comply with the notice, pay to the trustee of the bankrupt's estate an amount not exceeding the money, or value of the property, received as a result of the transaction that is void under sections 128B or 128C referred to in paragraph 128E(1)(a) and/or any other order the Court thinks appropriate.

Protection of Trustees of Eligible Superannuation Plan

Under section 128L the trustee of an eligible superannuation plan is protected from criminal or civil proceedings because of anything done (or not done) by the trustee in good faith):

- in compliance with a Superannuation Account-Freezing Notice
- in connection with, or incidental to, the trustee's compliance with such a notice
- in compliance with section 139ZQ
- in connection with or incidental to the trustee's compliance with 139ZQ notice
- in compliance with section 139ZU or 139ZT; and

- in compliance with 139ZQ, 139ZU, 139ZT(2)
- in compliance with 128K(1)(a).

Anything done by the trustee of a fund in compliance with the relevant sections referred to above is not to be regarded as a breach of the *Superannuation Industry (Superannuation) Act, 1993* or the standards prescribed under that Act or the *Retirement Savings Accounts Act, 1997* or the prescribed standards under that Act.

Rolled-over superannuation interests

Section 139ZU concerns 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. 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 provides the Court with a discretion to make orders in relation to other interests held by the bankrupt. It would not be necessary for the bankruptcy trustee to trace the original void contribution. However, the Court can only make an order in relation to another superannuation interest where it finds that all or part of that interest can be attributable to the original void contribution which has been rolled over or transferred by the bankrupt. Section 139ZU(1) allows the Court to make an order for the payment of money by the trustee of an eligible plan where the following conditions are met:

- (a) there is a void transaction under section 128B or 128C; and
- (b) that transaction was by way of a contribution to an eligible superannuation plan (the first plan) for the benefit of a person (beneficiary) who may or may not be the bankrupt; and
- (c) the beneficiary's withdrawal benefit in relation to the first plan falls short of the amount of the money, or the value of the property, received as a result of the transaction; and

- (d) the beneficiary has a superannuation interest in another eligible superannuation plan; and
- (e) superannuation interest referred to in (d) is attributable, in the whole or in part, to the roll-over or transfer, after the transaction referred to in (a) happened, of the whole or a part of the beneficiary's superannuation interest in the first plan.

Where the Court is satisfied under section 139ZU(1) it can order the trustee of the plan (holding moneys or property the subject of the transfer) to pay to the bankruptcy trustee a specified amount not exceeding the lesser of the amount of shortfall referred to in paragraph (c) and the beneficiary's withdrawal benefit in relation to the other eligible superannuation plan. Fees, charges and taxes are to be taken into account to ensure the trustee of the plan does not suffer a loss by excluding such amounts.

Sub-section 2 of section 139ZU says that the Court can only exercise the discretion under this section if satisfied that it is in the interests of the creditors of the bankrupt.

Applications under section 139ZU can only be made in respect of transactions which occurred after 28 July 2006, as sections 128B and 128C only apply to such transactions.

Section 139ZU(5) provides, for the purposes of sub-section (1)(c), if the beneficiary does not have a superannuation interest in an eligible superannuation plan, the beneficiary is taken to have a nil withdrawal benefit in relation to the plan. This will make it clear that the condition is met where the beneficiary no longer has an interest in the plan as well as where they have an interest but the withdrawal benefit is less than the value of the void transfer under section 128B or 128C.

Sub-section 6 of section 139ZU provides that for the purposes of sub-section (1)(e), it is immaterial whether the roll-over or transfer occur directly or indirectly through one or more interposed eligible superannuation plans. 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 interest held by the beneficiary.

Sub-section 7 of this section requires a copy of the application under 139ZU(1) to be provided to the trustee of the eligible superannuation plan and the beneficiary. Under

sub-section 8, at the hearing of the application both the trustee of the plan and the beneficiary may appear, adduce evidence and make submissions. At this stage, the trustee of the plan could make submissions regarding any fees, charges and taxes in relation to the member's interests in order to determine the appropriate amount for payment.

Section 139ZU does not operate until proclamation or 16 October 2007, whichever comes first.

A notice under section 139ZQ can only be issued to one superannuation fund. An order under this new section allows an order for payment to be issued to other superannuation funds for the repayment of amounts to which section 128B or 128C apply.

OTHER PROVISIONS

Section 302A renders void any provision in governing rules of a superannuation fund which has the effect that bankruptcy cancels, forfeits, reduces or qualifies a members beneficial interest or which provides a trustee or other person with a discretion relating to such interest in the event of bankruptcy. The amending legislation does not effectively change Section 302A except by an addition of Section 302(2A). Section 302(2A) provides that Section 302A does not apply to a provision which facilitates compliance with the new section 128B or section 128C.

There are also amendments made in respect of provisions dealing with amounts paid under the Commonwealth, State or Territory Rules support schemes which are not considered not to be property available to a bankrupt's trustee or property divisible amongst creditors