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Ms Jackie Morris
Acting Committee Secretary
Senate Standing Committee on Legal and
Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA NSW 2600

Dear Madam

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

The Taxation Institute of Australia appreciates the opportunity extended by the Senate Standing Committee in the letter of 8 December 2006 to make a submission on the Bankruptcy Legislation Amendment (Super Contributions) Bill 2006 (**'the Bill'**).

There are a number of major issues that the Institute wishes to bring to the Standing Committee's attention and some more minor technical (drafting) matters.

1. Major Issues

1.1 Section 120

In his Press Release of 28 July 2006 The Treasurer announced that the Bankruptcy legislation would be amended to counteract the decision of the High Court in *Cook v Benson* [2003] HCA 36 (19 June 2003). That decision concerned the application of section 120 of the *Bankruptcy Act* 1966 to contributions made by Mr Benson to three commercial superannuation funds. Section 120 of the *Bankruptcy Act* 1966 is about transfers of property for less than their market value. The High Court found that the trustees of the superannuation funds had obliged 'themselves to pay death, retirement or other related benefits' which had a value equal to the value of the cash payment made by Mr Benson. Accordingly, they held that section 120 had no application.

Section 121 of the *Bankruptcy Act* concerns transfers of property by a person who becomes a bankrupt where that person had the main purpose of preventing the transferred property from becoming available to his or her creditors in the Bankrupt's estate.

The Bill, in draft sections 128B and 128C, very closely adopts the terminology of section 121 of the *Bankruptcy Act*.

The possibility remains open that a trustee in bankruptcy may seek to distinguish *Cook v Benson* on its facts (it was a 'rollover' and the trustees of the superannuation funds acquired

life insurance policies) and argue that section 120 applies. From a policy perspective, it is submitted that trustees in bankruptcy (or the Official Receiver) should be restricted to actions under section 121 where the main purpose is demonstrably to avoid the funds represented by the contributions becoming available to creditors. In order to provide clarity and certainty to all parties it is submitted that section 120 of the *Bankruptcy Act* should be amended to prevent claims being made by trustees in bankruptcy in respect of superannuation contributions to an 'eligible superannuation plan'.

1.2 Rollovers

In *Cook v Benson*, Mr Benson compulsorily became the recipient of a payment from his employer's sponsored fund and then rolled it to new funds. In effect there was a transfer from one fund to another. It is submitted that such a transfer should be protected under the proposed amendments.

If the funds were to be maintained in the original superannuation fund the trustee in bankruptcy would not be entitled to them (subparagraph 116(2)(d)(iii)). It is only where the funds are transferred out of the superannuation fund and then immediately contributed to another fund that there is a real risk that section 128B would apply. This will particularly be the case if the transferor is bankrupt or about to become insolvent at the time.

It is submitted that all 'rollovers' should be excluded from the operation of section 128B as in effect they are a transfer from one protected fund to another. It is noted in this regard that the High Court observed that the rollover provided a 'commercial explanation of conduct unrelated to any attempt to defeat creditors'. The taxation legislation also drove the bankrupt to rollover the proceeds of the eligible termination payment.

This exemption should be provided by legislation.

1.3 Rebuttable Presumption

Draft subsections 128B(5) and 128C(7) provide a rebuttable presumption of insolvency paralleling that in subsection 121(4A) if the annual and proper books, accounts and records have not been kept, preserved or maintained. This rebuttable presumption only applies to transferors who carry on business. While this may be an appropriate presumption in relation to 'business' transfers generally it is difficult to understand why business proprietors should be discriminated against by comparison to persons who do not carry on a business undertaking when the matter at issue is superannuation contributions.

As a matter of course (and law) both business proprietors and non-business persons will be required to maintain comprehensive details of superannuation contributions.

It is submitted that the rebuttable presumption is not appropriate in the context of sections 128B and 128C.

2. Less Significant Issues

- 2.1 Draft paragraph 128C(1)(d) should specifically refer to creditors 'of the beneficiary' so that there is no uncertainty. It might otherwise be considered that the property would be available to creditors of the transferor.
- 2.2 Draft subsection 128C(2) provides that a benefit that is payable in the event of the death of a person is to be disregarded when determining whether the transfer by way of contribution to an eligible superannuation plan is 'for the benefit of a person who later became a bankrupt'. It is assumed that this provision is intended to preclude contributions for life insurance products from being recovered under subsection 128C. However, if the policy is payable on the happening of some event

but also provides for a death benefit it is not clear whether subsection 128C(2) is intended to operate fully or whether apportionment is required (it is acknowledged that apportionment would be very difficult in most instances).

- 2.3 Draft subsections 128B(5A) and 128C(7A) require a trustee in bankruptcy to refund any amount paid in compliance with a section 139ZAQ notice which represents any amount debited from the superannuation contribution for taxes or charges. It is not clear whether 'debited' includes the making of a provision for payment of tax or charges. It is submitted that it should extend to provisions and that the legislation should make it clear that it does so.
- 2.4 The refund mechanisms provided by subsections 128B(5A) and 128C(7A) do not apply where an order is made under section 139ZU. There may be instances where the trustee of the second superannuation fund has paid tax.
- 2.5 The intent of paragraph 139ZU(1)(b) needs to be clarified. This paragraph observes that the benefit under the first plan may or may not be for the bankrupt. Section 128C operates on the basis that the contribution is for the benefit of the person who ultimately becomes a bankrupt. It is not clear how paragraph 139ZU(1)(b) can ever operate in relation to section 128C when the person for whom the contribution is made is not the bankrupt.

Section 128B appears to be capable of operating when the contribution is made by the potential bankrupt or another person eg. a spouse.

It is not at all clear how these provisions are intended to operate (if at all) when there is a contribution for a spouse by a person who later becomes a bankrupt. In any event, a contribution for a spouse or a split of contributions to the spouse's superannuation fund or account may be issues which need further consideration. For example, the pattern of contributions to be taken into account for the purposes of determining the main purpose (paragraph 128C(4)(a)) refers to contributions made for the benefit of the beneficiary whereas contributions may be made for a spouse or split to a spouse's account.

- 2.6 Draft subsection 128E(2) should also empower the trustee of the superannuation fund to pay taxes.

If you have any queries in relation to any of the issues raised in this submission, please contact the Taxation Institute's Senior Tax Counsel, Dr Michael Dirkis, on 02 8223 0011.

Yours faithfully



Andrew Mills
President