

Superannuation and bankruptcy

While superannuation is viewed primarily as a means of saving for retirement, it can also provide asset protection. This can be particularly relevant for small business owners or individuals in occupations with a high litigation risk.

Superannuation accumulation interests are generally protected on bankruptcy...

Superannuation is protected

Superannuation accumulation interests held at the time of bankruptcy are not included in property that is available to be distributed to creditors. There is no limit on the amount which may be protected. Amounts that can be protected include:

- > Accumulation interests in regulated super funds;
- > Lump sum (but not pension) benefits paid to the bankrupt member;
- > Assets acquired with a protected benefit paid to a member; and
- > Payments under a family law split

Income streams are not protected

In contrast to accumulation interests and lump sum withdrawals, income streams paid to a bankrupt member are available to be distributed to creditors. Payments from income streams are added to the bankrupt member's other income and, once the income exceeds a threshold, a portion of income in excess of the threshold is available to be distributed to creditors.

Certain contributions may be recovered

The Bankruptcy Act permits the bankruptcy trustee to recover any contributions that were made or were deemed to be made with the intent of defeating the bankrupt's creditors. This applies to contributions made by the member and can also apply to contributions made by a third party, such as an employer.

While there is no time limit on contributions which may be recovered by the bankruptcy trustee, the longer the period between the contribution and the bankruptcy, the less likely it is that the contribution was made with the intent of defeating creditors.

Whether a contribution was made with the intent of defeating creditors will depend on the facts and circumstances. The two main factors which are considered are:

- > The member's solvency at the time the contribution was made; and
- > Any pattern of contributions.

When looking at the pattern of contributions, some of the factors the courts will consider include:

- > Any changes in the pattern of contributions; and
- > Any contributions which are out of character with the general pattern of contributions.

Where a member has had a long standing pattern of contributions, for example, a long standing salary sacrifice arrangement, it is less likely that the bankruptcy would seek to recover these contributions than if the member significantly increased salary sacrifice contributions or made large one off contributions shortly before the bankruptcy. It is also unlikely that the bankruptcy trustee would seek to recover superannuation guarantee contributions.

The fact that there has been a change in the pattern of contributions and/or that there have been any contributions which are out of character will not necessarily mean that these are contributions which have been made for the purpose of defeating creditors. For example, a large one off contribution could be explained by:

- > Proceeds on sale of a small business asset exempted by the CGT small business provisions. In 2017/18 the cap for such contributions is \$1.455 million; or
- > Taking advantage of the 'bring forward' to make a non-concessional contribution of \$300,000.

Effect of recovered contributions on the \$1.6 million cap

Where:

- > a member's superannuation fund has started to pay an income stream, which has counted towards the \$1.6 million transfer balance cap; and
- > the trustee in bankruptcy recovers contributions from that income stream.

The member can apply for a debit (reduction) against the cap for the amount recovered by the bankruptcy trustee.

Seek legal advice

This article provides general information about the treatment of superannuation benefits on bankruptcy, however, members should seek specialised legal about their own situation before acting.



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