

16 February 2018

## By email

### Review of the early release of superannuation benefits

The Financial Services Council (FSC) welcomes the opportunity to make submissions to the Treasury on the consultation paper on the early release of superannuation benefits.

The FSC has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than \$2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world.

The FSC makes the following comments on the consultation paper. Note there are a number of questions where we have chosen not to make a comment.

### Principles underlying early release

0.1. Do these proposed principles provide an appropriate guide to determine the nature and scope of the rules for early release under compassionate and financial hardship grounds, and for victims of crime compensation? If no, what should the principles be?

We support the principles in the consultation paper which, in summary, state:

- Superannuation benefits should generally be preserved to provide income in retirement. Early access to superannuation for other purposes is inconsistent with the preservation principle.
- There will be circumstances where the benefits of early access to superannuation for an individual will exceed the benefits of preserving balances until retirement, such as in cases of genuine financial hardship or under certain medical conditions where the individual is suffering a life threatening condition or the treatment is required to alleviate acute/chronic pain.
- Last resort: Early release of superannuation benefits should generally be a last resort where other sources of financial support have been exhausted. It is not an appropriate replacement for existing health and income support policies.
- Fair and effective: The rules should be able to be administered fairly and effectively. Rules that are highly subjective in nature will increase red tape, expense and difficulty for applicants, trustees and Government.

In relation to the final principle, the FSC encourages the development of clearer guidance so that trustees, advisers and fund members have a clearer understanding of what is and is not available to

claim. Our members indicate they are receiving frequent requests from customers and advisers for guidance on whether claims would be approved.

The statement on page 15 of the consultation paper is pertinent: “‘a lack of definition or objective test for ‘unable to meet reasonable and immediate family living expenses’ means trustees of superannuation funds may permit early release of superannuation on financial hardship grounds inconsistently.”

Some issues that trustees face in relation to assessing severe financial hardship include:

- What is a ‘family living expense’? Does the person need to be living with other family members to qualify?
- When is a family living expense ‘reasonable’? Would an outstanding expense that relates to a luxury or non-essential item be considered reasonable?
- Does the term ‘immediate’ require the expense to be due or outstanding at the time of application? If so this is quite limiting, as a fund member is only eligible to receive one lump sum in a 12 month period (the cashing limitation in Schedule 1 Item 105 of the SIS regulations).

One approach to respond to this issue would be for the government (or an agency of government such as the DHS) to take over assessment as it does for compassionate grounds.

0.2. Having regard to these principles, should early release of superannuation benefits generally be more or less difficult to obtain?

It appears the retirement savings system is being used to cover issues with the health system. This means retirement savings are being eroded because of unrelated policy problems.

It is not clear that in all cases the use of super for health services is consistent with the goals of the super system, or the principles of early release. Early release should be a last resort, and there is a case that in some cases the rules of early release on medical grounds need to be tightened, particularly for non-life threatening surgery. However if early release is a genuine last resort then there is no need to make it more difficult to obtain early release.

## Compassionate grounds

1.1 Should the assessment of financial capacity be made more prescriptive and/or objective? If so, how? What information might applicants need to provide?

Yes, we should investigate the merit of means testing. If an applicant has significant other assets outside super then these other assets should be used first.

Whatever test is applied, be it means testing or some other form of assessment, the test should be objective and uniformly applied across the industry to ensure fair and consistent treatment for all applicants. This testing should be conducted by the government or an agency, not by superannuation trustees.

1.2 What factors might be driving the increase in the amount of superannuation released on medical grounds and are these factors any cause for concern?

The increase in medical ground claims appears to coincide with the move of administration from APRA to the DHS. Another factor driving the increase could be the concerning increase in the advertising of services to facilitate the early access to super, particularly to pay for bariatric (weight loss) surgery, IVF treatment, and cosmetic enhancements purported to alleviate chronic medical problems. So we believe there should be further investigation into these practices.

1.4 Should there be a limit on the number of releases permitted within a certain timeframe (for example, 12 months) and/or should there be cashing restrictions on the amount released? If so, should there be different restrictions for different medical conditions?

There is merit in developing these type of restrictions. One approach could be to consider establishing monetary restrictions for the most common 5 or 6 medical reasons that give rise to early release of superannuation (which will likely be borne out of the Department of Health's current consultation/review).

See also answer to question 2.2 about restrictions on early release for financial hardship.

1.5 Have you observed any trends in the types of treatments that are being funded by superannuation benefits and are these trends any cause for concern?

FSC members have not been able to provide data at this level. As the assessment process is managed and dealt with by the DHS, FSC members are generally not provided with the information regarding what the lump sum payments are being released for.

1.6 Are there certain treatments for which early release of superannuation should not be permitted? If so, what is the basis upon which these treatments should be excluded?

Non-life threatening medical conditions or treatments that are not for alleviating acute/chronic pain such as cosmetic surgeries should be excluded.

1.8 When might bariatric surgery be genuinely necessary to treat a life threatening illness or alleviate acute or chronic pain or mental disturbance (in general – noting that this will depend upon the specific circumstances of each case)?

We do not have specific comments on this question. However, we note in some cases patients requiring organ donations need to be under a certain BMI and in other cases an individual is in a high risk category which may lead to heart failure. In some of these cases bariatric surgery is the only option.

1.9 Should the rules explicitly require that the Regulator be satisfied that the amount claimed for a particular treatment is 'reasonable'? If so, what evidence might be relevant to that determination?

There is merit in developing requirements in this area.

For example, where a treatment is available in Australia (and the waiting list is not unreasonable) but the patient chooses to undertake the procedure overseas, a restriction could be imposed preventing travel and accommodation expenses from being recouped from super.

The government or relevant regulator should satisfy itself that the amount being claimed is reasonable; and the regulator could specify that funds cover no more than the net costs of procedures (for example by paying amounts directly to providers for net costs).

1.10 Should there be an additional category of early release in respect of dental treatment? If so, under what circumstances should early release be available and should there be any limits or restrictions?

Any release for dental would need to be for treatments to prevent life threatening dental problems.

1.12 Should the reference to a medical specialist in SIS Regulation 6.19A(3) be clarified to ensure that the practitioner is a specialist in the field most relevant to the condition being treated?

There would be merit in this approach.

1.13 Should the Regulator be entitled to seek a second opinion from an approved medical practitioner/s, or should the individual be required to obtain a reference from a list of approved medical practitioners, to ensure the objectiveness of the assessment?

This appears reasonable, and there is precedent in other areas. For example workers compensation claims and access to super due to terminal illness.

1.14 Should early access to superannuation benefits to meet expenses associated with palliative care, death, funeral or burial be limited to where there is a dependency relationship? Why/why not? Could there be any unintended consequences from expanding this provision?

There is an argument that these costs should also be available to non-dependants (for example a sibling or parent).

1.15 Should there be a maximum amount that can be released to meet a funeral expense? (For example, the amount that the Regulator considers reasonable).

There is merit in developing limits in this area.

1.16 Should early release of superannuation benefits be available to meet mortgage payments regardless of whether a person's name is on the mortgage title for their principal place of residence? What might be the implications of broadening the provisions in this way and what additional limitations might be required? For example, should release be limited to dependants or spouses or partners?

There may be merit in making this type of expansion; however it would need to be managed carefully to ensure that individuals were not subject to pressure from the owner of the property to utilise their superannuation to meet repayments for an asset in which they have no legal or beneficial interest. At a minimum it should be limited to dependants, spouses or partners in cases where there is a clear benefit to the individual concerned and it where the property has been their principal place of residence for some time.

In addition, any rules would need the non-named title holder to demonstrate that it is their principal place of residence and they have been contributing to the mortgage payments.

More broadly, in all situations where superannuation is being accessed to meet mortgage repayments, there ought to be a requirement for lenders to assess ongoing serviceability of a loan once super has been released. Our members report cases in which superannuation is released to meet mortgage repayments, only to have the loan fall back into arrears because they are unable to afford the ongoing repayments. This situation can be exacerbated where customers are able to access their superannuation on multiple occasions.

Our members also report that, because funds released from superannuation to repay mortgage arrears are paid directly to the customer, funds may be is no used for a different purpose and not paid to the lender.

As a general comment, our members have observed that the lack of direct contact between banks, the ATO and the relevant superannuation funds can cause significant delays and frustration for customers experiencing financial hardship.

1.17 Is there a fundamental difference between meeting mortgage payments and meeting rental payments which would warrant a difference in treatment (for example, in respect of the asset available to mortgagees once all repayments have been made)? Or should early release on compassionate grounds be extended to include individuals who are unable to meet rental payments? If so, what evidence should be required and what should be the threshold for release (for example, in rental arrears or rental eviction notice)?

Housing is vitally important in providing living standards both in working years and retirement. We acknowledge there are reasons for and against for expanding early access to rent.

In support for expanding early access to rent is the fact that renters are on average less well off members of society; permitting early access for home owners alone will mean that, on average, assistance is being provided to those who are better off while those who are, on average, less well off will miss out.

Having a home is be an important factor in members' and dependents' ongoing wellbeing and employment prospects, both factors could contribute to a person's retirement savings, and therefore may not be out of step with the core principles of early release.

On the other hand, opening up superannuation to pay for housing costs more broadly has risks. Such a change could be open to be taken advantage of and could have unintended consequences — for example people could take on a higher level of housing costs and risks knowing that early access to superannuation could act as a fallback.

Also, in the case of early release to prevent mortgage foreclosure, the principal place of residence represents a long-term financial asset that is likely to contribute towards the adequacy of retirement wealth, whereas the same is not the case for rent. We also note there are government assistance programs for rent (ie rent assistance) while no similar government assistance is available for mortgage payments.

If the government does decide to expand early release to include rent payments, then this should be administered by a government agency not super funds (see response to question 0.1), and this should be subject to an assessment of ongoing serviceability of rental payments once the super release has been exhausted.

1.18 Are the current disability grounds fit for purpose, or should early release be extended, for example, to disability aids? If the latter, which expenses should be included, what evidence should be required, and should there be a cap on funds released?

It is unclear why this issue would not be dealt with through the NDIS. In addition, TPD insurance provided inside superannuation might be able to provide for these costs. If a member of a super fund has made a conscious decision to opt out of TPD insurance that would otherwise cover these costs, that should be a factor in determining whether the member should have early access to super.

If however all other potential funding sources are unavailable, there may be merit in permitting early release for disability aids.

1.19 Should individuals seeking early release of superannuation under disability grounds be required to demonstrate that they have sought assistance from other Government or non-Government programs prior to being approved? If so, how should this requirement be administered?

See answer to 1.18.

1.20 Should the Regulator's residual discretion in SIS Regulation 6.19A(1)(f) be removed? What would be the consequence of doing so?

If the residual discretion is retained, the Regulator should publish guidance of what would be covered under this criteria.

1.22 Should access to superannuation benefits be available to assist victims of domestic violence? Why / why not? If yes, under what particular grounds (for example, financial hardship, homelessness, victims of crime), which expenses should be included, and what evidence should be required?

There may be merit in extending early release to circumstances of domestic violence as the victim may have inadequate funds for support. This is particularly the case in situations where the person does not have the financial resources to extricate themselves from the situation without accessing some of their super.

We however note it is not clear how 'domestic violence' would be defined (would it, for example, only include acts of physical violence) and would the abuser would need to have been found guilty of an offence. Furthermore, applying for early release of superannuation is unlikely to provide funds urgently for victims of domestic violence in immediate need. Where a situation of domestic violence results in long term severe financial hardship the existing criteria ought to be applied.

## Severe financial hardship

2.1 Having regard to the necessary trade-off between simplicity, objectivity and flexibility, should the criteria for severe financial hardship be amended? If so, how? In particular, is there merit in expanding or contracting the 26-week rule and/or the definition of qualifying Commonwealth income support payments?

We do not support relaxing the current criteria. The Commonwealth provides income support as a safety net. If this support is not sufficient, then the issue should be addressed more broadly rather than through relaxing the current criteria for early release.

2.2 Should there be a prescribed standard of proof of being 'unable to meet reasonable and immediate family living expenses'? How can the legislation guard against non-genuine claims?

We support this proposal.

Currently, some super funds may be able to confirm that a member has been on Centrelink benefits for a continuous 26-week period by checking a DHS portal. However, not all funds have access to the portal and some still rely on the member providing a printed letter which they have obtained from DHS (known as a Q230 or Q251 letter depending on the member's circumstances). This presents risks to the current process, risks that will be exacerbated if a limit on releases is introduced at a member level rather than the current fund level and were assessment of claims to remain the trustee's responsibility.

Regardless, there is currently no way to let the DHS know when an early release payment on the grounds of severe financial hardship has been made to a member. As a result, an individual with multiple super accounts may make multiple withdrawals.

Several FSC members have indicated that fund members have been using multiple super fund accounts to get around existing restrictions and limits. For example, there have been instances where a new super account was opened and funds transferred into this account either by lump sum personal super contributions or by rollover from other super funds. These transactions were followed by instructions to rollover multiple amounts, each under \$10,000, to other super funds and then a request for early release of super on grounds of severe financial hardship. Once these transfers were completed, the account was closed. In some instances, accounts were open for just 7 business days. We understand that hardship claims were also made to the super funds receiving these rollovers in the same 12 month period.

We therefore request clarification on whether the maximum amount of \$10,000 that can be released on grounds of severe financial hardship during a 12 month period is applicable per super fund or across the entire Superannuation system. If the maximum amount of \$10,000 applies across all funds, changes will be required to enable super funds to identify if the member has already obtained early release of super on grounds of severe financial hardship during the previous 12 months.

As an alternative, as indicated earlier the government could take over administration of the financial hardship release, similar to compassionate grounds release. The government or a government agency could be required to authorise the early release on grounds of severe financial hardship and notify the superannuation fund when it has done so.

## Victims of crime compensation

3.1 Should victims of crime be able to access a perpetrator's superannuation for compensation?

We see merit in this proposal.

If this were to occur, we consider the relevant assessments (such as eligibility, value and timing of release) should all be conducted by a government agency rather than by superannuation trustees (see question 3.11).

3.2 Should access to superannuation be limited to cases where a criminal conviction has been made?

See answer to question 3.12.

3.3 Should access to a perpetrator's superannuation be available for compensation or restitution arising from all crimes, just violent crimes, or another threshold (such as the maximum penalty for offence)?

Compensation should be limited to the more serious or violent crimes that can have a significant impact on the victim and their relatives.

3.4 Should access to a perpetrator's superannuation only be available if the perpetrator made irregular or out of character contributions to superannuation to shelter assets?

Such a restriction may not be warranted. If this restriction were imposed, we would request that this is assessed by a regulator than by superannuation trustees.

3.5 How would a victim's right to a perpetrator's superannuation be enforced? How would the victim gain visibility over the perpetrator's superannuation assets?

This could potentially be done as per family law splitting requests where valuations of superannuation benefits are able to be obtained via a court enforced order. An alternative that would limit the burden on super funds would be to seek the information from the ATO (as they will hold 30 June balances and contribution data within the last 10 business days from 2018–19.)

3.6 How much of a perpetrator's superannuation should be available? Should the amount be different based on the perpetrator's circumstances (for example, low balances, dependent children)?

Any decision on this issue should take account of other members of the family, not just the perpetrator. If the perpetrator has a spouse or dependent children, certain safeguards should be established to ensure they are not unduly affected (as long as they are not party to the crime).

3.7 Should access to a perpetrator's superannuation be in the form of a lump sum, portions of income stream payments or both? How should defined benefit products and annuities that have not yet commenced payments be treated?

In our view, payments should be lump sums as income streams would be complicated for trustees to implement.

3.11 In circumstances where there are concurrent family law and victim of crime compensation proceedings, how should these matters be addressed and prioritised?

Interests that are already subject to family law proceedings (such as payment or interest splitting) at the time the crime was committed should be exempt from any victim of crime compensation proceedings, since the interest has already been dealt with previously. Only the perpetrator's remaining interest should be available for compensating the victim.

What other issues might arise?

The suitability or otherwise of accessing a perpetrator's super is a matter for government. Any determination about accessing a perpetrator's super should be made external to the trustee, at a minimum should require a criminal conviction and that the ordinary balance of the perpetrator's superannuation should be preserved (akin to the requirements of section 128B and 128C of the *Bankruptcy Act 1966*).

We would be concerned if early release is permitted when there has not been a criminal conviction given the issues that could arise around natural justice. In our view trustees and super funds need to be shielded from some of the very costly processes that eventuate.

## Other comments

We request that the government a minimum 12 month lead time to implement any proposed change in this area. The superannuation industry is already implementing a number of changes resulting from the ATO SuperStream Roadmap and potential changes arising from the Improving Accountability & Member Outcomes legislation (and associated proposed APRA changes to reporting & standards). The industry is also making changes relating to the Insurance in Super Voluntary Code of Practice.

In relation to the release of benefits from a market-linked pension as a result of severe financial hardship, we note the SIS regulations do not allow for a commutation of a market-linked pension in these circumstances. By contrast, the Social Security Act 1991 provides access in these circumstances (refer section 9BA(2)(f)(vii) – further referred to in the Guide to Social Security Law at 4.9.2.40). Therefore Centrelink may approve the release of benefits however the superannuation fund is unable to release the benefits without a breach of the SIS regulations.

Please contact me with any questions in relation to this submission on (02) 9299 3022.

Yours sincerely,

[signed]

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