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BANKRUPTCY & SELF- MANAGED SUPERANNUATION FUNDS

Statistics*

Number of entities

	June 2016	Sep 2016	Dec 2016	Mar 2017	Jun 2017
APRA-regulated	2,321	2,319	2,324	2,331	2,338
ATO-regulated SMSF	568,315	575,979	582,276	589,165	596,516
Other (Exempt Schemes)	19	19	19	19	19

*Courtesy of APRA Quarterly Superannuation Performance June 2017 (issued 22 August 2017)

Provisional annual personal insolvency statistics 2016-17*



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State / territory	Bankruptcies (Parts IV and XI)	Debt agreements (Part IX)	Personal insolvency agreements (Part X)	Total insolvency activity
NSW	4,471	3,992	49	8,512
ACT	197	204	7	408
Vic	3,242	2,519	51	5,812
Qld	4,874	4,072	59	9,005
SA	1,131	686	14	1,831
NT	120	183	5	308
WA	1,867	1,638	55	3,560
Tas	418	303	4	725
Total	16,320	13,597	244	30,161

*Courtesy of AFSA

Different types of superfunds

- APRA regulated:-
 - Corporate, industry, public sector, retail, single-member ADF's, small APRA funds
- Deputy Commissioner of Taxation (ATO) regulated:-
 - SMSF
- Unregulated superfunds



Property divisible among creditors

Section 116 (1) of the Bankruptcy Act:-

“ Subject to this Act:

- (a) *all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge; ...”*



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Non- divisible property – s116(2)(d) of the Bankruptcy Act

“(d) subject to sections 128B, 128C and 139ZU:

(i) policies of life assurance or endowment assurance in respect of the life of the bankrupt or the spouse or de facto partner of the bankrupt;

(ii) the proceeds of such policies received on or after the date of the bankruptcy;

(iii) the interest of the bankrupt in:

(A) a regulated superannuation fund (within the meaning of the Superannuation Industry

(Supervision) Act 1993); or

•



(B) an approved deposit fund (within the meaning of that Act); or
(C) an exempt public sector superannuation scheme (within the meaning of that Act);

(iv) a payment to the bankrupt from such a fund received on or after the date of the bankruptcy, if the payment is not a pension within the meaning of the *Superannuation Industry (Supervision) Act 1993*;...

What are we looking at today?

2 primary questions:-

Part A - What is a regulated superfund as defined by the Superannuation Industry (Supervision) Act, 1993 (“SIS Act”); and

Part B - What is a self managed superfund as defined by the SIS Act?

Part A - What is a regulated superfund as defined by the SIS Act?

- Defined in s19 of the SIS Act
 1. Must have a Trustee.
 2. The Trustee must be a constitutional corporation (company under the Corporations Act) or the fund must be a pension fund.
 3. Must be an election by the Trustee.



Mandatory requirement for certain funds to be regulated

- S19(7) of the SIS Act

All of the following conditions **MUST** be satisfied:-

1. The fund has a Trustee
2. Either a constitutional corporation or sole or primary purpose is the provision of old age pensions
3. Fund is not a public sector superannuation scheme
4. There is or is not a Notice satisfying superannuation conditions by Occupational Superannuation Standards Act, 1987.



What is a Trustee of a regulated superfund responsible for?



ENSURING THE CORE PURPOSE OF THE SUPERANNUATION FUND IS TO PROVIDE BENEFITS TO MEMBERS OF THE FUND ON THEIR RETIREMENT, THE ATTAINMENT OF A PRESCRIBED AGE OR, ON THEIR DEATH, TO THE MEMBERS LEGAL PERSONAL REPRESENTATIVES AND/OR DEPENDENTS.

Core purpose

- Defined in s62(1)(a) of the SIS Act

Maintained solely for the provision of benefits for each member for one or more of the following purposes:-

- ✓ On or after the members retirement
- ✓ On or after the members attainment of not less than the “retirement age”
- ✓ Earlier of the members retirement or the member attaining retirement age
- ✓ Death

- NB/
 - Ancillary provisions of a regulated fund defined in s62(1)(b) SIS Act
 - An unregulated and/or a non complying superannuation fund can become a regulated and complying superannuation fund if it passes the test in s42A(5) of the SIS Act.

Test – s42A SIS Act (SMSF)

“(1) An entity that was a self managed superannuation fund at all times during a year of income is a complying superannuation fund in relation to that year of income for the purposes of this Division if:

(a) either:

(i) the entity was a resident regulated superannuation fund ...; or

*(ii) ...; **and***

*(b) the entity passes the test in **subsection (5)** in relation to the year of income.”*



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“(5) An entity passes the test ... if:

(a) no trustee of the entity contravened any of the regulatory provisions in relation to the entity during the year of income or the part of the year of income; **or...**

(b) if a trustee of the entity contravened one or more of the regulatory provisions in relation to the entity during the year of income or the part of the year of income, the Regulator, after considering:

- (i) the taxation consequences...; and*
- (ii) the seriousness of the contravention(s); and*
- (iii) all other relevant circumstances;*

*thinks that a notice **should nevertheless** be given stating that the entity is a complying superannuation fund in relation to the year of income concerned.”*

Simple!

Jones v Official Receiver & Anor [2017] FCA 1101

“[60] First and most simply, Mr Jones (the bankrupt) said that it was [a regulated superfund] in his statement of affairs. Secondly by letter dated 1 March 2013 addressed to the fund’s trustee, the Deputy Commissioner of Taxation confirmed that the fund was a “complying superannuation fund” is a “resident regulated superannuation fund” that complies with certain requirements of s42 of the SIS Act [as opposed to s42A SIS Act].”



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Is it really a SMSF as defined by the Superannuation Industry (Supervision) Act, 1993 (“SIS Act”)?

S17A (a) SIS Act - Basic conditions (other than single member funds)

- Fewer than 5 members
- Each individual Trustee must also be a member
- If Trustee of the fund is a body corporate – each director must be a member of the fund
- No member can be an employee of another member (unless relatives)
- No Trustee / Director receives any remuneration from the fund or from any person for any duties or services performed



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S17(2) SIS Act - Basic conditions – single member

- Trustee of the fund must be a body corporate
- Member must be either :-
 - (a) the sole Director; or
 - (b) 1 of 2 directors and the member and the other director are relatives; or
 - (c) 1 of 2 Directors and the member is not an employee of the other director; and

- ❑ If Trustee is an individual:-
 - (a) The member is only 1 of 2 Trustees – (one must be a member and the other a relative of the member); or
 - (b) member is 1 of 2 Trustees and the member is not an employee of the other Trustee; and

- ❑ No remuneration

Disqualified persons - SMSF

Consider Insolvency Practice Schedule 2 of the Bankruptcy Act:-

“5-15 Meaning of regulated debtor

*A person is a **regulated debtor** if the person is:*

- (a) a bankrupt; or*
- (b) a person whose property is subject to control under Division 2 of Part X; or*
- (c) a debtor under a personal insolvency agreement; or*
- (d) a deceased person whose estate is being administered under Part XI.”*



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Disqualified persons – s120 SIS Act



“(1)...An individual is a disqualified person if:...

(b) The person is an insolvent under administration...

Disqualified person cont...

- (2)...A body corporate is a disqualified person if:...*
 - (a) body corporate knows, or has reasonable grounds to suspect, that a person who is, acting as, a responsible officer of the body corporate is:-*
 - (i) ...a disqualified person...*
 - (b) a receiver, or a receiver and manager appointed...*
 - (c) administrator appointed..*
 - (d) provisional liquidator...*
 - (e) body has begun to be wound up”*

s201B(1) Corporations Act, 2001



Must be over the age of 18 years of age to be a Director of a corporate entity.

Cannot be an undischarged bankrupt or subject to a Part X Agreement.

Obligations of a SMSF

s35AE SIS Act:-

- ✓ Accounting records correctly record and explain the transactions and financial position
- ✓ Able to prepare accounts, statements and returns from accounting records.
- ✓ Kept so that can be conveniently and properly audited.



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Trustee(s) of the SMSF MUST ensure that the accounting records are kept:-

- ✓ Kept For at least 5 years
- ✓ Kept In Australia
- ✓ Kept In writing in English (or a form which can be translated)
- ✓ Audited for each year of income

The Coshott Family Superannuation Fund



- ***Coshott v Coshott* [2013] FCA 907 (10 September 2013)**
- ***Coshott v Prentice* [2014] FCAFC 88 (“Appeal”)**

Irrelevant or crucial considerations???

- Irregularities in the SMSF records
- SMSF bank account sometimes used for other purposes;
- Purchase of the interest in the property was not authorised by the Trust Deed which made express reference to the SIS Act and Regulations.
- Bankrupt could not have been the Trustee of the Coshott Family Superfund...what happened to Schlotzsky?
- Purchased as joint tenants/ living in the property
- Some members were minors
- Raise funds to annul the bankrupt estate





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***Trustees of the Property of Morris (Bankrupt) v Morris
(Bankrupt) [2016] FCA 846 (22 July 2016)***



Cunningham (Trustee) v Gapes, in the matter of Gapes (Bankrupt) [2017] FCA 787 (13 July 2017).

Non-compliance issues

- Gap for attack
- Onus is on the Trustee in Bankruptcy to prove SMSF deficient if the Trustee in Bankruptcy wishes to take action
- Note: ATO has powers under s289 of the SIS Act:-
- A disqualified person does not automatically invalidate an appointment or transaction; s127 of the SIS Act.



- Trust Deed can be varied by the Court; *Westpac Securities Administration Ltd v Cooper* [2016] SASC 122 and *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121



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Investigations - *Examples (but not exhaustive)*

- What were the circumstances in which the property was purchased and the source of funds that were used to purchase it? (If claim real property held on trust for Superfund).
- Check establishment of the superfund and its subsequent activities.
- Does it comply with the SIS Act?
- Does the SMSF have a TFN?
- Evidence of any land tax Notice of Assessment (if relates to land).



- Does the bankrupt or any of its members reside in the property owned by the SMSF? If so, query breach of the “in house asset rule”
-
- Have any loans been made to the SMSF members?
-
- Where are the accounting records and what are they?
-
- When was the last audit? Evidence of any audits.

- Where is the Trust Deed?
- Statement of members and their respective interests
- Income Tax Returns
- Payments to spouses



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Attack - WHAT ARE SOME OF YOUR OPTIONS?

- s122 of the Bankruptcy Act
- Demand under s129 of the Bankruptcy Act (but note s349A SIS Act)
- Voidable transaction provisions pursuant to s128B and/or 128C of the Bankruptcy Act (mirrors ss120/121 of the Bankruptcy Act but superannuation specific).
- Use the common law
- Section 37A of the Conveyancing Act, 1919 (if in NSW).
- Family Law Act, 1975
- s139ZQ Notice.

