



CHARTERED ACCOUNTANTS
AUSTRALIA • NEW ZEALAND

12 February 2018

Division Head
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted via email to: superannuation@treasury.gov.au

Dear Sir/Madam,

Submission – Early release of superannuation benefits under compassionate and financial hardship grounds and for victims of crime compensation

Chartered Accountants Australia and New Zealand welcomes the invitation to make a submission on the above titled review.

Please note: our submission responds solely to the issues raised in the consultation paper and related material and does not imply our views on other aspects of the superannuation system or on any past or future policy proposals.

We would be pleased to discuss any aspect of our submission.

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Historical Development of Early Release of Super Benefits

We note that early release of superannuation benefits has been a feature of the superannuation laws for many years including in the *Occupational Superannuation Standards Regulations – OSSA Regs* – in 1987 when it was first made by the Governor General. A similar feature was then inserted into the *Superannuation Industry (Supervision) Regulations – SIS Regs* – in 1994 when they were first made by the Governor General however “financial hardship” in the OSSA Regs was altered to “severe financial hardship” in the SIS Regs.

Between 1987 and 1997 the early release of superannuation benefits before retirement and due to reasons other than specifically permitted by regulation had to be approved by the regulator – back then, the Insurance and Superannuation Commissioner.

As part of the 1997 Federal Budget the then Treasurer and Minister for Social Security jointly announced that, with effect from 1 July 1997, the “arrangements for the early release of superannuation benefits will be tightened to enhance preservation” and included a plan to introduce a “simple objective test of hardship to be administered by fund trustees” to determine financial hardship and “defined criteria for determining the release of benefits on compassionate grounds”¹.

Former Senate Inquiry Report Into Early Release of Super Benefits

In September 1997 the then Senate Select Superannuation Committee reviewed the current early release rules that at the time were newly implemented and said that “the Committee has some problems with the inflexibly (sic) of the new provisions”². It did agree that more objective criteria was appropriate but said the then newly introduced changes – which are now subject to this current consultation – may, in some cases, be inflexible and called for some refinements.

In relation to the financial hardship rules, the Senate Committee made three points:

1. Those on long term Commonwealth income support may not be in financial hardship that would warrant the early release of super benefits
2. The financial hardship rules work in such a way that accessing super monies might be the first option for those who satisfy the qualifying rules and are facing some fiscal difficulties
3. People not in receipt of Commonwealth income support payments can find themselves in financial hardship and would not be eligible to obtain a benefit under either the financial hardship rule or under the compassionate grounds provisions
4. Applicants who wished to appeal an objectively determined decision of a super fund would have no avenue for appeal (however as we discuss later, over the last 20 years some unsuccessful financial hardship early access rule applicants have complained to the Super Complaints Tribunal)
5. The Committee said that superannuation should be used to alleviate the burden of the aged pension and “has no role in supporting or underpinning the social security system”³.

In its conclusions about this topic the Committee said:

Restricting the definition of income support to certain Commonwealth payments seems unduly restrictive, while the lack of additional criteria beyond a period in receipt of payments may actually encourage the early access of superannuation.

¹ Costello, P and Newman, J, *Savings: Choice and Incentive*, Canberra, May 1997, p. 3

² Senate Select Committee on Superannuation, *Super - Restrictions on Early Access Small Superannuation Accounts Amendment Bill 1997 and related terms of reference*, Canberra, Sept 1997, par 4.10

³ *Op cit*, par 4.47

Other forms of income support would seem equally relevant for purposes of this objective test. Also, the Committee considers the period in receipt of such income needs to be reduced to three months, and a subjective test needs to be attached. (pars 4.57 and 4.58, our emphasis)

In December 1997 the government introduced amendments to the SIS Regs to implement part of a subjective test recommendation for those aged under their *preservation age*. That is the trustee determines that the member is “unable to meet reasonable and immediate family living expenses”.

In July 1998 the Commonwealth income support payments that would qualify a member to access their super benefits under the hardship rules were expanded to include exceptional circumstances relief payments often paid to farmers for drought relief.

There have been no further amendments in this area since 1998.

In relation to the compassionate grounds provisions, the Senate Committee made the following points:

1. Applicants who wished to appeal a decision could only initiate formal legal proceedings in the Federal Court.
2. “In the compassionate grounds area, the Committee is inclined to view the new objective criteria as having more the character of defined desperation than compassion. To attempt to strictly define such grounds, although no doubt based on the ISC's experience under the former tests for hardship, is a conceptually flawed exercise. In the Committee's view, the concept of "compassionate ground" necessarily implies a sympathetic discretion, albeit to be exercised only in rare circumstances.⁴

These compassionate grounds rules were amended in 1997, 1998 and 1999. The 1997 amendments provided some greater flexibility in some of the eligibility criteria for early release under compassionate grounds.

Superannuation Complaints Tribunal (SCT) cases

Our search of the SCT cases found that only a small number of super fund members complained to the Tribunal about an inability to obtain early release of benefits because of severe financial hardship grounds.

At the time of writing this submission there were about 3,500 written determinations on the SCT website.

In relation to financial hardship we identified about 13 cases. The trustee's decision was affirmed in 62% (that is 8) of cases with the balance seeing the SCT vary the trustee's decision. Nearly all the variation cases occurred before 2003.

We could not find any SCT cases that specifically dealt with the compassionate grounds rule.

Inadequate Data Publicly Available

We know that compassionate grounds applicants must be able to demonstrate that their super savings are the only funds available to them to pay for their requested expenditure. We also know that financial hardship applicants must provide official recent documentation that they have been in receipt of specific Commonwealth Government income payments for at least 6 months and are unable to meet reasonable and immediate living expenses.

⁴ *Op cit*, par 4.61

Apart from these broadly known requirements the precise financial circumstances of compassionate and financial hardship applicants is not publicly known.

We also know little about the location and frequency that medical doctors have certified that super fund monies should be withdrawn to pay for medical procedures.

As a result our comments must be read with these limitations in mind.

Regulatory Confusion

We are of the view that the regulatory structure of these rules create complexity for consumers seeking to use financial hardship or compassionate grounds.

In this area, as with many areas of superannuation, there are the regulatory rules and there is also a fund's trust deed and other governing rules. Both of these sets of rules can be changed quickly and without much general community or specific member knowledge.

The confusion is that the regulatory rules can state one rule but the fund's trust deed can state a more restrictive rule.

Many APRA regulated super funds will provide information on the documentary evidence they need to determine financial hardship but we think consumers need to know how trustees make their assessment.

When a super fund is found to have rules that are more restrictive than the super laws then the only way a member might be able to gain access to their benefit under the two rules in question is to transfer their balance to another super fund. That involves time delays and potential costs.

We are not in favour of the government enforcing more detailed early access provisions into fund governing rules via regulation.

However we believe an alternative solution maybe for funds to publish their requirements clearly, including any inconsistencies with the SIS Regulations and for consolidated information to be made available on the APRA and/or ASIC websites.

As we note below, funds should publish how they assess for severe financial hardship once they receive all required documentation.

Net of Tax Proceeds

At present all benefits are paid net of any lump sum tax applying to the Taxable Component portion of the benefit.

Without the benefit of verifiable data, it is nevertheless our expectation that in many cases the majority of the tax paid will be fully rebated via the income tax system when the individual submits their personal income tax return as their marginal rate will be lower than the rate that applied when the benefit was paid out of the super fund.

This process ensures individuals initially receive less than they otherwise could (when they are already under financial stress), creates multiple internal and external transactions for super funds and the ATO and probably generates negligible net Commonwealth revenue.

The government needs to consider simplifying this system to reduce overall system costs – for example by allowing financial hardship and compassionate ground benefits to be paid tax-free – without unnecessarily impinging on overall net government revenue.

Principles Underpinning Early Release

Q0.1 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?

Chartered Accountants ANZ believes the Sole Purpose Test, as defined in the *Superannuation Industry (Supervision) Act – SIS Act*, should be added as one of the guiding principles. That is, superannuation funds exist to provide core and potentially ancillary purposes as defined in the Sole Purpose Test definition.

Q0.2 Having regard to these principles, should early release of superannuation benefits generally be more or less difficult to obtain?

As noted there is a lack of quality data about how these 20 year old early release rules are used in practice. Our general impression is that overall this area of the superannuation law has been working reasonably well and we would be surprised if it was deemed necessary to make wholesale amendments especially limiting their overall scope.

Inability to transfer benefits from United Kingdom (UK) based pension schemes

It is well known that UK pension schemes can transfer benefits to a Qualifying Recognised Overseas Pension (QROP) scheme under a range of criteria including the demand that benefits cannot be paid from such schemes before retirement except in limited circumstances that do not include compassionate grounds or financial hardship grounds as defined in the SIS Regs before member reaches age 55.

This relatively recent UK regulatory requirement has seen a dramatic decrease in the funds flowing from UK pension schemes into Australian based super funds. This change is negatively impacting permanently returning ex-pat Australians and permanently emigrating UK citizens because an inability to transfer their UK pension monies means that they are forced to leave money in the another jurisdiction which increases costs and creates regulatory uncertainty.

We suggest that the SIS Regs should be amended to permit super funds to irrevocably elect to exclude their fund, or a defined portion of a fund, from early release rules. This may enable them to receive UK pension scheme benefit transfers.

Compassionate Grounds

Q1.1 Should the assessment of financial capacity be made more prescriptive and/or objective? If so, how? What information might applicants need to provide?

The circumstances when an individual can claim for an early release under compassionate grounds together with the requirement that they need to be able to demonstrate that they do not “have the financial capacity to meet an expense” is an adequate compromise.

Q1.2 What factors might be driving the increase in the amount of superannuation released on medical grounds and are these factors any cause for concern?

We do not have definitive information or data to answer this question. We believe greater effort needs to be made by the Australian Taxation Office when it takes over administration of this area to collect data to enable this type of analysis to be completed.

Question 1.3 Do the current provisions for early release on medical grounds strike the appropriate balance between preserving income for retirement and providing assistance in times of genuine hardship? If no, what are the alternatives?

Whilst we lack information or data about compassionate ground applicant's circumstances across all super funds we are of the view that many applicants will be seeking to use their super monies because they will have not ready access to other sources of money to pay for medical procedures (as required by the compassionate grounds regulation).

We think it is reasonable to assume that many applicants will retire on the full age pension. On that basis we think the current balance between putting away money for retirement and early release of benefits is about right.

Question 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?

We do not believe there should be a limit on the number of applications that can be made and each case should be assessed on its merits.

Question 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?

We do not have definitive information to answer this question with certainty.

Question 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?

Question 1.7 When might ART (IVF) be 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)?

Question 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 have insufficient medical or psychological knowledge to answer these questions.

Q1.9 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?

In our view there needs to be an amendment to this rule.

Applicants under this rule, if they wish to receive more than \$20,000, should have to supply at least two quotes – or more at the discretion of the Department of Human Services and, in future, the Australian Taxation Office – for any service or treatment they would like completed.

In our view the cost of this additional opinion(s) should be paid for by the individual.

If all opinions agree about cost and the need for a service or treatment then any professional fees for the opinions can be met from the amount withdrawn from super assuming the applicant is otherwise eligible for a withdrawal under Compassionate Grounds.

If any additional opinion requested by the Regulator says a treatment or service is not required and therefore a Compassionate Grounds application is rejected, then we believe the applicant should be able to withdraw money from their super fund – tax-free – for the cost of seeking the professional fees only if they genuinely lack other resources.

Q1.10 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?

We believe Reg 6.19A currently provides sufficient flexibility for early release of super benefits for dental treatments.

Q1.11 Should SIS Regulation 6.19A(a)(ii) and (iii) be amended to refer to ‘treatment’ rather than ‘alleviation’ of acute or chronic pain? Alternatively, should those provisions be removed entirely (so that early access is only available where the individual’s condition is life-threatening)? What would be the consequences of this approach?

We believe potential words, and their definitions, to use here are:

- “treat” – give medical care or attention; try to heal or cure
- “alleviate” – to make easier to be endured or lessen
- “mitigate” – make (something bad) less severe, serious or painful

Subject to the views of medical professionals and legal interpretation, we think “alleviate” would be the better word to use.

We do not support the full removal of Regulations 6.19A(a)(ii) and (iii).

Q1.12 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 proposed condition being treated?

In principle, we would support such an amendment.

Q1.13 Should the Regulator be entitled to seek a second opinion from an approved medical practitioner/s, or should the individual be required to receive a reference from a list of approved medical practitioners, to ensure the objectiveness of the assessment?

We would support such amendments in line with our answer to Q1.9.

Q1.14 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?

We believe that the current dependency relationship rule is broad enough however we would support a regulatory amendment to permit the Regulator’s concession to broaden it in exceptional circumstances.

Q1.15 Should there be a maximum amount that can be released to meet a funeral expense? (For example, the amount that the Regulator considers reasonable.)

We believe our recommendation that applicants must supply two or more quotes (see our response to Q1.9) plus the potential for the Regulator to demand additional quotes provides a solution here.

Q1.16 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?

We believe this type of amendment may be subject to abuse and would not support it. A potential solution maybe the requirement to provide evidence of an implied obligation on the third party – that

is, the super fund member – such as witnessed agreements and evidence that mortgage payments have already been made for a period of time from the applicant's bank accounts.

Q1.17 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)?

We would support the ability of renters to claim under compassionate grounds for rental arrears as detailed on an eviction notice with funds remitted directly to the landlord.

Q1.18 Are the current disability grounds fit for purpose, or should early release be extended 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?

We believe the current access rules (including the Regulator's residual concession) are sufficient.

Q1.19 Should individuals for 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 would this requirement be administered?

We would support this amendment as we think superannuation compassionate grounds should be the last resort. The Regulator should administer this so that formal documentation from government providers must be supplied with a compassionate grounds application detailing what necessary disability aids are still required but have not been funded. The compassionate grounds regulator should have the right to seek additional opinions if deemed necessary.

Q1.20 Should the Regulator's residual discretion in SIS Regulation 6.19A(1)(f) be removed? What would be the consequence of doing so?

We would not support this removal.

Q1.21 Are there situations outside of the current compassionate grounds which may justify inclusion in the early release of superannuation provisions, balanced against the need to preserve superannuation benefits to provide income in retirement?

We believe any additional cases can be handled via the Regulator's current administrative concession.

Q1.22 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?

It is often very costly to establish a family home and someone leaving an abusive relationship will need access to money. We would support an amendment to permit the release of money under compassionate grounds if money is unavailable in domestic violence cases from other sources.

Severe Financial Hardship

Q2.1 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 think the 26-week rule requires amendment however we think that transport accident, worker's compensation and life insurance income protection policy payments should also be included if reasonable and immediate living expenses cannot be met.

We consider that households suffering from temporary financial hardship because employment has involuntarily ceased – for example because of maternity/paternity leave, redundancy or enforced/non-voluntary early retirement – and allowable government benefits do not cover normal expense needs that had been put in place whilst employed, should also be allowed to claim under the severe financial hardship rule.

Q2.2 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 do not believe there needs to be a standard proof. In our view information about how funds administer this area needs to be more easily available.

Victims of Crime Compensation

Q3.1 Should victims of crime be able to access a perpetrator’s superannuation for compensation?

We believe this is a worthwhile policy change however any amendments will have to be very carefully drafted and implemented. The government will need to consider who is or is not a victim and the impact on all victims of taking the perpetrator’s super monies. In some cases victims will include perpetrator’s families and business associates.

Q3.2 Should access to superannuation be limited to cases where a criminal conviction has been made?

No. Many crimes remain unpunished for a variety of reasons including perpetrator’s escaping conviction because relevant statutes do not cover specific crimes and mistrials.

Q3.3 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)?

We believe all crimes should be covered by any new early access rule.

Q3.4 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?

Q3.5 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?

Q3.6 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)?

Q3.7 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?

Q3.8 Should contributions into superannuation after a compensation order has been made count towards the amount that can be accessed?

Q3.9 Where a criminal conviction has been made, should victims be able to access a perpetrator’s superannuation to pay either outstanding compensation or restitution orders?

Q3.10 Should State and Territory compensation schemes be able to recover their payments to victims from the perpetrator’s superannuation?

**Early Release of Superannuation Benefits – Compassionate, Financial Hardship and Compensation for Victims of Crime
Chartered Accountants ANZ submission**

Q3.11 In circumstances where there are concurrent family law and victim of crime compensation proceedings, how should these matters be addressed and prioritised? What other issues might arise?

We believe that a potential model for the government to follow in relation to the portion of a perpetrator's superannuation available to victims, are those provisions governing the splitting of super benefits contained within the Family Law Act.

Under that legislation super benefits are considered assets that must be factored into a relationship breakdown property settlement. As part of this process super funds are required to provide information to non-member spouses about their former spouse's interests held in that fund and, under direction of the Court, are also required to transfer benefits to another super fund in a timely fashion or to pay money directly to a non-member spouse.

We believe that as part of this process for victims of crime a Court should be free to decide if the rights of victims or family law proceedings should take precedence. The Court could also consider the merits of all victims and then make a judgement based on the evidence presented.

Should you require any further information or wish to discuss the contents of this submission, please contact Tony Negline, Head of Superannuation on 02 8078 5404 or by email at tony.negline@charteredaccountantsanz.com

Yours sincerely,

A handwritten signature in black ink that reads "Liz Stamford". The signature is written in a cursive, flowing style.

**Liz Stamford FCA
Head of Policy**