

30 April 2021

The Treasury  
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AUSTRALIA

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## **EXPOSURE DRAFT – EXEMPTING GRANNY FLAT ARRANGEMENTS FROM CGT**

Thank you for the opportunity to comment on the Exposure Draft: ‘Supporting older Australians – exempting granny flat arrangements from Capital Gains Tax (CGT)’ (the Exposure Draft). The ACT Law Society (the Society) have sought input from its Elder Law & Succession Law Committee (the Committee) who have made the following comments:

### **1. Clause 137-20 – creating or varying a granny flat interest**

Clause 137-20 in the Exposure Draft provides:

137-20 CGT event does not happen when a certain kind of granny flat arrangement is varied

A CGT event does not happen, to the extent it relates to creating or varying a granny flat interest in a dwelling under an arrangement by varying the arrangement at a particular time ...

We note the inconsistency between the heading and the terms of the clause, where the terms refer to ‘CGT event ... to the extent it relates to *creating or varying* a granny flat interest’ and the heading only refers to ‘CGT event ... where a ... granny flat arrangement is *varied*’. We understand that the creation of granny flat arrangements is captured in clause 137-15 and clause 137-20 only deals with the variation of existing granny flat arrangements.

To avoid confusion, we consider that the creation of granny flat interests is best dealt with in clause 137-15, and the reference to ‘creating a granny flat interest’ should be removed from clause 137-20.

### **2. Definition of ‘granny flat arrangement’**

Although there are definitions for ‘granny flat interest’ and ‘arrangement’, we note that ‘granny flat arrangement’ has not been defined, despite numerous references to this term in the sub-headings. We consider that a definition for ‘granny flat arrangement’ should be included.

### **3. Requirements that granny flat arrangements not be of a 'commercial nature'**

Clauses 137-15(e) and 137-20(e) provide that for the arrangement to be exempt, the arrangement must not be of a *commercial nature*. Guidance on the meaning of *commercial nature* is provided in the Explanatory Memorandum but the term is not defined in the Exposure Draft.

Members of the Committee stated that in their experience of drafting granny flat agreements, parties to the arrangements are often concerned about ensuring compliance with Centrelink deprivation (gifting) rules and providing clarity about the domestic and financial expectations between the parties.

In some cases, families may wish to include a notional cost or allowance for the provision of domestic support or care of the older person (as opposed to the provision of accommodation). In other cases, families may wish to include in their agreements an arrangement for a refund of some of the moneys to the older person in the event that the granny flat arrangement was terminated before the older person's death (e.g., in the event that the older person moves into residential care or on the death or divorce of the child).

These sorts of arrangements are sensible in providing clarity to families about their respective obligations and in providing protection to older persons in the event the granny flat arrangements terminate earlier than expected. Therefore, we seek to ensure that the sorts of provisions outlined above do not fall foul of the requirement relating to *commercial nature* under clauses 137-15(e) and 137-20(e).

### **4. Transitional provisions and application to existing granny flat arrangements**

The transitional provisions state that the new provisions take effect from the commencement of the new Division. Clause 137-10 makes it clear that the new provisions will apply to a new CGT event that happens in respect to any existing granny flat arrangements. We note that the exemption does not extend to CGT events that occurred prior to the commencement of the Division.

In our experience, many families entered into granny flat arrangements in the past without appreciating the CGT consequences. Therefore, we consider that it would be desirable for the rules to provide that a CGT event did not happen if there was a genuine (truly non-commercial) granny flat arrangement that was set up prior to the new laws.

### **5. Pension Age**

We note that the CGT exemption is only available for granny flat interests if the life tenant is of pension age or has a disability. This age limit potentially discourages families from early planning for age-appropriate accommodation or family living arrangements that can be beneficial for a variety of reasons.

We welcome the opportunity to comment further, if that would be of assistance.

Yours sincerely,



Simone Carton

Chief Executive Officer