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AUSTRALIA + NEW ZEALAND

18 June 2018

Manager, Early release of superannuation
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

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

Dear Sir/Madam,

Review of superannuation and victims of crime compensation

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

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

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members are known for their professional integrity, principled judgment, financial discipline and a forward-looking approach to business which contributes to the prosperity of our nations.

We focus on the education and lifelong learning of our members, and engage in advocacy and thought leadership in areas of public interest that impact the economy and domestic and international markets. We are a member of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance and Chartered Accountants Worldwide which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

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Introductory Comments

As previously advised in our February 2018 submission on Treasury's initial consultation into "Early release of superannuation benefits under compassionate and financial hardship grounds and for victims of crime compensation", we are broadly in favour of both draft proposals.

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An over-riding objective with any change made in this area must be to avoid the old legal maxim that “hard cases make bad laws”.

We agree that it is important to integrate the new arrangements with the existing legal frameworks, specifically bankruptcy laws and proceedings, family law and proceedings, and the Federal and State or Territory proceeds of crime regimes.

Our submission deals with the issues on which Treasury has sought feedback.

Draft Proposal 1: Preventing use of superannuation contributions to shield assets from victims of crime

Issue 1: Limits and thresholds

The paper proposes access to superannuation contributions for fully unpaid compensation orders flowing from all indictable offences.

We believe it should only apply to serious indictable offences (that we define as criminal trials involving judge and jury) and serious offences that an accused can elect to have dealt with by a judge alone (sometimes referred to as hybrid offences).

“Serious offences” would need to be defined. We suggest a minimum prison term of five years, in line with the NSW criminal code.

This would mean that this proposal would not apply to summary offences (e.g. road traffic offences such as careless driving, drink driving, and unlicensed driving; minor assaults; property damage; and offensive behaviour).

We think that superannuation monies should only become available when the time period to allow an appeal to a higher court has lapsed as otherwise there is a risk of an appeal exonerating the accused after some of their superannuation contributions had been paid to victims.

In rare cases, a conviction may be overturned (sometimes many years down the track) and the legislation should cater for this possibility – perhaps by way of a ministerial discretion to make an ex-gratia payment to restore the accused to the financial position which would have prevailed had his or her superannuation account not been dissipated.

The Treasury paper does not discuss how offences committed in an overseas jurisdiction may be dealt with. We believe that the relevant criminal processes of a foreign jurisdiction would need to be assessed to determine if it “fits” with the comparable Australian criminal law framework.

We agree that the amount of “out of character” contribution available under this proposal should not be capped.

It is possible to withdraw super benefits and have them deposited into a super fund in the name of another person. In addition, it is also possible to split contributions with a spouse. The bankruptcy-superannuation provisions contain “tracing” rules and similar provisions would be required here.

Issue 2: Visibility of assets

The courts will need an avenue to obtain information about a convicted criminal's superannuation contribution history.

The Tax Office holds this information and the court could direct what portions of it could be released to various parties. The Tax Office also retains information about each individual's superannuation balances. If appropriate this data also needs to be released for the 'tracing' issue we raise under Issue 1 above. The ATO knows from its data records if contributions have been split with a spouse and its destination.

We agree that there will need to be changes to taxpayer confidentiality legislation.

We note two limitations:

1. Self Managed Superannuation Funds do not report superannuation contributions in real time. They report contributions when they submit an annual return to the Tax Office and these returns may not be submitted until many months after the end of a financial year. This issue could be solved by issuing a statutory notice to SMSF trustees requiring the release of information
2. The ATO may have no visibility to trace withdrawn superannuation monies that have been given to another party. A trustee in bankruptcy under the superannuation contribution provisions is able to request a statutory recovery notice is issued and tracing orders are used to 'follow the money'. A similar approach could be used here.

We note that assets held in an offshore superannuation fund (or equivalent retirement savings vehicle) cannot be accessed for practical as well as jurisdictional reasons.

Issue 3: Determining whether contributions are "out of character"

Due to the costs and difficulties identified for subjective adjudication, we support a default approach. We suggest that all personal contributions including those that are claimed as a tax deduction and salary sacrifice contributions that do not fit the same pattern during the three years before the crimes were committed should be considered "out of character".

It is often reasonably clear that contributions are in or out of character. The Australian Financial Complaints Authority could be given sufficient powers to adjudicate any dispute.

Issue 4: Process of recovering money

On the basis that the ATO have existing processes to collect and pay individual taxpayers, in our view, the best collection method would be for the released proceeds to be sent to the ATO for distribution to relevant victims as per court order(s).

Because of delays in the legal process and the possibility that victims may dispute the court's allocation decision, consideration should be given to an earnings rate for disputed superannuation funds held by the Tax Office beyond a specified period of time.

Issue 5: Taxation rate applied to compensation

We agree with the approach in the Treasury consultation paper, that is:

1. There should be no further tax liabilities for the superannuation fund member whose money is withdrawn
2. All tax concessions on any contributions should be unwound
3. Money should be released to victims tax-free

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

Issue 1: Burden of proof

We support the focus on criminal conviction with a minimum term of imprisonment of at least 10 years.

We note that in addition there are a range of court-ordered *civil* compensation amounts which clearly relate to, or follow-on from, the criminal processes.

For example, regulators typically have a choice between pursuing criminal or civil action. Also, civil action may occur because of the higher evidentiary burden applicable in criminal proceedings cannot be satisfied based on legal advice from the outset or because of an adverse criminal court decision.

Under the proposals, if the civil litigation route is chosen from the outset, the issue of compensation from superannuation will not arise.

We recommend that Treasury obtain specialist legal input in this context to clearly clarify the range of circumstances where civil compensation could be met from superannuation benefits. Mapping examples of the relevant criminal and related civil legal processes intended to be covered by the proposal would be highly desirable

There are also complex issues arising for businesses structured as partnerships (with joint and several liability), trusts and companies. It is conceivable for example that a successful criminal prosecution of a partner may lead to follow-up civil action against their partnership. Similarly, criminal action against a specific director could lead to follow-up civil action against other directors for dereliction of duties. Those partners and directors who are the subject of civil action should not, in our view, have their superannuation balances at risk.

Issue 2: What crimes should be covered?

Please see our responses above.

Although there will be some hard outcomes, we agree that it is necessary to clearly delineate the circumstances in which superannuation benefits will be accessed for compensation. The proposal that a serious criminal offence should be defined as one with a minimum custodial sentence of at least 10 years seems appropriate.

Issue 3: What victims should be eligible?

We agree that the scope of compensation should be confined to primary victims, with access by secondary parties confined to those who are (or were) dependants of the primary victim.

We believe that it is important to limit the scope for further disputation and appeal for an extended range of persons who may see financial opportunity, or who are seeking to resolve personal disputes about the allocation of compensation obtainable from superannuation balances.

Accident insurers should be prohibited from claiming, directly or indirectly, against an at fault driver under these provisions.

Issue 4: Types of unpaid compensation orders covered

Subject to the caveats expressed earlier, we agree that unpaid compensation orders from both Sentence Act-style orders as well as those made in civil actions should be covered by this provision.

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

We agree that access to superannuation should only be available as a last resort and should only become accessible for compensation purposes when the time period to allow appeal to a higher court has lapsed.

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

The perpetrator's dependants may be innocent in the commission of a wrong and deserve to be treated fairly and equitably.

Family law interaction

We agree with the approach outlined in the Treasury paper that family law settlements should be completed first. However, to avoid the temptation to "double dip", a claimant who successfully claims under the family law provisions should then be prohibited from claiming for additional superannuation assets under victims of crime provisions.

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

We recommend that Treasury obtain specialist legal input.

We do not support retrospective legislation in general because actions and determinations are made on the basis of laws applicable at the relevant date. In relation to this issue, a judge will have already determined the penalty for the perpetrator on the basis of extant law and existing victim compensation processes.

We support the approach of accessing superannuation balances based on unpaid compensation orders at the time any new laws come into effect.

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

We do not believe State and Territory compensation schemes should receive benefits from superannuation funds. This function should be performed by the Tax Office.

Issue 9: tax rate applied to compensation

We agree that such payments should be paid to victims' tax free.

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,



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Chartered Accountants Australia and New Zealand