

Friday, 17 February 2023

Director, Tax and Compliance Unit
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

Sent by email: superannuation@treasury.gov.au

Dear Sir/Madam,

Access to offenders' superannuation for victims and survivors of child sexual abuse – Discussion Paper (“Discussion Paper”)

Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association, the Institute of Public Accountants and the SMSF Association support, in principle, the policy outlined in the Discussion Paper. However, as described below, we believe the scope of the policy should be broadened to cover victims and survivors of other heinous crimes.

Our submission does not directly answer the questions contained the Discussion Paper, but highlights our primary issues, concerns and recommendations.

We note that the Discussion Paper limits the payment from offender’s superannuation accounts in order to satisfy unpaid compensation orders. We agree with this limitation.

The Discussion Paper notes that, “In recent years, there have been a number of high-profile reports of convicted child sexual abuse offenders deliberately hiding millions of dollars’ worth of assets in superannuation accounts to defeat compensation claims.” While it is true that there are a small number of superannuation investors who have very large account balances, we believe that due to the contribution caps which were put into place in 2007, as well as the imposition of the total superannuation balance restrictions on contributions in 2017, the number of superannuation investors with very large account balances will fall. As a consequence, we believe that attempts to contribute large amounts into an offender’s superannuation account will also fall.

However, 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”.

Furthermore, 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. Existing systems presently in use, for example health, social security and other assistance, must still be able to be relied upon. The situation whereby superannuation becomes a first resort risks disadvantaging victims and survivors where an offender has no superannuation interests.



Type of offenses covered by this policy

We appreciate the rationale for permitting the early release of superannuation for child sexual abuse crimes.

However, it is our belief that once this policy is implemented, and commenced, victims and survivors of other crimes will also seek access to an offender's superannuation savings for unpaid compensation orders.

We therefore believe that this policy should be extended to all serious indictable offences which we define as criminal trials involving a judge and jury and serious offences that an accused can elect to have heard by judge alone. A serious offence in the NSW criminal code is defined as one involving a prison term of at least five years. We think this would be a good definition to use in these cases.

How offences committed in overseas jurisdictions are treated for the purposes of this policy also needs to be considered. We believe that the relevant criminal processes of a foreign jurisdiction would need to be assessed to determine if a case "fits" with the comparable Australian criminal law framework.

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. Civil action may occur because 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.

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.

When should superannuation monies become available?

We think that superannuation monies should only become available when the time period to allow an appeal to a higher court has lapsed. 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.

What types of contributions should be covered by this policy?

This policy should apply to *out of character* contributions only.

We suggest that all personal contributions, including those that are claimed as a tax deduction and salary sacrifice contributions that do not fit the offender's normal contribution pattern.

Contributions made for a spouse and contributions split with a spouse should also be considered, as should unclaimed superannuation monies held by the Australian Taxation Office.

It is possible to withdraw super benefits and have them deposited into a super fund in the name of another person. The bankruptcy-superannuation provisions contain "tracing" rules and similar provisions would be required here.

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.

We do not support the Discussion Paper's suggestion that "all personal contributions made in the period starting either six or 12 months before the day the offender was charged to the day the court grants the victim or survivor access to the offender's relevant superannuation interest, would be deemed to be 'additional'". We believe this period of time is too short.

Bankruptcy

The proposal in the Discussion Paper would allow compensation debt to survive bankruptcy. We do not have any objections to this proposal in principle.

However, we are uncertain whether the proposed requirement for superannuation funds to check if a member is on the National Personal Insolvency Index (NPII) is already a component of the Know Your Client (KYC) and/or Enhanced Customer Due Diligence (ECDD) requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* ("AML/CTF Act"). This requirement would appear to be only new for trustees of self-managed superannuation funds (SMSFs), who would already be in a position to know of trustee bankruptcy without needing this additional confirmation.

We consider that the proposal to prohibit superannuation fund trustees from complying with a release order until the bankruptcy is finalised is generally a good proposal. However, an exemption could be provided for instances where the trustee in bankruptcy advises the trustee of the superannuation fund that amounts sought from a fund for outstanding compensation orders are not amounts sought by the trustee in bankruptcy for other creditors.

Defined Benefit Super Funds

We do not agree with the Discussion Paper's proposal to exempt so called defined benefit super funds ("DB funds"). Many Australian DB funds are actually hybrid funds that contain a defined benefit component and an accumulation component for each member.

We also disagree that the DB component of such funds should be exempt. DB funds already have processes in place to manage family law splits which could be repurposed in these circumstances for the benefit of the victim.

Visibility of superannuation assets

We agree with the policy outlined in the Discussion Paper. That is, a process be used that is similar to that used for Family Law proceedings since April 2022 with the ATO then authorising release of money from a superannuation account and paying to the eligible recipient.

Which victims should be eligible?

This compensation mechanism should be confined to primary victims with access by secondary parties limited 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.

Balancing the rights of the victim with the rights of the offender's dependants and associates

The offender's dependants may be innocent in the commission of a wrong and deserve to be treated fairly and equitably. In particular, we note that an overwhelming number of victims and survivors in child sexual abuse cases are children of the offenders. As beneficiaries of members of super funds, we would not support victims/survivors being, in essence, made to fund their own compensation.

However, we also note that there are other superannuation beneficiaries of the offender who are likely to be innocent, particularly where the offender is not related or is only distantly related to victims/survivors. Superannuation beneficiaries of the offender should not be penalised by association. Care must also be taken with the issue of spouse superannuation interests: The inclusion of spouse contributions is highly problematic. Whilst we understand that the intent of the inclusion of these is to ensure that spouse contributions are not used as a shield, this must protect from happening, as much as possible, the risk of a "guilt by association" scenario emerging where the spouse is innocent.

Although not normally considered superannuation dependents, we note that the Discussion Paper considers the scenario where the superannuation account of a parent of an offender is the beneficiary of contributions. We are not aware of this practice being widespread and suggest that contributions made along these lines be the subject of further discussion. Special care will need to be taken with Small Business CGT Concession Contributions. The circumstances of these contributions can be many years in the making and may have been made to maximise access to these concessions. They may not have been made to deny a victim of a crime access to compensation. In addition, such contributions can appear out of character, but their timing may be related to when the proceeds in the sale of a business are received. Further, the contributions may relate to business activities that have been operating for many decades.

Family law interaction

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 and survivors of crime provisions.

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 offender 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.

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 Australian Taxation Office.

Tax rate applied to compensation payments

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

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

Issues that also need to be considered

In our view the Discussion Paper does not discuss some important matters including the following:

1. Fund deed provision – Treasury will need to consider if the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and regulations will need to contain a provision that permits the withdrawal of a offender's superannuation account balance regardless of the terms of a superannuation fund's trust deed
2. Failure to lodge returns – in some cases, superannuation fund trustees can elect not to submit annual returns to regulators for extended periods of time. This typically arises for SMSFs. When this occurs the Australian Taxation Office effectively loses visibility of member balances and contributions. To solve this problem, Treasury may need to consider suitable amendments to Part 17 of the SIS Act
3. Who controls a superannuation fund? A single member fund with a corporate trustee that only requires a single director may fail or refuse to appoint someone to attend to running an SMSF. Treasury will need to consider how this case may need to be handled
4. Illiquid fund assets and/or poorly performing investments – Treasury will need to consider what it would elect to do in relation to assets that are not readily saleable, and/or cannot be readily liquidated, so that a benefit can be paid to a perpetrator's victims. Equally, where a perpetrator's superannuation account balance may have a value less than the contributions that have been made, this also needs to be considered
5. Costs in administering / complying with this provision – Treasury will need to consider how the costs and taxes, including Capital Gains Tax incurred when money is paid out under this proposal, will be dealt with.

Yours Sincerely,

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