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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**BANKRUPTCY LEGISLATION AMENDMENT (SUPERANNUATION
CONTRIBUTIONS) BILL 2006**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

BANKRUPTCY LEGISLATION AMENDMENT (SUPERANNUATION CONTRIBUTIONS) BILL 2006

GENERAL OUTLINE

1. The most significant amendments to be made by this Bill will allow bankruptcy trustees to recover superannuation contributions made prior to bankruptcy with the intention to defeat creditors. These amendments will apply to superannuation contributions made on or after 28 July 2006. The Bill also contains amendments to facilitate recovery of void superannuation contributions by building on existing administrative recovery powers exercised by the Official Receiver and providing the Court with powers to make orders for payment by superannuation fund trustees where appropriate.
2. The Bill will also make other amendments designed to improve the operation of the Act particularly in relation to the treatment of rural support grants where the recipient is or becomes bankrupt.
3. The objects of this Bill are to:
 - (a) provide for the recovery of superannuation contributions made with the intention to defeat creditors;
 - (b) provide for certain rural support grants to be exempt from the property available to pay the bankrupt's creditors; and
 - (c) make minor technical amendments to clarify or improve the operation of the Act.
4. Schedule 1 contains the amendments relating to recovery of superannuation contributions made with the intention to defeat creditors. That Schedule is divided into two Parts. Part 1 contains the substantive amendments which have the effect of rendering certain contributions void. Part 2 is concerned with the recovery of void contributions.
5. Schedule 2 contains the amendments relating to the treatment of rural support grants and the minor technical amendments to clarify or improve the operation of the Act.

Financial Impact Statement

6. The amendments proposed by this Bill will have no significant financial impact.

Section 2 - Policy objectives

7. 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* [2003] HCA 36 (19 June 2003).

8. 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.

9. 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.

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

11. The Bill also contains other amendments designed to enable certain rural support grants to be treated as exempt property in the recipient's bankruptcy and some minor technical amendments designed to clarify or improve the operation of the Act.

Section 3 - Notes on sections

Section 1 - Short Title

12. The Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006 (the Bill) proposes amendments to the *Bankruptcy Act 1966* (the Bankruptcy Act), the *Payment Systems and Netting Act 1998* (the Payment Systems and Netting Act), and the *Proceeds of Crime Act 2002* (the Proceeds of Crime Act). By proposed section 1, when the Bill has been enacted, it will be known as the *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2006*.

Section 2 - Commencement

13. In accordance with the table in proposed section 2, proposed sections 1 to 3 and anything in the Bill not elsewhere covered in that table will commence on the day which the Bill receives Royal Assent.

14. Schedule 1, Part 1 will commence on 28 July 2006. Schedule 1, Part 2 will commence on a single day to be fixed by Proclamation. However, if any of the provisions do not commence within 6 months of Royal Assent, they will commence on the first day after the end of that 6 month period.

15. Schedule 2, item 1 will commence on a single day to be fixed by Proclamation. However, if the provision included in item 1 does not commence within 6 months of Royal Assent, it will commence on the first day after the end of that 6 month period. Schedule 2, items 2 to 5 will commence on the day after the Bill receives Royal Assent. Schedule 2, items 6 to 8 will commence at the same time as Schedule 2, item 1.

16. Schedule 2, item 9 will commence immediately after the commencement of item 12 of Schedule 1 to *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (that is, 31 May 2006). Proposed Schedule 2, item 10 will commence immediately after the commencement of item 208 of Schedule 1 to the *Bankruptcy Legislation Amendment Act 1996* (that is, 16 December 1996). Schedule 2, item 11 will commence immediately after the commencement of section 10 of the *Superannuation Industry (Supervision) Consequential Amendments Act 1993* (that is, 1 July 1994). These three amendments all correct drafting errors in the respective amending Acts so their commencement is linked to the commencement of the original amendments which are now being corrected.

17. Schedule 2, items 12 to 20 commence on the day after the Bill receives Royal Assent.

Section 3 – Amendments

18. Proposed section 3 is a drafting device to allow all the amendments proposed to be made to the Act to be set out in a Schedule. The items in the Schedule will amend the Act and will have effect according to their terms. Notes on the Schedule items follow.

SCHEDULE 1—AMENDMENTS RELATING TO SUPERANNUATION CONTRIBUTIONS

(This schedule sets out all of the amendments relating to superannuation contributions).

Part 1 – Amendments commencing on 28 July 2006

19. These amendments will provide for certain superannuation contributions made on or after 28 July 2006 to be void against a trustee in bankruptcy. This is line with the announcement by the Attorney-General on 27 July 2006 that the amendments would apply to superannuation contributions made after the date of that announcement.

Amendments to the Bankruptcy Act 1966

20. Item 1 will amend paragraph 59(1)(e) to ensure that, where a superannuation contribution is void under the new section 128B or 128C and the bankrupt becomes bankrupt again prior to discharge, that superannuation contribution continues to be void against the trustee of the first bankruptcy. Section 59 deals with the effect of second and subsequent bankruptcies which occur when the bankrupt is not yet discharged from an earlier bankruptcy.

21. Item 2 inserts a new heading before section 115 ‘Subdivision A – General’. This is designed to improve navigation with Division 3 – Property available for payment of debts.

22. Item 3 will amend paragraph 116(2)(d) to make it clear that superannuation contributions which are void under the new section 128B or 128C form part of the property available for distribution among the bankrupt’s creditors. Subsection 116(2) provides a list of exemptions from divisible property and paragraph (d) provides that the bankrupt’s interests in superannuation funds are not available to pay creditors. That policy continues subject to the amendments to be made by this Bill in relation to superannuation contributions made with the intention to defeat creditors. The amendment to be made by Item 3 is necessary to make it clear that, notwithstanding that the bankrupt’s interest in a superannuation fund is protected, that protection does not extend to contributions which are void.

23. Item 4 will amend subsection 123(1) to make it clear that superannuation contributions which are void under the new section 128B or 128C are not protected from the doctrine of relation back. Section 123 currently provides that, subject to sections 118 to 122 (inclusive), payments, transfers, assignments, contracts etc made prior to bankruptcy in good faith and in the ordinary course of business remain valid where the other party to the transaction was not aware at the time that a petition had been presented against the debtor. The amendment made by Item 4 will make that protection also subject to the new sections 128B and 128C.

24. Item 5 will amend subsection 123(6) to make it clear that a superannuation contribution made with the intention to defeat creditors is void notwithstanding that it was made pursuant to a maintenance agreement or maintenance order. This is consistent with existing subsection 123(6) which provides that a transfer which is void under section 121 is void notwithstanding that it was under or in pursuance of a maintenance agreement or maintenance order.

25. Item 6 inserts new Subdivision B – Superannuation contributions. The new sections to be included in this Subdivision are the substantive provisions which outline when a superannuation contribution made prior to bankruptcy will be void against a trustee in bankruptcy.

26. The new section 128A is a simplified outline of the Subdivision which explains that the purpose of the provisions is to enable the recovery of superannuation contributions made to defeat the bankrupt’s creditors and sets out the types of recoverable contributions.

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

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. The term ‘eligible superannuation plan’ is defined in new section 128N (see paragraph 46).

29. 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).

30. Subsection 128B(5) provides a rebuttable presumption of insolvency for the purposes of subsection 128B(2) where the transferor had not kept proper books and records relating to the time of the transfer. This is in line with existing subsection 121(4A).

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

32. Subsection 128B(7) contains definitions of ‘transfer of property’ and ‘market value’ and is in line with existing section 121(9).

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

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

34. Subsection 128C(1) will provide the circumstances in which such a contribution is void against the bankruptcy trustee. The conditions which must be met are:

- (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
- (a) the transfer occurred on or after 28 July 2006.

35. Paragraph (1)(c) will ensure that the transfer is void only where the bankrupt was a party to the arrangements which resulted in the transfer.

36. Paragraph (1)(d) will ensure that the transfer is void only if the money or property transferred would have been available as part of the bankrupt's divisible property in the event of bankruptcy.

37. 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.

38. Subsections 128C(3), (4), (5) and (6) deal with ways of showing that the transferor's main purpose in making the contribution was to defeat creditors. Subsection (3) allows that purpose to be inferred if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent. This replicates existing subsection 121(2). Subsection 128B(4) provides that, in determining whether the transferor had the requisite purpose in making the contribution, regard must be had to that person's pattern of contributions and whether, in light of any such pattern, the contribution in question is out of character. 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 128C(5) 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 provision is required for the same reasons as subsection 128C(2) – see paragraph 37. Subsection 128B(6) 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).

39. Subsection 128C(7) provides a rebuttable presumption of insolvency for the purposes of subsection 128B(3) where the transferor had not kept proper books and records relating to the time of the transfer. This is in line with existing subsection 121(4A).

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

41. Subsection 128C(9) contains definitions of 'transfer of property' and 'market value' and is in line with existing section 121(9).

Time for making claims by trustee

42. The new subsection 128D(1) will provide that an action under section 128B or 128C may be commenced by the bankruptcy trustee at any time. This is in line with existing subsection 127(4) which deals with commencement of actions under section 121.

43. The new subsection 128D(2) provides that a section 139ZQ notice in relation to a transfer that is void under section 128B or 128C cannot be given before the commencement of the amendments contained in Part 2 of Schedule 1 of this Bill. The amendments contained in Part 2 of Schedule 1 deal with the process for recovering void superannuation contributions.

44. The new subsection 128D(3) provides that a section 139ZQ notice in relation to a transfer that is void under section 128B or 128C may be given even if the transfer occurred prior to the commencement of the amendments contained in Part 2 of Schedule 1 of this Bill. A transfer will be void under section 128B or 128C only if it was made on or after 28 July

2006. However, the amendments relating to recovery of those contributions will not commence until a date to be fixed by Proclamation. The fact that the recovery provisions have not commenced does not affect the fact that a transfer may be void under section 128B or 128C. This amendment will ensure that transfers which are, in fact, void under the new provisions can be recovered.

Definitions

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

46. The key definition is that of ‘eligible superannuation plan’ which is defined to mean any of the following:

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

47. Section 128N will also include a definition of ‘scheme’ which is relevant to paragraph 128C(1)(c). The term is defined very widely and is deliberately intended to cover any type of arrangement which a person enters into to convert money or property which would have been available to creditors in the event of bankruptcy into an interest in superannuation.

Other amendments

48. Items 7 and 8 will amend provisions relating to objections to discharge. A superannuation contribution which is void under new section 128B or 128C has the same character as a transfer which is void under section 121, having been made with the intention to defeat creditors, and should give rise to equivalent grounds for objecting to the bankrupt’s discharge. Item 8 will amend subsection 149D(1) to provide further grounds upon which a trustee may rely to object to the bankrupt’s discharge from bankruptcy. Paragraph 149D(1)(ab) currently allows the trustee to object to discharge where any transfer is void against the trustee because of section 121. New paragraphs 149D(1)(ac) and (ad) will enable the trustee to object to discharge where a transfer is void against the trustee under section 128B or 128C. Item 7 will amend subparagraph 149A(2)(a)(i) to provide that the effect of the trustee objecting to discharge on one of the new grounds will be to extend the bankruptcy to 8 years (in line with the effect of an objection under paragraph 149D(1)(ab)).

49. Item 9 will amend paragraph 250(1)(e) to ensure that a superannuation contribution which is void against a bankruptcy trustee continues to be void against that trustee if the bankrupt subsequently dies and an order is made under Part XI for the administration of the deceased bankrupt’s estate.

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

- (a) any part of the beneficial interest of a member or depositor is cancelled, forfeited, reduced or qualified; or
- (b) the trustee or another person is empowered to exercise a discretion relating to such a beneficial interest to the detriment of a member or depositor;
- is void if the member or depositor becomes a bankrupt, commits an act of bankruptcy or executes a personal insolvency agreement under the Act.

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

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

53. The amendment to be made by item 11 makes a similar provision in respect of equivalent terms and conditions of a RSA as defined by the *Retirement Savings Accounts Act 1997*.

54. The amendments to be made by items 12 and 13 make a similar provision in respect of equivalent provisions in a trust deed.

Amendments to the Payment Systems and Netting Act 1998

55. The *Payment Systems and Netting Act 1998* provides that certain of its provisions (in respect of the effectiveness of multilateral netting arrangements for payments and transfers, and netting arrangements in connection with derivatives trading and financial markets) will have effect notwithstanding any other law to the contrary, including the law contained in the 'specified provisions' defined in section 5 of that Act.

56. Currently paragraph (e) of the definition of 'specified provisions' in section 5 of the *Payment Systems and Netting Act 1998* includes a reference to sections 120, 121 and 122 of the *Bankruptcy Act 1966*. These provisions of the *Bankruptcy Act 1966* provide for the recovery by trustees in bankruptcy of property disposed of by debtors prior to bankruptcy.

57. The amendments to be made by this Bill will insert new provisions that will provide for the recovery of certain transfers of property by way of contributions into eligible superannuation plans. The new sections 128B and 128C are similar in effect to section 121, a provision currently referred to in the definition in section 5 of the *Payment Systems and Netting Act 1998*.

58. In order to ensure that all *Bankruptcy Act 1966* antecedent transaction provisions are treated consistently, item 14 will amend paragraph (e) of the definition of 'specified provisions' in section 5 of the *Payment Systems and Netting Act 1998* to include a reference to transactions which are void under sections 128B and 128C.

Part 2 – Amendments commencing on Proclamation

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

60. Item 15 will insert the word ‘and’ between all the paragraphs in subsection 116(1) to make it clear that all types of property listed in that subsection are divisible among the bankrupt’s creditors.

61. Item 16 will amend subsection 116(1) to add to the list of types of property which are divisible among the bankrupt’s creditors. The new paragraphs (e), (f) and (g) will provide that amounts paid to the bankruptcy trustee under the new provisions relating to the recovery of void superannuation contributions are divisible property.

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

63. Item 18 will amend the simplified outline of the new Subdivision B of Division 3 of Part VI to include reference to the provisions allowing for the freezing of a superannuation account pending recovery action.

64. Items 19 and 20 will insert subsections 128B(5A) and 128C(7A) respectively to ensure that, where a superannuation contribution is void, the trustee of the superannuation fund does not bear any loss resulting from fees, charges and taxes paid in respect of that contribution. The amendments will mean that, where the trustee of the superannuation fund is required to pay an amount to the trustee in bankruptcy pursuant to a notice issued under section 139ZQ, and taxes, fees and charges have been debited in respect of that contribution, the bankruptcy trustee must pay to the superannuation fund trustee an amount equal to the amounts so debited.

Superannuation account-freezing notice

65. Item 21 will insert 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).

66. 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.

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

68. Subsection 128E(3) will provide that the notice issued by the Official Receiver must set out the facts and circumstances on which it is based. This is in line with the Official Receiver's obligations under similar provisions (such as section 139ZL and 139ZQ).

69. Subsection 128E(4) will provide that the Official Receiver may give a notice on his or her own initiative when the Official Trustee is the trustee of the bankrupt's estate, or on application by the registered trustee who is the trustee of the bankrupt's estate.

70. Subsection 128E(5) will provide that the notice comes into force when it is given to the trustee of the eligible superannuation plan.

Revocation of superannuation account-freezing notice

71. Section 128F will provide that the Official Receiver may revoke a superannuation account-freezing notice. Subsection (1) will provide that this is done by giving written notice to the trustee of the superannuation plan.

72. Subsection 128F(2) will provide that the Official Receiver may revoke a notice 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 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 notice.

73. Subsection 128F(3) will deal with revocation of a notice where the Official Receiver issues a notice under section 139ZQ requiring the superannuation fund to pay the amount of the void contribution to the trustee. Under subsection 128F(3), the superannuation account-freezing notice is revoked when the trustee of the superannuation fund complies with the section 139ZQ notice, when the section 139ZQ notice is revoked or when the Court sets aside the section 139ZQ notice.

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

75. 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.

76. Subsection 128F(6) will deal with the situation in which an application for a section 139ZU order is dismissed or withdrawn. In that case, the superannuation account-freezing notice is revoked when the application is dismissed or withdrawn.

77. Where the bankruptcy trustee has applied for a section 139ZU order and 180 days pass without an order being made, subsection 128F(7) will provide that the superannuation account-freezing notice is revoked.

78. 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.

Copy of superannuation account-freezing notice to be given to trustee etc

79. Subsection 128G(1) will provide that the Official Receiver must give 2 copies of any superannuation account-freezing notice or revocation notice to the trustee of the bankrupt's estate and that the trustee must give one of those copies to the member of the eligible superannuation plan. Subsection 128G(2) will make it clear that failure to comply with the requirement to give these copies does not invalidate the freezing notice or revocation notice, as the case may be.

Consent of Official Receiver to the cashing etc of a superannuation interest

80. Section 128H will provide a mechanism for a member of an eligible superannuation plan to request consent from the Official Receiver to the cashing, debiting, roll-over, transfer or forfeiture of all or part of the member's interest where a superannuation account-freezing notice is in force in relation to that member's interest – see subsection 128H(1).

81. Subsection 128H(2) will provide that a request by a member for such consent must be made in writing to the Official Receiver.

82. Subsection 128H(3) will provide that, where such an application is made, the Official Receiver may give consent to the cashing, debiting, roll-over, transfer or forfeiture, in whole or in part, of the member's superannuation interest. The Official Receiver's consent must be given in writing to the trustee of the eligible superannuation plan.

83. Subsection 128H(4) will provide that the Official Receiver's consent may be unconditional or subject to conditions.

84. Subsection 128H(5) will provide that the Official Receiver must give a copy of the consent to the member of the plan.

85. 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.

86. Subsection 128H(7) will provide that a decision by the Official Receiver refusing consent under subsection (3) is subject to review by the Administrative Appeals Tribunal. Subsection 128H(8) will provide that the trustee of the bankrupt estate may apply to the Administrative Appeals Tribunal for review of a decision by the Official Receiver giving consent under subsection (3).

Power of Court to set aside superannuation account-freezing notice

87. Section 128J will allow the Court to set aside a superannuation account-freezing notice. Subsection 128J(1) will allow an application to be made by a person to whom the notice has been given (the trustee of the eligible superannuation plan), the member whose interest is affected by the notice or any other interested person. The Court will set aside a notice where it is satisfied that the Official Receiver did not have reasonable grounds to believe that the conditions upon which a notice may be issued existed.

88. Subsection 128J(2) will provide that, where the Court sets aside a superannuation account-freezing notice, that notice is taken not to have been given.

Judicial enforcement of superannuation account-freezing notices

89. Section 128K will provide a mechanism for judicial enforcement of a superannuation account-freezing notice. This enforcement mechanism can apply either to a potential or actual breach of a notice and remedies are available for both situations. Subsection 128K(1) provides that, where 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 make an order directing the trustee of the plan to comply with the notice. In addition, the Court may make an order directing the trustee of the plan to pay to the bankruptcy trustee 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). This 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. Finally, the Court may make any other order it thinks appropriate. These 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.

90. Subsection 128K(2) will allow the Court to discharge or vary an order made under this section. Subsection 128K(3) will provide that an order under paragraph (1)(b) – 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 this Act.

Protection of trustee of eligible superannuation plan

91. Section 128L is designed to protect the trustee of an eligible superannuation plan who complies with their obligations under these amendments. Subsection 128L(1) will ensure that the trustee of an eligible superannuation plan who complies in good faith with a superannuation account-freezing notice, a notice under section 139ZQ or an order under section 139ZU cannot be exposed to civil or criminal liability as a result of that compliance.

92. Subsection 128L(2) will provide that anything done (or not done) by the trustee of a regulated superannuation fund or the trustee of an approved deposit fund in good faith to comply with a superannuation account-freezing notice, a notice under section 139ZQ or an order under section 139ZU is taken not to be in breach of the *Superannuation Industry (Supervision) Act 1993* or any standards prescribed under that Act. Subsection 128L(3) will provide equivalent protection to the provider of a Retirement Savings Account.

Other amendments

93. Section 128M will provide that references in this Subdivision to a member of an eligible superannuation plan and a bankrupt do not imply that the bankrupt may not be the member. This provision is intended to clarify that where ‘member’ and ‘bankrupt’ are used in the same provision, the ‘member’ may be the bankrupt.

94. Items 22 to 31 will amend section 128N to provide additional definitions for terms used in Subdivision B of Division 3 of Part VI.

95. Item 32 will amend subsection 139ZQ(1) to facilitate its application to the recovery of void superannuation contributions.

96. Item 33 will amend section 139ZQ by adding two new subsections. New subsection 139ZQ(9) will provide that, for the purposes of subparagraph (1)(c)(ii), a benefit that is payable in the event of the death of a person is to be disregarded. This is in line with other amendments being made by this Bill (see paragraph 37 for further explanation). Subsection 139ZQ(10) will provide definitions of certain terms used in section 139ZQ in relation to recovery of void superannuation contributions. These will ensure consistency of meaning between section 139ZQ and Subdivision B of Division 3.

Rolled-over superannuation interests etc

97. Item 34 will insert a new Subdivision K in Division 4B of Part VI. Section 139ZU will deal with the situation where there is a void superannuation contribution under section 128B or 128C but the member has rolled over that contribution to one or more other eligible superannuation plans. 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.

98. Subsection 139ZU(1) will allow 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:

- (a) there is a void transaction under section 128B or 128C; and
- (b) that transaction was by way of a contribution to an eligible superannuation plan (the *first plan*) for the benefit of a person (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 (d) is attributable, in whole or in part, to the roll-over or transfer, after the transaction referred to in (a) happened, of the whole or a part of the beneficiary's superannuation interest in the first plan.

99. 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 bankruptcy trustee a specified amount not exceeding the lesser of the amount of shortfall referred to in paragraph (c) and the beneficiary's withdrawal benefit in relation to the other eligible superannuation plan. In determining the specified amount to be repaid, the Court should consider whether the trustee of the other eligible superannuation plan has debited any fees, charges and taxes and ensure that the trustee of that plan does not suffer any loss by ensuring the specified amount does not include such amounts.

100. Subsection 139ZU(2) will provide that the Court must exercise this discretion only where it is satisfied that it is in the interests of the bankrupt's creditors to do so.

101. Subsection 139ZU(3) will provide that, for the purposes of paragraph (1)(a), it is immaterial whether the transaction occurred before, at or after the commencement of this section. However, a transaction is void under section 128B or 128C only if it occurred on or after 28 July 2006. The effect of subsection 139ZU(3) is that, although it will commence on a date to be fixed by Proclamation which will be later than 28 July 2006, an application can be made to the Court where the original void contribution was made on or after 28 July 2006.

102. Subsection 139ZU(4) will provide that, for the purposes of paragraph (1)(b), a benefit that is payable in the event of the death of a person is to be disregarded. Paragraph 37 explains the reason for this provision.

102. Subsection 139ZU(5) will provide that, for the purposes of paragraph (1)(c), if the beneficiary does not have a superannuation interest in an eligible superannuation plan, the beneficiary is taken to have a nil withdrawal benefit in relation to the plan. This will make it clear that the condition is met where the beneficiary no longer has an interest in the plan as

well as where they have an interest but the withdrawal benefit is less than the value of the void transfer under section 128B or 128C.

103. Subsection 139ZU(6) will provide that, for the purposes of paragraph (1)(e), it is immaterial whether the roll-over or transfer occurred directly or indirectly through one or more interposed eligible superannuation plans. This reinforces the notion that the trustee does not have to trace the original void contribution through a number of transfers or roll-overs. It will be sufficient for the trustee to establish that there were transfers or roll-overs and request the Court to exercise its discretion in relation to another interest or interests held by the beneficiary.

104. Subsection 139ZU(7) will provide that the bankruptcy trustee must give a copy of an application under subsection 139ZU(1) to the trustee of the other eligible superannuation plan and the beneficiary. Subsection 139ZU(8) will provide that, at the hearing of the application, the trustee of the other eligible superannuation plan and the beneficiary may appear, adduce evidence and make submissions. 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.

105. Subsection 139ZU(9) will clarify references to orders under section 139ZU as they appear in other sections of the Act.

106. Section 139ZV will provide that a section 139ZU order is enforceable as if it were an order for the payment of money made by the Court when exercising jurisdiction otherwise than under this Act.

107. Section 139ZW will ensure consistency of definitions applying to section 139ZU and Subdivision B of Division 3.

Other amendments

108. Section 302A of the Act states that a provision in a provident, benefit, superannuation, retirement or approved deposit fund that has the effect that:

(a) any part of the beneficial interest of a member or depositor is cancelled, forfeited, reduced or qualified; or

(b) the trustee or another person is empowered to exercise a discretion relating to such a beneficial interest to the detriment of a member or depositor;

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

109. The amendment proposed by item 35 provides that such a provision is not void pursuant to section 302A if it does so in order to facilitate compliance with various administrative notices or court orders issued or made to facilitate recovery of property that has been subject to transfers that are void pursuant to the new provisions. The item will also insert references to existing notices and orders pursuant to the current antecedent transaction provisions, which had not previously been provided for in the section.

110. The amendment proposed by item 36 will make a similar provision in respect of equivalent terms and conditions of an RSA as defined by the *Retirement Savings Accounts Act 1997*.

111. The amendment proposed by item 37 will make a similar provision in respect of equivalent provisions in a trust deed.

SCHEDULE 2—OTHER AMENDMENTS

(This schedule sets out the amendments relating to rural support schemes and the proceeds of crime legislation and also includes minor technical amendments to the Bankruptcy Act.)

Amendments to the Bankruptcy Act 1966

Definition of rural support scheme

112. Item 1 will insert a definition of ‘rural support scheme’ for the purposes of a proposed new regulation making power (see notes to items 5, 6 and 7).

Payments into the Consolidated Revenue Fund

Inspector-General’s functions

113. Subsection 20H(5) of the Bankruptcy Act currently provides that the Official Trustee in Bankruptcy must determine whether payments should be made from the Equalization Reserve of the Common Investment Fund into the Consolidated Revenue Fund. In practice however, it is the Insolvency and Trustee Service Australia (ITSA), through the Inspector-General in Bankruptcy, which effectively exercises this power. ITSA provides services to the Official Trustee to enable the Official Trustee to fulfill its statutory responsibilities under the Bankruptcy Act and the Proceeds of Crime Act. The Official Trustee is the trustee of bankrupt estates but it does not invest the Common Investment Fund money – that is done by ITSA and essentially ITSA, through the Inspector-General in Bankruptcy, makes determinations as to whether monies earned from investment of money in the Common Investment Fund can be paid into the Consolidated Revenue Fund. The money earned from investment of the Common Investment Fund is public money.

114. The amendments to be made by items 2 and 3 will ensure that the provisions in the Bankruptcy Act accurately reflect the Inspector-General’s role in relation to payments into the Consolidated Revenue Fund.

Transitional arrangements

115. The effect of the amendment proposed by item 4 is that anything done by the Official Trustee pursuant to subsection 20H(5) prior to commencement of this item has effect, after commencement of this item, as if it had been done under subsection 20H(5) by the Inspector-General.

Payments made under rural support schemes

116. The effect of the amendments to be made by items 5 to 7 will be to implement a regime to afford protection from seizure under the Bankruptcy Act to certain payments made pursuant to certain rural support schemes.

117. A number of rural grants are currently afforded the status of non-divisible property under the Bankruptcy Act. For example, grants pursuant to the Dairy Exit Program (“Dairy Exit”) and the Farm Help Re-establishment Grant Scheme (“Farm Help”).

118. The Bankruptcy Act does not currently explicitly provide that classes of rural grants may be prescribed by regulation as non-divisible property. The current non-divisible property status of Farm Help, Dairy Exit and other grants is provided for in the Bankruptcy Act and therefore can only be modified by primary legislation.

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

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

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

122. In such circumstances, a regulation making power is required to put in place or to amend, in a timely manner, adequate and appropriate protections for certain kinds of rural grants.

Minor technical amendments

Correction of drafting error in paragraph 121(4)(b)

123. The recently commenced *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (BLAAA) amended the claw back provisions in the Bankruptcy Act, including section 121. That provision allows the trustee to recover property transferred by the bankrupt prior to bankruptcy with the intention to defeat the interests of creditors. Subsection 121(4) sets out the defences available to the transferee where the trustee seeks to recover property under these provisions. As noted in the Explanatory Memorandum to the BLAAA, the intention of an amendment to paragraph 121(4)(b) was to provide that:

a person could only take advantage of subsection 121(4) if they both didn't know the transferor was seeking to defeat creditors (as at present) AND they *could not have reasonably inferred* that this was the transferor's main purpose. In other words, if the evidence objectively suggests the transferee (i.e. recipient) should have known that the transferor (i.e. pending bankrupt) was attempting to defeat creditors, the transfer would not be protected by subsection 121(4).

124. However, the actual amendment does not reflect this policy intention, using an 'or' rather than an 'and' in this context. Item 8 will correct this drafting error in paragraph 121(4)(b).

Correction of drafting error in paragraph 121(9)(a)

125. By replacing the word 'or' with 'of' the amendment to be made by item 9 will correct a minor drafting error.

Minor technical amendment to subsection 302A(3)

126. Section 302A of the Bankruptcy Act voids certain governing rules of superannuation funds and approved deposit funds where a member or depositor becomes a bankrupt, commits an act of bankruptcy or executes a personal insolvency agreement under the Act. Subsection 302A(3) provides that 'This section *applies* to governing rules made before the commencement of this section'. As currently drafted, this provision could be interpreted to mean that the section applies *only* to governing rules made before commencement of the section. Item 10 will substitute 'applies' with 'extends' to make it clear that the section applies to governing rules made before *and* after commencement of the section.

Amendments to the Proceeds of Crime Act 2002

Section 299

Role of the Inspector-General

127. Section 299 of the Proceeds of Crime Act allows the Official Trustee to make determinations in relation to suspended and distributable funds held in the Confiscated Assets Account. However, following forfeiture orders being made, it is ITSA, through the Inspector-General, which makes determinations as to whether the proceeds of crime monies held in the Confiscated Assets Account should have the status of 'suspended funds' or be 'distributable funds'. The Official Trustee does not perform this function.

128. The amendments to be made by items 11, 12, 13, 14, 15, 16, 17 and 18 will ensure that these provisions accurately reflect the Inspector-General's role in relation to Confiscated Asset Accounts determinations.

Transitional arrangements

129. The effect of the amendment proposed by item 19 is that anything done by the Official Trustee pursuant to section 299 of the Proceeds of Crime Act prior to commencement of this item has effect, after commencement of this item, as if it had been done under section 299 by

the Inspector-General.