

SUBMISSION

Australian Law Reform
Commission
Review of the Family Law
System
Discussion Paper 86

12 November 2018

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The Australian Law Reform Commission

Lodged via e-mail to familylaw@alrc.gov.au

12 November 2018

Dear Sir / Madam,

Review of the Family Law System – Discussion Paper 86 – issues with respect to superannuation

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Commission’s invitation to submit or comment on Discussion Paper 86 (DP 86).

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$2.7 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 15.6 million Australians with superannuation.

ASFA agrees that there are areas of the family law system where there are opportunities for improvement. These include, among others, where the family law system interacts with the superannuation system, including with the trust law regime under which the trustees of superannuation funds operate.

Our overarching comment is to agree there is a need to simplify the legislation and make it clearer – especially for the separating couple and for superannuation trustees which, by virtue of the nature of superannuation, have a direct role in the family law regime. Making the legislation simpler and clearer will assist the couple to be aware of their rights, obligations and potential entitlements; reduce the need to obtain professional advice; facilitate information sharing and aid in the resolution of disputes.

Given that our association represents the superannuation industry we have confined our comments to those areas of family law that intersect with superannuation law and industry practice – specifically Proposal 3-15, Proposal 3-16, Proposal 3-17 and Question 3-2.

If you have any queries or comments in relation to the content of our submission, please contact me on

[REDACTED]

Yours sincerely

[REDACTED]

Fiona Galbraith
Director, Policy

1. Proposal 3–15 – the Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur

We are supportive of the development of any information resources that may assist couples who are separating to understand how and why superannuation splitting may occur.

In this context we note that some generic information resources have been developed and are available to download from different websites, including: -

- the Attorney - General's Department – *Superannuation splitting frequently asked questions* and *Superannuation basic terms*, as well as information on the website itself¹
- the Family Court - *Superannuation Information Kit*, as well as information on the website itself.²

Further to this, we believe that a number of superannuation fund trustees and providers have developed detailed explanatory material for the use of their members, generally available from their website.

2. Proposal 3–16 – the Family Law Act should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. Procedural fairness should be deemed to be satisfied where parties develop orders based on these standard templates. The templates should be published on a central register

We are strongly supportive of the need to simplify and clarify the family law legislation. This should encompass significantly improving the drafting of the legislation, including restructuring and rationalising it, which will serve to improve its comprehensibility and usefulness to separating couples and practitioners, as well as superannuation trustee and service providers.

We do not, however, agree that superannuation trustees should be required to develop standard splitting orders based on common scenarios. Not only does this impose an unduly onerous obligation on the trustee - a third party - but there is a risk that a member and / or non-member spouse may rely on a 'standard' splitting order that is not appropriate to their circumstances and which may result in detriment.

If it were considered that superannuation splitting orders - in accumulation funds - are sufficiently uniform as to facilitate the creation of one or more standard orders then it would be appropriate if these were to be developed by the Family Court as a form, authorised by the Principal Registrar and published on the Family Court website.

In any event, standard forms should not apply to defined benefit schemes, due to the nature and complexity of defined benefit interests.

¹ <https://www.ag.gov.au/FamiliesAndMarriage/Families/SuperSplitting/Pages/default.aspx>

² <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/property-and-finance/superannuation/superannuation>

We do not agree that procedural fairness should be deemed to have occurred where the parties develop orders based on a standard form, or where a template is used. Often, even in cases where a standard form is used, there are issues with the matter specific variables which are used when completing the form.

Self-evidentially the trustee is not a party to the relationship but is a third party and, furthermore, is subject to a range of legal obligations, fiduciary duties and statutory requirements that they must observe. As a third party it is imperative that the trustee be afforded procedural fairness, which represents an important safeguard against orders issued by the Family Court being unworkable and to ensure they are capable of being implemented by the trustee. It is significantly easier, and less costly to the parties, for a trustee to review splitting orders in draft form, to identify and rectify any issues prior to them being finalised, than it is to have to deal with problematic splitting orders after they have been made, including the possibility of their having to be remade.

By way of example, one member fund has advised that it completes around 2,000 family law responses a year and generally objects to around 20% of the draft orders on the basis that they are poorly worded. This fund regularly encounters situations where the parties have used a standard template but have made amendments or included other orders that are inconsistent with the template.

This fund regularly is required to object to final orders where it has not been accorded procedural fairness or the final orders are unworkable for various reasons including, for example, where between the draft and final orders the parties have altered the content without submitting the amended orders to the fund for further review. On some occasions it is apparent that the parties do not understand how family law splitting applies, especially with respect to defined benefit schemes, and as a result their orders are unworkable.

Proposal 3–17 – the Government should develop tools to assist parties to create superannuation splitting orders. These could include:

- **a tool to look up the legal name and contact details of superannuation funds**

We support the development of any tools that will assist parties to create superannuation splitting orders, including a tool to look up the legal name and contact details of superannuation funds.

In this context it should be noted that the ATO maintains a publically accessible register of all superannuation funds - <http://superfundlookup.gov.au/>. There are, however, a number of issues with this register, including:

- it contains all Self-Managed Superannuation Funds (SMSFs) as well as APRA regulated funds
- as there is no naming convention / protocol for funds, there are a number of SMSFs with names that are similar to APRA regulated funds and/or to other SMSFs
- the search engine algorithm appears to maximise the number of search results, including returning results with no apparent relevance

- depending on which tab is selected the list will contain inactive funds / cancelled ABNs as well as active funds
- the register appears to contain a mix of fund and trustee ABNs (the trustee has a different ABN to the fund)
- there are no contact details for the superannuation funds / trustee.

Given the ATO is the ‘source of truth’ with respect to every superannuation account in Australia, the solution to this would appear to be to enable parties who are looking to create a superannuation splitting order to approach the ATO for information with respect to the superannuation account(s) of both parties. This information could include the:

- legal name of the fund
 - legal name of the trustee
 - contact details of the fund
 - (if applicable) Unique Superannuation Identifier or USI (this identifies a superannuation product within an APRA-regulated fund)
 - account number.
- **a tool, with appropriate safeguards, to identify the superannuation accounts held by a former partner from ATO records, with necessary amendments to the taxation law to support this**

As per above, we strongly support the development of a tool to identify the superannuation accounts held by a former partner from ATO records. Of course, this would necessitate amendments to the taxation law to support this with appropriate safeguards to prevent unauthorised access to this information.

The design and use of this tool should be confined to identifying and confirming the details of both parties’ superannuation fund account – it should not be used to provide the value of the superannuation interest. Even in an accumulation fund the value of the interest will need to be determined to take into account earnings, fees and taxes, rollovers in and out and recent contributions, and so will differ from any historical balance which may be held by the ATO. Further, with respect to defined benefit interests, the value of the interest for family law purposes can be quite different to the vested / notional amount in an account at a point in time.

- **tools to assist parties with process requirements, such as making superannuation information requests, providing draft orders to superannuation trustees for comment where standard orders are not used, and providing final orders to trustees.**

It is unclear what is envisioned with respect to tools to assist parties with process requirements. There are already approved forms authorised by the Principal Registrar of the Family Court for making superannuation information requests and the process for providing draft and final orders to trustees generally are to be found on the fund’s website.

It is important to note that many trustees make information with respect to family law superannuation splitting available to members, and their partners, on their website and / or via their contact centre to assist the parties to understand how superannuation splitting works.

The most important tool to assist the parties would be one which enabled the parties to identify relevant superannuation accounts from ATO records.

- **allowing auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data**

It is not clear precisely what is envisioned by ‘auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data’.

In any event we do not support the ‘auto-generation’ of any orders, especially when the outcome can be critical to the parties’ future financial position. This proposal would appear to be completely at odds with the requirement for each party to obtain independent legal advice about any splitting agreement they are considering – which is appropriate given the significance of the nature and outcome of a superannuation splitting order.

In particular, this proposal is not appropriate for defined benefit schemes. The value of a member’s defined benefit interest must be calculated through the use of professional advice from an actuary or valuation expert familiar with the benefits design of the fund and the family law rules regarding valuation.

3. Question 3–2 – should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?

Superannuation law already makes provision for the early release of superannuation to assist a party experiencing financial hardship, as defined in the *Superannuation Industry (Supervision) Regulations 1995*, or on prescribed compassionate grounds.

To access superannuation on the grounds of severe financial hardship, members must be able to

- show they are currently, and have been, in receipt of a qualifying Commonwealth income support payment for a continuous 26-week period; and
- satisfy the trustee of their fund that they are unable to meet reasonable and immediate family living expenses.

Currently there is no provision specifically with respect to financial hardship as a result of separation and at this stage we would not support such an extension.

Early release on compassionate grounds generally is for medical treatment; medical transport; modifications necessary for the family home or motor vehicle due to severe disability; palliative care; to prevent foreclosure of a mortgage or to pay for expenses associated with a dependant's death, funeral or burial.

On 8 December 2017 the Government announced that Treasury would conduct a review of the rules governing the early release of superannuation benefits, including for victims of crime compensation, as the rules governing early release of superannuation benefits have not changed substantially since 1997.

An issues paper *Early release of superannuation benefits - Under compassionate and financial hardship grounds and for victims of crime compensation, December 2017* (Issues Paper) was released for public consultation, examining the key issues related to the early release of superannuation benefits under compassionate grounds and severe financial hardship grounds. Treasury was to have made recommendations to the Government in mid-2018.

<https://treasury.gov.au/consultation/c2017-t246586/>

While the Issues Paper identified the potential for limited early release in circumstances of domestic violence, and raised family law in the circumstance where there may be a competing victim of crime compensation order, it did not address the matter of early release of superannuation on the grounds of financial hardship as a result of separation.

As Treasury observed in the Issues Paper with respect to financial hardship:

'The test for 'severe financial hardship' is ... deliberately strict and objective ...[to ensure] that early access to superannuation is available only as a last resort if the income support system – which is the preferred way of delivering financial support to Australians in need – has proved insufficient'.³

The superannuation splitting provisions are separate from, and independent of, the provisions with respect to early release.

The superannuation splitting provisions provide for the splitting of a member's superannuation entitlement to supplement the superannuation of the non-member spouse, which exists to provide an income in retirement. Accordingly, the requirement not to permit access to a superannuation benefit until the member has reached their 'preservation age' (or meets a condition for early release) continues to apply to any benefit transferred to the non-member spouse. It is not intended that the benefit resulting from a superannuation split be the source of income support at the time of separation but instead is intended to be used by the member in retirement.

³ The Treasury, *Early release of superannuation benefits - Under compassionate and financial hardship grounds and for victims of crime compensation*, December 2017, Page 13