***BANKRUPTCY ACT 1966* (CTH)**

**SCHEDULE TO NOTICE ISSUED PURSUANT TO SECTION 139ZQ**

**DATED this <date> day of <month> <year>**

1. **<Name of debtor>** (‘the Debtor’) became bankrupt on <date of bankruptcy> <when his/her/their debtor’s petition was accepted by the Official Receiver>. **OR** <pursuant to a sequestration order made in the Federal <Magistrates/Circuit> Court of Australia>.
2. **<Name of Trustee(s)>** (‘the Trustee<s>’) is/are the trustee<s> of the above administration.
3. Pursuant to subsection 115(2) of the *Bankruptcy Act 1966* (‘the Act’), the commencement of bankruptcy was on <date>, being <select>.

OR

1. In making the Sequestration Order, the Court noted that pursuant to subsection 115(X) of the *Bankruptcy Act 1966* (Cth) (‘the Act’), the bankruptcy is taken to have relation back to, and to have commenced on <date>, being the time of <insert, per s115(1), (1A) or (B)>.

**The Trustee<s> investigations into the financial affairs of the Debtor have disclosed the following:**

***Guidance note:*** *In this section of the notice schedule, you should clearly set out the background facts and circumstances which are relevant to the transfer. At a minimum, you* ***must*** *clearly identify:*

1. *what property was transferred and, if necessary, establish how this property was property of the Debtor;*
2. *how, where and when the property was transferred to the notice recipient;*
3. *what consideration (if any) was provided for the transfer. If you are asserting that consideration provided is not valid consideration, you must outline why;*
4. *whether or not the recipient is an entity related to the Debtor;*
5. *the relevant section/s (120, 121, 121A, 122, 128B, 128C) under which the Trustee claims that the transfer is void. The elements of the section are addressed later on in the notice schedule and* ***not*** *in this section.*
6. …
7. …

## ⭠ Click the triangle at left to expand s 120.

Section 120 of the Act, which is contained in Division 3 of Part VI of the Act, provides as follows:

***120 Undervalued transactions***

*Transfers that are void against trustee*

*(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:*

1. *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*
2. *the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.*

*Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.*

*Exemptions*

*(2)  Subsection (1) does not apply to:*

1. *a payment of tax payable under a law of the Commonwealth or of a State or Territory; or*
2. *a transfer to meet all or part of a liability under a maintenance agreement or a maintenance order; or*
3. *a transfer of property under a debt agreement; or*
4. *a transfer of property if the transfer is of a kind described in the regulations.*

*Transfers not void against the trustee*

*(3)  Despite subsection (1), a transfer is not void against the trustee if:*

1. *in the case of a transfer to a related entity of the transferor:*
2. *the transfer took place more than 4 years before the commencement of the bankruptcy; and*
3. *the transferee proves that, at the time of the transfer, the transferor was solvent; or*
4. *in any other case:*
5. *the transfer took place more than 2 years before the commencement of the bankruptcy; and*
6. *the transferee proves that, at the time of the transfer, the transferor was solvent.*

*Rebuttable presumption of insolvency*

*(3A) For the purposes of subsection (3), a rebuttable presumption arises that the transferor was insolvent at the time of the transfer if it is established that the transferor:*

1. *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*
2. *having kept such books, accounts and records, has not preserved them.*

*Refund of consideration*

*(4) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.*

*What is not consideration*

*(5)  For the purposes of subsections (1) and (4), the following have no value as consideration:*

1. *the fact that the transferee is related to the transferor;*
2. *if the transferee is the spouse or de facto partner of the transferor--the transferee making a deed in favour of the transferor;*
3. *the transferee's promise to marry, or to become the de facto partner of, the transferor;*
4. *the transferee's love or affection for the transferor;*
5. *if the transferee is the spouse, or a former spouse, of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the Family Law Act 1975 ;*
6. *if the transferee is a former de facto partner of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the Family Law Act 1975 .*

*Protection of successors in title*

*(6)  This section does not affect the rights of a person who acquired property from the transferee in good faith and by giving consideration that was at least as valuable as the market value of the property.*

*Meaning of****transfer of property****and****market value***

*(7)  For the purposes of this section:*

1. *transfer of property includes a payment of money; and*
2. *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*
3. *the market value of property transferred is its market value at the time of the transfer.*

***Guidance note****: In this section of the notice schedule, you must clearly explain how the Transfer satisfies each of the elements of s 120, as set out in the Official Receiver Notices Practice Statement (ORPS 7). You must address why no exemptions apply and why there are no defences which appear to be available to the notice recipient if that is claimed. Below is an example of how you may systematically approach this section of the notice schedule.*

*You must also clearly identify consideration (if any) that was provided for the transfer. Where you are claiming that any or all provided consideration is not “valid consideration”, you must clearly identify why.*

*If the Transfer is void under s 121A, you must clearly identify the transferor (Debtor), transferee (second party) and the third party (individual/entity that received property from the transferee). Proceed to address each of the elements of section 120, as if the property/consideration transferred by the second party to the third party had been made by the Debtor.*

1. Here, the Transfer is void pursuant to section 120 of the Act because:
2. The Transfer on <date> was a transfer of property owned by the Debtor.
3. <Notice recipient> as the Debtor’s <nature of relationship> is a related entity of the Debtor pursuant to section 5 of the Act.
4. The Transfer took place on <date>, which is within five (5) years prior to the commencement of the bankruptcy.
5. The market value of the property at or about the time of the Transfer was <amount>, as confirmed by a <valuation> provided by <name of valuer>.
6. <Notice recipient> gave no consideration for the Transfer <or> <Notice recipient> provided consideration of <amount>, which was less than the market value of the Property at the time of the Transfer.
7. The Transfer is not subject to any of the exemptions in section 120(2) of the Act.
8. Under Section 120(3) of the Act, there is no defence available in relation to a transfer of property to a related entity that is made within four (4) years of the commencement of the bankruptcy.

OR *(i.e. if the notice recipient is not a related entity and took place more than two (2) years before the commencement of the bankruptcy)*

It can reasonably be inferred that the Debtor was insolvent at the time of the transfer, based on their net asset and income position. Particulars:

* <Details of the Debtor’s asset and liability position>
* <Details of the Debtor’s income>
* <Details of any other indicators of insolvency as at the time of the Transfer>

1. The current market value of the property is <amount> based on a valuation obtained by the Trustee from <name of valuer> on <date>.
2. Accordingly, the Trustee submits that <notice recipient> is indebted to the bankrupt estate in the amount of <amount>, calculated a follows:

|  |  |
| --- | --- |
| **Details** | $ |
| Market Value Based on Current Valuation | <amount> |
| *Less* Consideration Provided | <amount> |
| Trustee’s Claim | <amount> |

## ⭠ Click the triangle at left to expand s 121.

Section 121 of the Act which is contained in division 3, part VI of the Act, provides as follows:

***121 Transfers to defeat creditors***

*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:*

*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*

*the transferor's main purpose in making the transfer was:*

1. *to prevent the transferred property from becoming divisible among the transferor's creditors; or*
2. *to hinder or delay the process of making property available for division among the transferor's creditors.*

*Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.*

*Showing the transferor's main purpose in making a transfer*

* + - * 1. *The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) 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.*

*Other ways of showing the transferor's main purpose in making a transfer*

* + - * 1. *Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.*

*Transfer not void if transferee acted in good faith*

* + - * 1. *Despite subsection (1), a transfer of property is not void against the trustee if:*

*the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and*

*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*

*the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.*

*Rebuttable presumption of insolvency*

*(4A) 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:*

1. *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*
2. *having kept such books, accounts and records, has not preserved them.*

*Refund of consideration*

* + - * 1. *The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.*

*What is not consideration*

* + - * 1. *For the purposes of subsections (4) and (5), the following have no value as consideration:*

*the fact that the transferee is related to the transferor;*

*if the transferee is the spouse or de facto partner of the transferor--the transferee making a deed in favour of the transferor;*

*the transferee's promise to marry, or to become the de facto partner of, the transferor;*

*the transferee's love or affection for the transferor;*

*if the transferee is the spouse, or a former spouse, of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the Family Law Act 1975;*

*if the transferee is a former de facto partner of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the Family Law Act 1975.*

*Exemption of transfers of property under debt agreements*

* + - * 1. *This section does not apply to a transfer of property under a debt agreement.*

*Protection of successors in title*

* + - * 1. *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.*

*Meaning of transfer of property and market value*

* + - * 1. *For the purposes of this section*

*transfer of property includes a payment of money; and*

*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*

*the market value of property transferred is its market value at the time of the transfer.*

***Guidance note:*** *In this section of the notice, you must clearly address each of the elements of s 121, as set out in the Official Receiver Notices Practice Statement. You must provide an analysis of the Debtor’s insolvency (asset, liability and income position) at or around the time of the Transfer.*

*The Official Receiver (OR) is unlikely to issue a notice in relation to a transfer claimed to be void under s 121 where you are unable to provide evidence that the Debtor was insolvent at the time of the transfer but claim that surrounding circumstances indicate that the transfer was made with the intention to defeat creditors.*

*If the Transfer is void under s 121A, you must clearly identify the transferor (Debtor), transferee (second party) and the third party (individual/entity that received property from the transferee). Proceed to address each of the elements of section 121, as if the property/consideration transferred by the second party to the third party had been made by the Debtor.*

1. Here, the Transfer is void pursuant to Section 121 of the Act because:
2. The Transfer on <date> was a transfer of property owned by the Debtor, which took place prior to the date of bankruptcy.
3. The <property> would probably have become part of the Debtor’s bankrupt estate or would probably have been available to creditors if it had not been transferred to <notice recipient>. Particulars:
   1. ….
   2. ….
   3. ….
4. Relying on section 121(2), the Trustee submits that, as it can reasonably be inferred that the Transfer was made when the Debtor was or was about to become insolvent, <his/her/their> main purpose in making the Transfer is deemed to be to prevent <money/property> from becoming divisible among <his/her/their> creditors or to hinder or delay the process of making <money/property> available for division among <his/her/their> creditors. Particulars:
   1. <Details of the Debtor’s estimated assets at the time of the Transfer>.
   2. <Details of the Debtor’s estimated liabilities at the time of the Transfer>.
   3. <Details of the Debtor’s income as at the time of the Transfer>
   4. <Details of any other indicators of insolvency as at the time of the Transfer>

*AND/OR*

<The Trustee submits that as it can reasonably be inferred from the circumstances surrounding the Transfer that the Debtor’s main purpose in making the Transfer was to prevent <his/her/their> interest in <money/property> from becoming divisible among <his/her/their> creditors or to hinder or delay the process of making <his/her/their> interest in <money/property> available for division among <his/her/their> creditors. Particulars:

1. <Details of relevant circumstances relied upon>
2. …
3. …
4. <Notice recipient> gave no consideration for the Transfer <or> <Notice recipient> provided consideration of <amount>, which was less than the market value of the Property at the time of the Transfer.
5. <Notice recipient> knew or had reason to suspect that the Debtor’s main purpose in making the Transfer was to prevent the property from becoming divisible among their creditors or to hinder or delay the process of making the property available for division among their creditors. Particulars:
6. …
7. …
8. …
9. <Notice recipient> knew or had reason to suspect that the Debtor was, or was about to become insolvent. Particulars:
10. …
11. …
12. …
13. The current market value of the property is <amount> based on a valuation/appraisal obtained by the Trustee from <name of valuer/real estate agent> on <date>.
14. Accordingly, the Trustee submits that <notice recipient> is indebted to the bankrupt estate in the amount of <amount>.

## ⭠ Click the triangle at left to expand s 121A. Use in addition to s 120 and/or s 121 template option where required.

***Transactions where consideration given to a third party***

*(1)  This section applies if:*

*(a)  a person who later becomes a*[*bankrupt*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s139zj.html#bankrupt)*(the****transferor****) transfers*[*property*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*to another person (the****transferee****); and*

*(b)  the transferee gives some or all of the consideration for the transfer to a person (a****third party****) other than the transferor.*

*(2)*[*Sections 120*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s120.html)*and*[*121*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s121.html)*apply as if the giving of the consideration to the third party were a transfer by the transferor of the*[*property*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*constituting the consideration.*

*(3)  If the giving of the consideration to the third party is void against*[*the trustee*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)*in the transferor's*[*bankruptcy*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#bankruptcy)*under*[*section 120*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s120.html)*or*[*121*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s121.html)*,*[*the trustee*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)*has the same rights to recover the*[*property*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*constituting the consideration as*[*the trustee*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)*would have if the giving of the consideration had actually been a transfer by the transferor of the*[*property*](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*constituting the consideration.*

## ⭠ Click the triangle at left to expand s 122.

Section 122 of the Act, which is contained in Division 3 of Part VI of the Act, provides as follows:

***122 Avoidance of preferences***

* 1. *A transfer of property by a person who is insolvent (the* ***debtor****) in favour of a creditor is void against the trustee in the debtor’s bankruptcy if the transfer:*
     1. *had the effect of giving the creditor a preference, priority or advantage over other creditors; and*
     2. *was made in the period that relates to the debtor, as indicated in the following table.*

|  |  |  |
| --- | --- | --- |
| *Periods during which transfers of property may be void* | | |
|  | *Description of petition leading to debtor’s bankruptcy* | *Period during which the transfer was made* |
| *1* | *Creditor’s petition* | *Period beginning 6 months before the presentation of the petition and ending immediately before the date of the bankruptcy of the debtor* |
| *2* | *Debtor’s petition presented when at least one creditor’s petition was pending against a petitioning debtor or a member of a partnership against which the debtor’s petition was presented* | *Period beginning on the commencement of the debtor’s bankruptcy and ending immediately before the date of the bankruptcy of the debtor* |
| *3* | *Debtor’s petition presented in any other circumstances* | *Period beginning 6 months before the presentation of the petition and ending immediately before the date of the bankruptcy of the debtor* |

*(1A) Subsection (1) applies in relation to a transfer of property by the debtor in favour of a creditor:*

1. *whether or not the liability of the debtor to the creditor is his or her separate liability or is a liability with another person or other persons jointly; and*
2. *whether or not the property transferred is the debtor’s own property or is the property of the debtor and one or more other persons.*
   1. *Nothing in this section affects:*
      1. *the rights of a purchaser, payee or encumbrancer in the ordinary course of business who acted in good faith and who gave consideration at least as valuable as the market value of the property; or*
      2. *the rights of a person who is making title through or under a creditor of the debtor in good faith and who gave consideration at least as valuable as the market value of the property; or*
      3. *a conveyance, transfer, charge, payment or obligation of the debtor executed, made or incurred under or in pursuance of a maintenance agreement or maintenance order; or*
      4. *a transfer of property under a debt agreement.*
   2. *The burden of proving the matters referred to in subsection (2) lies upon the person claiming to have the benefit of that subsection.*
   3. *For the purposes of this section:*
      1. *a transfer of property is taken to have been made in favour of a creditor if it is made in favour of a person in trust for the creditor; and*
      2. *a payment of tax, or of any other amount payable to the Commonwealth, or to the Commissioner of Taxation, under or because of an Act of which the Commissioner has the general administration, is taken to be made for consideration equal in value to the payment and in the ordinary course of business; and*
      3. *a creditor shall be deemed not to be a purchaser, payee or encumbrancer in good faith if the transfer of property was made under such circumstances as to lead to the inference that the creditor knew, or had reason to suspect:*
         1. *that the debtor was unable to pay his or her debts as they became due from his or her own money; and*
         2. *that the effect of the transfer would be to give him or her a preference, priority or advantage over other creditors.*

*(4A) A reference in this section (other than subsection (5)) to a creditor of the debtor shall be read as including a reference to a person who would be a creditor of the debtor in relation to a contract, agreement, transaction or other dealing if the contract, agreement, transaction or other dealing were not, in whole or in part, void or unenforceable, or had not been voided in whole or in part, by or under a law of the Commonwealth or of a State or Territory of the Commonwealth.*

* 1. *If a transfer of property is set aside by the trustee in a bankruptcy as a result of this section, the creditor to whom the property was transferred may prove in the bankruptcy as if the transfer had not been made.*

1. *In this section:*

***tax*** *means tax (however described) payable under a law of the Commonwealth or of a State or Territory, and includes, for example, a levy, a charge, and municipal or other rates.*

1. *For the purposes of this section:*
   * 1. *transfer of property includes a payment of money; and*
     2. *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*
     3. *the market value of property transferred is its market value at the time of the transfer.*

***Guidance note:*** *In this section of the notice, you must clearly address each of the elements of s 122 as set out in the Official Receiver Notices Statement (ORPS 7). This requires you to:*

1. *address why the debtor/creditor relationship exists;*
2. *address the timing of the Transfer and how it fits within the prescribed timeframe;*
3. *provide a detailed analysis of the reasons why the Trustee/s consider that the Transfer gave the creditor a preference, priority or advantage over other creditors;*
4. *include an analysis of the Debtor’s insolvency (asset, liability and income position) at the time of the Transfer; and*
5. *if appropriate, outline any further submissions from the Trustee/s as to why no defences are available to the notice recipient.*
6. Here, the Transfer is void pursuant to Section 122 of the Act because:
   1. The Transfer on <date> was a transfer of property owned by the Debtor, which took place in the <select from drop down menu>
   2. The Transfer was in favour of <Notice recipient>, an unsecured creditor of the Debtor. Particulars:
      1. …
      2. …
      3. …
   3. The Debtor was insolvent at the time of the Transfer. Particulars:
      1. <Details of the Debtor’s estimated assets and liabilities at the time of the Transfer>.
      2. <Details of the Debtor’s income as at the time of the Transfer>
      3. <Details of any other indicators of insolvency as at the time of the Transfer>
   4. The Transfer had the effect of giving <notice recipient> a preference, priority or advantage over other creditors. Particulars:
      1. <Detail the monetary impact of the Transfer on the other creditors of the estate>.
   5. The Transfer is not subject to any of the exemptions set out in section 122(2) of the Act. Particulars:
      1. …
      2. …
      3. …
7. Accordingly, the Trustee submits that <notice recipient> is indebted to the bankrupt estate in the amount of <amount>.

## ⭠ Click the triangle at left to expand s 128B.

Section 128B of the Act, which is contained in Division 3 of Part VI of the Act, provides as follows:

***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:*
   1. *the transfer is made by way of a contribution to an eligible superannuation plan; and*
   2. *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*
   3. *the transferor's main purpose in making the transfer was:*
2. *to prevent the transferred property from becoming divisible among the transferor's creditors; or*
3. *to hinder or delay the process of making property available for division among the transferor's creditors; and*
   1. *the transfer occurs on or after 28 July 2006.*

*Showing the transferor's main purpose in making a transfer*

1. *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.*
2. *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:*
   1. *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*
   2. *if so, whether the transfer, when considered in the light of that pattern, is out of character.*

*Other ways of showing the transferor's main purpose in making a transfer*

1. *Subsections (2) and (3) do not limit the ways of establishing the transferor's main purpose in making a transfer.*

*Rebuttable presumption of insolvency*

1. *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:*
   1. *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*
   2. *having kept such books, accounts and records, has not preserved them.*

*Refund of contributions tax etc.*

*(5A) If:*

* 1. *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*
  2. *any of the following amounts was debited from the contribution:*

1. *an amount in respect of tax in respect of the contribution;*
2. *a fee, or a charge, in respect of the contribution; and*
   1. *in compliance with a section 139ZQ notice that relates to the transfer, the trustee of the eligible superannuation plan pays an amount to the trustee in the transferor's bankruptcy; and*
   2. *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 successors in title*

1. *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.*

*Meaning of transfer of property and market value*

1. *For the purposes of this section:*
   1. *transfer of property includes a payment of money; and*
   2. *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*
   3. *the market value of property transferred is its market value at the time of the transfer.*
2. Here, the Transfer is void pursuant to Section 128B of the Act because:
3. The Transfer is made by a person who later becomes a bankrupt and is made by way of a contribution to an eligible superannuation plan.

The Trustee submits that:

1. The Debtor transferred <money/property> to <his/her/their> superannuation account held with <name of superannuation fund>.
2. After making the Transfer, the Debtor later became bankrupt on <date>.
3. <name of superannuation fund and ABN> which is a registrable superannuation entity under the *Superannuation Industry (Supervision) Act* and is regulated by the <name of regulator>.
4. The <money/property> would probably have become part of the Debtor’s estate or would probably have been available to creditors if the property had not been transferred:

The Trustee submits that:

1. The <money/property> transferred would not have been protected property under section 116(2) of the Act.
2. …
3. …
4. The Debtor’s main purpose in making the Transfer was to prevent the <money/property> from becoming divisible among <his/her/their> creditors or to hinder or delay the process of making property available or division among <his/her/their> creditors.

The Trustee submits that:

* + - 1. Pursuant to section 128B(2), the Debtor’s main purpose in making the Transfer is taken to be for this purpose as it can be reasonably inferred from all the circumstances that at the time of making the Transfer, the Debtor was, or was about to become insolvent. Particulars:
         * <Details of assets at the time of the Transfer>
         * <Details of liabilities at the time of the Transfer>
         * <Details of income at the time of the transfer>
         * <Pattern of contributions>
         * <Details of other relevant circumstances>

***Guidance Note:*** *In this section, you must clearly set out* ***all*** *of the evidence that the Trustee has obtained which demonstrate the Debtor’s intentions and main purpose. At a minimum, you* ***must****:*

*(i). Set out relevant circumstances which the Trustee submits as evidence of the Debtor’s intentions and main purpose (e.g. statements of intent evident in correspondence between advisors etc) – s 128B(1)(c).*

*and/or*

*(ii). Include an insolvency analysis (supported by evidence) which clearly sets out the Debtor’s assets, liabilities and income at or about the time of the transfer – establish s 128B(1)(c) via s 128B(2). Include evidence of the Debtor’s established patterns of contributions and an analysis of the reasons as to why the Trustee considers the Transfer is out-of-character - s 128B(3).*

1. The Transfer occurred after 28 July 2006.
2. The Transfer took effect on <date>.

## ⭠ Click the triangle at left to expand s 128C.

Section 128C of the Act, which is contained in Division 3 of Part VI of the Act, provides as follows:

***Superannuation contributions made to defeat creditors--contributor is a third party***

*Transfers that are void*

*(1)  If:*

*(a)  a person (the****transferor****) transfers*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*to another person, (the****transferee****); and*

*(b)  the transfer is by way of a*[*contribution*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#contribution)*to an*[*eligible superannuation plan*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#eligible_superannuation_plan)*for the benefit of a person who later becomes a*[*bankrupt*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s139zj.html#bankrupt)*(the****beneficiary****); and*

*(c)  the transferor did so under a*[*scheme*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)*to which the beneficiary was a party; and*

*(d)  the*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*would probably have become part of the beneficiary's estate or would probably have been available to*[*creditors*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#creditor)*if the*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*had not been transferred; and*

*(e)  the beneficiary's main purpose in entering into the*[*scheme*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)*was:*

*(i)  to prevent the transferred*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*from becoming divisible among the beneficiary's*[*creditors*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#creditor)*; or*

*(ii)  to hinder or delay the process of making*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*available for division among the beneficiary's*[*creditors*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#creditor)*; and*

*(f)  the transfer occurred on or after 28 July 2006;*

*the transfer is void against*[*the trustee*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)*in the beneficiary's*[*bankruptcy*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#bankruptcy)*.*

*(2)  For the purposes of*[*paragraph*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s130.html#paragraph)*(1)(b), disregard a benefit that is payable in the event of the death of a person.*

*Showing the beneficiary's main purpose in entering into the*[*scheme*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)

*(3)  The beneficiary's main purpose in entering into the*[*scheme*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)*is taken to be the purpose described in*[*paragraph*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s130.html#paragraph)*(1)(e) if it can reasonably be inferred from all the circumstances that, at the time when the beneficiary entered into the*[*scheme*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)*, the beneficiary was, or was about to become, insolvent.*

*(4)  In determining whether the beneficiary's main purpose in entering into the*[*scheme*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)*was the purpose described in*[*paragraph*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s130.html#paragraph)*(1)(e), regard must be had to:*

*(a)  whether, during any period ending before the*[*scheme*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)*was entered into, the transferor had established a pattern of making*[*contributions*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#contribution)*to one or more*[*eligible superannuation plans*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#eligible_superannuation_plan)*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*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s130.html#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*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)

*(6)*[*Subsections*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s130.html#subsection)*(3) and (4) do not limit the ways of establishing the beneficiary's main purpose in entering into a*[*scheme*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#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*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#scheme)*if it is established that the beneficiary:*

*(a)  had not, in respect of that time, kept such*[*books*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#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*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#books)*, accounts and records, has not preserved them.*

*Refund of*[*contributions*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#contribution)*tax etc.*

*(7A)  If:*

*(a)  as a result of*[*subsection*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s130.html#subsection)*(1), a transfer made by way of a*[*contribution*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#contribution)*to an*[*eligible superannuation plan*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#eligible_superannuation_plan)*is void against*[*the trustee*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)*in the beneficiary's*[*bankruptcy*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#bankruptcy)*; and*

*(b)  any of the following amounts was debited from the*[*contribution*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#contribution)*:*

*(i)  an amount in respect of tax in respect of the*[*contribution*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#contribution)*;*

*(ii)  a fee, or a charge, in respect of the*[*contribution*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#contribution)*; and*

*(c)  in compliance with a*[*section 139ZQ*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s139zq.html)*notice that relates to the transfer,*[*the*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)[*trustee*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)*of the*[*eligible superannuation plan*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#eligible_superannuation_plan)*pays an amount to*[*the trustee*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)*in the beneficiary's*[*bankruptcy*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#bankruptcy)*; and*

*(d)  the amount paid in compliance with the*[*section 139ZQ*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s139zq.html)*notice exceeds the amount so debited;*

*[the trustee](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html" \l "the_trustee) in the beneficiary's*[*bankruptcy*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#bankruptcy)*must pay to*[*the trustee*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)*of the*[*eligible superannuation plan*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s128n.html#eligible_superannuation_plan)*an amount equal to the amount so debited.*

*Protection of successors in title*

*(8)  This section does not affect the rights of a person who acquired*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*from the transferee in good faith and for at least the market*[*value*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s139k.html#value)*of the*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*.*

*Meaning of****transfer of***[***property***](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*and****market***[***value***](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s139k.html#value)

*(9)  For the purposes of this section:*

*(a)****transfer of***[***property***](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*includes a payment of money; and*

*(b)  a person who does something that results in another person becoming the owner of*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*that did not previously exist is taken to have transferred the*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*to the other person; and*

*(c)  the****market***[***value***](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s139k.html#value)*of*[*property*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#property)*transferred is its market*[*value*](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s139k.html#value)*at the time of the transfer.*

1. Here, the Transfer is void pursuant to Section 128C of the Act because:
2. The Transfer is made by way of a contribution to an eligible superannuation plan for the benefit of the Debtor under a scheme to which the Debtor was a party:
3. <name of transferor> transferred <amount> to <name of transferee> (the ‘Transfer’).
4. The Transfer was made to <superannuation account holder’s name> superannuation account held with <name of superannuation fund> for the benefit of the Debtor. Particulars:
   * <explain how and why the Debtor benefited>.
5. <name of superannuation fund and ABN> is a Regulated Superannuation Entity under the *Superannuation Industry (Supervision) Act* which is regulated by the <name of regulator>.
6. The Transfer was made by <name of transferor> under a scheme to which the Debtor was a party. Particulars:
   * <Describe the scheme and how the Debtor was a party to the scheme>.
7. The Debtor became bankrupt on <date>, being a date after the Transfer.
8. The <money/property> would probably have become part of the transferor’s estate or would probably have been available to creditors if it had not been transferred.

The Trustee submits that:

1. The <money/property> transferred would not have been protected property under section 116(2) of the Act.
2. …
3. …
4. The Debtor’s main purpose in entering into the scheme was to prevent <money/property> from becoming divisible among <his/her/their> creditors or to hinder or delay the process of making property available or division among <his/her/their> creditors.

The Trustee submits that:

1. Pursuant to section 128C(3), the Debtor’s main purpose in in entering into the scheme with <name of transferor> is taken to be for this purpose as it can be reasonably inferred from all the circumstances that at the time of making the Transfer, the Debtor was, or was about to become insolvent. Particulars:
   * + - * <Details of assets at the time of the Transfer>
         * <Details of liabilities at the time of the Transfer>
         * <Details of income at the time of the transfer>
         * <Pattern of contributions>
         * <Details of other relevant circumstances>

***Guidance Note:*** *In this section, you must clearly set out* ***all*** *of the evidence that the Trustee has obtained which demonstrate the Debtor’s intentions and main purpose in entering into the scheme. At a minimum, you* ***must****:*

*(i). Set out relevant circumstances which the Trustee submits as evidence of the Debtor’s intentions and main purpose (e.g. statements of intent evident in correspondence between advisors etc) – s 128C(1)(e);*

*and/or*

*(ii). Include an insolvency analysis (supported by evidence) which clearly sets out the Debtor’s assets, liabilities and income at or about the time of the transfer – s 128C(1)(e) established via s 128C(3). Include evidence of the Debtor’s established patterns of contributions and an analysis of the reasons as to why the Trustee considers the Transfer is out-of-character - s 128C(4).*

1. The Transfer occurred after 28 July 2006.
2. The Transfer took effect on <date>.