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Senator Jess Walsh
Chair
Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Chair

SUPERANNUATION (OBJECTIVE) BILL 2023 [PROVISIONS]

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) welcomes the opportunity to contribute to the Senate Economics Legislation Committee's (Committee) Inquiry into the Superannuation (Objective) Bill 2023 [Provisions] (the Bill).

About the IGTO

The IGTO is an independent statutory agency that investigates taxation administration systems and laws, as well as the actions and decisions made by Tax Officials - of the Australian Taxation Office (ATO) or the Tax Practitioners Board (TPB). The IGTO seeks to deliver 'fair, accountable and improved administration of the taxation and superannuation systems for the benefit of the Australian community, through independent investigation and reporting.'¹ We also undertake tax investigations for the purpose of providing independent advice and assurance to Government on taxation administration laws and systems.

The IGTO is also an integrity agency within the framework of the *National Anti-Corruption Commission Act 2023*.²

As the IGTO is not empowered to investigate or advise on policy matters, this submission does not make (or intend to make) comment on any matters relating to the proposed objective for superannuation as set out in the Bill. Rather, the purpose of this submission is to share observations based on the IGTO's conduct of dispute investigations in relation to superannuation, how objectives for different aspects and measures relating to superannuation can at times appear to conflict and create challenges in administration which, in turn, creates uncertainty for participants or results in adverse impacts for taxpayers.

Accordingly, the IGTO makes no comment on the stated policy objective for superannuation which is expressed in the Bill.

¹ Commonwealth of Australia, *Portfolio Budget Statements 2023-24 Budget Related Paper No 1.15 Treasury Portfolio*, p 281 <[Portfolio Budget Statements 2023-24 \(treasury.gov.au\)](https://www.treasury.gov.au/Portals/0/Budget/2023/2023-24/Budget_Related_Papers/1.15_Treasury_Portfolio.pdf)>.

² *National Anti-Corruption Commission Act 2023*, sub-s 15(k).

The important role of object or purpose provisions in informing administration

Objects, or purpose, provisions in law play a crucial role as they ‘give readers a general understanding of the purpose of legislation, or to set out general aims or principles that help readers to interpret the detailed provisions of legislation.’³ They also assist the courts and administrators to interpret the legislation.

Section 15AA of the *Acts Interpretation Act 1901* provides:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Objects clauses are helpful in this regard since they express what is the purpose or object of the provisions and in doing so limit or resolve uncertainty or ambiguity.⁴

A challenge emerges for administrators and the community alike where the objects of different parts of the legislative framework potentially come into conflict.

Some examples of conflicts in purpose and objectives

The IGTO understands that the current Bill seeks to address recommendations from the Financial System Inquiry⁵ and the Retirement Income Review⁶, both of which identified the absence of an agreed policy framework and objectives for superannuation.

At a high level, the community understands superannuation as a form of savings for retirement either through contributions made compulsorily or voluntarily by an employer or voluntarily by individual taxpayers.⁷ Although saving for retirement is a key function of the superannuation system, superannuation savings are also a source of taxation revenue (albeit taxed concessional), savings that may be accessed to relieve other emergencies in life (e.g. compassionate or early release of superannuation) and sometimes a vehicle to give effect to a number of other policy measures to support and assist Australians, again which provide for withdrawal of superannuation savings prior to reaching preservation age (e.g. first home super savings scheme).

Although the Explanatory Memorandum (EM) to the Bill notes that legislated access to savings in these ‘exceptional’ circumstances is not changed by legislating the objective of superannuation⁸, the Committee may wish to consider how to resolve or avoid potential conflicts in administration which can arise in these ‘exceptional’ circumstances. Some recent examples based on IGTO dispute investigations and review investigations are set out in further detail below for the information of the Committee.

³ Office of Parliamentary Counsel, *OPC’s drafting services: a guide for clients* (Seventh edition, July 2022), p 33.

⁴ *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 78.

⁵ The Treasury, *Financial System Inquiry Final Report* (November 2014) p 93.

⁶ The Treasury, *Retirement Income Review Final Report* (July 2020) p 27.

⁷ Australian Taxation Office, *Your superannuation basics* (10 June 2022) <<https://www.ato.gov.au/other-languages/information-in-other-languages/super/your-superannuation-basics>>.

⁸ Refer paragraph 1.24 of the Explanatory memorandum to Superannuation (Objective) Bill 2023.

Compassionate Release of Superannuation

Regulation 6.19A of the Superannuation Industry (Supervision) Regulations 1994 (**SISR 1994**) provides that (subject to certain conditions):

1. *A person may apply to the Regulator for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a specified superannuation entity may be released on the ground that it is required:*
 - (a) to pay for medical treatment or medical transport for the person or a dependant; or*
 - (b) to enable the person to make a payment on a loan, to prevent:*
 - i. foreclosure of a mortgage on the person's principal place of residence; or*
 - ii. exercise by the mortgagee of an express, or statutory, power of sale over the person's principal place of residence; or*
 - (c) to modify the person's principal place of residence, or vehicle, to accommodate the special needs of the person, or a dependant, arising from severe disability; or*
 - (d) to pay for expenses associated with the person's palliative care, in the case of impending death; or*
 - (e) to pay for expenses associated with a dependant's:*
 - i. palliative care, in the case of impending death; or*
 - ii. death; or*
 - iii. funeral; or*
 - iv. burial; or*
 - (f) to meet expenses in other cases where the release is consistent with a ground mentioned in paragraphs (a) to (e), as the Regulator determines.*

A case study example is set out below.

Case Study – Administration of Residual Discretion

A complainant that had recently been diagnosed with stage four prostate cancer, was advised by their doctor to have surgery as soon as possible to remove the cancer. Understandably, the surgery was time critical. The complainant needed to borrow money from a family friend to make the upfront payment for the surgery as well as other medical expenses. The complainant intended to repay their family friend by applying for an early release of their superannuation on compassionate grounds. The grounds for compassionate release of superannuation are set out in regulation 6.19A of the *Superannuation Industry (Supervision) Regulations 1994* and the relevant provisions are currently administered by the ATO. In the past, these provisions had been administered by the Department of Human Services (DHS) and the Australian Prudential Regulation Authority (APRA).

As per section 4 of the *Superannuation Industry (Supervision) Act 1993*, the Commissioner of Taxation is now generally responsible for self-managed superannuation funds, data and payment standards, tax file numbers and the compassionate release of superannuation amounts.

Importantly, there has not been any legislative changes to the eligibility for early release of superannuation on compassionate grounds across the different periods of administration – that is, by the ATO and DHS, and APRA.

Following the ATO's consideration of the complainant's application, the ATO informed the complainant that their application had been rejected on the basis that the surgery and medical expenses had already been paid. The ATO's policy was to only approve compassionate release of superannuation for unpaid expenses. Therefore, if the expense had already been paid, for example by using a loan, a credit card or money borrowed from family or friends, then the applicant would not meet the eligibility requirements for compassionate release of superannuation. The complainant sought an internal review of the ATO's decision. That review affirmed the ATO's original decision.

The complainant subsequently lodged a dispute with the IGTO. The IGTO's investigation initially focused on the legislative basis for early release of superannuation on compassionate grounds and whether it required medical expenses to be unpaid. The IGTO also referred the ATO to a 2014 version of the DHS's website which suggested that it had approved applications for compassionate release of superannuation to repay a loan, where an applicant borrowed money to pay for their medical expenses. Accordingly, the IGTO recommended that the ATO reconsider the complainant's original application based on the specific circumstances. The ATO responded that reconsideration of the complainant's original application would not lead to a different outcome.

The IGTO also examined a specific paragraph in the relevant legislative provisions which provided the ATO with legislative residual discretion to approve release on grounds that are consistent with the compassionate grounds of release in the legislation (i.e. Regulation 6.19A(1)(f) reproduced above). The IGTO formed the view that this legislative residual discretion could be applied to the complainant's circumstance.

The IGTO also further investigated the circumstances described on the 2014 version of the DHS website. This led the IGTO to locate a publicly available version of APRA's guidelines from 2001. The APRA guidelines stated that the legislative residual discretion may be exercised to approve a release where an applicant had incurred debts by borrowing money to pay for expenses that were ordinarily grounds for compassionate release and had difficulties repaying the loan. Furthermore, the guidelines set out what evidence was required from applicants at the time to approve their applications for early release of superannuation.

The IGTO escalated its investigation to Senior ATO Executives and provided to them the evidence of how previous administrators would consider and approve applications for early release of superannuation on compassionate grounds to repay loans that were taken out to pay for eligible expenses, such as medical expenses. The IGTO also communicated its view to the ATO that if the ATO were to adopt this approach, then further information would be required from the complainant to determine if they were eligible on this basis.

The ATO's initial response was that the DHS approach in 2014 would not have resulted in a release of superannuation to the applicant, and that this outcome was also implicit in the guidance materials provided when administration passed to the ATO in 2018.

Following the ATO's further review of the relevant legislation and the policy intent, however, the ATO informed the IGTO that it had determined that a release of superannuation can be granted in certain limited circumstances where:

1. a loan was taken out by an applicant to pay for medical treatment for themselves or their dependant,
2. the applicant would have been eligible for release under the primary compassionate ground (in this case, Regulation 6.19A(1)(a)) if the expense had not been paid, and
3. all or part of that loan remains unpaid, and the applicant is assessed as being unable to repay such a loan.

As a result of this ATO policy change, it was agreed for the ATO to directly contact the complainant and request the relevant evidence required to determine whether the complainant was eligible for compassionate release on this new basis.

Once the ATO contacted and obtained the relevant evidence from the complainant, the ATO made the decision to approve the complainant's request for early release of superannuation on compassionate grounds to repay the loan that they had obtained from their family friend to pay for their surgery and medical expenses.

As a result of the IGTO's investigation, the ATO also agreed to review all of its internal guidance material and publicly available information to determine what changes are necessary to reflect this update to the ATO policy.

The case study illustrates a potential whereby the administrator (in this case, the ATO) that is usually charged with the protection and oversight of the superannuation system to guard against illegal early release of superannuation is also required to administer provisions aimed at enabling taxpayers to access superannuation prior to reaching preservation age. The differences in purpose and objectives gave rise to a stricter interpretation of the early release provisions than was otherwise warranted in the circumstances, and was inconsistent with how they had been interpreted and applied by DHS and APRA some years earlier.

Such circumstances are difficult for both the administrator and for the affected taxpayers, as early release of superannuation is only permitted in circumstances where the taxpayer is experiencing some form of hardship, often where time is of the essence, and delays in administration are likely to exacerbate the hardship which the legislation is intended to ameliorate.

Early Release of Superannuation – COVID-19

Regulation 6.19B of the SISR 1994 provides that (subject to certain conditions):

A person may apply to the Regulator for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a specified superannuation entity or entities may be released on the ground that it is required to assist the person to deal with the adverse economic effects of the coronavirus known as COVID-19...

Case Study – Refer GPA Report

The IGTO examined the challenges with the COVID-19 early release of superannuation measure in detail as part of our investigation into *The Exercise of the Commissioner's General Powers of Administration*.⁹ A detailed case study (Case Study 2) is included at Section 3.2 of that report.

First Home Super Saver Scheme (FHSSS)

Since 1 July 2018, taxpayers have been able to apply to the ATO for a release of the voluntary contributions made to their superannuation funds after 1 July 2017 along with any associated earnings to contribute towards the purchase or construction of a first home. The FHSSS capped the amount of contributions that can be released at \$15,000 in any financial year¹⁰, and a total maximum of \$30,000 across all years. From 1 July 2022, the maximum total increased to \$50,000¹¹. The mechanism for this is set out in Division 138 of Schedule 1 to the *Taxation Administration Act 1953*.

Accessing funds under the FHSSS involves:

- applying to the ATO for a determination of the maximum amount that may be released;¹²
- applying to the ATO for a 'release authority' which specifies the amount that the superannuation fund must release to the ATO;¹³ and
- receiving released amounts from the ATO,¹⁴ minus any applicable withholding, in order to facilitate the purchase or construction of the home.

A taxpayer is required to enter into a contract for purchase or construction of the home within 14 days before, or 12 months after, applying to the ATO for release of the funds. However, the Commissioner may grant taxpayers an additional 12 months to enter into the contract.¹⁵ Where, at the end of the extended period, no purchase has been made, the taxpayer may either recontribute the released sums or choose to keep the amounts and be subject to FHSS tax.

Case Study - Freehold Interest

The term 'freehold interest' is well defined in the context of property law and the Commissioner of Taxation has also issued his own views on the definition of 'freehold interest' in a number of different contexts including Self-Managed Superannuation Funds (SMSFs), Capital Gains Tax (CGT) and Goods and Services Tax (GST). A summary of these views and definitions is provided in Appendix B to the IGTO's submission to the House of Representatives Standing Committee on Tax and Revenue's Inquiry into Housing Affordability and Supply in Australia.¹⁶

⁹ Inspector-General of Taxation and Taxation Ombudsman, *The Exercise of the Commissioner's General Powers of Administration* (2023) pp 104-129 <<https://www.igt.gov.au/investigation-reports/the-exercise-of-the-commissioners-general-powers-of-administration/>>.

¹⁰ *Taxation Administration Act 1953*, Sch 1, Sub-div 138-B.

¹¹ Australian Government, Federal Budget 2021-22 – Budget Paper No 2 (2021) p 17.

¹² *Taxation Administration Act 1953*, Sch 1, s 138-10.

¹³ *Taxation Administration Act 1953*, Sch 1, Div 131.

¹⁴ *Taxation Administration Act 1953*, Sch 1, s 131-65.

¹⁵ *Income Tax Assessment Act 1997*, s 313-35(2). The ATO has stated on its website that "we will grant you an extension of time to do so for a further 12 months. There is no need to apply for this extension, it will be automatically granted to you and we will notify you of this."

¹⁶ Inspector-General of Taxation and Taxation Ombudsman, Submission to the House of Representatives Standing Committee on Tax and Revenue *Inquiry into Housing Affordability and Supply in Australia* (27 September 2021), Submission #120 accessible at:

<https://www.aph.gov.au/Parliamentary_Business/Committees/House/Former_Committees/Tax_and_Revenue/Housingaffordability/Submissions>.

However, in the context of the FHSSS, the Commissioner adopted a broader [different] view of 'freehold interest' which narrows the eligibility circumstances for FHSSS and which is inconsistent with his views expressed in other contexts. In particular, the ATO view adopted for the purposes of administering FHSSS was that:

- an individual can hold a freehold interest in land even if he or she does not have exclusive possession of land for an indefinite period of time;
- when an individual enters into a standard form contract for the acquisition of land and the contract does not contain special conditions, the individual holds a freehold interest in that land because of their equitable right to enforce that contract, even if the individual does not have any right of possession and even if the individual is not yet the legal or indeed the beneficial owner of the land;
- the individual can hold a freehold interest in land, even if the relevant lot will not come into existence until subdivision occurs at a later time;
- the individual is, nevertheless, not taken to have held a freehold interest in land if the contract does not complete.

This meant that some taxpayers were denied access to voluntary super contributions, that they had made for the purpose of saving to purchase their first home, because they had signed (but not settled) the very contract for that first home, and had done so before the FHSS determination had been processed.

The ATO was not able to point to any legal authorities to support this particular interpretation of 'freehold interest'. The adoption of the broad definition can operate to prevent certain types of first home purchasers from accessing the FHSSS, as illustrated in Examples 3 and 4 taken from the IGTO submission (noted above).

The statutory interpretation issues noted above were ultimately addressed by legislative change in 2023 by passing an amendment. Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 (**the 2023 Bill**) was introduced into Parliament on 14 June 2023 and received Royal Assent on 20 September 2023. Schedule 4 of the Act repeals s 138-10(2)(a)(i) and replaces it so that s 138-10(2)(a)(i) now reads as follows:¹⁷

- (2) You may request the Commissioner, in the *approved form, to make a *first home super saver determination if:
 - (a) you have never held:
 - (i) a legal interest in an estate in fee simple in real property in Australia;

The EM to the 2023 Bill states:

4.10 Amendments have been made to provisions which determine an individual's eligibility for the FHSS Scheme. For an individual to be eligible for the FHSS Scheme, the individual must first make a request for a FHSS determination. An individual can only do this if certain conditions are satisfied. One of these conditions is that the individual has never held a relevant interest in real property or land (see paragraph 138-10(2)(a) in Schedule 1 to the TAA). Amendments have been made to ensure this condition refers to

¹⁷ Item 29 of Sch 4 to the Treasury Laws Amendment (2023 Measures No. 3) Bill 2023.

the point in time at which an individual becomes a property owner. In the case of a standard contract for the purchase and sale of real property, the purchaser becomes a property owner once the contract is completed and ownership of the real property transfers to the purchaser. As per the application provision provided by item 28 of Schedule 4 to the Bill, the amendments apply in relation to FHSS determinations made on or after the commencement of Schedule 4 to the Bill. [Schedule 4, items 20 and 21, subparagraphs 138-10(2)(a)(i) and 138-10(2)(a)(ii) of Schedule 1 to the TAA]

Where the interpretation of a statute is ambiguous, the aim and provisions of a subsequent Act (in this case, an amended provision) may throw light on the correct construction¹⁸. In this case, the language of the EM to the 2023 Bill supports the argument that Parliament intended to only clarify the provision, for example, in stating that ‘amendments have been made to ensure this condition refers to the point in time at which an individual becomes a property owner’, rather than suggesting that the amendments alter the condition – i.e. the amendment clarifies how the provision was always intended to operate in the past.

Notwithstanding this amendment and clarification, the ATO view is that the clarified interpretation does not apply retrospectively to ‘cure’ or ‘clarify’ the prior applications. This seems curious given the objectives, aims and purpose of the FHSS.

Another case study, examining the impact of mistake and the ability to rectify those mistakes is provided below.

CASE STUDY – FHSS Determination (pre-legislative amendments)

A complainant raised concerns that the ATO had unreasonably withheld amounts released by her superannuation fund under the First Home Super Saver scheme (FHSS scheme). These amounts were to be used in buying her first home. The ATO instead decided to return the released monies to her superannuation fund as it decided that she had made errors on her application form that invalidated her claim and that the law prevented her from correcting that error or ever applying again under the FHSS scheme. She had raised her complaint with the ATO and explained that the errors were a genuine misunderstanding. The ATO did not change its decision following an internal review.

The IGTO commenced an investigation. The IGTO reviewed the ATO case notes and ATO call centre recordings and found that the errors were due to the complainant’s genuine (but erroneous) belief which was not dispelled during her calls to the ATO when she was seeking ATO assistance to complete her application (before and whilst completing her application) and that the ATO had failed to consider this relevant evidence. The IGTO also found that the ATO had revoked the FHSS Determination, cancelled the release authority and returned the released monies back to the superannuation fund without lawful authority to do so. This was due to a genuine (but erroneous) ATO belief that the errors had invalidated the Determination. Views on particular tax administration laws which impacted on this case were also communicated.

As a result, the IGTO recommended the ATO to provide an equitable remedy to the complainant, provide an appropriate apology and consider compensation for the loss caused. The IGTO also

¹⁸ *Deputy Federal Commissioner of Taxes v Elder’s Trustee & Executor Co Ltd* (1936) 57 CLR 610, 625–626; cited in *Masson v Parsons* (2019) 266 CLR 554 at [28].

made recommendation for broader improvements, including improvements to the ATO's administration of the FHSS scheme and its governance of ATO adherence to the Taxpayers' Charter. As a result of issues raised by this case, the Government announced potential amendments that would assist complainants to rectify errors made on their FHSS applications. The IGTO also recommended that the ATO take steps to address the risk of individuals suffering adverse consequences due to errors made on applications prior to the enactment of the legislation.

Following consideration of a lengthy IGTO report which detailed the evidence, the ATO ultimately agreed to release the FHSS amounts to the complainant with an apology and advised that it had made improvements to its administration of the FHSS scheme. The ATO also agreed to review all prior cases which had been denied access to release of FHSS amounts due to errors on their application (after the proposed amendments to the FHSS legislation have been enacted) and contact all individuals in these cases to offer to remediate their case.

The potential impacts where purpose or objects are in conflict

It is Parliament's prerogative to make laws and for administrators to give effect to Parliament's intent by interpreting and applying the laws in a manner which best gives effect to that intent. However, the IGTO's investigation of disputes has found that at times this can prove difficult, especially where the administrator may be trying to have regard to more than one objective. The case study examples noted above are provided as evidence of this and the potential impacts on individual taxpayers.

Resolving conflicts in the purpose and objectives

Superannuation is an important part of Australia's retirement system. It is to be expected that new laws and measures will be introduced over time that will amend and reform the superannuation system, which impact its administrators and taxpayers. It is also expected that, at times, the objects of those new laws and measures may not be wholly consistent with the stated objects proposed in the Bill. The requirement under the Bill for lawmakers to consider and provide a statement of compatibility should assist to identify and address any potential incompatibility or inconsistency issues.

Having regard to the potential for inconsistent purposes or objectives to impact administration and taxpayers, the Committee may wish to consider whether additional requirements to resolve any incompatibility issues from both a policy and an administration standpoint are warranted. This may include, for example:

- including necessary discretionary or other powers for the administrator to assist affected taxpayers to address issues of incompatibility or inconsistency;
- including necessary discretionary or other powers for the administrator to assist affected taxpayers to correct their mistakes to give effect to the intent and purpose of superannuation objectives;
- confirming whether the overriding objective or purpose of superannuation applies unless this is expressly acknowledged or stated in the amending laws; and
- confirming whether any impact on taxpayers needs to be estimated or explained.

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Two recent IGTG reports consider these issues in greater detail¹⁹ and made a number of recommendations for improvement:

- The Exercise of the Commissioner's General Powers of Administration;
- The Administration of the Commissioner's Remedial Power.

I trust this submission is helpful to assist the Committee in its inquiry. If you have any further questions or wish to discuss this submission, please do not hesitate to contact me on [REDACTED]

Kind regards

[REDACTED]
Karen Payne
Inspector-General of Taxation and Taxation Ombudsman

¹⁹ Inspector-General of Taxation and Taxation Ombudsman, *The Exercise of the Commissioner's General Powers of Administration* (2023) <<https://www.igt.gov.au/investigation-reports/the-exercise-of-the-commissioners-general-powers-of-administration/>>.

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