

Superannuation Fund Contributions Open to Attack

A recent decision of the Federal Court of Australia has implications for the Superannuation Industry and Superannuation Contributors, as well as for insolvency practitioners (*Official Trustee v. Trevor Newtown Small Superannuation Fund Pty Limited and anor*). Kemp Strang appeared on behalf of The Official Trustee in Bankruptcy.

Over a 13 month period prior to a bankruptcy order being made against him for substantial unpaid taxes, a Sydney barrister paid into his superannuation fund in excess of \$260,000.00.

Until the decision there was some debate as to whether superannuation funds were protected against claims by trustees in bankruptcy. It is now clear that bankruptcy trustees are able to recover contributions to superannuation funds in the same circumstances as other dispositions by bankrupts are recoverable by Bankruptcy Trustees.

The Bankruptcy Act provides that all property that belonged to or that was vested in a bankrupt at the commencement of the bankruptcy becomes property divisible amongst all the creditors of the bankrupt. However there are exceptions to this general rule. One of those exceptions is Section 116(2)(d)(iii) of the Bankruptcy Act which states that interests of a bankrupt in a regulated superannuation fund (within the meaning of the Superannuation Industry (Superannuation) Act 1993) are not divisible amongst the bankrupt's creditors.

An insolvent person may believe any payments into his or her superannuation fund, prior to a bankruptcy order being made against them, are absolutely protected from a Bankruptcy Trustee. This is not the case.

There has been a debate for some time that because of the protections under Section 116(2) a bankruptcy trustee could not claw back payments made into a superannuation fund. The decision in Small's case establishes that Section 116

is subject to other provisions of the Bankruptcy Act including what are known as the "claw back" provisions of the Act. It was held that provided the general preconditions contained in the Bankruptcy Act for trustees to recover assets have been met, the Court will make orders requiring the repayment to a bankruptcy trustee of contributions made into superannuation funds by bankrupts.

The Court is prepared to make such orders despite an argument that the social policy behind Section 116(2) is that Parliaments throughout Australia have given protection against claims by creditors to policies of life insurance and superannuation funds.

Having considered the general policy, the Court held that the legislative protection is not so broad. The Court took the view that there is no injustice to a bankrupt and no necessary loss of the socially desired benefit, whether the claim involves premiums for life policies (which are also protected by Section 116(2)) or contributions to a superannuation fund, when the claw back provisions apply.

In this particular instance the Court found that the Court could make an order that superannuation contributions be repaid to the trustee by the fund trustee. Relevant considerations included:-

- the Bankrupt had a significant debt;
- the contributions occurred within at least six months before the commencement of the bankruptcy;
- no consideration in any relevant form was provided by the superannuation fund.

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THE KEMP
STRANG
BRIEF

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- Partner



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THE KEMP STRANG BRIEF IS INTENDED TO KEEP READERS ABREAST OF CURRENT LEGAL AND FIRM DEVELOPMENTS. IT IS NOT TO BE USED OR RELIED UPON AS A SUBSTITUTE FOR PROFESSIONAL ADVICE. BEFORE ACTING ON ANY MATTER, READERS SHOULD CONSULT WITH THEIR ADVISERS.

Changes to NSW O H & S legislation requires employers to be more proactive in determining workplace safety hazards, as well as involving employees in assessing any risks.

O H & S: Safety is Everyone's Responsibility

On 1 September 2001, new provisions of the Occupational Health & Safety Act 2000 commenced operation.

Recent amendments made to NSW O H & S legislation are not an exercise in rearranging the deck chairs. Employers now have duties which to some extent eat into the management structures which presently exist in most enterprises. Newly amended Part 2 Division 2 of the Act requires employers to consult with their employees on OH & S matters. The intention is for employees to participate in decisions affecting employees' health, safety and welfare at the workplace. If employers fail to consult with employees on such issues the employer commits an offence.

Important legislative changes

The amended Act requires employers to be proactive. The Act and regulations, require employers to secure and promote the health, safety and welfare of people at work, and promote a safe and healthy work environment that protects persons from injury and illness and that is adapted to their needs. The Act requires employers to ensure that risks to health and safety at work are identified, assessed and eliminated or controlled.

Employers are required in undertaking their risk analysis to consider:

- (i) the work premises;
- (ii) work practices, work systems, shift working arrangements (including psychological hazards and fatigue related hazards);

- (iii) plant (including its transport, installation, erection, commissioning, use, repair, maintenance, dismantling and storage);

- (iv) hazardous substances;

- (v) manual handling;

- (vi) the layout condition of a place of work;

- (vii) biological organisms, products or substances;

- (viii) the physical environment, including such things as people slipping, tripping or falling, drowning, fire, contact with moving or stationary objects, exposure to noise, heat, cold, vibration, radiation, static electricity or a contaminated atmosphere and the potential for workplace violence.

The Act requires employers to ensure that risks to health and safety at work are identified, assessed and eliminated or controlled.

The obligations of employers will be phased in over the next two years.

Type of consultation

Employers are required to share relevant information about health and safety issues with their employees and afford them the opportunity to express their views. Employees are to be allowed to contribute in a timely fashion to the resolution of all safety issues at their workplace. The consultation process is to be on-going and is to include an on-going monitoring system.

Consultation structure

If safety committees are in existence such committees can carry on the consultation process; otherwise representatives may be elected by employees to represent them.

What O H & S committees or representatives must represent

Committee members or representatives of O H & S work groups must be established so they can take into account the diversity of employees and their work. That includes hours of work of employees, patterns of work (including seasonal or short term employees) geographical location, types of work performed and attributes including gender, ethnicity, age and special needs.

Function of O H & S committees or representatives

Employees and representatives are required to keep under review the measures taken to ensure health and safety of persons at the workplace. However

monitoring it is not their only function. Other functions include: investigating matters which may be a risk; attempting to resolve risk issues; and reporting matters of risk to Workcover inspectors.

Training

An employer must ensure that each member of an OH & S committee and each OH & S representative undertakes a course of training as soon as practicable after the person is first appointed.

Training must be provided by:

- (a) a trainer who is accredited by workcover to provide that training; or
- (b) a person registered under the Vocation or Education and Training Accreditation Act 1990.

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Why have a Will? Is it the Last Word?

A Will directs how your estate will be distributed after you die. Without a Will your estate will be distributed to your relatives under the legal rules for intestate estates.

Your estate may not be distributed in the way you would have wished. For example, if you are survived by children, even if they are financially independent, your spouse may not be entitled to the whole estate, and may not even be entitled to your interest in the family home. A separated, but not divorced, spouse remains entitled. Your estate may pass to relatives with whom you have had little contact. If there are no relevant relatives then your estate may pass to the Crown. The only way to be sure that your estate will be distributed as you wish is to make a properly drafted Will which allows for all foreseeable contingencies, including if the primary beneficiaries do not survive.

Asset protection, tax planning and business and family investment structure succession issues will also impact on how your Will may be drafted.

Your Will may not be the last word. Your spouse, even an ex-spouse, children and others with whom you have had a domestic relationship may be entitled to apply to the courts for provision out of your estate if their needs have not been met. The courts look at all relevant circumstances, including the needs of those provided for in the Will. If your Will is likely to result in an application for provision then you may wish to leave a written statement about why you have made, or not made, provision for a particular person. The courts will admit such a statement into evidence if an application is made.

These matters need to be considered in Will making.

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Our December interview is with Lisa Berton, a partner in our Human Resources Practice Group. Lisa talks about the increasing demand for Human Resources and Employment Law services. We also have a look behind the lawyer...

Lisa tell us a little about how the focus of your practice has changed during your time at Kemp Strang.

When I joined in 1994 I was working predominately in Commercial Litigation and Insolvency, whereas now the main of my practice is in the firm's Human Resources and Employment Law Group. While this transition was partly due to my interest in that practice area, it has also coincided with the increased demand for Human Resources and Employment Law services from both our existing and new clients.

Why do you think there has been such an increase in demand for Human Resources and Employment Law services?

I think a combination of a number of factors can explain the increased demand. Over recent years employers have become more aware of the necessity to document employment arrangements, employees are much more aware of their rights and the ever-changing legislation that relates to this area. There have been recent developments in employment legislation generally and also areas such as privacy and discrimination which have created greater obligations and issues for employers to consider.

Also, the increased number of corporate collapses in recent years has created a particular demand for legal services in the area of employee entitlements in insolvency. The increase in demand for legal services in this area is a fits with the Kemp Strang Human Resources and Employment Law practice area, the large Kemp Strang Commercial Litigation and Insolvency practice area and my background in Commercial Litigation and Insolvency.

You have been with Kemp Strang for quite a while, what are a few things that you like about the place?

When I joined in 1994 there were approximately 60 people employed by

Kemp Strang. Now Kemp Strang employs approximately 140 people. The strengths of Kemp Strang that were readily apparent when I joined, being the direct accessibility that clients have to partners of the firm as well as good working environment have been sustained throughout the firm's growth.

You were recently a crew member of the Kemp Strang Rowing "Eight" for the corporate rowing regatta organised by the Mosman Rowing Club, did you enjoy that experience?

I found the very early mornings more difficult to cope with than learning to row. Once I got over that I really enjoyed the challenge of both the training and the regatta. I had never rowed before and after rowing as part of an 'eight', I really appreciate not only the physical demands of the sport but also the technical aspects and the incredible importance of team work. Our crew had very little (if any) rowing experience so the challenge was a great way to get to know work colleagues in a totally different environment.

You enjoy travelling, do you have a favourite destination?

I don't know anyone who doesn't enjoy travelling and wishes they could travel more. Italy is certainly my favourite place and although it sounds boring I would holiday there every year if I could.



Welcome to our new solicitors

Angus Tye, Karina Carter, Rory O'Hagen, Rebecca Young, Charlotte Christmas and Sean Docker have joined Kemp Strang recently.

Wishing you a very happy Christmas

The partners and staff of Kemp Strang take this opportunity to wish you all a very happy and peaceful Christmas and a prosperous New Year.

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