

## Contribution clawback on bankruptcy - further clarity

by *Matthew Burgess, Director, View Legal*

Alan Bond is arguably one of the most famous, or infamous, entrepreneurs in modern Australian history.

Indeed, Kerry Packer's observation following his sale of Channel 9 for \$1 billion to Alan Bond, only to buy it back about two years later for \$250 million, that 'you only get one Alan Bond in your life' has achieved folklore status.

Arguably, one of the biggest impacts of Alan Bond's financial demise in the early 1990s relates to superannuation.

### Protection of superannuation

As a direct consequence of the case, significant legislative changes were introduced, which ultimately provided that superannuation entitlements up to a statutory limit that was referred to at the time as a 'reasonable benefits limit' were protected from creditors.

When the reasonable benefits limit was subsequently abolished, the legislation was further changed to quarantine all superannuation entitlements from creditors on bankruptcy, subject to certain clawback provisions.

The 2016 rebranding of reasonable benefits limits as the '\$1.6 million balance cap' did not cause any further change to the bankruptcy legislation to expose superannuation entitlements above the balance cap to creditors.

### Clawback rules

However the quarantining of superannuation entitlements is subject to certain clawback provisions,

In particular, from 1 July 2007 assets held via a superannuation fund can be 'clawed back' if the main purpose of the transferor was either to:

- (a) prevent the transferred property being available to creditors; or
- (b) hinder or delay the process of making property available for division among creditors.

To determine the main purpose for making the contribution it is presumed to be an attempt to defeat creditors 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.

If insolvency is not an issue at the time of transfer, both sections provide that when determining the transferor's main purpose for making the transfer, regard must be had to whether the transferor had established any pattern of making contributions to one or more superannuation funds and if so whether the transfer under examination is out of character.

Therefore, as an example, contributions are unlikely to be made with the intention of defeating creditors if contributions have been made every year for the past 5-10 years.

However, it is debateable (as another example) if a contribution will be sufficiently 'unusual' to be for the purpose of defeating creditors if a person makes contributions utilising the accelerated non-concessional regime.

This is despite the fact that such contributions are at law only able to be made in sporadic instalments.

## Recent decision

One example of the application of the rules in this area is the case of Do (Trustee), in the matter of Andrew Superannuation Fund v Sijabat [2023] FCAFC 6.

In this decision, it was relevantly confirmed that:

1. the onus of proving solvency at the relevant time of a contribution is on the transferor;
2. if the transferor proves solvency at the time of the contribution, it is then for the trustee in bankruptcy to establish that the main purpose in the making of the transfers was to prevent the funds from becoming divisible among the member's creditors or to hinder or delay the process of making property available for division among the creditors;
3. just because large sums of money are involved, and just because various documents (other than bank statements) are not produced to the court, does not, of itself, constitute the requisite intention relevant to establish that the main purpose was to prevent the transferred property from becoming available or divisible for creditors. This is especially so where there is a history, for some years prior to the impugned transactions, of the bankrupt member regularly contributing funds to superannuation;
4. while the circumstances surrounding a transfer may be highly suspicious and might in fact have been actuated by a desire to prevent, hinder or delay the process of making property available for division amongst creditors, this of itself will not meet the definition of the relevant transfers being the main purpose and therefore able to be unwound, particularly if the arguments of the trustee in bankruptcy are based on indirect inferences and innuendo.

