Asset Protection and Superannuation

Date: Thursday 28 May 2009
Time: 2.00pm
Venue: Swissotel Sydney – Level 8, 68 Market Street, Sydney

Whilst recent legislative changes surrounding superannuation funds have made them popular wealth creation and accumulation vehicles, it is expected that the change in the economic climate will cause the asset protection aspects of superannuation to be tested. This session will look at:

- The interaction of the Bankruptcy Act and the superannuation regime
- Recovery of superannuation contributions
- SMSF implications of becoming bankrupt

Denis Barlin
Partner, SBN Lawyers

With a particular focus on the SME market, Denis advises on all aspects of revenue laws, including income tax, CGT, GST and State taxes generally – including stamp duties and land tax. As well as taxation, Denis provides advice on trust law matters generally and superannuation.

Denis is a regular speaker for professional associations including the TIA and has been a regular contributor to a number of professional journals.

Table of Contents

1. Overview of the 'bankruptcy' process

1.1 Subsection 5(1) of the Bankruptcy Act 1966 (Cth) (**'the Bankruptcy Act'**) defines the term 'bankrupt' to be:

> ***"bankrupt"*** *means a person:*
>
> *(a) against whose estate a sequestration order has been made; or*
>
> *(b) who has become a bankrupt by virtue of the presentation of a debtor's petition.*

1.2 That is, there are two ways in which a person can become bankrupt, being:

1.2.1 ***Involuntarily*** – the right of a creditor to enforce the status of 'bankrupt' on a debtor if a debt remains unpaid. This method involves a sequestration order being made by the Court as a result of an application being made by a creditor, which results in the debtor becoming 'bankrupt'; and

1.2.2 ***Voluntarily*** – this occurs where a debtor presents a debtors petition, which is presented to the Official receiver. If there are no pending applications by creditors to bankrupt the debtor, and if the petition is accepted, then the debtor will become bankrupt.

1.3 With respect to involuntary bankruptcies, a creditor (who must be owed by the debtor at least $2,000) wishing to initiate bankruptcy proceedings must show that the debtor has committed an 'act of bankruptcy'. This is typically shown via a non-compliance with a 'bankruptcy notice' served on a debtor. The creditor must present to the Court, within six months of the commission of an 'act of bankruptcy' a creditor's petition. The Court must then decide whether a sequestration order should be made.

1.4 With respect to involuntary bankruptcies, they can only be initiated by a debtor if the debtor is insolvent.

1.5 Unlike in the context of a company in liquidation, there is no separation of ownership and control with respect to assets of an individual. As a result, upon insolvency occurring for an individual, a separate 'bankrupt estate' is established, with the 'trustee in bankruptcy' appointed to that estate.

1.6 Only assets specifically exempted from vesting in the bankrupt estate do not pass to that estate. The trustee in bankruptcy must:

1.6.1 determine the property of the bankrupt;
1.6.2 recover property improperly disposed of by the bankrupt;
1.6.3 realize the property recovered by the trustee in bankruptcy;

1.6.4 pay the proceeds of the realized property to creditors of the bankrupt who have 'provable debts'.

1.7 A bankrupt may obtain automatic discharge from bankruptcy three years from the date of bankruptcy under a debtor's petition or if a bankruptcy has arisen out of a sequestration order, three years from the date of filing of the statement of affairs. However, bankruptcy may be extended for up to eight years.

1.8 A bankruptcy may be annulled if all of the debts of a bankrupt are paid, or if the Court considers that a sequestration order should not have been made due to certain irregularities.

1.9 The Bankruptcy Act distinguishes between the 'commencement of the bankruptcy' and the (later) 'date of bankruptcy'. The two periods are important, particularly under the 'doctrine of relation back'. Indeed, under section 116 of the Bankruptcy Act, a trustee in bankruptcy can claim property belonging to the bankrupt both at the 'commencement of the bankruptcy' and all property acquired by the bankrupt between the 'commencement of the bankruptcy' and the actual date of bankruptcy.

1.10 Section 115 of the Bankruptcy Act provides for the 'commencement of bankruptcy':

> **115 Commencement of bankruptcy**
>
> *(1) If a person becomes a bankrupt on a creditor's petition and subsection (1A) does not apply, then the bankruptcy is taken to have relation back to, and to have commenced at, the time of the commission of the earliest act of bankruptcy committed by the person within the period of 6 months immediately before the date on which the creditor's petition was presented.*
>
> *(1A) If:*
>
> > *(a) a person becomes a bankrupt on a creditor's petition that was based on breach of a bankruptcy notice; and*
> >
> > *(b) the time for compliance with the notice was extended under subsection 41(7); and*
> >
> > *(c) the Court making the sequestration order considers that the application under subsection 41(7) was frivolous, vexatious or otherwise without substantial merit;*
>
> *then the bankruptcy is taken to have relation back to, and to have commenced at, the time that would have applied under subsection (1) of this section if the time for compliance had not been extended.*

(1B) If a person becomes a bankrupt because of a sequestration order made under Division 6 of Part IV or under Part X, then the bankruptcy is taken to have relation back to, and to have commenced at, the time of the commission of the earliest act of bankruptcy committed by the person within the period of 6 months immediately before the date on which the application for the sequestration order was made.

(2) The bankruptcy of a person who becomes a bankrupt as a result of the acceptance of a debtor's petition is taken to have relation back to, and to have commenced at, the time indicated in the following table.

Debtor's petition bankruptcy—time to which bankruptcy has relation back and time bankruptcy commences

	Circumstances in which debtor's petition was presented or accepted	**Time to which bankruptcy has relation back and time of commencement of bankruptcy**
1	Petition accepted by the Official Receiver under a direction of the Court	Time specified by the Court as the commencement of the bankruptcy
2	Petition presented when at least one creditor's petition was pending against the petitioning debtor (whether alone, as a member of a partnership or as a joint debtor), and accepted by the Official Receiver without a direction from the Court	Time of the commission of the earliest act of bankruptcy on which any of the creditor's petitions was based
3	Petition presented when no creditor's petitions were pending but the debtor had committed at least one act of bankruptcy in the past 6 months, and accepted by the Official Receiver without a direction from the Court	Time of commission of the earliest act of bankruptcy within the 6 months before the petition was presented
4	Petition presented when no creditor's petitions were pending and the debtor had not committed any act of bankruptcy in the past 6 months, and accepted by the Official Receiver without a direction from the Court	Time of presentation of the petition

(3) A creditor's petition or a sequestration order made on a creditor's petition is not invalid by reason of the commission of an act of bankruptcy before the time when the debt on which the petition was based was incurred.

1.11 Importantly, subsection 115(1) of the Bankruptcy Act provides that for a person made bankrupt under a creditor's petition, the commencement of bankruptcy is at the time of the commission of the earliest act of bankruptcy[1] occurring within six months immediately before the presentation of the creditor's petition.[2]

1.12 As mentioned at **paragraph 1.9** above, determining the actual date of commencement of bankruptcy is crucial, as the trustee in bankruptcy can claim the property belonging to the bankrupt at the commencement date and all property acquired by the bankrupt between the commencement date and the date of bankruptcy. Paragraph 116(1)(a) of the Bankruptcy Act provides that:

> *Subject to this Act … all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge … is property divisible amongst the creditors of the bankrupt.*

1.13 Generally speaking, bankruptcy proceedings are commenced by the creditor presenting a 'creditor's petition' to the Court (see section 44 of the Bankruptcy Act). The petition seeks the 'sequestration' of the debtor's estate, which causes bankruptcy to commence if a sequestration order is obtained. Section 43 of the Bankruptcy Act provides that:

> ***Jurisdiction to make sequestration orders***
>
> *(1) Subject to this Act, where:*
>
> *(a) a debtor has committed an act of bankruptcy; and*
>
> *(b) at the time when the act of bankruptcy was committed, the debtor:*
>
> *(i) was personally present or ordinarily resident in Australia;*
>
> *(ii) had a dwelling-house or place of business in Australia;*
>
> *(iii) was carrying on business in Australia, either personally or by means of an agent or manager; or*
>
> *(iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;*

[1] 'acts of bankruptcy' are provided for in section 40 of the Bankruptcy Act.

[2] Paragraph 44(1)(c) of the Bankruptcy Act provides that a '*… creditor's petition shall not be presented against a debtor unless … (and amongst other things) … the act of bankruptcy on which the petition is founded was committed within 6 months before the presentation of the petition.*'

the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.

(2) Upon the making of a sequestration order against the estate of a debtor, the debtor becomes a bankrupt, and continues to be a bankrupt until:

(a) he or she is discharged by force of subsection 149(1); or

(b) his or her bankruptcy is annulled by force of subsection 74(5) or 153A(1) or under section 153B.

1.14 It should be noted that as well as all property belonging to a bankrupt at the 'commencement of bankruptcy' and property that has been acquired by a bankrupt between the commencement of bankruptcy and the date of bankruptcy, subsection 116(1) of the Bankruptcy Act provides that the following (additional) categories of property may be divisible amongst the creditors of a bankrupt:

(1) Subject to this Act:

…

(e) money that is paid to the trustee of the bankrupt's estate under an order under paragraph 128K(1)(b); and

(f) money that is paid to the trustee of the bankrupt's estate under a section 139ZQ notice that relates to a transaction that is void against the trustee under section 128C; and

(g) money that is paid to the trustee of the bankrupt's estate under an order under section 139ZU; …

1.15 That is, in the superannuation context, the following is property which is divisible amongst the creditors of a bankrupt:

1.15.1 money which is forfeited because of a breach (or proposed breach) of a superannuation account-freezing notice under section 128K of the Bankruptcy Act (see **paragraph 6.2** and following);

1.15.2 money that represents a void transaction as against a trustee in bankruptcy under sections 128B or 128C of the Bankruptcy Act as provided for in a section 139ZQ notice (see **paragraph 6.46** and following); or

1.15.3 money that represents a void transaction as against a trustee in bankruptcy under sections 128B or 128C of the Bankruptcy Act, where the amounts have been rolled-over into another superannuation fund and a section 139ZU order obtained **(see paragraph 6.65** and following).

2. Contributions into superannuation funds

2.1 The primary concern is of a trustee administering an estate is determining the property owned by a bankrupt. This is so the trustee can realize those assets, with the proceeds obtained from realization being distributable to the creditors. Indeed, unlike most other transfers that may be made to bankrupts (e.g. to a spouse or a related trust), a transfer made by a bankrupt which causes a bankrupt to obtain an interest in a superannuation fund is prima facie not divisible among the bankrupt's creditors.

2.2 The starting point in determining what property is available to creditors is contained in subsection 58(1) of the Bankruptcy Act, which provides that:

> *(1) Subject to this Act, where a debtor becomes a bankrupt:*
>
> *(a) the property of the bankrupt, not being after-acquired property[3], vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and*
>
> *(b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.*

2.3 That is:

2.3.1 ***paragraph 58(1)(a) of the Bankruptcy Act*** vests property of a bankrupt in the trustee on the date of bankruptcy (see also *Anscor Pty Ltd v Clout* (2004) 135 FCR 469); and

2.3.2 ***paragraph 58(1)(b) of the Bankruptcy Act*** vests property acquired by the bankrupt after bankruptcy in the trustee in bankruptcy as soon as the acquisition occurs.

2.4 Subsection 5(1) of the Bankruptcy Act defines the term 'the property of the bankrupt' for the purposes of section 58 of the Bankruptcy Act as:

> ***"the property of the bankrupt"*** *, in relation to a bankrupt, means:*
>
> *(a) except in subsections 58(3) and (4):*

[3] The term 'after-acquired property' is defined in subsection 58(6) of the Bankruptcy Act as: '*(6) In this section,* ***after-acquired property*** *, in relation to a bankrupt, means property that is acquired by, or devolves on, the bankrupt on or after the date of the bankruptcy, being property that is divisible amongst the creditors of the bankrupt.*'

> *(i) the property divisible among the bankrupt's creditors; and*
>
> *(ii) any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt …*

2.5 That is, 'the property of the bankrupt' includes property, and rights and powers exercisable by the bankrupt had it not become bankrupt, that is divisible amongst the bankrupt's creditors.

2.6 The term 'property' is defined in subsection 5(1) of the Bankruptcy Act as:

> ***"property"*** *means real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property.*

2.7 Whilst subsection 58(1) of the Bankruptcy Act contains the 'starting point' in determining what property is available to creditors, the property which is divisible amongst creditors is provided for in subsection 116(1) of the Bankruptcy Act:

> *(1) Subject to this Act:*
>
> *(a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge; and*
>
> *(b) the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge; and*
>
> *(c) property that is vested in the trustee of the bankrupt's estate by or under an order under section 139D or 139DA; and*
>
> *(d) money that is paid to the trustee of the bankrupt's estate under an order under section 139E or 139EA; and*
>
> *(e) money that is paid to the trustee of the bankrupt's estate under an order under paragraph 128K(1)(b); and*

> *(f) money that is paid to the trustee of the bankrupt's estate under a section 139ZQ notice that relates to a transaction that is void against the trustee under section 128C; and*
>
> *(g) money that is paid to the trustee of the bankrupt's estate under an order under section 139ZU;*
>
> *is property divisible amongst the creditors of the bankrupt.*

2.8 That is, subsection 116(1) of the Bankruptcy Act, subsection 116(1) of the Bankruptcy Act allows the following items of 'property' to be divisible amongst the creditors of a bankrupt:

2.8.1 property belonging to a bankrupt at the commencement of bankruptcy;

2.8.2 property acquired by a bankrupt after the commencement of bankruptcy and before discharge; and

2.8.3 the right to exercise the powers over or in respect of property which could have been exercised by the bankrupt at the commencement of the bankruptcy and before the discharge.

2.9 Subsection 116(1) of the Bankruptcy Act is subject to subsection 116(2), which provides for property of a bankrupt that is not divisible amongst the creditors of a bankrupt. Relevantly, paragraph 116(2)(d) of the Bankruptcy Act provides:

> ***(2) Subsection (1) does not extend to the following property****:*
>
> *…*
>
> ***(d) subject to sections 128B, 128C and 139ZU:***
>
> *(i) policies of life assurance or endowment assurance in respect of the life of the bankrupt or the spouse or de facto partner of the bankrupt;*
>
> *(ii) the proceeds of such policies received on or after the date of the bankruptcy;*
>
> ***(iii) the interest of the bankrupt in:***
>
> ***(A) a regulated superannuation fund (within the meaning of the Superannuation Industry (Supervision) Act 1993)****; or*
>
> *(B) an approved deposit fund (within the meaning of that Act); or*

> *(C) an exempt public sector superannuation scheme (within the meaning of that Act) …*
> [emphasis added]

2.10 Paragraph 116(2)(d) of the Bankruptcy Act is subject to sections 128B and 128C of the Bankruptcy Act. In effect, the section provides that notwithstanding that a bankrupt's interest in a superannuation fund is protected, the protection does not extend to contributions which are void.

2.11 The policy objective behind paragraph 116(2)(d) of the Bankruptcy Act was explained in *Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund Pty Ltd* (2001) 114 FCR 160 (***'Small's case'***) (see **paragraph 4.2** below):

> *… the protection offered by s 116(2)(d)(iii)(A) is part of a broad legislative policy, manifest in a number of statutes touching superannuation, actively encouraging individuals to provide for their own future and retirement rather than to rely on government assistance. In order to achieve this goal, the legislature has provided for a person's interest in a regulated superannuation fund to be protected in the event that he or she should become bankrupt: the legislative policy seems to be that a person should not lose what he or she has bona fide managed to provide for retirement merely because that person becomes insolvent.*

2.12 In the event that funds within a superannuation fund are accessed before bankruptcy, then those funds will not be protected.

2.13 Further, a payment made to a bankrupt from a superannuation fund made on or after bankruptcy will also not be divisible amongst the creditors of a bankrupt, provided that the payment is not a pension. Specifically, after bankruptcy, a pension will be income for the purposes of the contribution from income to creditors for the duration of the bankrupt[4]. Paragraph 116(2)(d)(iv) of the Bankruptcy Act provides that:

> *Subsection (1) does not extend to the following property … subject to sections 128B, 128C and 139ZU …* ***a payment to the bankrupt from such a fund received on or after the date of the bankruptcy, if the payment is not a pension*** *within the meaning of the Superannuation Industry (Supervision) Act 1993 …* [emphasis added]

2.14 Further, section 139L of the Bankruptcy Act provides that 'income' for the purposes of determining whether a bankrupt is required to make a contribution of its income during bankruptcy as including:

> ***'income'****, in relation to a bankrupt, has its ordinary meaning, subject to the following qualifications:*

[4] Subparagraph 116(2)(d)(iv) and section 139L *Bankruptcy Act* 1966

> *(a) the following are income in relation to a bankrupt (whether or not they come within the ordinary meaning of "income"):*
>
> > *(i) an annuity or pension paid to the bankrupt from a provident, benefit, superannuation, retirement or approved deposit fund;*
> >
> > *(ii) an annuity or pension paid to the bankrupt from an RSA …*

2.15 As a result, in the context of bankruptcy, it will be important to determine what the asset of the bankrupt is – that is, whether it is an 'interest' in a superannuation fund or otherwise.

2.16 In *NM Superannuation Pty Ltd v Young* (1993) 41 FCR 182, a trustee in bankruptcy argued that a superannuation investment policy issued by a life office and which was owned by a trustee of a superannuation fund was not a life insurance policy at general law. As such, it was argued that the proceeds of the policy were available to the trustee in bankruptcy. The Full Federal Court held that the policy was a life insurance policy and therefore protected as against the trustee in bankruptcy.

2.17 The Court found that the life office had contracted to pay, upon the death of the insured, a refund of the premiums paid plus an agreed amount of interest. As a result, it was found that the insurer was at risk as it may not have been able to earn (upon the premiums it received) the interest amount. As there was that element of risk, the Court found that the policy was one of insurance, with the result that the proceeds of the policy was not available to the trustee in bankruptcy.

3. What interest does a beneficiary of a superannuation fund have in the assets held by the superannuation fund?

3.1 Gzell J referred to (amongst others) the decision of *CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53* in *CSR v The Chief Commissioner of State Revenue* [2006] NSWSC in finding that no members of a superannuation fund '*... had any beneficial ownership of any of the underlying investments ...*' held within the superannuation fund. Gzell J observed that:

> *The trust deed was amended on a number of occasions in the period from 30 June 2002 to 30 June 2004. Key provisions, however, remained constant. The assets of the Fund were held by the trustee upon trust to be applied in accordance with provisions of the deed pursuant to cl 4.2. Clause 6.3 provided that no person should have any claim, right, or interest to or in respect of the fund, or any contributions thereto, or any interest therein, or any claim upon or against the trustee or an employer, except under and in accordance with the provisions of the deed. Members had to elect between a pension and a lump sum. The pension was calculated as a percentage of the final three years' average salary, the percentage increasing with the number of years of service. Likewise, the lump sum was calculated as a multiple of the final three years' average salary, the multiple increasing*

with the number of years of service. Upon termination of the Fund, cl 13, and later cl 13A, provided that any surplus should be applied by the trustee in any manner reasonably consistent with any of the objects of the Fund. Clause 7.4 provided that if the trustee should determinate at any time, on the advice of the actuary, that the value of the assets of the Fund exceeded 120% of the amount required to meet actuarial liabilities, the trustee might agree with CSR to apply all or part of the excess to CSR, to augment benefits payable to members, or as they might otherwise agree.

Clause 13 and cl 13A of the deed vary the usual situation in which an ultimate surplus in a superannuation fund is prima facie held on a resulting trust for those who contributed to it (Air Jamaica Ltd v Charlton [1999] UKPC 20; [1999] 1 WLR 1399 at 1411, Wrightson Ltd v Fletcher Challenge Nominees Ltd [2002] 2 NZLR 1 at [23]).

None of the members of the Fund had any beneficial ownership of any of the underlying investments including, in particular, the top-up contributions (CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; (2005) 79 ALJR 1724 at [25], Halloran v Minister Administering National Parks and Wildlife Act 1974 [2006] HCA 3; (2006) 80 ALJR 519 at [75]).

Until the happening of a prescribed event that crystallizes a member's right into an actual entitlement, a member of a superannuation fund is neither the legal nor the beneficial owner of any amount that stands to the credit of the member's account from time to time (Re Coram; Ex parte Official Trustee in Bankruptcy v Inglis (1992) 36 FCR 250 at 253, Wrightson at [28]).

3.2 Similarly, Heerey J in *Re John Sloane Kirkland; Ex Parte: Official Trustee in Bankruptcy* [1997] FCA 684 held that the rule in 'Saunders v Vautier' does not apply in the context of a superannuation fund. The Court observed that:

The Official Trustee in Bankruptcy, as trustee of the bankrupt estate of John Sloane Kirkland (the bankrupt), seeks payment of a benefit to which the bankrupt is entitled under the TNT Group Retirement Fund (the Fund). In essence the Official Trustee contends that the amount in question, although payable at a future date, has unconditionally vested in the bankrupt and that he can call for immediate payment under the Rule in Saunders v Vautier (1841) Cr & Ph 240, 49 ER 282.

3.3 Heerey J found that:

I conclude that at the date of the bankrupt's resignation, the date of sequestration, and the present time, the bankrupt was and is not entitled to payment of the Preserved Withdrawal Benefit. The rule in Saunders v Vautier does not apply. Because superannuation funds in Australia enjoy substantial tax benefits there is a complex statutory regime which restricts the access members may have to benefits. Speaking very generally, the object of superannuation is to make provision for death, disablement or

> *retirement at normal retiring age, or earlier if there are exceptional circumstances. It would conflict with that objective if members of funds could treat their entitlements as though they were funds on deposit, available at call.*
>
> *The bankrupt could not on resignation or at the date of sequestration, and cannot at the present time, obtain payment of those benefits. The applicant can be in no better position than the bankrupt.*

3.4 That is, a member of a superannuation fund does not have an interest in the assets held subject to a superannuation fund. Rather, the member's interest is the interest in the superannuation fund.

4. Pre-28 July 2006 contributions into superannuation funds

4.1 The avoidance provisions of sections 120 (undervalue transactions) and 121 (transfers to defeat creditors) of the Bankruptcy Act have been the subject of recent Federal Court and High Court decisions with respect to superannuation entitlements.

(a) Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund

4.2 In *Official Trustee in Bankruptcy* v *Trevor Newton Small Superannuation Fund Pty Ltd* (2001) 114 FCR 160, the bankrupt (Mr Small) had made three payments into a superannuation fund after Mr Small had received tax assessments that he was unable to pay.

4.3 The circumstances surrounding the relevant debts were explained by the Court in paragraph 3:

> *3. On 25 September 1995, three Notices of Assessment together with a provisional tax notice were issued by the Australian Taxation Office ('ATO') to the second respondent …. Pursuant to these notices, the sum of $308,802.20 became due and payable to the Deputy Commissioner of Taxation … on 27 October 1995. As at that date, Mr Small was unable to pay the sum of $308,802.20 to the DCT. On 21 March 1996, the DCT commenced proceedings against him to recover the unpaid income tax.*

4.4 Further, Mr Small was served with a statement of claim in which the Deputy Commissioner of Taxation claimed an amount of $398,223.01. There was no defense filed to the statement of claim.

4.5 The relevant superannuation fund (being a self-managed superannuation fund) was established on 21 June 1996.

4.6 The circumstances surrounding the contributions made into the fund was explained by the Court in paragraphs 6 to 9:

> *6. On 26 June 1996, Mr Small paid the sum of $85,387.00 (``the first payment'') to the first respondent as a contribution to the fund. On 9 July 1996, the DCT obtained judgment against Mr Small in the Supreme Court in the sum of $391,778.14. On 15 January 1997, Mr Small paid a further sum in the amount of $85,387.00 into the superannuation fund (via the first respondent).*
>
> *7. On 28 February 1997, Mr Small was served with a bankruptcy notice issued on the application of the DCT. The notice alleged that he was indebted to the DCT in the sum of $370,003.63. The bankruptcy notice required that he pay or secure the payment of that sum to the satisfaction of this Court or the DCT, or that he compound that sum to the satisfaction of the DCT. By 14 March 1997, Mr Small had failed to comply with the bankruptcy notice. Having also failed to satisfy this Court that he had a counter-claim, set off or cross-demand equal to or exceeding the sum specified in the bankruptcy notice, being one that he could not have set up in the action in which the judgment was obtained, Mr Small committed an act of bankruptcy on 14 March 1997.*
>
> *8. On 23 July 1997 Mr Small paid a further amount of $92,900 into the fund.*
>
> *9. On 29 July 1997, the DCT filed a creditor's petition based on Mr Small's failure to comply with the bankruptcy notice. The petition claimed the sum of $595,387.63. On 6 October 1997, a sequestration order was made against Mr Small's estate by a Registrar of this Court. Z*

4.7 The contributions fell within the ‘reasonable benefit limited’ as applied at that time.

4.8 It was further observed that the fund paid tax on the contributions:

> *11. In respect of the three payments made into the superannuation fund, the trustee paid contribution tax equal to 15% of the deductible amount referable to each payment being $9,718.50 for the first payment, $10,107.30 for the second payment and $10,572.30 for the third payment. The superannuation fund trustee also paid a superannuation surcharge calculated at 15% on each of the second and third payments in the amounts of $10,107.30 and $10,572.30 respectively. Therefore, the total tax paid to the ATO on contributions made to the superannuation fund was $51,077.70. Further, the superannuation fund derived income from, and was charged or held liable for expenses in relation to, the trustee's management of the fund's assets.*

4.9 That is, Mr Small made the following contributions into his self-managed superannuation fund.

4.9.1 26 June 1996 $85,387;

4.9.2 15 January 1997 $85,387; and

4.9.3 23 July 1997 $92,900.

4.10 Mr Small committed a relevant act of bankruptcy on 14 March 1997. As a result, the last payment belonged to the trustee in bankruptcy and Mr Small had no authority to pay it to the trustee of the superannuation fund[5].

4.11 The third payment, which was made after Mr Small's bankruptcy commenced, was set-aside. It was observed that:

> *As indicated above, the third payment of $92,900 was paid to the superannuation fund trustee on 23 July 1997, whereas on 14 March 1997 Mr Small failed to comply with a bankruptcy notice in relation to a judgment debt. Therefore, applying s 115(1) (and as Mr Small was made bankrupt on a creditor's petition issued within six months immediately after the act of bankruptcy) his bankruptcy is deemed to have commenced on 14 March 1997. By operation of s 58(1)(a), where a person becomes bankrupt, his or her property vests from the date of bankruptcy in the Official Trustee.* ***Accordingly, as at the date of the third payment, the $92,900 was money that had vested in the hands of the applicant and Mr Small had no authority to part with it. It follows that the superannuation fund trustee, which must be taken to have been aware of that lack of authority, derived no title to the moneys paid****. Pursuant to s 129(4) the money paid to the superannuation fund trustee is recoverable and should be paid back to the Official Trustee.* [emphasis added]

4.12 However, as the first two contributions were made prior to the commencement of bankruptcy, the trustee in bankruptcy was required to use section 121 of the Bankruptcy Act to claw-back the contributions:

> *Unlike the third payment, the first two payments were made before the commencement of the relation back period provided by s 115. The applicant sought primarily to have these two payments recognised as void by reason of the operation of s 121 of the Act. To be void under s 121, it must either directly appear that the bankrupt's main purpose in making the transfer was to prevent the money from becoming divisible among his creditors: s 121(1)(b)(i); or the evidence must be such so as to allow a reasonable inference to be drawn that at the time of the transfer he was or was about to become insolvent. In the latter case, his purpose is then conclusively deemed to have been to prevent the property from becoming divisible amongst his creditors: s 121(2). The presumption effected by s*

[5] Although the creditor's petition was not lodged until 29 July 1997 the commencement of the bankruptcy related to the earliest act of bankruptcy, committed in the six month period preceding the petition. See section 115 *Bankruptcy Act* 1966

> *121(2) cannot be rebutted even by direct proof that the transferor's main purpose was other than that described by s 121(2)(b): see Re Jury:Ashton v Prentice (1999) 92 FCR 68 at 82. The Full Court acknowledged in Re Jury (at 81) that the wording of the section leaves open the possibility that the person is in fact solvent and all that is required is that the inference is 'reasonably open''.*

4.13 The Court held that Mr Small made the two lump sum payments to a regulated superannuation fund at a time where it was readily to be inferred from all the circumstances that he was or was about to become insolvent:

> *In my opinion, it is readily to be inferred from all the circumstances that, at the time of both transfers (and also the third transfer), Mr Small was or was about to become insolvent, thereby establishing the requisite **purpose** in s **121**(1)(b)(i).*

4.14 As a result, subsection 121(2) of the Bankruptcy Act applied, being that Mr Small's '*... main purpose in making the transfer …* [being the contributions into the superannuation fund] *… is taken to be the purpose described in paragraph (1)(b) …* [i.e. to prevent the property becoming divisible amongst creditors, or to hinder or delay the process of making property divisible amongst creditors] *… 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 bankrupt…*'. The 'circumstances' were described by the Court as follows:

> *34. The relevant circumstances include:*
>
> *• On 25 September 1995, Mr Small was issued with Notices of Assessment by the DCT totalling $308,802.21;*
>
> *•About 6 months later, proceedings were commenced by the DCT on 21 March 1996 to recover the debt arising from those notices;*
>
> *•After a further three months, when the first transfer was made to the **superannuation** fund Mr Small had made no payments to the DCT in partial satisfaction of the notices;*
>
> *•On 9 July 1996 judgment was obtained by the DCT against Mr Small in the amount of $391,778.14 plus $485 in costs;*
>
> *•Six months later, when the second transfer was made to the **superannuation** fund, Mr Small had paid nothing on account of that judgment debt;*
>
> *•Mr Small's Statement of Affairs dated 13 November 1997 revealed that his total liabilities of $640,038 (including $623,609 owed, by him, to the ATO) substantially exceeded his assets of $348,490, which included $135,626 in*

> *debts owed to him and $155,223 in **superannuation**. Further, his annual pre-tax income of $250,000 was substantially less than his liabilities and he had not, in the two years prior to his **bankruptcy**, disposed of any significant assets which he could use to satisfy any of his debts;*
>
> *•The transcript of Mr Small's and his accountant's examinations under s 81, before a Registrar of this Court on 23 November 1998, reveal that, in the accountant's opinion, the only basis upon which Mr Small would not have been insolvent as at 26 June 1996 was the possibility that he could negotiate a part payment scheme with the DCT, even though most of the DCT's assessments require a lump sum payment. After receiving the notices from the DCT, Mr Small was advised by his accountants that he should see a registered trustee in **bankruptcy**. This he did by June 1996, and shortly thereafter he went to see his solicitors. Mr Small admitted that, at the time he received the notices, he was in no position to make any lump sum payment to the DCT and, by 26 June 1996, Mr Small was aware that money in a regulated **superannuation** fund was protected in the event of **bankruptcy**. (See s 255(2) as to the admissibility of the transcript of a s 81 examination — no order was sought to make the transcript inadmissible).*

4.15 As a result, the Court found that when the first and second contributions were made, that Mr Small was either insolvent, or about to become insolvent:

> *On the basis of this evidence**, it is impossible not to draw the inference** urged by counsel for the applicant **that, as at 26 June 1996, Mr Small was already insolvent or at the very least about to become insolvent.** He owed a large sum of money to the DCT, his liabilities exceeded his assets and he and his advisers were of the view that he could only meet his obligations to the DCT if he could negotiate a re-payment scheme, a course usually not agreed to by the DCT. Accordingly, Mr Small's main purpose in making the three transfers must be taken to have been to prevent the transferred property from becoming divisible amongst his creditors and, subject to any exception provided in s 121, the transfers would be void against the applicant.* [emphasis added]

4.16 The Court in *Small's case* distinguished the concepts of an 'interest' in a fund, and a 'payment' into a fund. The Court observed at paragraph 24 that:

> *There is a need to draw a distinction between an interest and a payment into a fund. I have little doubt that the protection provided for by s 116(2)(d)(iii)(A), operates in favour of any lawful interest in a regulated superannuation fund. However, the exemption of a wide range of superannuation interests from divisibility, along with a bankrupt's other property, amongst the creditors (subject to s 116(5)) applies to the interest. This does not exclude the potential for a payment to a superannuation fund to be caught by the relation back or avoidance provisions of the Act, even though that payment gives rise to the interest in the fund, which is protected. Such a payment is a transfer of property. The structure of Part VI*

> *of the Act is clear. Sections 120 and 121 deal with transfers. Section 116(2)(d)(iii) only protects superannuation interests which have arisen out of transfers of property prior to a person becoming a bankrupt that are not caught by s 121 as transactions to defeat creditors. If the Official Trustee can show that payment to a superannuation fund was, pursuant to the Act, void then the creditors are entitled to the benefit that flows from that.*

4.17 That is, it is an 'interest' in a superannuation fund that is protected under paragraph 116(2)(d)(iii)(A) of the Bankruptcy Act, and not a 'payment' to a fund. However, an 'interest' which is created via a 'payment' may be caught by the relation back or the avoidance provisions in the Bankruptcy Act, as such a payment will constitute a transfer of property. As a result, the Court noted that paragraph 116(2)(d)(iii) of the Bankruptcy Act only protects 'interests' which are created prior to bankruptcy, and if the person who obtains the interest is not subjected to section 121 of the Bankruptcy Act with respect to the payment that gave rise to the interest.

4.18 The Court drew a potential distinction between voluntary transfers by contributors and those required by legal compulsion:

> '*Where superannuation fund contributions are made by legal compulsion, there is a question whether there has been a voluntary transfer of property (or at least a positive act by the putative transferor) represented by a compulsory contribution to a superannuation fund. An implication that voluntariness is requisite may protect, as an instance discussed in argument, a public officer unable to prevent his or her employer from deducting superannuation contributions, even though that officer knows that he or she is about to become insolvent (cf. s121(2) and (4)). There is probably a difference between a 'transfer of property by a person' and an exaction (or extraction) of property by somebody else from that person; this view appears to be supported by s.121(9)(b) which provides that '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.'*
>
> *I have applied the emphasis to indicate that positive action by the bankrupt is seen as necessary. In any event, this is not the case of a government officer with a 'bona fide legal obligation to make irreducible superannuation contributions and the legal position in such a case may await its occurrence.*[6]'

4.19 The conclusion was reached that it was reasonable to infer that at the time Mr Small made the first two contributions he was, or was about to, become insolvent. Subsection 121(2) therefore provided an irrefutable presumption that Mr Small's main purpose was to evade creditors, and that paragraph 116(2)(d)(iii)(A) of the Bankruptcy Act did not protect those payments.

---

[6] [2001] FCA 1267 at para. 23

4.20 The defense available to a bankrupt contained in subsection 121(4) of the Bankruptcy Act was also considered. Subsection 121(4) of the Bankruptcy Act provides that:

> ***Transfer not void if transferee acted in good faith***
>
> *(4) Despite 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 transferor's 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, or was about to become, insolvent.*

4.21 The Court did not accept that subsection 121(4) of the Bankruptcy Act applied as a defense, principally because paragraph 121(4)(c) of the Bankruptcy Act could not be satisfied by Mr Small – i.e. that the superannuation fund (being the 'transferee) '*…could not reasonably have inferred that, at the time of the transfer, the transferor …* [i.e. Mr Small] *… was, or was about to become, insolvent…'.*

4.22 In particular, the defense failed because Mr Small and his accountant were the only directors of the superannuation fund trustee at all relevant times, and as the debtor's purpose to defeat the creditors was established, the fund trustee was also aware of this.

> *36. Section 121(4) provides that a transfer is not void if stated conditions are satisfied, including that in subs (c) which requires that the transferee could not have reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become insolvent. As stated above, it was conceded by counsel for both respondents that,* ***as Mr Small and his accountant were the only directors of the superannuation fund's trustee company at all relevant times, if I found that Mr Small was or was about to become insolvent, as I have, then the superannuation fund trustee was also aware of this. Accordingly, the exception provided by s 121(4) is not available to the respondents.*** [emphasis added]

4.23 Additionally the defense of consideration contained in paragraph 121(4)(a) of the Bankruptcy Act and subsection 121(5) of the Bankruptcy Act (which provides that a trustee in bankruptcy '*…must pay to the transferee …* [i.e. the superannuation fund] *… an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee …*' in bankruptcy) was not available.

4.24 It was held that the services of the trustee were not provided as consideration for the contributions. They were provided in return for the management fees and charges that the trustee was permitted to charge for administering the fund. There was no valuable consideration for the contributions themselves. The Court held that:

> *The promises and guarantees that the **superannuation** fund trustee provided pursuant to both the trust Rules and the provisions of the SIS Act, as well as the management services it provided, were not provided as consideration for the three contributions made by Mr Small. Those services were provided in return for the management fees and charges that that trustee was permitted by the Rules under the Deed to charge the fund for the administration of it.*

4.25 In *Worrell v Kerr-Jones* (2002) 190 ALR 146, a Federal Magistrate was required to decide whether a payment made in consequence of a divorce from a superannuation fund by a bankrupt to his wife was subject to attack by the husband's trustee in bankruptcy. Upon divorce, $95,000 was paid from the husband's superannuation fund to his wife. Because the wife was a creditor of the husband, the trustee in bankruptcy claimed that the payment was a preferential payment.

4.26 The Magistrate considered that the approach that needs to be taken in such a situation was to compare the position of other creditors if the payment had not been made, with what the position would have been after the payment was made. As the benefit was in a superannuation fund before it was paid to the wife, it would not have been available to other creditors and as a result, the payment to the wife did not give her a preference as compared with the other creditors.

4.27 As a result, the payments were held not to be void, and not available to the trustee in bankruptcy.

4.28 In *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469, the bankruptcy of an employer was considered. In that case, the employer made a contribution of $2.8 million to an offshore superannuation fund. The contribution was made just before the employer went into liquidation.

4.29 Soon after the contribution was made, it was lent by the offshore superannuation fund to the employer for a twelve month period.

4.30 It was held by the Court that the transaction was a sham. This is because none of the parties intended that the offshore superannuation fund would operate for the benefit of the employees of the contributor. As a result, the contribution was required to be paid by the offshore superannuation fund (and therefore subject to attack by the employer's creditors).

(b) Cook v Benson – the precursor to the amendments to the Bankruptcy Act

4.31 In contrast to the decision in *Small's case*, in *Benson* v *Cook* (2001) 114 FCR 542, the Full Federal Court applied former section 120 of the Bankruptcy Act (as it applied before December 1996)[7]. That section gave protection to "a purchaser or encumbrance in good faith and for valuable consideration", by providing that:

> *120(1) A settlement of property, whether made before or after the commencement of this Act, not being:*
>
> > *(a) a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrance in good faith and for valuable consideration; or*
> >
> > *(b) a settlement made on or for the spouse or children of the settlor of property that has accrued to the settlor after marriage in right of the spouse of the settlor;*
>
> *is, if the settlor becomes a bankrupt and the settlement came into operation after, or within 2 years before, the commencement of the bankruptcy, void as against the trustee in the bankruptcy.*
>
> *...*
>
> *(8) In this section, **'settlement of property'** includes any disposition of property."*

4.32 The Full Federal Court held that there was valuable consideration when three arms-length superannuation funds received by way of rollover, prior to bankruptcy, payments from a vested interest of the debtor in a company superannuation fund. As a result, section 120 of the Bankruptcy Act could not be used to claw-back the contributions.

---

[7] The current section 120 of the Bankruptcy Act provides that a transfer of property is void as against the trustee in bankruptcy if the person who undertook the transfer did so within 5 years before the commencement of bankruptcy. Subsection 120(1) 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 transferor's 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.

4.33 In the decision of *Cook* v *Benson* (2003) 114 CLR 370, the High Court (by a 4 to 1 majority – Gleeson CJ, Gummow, Hayne and Heydon JJ with Kirby J dissenting) dismissed an appeal by the trustee in bankruptcy from the decision of the Full federal Court.

4.34 The issue that the High Court was asked to consider was whether the recipient of a superannuation contribution (being corporate superannuation trustees) could be described as "purchasers" for "valuable consideration' for the purposes of the carve-out from the application of the then section 120 of the Bankruptcy Act.

4.35 The High Court summarised the facts of the case as follows:

> *The facts may be summarised as follows.*
>
> *The first respondent became a bankrupt on 21 July 1992, when a sequestration order was made against his estate. He had committed an act of bankruptcy on 18 September 1991, and the bankruptcy was deemed to commence on that date (s 115 of the Act.)*
>
> *There were three payments in question, which were respectively of $20,000, $40,000 and $20,000. They were made, in September 1990, at the first respondent's direction, out of an amount of $96,192.36 which became payable to him in his capacity as a member of the ISAS (Tas) Retirement Fund. The first respondent had been employed by Industrial Sales and Service (Tas) Pty Ltd ("ISAS") since 1972. He was a member of that company's superannuation scheme. ISAS ceased to carry on business on 20 April 1990, and went into liquidation on 4 June 1990. In consequence, the first respondent's employment was terminated. He became entitled to a lump sum benefit in the amount of $96,192.36. He was in his forties, well below the normal retirement age. He decided to "roll-over" an amount of $80,000 into other superannuation funds. Accordingly, he directed the making of the payments the subject of the appeal.*
>
> *The fact that the amount of $96,192.36, of which the $80,000 formed part, represented entitlements under another superannuation scheme was directly relevant to the appellant's attempt, in the Federal Court, to rely on s 121 of the Act. It provided a commercial explanation of the first respondent's conduct, unrelated to any attempt to defeat his creditors. On the face of it, what was involved was an ordinary commercial dealing, being a re-investment of funds representing the proceeds of superannuation benefits to which the first respondent had become entitled prematurely. His original intention had been to make provision for his retirement, and he wished to carry that intention forward.*
>
> *The three roll-over transactions involved an investment of $20,000 in a Legal & General Personal Super Investment Growth Bond, $40,000 in a*

> *Prudential Investment Bond, and $20,000 in a Mercantile Mutual Superannuation Bond. It will be necessary to attempt to define those transactions with greater particularity, to the extent to which the evidence enables that to be done.*
>
> *The appellant commenced proceedings in the Federal Court, claiming declarations that each payment was void as against the appellant. In addition to the first respondent, the appellant sued Legal & General Superannuation Services Pty Ltd as second respondent, Prudential Corporation Australia Ltd as third respondent, and Mercantile Mutual Custodians Pty Ltd as fourth respondent. The appellant sought an order for repayment by the second, third and fourth respondents of the amounts of $20,000, $40,000 and $20,000 respectively.*

4.36 The issue to be determined by the High Court was the application of section 120 of the Bankruptcy Act, and not section 121:

> *The appeal in this Court was conducted, by both sides,* ***on the basis that the payments in question each constituted a settlement of property within the meaning of s 120, and that the issue was whether the recipients were purchasers for valuable consideration****. No question of want of good faith arose. Although at one stage of the proceedings there had been a claim that the conduct of the first respondent involved fraudulent dispositions within s 121 of the Act, the Federal Court resolved that issue in his favour, and it was not pursued in this Court.* [emphasis added]

4.37 The High Court observed the policy intent behind section 120 of the Bankruptcy Act:

> *Approaching s 120(1) and the critical words in this way, it is clear that the provision represents an important measure protective of creditors. It is enacted as a response to the common experience of the law that bankrupts, facing the prospect of bankruptcy, will often attempt, within a given time of that anticipated event, to divest themselves of property to people (usually family) whom they specially wish to favour, whom they trust and whose use of the property will generally inure to the advantage of the bankrupt, in the event that bankruptcy supervenes. Against fraudulent and semi-fraudulent dispositions of property of this kind, s 121 stands as guardian. Against other, non-fraudulent, dispositions, s 120 provides protection to creditors. In case of any ambiguity, it is the duty of courts giving effect to the Act, to apply such provisions so as to achieve, and not frustrate, the attainment of these purposes.*

4.38 The Court observed that:

> *The history of s 120, and the English legislation upon which it was based, is set out in the judgment of this Court in Barton v Official Receiver. The Court*

> *said that the purpose of the English legislation was "to prevent properties from being put into the hands of relatives to the disadvantage of creditors".. Of course, it is not confined to dispositions to relatives, and the width of the definition of property has already been noted.*

4.39 The High Court considered that the recipient of a superannuation contribution (being corporate superannuation trustees) could be described as "purchasers" for "valuable consideration'. It was observed by the High Court that:

> *As Lockhart J, in the Full Court of the Federal Court, pointed out in Barton, the concept of a "purchaser ... for valuable consideration", while it involves two elements, does not involve two separate and independent notions. It has repeatedly been held that the legislation uses those terms in a commercial, rather than a conveyancing, sense. It does 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.*

4.40 That is, it was held that they could be so described. They said that the concept of a purchaser for valuable consideration does not involve two separate and independent notions. Those terms are used in a commercial, rather than a conveyancing, sense. It refers to a purchaser not in the limited sense of a purchase and sale, but to a person who in a commercial sense provides a quid pro quo. While valuable consideration requires something more than a merely nominal consideration that would otherwise suffice to make a contract enforceable in common law, here the payments were made at the direction of the debtor, out of funds due to the debtor under an existing superannuation scheme, by way of contributions to other, commercially marketed, superannuation schemes, in return for the obligations, undertaken by the trustees of those schemes, to provide the debtor with rights and benefits to which the debtor would in due course become entitled under the rules of each scheme. Those rights and benefits constitute substantial and valuable consideration for the contributions of the debtor.

4.41 The High Court accepted that the trustee's of the superannuation schemes were 'purchasers' for the purposes of section 120 of the Bankruptcy Act, on the basis that in consideration for the contributions, the trustees of the superannuation funds '*… undertook to provide the rights and benefits to which contributors would become entitled on death or retirement…*'. It was held that:

> *As Beaumont J pointed out in the Full Court, the concept of "purchaser" in s 120 must be understood and applied in the light of the expanded concepts of "disposition of property" and "settlement". Since a payment of money, or a transfer of a chose in action, is capable of constituting a settlement, then the payee or transferee must be capable of being a "purchaser ... for valuable consideration".* ***The second, third and fourth respondents, as trustees of the respective superannuation schemes, in return for the contributions to the schemes, undertook to provide the rights and benefits to which contributors would become entitled on death or retirement. The contributions fall within the expanded concept of***

> ***settlements of property****. A payment of money is, by definition, a disposition of property. If the recipient of the money, in the commercial sense relevant to the application of s 120, provides valuable consideration in return, then there is no reason to deny to the recipient the character of a purchaser. The trustees satisfy the description of purchasers for valuable consideration.* [emphasis added]

4.42 Further, the High Court agreed with the Full Federal Court, in finding that the contributions were 'settlements of property' for the purposes of section 120 of the Bankruptcy Act:

> *There was a difference between the approach of the majority in the Full Court, and that of Hely J, to the identification of the property that was settled for the purposes of s 120. Beaumont and Kiefel JJ, consistently with the relief claimed by the appellant, treated the three payments of money as the relevant settlements of property, and enquired whether the first respondent had received valuable consideration for them. Hely J, on the other hand, observing that the amounts were applied in payment of premiums on policies of insurance on the life of the first respondent, identified the "settlement of the life policies on the trustees" as the relevant settlement of property, and enquired whether the trustees provided "valuable consideration for that settlement". He answered that question in the negative, pointing out that the trustees held the life policies on trust, and that "a trustee who promises to receive and hold property transferred to him ... does not thereby give valuable consideration for the property transferred". However, the settlements or dispositions of property which the appellant claimed to be void were the three payments of money, not the issue of the life policies. The Amended Statement of Claim made no reference to the life policies. It asserted that each of the payments of $20,000, $40,000 and $20,000 respectively was void as against the appellant, claimed declarations accordingly, and sought orders for repayment of those amounts. There is no reason to doubt that the property, and the only property, of which the first respondent divested himself by the impugned transactions was the $80,000. Once that is accepted, the question whether he received substantial and valuable consideration in return is to be answered in the affirmative. The first respondent never divested himself of the life policies, and they did not constitute the property which the appellant alleged was settled in terms of s 120. It is erroneous to ask what consideration the trustees gave for the life policies. The question is what consideration they gave for the $80,000.*
>
> ***The majority in the Full Court were correct in treating the three payments, by way of contribution to the superannuation funds, as the settlements of property to which s 120 potentially applied, and in concluding that they were settlements made in favour of purchasers for valuable consideration****.* [emphasis added]

4.43 That is, the High Court found that the trustees of the superannuation funds to which to which the roll-over was paid were purchasers for valuable consideration of the amounts paid into their funds. Indeed, the High Court held that there was valuable consideration on the basis that in return for the contributions into the fund, the trustees undertook to provide the rights and benefits to which the contributors became entitled on death or retirement under the terms of the relevant trust deed.

4.44 As a result, the High Court found that the roll-overs to the trustees of the superannuation fund by the bankrupt was not void as against the trustee in bankruptcy. The member therefore continued to be entitled to the benefits in each of the funds.

4.45 For completeness, it should be noted that contributions made by bankrupts with the intention to defeat creditors should be considered as void as against a trustee in bankruptcy under section 121 of the Bankruptcy Act. This is unless a bankrupt can prove that the contribution was made for the main purpose of providing for retirement benefits, unless '*… it can be reasonably inferred from all the circumstances that, at the time of the transfer …* [by the bankrupt, that the bankrupt] *… was, or was about to become, insolvent…*' (see subsection 121(2) of the Bankruptcy Act). However, if full consideration is paid, and if the transferee does not know of the transferor (i.e. bankrupt's) main purposes of the transfer, then subsection 121(5) of the Bankruptcy Act would be a defense:

> ***Transfer not void if transferee acted in good faith***
>
> *(4) Despite 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 transferor's 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, or was about to become, insolvent.*

5. Post-28 July 2006 Contributions

5.1 Partly as a result of the High Court's decision in *Cook v Benson (*2003) 114 CLR 370, the law regarding claw-backs of contributions made into superannuation funds has been changed by the *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007* (Cth), which inserted Subdivision B into Division 3 of Part VI of the Bankruptcy Act. Indeed, the accompanying Explanatory Memorandum provided that:

… the principal purpose of the amendments to be made by this Bill is to allow bankruptcy trustees to recover superannuation contributions made prior to bankruptcy with the intention to defeat creditors. These amendments will address problems highlighted following the High Court's decision in Cook v Benson…

5.2 The Explanatory Memorandum accompanying the *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007* (Cth) (**'Explanatory Memorandum'**) provides that the 'overall purpose' of the amendments to the Bankruptcy Act contained in the *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007* (Cth) was to provide as follows:

The overall purpose of the amendments is to:

- *allow a bankruptcy trustee to recover the value of contributions to an eligible superannuation plan made by the bankrupt to defeat creditors (along the lines of the current section 121);*
- *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 recoverable by the bankruptcy trustee, thus overcoming the effect of the High Court decision of Cook v Benson;*
- *allow the 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.*

The effect of these 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.

The amendments will apply to any contributions made after 27 July 2006.

5.3 The Subdivision provides for the situations in which a contribution made into a superannuation fund will be void as against a trustee in bankruptcy, and broadly, provides for two types of recoverable contributions, being:

5.3.1 contributions made by persons who later become bankrupt (section 128B of the Bankruptcy Act); and

5.3.2 contributions made by a third party for the benefit of a person who later becomes a bankrupt (section 128C of the Bankruptcy Act).

(a) <u>Contributions made by a person who later becomes a bankrupt – section 128B of the Bankruptcy Act</u>

5.4 Section 128B of the Bankruptcy Act provides for when a contribution into a superannuation fund made by a person who becomes a bankrupt is void against a trustee in bankruptcy. Section 128B of the Bankruptcy Act is based on section 121 of the Bankruptcy Act, which deals with transfers to defeat creditors.

5.5 Subsection 128B(1) of the Bankruptcy Act provides when a contribution into a superannuation fund is void, and provides that:

> ***Superannuation contributions made to defeat creditors--contributor is a person who later becomes a bankrupt***
>
> *Transfers that are void*
>
> *(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 if:*
>
> > *(a) the transfer is made by way of a contribution to an eligible superannuation plan; and*
> >
> > *(b) 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*
> >
> > *(c) the transferor's main purpose in making the transfer was:*
> >
> > > *(i) to prevent the transferred property from becoming divisible among the transferor's creditor's; or*
> > >
> > > *(ii) to hinder or delay the process of making property available for division among the transferor's creditors; and*
> >
> > *(d) the transfer occurs on or after 28 July 2006.*

5.6 For the purposes of section 128B of the Bankruptcy Act, the 'transferor' is the person who becomes a bankrupt, and the 'transferee' is the superannuation fund which receives a contribution from the 'transferor'.

5.7 Subsection 121B(1) of the Bankruptcy Act is substantially the same as subsection 121(1) of the Bankruptcy Act, except that subsection 121B(1) of the Bankruptcy Act deals with superannuation contributions. Specifically, the differences between the two sections is that:

5.7.1 paragraph 128B(1)(a) of the Bankruptcy Act requires the transfer by the bankrupt to be '*…is made by way of a contribution to an eligible superannuation plan…'; and*

5.7.2 paragraph 128B(1)(d) of the Bankruptcy Act requires the transfer to occur on or after 28 July 2006.

5.8 Indeed, the Explanatory Memorandum at paragraphs 27 and 28 provide that:

> *27. The 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).*
>
> *28. 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 …*

5.9 The term 'eligible superannuation plan' is defined in section 126N of the Bankruptcy Act as to include a 'regulated superannuation fund' as defined in the SIS Act.

5.10 Specifically, in order for a transfer of property by a person (who becomes a bankrupt) to be void as against the trustee in bankruptcy under section 128B(1) of the Bankruptcy Act:

5.10.1 the transfer of property needs to be a contribution to a superannuation fund;

5.10.2 if the property had not been transferred, then the property either 'would probably':

(a) have become part of the bankrupts estate; or
(b) have been made available to creditors;

5.10.3 the 'main purpose' of the transfer by the bankrupt was either:

(a) to prevent the property becoming divisible amongst the bankrupt's creditors; or

(b) to 'hinder or delay' the process of making the property available for a division amongst the creditor's of the bankrupt;

5.10.4 the transfer happens on or after 28 July 2006.

5.11 One issue to consider is whether the property contributed into the superannuation fund by the bankrupt 'would probably' have become part of the bankrupt estate or made available to the creditors of the bankrupt. That is (and similarly with section 121 of the Bankruptcy Act), if it can be demonstrated that the bankrupt would have dissipated value actually transferred by the bankrupt into a superannuation fund (prior to bankruptcy) that value will not be caught by section 128B of the Bankruptcy Act. This is because in order for section 128B of the Bankruptcy Act to apply, it must be shown (by the trustee in bankruptcy) that the property '***would probably***' have become part of the transferor's bankrupt estate available to the creditors.

The requisite 'main purpose'

5.12 As discussed above, in order for a contribution into a superannuation fund to be clawed-back under section 128B of the Bankruptcy Act, it must be shown that the bankrupt's 'main purpose' of the contribution was either to:

5.12.1 prevent the property contributed into the superannuation fund from becoming divisible among the transferor's creditor's; or

5.12.2 to hinder or delay the process of making property available for division among the transferor's creditors.

5.13 Subsection 128B(2), (3) and (4) of the Bankruptcy Act provides guidance with respect of proving whether the 'main purpose' of a contribution was to defeat or hinder or delay creditor's rights with respect to the property contributed.

5.14 The Explanatory Memorandum provides at paragraph 29 that:

> *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 (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. 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 the Court's satisfaction. Subsection 128B(4) provides that subsections (2) and (3) do not limit the ways of showing the transferor's main purpose. This is in line with existing subsection 121(3).

5.15 Subsection 128B(2) of the Bankruptcy Act provides that:

> *(2) The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(c) 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.*

5.16 That is, subsection 128B(2) of the Bankruptcy Act allows that the 'main purpose' requirement in subsection 128B(1) of the Bankruptcy Act is satisfied if it can be reasonably inferred from all the circumstances that at the time of the transfer, the transferor either was, or was about to become insolvent.

5.17 Subsection 128B(2) of the Bankruptcy Act replicates subsection 121(2) of the Bankruptcy Act. As a result, commentary on subsection 121(2) of the Bankruptcy Act is relevant for the purposes of subsection 128B(2) of the Bankruptcy Act.

5.18 Sackville J in *Prentice v Cummins (no 5)* 2002) 124 FCR 67 observed that:

> *If reliance is placed on s 121(2), the transferor's subjective intention is likely to be irrelevant: in other words if it can be reasonably inferred that the transferor was insolvent at the time of the transfer, it will not matter if his or her subjective intention was not to prevent, hinder or delay the process of making property available for division among creditors … On the other hand, if the trustee attacking a transfer does not rely on s 121(2), the trustee will need to establish that the transferor's subjective purpose was that described in s 121(1)(b).*

5.18 That is, if reliance is placed on subsection 128B(2) of the Bankruptcy Act, then the subjective intent of the transferor will not be relevant. All that is required is that an inference may be reasonably made that at the time of the transfer, the transferor was, or was about to become insolvent.

5.19 Subsection 128B(3) of the Bankruptcy Act provides that:

> *(3) In determining whether the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(c), 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.*

5.20 That is, determining whether the transferor had the requisite purpose in making the contribution, regard should be to the bankrupt's pattern of contributions. In particular, after having regard to the pattern of contributions, whether the contributions being analyzed are 'out of character'.

5.21 The Explanatory Memorandum at paragraph 38 observes with respect to subsection 128B(3) of the Bankruptcy Act that:

> *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 the Court's satisfaction.*

5.22 Subsection 128B(4) of the Bankruptcy Act provides that '*…Subsections (2) and (3) do not limit the ways of establishing the transferor's main purpose in making a transfer.*'. This is equivalent to subsection 121(3) of the Bankruptcy Act.

Rebuttable presumption – books and records

5.23 Subsection 128B(5) of the Bankruptcy Act provides a rebuttable presumption of insolvency, where the transferor had not kept proper books and records relating to the time of the transfer. Subsection 128B(5) of the Bankruptcy Act provides:

> *(5) For the purposes of this section, 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.*

5.24 The subsection 128B(5) of the Bankruptcy Act rebuttable presumption is the same as that contained in subsection 121(4A) of the Bankruptcy Act.

Refunds of tax and fees referable to contributions

5.25 Subsection 128B(5A) of the Bankruptcy Act provides that:

> ***Refund of contributions tax etc.***
>
> *(5A) If:*
>
> *(a) as a result of subsection (1), a transfer made by way of a 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 pays an amount to the trustee in the transferor's bankruptcy; and*
>
> *(d) the amount paid in compliance with the section 139ZQ notice exceeds the amount 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.*

Protection of bona fide purchasers

5.26 Subsection 128B(6) of the Bankruptcy Act replications subsection 121(8) of the Bankruptcy Act, and seeks to protect bona fide purchasers for value of property which has been transferred by the 'transferee' (i.e. the fund). Subsection 128B(6) of the Bankruptcy Act provides that:

> *(6) This section 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.*

5.27 The meaning of 'transfer of property' and 'market value' for the purposes of section 126B of the Bankruptcy Act is provided for in subsection 128B(7) of the Bankruptcy Act:

Meaning of transfer of property and market value

(7) For the purposes of this section:

*(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.*

(b) Contributions made by third persons – section 128C of the Bankruptcy Act

5.28 Section 128C of the Bankruptcy Act deals with contributions by third parties for the benefit of a person who later becomes a bankrupt. If section 128C of the Bankruptcy Act applies, then such contributions are considered void as against the trustee in bankruptcy.

5.29 Section 128C of the Bankruptcy Act is designed to apply to situations in which a person agrees that monies that would usually be paid to them should instead be paid into the person's superannuation fund. An example of such a scenario is if a payment is made by a person's employer under a salary sacrifice arrangement.

5.30 Subsection 128C(1) of the Bankruptcy Act provides that:

(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 from becoming divisible among the beneficiary's creditors; or

(ii) to hinder or delay the process of making property available for division among 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.

5.31 Importantly, in order for section 128C of the Bankruptcy Act to apply (and amongst other things):

5.31.1 the bankrupt needs to be a party to the 'scheme' which resulted in the transfer (see paragraph 128C(1)(c) of the Bankruptcy Act); and

5.31.2 the property transferred '*… would probably have been available …*' as part of the bankrupt's divisible property in the event of bankruptcy has the transfer not occurred ((see paragraph 128C(1)(d) of the Bankruptcy Act).

5.32 Subsection 128C of the Bankruptcy Act requires for there to be a 'scheme'. The term 'scheme' for the purposes of section 128C of the Bankruptcy Act is defined in section 128N on the Bankruptcy Act, to be:

'scheme' *means:*

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

5.33 Subsection 128C(2) of the Bankruptcy Act provides that for the purposes of paragraph 128C(1)(b) of the Bankruptcy Act (i.e. transfers by way of contributions to a fund for the benefit of a person who later becomes bankrupt), then a benefit that is payable in the event of death of a person is disregarded. This provision seeks to disregard contingent benefits both to a bankrupt at the time that a contribution is made, and to the spouse / children of a bankrupt which may be paid upon death of the bankrupt.

5.34 The Explanatory Memorandum explains that subsection 128C(2) of the Bankruptcy Act addresses two situations, being:

5.34.1 the bankrupt's employer making a contribution to a superannuation fund for the benefit of a bankrupt's spouse; and

5.34.2 the bankrupt's employer making a contribution to a superannuation fund for the benefit of a bankrupt, and the bankrupt's spouse / children become beneficiaries in the event of the bankrupt's death.

5.35 Paragraph 37 of the Explanatory Memorandum provides that:

> *Subsection 128C(2) 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. This is designed to address two situations:*
>
> *(i) 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.*
>
> *(ii) 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.*

5.36 Subsections 128C(3), (4), (5) and (6) of the Bankruptcy Act provide for the following:

> ***Showing the beneficiary's main purpose in entering into the scheme***
>
> *(3) The beneficiary's main purpose in entering into the scheme is taken to be the purpose described in paragraph (1)(e) 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.*
>
> *(4) In determining whether the beneficiary's main purpose in entering into the scheme was the purpose described in paragraph (1)(e), regard must be had 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.

(5) For the purposes of paragraph (4)(a), disregard a benefit that is payable in the event of the death of a person.

Other ways of showing the beneficiary's main purpose in entering into a scheme

(6) Subsections (3) and (4) do not limit the ways of establishing the beneficiary's main purpose in entering into a scheme.

Rebuttable presumption of insolvency

(7) For the purposes of this section, a rebuttable presumption arises that the beneficiary was, or was about to become, insolvent at the time the beneficiary entered into the scheme if it is established that the beneficiary:

(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 beneficiary and as sufficiently disclose the beneficiary's business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

5.37 That is, subsections 128C(3), (4), (5) and (6) of the Bankruptcy Act are similar to section 128B of the Bankruptcy Act insofar as the subsections deal with:

5.37.1 showing the transferor's main purpose; and

5.37.2 providing a rebuttable presumption of insolvency.

5.38 As with subsection 128B(6) of the Bankruptcy Act, subsection 128C(8) of the Bankruptcy Act provides a protection of rights for third party acquirers:

Protection of successors in title

(8) This section 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.

5.39 As with subsection 121(9) of the Bankruptcy Act, subsection 128C(9) of the bankruptcy Act provides definitions of 'transfer of property' and 'market value' for the purposes of section 128C of the Bankruptcy Act.

6. Recovering Void Contributions

6.1 In the context of recovering void contributions, a trustee of a superannuation fund may be required to deal with:

6.1.1 a superannuation account freezing notice issued by the Official receiver pursuant to section 128E of the Bankruptcy Act;

6.1.2 a notice issued pursuant to section 139ZQ of the Bankruptcy Act by the Official Receiver. Such a notice may require a payment to the trustee in bankruptcy of the lesser of the value of property received as a result of a void transaction or the withdrawal benefit; or

6.1.3 a Court order pursuant to section 139ZU of the Bankruptcy Act, which deals with rolled-over superannuation interests. Such an order may direct a trustee of a superannuation fund to pay a trustee in bankruptcy a specified amount where a void contribution has been paid to another superannuation fund.

(A) Account freezing notices

6.2 Sections 128E and 128F of the Bankruptcy Act contains a regime under which the Official Receiver may issue account-freezing notices with respect to a contributor's interest in a superannuation fund or notice under section 139ZQ to recover void contributions where the Official receiver has reasonable grounds to believe that the contributions are void.

6.3 Paragraph 65 of the Explanatory Memorandum provides that:

> *… new section 128E which will allow the Official Receiver to issue a superannuation account-freezing notice. 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 (such as those under sections 77C, 139ZL and 139ZQ).*

6.4 Paragraph 71 of the Explanatory Memorandum provides that: '*Section 128F will provide that the Official Receiver may revoke a superannuation account-freezing notice.*'

(i) Superannuation Account-Freezing Notice

6.5 Subsection 128E(1) of the Bankruptcy Act provides the gate-way provision that needs to be satisfied before an account-freezing notice can be provided to a trustee of a superannuation fund. Subsection 128E(1) of the Bankruptcy Act provides that:

> *(1) 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 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 member's superannuation interest.*

6.6 The Explanatory Memorandum at paragraph 66 provides that:

> *Subsection 128E(1) will provide that, before issuing a notice, the Official Receiver must have reasonable grounds to believe that a transaction is void against the bankruptcy trustee under section 128B or 128C and either the whole or part of the member's superannuation interest is attributable to the transaction or the trustee has made an application for an order under section 139ZU that relates to the void transaction and the member's superannuation interest.*

6.7 That is, subsection 128E(1) of the Bankruptcy Act provides that before a 'superannuation account freezing notice' can be given to a trustee of a superannuation fund ***the Official Receiver must have reasonable grounds to believe that***:

6.7.1 a transaction is void against the bankruptcy trustee under sections 128B or 128C of the Bankruptcy Act; and

6.7.2 either the whole or part of the member's superannuation interest is attributable to the transaction, or the trustee has made an application for an order under section 139ZU of the Bankruptcy Act that relates to the void transaction and the member's superannuation interest.

6.8 An issue to consider is what the requisite 'reasonable grounds to believe' test is.

6.9 In *Hurst v Ninyett* (1992) 16 MVR 397, the Supreme Court of Western Australia held that the term 'reasonable grounds to believe' involves more than mere suspicion:

> *In my view the appellant has not made out the ground in the amended grounds of appeal that the learned magistrate erred in law in finding that a 'reasonable suspicion' on the part of the respondent was sufficient to require the appellant to provide a sample. Although the magistrate on one occasion used the word ``suspicion", he had previously correctly on three occasions used the words 'reasonable*

grounds to believe'. Also after he used the word 'suspicion', the learned magistrate again used the words 'reasonable grounds'.

6.10 Further, *Woolworths Ltd v Luff* (1988) 88 FLR 224 is authority for the proposition that a person who 'has reasonable grounds to believe' must have a subjective personal belief. Kelly J observed in *Woolworths Ltd v Luff* (1988) 88 FLR 224 that:

> *Having regard to the authorities referred to above and to what I believe to be the true meaning of the word `had' as used in s 80(2) of the ordinance, the expression `had reasonable grounds for believing that the person was not less than 18 years of age' must, in my opinion, be taken to mean `had reasonable grounds to believe' and did in fact believe that the person was not less than 18 years of age.*

6.11 That is, in order for the Official Receiver to be able to issue account freezing notices under subsection 128B(1) of the Bankruptcy Act, the Official Receiver must show that it 'has reasonable grounds to believe' that the contributions are void, which:

6.11.1 involves more than 'reasonable suspicion', but is in fact a 'reasonable ground to believe'; and

6.11.2 requires the Official receiver not only to have 'reasonable grounds to believe', but in fact does believe that the contributions are void.

6.12 In the event that the gate-way provision in subsection 128B(1) of the Bankruptcy Act is satisfied, then subsection 128E(2) of the Bankruptcy Act provides that:

> *(2) 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, roll-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 an 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 subsection 139ZT(2); or

(j) in such circumstances (if any) as are specified in the regulations.

6.13 That is, subsection 128E(2) of the Bankruptcy Act provides that the Official Receiver may, by written notice, direct the trustee of an eligible superannuation plan not to cash or debit or 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.

6.14 Subsection 128E(5) of the Bankruptcy Act provides that a '*… superannuation account-freezing notice comes into force when the notice is given to the trustee of the eligible superannuation plan.*'

6.15 Subsection 128E(3) of the Bankruptcy Act provides that:

(3) 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:

(a) the transaction is void against the trustee of the bankrupt's estate under section 128B or 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 member's superannuation interest.

6.16 That is, subsection 128E(3) of the Bankruptcy Act provides that a superannuation account-freezing notice issued by the Official Receiver must set out the facts and circumstances on which it is based. It was held in *Sutherland v Vale* [2007] FMCA 1617 that in the context of a section 139ZQ of the Bankruptcy Act notice (which,

like subsection 128E(3) of the Bankruptcy Act requires an Official Receiver to '*… set out the … facts and circumstances …*'), that if the notice:

6.16.1 provides the details of the property that was disposed of by a bankrupt before bankruptcy; and

6.16.2 the value of the property is provided for, then

the value must be supported by sufficient evidence. If it is not, then the notice may be set-aside.

(ii) *Revocation of a superannuation account freezing notice*

6.17 Section 128F of the bankruptcy Act deals with the revocation of superannuation account-freezing notices. Subsection 128F(1) of the Bankruptcy Act provides that:

> *If a superannuation account-freezing notice is in force in relation to a member of an eligible superannuation plan, the Official Receiver may, by written notice given to the trustee of the plan, revoke the superannuation account-freezing notice.*

6.18 That is, subsection 128F(1) of the Bankruptcy Act allows a superannuation account-freezing notice to be revoked upon written notice being given to the trustee of the relevant superannuation fund.

6.19 Subsection 128F(2) of the Bankruptcy Act provides that the Official Receiver may revoke a superannuation account-freezing notice on its own initiative where the Official Trustee is the trustee of the bankrupt estate, or upon on application by a registered trustee who is the trustee of the bankrupt estate. In addition, in any case, the member of the superannuation plan may apply to the Official Receiver for revocation of the superannuation account-freezing notice.

6.20 Subsection 128F(3) of the Bankruptcy Act provides that a superannuation account-freezing notice may be revoked if the Official Receiver issues a notice under section 139ZQ of the Bankruptcy Act requiring the superannuation fund to pay the amount of the void contribution to the trustee. Under subsection 128F(3) of the Bankruptcy Act the superannuation account-freezing notice is revoked when either:

6.20.1 the trustee of the superannuation fund complies with the section 139ZQ of the Bankruptcy Act notice;

6.20.2 when the section 139ZQ notice is revoked; or

6.20.3 when the Court sets aside the section 139ZQ notice.

6.21 Subsection 128F(4) of the Bankruptcy Act provides that a superannuation account-freezing notice is revoked if 180 days pass after the notice comes into force, and no section 139ZQ of the Bankruptcy Act notice is given in relation to the void contribution.

6.22 Subsection 128F(5) will deal with the situation in which the void contribution has been rolled over and the bankruptcy trustee obtains a Court order under section 139ZU requiring the trustee of an eligible superannuation plan to pay an amount which effectively represents the original void contribution. In that case, the superannuation account-freezing notice is revoked when the trustee of the plan complies with the notice or the section 139ZU order is set aside on appeal.

6.23 Subsection 128F(6) of the Bankruptcy Act deals with the situation in which an application for a section 139ZU of the Bankruptcy Act order is dismissed or withdrawn. In such a case, the superannuation account-freezing notice is revoked when the application is dismissed or withdrawn.

6.24 In the event that a trustee in bankruptcy has applied for a section 139ZU of the Bankruptcy Act order, and 180 days pass without an order being made, subsection 128F(7) of the Bankruptcy Act provides that the superannuation account-freezing notice is revoked.

6.25 Whilst subsections 128F(5), (6) and (7) of the Bankruptcy Act all impose a 180 day time limit on the life of a superannuation account-freezing notice. However, subsection 128F(8) of the Bankruptcy Act permits a Court, on application by the Official Receiver, to extend the 180 day time limit, by providing that:

> *The Court may, on application by the Official Receiver, extend, or further extend, the 180-day period referred to in subsection (5), (6) or (7).*

6.26 Paragraph 78 of the Explanatory Memorandum explains the rationale behind the extension of time contemplated in subsection 128F(8) of the Bankruptcy Act:

> *Subsections 128F(5), (6) and (7) all impose a 180 day time limit on the life of a superannuation account-freezing notice. However, subsection 128F(8) will allow the Court, on application by the Official Receiver, to extend that time limit. This may be appropriate where, for example, the Court has been unable to deal with an application for a section 139ZU order or the bankruptcy trustee has been unable to complete investigations within that time frame. It is not intended to allow the bankruptcy trustee to obtain indefinite extensions where delays result from a lack of action or investigation. Subsection 128F(9) will provide that an application to the Court for extension of a notice may be made by the Official Receiver on his/her own initiative where the Official Trustee is the trustee of the bankrupt estate or on application by a registered trustee who is trustee of the bankrupt estate.*

(iii) Seeking consent to deal with a superannuation interest

6.27 Section 128H of the Bankruptcy Act provides a mechanism under which a member of a superannuation fund may 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 with respect to the member's interest. Indeed, subsection 128H(1) of the Bankruptcy Act provides that section 128H of the Bankruptcy Act '*… applies if a superannuation*

account-freezing notice is in force in relation to a member's superannuation interest.'

6.28 Subsection 128H(2) of the Bankruptcy Act provides that a request by a member for consent to deal with it's superannuation interest must be made in writing to the Official Receiver:

> *The member may apply in writing to the Official Receiver for the Official Receiver to consent to the cashing, debiting, roll-over, transfer or forfeiture, in whole or in part, of the member's superannuation interest.*

6.29 Subsection 128H(3) provides that where consent is sought, the Official Receiver may give consent for the member to deal with it's superannuation interest (either in whole or in part), of the member's superannuation interest. Further, any consent given by the Official Receiver's must be given in writing to the trustee of the eligible superannuation plan:

> *If an application is made under subsection (2), the Official Receiver may, by written notice given to the trustee of the eligible superannuation plan concerned, consent to the cashing, debiting, roll-over, transfer or forfeiture, in whole or in part, of the member's superannuation interest.*

6.30 Subsection 128H(4) of the Bankruptcy Act provides that the Official Receiver's consent may be unconditional or subject to conditions.

6.31 Subsection 128H(5) of the Bankruptcy Act provides that the Official Receiver must give a copy of the consent to the member of the plan.

6.32 Subsection 128H(6) of the Bankruptcy Act provides that:

> *Before giving a consent under subsection (3), the Official Receiver must consult the trustee of the bankrupt's estate.*

6.33 Paragraph 85 of the Explanatory Memorandum provides that:

> *Subsection 128H(6) will provide that, before giving consent under subsection (3), the Official Receiver must consult the trustee of the bankrupt's estate. The Official Receiver is not bound to act in accordance with the wishes of the bankruptcy trustee but will take account of the trustee's views in making a decision. 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.

6.34 Subsections 128H(7) and (8) of the Bankruptcy Act provides for the review mechanism for decisions made by the Official Receiver under subsection 128H(3) of the Bankruptcy Act (i.e. the consent to deal with superannuation interests):

(7) Applications may be made to the Administrative Appeals Tribunal for review of a decision of the Official Receiver refusing to give a consent under subsection (3).

(8) The trustee of the bankrupt's estate may apply to the Administrative Appeals Tribunal for review of a decision of the Official Receiver giving a consent under subsection (3).

6.35 That is, a decision by the Official Receiver either refusing or granting consent under subsection 128H(3) of the Bankruptcy Act may be subject to review by the Administrative Appeals Tribunal.

(iv) Power of Court to set aside superannuation account-freezing notice

6.36 Section 128J of the Bankruptcy Act provides that the Court may set aside a superannuation account-freezing notice. Subsection 128J(1) of the Bankruptcy Act provides that:

(1) If the Court, on application by:

(a) a person to whom a superannuation account-freezing notice has been given; or

(b) the member whose superannuation interest is affected by a superannuation account-freezing notice; or

(c) any ***other interested person;***

is satisfied that the Official Receiver did not have reasonable grounds to believe *that:*

(d) the relevant transaction is void against the trustee of a bankrupt's estate under section 128B or 128C; and

(e) either:

(i) the whole or a part of the relevant 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 relevant member's superannuation interest;*
>
> *the Court may make an order setting aside the notice.* [emphasis added]

6.37 That is, subsection 128J(1) of the Bankruptcy Act provides that an application may be made by a person to whom the notice has been given (i.e. the trustee of the eligible superannuation plan), the member whose interest is affected by the notice or any other 'interested person'. An issue to consider is the scope of persons who may be 'interested' for the purposes of subsection 128J(1) of the Bankruptcy Act.

6.38 Further, a superannuation account-freezing notice may be set aside under subsection 128J(1) of the Bankruptcy Act where the Court is satisfied that the ***Official Receiver did not have reasonable grounds*** to believe that the conditions upon which a notice may be issued existed.

6.39 Subsection 128J(2) of the Bankruptcy Act provides that, where the Court sets aside a superannuation account-freezing notice, that notice is taken not to have been given.

(v) Judicial enforcement of superannuation account-freezing notices

6.40 Section 128K of the Bankruptcy Act provides a mechanism for judicial enforcement of a superannuation account-freezing notice. Subsection 128K(1) of the Bankruptcy Act provides that:

> *(1) 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's estate, make any or all of the following orders:*
>
> *(a) an order directing the trustee of the plan to comply with that notice;*
>
> *(b) an order directing the trustee of the plan to pay to the trustee of the relevant bankrupt's estate an amount not exceeding the money, or the value of the property, received as a result of the transaction referred to in paragraph 128E(1)(a);*
>
> *(c) any other order that the Court thinks appropriate.*

6.41 That is, subsection 128K(1) of the Bankruptcy Act provides that the Court may enforce a superannuation account-freezing notice if there is either to a potential or actual breach of a notice. The remedies are available for both situations.

6.42 Subsection 128K(1) of the Bankruptcy Act provides that the Court may make orders:

6.42.1 directing the trustee of the plan to comply with the superannuation account-freezing notice;

6.42.2 directing the trustee of the superannuation fund to pay to the trustee in bankruptcy an amount not exceeding the money, or the value of property, received as a result of the void transaction (that is, the void superannuation contribution). The Explanatory Memorandum (at paragraph 89) observes that such an order '*… will cover the situation where the notice has been breached, the member has withdrawn their interest in the plan and the trustee is unable to recover the void contribution…*'; and

6.42.3 that it thinks appropriate. The Explanatory Memorandum (at paragraph 89) observes that such '*…orders may be directed at ensuring that the bankrupt estate is compensated for any loss suffered as a result of the breach of the notice*'.

6.43 Subsection 128K(2) of the Bankruptcy Act allows the Court to discharge or vary an order made under section 128K of the Bankruptcy Act. Further, subsection 128K(3) of the Bankruptcy Act provides that an order under paragraph 128K(1)(b) of the Bankruptcy Act (i.e. an order to pay money to the bankruptcy trustee) is enforceable as if it were an order for the payment of money made by the Court when exercising jurisdiction otherwise than under the Bankruptcy Act.

(vi) Protection of trustees of superannuation funds

6.44 Section 128L of the Bankruptcy Act provides that a trustee of a superannuation fund that complies with their obligations under the Bankruptcy Act provisions are protected from any criminal or civil proceedings. Indeed, subsection 128L(1) of the Bankruptcy Act provides that trustees of superannuation funds that comply in good faith with:

6.44.1 a superannuation account-freezing notice;

6.44.2 a notice under section 139ZQ of the Bankruptcy Act; or

6.44.3 an order under section 139ZU of the Bankruptcy Act,

cannot be exposed to civil or criminal liability as a result of that compliance.

6.45 Subsection 128L(2) of the Bankruptcy Act similarly provides that anything done (or not done) by the trustee of a superannuation fund in good faith to comply with a superannuation account-freezing notice, a notice under section 139ZQ of the Bankruptcy Act or an order under section 139ZU of the Bankruptcy Act is taken not to be in breach of the *Superannuation Industry (Supervision) Act 1993* (Cth) or any standards prescribed under that Act.

B. <u>Section 139ZQ of the Bankruptcy Act notice</u>

6.46 Subdivision J of Division 4B of Part VI of the Bankruptcy Act contains an 'administrative mechanism' for recovering assets in behalf of a bankrupt's estate. The provisions apply by allowing for the service of a statutory notice of demand by trustees in bankruptcy. The sections allow the Official receiver (on behalf of the Official Trustee or registered trustees) to recover by administrative means, property disposed of by a bankrupt in a transaction to defeat creditors which is void as against the trustee in bankruptcy.

6.47 Where a person receives money or property as a result of a transaction that is void as against a trustee in bankruptcy, the Official Receiver may issue a written notice to the person, which requires the person to pay to the trustee an amount equal to the value of the money and / or property received. Subsection 139ZQ(1) of the Bankruptcy Act provides that:

> *(1) If a person has received any money or property as a result of a transaction that is void against the trustee of a bankrupt under Division 3, the Official Receiver:*
>
> > *(a) if the Official Trustee is the trustee—on the initiative of the Official Receiver; or*
> >
> > *(b) if a registered trustee is the trustee—on application by the trustee;*
> >
> > *may require the person, by written notice given to the person, to pay to the trustee an amount equal to whichever of the following is applicable:*
> >
> > *(c) if:*
> >
> > > *(i) the transaction is void against the trustee under section 128B or 128C; and*
> > > *(ii) the transaction is by way of a contribution to an eligible superannuation plan for the benefit of a person (the **beneficiary**) who may or may not be the bankrupt; and*
> > > *(iv) the beneficiary is a member of the eligible superannuation plan;*
> >
> > *whichever is the lesser of the following:*
> >
> > > *(iv) the money or the value of the property received;*
> > > *(v) the beneficiary's withdrawal benefit in relation to the eligible superannuation plan;*

(d) in any other case—the money or the value of the property received.

6.48 That is, if an amount is held by a trustee of a superannuation fund, then the trustee may be required to pay an amount if:

6.48.1 sections 128B or 128C of the Bankruptcy Act applies;

6.48.2 the transaction is a contribution into the superannuation fund for the benefit of a person who may or may not be a bankrupt;

6.48.3 the person for whom the contribution is made is a member of the superannuation fund, then

the trustee of the superannuation fund is required to pay the trustee in bankruptcy the lesser of:

6.48.4 the money or the value of the property received; or

6.48.5 the member of the superannuation plan's withdrawal benefit.

6.50 That is, a trustee of a superannuation fund may receive a section 139Q of the Bankruptcy Act notice, which requires the trustee of the superannuation fund to pay a trustee in bankruptcy an amount equal to the lesser of:

6.50.1 the value of the property received as a result of a void transaction; or

6.50.2 the withdrawal benefit.[8]

6.51 Subsection 139ZQ(8) of the Bankruptcy Act provides that: '*An amount payable by a person to the trustee under this section is recoverable by the trustee as a debt by action against the person in a court of competent jurisdiction.*'

6.52 A section 139ZQ notice must set out the facts and circumstances which have satisfied the Official receiver that the transaction referred to in the notice are void

---

[8] The term 'withdrawal benefit' is defined in section 128N of the Bankruptcy Act as:

"withdrawal benefit" :

(a) in relation to a regulated superannuation fund or an approved deposit fund--has the same meaning as in the *Superannuation Industry (Supervision) Regulations 1994* ; or

(b) in relation to an RSA--has the same meaning as in the *Retirement Savings Accounts Regulations 1997* ; or

(c) in relation to a public sector superannuation scheme--has the meaning given by the regulations.

against the trustee in bankruptcy (see subsection 139ZQ(2) of the Bankruptcy Act). Further, subsection 139ZQ(3) of the Bankruptcy Act provides that:

> *(3) The notice may:*
>
> > *(a) require the amount to be paid at a time or within a period set out in the notice; or*
> >
> > *(b) require the amount to be paid at such times, and in such instalments, as are set out in the notice.*

6.53 *Sutherland v Vale* [2007] FMCA 1617 is authority for the proposition that where a section 139ZQ notice provides that property was disposed of by a bankrupt before bankruptcy, and if the notice provides the value of that property, then the value must be supported by evidence. If such evidence is not given, then the notice may be set aside.

6.54 Non-compliance of a section 139ZQ notice may be punishable by six months in prison under section 139ZT of the Bankruptcy Act. As a result, the Official receiver needs to ensure that the following information is provided in the notice:

6.54.1 the fact that the notice is issued under section 139ZQ of the Bankruptcy Act;

6.54.2 the effect of non compliance of the notice (e.g. criminal punishment);

6.54.3 the place to which the money or property may be delivered so as to comply with the notice; and

6.54.4 the fact that the notice may be set aside.

(i) The effect of a section 139ZQ notice

6.55 Paragraph 139ZR(1)(a) of the Bankruptcy Act provides that a section 139ZQ notice given with respect to any property results in the property being charged with the liability of the recipient of the notice to make payments to the trustee as provided for in the notice. Subsection 139ZR(1) of the Bankruptcy Act provides that:

> *(1) If a notice under section 139ZQ is given to a person in respect of any property:*
>
> > *(a) the property is charged with the liability of the person to make payments to the trustee as required by the notice; and*
> >
> > *(b) if the person makes the payments or transfers the property to the trustee, the property ceases to be subject to the charge.*

6.56 Subsection 139ZR(2) of the Bankruptcy Act provides that:

> *Subject to subsection (3), a charge under subsection (1) has priority over any existing or subsequent mortgage, lien, charge or other encumbrance over the property in favour of an associated entity of the bankrupt, and has that priority despite any other law of the Commonwealth or any law of a State or Territory.*

6.57 The term 'associated entity' for the purposes of subsection 139ZR(2) of the Bankruptcy Act is defined in subsection 5(1) and sections 5B-5E of the Bankruptcy Act.

6.58 Subsection 139ZR(3) of the Bankruptcy Act provides that the charge does not operate with priority if the associated entity can convince a Court that an encumbrance resulted from an arm's length transaction for valuable consideration , and that the transaction is not void as against the trustee in bankruptcy.

6.59 Subsection 139ZR(6) of the Bankruptcy Act provides that the trustee in bankruptcy may sell any property over which a charge is created. The proceeds from any sale, subject to satisfying any prior charges, be applied towards the discharge of the liability which gave rise to the section 139ZQ of the Bankruptcy Act notice:

> *(6) The trustee has power to sell any property over which a charge exists under subsection (1) and, if the property is so sold, then, subject to any charges that have priority over the first-mentioned charge, the proceeds of the sale are, to the extent of the charge, to be applied in or towards the discharge of the liability to make a payment or payments to the trustee of the person to whom the notice was given.*

6.60 In the event that the recipient of a section 139ZQ notice refuses or fails to comply with the notice, then:

6.60.1 the recipient is guilty of an offence that is punishable by imprisonment for a period not exceeding six months (subsection 139ZT(1) of the Bankruptcy Act); and

6.60.2 the recipient may be liable to pay an amount not exceeding the total amount which was not paid by the recipient (subsection 139ZT(2) of the Bankruptcy Act).

(ii) Setting aside a section 139ZQ notice

6.61 Section 139ZS of the Bankruptcy Act allows the recipient of a section 139ZQ notice, or any other interested party, to apply to the Court to set aside the notice. Section 139ZS of the Bankruptcy Act provides that:

> *(1) If the Court, on application by a person to whom a notice has been given under section 139ZQ or by any other interested person, is satisfied that this Subdivision does not apply to the person on the basis of the alleged facts and circumstances set out in the notice, the Court may make an order setting aside the notice.*

(2) A notice that has been set aside is taken not to have been given.

6.62 Whilst it is the onus is on the trustee in bankruptcy to prove that a transaction is void, an applicant under section 139ZS of the Bankruptcy Act must present sufficient evidence that the notice is invalid. That is, unless the person making a section 139ZS application has sufficient evidence to query the basis of the section 139ZQ notice, the notice continues to have full force (see *Norton v Halse* (1996) 137 ALR 593). If sufficient evidence is given to query the basis of the notice (i.e. that there is no void transaction, or that the facts to prove a void transaction do not exist), then the onus to adduce the relevant evidence shifts to the trustee in bankruptcy.

6.63 Further, if a section 139ZQ notice does not provide a correct value of the relevant property, then the notice may be set aside under section 139ZS (see *Coddy v McInnes* (1995) 58 FCR 570).

6.64 Apart from section 139ZS of the Bankruptcy Act, the recipient of a section 139ZQ notice may seek a declaration under section 30(1) of the Bankruptcy Act that a condition precedent to the operation of section 139ZQ of the Bankruptcy Act has not occurred and that an injunction be granted to restrain any further action being undertaken under the notice.

C. <u>Section 139ZU of the Bankruptcy Act order</u>

6.65 Subdivision K in Division 4B of Part VI of the Bankruptcy Act includes section 139ZU. That section deals 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 superannuation funds. Paragraph 97 of the Explanatory Memorandum observes 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 the 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 the 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.*

6.66 Subsection 139ZU of the Bankruptcy Act provides the gateway provision in determining whether an order may be made:

> ***139ZU Order relating to rolled-over superannuation interests etc.***
>
> *(1) If, on application by the trustee of a bankrupt's estate, the Court is satisfied that:*

(a) a transaction is void against the trustee of the bankrupt's estate under section 128B or 128C; and

*(b) the transaction was by way of a contribution to an eligible superannuation plan (the **first plan**) for the benefit of a person (the **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) the superannuation interest referred to in paragraph (d) is attributable, in whole or in part, to the roll-over or transfer, after the transaction referred to in paragraph (a) happened, of the whole or a part of the beneficiary's superannuation interest in the first plan;

the Court may, by order, direct the trustee of the other eligible superannuation plan to pay to the trustee of the bankrupt's estate a specified amount not exceeding whichever is the lesser of the following:

(f) the amount of the shortfall referred to in paragraph (c);

(g) the beneficiary's withdrawal benefit in relation to the other eligible superannuation plan.

6.67 That is, subsection 139ZU(1) of the Bankruptcy Act allows the Court to make an order for the payment of money by the trustee of an eligible superannuation plan where the following conditions are met:

6.67.1 there is a void transaction under section 128B or 128C; and

6.67.2 that transaction was by way of a contribution to an eligible superannuation plan (the ***first plan***) for the benefit of a person (the ***beneficiary***) who may or may not be the bankrupt; and

6.67.3 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

6.67.4 the beneficiary has a superannuation interest in another eligible superannuation plan; and

6.67.5 the superannuation interest referred to in **paragraph 6.67.4** is attributable, in whole or in part, to the roll-over or transfer, after the transaction

referred to in **paragraph 6.67.1** happened, of the whole or a part of the beneficiary's superannuation interest in the first plan.

6.68 Where the 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 trustee in bankruptcy a specified amount.

6.69 Subsection 139ZU(2) of the Bankruptcy Act provides that the Court should only make a subsection 139ZU order only where it is satisfied that it is in the interests of the bankrupt's creditors to do so.

6.70 Subsection 139ZU(3) of the Bankruptcy Act provides that for the purposes of paragraph 139ZU(1)(a) of the Bankruptcy Act, it is immaterial whether the transaction occurred before, at or after the commencement of section 139ZU of the Bankruptcy Act. However, a transaction is void under section 128B or 128C of the bankruptcy Act only if it occurred on or after 28 July 2006. The effect of subsection 139ZU(3) of the bankruptcy Act an application can be made to the Court where the original void contribution was made on or after 28 July 2006.

6.71 Subsection 139ZU(4) of the Bankruptcy Act provides that, for the purposes of paragraph 139ZU(1)(b) of the Bankruptcy Act, a benefit that is payable in the event of the death of a person is to be disregarded.

6.72 Subsection 139ZU(5) of the Bankruptcy Act provide that, for the purposes of paragraph 139ZU(1)(c) of the Bankruptcy Act, if the beneficiary does not have a superannuation interest in an eligible superannuation plan, then the beneficiary is taken to have a nil withdrawal benefit in relation to the plan. This subsection makes 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 of the Bankruptcy Act.

6.73 Subsection 139ZU(6) of the Bankruptcy Act provides that for the purposes of paragraph 139ZU(1)(e) of the Bankruptcy Act, it is immaterial whether the roll-over or transfer occurred directly or indirectly through one or more interposed eligible superannuation plans. Paragraph 103 of the Explanatory memorandum provides that this subsection '*… 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.*'

6.74 Subsection 139ZU(7) of the Bankruptcy Act provides that the trustee in bankruptcy must give a copy of an application under subsection 139ZU(1) of the Bankruptcy Act to the trustee of the other eligible superannuation plan and the beneficiary. Subsection 139ZU(8) of the Bankruptcy Act provides 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. Paragraph 104 of the Explanatory Memorandum provides that:

> *These provisions will assist the Court in determining whether the conditions set out in subsection 139ZU(1) have been met. 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 and 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.*

7. Associated issues arising – bankruptcy and self-managed superannuation funds

7.1 Self-managed superannuation funds are regulated under the *Supervision Industry (Supervision) Act 1993* (Cth) (**'SIS Act'**).

7.2 Section 19 of the SIS Act provides that a regulated superannuation fund must have a corporate trustee, or that the superannuation fund's governing rules must provide that the fund's sole or primary purposes is the provision of old-age pensions. Specifically, subsections 19(1) to (3) of the SIS Act provides that:

> *(1) A regulated superannuation fund is a superannuation fund in respect of which subsections (2) to (4) have been complied with.*
>
> ***Fund must have a trustee***
>
> *(2) The superannuation fund must have a trustee.*
>
> ***Trustee must be a constitutional corporation or fund must be a pension fund***
>
> *(3) Either of the following must apply:*
>
> > *(a) the trustee of the fund must be a constitutional corporation pursuant to a requirement contained in the governing rules;*
> >
> > *(b) the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions.*

7.3 That is, self-managed superannuation funds may have as trustee(s) individuals or a corporate trustee. However, the SIS Act regulates who may in fact become a trustee of a director of a corporate trustee.

7.4 Section 17A of the SIS Act provides the definition of 'self-managed superannuation fund'. For example, subsection 17A(1) of the SIS Act provides that:

Basic conditions--funds other than single member funds

(1) Subject to this section, a superannuation fund, other than a fund with only one member, is a ***self managed superannuation fund*** *if and only if it satisfies the following conditions:*

(a) it has fewer than 5 members;

(b) if the trustees of the fund are individuals--each individual trustee of the fund is a member of the fund;

(c) if the trustee of the fund is a body corporate--each director of the body corporate is a member of the fund;

(d) each member of the fund:

(i) is a trustee of the fund; or

(ii) if the trustee of the fund is a body corporate--is a director of the body corporate;

(e) no member of the fund is an employee of another member of the fund, unless the members concerned are relatives;

(f) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;

(g) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

7.5 The SIS Act prohibits a 'disqualified person' from being a trustee or a director of a corporate trustee of a superannuation fund (see section 126K of the SIS Act). For example, subsection 126K(1) of the SIS Act provides that:

Disqualified persons not to be trustees, investment managers or custodians of superannuation entities

(1) A person commits an offence if:

(a) the person is a disqualified person; and

(b) the person knows he or she is a disqualified person; and

(c) the person is or acts as a trustee, investment manager or custodian of a superannuation entity; and

(d) for a person who is an individual and who is a disqualified person only because he or she was disqualified under section 126H--the person is disqualified from being or acting as a trustee of that superannuation entity.

Penalty: Imprisonment for 2 years.

7.6 Similarly, subsection 126K(3) of the SIS Act provides that:

(4) A person commits an offence if:

(a) the person is a disqualified person; and

(b) the person knows he or she is a disqualified person; and

(c) the person is or acts as a responsible officer of a body corporate that is a trustee, investment manager or custodian of a superannuation entity; and

(d) for a person who is an individual and who is a disqualified person only because he or she was disqualified under section 126H--the person is disqualified from being or acting as that responsible officer.

Penalty: Imprisonment for 2 years.

7.7 The term 'disqualified persons' is defined in section 120 of the Bankruptcy Act to include a bankrupt.

7.8 As a result, to the extent that a member becomes a bankrupt, that person will be a 'disqualified person'. That person (i.e. the member) is required to be a trustee or a director of a corporate trustee of a self-managed superannuation fund is prohibited from acting in those positions. The result is that section 17A of the SIS Act cannot be satisfied. As a result, the self-managed superannuation fund may lose its complying status.

7.9 If the superannuation fund loses its complying status, then not only will there be adverse tax implications for the fund, but also the interest of the bankrupt in the superannuation fund will no longer be protected, on the basis that the fund is no longer a 'regulated superannuation fund' (see subsection 116(2) of the Bankruptcy Act).

7.10 Subsection 17A(4) of the SIS Act provides that:

Circumstances in which entity that does not satisfy basic conditions remains a self managed superannuation fund

(4) Subject to subsection (5), if a superannuation fund that is a self managed superannuation fund would, apart from this subsection, cease to be a self managed superannuation fund, it does not so cease until the earlier of the following times:

(a) the time an RSE licensee of the fund is appointed;

(b) 6 months after it would so cease to be a self managed superannuation fund.

7.11 That is, there is a six month grace period in which to deal with an issue that may cause a self-managed superannuation fund to be non-complying under section 17A of the SIS Act. Strategies, in order to ensure that the member's interests remain protected include transferring the member's interests in the self-managed superannuation fund to (for example) a retail fund.

8. Forfeiture of benefits

8.1 Some superannuation fund deeds and / or rules provide that a member's vested or contingent entitlement to benefits may be forfeited upon the occurrence of certain events, such as (and for example) bankruptcy of the member, or an event which results in the member's entitlement being vested in another.

8.2 Forfeiture benefits clauses seek to ensure that benefits remain for the purpose for which they were funded – that is, for the provision of retirement benefits for the member or benefits for the dependants of the member in the event of the member's death. Such provisions are designed to ensure that benefits do not (for example) pass to the protector of an insane person's estate, or to a person to whom the benefits may be assigned.

8.3 However, from 1 July 1994, section 302A of the Bankruptcy Act came into effect. Subsections 302A(1) and (2) of the Bankruptcy Act provides that:

(1) This section applies to a provision in the governing rules of a provident, benefit, superannuation, retirement or approved deposit fund to the extent to which the provision 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;

if the member or depositor:

(c) becomes a bankrupt; or

(d) commits an act of bankruptcy; or

(e) executes a personal insolvency agreement under this Act.

(2) The provision is void.

8.4 That is, subsections 302B(1) and (2) of the Bankruptcy Act provides that a provision in the governing rules of a superannuation fund which has the effect of forfeiting any part of a beneficial interest of a member on bankruptcy is void.

8.5 Forfeiture of benefits clauses may be drafted to apply either:

8.5.1 if there is a benefit to which a member has already become entitled, but which has not been paid; or

8.5.2 in relation to benefits to which a member has only a contingent interest.

8.6 The decision of *Re Alan Bond; Ex parte Ramsay* (1992) ATR 61 is an example of the former (**paragraph 8.5.1**). The relevant superannuation fund's constituent documents provided that a benefit which a member is entitled to, but at the date of bankruptcy is unpaid, will be forfeited by the member.

8.7 Mr Bond's trustee in bankruptcy argued that Mr Bond's benefit in a superannuation fund could not be forfeited as Mr Bond had already become entitled to receive the benefit from the fund when Mr Bond was bankrupt due to Mr Bond's prior termination of employment. It was further contended by the trustee in bankruptcy that notwithstanding that some of the benefit was preserved, the entitlement to the benefit vested in the trustee.

8.8 The trustees of the fund argued that they were bound by the terms of the fund's constituent documents.

8.9 In finding for the trustee in bankruptcy, Hill J applied the reasoning in *Re Smith; Smith v Smith* [1916] 1 Ch 369, where it was held that a condition that divests property that has been vested in a person by another condition is void, on the basis that the condition divesting is repugnant to the provision which vests. Specifically, Hill J considered that the forfeiture on bankruptcy clause:

> *… is, on its face, capable of operating to forfeit a benefit in a circumstance where that benefit has become absolutely and indefeasibly payable to the member and consequently … should be held to be void…*

8.10 Further, and as obiter, Hill J considered that if the forfeiture clause was not void, by not applying with respect to a benefit which a member was entitled to be paid, the

forfeiture clause would have operated to deny the trustee in bankruptcy from being entitled to the benefit in the superannuation fund.

8.11 The decision in *Re Alan Bond; Ex parte Ramsay* (1992) ATR 61 was applied in *re Coram; Ex parte Official Trustee in Bankruptcy v Inglis* (1992) 36 FCR 259. In that case the bankrupt resigned from his employment before the early retirement age provided for in the superannuation deed. As a result, the bankrupt had a deferred benefit in the fund payable upon attaining the early retirement age. After the bankrupt attained the early retirement age, he became bankrupt.

8.12 The trustee in bankruptcy contended that the bankrupt became entitled to the superannuation benefit upon attaining the requisite age.

8.13 The trustee of the superannuation fund contended that the forfeiture provisions contained in the fund deed caused the bankrupt's benefit to be forfeited.

8.14 The Court held that when the bankrupt resigned, the bankrupt's rights with respect to the superannuation fund crystallized. The benefit payable to the bankrupt upon the bankrupt attaining the early retirement age was a debt owed to the bankrupt, payable in the future. As a result, the benefit which the bankrupt became entitled to at the retirement age was the bankrupt's asset, which vested in the trustee in bankruptcy.

8.15 However, subsections 302A(1) and (2) of the Bankruptcy Act is subject to (amongst other sections) sections 128B and 128C of the Bankruptcy Act. Subsection 302A(2A) of the Bankruptcy Act provides that:

> *(2A) This section does not apply to a provision that facilitates compliance with:*
>
> *(a) section 128B; or*
>
> *(b) section 128C; or*
>
> *(c) a notice under section 128E; or*
>
> *(d) an order under paragraph 128K(1)(b); or*
>
> *(e) a notice under section 139ZQ; or*
>
> *(f) an order under subsection 139ZT(2); or*
>
> *(g) an order under section 139ZU.*

9. Transfers to defeat creditors under State legislation

9.1 Conveyancing and property legislation in each State allows creditors to challenge transfers of property which are made with the intention to defraud creditors. The provisions seek to make such transfers voidable at the instance of the creditor prejudiced.

9.2 For example, in New South Wales, section 37A of the *Conveyancing Act 1919* (NSW) (**'Conveyancing Act'**) provides that:

> *(1) Save as provided in this section, every alienation of property, made whether before or after the commencement of the Conveyancing (Amendment) Act 1930, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.*
>
> *(2) This section does not affect the law of bankruptcy for the time being in force.*
>
> *(3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.*

9.3 The Court in *Andrew v Zant Pty Ltd* (2004) 213 ALR 812 observed that section 37A of the Conveyancing Act is an alternative to section 121 of the Bankruptcy Act. It was observed that the difference between section 121 of the Bankruptcy Act and section 37A of the Conveyancing Act is that section 121 requires the 'main purpose' test to be satisfied, whereas in section 37A only requires for there to be 'an intent'. As a result, it was observed in *Andrew v Zant Pty Ltd* (2004) 213 ALR 812 that '*A case that would fall within s 121 would clearly fall within s 37A. The obverse is not true*'.

9.4 In the event that a trustee in bankruptcy does not rely on section 121 of the Bankruptcy Act, then a creditor may seek to rely on section 37A of the Conveyancing Act.

9.5 In *Green v Official Trustee in Bankruptcy, in the matter of Schneller (Bankrupt)* [2001] FCA 1644, the Court granted leave to a creditor under subsection 58(3) of the Bankruptcy Act to continue proceedings despite a bankruptcy, on the condition that any property recovered would be held for the trustee for the benefit of all of the creditors.

9.6 It a trustee in bankruptcy has proceeded under section 121 of the Bankruptcy Act, then creditors cannot seek to use section 37A of the Conveyancing Act.

9.7 Some disadvantages of section 37A of the Conveyancing Act include:

9.7.1 It is an application made by a creditor, and not the trustee in bankruptcy;

9.7.2 Section 37A of the Conveyancing Act seeks to claw-back transfers made to parties other than creditors;

9.7.3 Section 37A of the Conveyancing Act requires the establishment of the requisite 'intent' for the alienation of property, being to defraud creditors (see *Alati v Wei Sheung and Others* [2000] NSWSC 601);

9.7.4 Proceedings under section 37A of the Conveyancing Act needs to be made within the relevant limitation period; and

9.7.5 Unlike in the Bankruptcy Act, creditors seeking to use section 37A of the Conveyancing Act do not have extended examination powers.