

Senate Select Committee on
Superannuation & Financial Services

Early Access to Super



A discussion paper

November 2001

HOW TO COMMENT ON THIS PAPER

The Committee invites you to comment on any of the questions or issues raised in this Discussion Paper. Written comments should be sent to:

**The Secretary
Senate Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600.**

(02) 6277 3130 (fax)
super.sen@aph.gov.au (email)

Please clearly note your name and postal address so your comments can be acknowledged. To assist you in preparing your submission, an electronic copy of this Discussion Paper can be found on the Committee's website at:

http://www.aph.gov.au/senate/committee/superfinan_ctte/index.htm

It would be helpful if your comments related to specific paragraph or question numbers in this Discussion Paper.

The closing date for submissions is 7 December 2001.

If you would like to make a submission but cannot meet this deadline, please contact the Secretariat on (02) 6277 3458.

CONFIDENTIALITY

Unless a submission is confidential, it will be authorised for publication and made available to any person or organisation on request.

The Committee will also table all non-confidential submissions received in response to this Discussion Paper.

Because of the personal nature of some information, you may wish your submission to be confidential to the Committee. You should note that the decision about whether submissions are treated as confidential is one for the Committee to make. However, if you want your submission, or any part of it, to be treated as confidential, please indicate this clearly so that the Committee can consider your request.

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SUPERANNUATION AND FINANCIAL SERVICES

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ABBREVIATIONS

APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
House of Representatives Committee	House of Representatives Standing Committee on Employment, Education and Workplace Relations
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulation	Superannuation Industry (Supervision) Regulations 1994

CHAPTER 1

THE INQUIRY

What is this inquiry about?

1.1 Superannuation is a form of long term saving and investing which aims to provide funds for people to use in their retirement. Since 1992 when employers became obliged by legislation to pay a minimum level of superannuation for their employees,¹ there has been significant growth in both the number of superannuation entities and the amount of money contributed by employers and employees in Australia.²

1.2 Because the aim of superannuation is to provide either a lump sum or pension on retirement, fund members are generally prevented from accessing their preserved benefits until retirement age.³ However, the law currently allows access to some of the preserved funds on strictly limited grounds before retirement. This Discussion Paper looks at those cases and whether any change should be made.

How did the inquiry begin?

1.3 On 27 August 2001, the Assistant Treasurer, Senator The Hon. Rod Kemp, wrote to the Committee, asking it to consider examining the rules surrounding early access by fund members to superannuation benefits. The Assistant Treasurer noted that the current rules had been in place for a number of years and referred to the difficult nature of many of the applications for early release and continuing public interest in the issue.

1.4 On 24 September 2001 the Senate gave the following terms of reference to the Committee:

That the Committee assess and report on the effectiveness and efficiency of the current rules governing early access to superannuation benefits on existing compassionate and severe financial hardship grounds.

1.5 The Committee is to report by 31 January 2002.

1 By virtue of the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Guarantee Charge Act 1992*. Prior to that time, some industrial awards required employer contributions to superannuation.

2 Currently there are about 220 000 superannuation funds in Australia with assets of almost \$500 billion.

3 The rules on early access apply both to superannuation funds regulated by APRA and the self-managed funds regulated by the Australian Taxation Office.

What does the Committee do?

1.6 The current Committee was established by a Senate resolution on 22 September 1999 to take effect from 11 October 1999. The Committee's terms of reference include inquiring into matters pertaining to superannuation and financial services, as referred to it by the Senate.

1.7 One of the terms of reference which the Senate gave the Committee was to inquire into prudential supervision and consumer protection for superannuation, banking and financial services. The Committee released three reports on these matters in August and September 2001.⁴ While the early release of superannuation benefits was one of many topics that were raised in submissions, the Committee focussed its inquiry at that stage on major prudential supervision issues, and noted that it would monitor the issue of early release.⁵

Conduct of this inquiry

1.8 Because of the timing of the federal election, the Committee decided not to advertise the inquiry or invite submissions at the time of receiving the terms of reference. In order to assist members of the public, superannuation funds and relevant organisations to focus their submissions on relevant issues, the Committee resolved to prepare and circulate this Discussion Paper for comment after the election had been held.

1.9 The Paper sets out the current regulatory framework for the availability of early release of superannuation benefits, and discusses relevant issues that have been drawn to the Committee's attention. The Paper also poses various questions on which people and organisations may wish to comment.

1.10 The matters raised in this Paper are intended to facilitate discussion. They do not in any way represent the Committee's views or recommendations on those issues.

Structure of this Discussion Paper

1.11 Chapter 2 outlines the background to the current provisions on early release of superannuation benefits.

1.12 Chapter 3 discusses the severe financial hardship provisions.

1.13 Chapter 4 considers the early release of benefits on compassionate grounds.

1.14 Chapter 5 considers other relevant issues.

4 Senate Select Committee on Superannuation and Financial Services *Prudential Supervision and Consumer Protection for Superannuation, Banking and Financial Services: First Report*, August 2001; *Second Report – Some Case Studies*, August 2001; *Third Report – Auditing of Superannuation Funds*, September 2001.

5 *First Report*, pp. 109-110.

Comments on the Discussion Paper

1.15 The Committee invites you to make submissions on any or all of the issues canvassed in this Discussion Paper. Written submissions are requested by **7 December 2001**. They should be sent to:

**The Secretary
Senate Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600.**

1.16 After considering the submissions, the Committee may hold public hearings at dates and times to be determined. When making a submission, you should note the guidelines on confidentiality, set out on the inside cover of this Paper.

1.17 If you have any queries about the Committee's inquiry, you may wish to go to the Committee's website at:

http://www.aph.gov.au/senate/committee/superfinan_ctte/index.htm

Alternatively you may contact the Committee Secretariat on:

(02) 6277 3458 (phone)
(02) 6277 3130 (fax)
super.sen@aph.gov.au (email).

1.18 If you would like to make a submission but are unable to meet the deadline, please contact the Secretariat before 7 December 2001.

CHAPTER 2

THE GROUNDS FOR EARLY RELEASE

2.1 This chapter outlines the background to the current rules on early release of benefits.

How superannuation funds are regulated

2.2 The superannuation industry is regulated by the offer of significant tax concessions to those entities which comply with the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).¹ The Act imposes various obligations and restrictions on superannuation fund activities and provides for prudential supervision by the Australian Prudential Regulation Authority (APRA) or, in the case of small self-managed funds, by the Australian Taxation Office.

2.3 Under the SIS Act, the sole purpose of a superannuation fund must be the provision of benefits for members on retirement, on reaching the ‘preservation age’ or on the member’s death.²

When are superannuation benefits available?

2.4 A person’s preservation age is between 55 and 60 years of age, depending on his or her date of birth. For those people born before 1 July 1960, it is 55 years of age. The preservation age increases on a sliding scale to 60 years for those born after 30 June 1964.³

2.5 Under the SIS Act there are three types of benefits which a member may have: preserved, restricted non-preserved and unrestricted non-preserved. Preserved benefits cannot be accessed until the person has reached the preservation age and has permanently retired from the workforce. Only unrestricted non-preserved benefits may be cashed by the member at any time.⁴ Over the last decade, increasing proportions of superannuation benefits have fallen into the preserved category. In particular, all contributions made since 1 July 1999 by members and employers and all fund earnings must be preserved.

1 Superannuation ‘entities’ under the SIS Act are regulated superannuation funds, approved deposit funds and pooled superannuation trusts (s. 10). This Paper refers primarily to superannuation funds.

2 SIS Act, s. 62.

3 SIS Regulation, Reg 6.01. Until 30 June 1998 the preservation age was 55 for all people.

4 Restricted non-preserved benefits do not have to be preserved until retirement, but are generally payable only on termination of employment with the contributing employer.

2.6 However, in some strictly limited circumstances, a member's preserved benefits may be released before preservation age. These circumstances are outlined below.

Grounds for early release of benefits

2.7 There are currently two main ways in which a person may be able to access his or her superannuation benefits before reaching the preservation age:

- applying to the fund's trustee on the grounds of severe financial hardship; or
- applying to APRA for release on compassionate grounds.

How the rules have changed

2.8 Until 1997, the former Insurance and Superannuation Commissioner had a broad discretion to administer the early release of benefits both on severe financial hardship and compassionate grounds.

2.9 In the 1997-98 Budget the Government announced that the arrangements for early release would be reformed to 'tighten and streamline' the administration of the benefits.⁵ The former Insurance and Superannuation Commissioner's discretionary administration was replaced 'with an objective test to be administered by fund trustees' in the case of severe financial hardship, and 'defined criteria' in relation to compassionate grounds.⁶ A trustee's ability to release benefits on the basis of financial hardship was still to be subject to the fund's governing rules.

2.10 In September 1997 the former Select Committee on Superannuation issued a report on the changes to the arrangements for early release.⁷ While the report focused on the arrangements applying to monies held in the Superannuation Holding Accounts Reserve, the Committee also considered the financial hardship and compassionate grounds principles more generally. The Committee concluded that the rules on financial hardship applying up until 1997 had been 'leading to an unacceptably high level of leakage in the superannuation system', but cautioned that the new rules proposed by the Government in 1997 may have been an over-reaction that had not been fully researched.⁸ The Committee recommended some modifications to the Government proposals, while supporting the thrust of the reforms.

2.11 From 1 July 1998, the release of benefits on compassionate grounds became the responsibility of APRA in place of the Insurance and Superannuation

5 Explanatory Statement to the Superannuation Industry (Supervision) Regulations (Amendment) 1997 No. 152, issued by the authority of the Assistant Treasurer.

6 *ibid.*

7 Senate Select Committee on Superannuation *Super – Restrictions on Early Access: Small Superannuation Accounts Amendment Bill 1997 and related terms of reference*, September 1997.

8 *ibid.*, p. 27.

Commissioner, while the trustees of superannuation funds retained responsibility for releasing benefits on the grounds of severe financial hardship.

Criticism of the current provisions

2.12 The Committee notes that the current provisions have attracted conflicting criticism.

2.13 On the one hand, there has been criticism on the basis that the provisions aim to ensure that people in their 50s who are unemployed but still seeking work use all assets at their disposal to support themselves rather than relying on Commonwealth income support payments. A media report earlier this year referred to criticism by the chief executive of the South Australian Council on the Ageing, Mr Ian Yates. Mr Yates was reported as saying ‘The rest of us are told that we have to protect our super ... This is fundamental discrimination. It is effectively the Government saying ‘we give up on you being unemployed – we’re retiring you.’⁹ In the same article, the executive director of another organisation reportedly commented that people who were ‘forced to cash in their superannuation in their late 50s’ would be ‘broke by the time they reached retirement age and need a pension to survive’.¹⁰

2.14 On the other hand, others have suggested that the rules are too restrictive, in that people who fall outside the current criteria set out in the regulations may suffer severe hardship. Accordingly it has been argued that the rules should be relaxed so that access is made easier for such people.

2.15 Yet another perspective has been offered by a superannuation fund. During its major inquiry into prudential supervision of superannuation and other services, the Committee noted that a submission from Tasmanian superannuation fund Tasplan Super had argued that the operation of the severe financial hardship provisions was costly and time-consuming to administer and that the system was open to abuse.¹¹

2.16 The Committee is interested to hear all views. The following chapters discuss the current provisions in more detail and raise issues on which further comment is sought.

Are there any other grounds for early payment?

2.17 Although the terms of reference given to the Committee referred only to severe financial hardship and compassionate grounds, there are several other bases on which payment of benefits is available prior to retirement. They are:

9 M King ‘Over 50s on welfare forced to use super’, *The Advertiser*, Saturday 3 February 2001.

10 Ibid. According to the article, the comments were made by Ms Sharon Davis, Executive Director, Don’t Overlook Mature Experience.

11 Senate Select Committee on Superannuation and Financial Services *Prudential Supervision and Consumer Protection for Superannuation, Banking and Financial Services: First Report*, August 2001, pp. 109-110.

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- permanent incapacity for employment;
 - temporary incapacity for employment;
 - permanent departure from Australia prior to 1 July 1998; and
 - the amount of preserved benefits being less than \$200 on termination of employment.

2.18 More information on these grounds is provided below in order to provide a comprehensive picture of the circumstances in which benefits are payable prior to preservation age. However, because these matters are not addressed by the Committee's terms of reference, they will not be discussed in any more detail elsewhere in this Paper.

Permanent incapacity

2.19 A person is entitled to have access to superannuation benefits where he or she has ceased to be gainfully employed because of ill-health (whether physical or mental), and the trustee is reasonably satisfied that the person is unlikely to engage ever again in gainful employment for which he or she is reasonably qualified by education, training or experience.¹² There is no limit on the amount that can be released where the person is permanently incapacitated.

Temporary incapacity

2.20 Where physical or mental ill-health causes a person to cease gainful employment for a limited time, he or she may be also entitled to benefits under a fund's arrangements for temporary incapacity.¹³

2.21 The purpose of such benefits is to restore the member's remuneration to the level received before he or she became incapacitated. As the benefits cannot be paid from the member's minimum benefits,¹⁴ they are usually paid under an insurance policy maintained by the fund. The length of time for which such benefits are paid depends on the terms of the insurance policy and the fund's governing rules, but there will be taxation and 'sole purpose' implications for the fund where the period exceeds two years.

Permanent departure from Australia

2.22 Benefits are also payable to a person who permanently departed from Australia before 1 July 1998. The following conditions must be satisfied:

- the fund trustee must be reasonably satisfied that the person intends or had intended to permanently reside outside Australia; and

12 Superannuation Industry (Supervision) Regulations 1994 (the SIS Regulations), reg 6.01(2).

13 Reg 6.01(2).

14 Reg 5.0.

- the written request for release of the benefits must have been made before 1 July 1998.

2.23 From 1 July 1998, a person who permanently departs from Australia is only able to access preserved and restricted non-preserved benefits either on reaching the preservation age or by satisfying other grounds for release, such as financial hardship. The former Select Committee on Superannuation considered this change in detail in its 1997 report and supported the new rule.¹⁵

Should there be any early release of benefits?

2.24 As has been mentioned, the aim of superannuation is to provide for income during retirement, as an alternative to, or supplementary to, government income support through the Age Pension. As such, the current law seeks to ensure that members are not able to access either their own superannuation contributions or the contributions made by their employers until they have reached the preservation age and have permanently retired from the workforce.

2.25 The current exceptions that allow for early release in limited circumstances thus represent a compromise between prohibiting any access to benefits before a person's preservation age, and abandoning the principle of preservation of benefits until retirement. The current criteria will not meet every individual's circumstances. Where benefits are made available, that needs to be done in the most effective and efficient way possible.

2.26 As mentioned above, in 1997 the former Select Committee on Superannuation emphasised its concern about the effect on the integrity of the superannuation system of the previously unfettered discretion on early release of benefits. One of the questions which this Discussion Paper seeks to address is whether the current system has achieved the right balance.

15 Senate Select Committee on Superannuation *Super – Restrictions on Early Access: Small Superannuation Accounts Amendment Bill 1997 and related terms of reference*, September 1997, pp. 62-63. The Committee unanimously supported the change in relation to Australian citizens and permanent residents, but there were some differences of opinion in relation to temporary residents of Australia who departed the country permanently. s

DISCUSSION POINTS

- Q.1 Does the availability of early release of superannuation benefits on limited grounds unjustifiably impair the principle of preservation of funds for retirement? Should early release be available on any grounds?
- Q.2 Is there a perception amongst members of the public that their superannuation benefits are ‘their’ money, which should be available for their use whenever required? Does this create a problem for superannuation funds? If so, what might be done to overcome this perception?

CHAPTER 3

SEVERE FINANCIAL HARDSHIP

3.1 This chapter considers the application of the severe financial hardship provisions.

What are the grounds for severe financial hardship?

3.2 Regulations under the SIS Act recognise that a superannuation fund may pay benefits to a person in the case of severe financial hardship. From 9 December 1997, a person is regarded as being in severe financial hardship if the fund's trustee is satisfied that the person:

- has been receiving Commonwealth income support payments for a continuous period of at least 26 weeks, was still receiving the benefits on the date of submitting written evidence from the relevant Commonwealth agency and is unable to meet reasonable and immediate family living expenses;¹ or
- after reaching preservation age,² has been receiving Commonwealth income support payments for a cumulative period of at least 39 weeks, and was not gainfully employed on the date of application.³

3.3 Similar provisions apply to Retirement Savings Account (RSA) providers.⁴

Which type of Commonwealth income support payments qualify?

3.4 Commonwealth income support payments⁵ include:

- income support supplements;⁶
- a service or social security pension;⁷ or
- a social security benefit⁸ other than Austudy or youth allowance;

1 SIS Regulation, reg 6.01(5)(a).

2 As discussed in Chapter 2.

3 Reg 6.01(5)(b).

4 Reg 4.01(5). RSAs are accounts or policies offered by banks and other financial institutions approved by APRA as a low cost, low risk alternative to the trust fund structure. They are aimed particularly at people with low levels of superannuation benefits or with transient employment patterns.

5 Reg 6.01(2), referring to payments as defined in the *Social Security Act 1991*, s. 23.

6 Under Part IIIA of the *Veterans' Entitlements Act 1986*.

7 Such as an age pension, disability support pension, sole parent pension or carer payment.

8 Such as a Newstart allowance, widow allowance, sickness allowance, partner allowance or special benefit.

and, from 1 January 1998:

- drought relief payments or exceptional circumstances relief payments under the *Farm Household Support Act 1992*; or
- salary or wages under the Community Development Employment Projects Scheme.

What is meant by ‘unable to meet reasonable and immediate family living expenses’?

3.5 Essentially, the expression means that the person’s income is insufficient to meet his or her daily living expenses and that the person’s assets (excluding the family home from consideration) could not reasonably and realistically be sold or used to cover the gap. If the person has a family, the family’s combined resources are considered.

3.6 APRA has produced a set of guidelines to assist trustees in making determinations under this heading.⁹ Those guidelines do not have the force of law, but are intended to assist trustees in their duties. The guidelines include a sample form by which a trustee might seek information about an applicant’s financial situation and a suggested statutory declaration which a trustee could require an applicant to sign.

3.7 APRA’s guidelines note in relation to considering the family’s resources:

Some trustees may consider that a member should not be forcing his/her dependants to contribute any income they derive to satisfy debts incurred by the member. However, for the purposes of determining whether the subjective test is satisfied, then that family’s combined resources and outgoings should be considered. To make assessments without regard to the whole family’s position could lead to unjust decisions being made, involving either unjustified release or unjustified non-release.¹⁰

3.8 It should be remembered that people who have reached the preservation age and have been on income support payments for at least 39 weeks do not have to meet this test, as the alternative second ground for release (as set out in paragraph 3.2) can be applied.

Trustees must develop flexible rules

3.9 The Superannuation Complaints Tribunal may review a trustee’s determination on financial hardship and may vary the decision or substitute its own

9 APRA *Guidelines for Trustees: Early Release of Superannuation Benefits*, July 1999. The guidelines are available from APRA’s website at <http://www.apra.gov.au>.

10 *Guidelines for Trustees*, para 18.

decision where it is not satisfied that the trustee's decision was fair and reasonable in the circumstances.¹¹

3.10 A recent Tribunal decision overturned a trustee's decision not to grant early release of benefits and emphasised the need for trustees to develop and apply flexible rules in their determinations.¹² The complainant had claimed she was unable to meet the cost of various house repairs required for the safety of her young son, including replacing perimeter fences and rewiring a filter and pump for an above-ground swimming pool. She stated that her sole income was a Centrelink payment and child maintenance from the child's father. The trustee rejected the claim on the basis of its published policy which stated that property maintenance was not viewed as day to day living expenses for 'extreme' financial hardship claims.¹³

3.11 While noting that the trustee had 'acted in a very professional manner throughout the dispute', the Tribunal criticised the trustee's inflexible application of its policy. The Tribunal also criticised the policy itself, which specifically excluded property maintenance from the definition of reasonable living expenses, and emphasised that applications for release of benefits should be considered on a case by case basis. In this case, the Tribunal found that the complainant qualified as suffering from severe financial hardship.

Are there any limits on the maximum amount payable?

3.12 There are limits on the amount that can be paid to a person who satisfies the first ground of the severe financial hardship test (that is, he or she has been receiving Commonwealth income support payments for a continuous period of at least 26 weeks). In each 12 month period a single lump sum of not less than \$1,000¹⁴ and not more than \$10,000 may be paid.

3.13 APRA's guidelines for trustees note that 'for administrative efficiency and convenience', a trustee may decide to release an amount sufficient to cover the full 12 months, or a shorter period if the trustee considered that the person's financial circumstances might improve during that time.

3.14 Where a person is taken to be in severe financial hardship under the second ground (that is, he or she has reached retiring age plus at least 39 weeks), there is no upper limit on the amount that can be released.¹⁵

11 Issues relating to the Tribunal are discussed further in Chapter 5.

12 D01-02\012, 16 July 2001.

13 The regulations refer to 'severe' financial hardship. On this point the Tribunal noted that 'it is obviously important that trustees not impose their own definitions for those found in the legislation'.

14 Except if the amount of the person's preserved benefits and restricted non-preserved benefits is less than that amount.

15 SIS Regulation, Schedule 1.

A recent Parliamentary inquiry

3.15 In June 2000 the House of Representatives Standing Committee on Employment, Education and Workplace Relations (the House of Representatives Committee) released its report on issues relating to mature age workers.¹⁶ One of the many issues the report discussed was access to superannuation.

3.16 The House of Representatives Committee heard from witnesses about the hardship experienced when retrenched people aged over 55 had to draw on their superannuation after 39 weeks on unemployment benefits (Newstart). The report noted differing views on the issue. The Association of Superannuation Funds of Australia (ASFA) had argued that superannuation assets should be excluded from eligibility assessments for Newstart payments because of the principle that superannuation should not be used for other purposes prior to a person's retirement age. However, the Department of Family and Community Services had argued that the inclusion of superannuation savings in the means test led to greater fairness, because the policy treated people who had invested in private superannuation in the same way as people who had other forms of investment such as shares.¹⁷

3.17 The House of Representatives Committee recommended that the Government reconsider the policy, and if necessary impose a ceiling on the amount of superannuation assets that could be excluded from the means test.¹⁸ The House of Representatives Committee also recommended that the existence of mortgage repayments should be deemed to satisfy the severe financial hardship test, and that the Government should explore the feasibility of allowing anyone over 45 to access their superannuation contributions for mortgage purposes in the immediate post-employment period, up to a maximum of 26 weeks.¹⁹

3.18 There has been no Government response as yet to this report. However, some income assessment rules for benefits for people over 55 years of age changed in 2001. From 1 July 2001, a person aged between 55 and Age Pension age (between 61½ and 65 years)²⁰ who makes a withdrawal from a superannuation asset will not have that withdrawal included in the assessment of his or her income for eligibility for income support payments. (Before 1 July 2001, the component of a withdrawal that represented profit earned was assessed as income for 12 months from the date of withdrawal. This provision still applies to those people under 55 who receive income

16 House of Representatives Standing Committee on Employment, Education and Workplace Relations *Age Counts: An inquiry into issues specific to mature-age workers*, June 2000, Canberra.

17 *ibid*, pp. 173-175.

18 Recommendation 28.

19 Recommendation 29.

20 Men must have reached 65 years of age to be eligible for the Age Pension. The age for women is slowly increasing from 60 to 65. A sliding scale applies according to the date of birth, from 60½ years of age for those women born between 1/7/35 and 31/12/36, to 65 years of age for those women born in 1949 or later. (Thus the eligibility age for a woman applying at the time of writing is 61½.)

support and make a withdrawal from their superannuation benefits.) The relationship between income support payments and early withdrawal of benefits is discussed in more detail in Chapter 5.

What is the impact on funds of administering these provisions?

3.19 A submission from a Tasmanian superannuation fund to the Committee's inquiry into the prudential supervision and consumer protection for superannuation, banking and financial services set out various concerns about the operation of the current provisions.²¹

3.20 Tasplan Super stated that its Board had become concerned with 'the principle and magnitude of claims' for the early release of benefits on the basis of severe financial hardship. The submission said that the number of claims on the fund had increased over the past two years and that the fund was considering 'withdrawing the availability' of this benefit for the following reasons:

- The fundamental principle of superannuation is undermined by the fact that members gain access to their accounts prior to retirement.
- The practice is open to abuse by members.
- It is having a major impact on administration in terms of cost and time. It is estimated that 20% of Tasplan administration activity is associated with the processing of Severe Financial Hardship Claims.
- The rule imposing a single lump sum payment in any 12 month period is not policed, especially if a person is a member of more than one superannuation fund.
- The application and subsequent payment of some claims, is in effect clearing debt, which in turn, does not encourage savings.
- Member Benefit Protection (MBP) is impacted when there is a small account balance remaining in the fund or if the member re-joins the fund at a later date. MBP is detrimental to other members of the fund.
- It is too convenient for Centrelink to "handpass" such cases to superannuation funds.²²

3.21 Tasplan Super acknowledged that it would be a 'brave decision' for the Board to cease access to such benefits 'as there is no doubt that people with genuine claims will be disadvantaged'. However, the fund considered that benefits for other members needed to be protected, and stated that some other funds refused to release benefits for severe financial hardship. Tasplan Super called for the regulations to be amended.

3.22 The Committee notes that the regulations state that a person is 'taken to be' in severe financial hardship if the trustee is 'satisfied' that the income support payment requirement is met and the person is unable to meet reasonable and immediate living expenses. While a trustee's discretion to release money will be subject to the

21 See *First Report*, pp. 109-110, referring to Submission No. 50.

22 Submission No. 50, p. 2.

particular fund's governing rules,²³ it would not appear to be possible for a trustee simply to issue a blanket refusal to consider any applications at all. Trustees must consider whether or not they are satisfied that an applicant has met the prescribed test.

DISCUSSION POINTS

Impact on superannuation funds

- Q.3 How much money do funds release each year under the financial hardship provisions? What proportion of a fund's total release of benefits does this represent?
- Q.4 How significant are the administration costs involved in dealing with financial hardship claims?
- Q.5 Has the number of claims under the financial hardship provisions increased or decreased since the current regulations were made in 1997?
- Q.6 Does the application of these provisions create an unduly onerous burden on superannuation funds, particularly smaller funds? If so, what could be done to lessen this burden?
- Q.7 Should application of the severe financial hardship provisions be optional for superannuation funds according to the terms of their governing rules, or should all funds be required to make some provision for such cases?

Income support payments

- Q.8 Are there other types of Commonwealth income support payments which should qualify a person for early release of benefits? For example, should Austudy payments automatically be excluded in the case of a person who may have become disabled and receive Austudy instead of a disability pension because he or she chooses to retrain in another area of work?
- Q.9 Given that income support payments may be suspended or stopped for different reasons, do people have difficulty meeting the requirement for receipt of income support payments for a cumulative period of 26 weeks? If so, what could be done?
- Q.10 What type and standard of proof should be required to satisfy the severe financial hardship test? Should there be some system of independent assessment of members' claims?

23 See Explanatory Statement to the Superannuation Industry (Supervision) Regulations (Amendment) 1997 No. 152.

Assessing claims

- Q.11 Are there problems in assessing claims of financial hardship where a person may be a member of more than one fund?
- Q.12 Is the test of being 'unable to meet reasonable and immediate family living expenses' appropriate? Are the guidelines circulated by APRA adequate to assist trustees in determining whether a person has met this test? Should the test be more strictly defined, or should trustees retain a broad discretion in applying the test to their fund members?
- Q.13 Is there difficulty in assessing the genuineness of claims? If so, what could be done to assist trustees?

Limits on payments

- Q.14 Are the limits on the maximum amount that can be released under the first ground appropriate (that is, a single lump sum of not more than \$10,000 in each 12 months)?
- Q.15 Should there be an upper limit on the amount that can be released under the second ground of severe financial hardship (that is, where a person has reached the preservation age and has been in receipt of Commonwealth income support payments for at least 39 weeks)? If so, why?

CHAPTER 4

COMPASSIONATE GROUNDS

4.1 This chapter looks at the second main ground on which superannuation benefits may be made available to a person prior to retirement, that is, early release granted by APRA on compassionate grounds.

What are the grounds for release?

4.2 For a person to be granted benefits on compassionate grounds, he or she must satisfy APRA that:

- the money is to pay for prescribed expenses; and
- he or she would not otherwise have the financial capacity to meet those expenses.¹

4.3 As Chapter 2 noted, these prescribed grounds replace the broad discretion that was formerly given to the Insurance and Superannuation Commissioner.

What are prescribed expenses?

4.4 Prescribed expenses are:

- medical treatment or medical transport for the person or the person's dependant;
- palliative care in the case of the impending death of the person or the person's dependant;
- expenses associated with a dependant's death, funeral or burial;
- where the person is severely disabled, payments to modify the person's home or vehicle; or
- payment on a loan to prevent foreclosure of a mortgage on the person's principal place of residence.²

4.5 APRA also has a qualified discretion to approve cases that do not strictly satisfy these criteria but are consistent with them.³

4.6 An explanation of certain qualifications to those provisions is below.

1 Reg. 6.19A(2).

2 Reg 6.19A.

3 Reg. 6.19A(1)(f).

Medical treatment

4.7 The person must have two registered medical practitioners (one of whom is a specialist) certify that the medical treatment is necessary to treat a life-threatening illness or injury, acute or chronic pain, or acute or chronic mental disturbance. The medical practitioners must also certify that the treatment is not available through the public health system.

Medical transport

4.8 The medical transport must be necessary and related to the medical treatment which has been certified by two medical practitioners as explained above.

What is the maximum amount that can be released?

4.9 The maximum amount that can be released on compassionate grounds, other than in the case of mortgage payments, is a single lump sum determined by APRA to be 'reasonably required', taking into account the ground of release and the person's financial capacity.

4.10 The maximum amount that may be released to cover a mortgage is three months' repayments under the mortgage and 12 months' interest on the outstanding balance of the loan. This amount can be released every 12 months.⁴

DISCUSSION POINTS

Medical

Q.16 Are the grounds for release for medical treatment adequate? Should they be tightened or made less restrictive in any way?

Q. 17 Are there any difficulties in obtaining funds quickly to meet medical expenses, palliative care and funeral expenses? Should any steps be taken to streamline the process? If so, what are they?

Disability

Q. 18 Are the provisions that allow for modifications to a person's home or vehicle in the case of a person's severe disability sufficient to meet the needs of disabled people?

Housing

- Q.19 Apart from the prescribed limit on funds for mortgage repayments, should there be any restriction on the amount of money made available on compassionate grounds? Is the limit of a single lump sum determined by APRA to be 'reasonably required' appropriate?
- Q.20 Are the provisions concerning mortgage payments to prevent foreclosure adequate? Is the upper limit of three months' repayments under the mortgage and 12 months' interest on the outstanding balance of the loan appropriate? Should the provisions be tightened or made less restrictive in any way?
- Q.21 Are there any difficulties in obtaining funds quickly to meet mortgage repayments? If so, what could be done?
- Q.22 Should people who are renting their home and cannot meet their rental payments be treated differently from those who own their own homes and cannot meet the mortgage repayments? That is, should the grounds for early release include an inability to meet rental payments, or do different policy considerations justify the distinction?

Other grounds

- Q.23 Is APRA's residual discretion to release benefits to meet other expenses consistent with the specified grounds necessary and appropriate?
- Q.24 Should any other matters be added to the list of prescribed expenses for release on compassionate grounds? Why?
- Q.25 Is a list of defined criteria preferable to a broad discretion to release funds on compassionate grounds? Why?

CHAPTER 5

OTHER ISSUES

5.1 This chapter considers some other relevant issues, including:

- the relationship between superannuation withdrawals and Commonwealth income support payments;
- the role and function of the Superannuation Complaints Tribunal; and
- the role of financial advisers in accessing preserved benefits.

What is the relationship between superannuation withdrawals and income support payments?

5.2 The release of superannuation benefits may affect a person's income support payments. As Chapter 3 noted, as of 1 July 2001, where a person is 55 years of age or more, no income is assessed for early withdrawal of superannuation assets.

5.3 However, for those people under 55 who withdraw money from their superannuation, the income assessment will include investment profit earned on the amount that is withdrawn since the person started receiving a benefit.

5.4 An example of this rule concerns a person who has been receiving Newstart benefits since 1/6/97 when the value of their superannuation assets was \$100,000. If the person withdrew \$10,000 from their superannuation benefits on 1/10/98, when the total value of the assets had increased to \$102,000, the assessable amount would be:

$$\frac{\text{amount withdrawn}}{\text{total value at withdrawal}} \times \text{profit} \quad \text{OR} \quad \frac{\$15,000}{\$102,000} \times \$2,000 = \$294$$

5.5 That investment profit of \$294 is counted in the person's assessment for income support payments for 12 months from the date of withdrawal.¹

¹ However, if the withdrawn amount is directly rolled over into another fund it is disregarded.

DISCUSSION POINTS

- Q.26 Are there any problems in the relationship between the social security legislation and the provisions governing early release of superannuation benefits, for example, in the way access to one affects eligibility for the other? If so, what are those problems? How might they be addressed?
- Q.27 Are individuals who are receiving Commonwealth income support payments compelled in practice to access their superannuation benefits because the financial hardship provisions exist? Should they have a choice whether or not they do so?
- Q.28 What is the impact of the recent changes that took effect from 1 July 2001 to income assessment for Commonwealth income support payments to people over 55 years of age?

The Superannuation Complaints Tribunal

5.6 Under the *Superannuation (Resolution of Complaints) Act 1994*, the Superannuation Complaints Tribunal was established as an independent statutory body to deal with certain complaints by superannuation fund members. Those complaints include complaints about trustees' decisions on the early release of benefits on severe financial hardship grounds.

5.7 The Tribunal cannot deal with complaints before they have been through the fund's internal complaints process. Trustees must have arrangements in place to ensure that members and beneficiaries can make complaints and that such complaints are dealt with in 90 days, although it is for the fund to determine the particular form that its complaints process will take.² After deciding on a complaint, trustees are also obliged to provide the complainant with information about the Tribunal's role and an outline of its functions.³ Information about the Tribunal's complaints process is also available from the Tribunal's website.⁴

5.8 There is no fee for lodging a complaint with the Tribunal, nor are any costs charged to a complainant. If the person wishes to be represented by a lawyer, he or she must seek the Tribunal's permission. The Tribunal must attempt to resolve complaints by conciliation, and if that is not possible, the Tribunal will review the

2 SIS Act, s. 101.

3 SIS Regulation 2.41B.

4 At <http://www.sct.gov.au>.

matter about which the complaint has been made.⁵ The Tribunal can vary the trustee's decision or substitute its own decision if it finds that the trustee's decision was not fair and reasonable in the circumstances.

5.9 During 2000/2001, the Tribunal received 1856 written complaints, about half of which were outside its jurisdiction. As the Tribunal noted in its most recent quarterly report, a key reason for complaints being outside the Tribunal's jurisdiction was that complainants had not yet been through their funds' internal complaints process. The Tribunal considered this indicated that there was 'still much educative work to be done' with fund members.⁶

5.10 The Committee notes that the Productivity Commission recently inquired into the operation of the Tribunal as part of its review of the SIS Act and related legislation. The draft report the Commission released in September 2001 found that most submissions had expressed support for the way in which the Tribunal was working.⁷ Nevertheless, the Commission recommended that the Tribunal be abolished in favour of an industry self-regulatory mechanism approved by the Australian Securities and Investment Commission.⁸

5.11 Without wishing to impinge on the Productivity Commission's inquiry, the Committee is interested to explore the Tribunal's role and how well it is functioning in the overall resolution of complaints about early release of superannuation benefits. The Committee is also interested to hear views on the process for complaints about APRA's release of benefits on compassionate grounds, a matter which is currently within the investigative jurisdiction of the Commonwealth Ombudsman.⁹

DISCUSSION POINTS

Q.29 Is there sufficient public awareness of the role of the Superannuation Complaints Tribunal in hearing complaints about decisions on the early release of benefits? Should either trustees or the Tribunal be making available more information and/or education for superannuation fund members about the Tribunal's role?

5 *Superannuation (Resolution of Complaints) Act 1993*, s. 12.

6 Superannuation Complaints Tribunal *SCT Quarterly Bulletin*, Issue No. 24, 1 April 2001-30 June 2001.

7 Productivity Commission *Review of the Superannuation Industry (Supervision) Act 1993 and Certain Other Superannuation Legislation: Draft Report*, Canberra, September 2001, p. 135.

8 p. 143.

9 In 2000/01, the Commonwealth Ombudsman finalised 111 complaints about APRA, most of which concerned early release of benefits (Commonwealth Ombudsman *Annual Report 2000-01*, pp. 93, 117). Thirty-five matters were investigated and of these, in only 5 matters was there an 'arguable agency defect' (p. 117).

- Q.30 What proportion of the Tribunal's work deals with complaints about early release of benefits? Should the Tribunal's role in such complaints be changed in any way? If so, how?
- Q.31 Should the Tribunal's procedures be changed in any way to assist people who complain about trustees' decisions on severe financial hardship? If so, how?
- Q.32 Should any changes be made to complaints about APRA's decisions in relation to release of benefits on compassionate grounds?

The role of financial advisers

5.12 In the past year the Australian Securities and Investments Commission (ASIC) has taken action against several financial advisers who arranged fraudulent early cash payouts of their clients' preserved superannuation benefits. Some stole all or part of these benefits, while others took large fees.

5.13 ASIC issued a consumer alert in March 2001, warning superannuation fund members that they could only gain access to their preserved benefits in restricted circumstances, and calling on superannuation funds to be careful of requests to forward benefits directly to advisers.¹⁰ ASIC detailed its enforcement action in four recent Victorian cases. Three resulted in convictions for fraud and in the fourth case a company was permanently restrained from providing superannuation services and ordered to pay compensation to its clients.

5.14 The Committee is interested to explore whether some fund members seek the assistance of third parties because they have difficulty dealing directly with their superannuation funds or with APRA, or because they are not sufficiently aware of the steps in the process for early release of their benefits.

DISCUSSION POINTS

- Q.33 Do people need the assistance of financial or legal advisers to obtain early release of their benefits? Is there a need for better education for fund members about their access to early release on severe financial hardship or compassionate grounds?
- Q.34 Are any steps being taken to protect fund members from unscrupulous advisers in circumstances such as those outlined above?

10 ASIC "ASIC warns of advisers offering early access to superannuation", *Media Release 01/100*, 21 March 2001.