

SUBMISSION

Submission to Treasury
on *improving the visibility
of superannuation assets
in family law proceedings*

2 July 2021

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Director
Retirement Income Policy Division
Treasury
Langton Cres
Parkes ACT 2600

Via email: superannuation@treasury.gov.au

2 July 2021

Dear Sir/Madam,

Improving the visibility of superannuation assets in family law proceedings

The Association of Superannuation Funds of Australia (ASFA) is writing in response to your consultation on the exposure draft legislation and explanatory material to amend the *Taxation Administration Act 1953* and the *Family Law Act 1975* to facilitate the identification of superannuation assets by parties to family law proceedings, that were released for feedback and comment on 31 May 2021.

About ASFA

ASFA is a nonprofit, 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 \$3 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 16 million Australians with superannuation.

GENERAL COMMENTS

ASFA supports the objective of facilitating the identification of superannuation assets by parties to family law proceedings, leveraging information held by the Australian Tax Office (ATO).

SPECIFIC COMMENTS

An ASFA member organisation has raised some issues with respect to aspects of the exposure draft legislation that is the subject of this consultation as it applies to defined benefit schemes. These are outlined in the Specific Comments section of the submission.

Should you have any queries or comments in relation to the content of our submission, please contact me on (03) 9225 4021 or via email to fgalbraith@superannuation.asn.au.

Yours sincerely

Fiona Galbraith
Director, Policy

Specific comments

One of our member organisations has expressed some concerns with respect to the information that the Australian Taxation Office (ATO) will report to the Court and other party regarding the value of defined benefit interests and pensions.

A. Issues

Defined benefit schemes – account balance information insufficient to value defined benefit interest

In particular, the member organisation is of the view that, for defined benefit schemes, the provision of account balance information, in and of itself, is not sufficient for family law purposes, as account balances do not necessarily reflect the value of a member's superannuation interest.

Accordingly, there is a potential risk that the provision of account balance information, without appropriate qualifications and/or recommendations to follow up the superannuation fund for further information, may mean that the parties and/or the Court believe that this information represents the value of the member's superannuation interest.

Defined benefit schemes – current value for pensions not reported to the ATO

Further to this, the member organisation has advised that an accurate value for pensions cannot be determined from ATO information.

As the account is in payment phase, the trustee will have reported only the amount of the Transfer Balance Cap to the ATO, which cannot be used to calculate the value of the superannuation interest for family law purposes. To obtain an accurate valuation of an interest in payment phase, the Court/parties would need to contact the trustee of the superannuation fund directly, as the information held by the ATO will have insufficient to determine the value of the pension interest.

Defined benefit schemes – reversionary pensions not reported to the ATO

There is a potential issue in that some reversionary pensions paid to spouses are not reported by the trustee to the ATO.

Should the surviving, non-member, spouse re-partner, but then separate from the subsequent spouse, the ATO Commissioner would not have information with respect to the reversionary pension to report to the Court/other party.

Defined benefit schemes – member re-joins scheme

Given the inherent time lags in reporting data to the ATO, if a member were to re-join the scheme or restart their defined benefit information with respect to the value of the interest will not be reported to the ATO until after the end of the reporting period, which may involve a delay of up to 18 months.

If a request of information is submitted after the member has re-joined the scheme but before information with respect to the value of the benefit has been reported to the ATO, the ATO would not have this information with respect to the superannuation interest and balance to disclose to the Court/other party.

B. Potential approaches with respect to defined benefit schemes

There are a couple of possible approaches to resolve this issue with respect to defined benefit schemes:

1. Account balance information is not included in the ATO Commissioner's report to the Court

With defined benefit interests in particular, the information reported to the ATO is not complete or sufficient for the valuation of a superannuation interest for the purposes of family law.

We note that clause 1.35 of the draft Explanatory Memorandum refers to the reporting of information from the ATO Commissioner to the Court/other party as *'a preliminary step in the process of a family law court in resolving a later, more substantive matter'*. Given this, there is an argument that there is little to be gained by disclosing insufficient, and potentially misleading, information with respect to the value of superannuation interests at this preliminary stage.

Further, as acknowledged in clauses 1.18 and 1.42 of the draft Explanatory Memorandum, superannuation information is only reported to the ATO once a year and the information may be up to 18 months out of date. In a defined benefit scheme there is greater potential for the current value of the superannuation interest to vary significantly from the historical value held by the ATO.

In order to obtain accurate information as to the value of the superannuation interest as at the relevant time the parties will need to go through the existing 'Form 6' process anyway.

Given the above, for defined benefit schemes, one possibility is that the dollar value of the interest not be included in the information provided by the ATO Commissioner to the Court/other party.

2. Account balance information is accompanied by an alert to contact the super scheme

An alternative approach is that, if the account balance information is to be provided, is that it is accompanied by:

- a specific warning to alert the Court/parties that, as it is with respect to a defined benefit interest
 - the information provided by the ATO Commissioner is not sufficient for family law purposes
 - the Court/parties should not rely on the dollar value of the account balance
- advice that the parties should contact the super scheme directly for more complete and up-to-date information that will enable the defined benefit interest to be valued for family law purposes
- the appropriate contact details of the superannuation scheme.