

Super and Bankruptcy: What's Safe and What isn't

If bankruptcy is on the horizon, one of the first questions people ask is what happens to their super. The answer turns on timing, the type of contribution, and how you draw on the fund.

The general rule

Money sitting in a regulated super fund is protected from your bankruptcy trustee. Creditors cannot touch it, and the balance stays yours. That protection covers accumulation accounts and pension accounts inside the fund, and it extends to lump sums you withdraw after the date your bankruptcy starts. If you take a lump sum out post-bankruptcy and use it to buy a car or a holiday or invest in your own name, those assets remain protected too.

The protection only applies to regulated funds, approved deposit funds, and public sector schemes. If your fund becomes non-complying, you lose protection.

Contributions made to defeat creditors

Under sections 128B and 128C of the Bankruptcy Act, your trustee can claw back super contributions made before bankruptcy if the main purpose of the contribution was to keep money out of creditors' reach. This applies whether you made the contribution yourself or someone made it on your behalf such as employer via a salary sacrifice arrangement.

What does the bankrupt trustee actually look at? Patterns. A sudden spike in voluntary contributions in the year or two before bankruptcy is a red flag,

particularly if it looks out of step with your earlier contribution history. Routine employer SG contributions and ordinary salary sacrifice arrangements that have been running for years usually pass without issue. Large one-off personal

contributions when you knew the wheels were falling off do not.

There is also a presumption to be aware of. If you were insolvent or about to become insolvent when the contribution was made, the law presumes the contribution was made to defeat creditors, and the burden shifts to you to prove otherwise.

Pensions and the income limit

Lump sums from super are treated very differently to pension payments. Once your super starts paying you a pension or income stream, those payments are counted as income under the Bankruptcy Act. Income during bankruptcy is only protected up to a threshold set by Australian Financial Security Authority (AFSA), which is indexed twice a year and varies based on your number of dependants. Anything above the threshold gets split, with 50 per cent going to your bankruptcy trustee.

For someone already drawing a pension when bankruptcy hits, it can be worth getting advice on commuting the pension back to accumulation phase and taking lump sums instead. The tax and Centrelink consequences need careful thought before doing this.

A few other things worth knowing

Withdrawals taken out of super before you become bankrupt are not protected. Once the money is sitting in your bank account, it forms part of your divisible property.

If you run an SMSF, you must resign as trustee on bankruptcy. You become a disqualified person under the SIS Act, and staying on is an offence.

Super is generally protected in bankruptcy, but the timing and shape of any contribution or withdrawal matters enormously. Get advice before you move money.



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