



Submission by the
Commonwealth Ombudsman

Treasury review of the early release of superannuation benefits

EARLY RELEASE OF SUPERANNUATION BENEFITS UNDER
FINANCIAL HARDSHIP GROUNDS AND FOR VICTIMS OF CRIME
COMPENSATION
CONSULTATION PAPER
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Introduction and summary

The Superannuation Industry (Supervision) Regulations 1994 allow a person to access their superannuation early on two specified grounds: severe financial hardship and compassionate grounds.

This submission focuses primarily on the trends we have identified through complaints this Office has received about the Department of Human Services' (DHS) administration of early release of superannuation applications.

In relation to Treasury's proposal for a new ground for early release of superannuation for victims of crime compensation, we believe other submitters will be better placed to provide comment on this proposal.

Background

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Commonwealth Ombudsman's unique position in the Australian administrative law landscape provides my Office with an understanding of individual experiences from members of the public, who are dissatisfied with the way the government has dealt with their issue. Over time, through investigating individual complaints about the actions of a particular Commonwealth department or agency, the Ombudsman's Office is able to build up a detailed picture of an agency's operations and to observe what happens when legislation has unintended consequences.

Treasury has invited submissions in response to its review of the current grounds for access to early release of superannuation benefits and for victims of crime compensation.

We welcome this opportunity to contribute to this consultation paper and hope that our submission may usefully inform Treasury's response to the Government.

Response to Terms of Reference

This submission provides our responses to Questions 1.16, 1.17 and 2.1 in Treasury's Consultation Paper. In summary, we support:

- the proposal to broaden the current mortgage ground to include spouses whose name is not on the title of the property
- including 'rent to buy' agreements in the grounds for early release

- amending the criteria under the *severe financial hardship* ground.

Part 1 – Compassionate grounds

Regulation 6.19A(1) of the Superannuation Industry (Supervision) Regulations 1994 allows a person to access their superannuation early under five compassionate grounds specified in subsections (a) to (e):

- (a) to pay for certain medical treatment and or medical transport for the person or their dependant
- (b) to prevent foreclosure of a mortgage or sale by a mortgagee on a person's principal place of residence
- (c) to pay for modifications to a home or vehicle to accommodate a person's, or their dependant's, special needs arising from a severe disability
- (d) to pay for expenses associated with a person's palliative care
- (e) to pay for expenses associated with a dependant's palliative care or funeral.

Under subsection (f), a release may also be granted for grounds 'consistent with' the specified grounds.

In addition to meeting a ground, the person must also demonstrate they lack the financial capacity to pay the expenses any other way.

Mortgage ground

Question 1.16 - Should early release of superannuation benefits be available to meet mortgage repayments 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 may be required? For example, should release be limited to dependants or spouses or partners?

Under the current law, an early release may be made to enable the person to make a payment on a loan, to prevent foreclosure of a mortgage on the person's principal place of residence; or exercise by the mortgagee of an express or statutory power of sale over the person's principal place of residence (the mortgage ground).

DHS's current policy is to allow a release only where a person is considered legally responsible for repayments of the mortgage. DHS officers assess this by considering if the applicant is listed on the title of the mortgage.

In our view, this requirement may disadvantage people who live at a property that is clearly their principal place of residence, but for whatever reason, they do not have their name on the title of the property. This issue is illustrated by the case study below received by this Office in 2017.

Case Study – mortgage title

Ms A complained to us that DHS had declined her application for early release of her superannuation to pay her mortgage arrears, as she was not listed on the title of the property. Ms A told us the property was her principal place of residence, and she had lived there for nearly 30 years. She said the title was in her husband's name, as they had done this when they got married. She also told us the rates and bills for the property were in her name.

While we accepted DHS's decision not to approve the application was in line with its policy, in our view, this resulted in a disadvantage for the complainant and may have been an outcome that was not intended by the legislation. As the complainant's name was not on the title of the property, Ms A was unable to access an early release of her superannuation to prevent foreclosure of her principal place of residence.

This Office supports the recommendation to broaden the mortgage ground for early release of superannuation to include spouses or partners whose name may not appear on the title, but who can demonstrate the property is their principal place of residence. Should Treasury recommend this, we would suggest careful consideration be given to alternative means available to an applicant to prove their interest in the principal place of residence (for example, rates notices and phone bills). We also suggest careful consideration be given to including appropriate safeguards in situations where a request for early release may arise from economic and financial abuse between spouses or partners.

'Consistent with' mortgage grounds

Question 1.17 – 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)?

Regulation 6.19A(1)(f) of the Superannuation Industry (Supervision) Regulations 1994 allows the early release of superannuation for instances considered 'consistent with' a release of benefits on compassionate grounds, including the mortgage ground.

A typical example of this is outstanding council rates. Under State and Territory laws, a local council generally has the power to seize and sell a property for unpaid council rates. In this situation, an early release can be granted, as it is considered 'consistent with' the mortgage ground.

In our view, rent to buy agreements would also meet the 'consistent with' ground. Rent to buy agreements can be used where a person may not have the means to pay the deposit that a bank would require to grant a mortgage. Under rent to buy agreements, the usual situation is a person signs a contract with the current owner of a house, to make specified payments for a specified period, after which, the title is transferred and the person becomes the registered owner of the property.

However, DHS does not currently consider rent to buy agreements to be 'consistent with' the mortgage grounds as the applicant's name is not on the title of the property.

This is illustrated by the case study below.

Case Study – rent to buy agreements

Mr A told our Office that he entered into a rent to buy agreement for his property and he had been paying rent for the past three and a half years. He applied for early release of his superannuation to pay the final instalment for the property, after which, he would become the registered owner of the property under the rent to buy agreement. DHS refused Mr A's application as it said he was not the registered owner of the property and therefore it did not consider the matter to be 'consistent with' mortgage grounds.

While this Office accepted that DHS's decision in the above case not to allow a release under the 'consistent with' mortgage grounds was open to it to make, we believe this may have disadvantaged the complainant.

Therefore, we suggest the legislation be amended to specifically allow, or a standalone ground be established, for early release of superannuation for rent to buy agreements.

Financial capacity

For an early release of superannuation to be granted, the Regulator must be satisfied the person does not have the financial capacity to meet an expense arising from that ground.¹

We understand DHS's policy is only to allow a release for unpaid expenses. DHS does not permit an early release where the applicant has borrowed funds to pay for the expense. DHS currently treats all loans as borrowed funds, regardless of whether it was a commercial loan (such as a credit card) or a loan from friends or family.

From 1 January 2016 to date, my Office has received 17 complaints from people who have borrowed funds from their friends or relatives to pay for expenses and therefore, have been refused an early release of their superannuation.

In our view, using a credit card or bank loan to pay for an expense should be treated differently from borrowing money from friends or relatives to pay the expense. In our view, borrowing the money from someone else could be, in and of itself, an indication that the applicant does not have the capacity to pay for the expense by other commercial means (such as a credit card or loan). The below case study is an example of this.

Case study – borrowed funds

Mr A told us he had to borrow money from a friend to pay for his son's funeral. Mr A then lodged an application for an early release of his superannuation to repay his friend. However, DHS refused his application as the funeral bill had already been paid. It advised him that this showed he had the financial capacity to pay the expense.

Arguably, this application of the law may result in an unfair disadvantage to more vulnerable people. In our view, the law could be clarified to state that where an applicant has borrowed

¹ Superannuation Industry (Supervision) Regulations 1994, r 6.19A(2)(b).

funds from friends and relatives, an early release would be permitted. If Treasury recommended this change, careful consideration would need to be given to how the person could demonstrate to DHS that they were not able to borrow the funds commercially and the only other option they had was to borrow the money from family or friends.

Part 2 - Severe financial hardship grounds

Question 2.1 – 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?

Under the current law,² a person is taken to be in *severe financial hardship* if the trustee of the superannuation entity is satisfied:

- the person has received Commonwealth income support payments for a continuous period of 26 weeks
- the person was in receipt of payments of that kind on the date of the written evidence, and
- the person is unable to meet reasonable and immediate family living expenses.

Definition of Commonwealth income support payment

A Commonwealth income support payment means the payments listed in s 23(1) of the *Social Security Act 1991*. Austudy, youth allowance and New Enterprise Incentive Scheme (NEIS) payments are not included in the definition of income support payments.

In our view, as recipients of Austudy and students receiving youth allowance have made the voluntary decision to pursue study, it is reasonable that early release of superannuation is not available to them, however, this may not be the case with recipients of NEIS payments.

NEIS payments assist eligible job seekers to commence their own business and provide the same level of assistance as newstart allowance. Recipients of NEIS are eligible to receive income support for up to 39 weeks.

In our view, it appears inconsistent that an early release is available for recipients of newstart allowance but not to customers receiving NEIS allowance for 26 continuous weeks. Therefore, this Office would support an amendment to the current definition of Commonwealth income support payments to include recipients of NEIS allowance.

Receipt of payment for a continuous period of 26 weeks

In order to be eligible for early release of their superannuation on the grounds of severe financial hardship, a person must have received an *income support payment* for a continuous period of 26 weeks. DHS' current policy states that 'continuous' means the person must have actually *received* a payment for each fortnight – in other words, any period/s of nil payment do not count towards the 26 week period.

There are many reasons which may result in a person experiencing a 'break' in payments. For example, they could gain temporary employment for one fortnight and their income support

² Superannuation Industry (Supervision) Regulations 1994, r 6.01(5).

payment reduces to nil. This means the applicant needs to begin the 26 week period again when they are experiencing severe financial hardship.

In 2016-2017, this Office received 78 complaints from people who received an income support payment but had not received those payments for 26 continuous weeks and therefore did not meet the criteria for a release.

The following case studies demonstrate this.

Case Study A – break in payments

Ms A applied for early release of her superannuation due to severe financial hardship. She had been receiving income support payments for three years however, in one single fortnight, she picked up an extra shift at work which reduced her income support payment to zero for that one fortnight. Her application was refused as she did not meet the criteria of receiving payments for 26 continuous weeks.

Case Study B – switching income support payment

Mr A was receiving sickness allowance while awaiting spinal surgery. He lost his job and notified DHS of this. DHS advised that he would stop receiving sickness allowance and he would need to apply for newstart allowance. He did this, but this caused a break in payment. He applied for early release of his superannuation and DHS refused as he had not been receiving income support payments for 26 continuous weeks.

This Office has previously made comments about the potential effect of this requirement in our submission to the Australian Law Reform Commission (ALRC) Issues Paper 36, in April 2011.³ In that submission we recommended greater flexibility to establish severe financial hardship.

We note the ALRC has previously recommended the ground be amended to include that an applicant has been receiving Commonwealth income support payments for 26 out of a possible 40 weeks.⁴

In light of the complaints we have received, this Office's position remains the same. We would support an amendment to the criteria for release on severe financial hardship grounds to include that an applicant must be receiving Commonwealth income support payments for 26 out of a possible 40 weeks.

³ http://www.ombudsman.gov.au/_data/assets/pdf_file/0015/34602/Family-Violence-and-Commonwealth-Laws-Social-Security-April-2011-36.pdf

⁴ ALRC Report 117: *Family Violence and Commonwealth Laws – Improving Legal Frameworks*.

Part 3 – Treatment of an early release amount

Early release and family tax benefit

Early release of superannuation lump sums are not treated as income for social security purposes. However, it is taxable income for Australian Taxation Office purposes,⁵ and therefore forms part of a person's adjusted taxable income for the family tax benefit income test.⁶

As the DHS website neatly summarises:

Early release of super has some downsides. You may end up with:

- *more tax to pay*
- *more child support to pay*
- *lower Centrelink payments*
- *less child support*⁷

In these circumstances, a person can be granted an early release of superannuation however, they may lose a significant amount of family tax benefit due to the income test.

This means people in severe financial hardship can find themselves with reduced family payments at the time when they need them most.

This Office recommends Treasury consider whether legislative amendments are necessary so that early release of superannuation for severe financial hardship is not part of a person's adjusted taxable income for family assistance income tests.

⁵ There are no special tax rates for a super withdrawal on compassionate grounds see ATO website [https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-paying-tax/Withdrawing-your-super-and-paying-tax/?page=4#How tax applies to your super](https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-paying-tax/Withdrawing-your-super-and-paying-tax/?page=4#How%20tax%20applies%20to%20your%20super) accessed 25 January 2018

⁶ Taxable income has the same meaning as in the *Income Tax Assessment Act 1997*. It is the amount of assessable income received for a relevant income year, less any allowable deductions: *Guide to Family Assistance Law at 3.2.2; s 3(1) A New Tax System (Family Assistance) Act 1999*.

⁷ <https://www.humanservices.gov.au/individuals/enablers/financial-impact-if-your-release-your-superannuation-early>, accessed 25 January 2018