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Superannuation & Victims of Crime – FSC Submission

The Financial Services Council (FSC) welcomes the opportunity to make a submission to the Review of superannuation and victims of crime compensation.

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 promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The FSC supports the proposal to allow victims of crime to access the superannuation of the perpetrators of crime in limited circumstances as proposed by the Government. The FSC's comments on the proposals, detailed in the attachment, largely relate to ensuring the proposal works as intended.

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

Yours sincerely

[signed]

Michael Potter
Senior Policy Manager, Economics & Taxation

Issue 1: Limits and thresholds: It is proposed not to cap the amount of contributions that can be released under this mechanism.

The FSC supports this proposal – there should not be cap on how much of the ‘out of character’ contributions into super can be clawed back. The amount able to be clawed back should be the total amount of the compensation owed to the victim, up to the total amount of ‘out of character’ contributions.

Issue 2: Visibility of assets

The process for disclosure of a perpetrator’s assets should originate from a criminal or civil court proceeding, to balance efficacy of proceedings with appropriate oversight & privacy implications. (This could be done in conjunction with the ATO building a new, secure electronic system to give courts visibility of super info held by the ATO in appropriate circumstances.)

Trustees would not be required to comply with the claw back process if the member is subject to:

- an active bankruptcy proceeding,
- a discharged bankruptcy administered during the relevant period where bankruptcy claw-back provisions have been exercised,
- a family law proceeding, or
- if the funds are the subject of a proceeds of crime forfeiture order,

until those matters have been dealt with.

The FSC supports this proposal. In the absence of being able to extend the existing frameworks for bankruptcy proceedings (as outlined in the paper), a new mechanism is needed to enable a victim of crime to obtain visibility of the perpetrator’s super assets and contributions.

We agree that the disclosure of a perpetrator’s super assets should come from criminal or civil court proceedings, not via requests for information to trustees of super funds.

It would be appropriate for the courts 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.

FSC supports the proposal that all other proceedings (including bankruptcy, family law) should be fully dealt with first before trustees are required to action any ‘claw back’ of a member’s super for compensating a victim of crime.

Issue 3: Determining whether contributions are ‘out of character’

Two options for how to adjudicate this:

- Subjective determination, performed by either a court or a super trustee; or
- Deem all voluntary super contributions within a certain time period as a proxy for out of character contributions.

The FSC supports the first option, but this should be determined by the courts, not super trustees. It will be very difficult to determine whether or not a contribution is ‘out of character’. Trustees are not well placed to make this assessment, and it may conflict with their duties to act in their members’ best interests, which could easily conflict with victim’s interests.

We also note that contributions are subject to market movements once they are in a fund. The amount of ‘out of character’ superannuation contributions will not have the same value at date of contribution as at date of release. There could conceivably be a situation in which the entire balance of the

member's account in the fund is now worth less than the amount contributed – especially if the contribution was subject to 15% tax in the fund.

We do not support the second option – it is not necessarily true that all voluntary contributions are 'out of character'. This would inadvertently capture the contributions of self-employed persons for example, who do not receive SG and make voluntary contributions into super.

Issue 4: Process for recovering money

Released amounts would be paid into court, either directly from the super fund or through some mechanism to centralise and streamline release and payment.

The FSC supports centralising the process through a central body such as the ATO in line with matters such as payment of early release of super under compassionate grounds, which will transfer to the ATO from 1 July 2018. This would simplify and streamline fund interactions.

The process would become very difficult administratively if trustees were receiving payment requests in various formats from separate courts and jurisdictions across Australia. As a result, these recovery orders must come to funds via a single / secure / standardised format.

To make it easy, trustees should just be provided with the amount to release, with the amount provided to the victims to be before any fees and charges. The timeframes imposed on funds should also be practical (suggest 30 days) to allow for the unwinding of any tax concessions (mentioned below) and other practical issues.

In addition, the orders granted by the court should only make reference to the perpetrator and not the specific super fund. It would then be up to the ATO to send it to the current fund. This is to address the situation where the perpetrator does a rollover to a different fund just after the order is granted.

Issue 5: Taxation rate applied to compensation

Released amounts should not incur additional tax liabilities for the superannuation account holder. Any tax concession associated with the contribution (eg. in the case of a personal deductible contribution) should be unwound, to the extent practicable, with the voiding of the transaction.

We support the principle of this proposal. Unwinding claims for personal tax deductions would not be easy from a practical perspective, for example there are complications where the tax deducted relates to prior financial years in terms of how funds can recoup tax already paid.

Money released should also be tax-free in the hands of the victim.

We support this proposal.

Draft proposal 2: Allowing uncompensated or partially compensated victims of crime broader access to the perpetrator's superannuation balance

Issue 1: Burden of proof

Proposal would only apply to unpaid compensation orders where a criminal conviction has been obtained. This reflects a view that the act should have been proven to the criminal standard – beyond reasonable doubt. It would not apply to unpaid civil compensation claims in the absence of a prior criminal conviction.

We support this approach.

Issue 2: What crimes should be covered?

Super trustees should be required to release a member's funds to a court, as a lump sum, where an officer of the court certifies that:

- there has been a criminal conviction against the member;
- the crime is a serious crime, involving violence against an individual, that has a maximum custodial sentence of 10 years or greater;
- a compensation order has been made to a primary victim of that crime under State and Territory Sentencing Acts or in a civil claim following conviction; and
- the perpetrator's other assets are exhausted, or the compensation order remains unpaid after twelve months.

The FSC supports the request for access to superannuation should be done through a single body (the courts), which would provide super funds with all the necessary information to release benefits to the victims when required (i.e. trustees should not be involved in any way in the assessment process, only for making payment).

Issue 3: What victims should be eligible?

Only the victims themselves (i.e. primary victims) should be able to make a claim against a perpetrator's super.

We support this in principle – but in the event that the primary victim dies as a result of the act of violence, a secondary or related victim (such as a close family member or financial dependant) should be able to claim against the perpetrator's super.

Issue 4: Types of unpaid compensation orders covered

Victims of crime will be able to make a claim against the perpetrator's super following a criminal trial or through an order made pursuant to a civil law claim.

We support this proposal – both types of orders should be covered.

Issue 5: How to ensure that access to super is a last resort

Trustee would only be able to release a member's super if a state sheriff's office or similar certifies that other assets of the perpetrator have been exhausted (or that the compensation order remains unpaid for 12 months).

We support this proposal – this is consistent with the view that super should only be available as a last resort and after the perpetrator's other assets have been exhausted. It would also mean that super fund trustees would not be involved in any form of assessment as to whether victims are eligible, or in the assessment of any other criteria.

But the request for access to super should be done through a single (Commonwealth) regulatory body, which would provide super funds with the necessary information to release benefits when required. Having each state/territory being able to apply for a perpetrator's super could be overly complex to administer, particularly if each state/territory has different requirements.

Issue 6: Balancing rights of the victim with rights of the perpetrator's dependants

Any concurrent family law property (including super) settlement proceedings should be completed prior to a victim's compensation order being enforced via super.

If the member has no dependants, the full balance should be available to the victim. If the member has dependants, a proportion of the balance should be available.

- Option 1: allow 50% of the balance up to \$1.6 million (plus any amount in excess of \$1.6 million) to be available as an aggregate limit for any claims arising out of a conviction; or
- Option 2: do not have an explicit limit but ensure family law proceedings can 'interrupt' claims to allow potential family law splitting prior to any payment to the court.

We support this proposal – any family law processes should be completed first so that victims are compensated by the perpetrator, not their dependants.

We support the full balance being available if the perpetrator has no dependants. If the perpetrator has dependants, certain safeguards should be established to ensure they are not unduly affected (as long as they are not party to the crime). The preference would be for Option 2. Under Option 1 if the perpetrator has dependants at the time of the crime and say \$2 million in super, the victim's compensation would be limited to \$1.2 million (i.e. 50% of \$1.6m + the \$400k in excess of \$1.6m). But by the time the perpetrator retires, they may no longer have dependants, which means the perpetrator themselves would benefit from the \$800k (plus interest) that was untouched as part of the compensation, not the perpetrator's dependants (or the victim).

Issue 7: Application of the draft proposal to pre-existing convictions and unpaid compensation orders

It is proposed that access to a perpetrator's super would be available for past crimes and existing eligible unpaid compensation orders.

We support this proposal – it is reasonable to allow existing unpaid judgement debts arising from criminal compensation orders to be available for compensation through super.

The person would already have committed the serious crime and already had a court determine the appropriate compensation they should pay the victim.

The alternative would be for only new crimes or compensation orders from a certain date to be available for compensation from super which, although would be a positive outcome for future victims, would be unfair on existing victims who remain uncompensated.

Issue 8: Recovery of costs by state & territory compensation schemes

State and territory compensation schemes should not be able to recover the costs of their payments (to victims of crime) from the perpetrator's super balance.

Support – allowing state/territory compensation schemes to claim against a perpetrator's super would substantially broaden the scope of the proposal, as some state/territory schemes allow compensation to be paid to a wide range of individuals in the absence of a criminal conviction.

As outlined in our response to Issue 3 above, only the victims themselves (or a close family member or financial dependant, if the primary victim dies as a result of the violent crime) should be able to make a claim against a perpetrator's super.

Allowing each state/territory to apply for a perpetrator's super would also make the proposal complex to administer.

Issue 9: Tax rate applied to compensation

The review proposes that no tax be applied to the release of funds from the perpetrator's super account to pay compensation to a victim.

We support this proposal – this correctly distinguishes compensation payments to victims of crime from the existing early release of super (i.e. severe financial hardship and compassionate grounds). Unlike the existing early release regime, which is taxed (albeit concessionally), payments under this proposal would be for the benefit of a third party (i.e. the victim). So it makes sense for the payment to be untaxed.

The preservation status also needs to be considered. Suggest same approach as per majority of super benefit payments.

If the compensation payments were to be taxed, they would need to be grossed up for the tax component, together with any fees or charges applied by the super fund, otherwise the full amount would not be available to the victim.