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Improving the visibility of superannuation assets in family law proceedings

Super Consumers Australia welcomes the release of the exposure draft which will improve the visibility of superannuation assets in family law proceedings.

For many Australians, super is the largest asset they own after their home. One person not disclosing their super in divorce proceedings can have disastrous consequences for the other side.

This inequity happens more often to women than men. To compound this fact, in 2017-18, the gap in the median superannuation balance between men and women aged 60-64 was 22 per cent.¹ Women over 55 years old are also the fastest growing group experiencing homelessness in Australia.² The inability to access their spouse's superannuation assets is a contributor to this problem.

Around 40% of people with superannuation have more than one account.³ This legislation will ensure all accounts are disclosed, not just one.

Ultimately, this process will make it harder for parties to hide or under-disclose their super assets and will reduce the time, cost and complexity in seeking this information.

We strongly support the introduction of this legislation into Parliament and call for it to be promptly passed.

¹ Retirement Income Review, p.42, <https://treasury.gov.au/sites/default/files/2021-02/p2020-100554-udcomplete-report.pdf>

² Older Women's Risk of Homelessness: Background Paper (2019)

³ Productivity Commission report into Superannuation; Assessing efficiency and competitiveness, p84, <https://www.pc.gov.au/inquiries/completed/superannuation/assessment/report/superannuation-assessment.pdf>

Operation of the legislation

We have no concerns with the application and the scope of the mechanism which will allow permitted individuals to request superannuation information from the Australian Taxation Office (ATO). This includes:

- Only a former spouse/de facto partner in permitted family law proceedings may apply for the registries to request superannuation information.
- The information required, a partner's legal name, date of birth and last known residential address is appropriate to validate the superannuation information.
- The information accessible which is,
 - The name and last reported account balance of each superannuation interest.
 - Whether it is in the retirement phase or accumulation phase.
 - Whether it is an account based or defined benefit interest.

Expanding the information sharing to other areas

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.

We encourage the Government to consider using this consultation to quickly and efficiently fix another minor information sharing issue in Division 355 of the Taxation Act which is currently being raised by Financial Counselling Australia (FCA) for Australians that lack easy access to legal systems, predominantly impacting First Nations people.⁴

First Nations people, like many Australians, often lose track of their superannuation. When they die, their relatives often do not know whether the deceased person had a superannuation account or, if they did, with which superannuation fund(s).

The ATO holds information about all Australians' superannuation accounts. Currently, the law, in Division 355 of the Tax Administration Act 1953 permits a taxation office to disclose protected information to an entity. These include:

*(a) the covered entity is the primary entity's *registered tax agent or BAS agent; or*

*(b) the covered entity is a *legal practitioner representing the primary entity in relation to the primary entity's affairs relating to one or more *taxation laws; or*

(ba) the covered entity is a public officer (within the meaning of section 252 or 252A of the Income Tax Assessment Act 1936) of the primary entity; or

⁴ Appendix attached, Deceased estates access to ATO information, FCA, February 2021

*(c) the primary entity is an *incapacitated entity and the covered entity is a *representative of the incapacitated entity; or*

*(d) the covered entity is the primary entity's *legal personal representative; or*

(e) the covered entity is the primary entity's guardian where the primary entity is a minor or suffers from mental incapacity; or

*(f) the covered entity and the primary entity are members of the same *consolidated group or *MEC group; or*

*(g) the covered entity is a representative of the primary entity who has been nominated by the primary entity in the *approved form to act on that entity's behalf with respect to protected information.*

The legislation only allows for this information to be disclosed to a legal personal representative of the deceased (defined as an executor under a will or administrator under letters of administration). There is a significant financial cost, requiring the courts in order to be declared the administrator of an estate. It is often not worth the cost in situations where the estate is of little value or where there is a legitimate question about whether there are funds in any superannuation accounts. Similar to the problem this draft legislation deals with in divorce proceedings, without knowledge of the size and location of superannuation balances parties can not make an assessment of their materiality. Some legal capacity to request information is all the more important in the superannuation context, which is governed by trust law and would otherwise rely on the trustee having some knowledge of the deceased and potential beneficiaries.

The FCA has obtained legal advice and has argued a broader interpretation of the legislation to the ATO. The ATO is, however, standing firm on its interpretation.

To address the gap in the legislation, we propose that section 355-25(2) is amended to include another category of covered entity for the purposes of a deceased taxpayer. The solution should ensure that First Nations people in particular, but other groups in vulnerable situations the ability to easily and freely determine if their deceased relatives have superannuation and its location.

These proposals should be confined to relate only to the information about superannuation funds associated with the deceased taxpayer but should deem a person who is an immediate family member or next of kin to the deceased taxpayer as appropriate to access this information.