Super exposed

This article was supplied by Peter Bobbin, Jennifer Yeo and Matthew McKee from Law Central's partner law firm Rockwell Olivier Sydney (formerly known as Argyle lawyers). Rockwell Olivier are leaders in Australia's modern superannuation landscape. www.rockwellolivier.com.au

Is your super protected? Super is not always the protected investment or strategy that most believe. Super is exposed.

Traditionally, superannuation funds have been seen as an effective asset protection strategy because a person's interest in a super fund is not property that is available to a bankrupt's creditors. This protection comes from section 116(2)(d) of the Bankruptcy Act.

But super is not safe in a pre-bankruptcy scenario.

Does the Commissioner of Taxation have the power to issue a garnishee notice?

Yes. Not only does the ATO have the power to issue a garnishee notice to a super fund to recover any tax related liability of a taxpayer, the Commissioner has instructed his staff to do this.

In *Practice Statement Law Administration* PS LA 2011/18, the ATO staff has been told that *"a garnishee notice in respect of any tax-related liabilities may be served on a superannuation fund"*.

This means that your super is at risk prior to bankruptcy and a garnishee can be used to capture it.

What is the effect of a garnishee notice?

The amount of super money impacted by the garnishee notice, up to the debt claimed, is taken immediately. But first there must be a debt.

Whether this is court ordered or follows from an ATO notice of tax assessment, the debt can be claimed under a garnishee notice. This is a notice that requires anyone who holds money for the debtor/taxpayer to pay the money to the claimant/ATO.

Again: what does the ATO say?

"The garnishee ... will not be effective until the debtor's (member's) benefits are payable under the rules of the fund."

And the corollary applies - that is, the garnishee is immediately effective when the debtor taxpayer's super benefits are payable to them.

At that point, the super fund will be required to pay the garnisheed amount to the Commissioner.

This concept of whether and when a benefit will be 'due and payable' from the fund will depend on the rules of the fund, and this is the concept that is the key to the potential solutions.

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What super is affected?

All and any that is currently due and payable. It does not matter if it is self managed, multi member or a small APRA fund, it is all capable of a garnishee claim.

It also does not matter whether the fund benefit is a claimable lump sum or pension of any form. The amount of the benefit that is due and payable to the member-taxpayer is exposed to a garnishee claim.

What should you do?

Be proactive now. Once a garnishee issues (whether ATO or creditor), there is virtually no scope to protect the super.

Declaring bankruptcy is too late.

Once issued on the super it will already have been garnished. The key to enhancing super's pre-bankruptcy protection lies in the phrase 'due and payable'.

It is only the amount that is 'due and payable' from the super fund to the member that may be subject to a garnishee notice.