
TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2021: SUPERANNUATION INFORMATION FOR FAMILY LAW PROCEEDINGS

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of contents

Glossary	1
Chapter 1 Superannuation information for family law proceedings	3

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
Court Rules	Currently, the <i>Family Law Rules 2004</i> (Cth) and the <i>Federal Circuit Court Rules 2001</i> (Cth), noting that the rules will be updated to reflect the formation of the <i>Federal Circuit and Family Court of Australia Act 2021</i> (Cth)
Family Law Act	<i>Family Law Act 1975</i> (Cth)
Family law courts	The Federal Circuit and Family Court of Australia and the Family Court of Western Australia
Federal Circuit and Family Court of Australia	The Federal Circuit and Family Court of Australia will be formed in September 2021, upon commencement of the <i>Federal Circuit and Family Court of Australia Act 2021</i> (Cth) and Schedule 1, Parts 1 and 2 of the <i>Federal Circuit and Family Court of Australia Act (Consequential Amendments and Transitional Provisions) Act 2021</i> (Cth)
Income Tax Assessment Act	<i>Income Tax Assessment Act 1997</i> (Cth)
Part VIIC	Part VIIC of the Family Law Act deals with superannuation splitting for separating de facto couples in Western Australia. Part VIIC will be inserted into the Family Law Act by the <i>Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020</i> (Cth), when that Act commences.
Permitted family law proceedings	Proceedings as defined in proposed subsections 90XZJ(1), 90YZY(1) and 90YZY(2) of the Family Law Act.
Property settlement proceedings	Defined in subsection 4(1) of the Family Law Act

Treasury Laws Amendment (Measures for Consultation) Bill 2021: superannuation information for family law proceedings

<i>Abbreviation</i>	<i>Definition</i>
Registry, registries	Registry Manager of the Federal Circuit and Family Court of Australia, and the Principal Registrar of the Family Court of Western Australia
Schedule	Schedule 1 to the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Superannuation information for family law proceedings
Secure portal	The encrypted electronic system for secure information sharing between registries and the ATO, created to implement this Schedule
Superannuation information	Information about the identity and value of each superannuation interest of a party to a permitted family law proceeding. This information is protected information under Schedule 1 to the Taxation Administration Act.
Taxation Administration Act	<i>Taxation Administration Act 1953</i> (Cth)

Chapter 1

Superannuation information for family law proceedings

Outline of chapter

1.1 This Schedule creates an information sharing mechanism to allow the family law courts to access certain superannuation information held by the ATO for the purposes of permitted family law proceedings.

Context of amendments

1.2 On 20 November 2018, the then Minister for Women announced the ‘Improving visibility of superannuation assets in family law proceedings’ measure, as part of the inaugural Women’s Economic Security Statement.

1.3 The Australian Government provided \$3.3 million to the ATO to develop and implement a secure electronic information sharing system that would allow superannuation information to be safely shared with the family law courts for the purposes of this information being disclosed to parties to a family law matter.

1.4 This new information sharing process will make it harder for parties to hide or under-disclose their superannuation assets in family law proceedings, and will reduce the time, cost and complexity for parties seeking accurate superannuation information from one or more superannuation funds, or by subpoenaing employment records.

1.5 This will support more separated couples to divide their property, including superannuation, on a just and equitable basis, and help alleviate the financial hardship and unequal retirement income outcomes that people, particularly women, can experience after separation.

1.6 This measure responds directly to recommendations made by the House of Representatives’ Standing Committee on Social Policy and Legal Affairs in its inquiry into ‘A better family law system to support and protect those affected by family violence’ and the Women’s Legal Service Victoria’s ‘Small Claims, Large Battles’ report.

Summary of new law

1.7 This Schedule creates an information sharing mechanism to allow the family law courts to access certain superannuation information held by the ATO for the purposes of permitted family law proceedings.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Request to registries by party to family law proceedings	
A party to permitted family law proceedings can apply to the registries to request superannuation information of the other party from the Commissioner.	<p>A party to permitted family law proceedings cannot request superannuation information about the other party from the Commissioner.</p> <p>They also face difficulties in getting accurate or complete superannuation information of their former spouse/de facto partner unless they have sufficient information to make a request to the trustee under s90XZB of the Family Law Act or have sufficient funds to subpoena employment records from a former employer.</p>
Registries to request superannuation information from ATO	
Registries may request superannuation information from the Commissioner on behalf of parties to permitted family law proceedings.	Registries are not authorised to request superannuation information from the Commissioner on behalf of parties to permitted family law proceedings.
ATO to provide superannuation information to registries	
<p>The Commissioner may provide superannuation information to the registries, in response to a request by the registries for that information on behalf of a party to property settlement proceedings.</p> <p>The party seeking that information must be a former spouse or de facto partner. The request must be made in the approved form through the</p>	The Commissioner is not authorised to provide superannuation information to the registries, in response to a request by the registries for that information on behalf of a party to permitted family law proceedings.

<i>New law</i>	<i>Current law</i>
secure portal by the registries on behalf of that party for the purposes of permitted family law proceedings.	
On-disclosure of ATO superannuation information to parties	
Registries may receive superannuation information provided to them by the Commissioner, and disclose it to the parties and their lawyers, in response to a request by a party for the purpose of permitted family law proceedings.	Registries are not authorised to receive superannuation information provided to them by the Commissioner, or to disclose it to the parties and their lawyers for the purpose of permitted family law proceedings.

Detailed explanation of new law

Party to proceedings may apply for information to the registries

What proceedings

1.8 A party to permitted family law proceedings in the family law courts may apply, in the approved form, to the registries, for the registries to request the superannuation information of the other party to proceedings, from the Commissioner.

1.9 For separating married couples, and separating de facto couples everywhere in Australia except Western Australia, permitted family law proceedings are those that relate to the division of property of a marital or de facto relationship, including the distribution of superannuation interests. *[Schedule 1, item 1, subsection 90XZJ(1) of the Family Law Act]*

1.10 For separating de facto couples in Western Australia, permitted family law proceedings means:

- superannuation splitting proceedings under Part VIIC of the Family Law Act, or
- proceedings under the *Family Court Act 1997 (WA)* with respect to the property of the parties to the de facto relationship or either of them, if the requesting party is seeking, or is considering seeking, orders under Part VIIC.
- In those circumstances:
 - the superannuation information provided by the ATO would assist the party to make a decision about the distribution of superannuation interests; and

- the requesting party may be required to declare within their application for this information that they are considering seeking orders under Part VIIIIC, or words to that effect [Schedule 1, item 1, subsections 90YZY(1) and 90YZY(3) of the Family Law Act]

1.11 Permitted family law proceedings capture those proceedings that relate to the division of property of a de facto or marital relationship, including the distribution of superannuation interests, between the parties to that relationship. [Schedule 1, item 1, subsections 90XZJ(1) and 90YZY(1) of the Family Law Act]

Parties who may apply through the registry

1.12 Only a former spouse/de facto partner of the other party to permitted family law proceedings may apply for the registries to request superannuation information. It is expected that the approved form will require them to declare this relationship when applying for this information. [Schedule 1, items 1 and 4, subsections 90XZJ(1) and (3) and 90YZY(3) of the Family Law Act]

1.13 Registries may only request this information on application of parties if it is to be used for permitted family law proceedings. [Schedule 1, items 1 and 4, subsections 90XZJ(2) and 90YZY(2) of the Family Law Act]

1.14 Parties to permitted family law proceedings and their lawyers may not make information requests directly to the Commissioner. Requests must be made by the registries only, on application by parties to permitted family law proceedings.

Information that may be requested by the registries

1.15 A party to permitted family law proceedings may apply to the registries to request superannuation information about the identity and value of superannuation interests of the other party. Superannuation interests is defined in section 995-1 of the Income Tax Assessment Act, and covers the following superannuation interests:

- an interest in a superannuation fund;
- an interest in an approved deposit fund;
- a retirement savings account; or
- an interest in a superannuation annuity.

Value and identity

1.16 Not all superannuation information held by the Commissioner may be requested. Information is limited to what is relevant to permitted family law proceedings, and relates to the value and identity of a party's

superannuation interests. *[Schedule 1, items 1 and 4, subsections 90XZJ(4) and 90YZY(5) of the Family Law Act]*

1.17 Superannuation information of a party that can be requested is likely to include:

- the name and the last-reported account balance of each of their superannuation interests;
- whether each superannuation interest is in the retirement phase or the accumulation phase; and
- whether the superannuation interest is an account based or defined benefit interest.

1.18 The Commissioner is only able to provide fund balance information based on the information last reported by funds to the Commissioner, because that is the only superannuation information held. This information may be up to 18 months old.

1.19 Under the Court Rules, parties are already required to disclose this information about their superannuation to each other to help them reach agreement, and to the family law courts to allow the family law courts to reach a decision, about a just and equitable division of their assets.

1.20 With the superannuation information received from the Commissioner, parties can seek more up-to-date information about the value of their former spouse's/de facto partner's superannuation directly from the trustee under sections 90XZB or 90YZR of the Family Law Act. This will allow them to make an informed decision about whether to seek to split their superannuation under Part VIIIB or Part VIIC of the Family Law Act.

1.21 The definition of superannuation information in this Schedule is section specific, and distinct from the information that a trustee might provide (or be required to provide) under Part VIIIB or Part VIIC of the Family Law Act about a superannuation interest. *[Schedule 1, items 1 and 4, subsections 90XZJ(4) and 90YZY(5) of the Family Law Act]*

1.22 The valuation of superannuation has been codified in the *Family Law (Superannuation Regulations) 2001* (Cth) and there are specific actuarial formulae that must be applied to obtain the value for the purposes of superannuation splitting. The requirements for valuation vary depending on the type of interest. The information provided by the Commissioner through the mechanism in this Schedule is not sufficient, nor does it substitute, the valuation methods set out in the *Family Law (Superannuation) Regulations 2001* and subordinate instruments, which allow practitioners to draft superannuation splitting orders and provide evidence about the nature, form and characteristics of the superannuation in question, or the effect of a superannuation splitting order.

Application to be made in the approved form

1.23 A party may apply to the registry by submitting an application in the approved form and may do so at any stage of permitted family law proceedings.

1.24 The application must be in the form approved in writing by the person prescribed by the Federal Circuit and Family Court of Australia (Division 1) Rules. The approved form must be used by all parties to permitted family law proceedings in the family law courts. *[Schedule 1, items 1 and 4, subsections 90XZJ(3) and 90YZY(3) of the Family Law Act]*

1.25 The approved form may require a person to make certain declarations in their application. For example, a party may be required to declare that:

- the requesting party believes the other party to proceedings has not fully disclosed all relevant information about their superannuation;
- the requesting party is a former spouse/de facto partner of the person whose superannuation information they are seeking;
- the information is required for the purposes of permitted family law proceedings; and
- the requesting party will only use the information for the purpose of permitted family law proceedings.

1.26 The approved form is expected to require the requesting party to provide specific identify information about their former spouse/de facto partner. For example, the requesting party may be required to provide their former spouse's/de facto partner's legal name, date of birth, and a last known or current residential address as part of the application, so that the Commissioner is able to identify the superannuation information of their former spouse/de facto partner.

1.27 Without this identity information, the registries may not accept the application. If they do submit the application to the ATO and the Commissioner cannot conclusively identify the individual based on the information provided, the ATO will not be able to provide the requested information.

1.28 If the Commissioner can match the identity of the individual in the request, then the ATO will be able to retrieve the superannuation information of the former spouse/de facto partner based on the information contained in the application, and the ATO will provide that information to the registry that requested it.

1.29 Current residential address details will not be provided as part of the information shared by the Commissioner. The address of the other

party is considered to be protected information (as per section 355-30 of Schedule 1 to the Taxation Administration Act) and the Commissioner is prohibited from disclosing this information to the registries pursuant to section 355-25, unless an exception applies. The exception for disclosure of superannuation information in this Schedule does not extend to residential address information.

Secure portal for information sharing

1.30 The ATO is working with the family law courts to build and access a secure portal through which superannuation information is expected to be requested and disclosed for the purposes of the information sharing mechanism created by this Schedule.

1.31 It is expected that the registries will access the secure portal to lodge applications (in the approved form) with the ATO. The ATO will share information with the registries through the same system.

1.32 The secure portal enables the Commissioner to ensure appropriate protections apply as they send protected superannuation information to the registries. Once the information is received by the registries, they are responsible for correctly providing it to the parties and their legal representatives.

Registries may process application and request information from Commissioner

1.33 The registry of the relevant family law court may accept an application where the application is given in the approved form and is complete. They will send the request to the ATO through the secure portal.

1.34 The registries may request that the Commissioner disclose the superannuation information. However, in practice, the registries will not exercise a discretion as to whether or not to make the request and will only send a request for the purpose of permitted family law proceedings. The registries would not send a request to the Commissioner where the application is not in the approved form, or if the party's application has not provided sufficient identifying information about the other party. *[Schedule 1, items 1 and 4, subsections 90XZJ(2) and 90YZY(2) of the Family Law Act]*

1.35 This action is a procedural measure that may be a preliminary step in the process of a family law court in resolving a later, more substantive matter, such as making a decision about the distribution of superannuation or other property. On this basis, the provision of merits review of this procedural action to send the request to the ATO or not, would not be appropriate.

1.36 It is important to note in this context that the request for superannuation information from the ATO through this mechanism involves seeking information that should have been provided to the family law court by the other party in compliance with their existing disclosure obligations under the Family Law Act.

Delegation of Registry Manager or Principal Registrar’s powers

1.37 The Registry Manager or Principal Registrar of the relevant family law court may delegate their functions.

1.38 These functions may be delegated to an officer or staff member of the Federal Circuit and Family Court by the Registry Manager, under section 105 and section 267 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth). Officers are defined in subsection 103(1) of that Act. Staff members are “staff of the registries” as contemplated in subsections 103(6) and (7) and subsections 265(1) and (2) of that Act.

1.39 The Principal Registrar of the Family Court of Western Australia may, in writing, delegate any of their functions or powers to any other appropriate officer or staff member of that Court. *[Schedule 1, item 4, subsection 90YZY(4) of the Family Law Act]*

1.40 It is intended that a Registry Manager or Principal Registrar are able to delegate their functions under this Bill to registry staff. It would be appropriate to delegate these functions to registry staff because:

- this is purely an administrative mechanism which does not involve a finding of fact;
- the extent of an assessment by court officers would be to confirm that the application is in the approved form (including declarations) and contains sufficient identity information; and
- it may not be practicable for the Registry Manager or Principal Registrar to solely manage these information requests and disclosures, particularly if there is a significant volume of requests.

Commissioner may disclose protected information on superannuation interests

1.41 Once an application for superannuation information that satisfies the necessary requirements has been received by a registry and a request is made to the ATO, the Commissioner may provide any available superannuation information for the purpose of permitted family law proceedings (see below). *[Schedule 1, items 2 and 5, table items 8A and 8B in subsection 355-65(3) in Schedule 1 to the Taxation Administration Act]*

1.42 The Bill enables the Commissioner to provide information reflecting the latest reported information provided by superannuation funds. This information may be out of date. An applicant can use this ATO-provided information to apply to the trustee under section 90XZB or 90YZR of the Family Law Act, for the most up-to-date information about the superannuation interests of their former spouse/de facto partner as this use is also relevant to the permitted family law proceedings. *[Schedule 1, items 1 and 4, note 2 to subsections 90XZJ(2) and 90YZY(2) of the Family Law Act]*

1.43 If the conditions are met, the Commissioner may provide the requested information to the registries.

1.44 This Schedule is intended to support parties to use sections 90XZB and 90YZR of the Family Law Act by helping them identify which superannuation trustees to approach for more up-to-date information.

1.45 All taxpayer information held by the Commissioner is subject to the secrecy provisions and must not be disclosed unless an exception applies.

1.46 A taxation officer supplying this information in the circumstances to which the exception applies does not commit the offence of disclosing protected information in section 355-25 of Schedule 1 to the Taxation Administration Act, because an exception is provided for disclosures to the registries. *[Schedule 1, items 2 and 5, table items 8A and 8B in subsection 355-65(3) in Schedule 1 to the Taxation Administration Act]*

1.47 Only information that is superannuation information may be provided. The address of any individual may not be shared as it is not information about the identity and value of a superannuation interest.

What happens if ATO cannot match the request with its records

1.48 The exception does not extend to situations where a taxation officer is not able to identify with certainty the relevant superannuation information. This could occur, for example, if a name is common or has changed, and/or if address is out-of-date.

1.49 If the Commissioner is unable to provide the requested information, a taxation officer will provide a notice to the registry to this effect. If further identifying information is available this can be provided to the Commissioner to assist in the consideration of the registries' request.

Who must information be provided to

The ATO will provide information to the Registry Manager or Principal Registrar

1.50 The Commissioner is only authorised to provide the requested information to the registries of the relevant family law court in response to a request by the registries. *[Schedule 1, items 2 and 4, sections 90XZJ and 90YZY of the Family Law Act]*

1.51 The information will be provided to that court through the secure portal.

Registry Manager or Principal Registrar will provide information to parties

1.52 The registry of the relevant family law court is authorised to disclose the information to the parties and their lawyers. *[Schedule 1, items 2 and 4, subsections 90XZJ(3) and 90YZY(3) of the Family Law Act]*

Purpose for disclosure of information / Permitted use of the information

1.53 The Commissioner discloses the protected information for the purposes of permitted family law proceedings. *[Schedule 1 items 1 and 5, table items 8A and 8B in section 355-65(3) in Schedule 1 to the Taxation Administration Act]*

1.54 The Commissioner may rely on the information submitted by the registries on the secure portal, including any declarations made by the applicant.

1.55 The Commissioner does not need to undertake any further checks that the information is to be used in permitted family law proceedings.

How parties can use the information

1.56 The party may only use the information received for the purposes for which it was disclosed under the Taxation Administration Act (subsection 355-65(3) in Schedule 1, table items 8A and 8B):

- for requests under section 90XZJ, for the purpose of property settlement proceedings (within the meaning of the Family Law Act) in that court; and
- for requests under section 90YZY, for the purpose of all relevant property settlement and superannuation splitting proceedings (within the meaning of that section).

[Schedule 1, items 2 and 4, sections 90XZJ and 90YZY of the Family Law Act]

1.57 Parties and their legal advisers may use the information to satisfy themselves that they have the information they need about the identity and value of their former spouse's/de facto partner's superannuation interests.

1.58 This information may not be sufficient for the court to make relevant orders, in which case the parties may use the information to make further investigations about their former spouse's/de facto partner's superannuation information. Specifically, this would include using the superannuation information provided by the ATO to request further information from a superannuation trustee under s90XZB or 90YZR of the Family Law Act.

1.59 Parties should be aware that section 121 of the Family Law Act prohibits the publication or dissemination of an account of family law proceedings that may identify a party, witness or other person associated with the proceedings.

Consequences of on-disclosure for an unrelated purpose

1.60 A party who uses the information for any other purpose than permitted family law proceedings may be committing an offence under either the Taxation Administration Act or section 121 of the Family Law Act.

1.61 The registries may only on-disclose the information to the applicant, the other party, and both parties' lawyers for the purposes of permitted family law proceedings.

1.62 Information disclosed under this Schedule is protected information under Schedule 1 to the Taxation Administration Act. Generally, a taxation officer may not disclose protected information (penalty: imprisonment for two years).

1.63 This Schedule provides that superannuation information may be disclosed by a taxation officer to the registries for the purposes of property settlement proceedings within the meaning of the Family Law Act.

1.64 Protected information may be on-disclosed if an exception applies, and it is on-disclosed for the purposes of the exception, or a connected purpose (section 355-175(1)(c) of Schedule 1 to the Taxation Administration Act. On-disclosure for court proceedings is permitted by subsection 355-175(2) of Schedule 1 to the Taxation Administration Act.

1.65 If the Registrar or an applicant uses the information for any other purpose than permitted family law proceedings, they may be subject to on-disclosure offences under section 355-155 of Schedule 1 to the Taxation Administration Act. The secrecy rules in the Taxation

Administration Act require information to be kept confidential unless an exception applies.

1.66 Section 121 of the Family Law Act prohibits the publication or dissemination of an account of family law proceedings that may identify a party, witness or other person associated with the proceedings.

1.67 Parties and their lawyers should be made aware of potential penalties for using or on-disclosing the information for unrelated purposes when they apply to the court for information and when they receive the information from the courts. For example, the approved form may state what potential penalties apply, and is likely to require the applicant to acknowledge the penalties for misuse of the information.

Consequential amendments analysis

1.68 No amendment to the *Privacy Act 1988* is required due to the operation of APP 6.2(b) – as the information is provided due to the authorisation this amendment provides.

1.69 The secure portal is an encrypted information sharing mechanism.

1.70 Under the *Electronic Transactions Act 1999*, information may be sent between agencies using electronic means. This is already enabled by section 9 (a requirement to give information in writing may be done by way of electronic communication) or by section 11 (requirement to produce a document may be done by way of electronic communication).

1.71 The person who approves the form may require the form to be given by a party to the registries in a particular manner, including electronically. [*Schedule 1, items 1 and 4, sections 90XZJ(3) and 90YZY(3) of the Family Law Act*]

Application and transitional provisions

1.72 The amendments of the Family Law Act made by Part 1 of Schedule 1 apply in relation to property settlement proceedings in the Federal Circuit and Family Court of Australia and property settlement proceedings in relation to the parties to a marriage in the Family Court of Western Australia, at or after the commencement of this Part, whether the proceedings commenced before or after the commencement of this Part.

1.73 The amendments of the Taxation Administration Act made by Part 1 of Schedule 1 apply in relation to records or disclosures of information made at or after the commencement of Part 1, whether the

information was obtained before, at or after the commencement of this Part.

- 1.74 Part 2 of Schedule 1 commences on the later of:
- immediately after the commencement of Part 1; and
 - immediately after the commencement of the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*.

However, if the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020* does not commence, Part 2 of Schedule 1 does not commence.

1.75 The amendments of the Family Law Act made by Part 2 of Schedule 1 apply in relation to proceedings referred to in Part 2 that are in the Family Court of Western Australia at or after the commencement of this Part, whether the proceedings commenced before or after the commencement of this Part.

1.76 The amendments of the Taxation Administration Act made by Part 2 of Schedule 1 apply in relation to records or disclosures of information made at or after the commencement of Part 2, whether the information was obtained before, at or after the commencement of this Part.