

# SUBMISSION

## Submission — Financial Services Regulatory Framework in Relation to Financial Abuse

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17 July 2024

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Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
Parliament House  
Canberra ACT 2600

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17 July 2024

Dear Sir/Madam

**Financial Services Regulatory Framework in Relation to Financial Abuse**

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the financial services regulatory framework in relation to financial abuse.

**About ASFA**

ASFA has been operating since 1962 as the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, critical service providers and industry partners.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

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If you have any queries or comments in relation to the content of our submission, please contact me by email [jkoval@superannuation.asn.au](mailto:jkoval@superannuation.asn.au).

Yours sincerely

James Koval

Head of Policy and Advocacy

## Context

ASFA welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the financial services regulatory framework in relation to financial abuse on behalf of our members. We acknowledge the significant impact that financial abuse can have on individuals' financial security and well-being, particularly in relation to retirement savings and income.

Our submission focuses on the role of superannuation in relation to financial abuse and the legislative and regulatory settings that guide the responses of the superannuation community. We have also addressed some of the recommendations made by other organisations relating to superannuation.

We have structured our response using the Terms of Reference and noted where this addresses the specific questions asked of the sector by the Secretariat:

1. What specific policies, systems, processes or other safeguards does your business have in place to identify, respond to and report suspected financial abuse occurring to your customers?
2. What is the extent of suspected financial abuse identified by any such measures in place? and
3. What is the impact of the shift of financial products to online platforms on the prevalence of, and ability of your business to identify, respond to and report, suspected financial abuse?

Our high-level commentary, for the Committee's reference, is that superannuation will often be the largest or second largest asset held by most Australians, making an individual's superannuation account a target for financial abuse. We note, however, that the operating environment within and between APRA-regulated superannuation funds often shows less risk of financial abuse to other elements of the sector. Instead, many cases of financial abuse originate from transfers from APRA-regulated funds to ATO-regulated self-managed superannuation funds (SMSFs). ASFA believes greater guidance can be provided from regulators for trustees to be aware of in cases of potential financial abuse, particularly in initial identification of risks.

We note that an increase to transaction requirements can create conflicting priorities for trustees between speed of processing and additional checks on transactions.

## Recommendations

1. That the scope of the AFCA Approach on Financial Elder Abuse be updated to address the specifics of superannuation and provide case study guidance for trustees.
2. That options be explored to better allow trustees to consider financial abuse and forms of intimate partner violence in the administration of death benefits, which potentially could include changes to the SIS Act.

## Understanding Financial Abuse in the context of superannuation

### Forms of abuse

Detecting and reducing fraudulent activity is a focus for super funds and the critical service providers who are contracted to provide members with assistance. Financial abuse is a form of fraudulent activity that can take many forms, including unauthorised access to superannuation funds, coercion to make financial decisions, unauthorised access to benefits, access to benefits as a result of violence, coercion and other criminal activity, and misuse of powers of attorney.

Superannuation is often a substantial asset and can therefore be a target for financial abuse. The sector recognises that financial abuse is most often perpetrated by a family member, partner or caregiver<sup>1</sup>.

The exact number of incidents of financial abuse occurring within a superannuation environment are not known with certainty (**Secretariat q2**), due to the nature of financial abuse trustees and service providers find it difficult to detect all instances.

As the member nears retirement, their savings pot in superannuation is larger, and access imminent, and it is reasonable to assume the risk for abuse is increased.

The Australian Financial Complaints Authority (AFCA) offers a definition of Financial Elder Abuse:

*AFCA's view is that financial abuse occurs where a third party uses the funds or assets of an elderly person to the detriment of the elderly person. The misuse can be by illegal conduct (such as fraud or forgery) or by abusing the incapacity, trust or confidence of the vulnerable elderly person.*<sup>2</sup>

AFCA publishes a series of useful 'Approaches' to assist members of AFCA and consumers navigate the financial complaints landscape. "AFCA Approaches are based on the experience of our Ombudsmen in resolving complaints and aim to provide practical information and our approach on substantive issues."<sup>3</sup>

The guiding AFCA approach quoted above on financial elder abuse is informative for superannuation trustees and service providers but is directed at "Financial Firms"<sup>4</sup>, most often banking institutions. It would be useful for superannuation trustees and service providers if an updated Approach was considered with a scope that included superannuation benefits. **ASFA recommends** that this be prioritised and welcomes the opportunity to work with AFCA to ensure comprehensive and appropriate coverage.

### The risk of financial abuse

The risk of financial abuse using fraud causing loss of superannuation or benefits is more pronounced if a condition of release has been met.

A "condition of release" refers to specific circumstances under which you can access your superannuation savings. These conditions are set by the Australian government to ensure that superannuation is preserved until it is genuinely needed, typically during retirement. Here are some key conditions of release for superannuation:

#### 1. Reaching Preservation Age and Retiring:

Preservation age depends on a member's date of birth but is predominantly 60 years. If a member reaches preservation age, they can access their super.

#### 2. Reaching Age 65:

Members can access their superannuation savings upon reaching the age of 65, regardless of whether they are still working.

#### 3. Permanent Incapacity:

If a member is permanently incapacitated and unable to work, they can access their superannuation savings.

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<sup>1</sup> [https://www.afca.org.au/sites/default/files/2019-12/afca\\_approach\\_-\\_financial\\_elder\\_abuse.pdf](https://www.afca.org.au/sites/default/files/2019-12/afca_approach_-_financial_elder_abuse.pdf)

<sup>2</sup> [https://www.afca.org.au/sites/default/files/2019-12/afca\\_approach\\_-\\_financial\\_elder\\_abuse.pdf](https://www.afca.org.au/sites/default/files/2019-12/afca_approach_-_financial_elder_abuse.pdf)

<sup>3</sup> <https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>

<sup>4</sup> [https://www.afca.org.au/sites/default/files/2019-12/afca\\_approach\\_-\\_financial\\_elder\\_abuse.pdf](https://www.afca.org.au/sites/default/files/2019-12/afca_approach_-_financial_elder_abuse.pdf)

#### 4. Severe Financial Hardship:

In cases of severe financial hardship, members may be allowed to access a portion of their superannuation savings. Specific criteria must be met, including being in receipt of specified security benefits, and typically members need to provide evidence of their financial situation.

#### 5. Compassionate Grounds:

Members can access their superannuation savings on compassionate grounds for specific reasons, such as paying for medical treatment, preventing foreclosure on their home, or covering funeral expenses, and apply for release through the Australian Taxation Office (ATO).

#### 6. Terminal Medical Condition:

If a member has a terminal illness with a life expectancy of less than 24 months, they can access their superannuation savings.

#### 7. Temporary Resident Leaving Australia:

Temporary residents who are leaving Australia permanently can access their superannuation savings.

In addition to accessing a benefit, superannuation money can leave the APRA regulated superannuation environment and roll into a Self-Managed Superannuation Fund (SMSF).

Unlike the banking environment, superannuation funds, when considering members under preservation age, do not experience withdrawal “transactions”. Contributions are made and preserved so an approach such as a bank may take to monitor suspicious or unusual activity is not available and may not be available for superannuation funds to attempt to detect and mitigate fraud and financial abuse. Transactions that may occur for those undertaking a withdrawal (such as release for a temporary resident) are transacted through the banking system.

It is very difficult for superannuation funds and service providers to detect financial abuse (**Secretariat q2**) noting these elements –

- That most financial abuse is perpetrated by a relative or carer (who has access to a level of personal information about the victim/survivor and may be able to impersonate them without detection)
- That the transaction volume is naturally low (meaning patterns and a departure from those patterns is not a form of detection likely to be effective).

Using a traditional risk assessment approach, it is apparent that members who apply for or meet a condition of release, whether through special circumstances or age and work status, are at greatest risk. The Australian Law Reform Commission report (albeit dated from 2017) underscores this in the examples they highlight.<sup>5</sup> Of the eight real life examples detailed, 6 of these had met a condition of release. The remaining two are examples of abuse using an SMSF.

It is generally considered that superannuation money moving out of the APRA environment and into the ATO environment (in the form of an SMSF) presents a greater risk than a rollover from one fund to another within the APRA regulated environment.

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<sup>5</sup> <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/7-superannuation/financial-abuse-and-superannuation-funds/>

In the *Superannuation Industry (Supervision) Regulations 1994*, Regulation 6.34A outlines the timeframes for processing rollovers and transfers of superannuation benefits. According to this regulation:

1. Trustees must process rollovers or transfers as soon as practicable, but no later than 3 business days after receiving the request or necessary information, unless there are specific circumstances that warrant a longer timeframe.
2. If further information is required, the timeframe extends to 3 business days after receiving the additional information.<sup>6</sup>

The regulations have prioritised the timeliness of transaction processing, leaving very little ability for trustees and their service providers to interrogate the transaction with the tools and processes outlined below. This was noted in the recent judgement handed down by His Honor Justice Thomas in *Braz v Host Plus* [2023]. His Honor highlighted that current regulatory settings prioritise quick processing of rollover requests, usually within three business days, but also stress the necessity of obtaining proper member consent to avoid fraudulent activities (as was present in this matter).<sup>7</sup>

### The COVID-19 Early Release scheme shame

The COVID-19 Early Release of Superannuation scheme was introduced by the Australian government in response to the financial impacts of the COVID-19 pandemic. Announced in March 2020 as part of the economic stimulus measures, the scheme allowed eligible individuals to access up to \$10,000 of their superannuation in the 2019-20 financial year and a further \$10,000 in the 2020-21 financial year. The initiative aimed to provide financial relief to those facing economic hardship due to the pandemic, such as job loss or significant income reduction.

The scheme was administered by the Australian Taxation Office (ATO) and saw over 3 million Australians withdraw more than \$36 billion from their super accounts.

To ensure Australians had their money efficiently, given the financial stress many were under, APRA set an expectation that a fund would process a transaction promptly once the application was received from the ATO. 95% were expected to be processed in 5 business days.<sup>8</sup>

A survey conducted by ANROWS in 2021 on intimate partner violence during the COVID-19 pandemic detailed that, of the approximately 10,000 women surveyed, one in five women (19.3%) reported that their partner had been financially abusive towards them in the last 12 months. Of those women, one in three women (32.7%) who experienced financial abuse reported that their partner had pressured them to give them money or access to their money in the last 12 months, of which 43.2 per cent said this had included their superannuation.<sup>9</sup>

The superannuation sector, through ASFA and others, raised concerns about the COVID-19 Early Release Scheme, including the issue of potential fraud being exacerbated by lowering the barriers to early release.

Superannuation has a unique role to play in women's financial security as possibly the only financial asset a woman may have that exists in her name only.

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<sup>6</sup> [Superannuation Industry \(Supervision\) Regulations 1994 - Regulation 6.34A](#)

<sup>7</sup> *Braz v Host-Plus Pty Ltd* [2023] FCA 1454

<sup>8</sup> <https://www.apra.gov.au/covid-19-early-release-scheme-issue-36-accessible-version>

<sup>9</sup> Boxall, H., & Morgan, A. (2021). Intimate partner violence during the COVID-19 pandemic: A survey of women in Australia. Research Report, Issue 3

It is clear now that by lowering the barriers to early release, many women have lost some or all of their retirement savings to perpetrators of financial abuse. This ANROWS data should be taken into serious consideration when contemplating of the impacts of weakening the principle of preservation.

The manner and form of the fraud and financial abuse prevalent in the COVID-19 Early Release Scheme has informed responses, tools and processes adopted by funds and outlined below.

### Release of benefit payments

The payment of death benefits is an area of specific concern and public interest regarding the possible interaction with forms of financial abuse.

When a superannuation fund member passes away, their superannuation balance and any associated life insurance benefits, collectively known as a "death benefit," typically is paid to their beneficiaries. Superannuation trustees have specific obligations and procedures to follow in managing and distributing death benefits.

#### 1. Identify Beneficiaries:

Trustees must identify the legal beneficiaries of the deceased member's superannuation benefits. These beneficiaries could include a spouse, children, or other dependents, or the member's estate if no dependents are found.

#### 2. Adhere to Binding Nominations:

If the deceased member made a binding death benefit nomination, the trustee must pay the death benefits according to this nomination, provided it is valid and effective at the time of death. Binding nominations typically expire every three years and must be renewed to remain valid.

#### 3. Consider Non-binding Nominations:

In the absence of a binding nomination, the trustee may consider any non-binding nominations as a guide but is not obligated to follow them. Trustees will use their discretion to determine the most appropriate beneficiaries based on the member's relationships and any relevant circumstances, such as the degree of financial dependency.

#### 4. Follow Legal and Regulatory Requirements:

Trustees must comply with relevant superannuation laws, including the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and regulations, which outline the conditions and requirements for paying death benefits.

#### 5. Communicate with Beneficiaries:

Trustees must communicate with potential beneficiaries to gather necessary information and documents to determine the rightful recipients of the death benefits.

#### 6. Timely Processing:

Trustees are required to process death benefit claims efficiently and within a reasonable timeframe to minimize financial and emotional stress for the beneficiaries. APRA and ASIC emphasize the importance of timely, clear, and respectful handling of death benefit claims.

## Key Points from APRA and ASIC Guidelines:

APRA's Guidance: APRA's frequently asked questions (FAQs) and guidelines stress the importance of superannuation funds providing clear and accessible information about death benefit claims on their websites. They also recommend best practice for trustees in communicating and processing these claims efficiently.<sup>10</sup>

ASIC's Expectations: ASIC expects superannuation trustees to deal with death benefit claims in a manner that is efficient, honest, and fair. Trustees should ensure that their processes for handling these claims are fit for purpose, considering the emotional and financial stress beneficiaries may be under.<sup>11</sup>

The focus on dependence is because the purpose of superannuation is enshrined as being to provide for fund members and their dependents, either in retirement or after a member dies. Non-dependent people and adult children who are not financially dependent have to pay some tax on death benefits, rather than the benefits being tax free.

The Australian community has seen some disappointing and distressing outcomes regarding the payment of death benefits, this is an area of ongoing improvement and advocacy, including through ASFA's recent engagement with government and regulators. The community has an understandable expectation that trustees will take into consideration issues of financial abuse if it is apparent, but the regulatory environment can constrain that consideration.

Recently, it was reported that The Honourable Tanya Plibersek, The Minister for the Environment, had written to Attorney-General Mark Dreyfus and Minister for Women Katy Gallagher after representations from a grieving mother following revelations that an accused domestic violence abuser received a \$65,000 payout from the wife's superannuation insurance when she took her own life. In this instance, the alleged perpetrator was not charged with abuse, however, a charge of abuse would not negate their entitlement under the current law.

This echoes an earlier case *Levers v Superannuation Complaints Tribunal* [2016] where the circumstances were very similar.<sup>12</sup>

Theoretically, the trustee can intervene where an eligible dependant has been convicted of member's murder under the Common Law principle of the forfeiture rule, preventing murderers benefits from their crime. However, in reality, the trustee is not in a position to defer its decision until the criminal justice system runs its course through coronial inquiry, trial, sentencing and the appeals process. There is no mechanism for a trustee to pay a death benefit into Court in these circumstances, unlike for a life insurer under s 215 of the *Life Insurance Act 1995* which allows a life insurer to pay a benefit into Court so the Court can determine entitlement in such circumstances, and in the fullness of time.<sup>13</sup>

This raises an interesting discussion point about the nexus between suicide and murder as a "cause of death". While beyond the scope of this submission, it is clear that community expectations could be better captured in the superannuation legislation allowing for trustees to take other matters into consideration.

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<sup>10</sup> APRA's FAQs on Superannuation (<https://www.apra.gov.au/news-and-publications/covid-19-early-release-scheme-issue-36>)

<sup>11</sup> ASIC's Guidelines on Superannuation (<https://asic.gov.au/regulatory-resources/superannuation-funds/>)

<sup>12</sup> *Levers v Superannuation Complaints Tribunal* [2016] FCA 936

<sup>13</sup> *Westpac Life Insurance Services Limited v Mahony (No 3)* [2020] FCA 285

**ASFA recommends** exploring contemporary community expectations re the payment of death benefits, which could be provided for better. One possible avenue is through inserting the common law forfeiture rule (preventing murderers from benefiting from their crime) into the SIS Act/Regs, expanding it to include persons convicted of domestic violence related crimes against the deceased, and a power for the trustee to pay a benefit into court, as is the process in s215 of the Life Insurance Act where there is doubt as to who should receive the benefit, and expanding this to include where there is or was a domestic violence related restraining order in place.

ASFA has established an Insurance in Super Working Group including the broad range of participants in the superannuation and insurance sectors required to consider improvements, and we look forward to working with policymakers on potential changes.

### Improving awareness and education

Increasing awareness and education among superannuation fund members and industry professionals about financial abuse is essential.

ASFA continues to build on our targeted educational programs and materials to help industry professionals recognise signs of financial abuse and understand the actions they can take.

ASFA covers content on vulnerable members in the claims handling component of our Super Essentials course. This is an area of concern for the sector, and we provide the education to build the capability of super fund professionals.

ASFA is also working on a sector response to financial crimes which will include a gender lens and a greater understanding of the prevalence of financial abuse.

### Enhancing protections and support mechanisms

The superannuation community, including funds and service providers, have developed policies and processes that attempt to detect, respond to and mitigate financial abuse. **(Secretariat q1)**

Funds can take different approaches, but some measures include:

- Sophisticated member identification procedures and operational controls.
- Verification procedures for certain transactions, including phone calls or text messages.
- Fraud protocols and detection procedures.
- Member and staff education and awareness raising.

### Vulnerable member protocols

Superannuation funds are required to have protocols in place to protect vulnerable members. This requirement is contained in several regulatory standards and guidelines:

APRA's Prudential Standard SPS 515 Strategic Planning and Member Outcomes requires superannuation trustees to consider the interests and needs of different cohorts of members, including vulnerable members. Trustees are expected to have policies that ensure they can identify and support vulnerable members effectively.

ASIC has highlighted the importance of protecting vulnerable consumers, including superannuation fund members, in various regulatory guides and reports. ASIC's focus on vulnerable members aligns with ensuring that trustee services are provided fairly and efficiently.

The final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's emphasised the need for financial institutions, including superannuation funds, to have robust measures in place to protect vulnerable consumers. This includes developing and implementing policies to identify and support vulnerable members.

The regulations, standards and guidelines help to ensure that superannuation funds take proactive steps to identify and support vulnerable members, safeguarding their interests and enhancing their financial wellbeing.

AFCA notes that "Vulnerability combined with a detrimental impact on the elderly person can help to identify improper conduct. It is important to note that while vulnerability can be related to incapacity, it can also be due to dependence on, or trust in, a third party. It is important to distinguish potential financial abuse from what is actually an informed decision made by an elderly person with capacity to make a decision, who makes it free from any improper or influence from a third party."

ASFA understands that the work in this area needs to be ongoing, as the magnitude of the risk increases. In practice, while some elements of vulnerability can be deduced from the circumstances of the member – such as the claim for a death benefit by a spouse – others are very difficult for superannuation funds to assess, as they tend to happen 'behind the scenes'.

It should be noted that, even with very good protocols, policies, procedures and training, super funds and service providers often cannot detect financial abuse.

## Conclusion

ASFA is committed to supporting measures that protect superannuation fund members from financial abuse and ensure their retirement savings are secure. We look forward to working with the Committee and other stakeholders to develop and implement effective strategies to address this critical issue.

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