



Submission by the  
Commonwealth Ombudsman

**Review of the early release of  
superannuation benefits**

Draft proposals consultation

Submission by the Commonwealth Ombudsman, Michael Manthorpe

**February 2019**

## Introduction and summary

In February 2018 the Office of the Commonwealth Ombudsman (the Office) provided a submission to Treasury in its first round of consultation in the Review of the early release of superannuation benefits.

The Office welcomes the opportunity to provide a submission in this second round of consultation on proposed reforms to the early release of superannuation benefits.

The Office is supportive of a number of the proposed reforms, particularly those which amend the severe financial hardship grounds for release to require people to demonstrate receipt of income support for 26 weeks out of 40, rather than 26 weeks continuously.

This submission is limited in scope to two reforms, relating to:

- the mortgage foreclosure ground of release
- the removal of the Regulator's residual discretion (the 'consistent with' ground)

In particular, we are concerned at how the interaction of these two reforms may affect people whose principal home is at risk due to unpaid council rates.

We propose a small modification to the proposed mortgage foreclosure reforms, to deal with unpaid council rates, and have provided comments and suggestions for additional steps to be taken if residual discretion is removed.

## Background

The purpose of the Office of the Commonwealth Ombudsman is to:

- Provide assurance that the organisations we oversight act with integrity and treat people fairly
- Influence systemic improvement in public administration in Australia and the region.

We seek to achieve our purpose through:

- 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; and
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers.

## Response to reform proposals

### Draft Proposal 8 - Housing

The Office supports measures which ensure that early release to meet mortgage repayments is a last resort and available only where it is likely the mortgagee will be able to service the mortgage over the longer term. This increases the likelihood that the early release of funds results in preservation of an asset for retirement, which aligns with the Government's broader superannuation policy objectives. We also support the extension of evidentiary requirements to achieve this end.

Currently, a person may be eligible for early release if they satisfy the mortgage foreclosure ground, or if the Regulator's residual discretion is applied on the basis release would be 'consistent with' the mortgage foreclosure ground. However, the Review's draft proposal 10 would remove the Regulator's residual discretion and prevent discretionary releases. If this occurs, the 'consistent with' ground will no longer be available in situations where the mortgage foreclosure ground is not made out, but the situation is such that the person's house is likely to be seized and sold to recover overdue council rates.

The Review observed:

Notably, this will affect the housing ground of early release by removing the ability to access superannuation for the purpose of paying council rate arrears. The Review considers this is an appropriate tightening of the eligibility criteria, as ***council rates do not provide an asset in retirement (unlike a mortgage)***. (emphasis added)<sup>1</sup>

While the Office accepts the Review's assertion that council rates do not provide an asset in retirement, unpaid rates *can* deprive a person of an asset in retirement. This is because in most local government areas, councils can force the sale of a person's home to recover unpaid rates.

In our view, where unpaid rates result in seizure and sale of a person's home, the inability to pay council rates has directly caused the loss of an asset in retirement. In this sense, it is directly comparable to mortgage foreclosure ground.

We therefore recommend the mortgage foreclosure ground be amended to permit release for payment of council rates, in appropriately limited circumstances. For example, the mortgage foreclosure ground could be amended to:

- permit an early release of superannuation to cover the cost of rates arrears (limited, for example, to 24 months arrears)
- include an appropriate evidentiary requirement to show:
  - the likelihood or imminence of seizure of a retirement asset, and
  - that council will desist from taking action to seize the asset following receipt of payment.

---

<sup>1</sup> Treasury, *Review of Early Release of Superannuation Benefits – Further consultation and draft proposals* - November 2018, p 27.

If adopted, the inclusion of release for council rates under the Housing ground should not restrict access to early release where seizure is not imminent but release is possible under other grounds, for example financial hardship release<sup>2</sup> grounds.

### **Draft Proposal 10 - Residual discretion**

We acknowledge the Review's reasons for proposing removal of the Regulator's residual discretion, including the inherent challenges in administering broad discretions, such as additional costs and the risk of inconsistency in decision making.

However, discretions ensure legislative frameworks are sufficiently flexible, so that hardship relief is not unduly restricted to matters set out in legislation and unforeseen circumstances are not excluded. The inclusion of a discretion can help ensure decision-making is consistent with the broader legislative and policy intent.

We understand the Review considers that situations where this discretion has been used (for example payment of bills, debts, legal fees, fertility treatment, holidays, disability aids), should instead be included in other legislated grounds (revised mental illness release grounds and new severe disability grounds).

If this approach is to be taken, clear guidance about the broader scope of these new and revised grounds should be developed, to ensure the new grounds are not too narrowly construed by decision makers, and to ensure that applicants are not disadvantaged by the new arrangements. If the grounds are not broad enough to cover situations currently covered by the discretion (i.e. the mortgage foreclosure ground and coverage for unpaid council rates) the grounds should be modified to ensure coverage.

---

<sup>2</sup> Under proposed reform 11, this would involve an objective test of receipt of income support for 26 out of the preceding 40 weeks, and a subjective 'living expenses' test – to a cap of \$10,000 over a 24 month period.