EMPTYING THE NEST EGG TO FILL THE NURSERY: EARLY RELEASE OF SUPERANNUATION TO FUND ASSISTED REPRODUCTIVE TECHNOLOGY

NEERA BHATIA* AND LILY PORCEDDU**

This article considers the current law in Australia that regulates early release of superannuation on compassionate grounds, for Assisted Reproductive Technology ('ART') to alleviate a 'mental disturbance'. We examine the role of the fertility industry and third-party intermediaries in this pursuit. Current mechanisms for early release may give rise to ethical concerns, especially given the emotional vulnerability of persons accessing ART, whose successful applications are based on a diagnosis of 'mental disturbance'. We do not argue for a blanket prohibition of early release for ART. Rather, we make several recommendations that include financial counselling for individuals or couples – independent of fertility clinics prior to making a financial decision to access superannuation early. The law concerning early release on grounds of 'mental disturbance' is ripe for reform. Necessary and appropriate reforms may lead to better retirement outcomes for those accessing ART, and greater public faith in the fertility industry and its practitioners.

I INTRODUCTION

Assisted Reproductive Technology ('ART') includes a range of procedures used to help establish a pregnancy and conceive a child. These procedures can involve techniques such as donor insemination, artificial insemination and ovulation induction.[1] In some circumstances, advanced techniques that require more invasive intervention include in-vitro fertilisation ('IVF') and intracytoplasmic sperm injection.[2] ART is defined in Victorian legislation as:

* Associate Professor, Deakin University, School of Law, Melbourne, Australia, neera.bhatia@deakin.edu.au.

** Bachelor of Arts, Monash University, Melbourne, Bachelor of Laws, Deakin University, Melbourne, Lawyer, Victoria, Australia, lily.porceddu@outlook.com. The authors wish to thank the anonymous reviewers for their valuable comments. The authors also acknowledge Dr Rami Hanegbi for his contribution to a previous version of this article.

1 Victorian Assisted Reproductive Treatment Authority ('VARTA'), 'What Is Assisted Reproductive Technology (ART)?' (Brochure, December 2012) 2 <https://www.varta.org.au/sites/default/files/2020-12/What%20is%20ART.pdf>.

2 Ibid.

> medical treatment or a procedure that procures or attempts to procure, pregnancy in a woman by means other than sexual intercourse or artificial insemination, and includes: (a) in-vitro fertilisation, (b) gamete intrafallopian transfer, and (c) any related treatment or procedure prescribed by the regulations.[3]

There has been continued public interest in and increasing demand for ART, including IVF, since the birth of the first IVF baby in the United Kingdom ('UK').[4] A healthy baby girl, Louise Brown, weighing 5 pounds, 12 ounces (2,700 grams), was born at Oldham and District General Hospital via caesarean section at 11:47 pm on 25 July 1978. Scientists, religious organisations and the watching world met the much-publicised birth of the baby with a mixture of optimism and cynicism globally.[5] Meanwhile, across the seas in Australia, ART was making waves of its own. In 1980, a team of specialists in Melbourne successfully delivered their first IVF baby, Candice Elizabeth Reed.[6]

Almost 40 years ago, Singer and Wells had the foresight to consider the 'reproduction revolution'.[7] They explored emerging reproductive health innovations, such as artificial womb technology (ectogenesis) that some developed nations are now closer to realising.[8] Over the past four decades, there have been considerable scientific advancements in ART. Technology once considered science fiction has become a reality, giving individuals and couples the chance of having a child and creating a family. IVF was once regarded as 'irrelevant, disruptive and an unethical practice'.[9] However, it may now offer individuals and couples the chance of conceiving a child, although it does not guarantee the successful outcome of pregnancy or live birth, and its success rates are low.[10]

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3 *Assisted Reproductive Treatment Act 2008* (Vic) s 3 ('*ART Act*').

4 The media often referred to this case as the 'test tube' baby case, although technically there was no use of a test tube for her conception. See PC Steptoe and RG Edwards, 'Birth after the Reimplantation of a Human Embryo' (1978) 312(8085) *Lancet* 366.

5 Victoria Ward, 'Louise Brown, the First IVF Baby, Reveals Family Was Bombarded with Hate Mail', *The Telegraph* (online, 24 July 2015) <https://www.telegraph.co.uk/news/health/11760004/Louise-Brown-the-first-IVF-baby-reveals-family-was-bombarded-with-hate-mail.html>; Genelle Weule, 'First IVF Baby's 40th Birthday: How a Tiny Girl Changed Science and the World', *ABC News* (online, 25 July 2018) <https://www.abc.net.au/news/science/2018-07-25/first-ivf-baby-louise-joy-brown-turns-40/10017032>; Joe Sommerlad, 'World's First Test Tube Baby at 40: How the Public Reacted to the IVF Breakthrough of the Century', *The Independent* (online, 24 July 2018) <https://www.independent.co.uk/news/health/test-tube-baby-40th-anniversary-world-first-reaction-ivf-louise-brown-a8454021.html>.

6 Alexander Lopata et al, 'Pregnancy Following Intrauterine Implantation of an Embryo Obtained by In Vitro Fertilization of a Preovulatory Egg' (1980) 33(2) *Fertility and Sterility* 117. See also John Leeton, 'The Early History of IVF in Australia and Its Contribution to the World (1970–1990)' (2004) 44(6) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 495.

7 Peter Singer and Deane Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford University Press, 1984).

8 Ibid 131. See also Neera Bhatia and Evie Kendal, 'We May One Day Grow Babies Outside the Womb, but There Are Many Things to Consider First', *The Conversation* (online, 11 November 2019) <https://theconversation.com/we-may-one-day-grow-babies-outside-the-womb-but-there-are-many-things-to-consider-first-125709>.

9 PR Braude and MH Johnson, 'Reflections on 40 Years of IVF' (2019) 126(2) *BJOG: An International Journal of Obstetrics and Gynaecology* 135, 135.

10 VARTA, 'Understanding IVF Success Rates' (Brochure, April 2016) 1 <https://www.varta.org.au/sites/default/files/2020-12/Understanding%20IVF%20success%20rates.pdf>;

Despite operating in the realm of *possibility* rather than *probability*, for those trying to conceive a child, IVF and other ART have become commonly used in some areas of Australia. So much so, that today, 1 in 20 children in Victoria are born as a result of some type of ART. As recently as 2018, approximately 13,000 people used ART services in Victoria and 1 in 12 women over the age of 35 became mothers to children using ART.[11] Notwithstanding its current widespread acceptance, historically access to ART was only available to heterosexual married couples who were infertile.[12] However, legislative reform[13] and evolving social attitudes led to broader accessibility of ART to single women and same-sex couples.[14] This development consequently challenged social, ethical and religious perspectives of the construct of the traditional nuclear family unit and the perception of the type of person likely to access IVF.

Nevertheless, the conduct and practices of fertility clinics are not without controversy and regularly come under public scrutiny. To some degree, this is due to the commercialised, for-profit nature of the fertility industry. Arguably, the practice of ART in Australia is not recognised or addressed as a health concern, but as a profit making business where success is predicated on the willingness of individuals or couples to pay for services that they hope will result in the birth of a child.[15] In Brazier's seminal paper she stated:

> What was until very recently seen as a couple's private business has become in many cases the business of the state. An area of medicine, treatment of infertility, which was not long ago a 'speciality' which offered little more than minor surgery, advice and tender loving care has grown into a multimillion pound international business.[16]

Brazier is correct, the business of babies is a booming industry. Despite the emotive nature and sensitive circumstances that childbearing and infertility bring to bear on the human experience, the vast majority of fertility clinics in Australia operate as commercial entities.[17] Globally, the fertility industry is estimated to be worth more than USD25 billion with predictions that it could grow to USD41 billion by 2026.[18] The fertility industry in Australia currently generates revenue of over AUD500 million annually, with an anticipated rise to AUD630 million in the

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Georgina M Chambers et al, 'Assisted Reproductive Technology in Australia and New Zealand: Cumulative Live Birth Rates as Measures of Success' (2017) 207(3) *Medical Journal of Australia* 114.

11 Michael Gorton, 'Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment' (Report, May 2019) 1 ('Victorian ART Final Report 2019').

12 See Kristen L Walker, 'Equal Access to Assisted Reproductive Services: The Effect of *McBain v Victoria*' (2000) 25(6) *Alternative Law Journal* 288, 288.

13 *Infertility Treatment Act 1995* (Vic), as repealed by *Assisted Reproductive Treatment Act 2008* (Vic).

14 See *McBain v Victoria* (2000) 99 FCR 116, 123 (Sundberg J) where it was held that a woman did not have to be married or in a de facto relationship to qualify for treatment for infertility under the *Infertility Treatment Act 1995* (Vic).

15 Esther Han, 'Bioethicists Raise Alarm about Conflicts of Interest in Australia's IVF Industry', *The Sydney Morning Herald* (online, 1 November 2017) <https://www.smh.com.au/healthcare/bioethicists-raise-alarm-about-conflicts-of-interest-in-australias-ivf-industry-20171101-gzcp8z.html>.

16 Margaret Brazier, 'Regulating the Reproduction Business' (1999) 7(2) *Medical Law Review* 166, 167.

17 'Victorian ART Final Report 2019' (n 11) 1.

18 'The Fertility Business Is Booming', *The Economist* (online, 8 August 2019) <https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming>.

next by 2022.[19] Further, several fertility clinics are listed on the Australian Securities Exchange with other clinics being purchased by overseas venture capitalist consortia and new clinics entering the fertility market and aggressively promoting their services in an attempt to capture market share.[20]

Yet, it would be incorrect to consider the fertility industry as a single entity. It comprises a variety of organisations that operate in different ways, offering diverse options to a range of different people. The fertility industry includes single private operators, low cost commercial clinics offering limited types of treatments, and public fertility clinics that receive government funding.[21] Some fertility clinics focus on better serving the needs of single people and same-sex couples by providing greater donor egg, sperm or surrogacy options. Other fertility clinics employ general practitioners that provide initial consultation before providing further assistance of reproductive specialists.[22] Additionally, some clinics may focus on providing advice and services of practitioners with expertise in special interest areas of reproductive infertility.[23]

The combination of a growing market for ART with greater numbers of clinics competing for people to use the services they provide has had an unknown impact on the pricing of IVF in Australia. It is unclear whether the long-term trend for IVF will see decreasing prices based on greater competition for services, or increasing prices given that services are delivered by fertility clinics that are ultimately beholden to shareholders.

In some circumstances, individuals or couples trying to conceive a child are funding, or continuing to fund, ART through the early release of their superannuation funds. An individual may seek the early release of retirement funds under 'compassionate grounds' available in the relevant superannuation regulations.[24]

The *Superannuation Industry (Supervision) Regulations 1994* (the '*Regulations*') permit the release of benefits on compassionate grounds:

> (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 …[25]

19 'Victorian ART Final Report 2019' (n 11) 12.

20 Ibid 1. For example, Melbourne IVF and Monash IVF are both publicly listed companies. They have national and international operations. There has been significant venture capital investment in the fertility industry. For example, Genea IVF has recently been purchased by international consortia.

21 We discuss some of these fertility clinic options further in Part III(B).

22 'How to Choose a Fertility Specialist', *VARTA* (Blog Post, March 2020). <https://www.varta.org.au/resources/blogs/how-choose-fertility-specialist>.

23 In most cases fertility specialists are trained gynaecologists and obstetricians. They are also trained in reproductive treatment. Some fertility specialists may have additional training and are certified in reproductive endocrinology and infertility, or have specialist interests in certain areas, for example, andrology, a branch of medicine that focuses on male conditions. In some instances, if a man has infertility issues, a fertility clinic where there is a specialist that has training in andrology might be preferable. See also ibid.

24 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A ('*Regulations*').

25 Ibid reg 6.19A(1)(a).

Further, a person applying for funds must show they lack financial capacity:

> (2) The Regulator must determine, in writing, that the person has satisfied, for the purposes of subregulation 6.18(1) or 6.19(1), a condition of release on a compassionate ground if the Regulator is satisfied that:
>
> (a) the release is required on a ground mentioned in subregulation (1); and
>
> (b) the person does not have the financial capacity to meet an expense arising from that ground.[26]

Additionally, the medical treatment must be certified by two practitioners and necessary:

> (3) The Regulator cannot be satisfied that money is required for medical treatment unless 2 registered medical practitioners (at least one of whom must be a specialist) certify that:
>
> (a) the medical treatment is necessary to:
>
> (i) treat a life threatening illness or injury; or
>
> (ii) alleviate acute, or chronic, pain; or
>
> (iii) alleviate an acute, or chronic, mental disturbance; and
>
> (b) the treatment is not readily available to the person, or the dependant, through the public health system.[27]

Notably, the *Regulations* do not expressly refer to ART as a permitted ground for early release. However, early withdrawal of superannuation has proven possible to fund 'medical treatment' for an individual or dependent, under compassionate grounds on the basis that ART (most often IVF) is necessary to treat 'an acute, or chronic, mental disturbance'.[28]

A Aims and Structure of Article

In this article, we examine the current law that regulates early release of superannuation for ART under medical grounds to alleviate a 'mental disturbance'. We contend that the current mechanisms that allow early release of superannuation under this criterion may give rise to ethical concerns. We consider that this area is ripe for law and policy reform.

Much of our discussion focuses on Victoria. This is pertinent to our article given the recent wholesale independent review of ART in Victoria published in a Final Independent Report in May 2019 entitled: 'Helping Victorians Create Families with Assisted Reproductive Treatment' ('Victorian ART Final Report 2019'). The Victorian ART Final Report 2019 made a number of reform recommendations after broad consultation with a diverse range of stakeholders and members of the public published initially in an Interim Report in October 2018.

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26 Ibid reg 6.19A(2).

27 Ibid reg 6.19A(3)

28 Ibid. We discuss this in further detail in Part IV(B). In Part V we also raise concerns about fertility clinics promoting this practice without providing any advice on their websites for individuals or couples to seek independent financial counselling about the impact of early withdrawal or alternatives funding for consideration. For example, Monash IVF and Melbourne IVF websites include links to SuperCare, a third-party intermediary to assist individuals or couples to access to their superannuation as a payment option for ART. See 'Accessing Super for IVF', *Monash IVF* (Web Page) <https://monashivf.com/cost/accessing-super-for-ivf/>; 'Costs of IVF', *Melbourne IVF* (Web Page) <https://www.mivf.com.au/ivf-costs/treatment-costs>.

This was followed by the Victorian ART Final Report 2019. The issues raised and addressed in the Victorian ART Final Report 2019 have set a benchmark for improving the provision, access, and regulation nationally.[29] In light of this, we refer to, and discuss the Victorian ART Final Report 2019 and its recommendations, where relevant, throughout the article.

In the next part of this article, we discuss the regulatory and legislative landscape of ART in Victoria.[30] Part III briefly outlines the eligibility and accessibility to ART services in Victoria. Part IV then provides an analysis of early release of superannuation on grounds of 'mental disturbance' for ART under the current Commonwealth legislation. This discussion details the law and criteria under which an individual or couple can access their retirement funds early for ART. We also discuss the recent Treasury 'Review of Early Release of Superannuation Benefits' paper ('2018 Super Benefits Paper').[31] Part V explores a range of practices that can facilitate early release of superannuation funds for ART but may raise ethical concerns. This part of the article also discusses the role of fertility clinics in this pursuit. We argue, amongst other things, that in some cases, the involvement, overreach and influence of fertility clinics in individuals' or couples' financial decision-making goes beyond the permissible conduct sanctioned under the relevant guidelines governing ART. In Part VI, we attempt to address some of these practices by making a number of recommendations for reform. These include mandatory financial counselling that is independent of the fertility clinic and tighter eligibility criteria for those wishing to access superannuation early for ART. Further, we explore the ethically problematic nature of the 'mental disturbance' criteria for early access to superannuation. Additionally, we highlight the need for greater objectivity, impartiality, and affordability of ART services, which includes the need for further public, political and policy discussion about broadening the scope of these services to publicly funded hospitals and corresponding Medicare subsidy reform. Part VII provides our concluding remarks.

II THE REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY IN VICTORIA

The oversight and provision of ART is regulated through a range of mechanisms that include legislation, National Health and Medical Research Council ('NHMRC') ethical guidelines and Reproductive Technology Accreditation Committee ('RTAC') accreditation. There has been some academic

29 'Victorian ART Final Report 2019' (n 11) 1; See generally Michael Gorton, 'Helping Victorians Create Families with Assisted Reproductive Treatment: Interim Report of the Independent Review of Assisted Reproductive Treatment' (Report, October 2018).

30 In Part II we focus on the regulatory frameworks, legislation, and relevant guidelines as they pertain to Victoria. However, more broadly the superannuation legislation discussion in Part IV is Commonwealth legislation.

31 The Treasury, Commonwealth, 'Review of Early Release of Superannuation Benefits: Further Consultation and Draft Proposals' (Issues Paper, November 2018) <https://treasury.gov.au/consultation/c2018-t341625> ('2018 Super Benefits Paper').

discussion about the shortcomings of the current model and about the extent to which the state should play a role in the regulation and access to ART.[32] There are currently only four states in Australia that govern ART through a combination of legislation, guidelines and accreditation requirements.[33] The remaining states and territories that do not have legislation must adhere to guidelines or accreditation. They are required to comply with NHMRC ethical guidelines and the RTAC code of practice through a comprehensive self-regulatory system. In the following discussion, we provide an overview of regulatory frameworks and legislation governing ART services in Victoria.[34]

A *Assisted Reproductive Treatment Act 2008* (Vic)

The *Assisted Reproductive Treatment Act 2008* (Vic) ('*ART Act*') regulates the use of assisted reproductive treatment, access to information about treatment procedures carried out under this act and establishes the Victorian Assisted Reproductive Treatment Authority ('VARTA').[35] The *ART Act* sets the guiding principles which stipulate that 'the welfare and interests of persons born or to be born as a result of treatment procedures are paramount',[36] and 'the health and wellbeing of persons undergoing treatment procedures must be protected at all times'.[37] To provide ART services, there is a requirement that fertility clinics are registered. In order to obtain registration, clinics must hold accreditation from the RTAC body.[38] Under the *ART Act*, there is a requirement that the registered fertility clinic must obtain consent from the woman (and her partner, if any) for a treatment procedure specified to commence.[39] The *ART Act* also establishes a counselling requirement – where both the woman and her partner must have received counselling before they consent to ART treatment from a counsellor who provides services on behalf of a registered ART provider.[40] The counselling must be in relation to the prescribed matters, which include 'the options or choices available to the particular woman and her partner, if any; the possible outcomes of the treatment procedure; and any issue or concern raised by the woman or her partner'.[41]

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32 HW Gordon Baker, 'Problems with the Regulation of Assisted Reproductive Technology: A Clinician's Perspective' (2002) 9(4) *Journal of Law and Medicine* 457; Kerry Petersen, 'The Regulation of Assisted Reproductive Technology: A Comparative Study of Permissive and Prescriptive Laws and Policies' (2002) 9(4) *Journal of Law and Medicine* 483.

33 New South Wales, South Australia, Victoria and Western Australia are the only states with legislation. In these states, the legislation takes precedence, while operating in conjunction with the relevant guidelines and accreditation.

34 We note that the Victorian legislation refers to ART as assisted reproductive 'treatment'. However more broadly, ART is commonly referred to as assisted reproductive 'technology'. It is only this section of the article that uses the term 'treatment' as per the Victorian legislation.

35 *ART Act 2008* (Vic) s 1.

36 Ibid s 5(a).

37 Ibid s 5(d).

38 Ibid s 74(1). We discuss the role of RTAC in more detail in Part II(C).

39 Ibid ss 11(1)(a), (2)(a).

40 Ibid s 13.

41 *Assisted Reproductive Treatment Regulations 2019* (Vic) reg 7.

The Fertility Society of Australia's RTAC code provides that an ART clinic must have a senior counsellor who is responsible for the counselling, management and the supervision of all counsellors.[42] However, this process was criticised in the Victorian Independent ART Interim Report ('Victorian ART Interim Report') for its lack of independence of counselling, suggesting that the counselling received by patients has become a 'tick box' compliance exercise with a lack of therapeutic benefit.[43] The Victorian ART Final Report 2019 further noted tensions arising from the role of counsellors in reviewing patient's police checks, complicating the therapeutic relationship between counsellor and patient.[44] The requirements for police and child protection order checks have been criticised as being inequitable, and are soon to be abolished in Victoria.[45]

B Victorian Assisted Reproductive Treatment Authority

The *ART Act* establishes the statutory body – the VARTA.[46] Formally, the 'Infertility Treatment Authority' ('ITA') became VARTA in 2010.[47] Victoria was among one of the first places globally to regulate ART. VARTA is the body responsible for ensuring that certain activities governed under the *ART Act* are regulated. VARTA is responsible for monitoring the activities associated with the *ART Act*. Amongst other matters, VARTA also has to ensure that providers of ART (fertility clinics) are registered, and approve the import and export of donor eggs, sperm, and embryos.[48] VARTA consists of 'no more than 7 members nominated by the minister and appointed by the Governor in Council'.[49] Amongst its functions, VARTA also engages in public education about ART procedures.[50] Further, VARTA must advise the Minister of the number of ART procedures performed, the number of embryos formed and the outcome of the procedures.[51] Additionally, VARTA must also report the number of participants in ART procedures carried out by each registered fertility clinic.[52] While VARTA ensures that fertility clinics are registered, there is also a requirement that clinics are

42 Reproductive Technology Accreditation Committee, Fertility Society of Australia, 'Code of Practice for Assisted Reproductive Technology Units' (Code of Practice, October 2017) 11 <https://www.fertilitysociety.com.au/wp-content/uploads/2017-RTAC-ANZ-COP-FINAL-2.pdf>.

43 'Victorian ART Final Report 2019' (n 11) 53.

44 Ibid 59–60.

45 Wendy Tuohy, 'Police Checks for IVF Patients to Be Scrapped', *The Age* (online, 18 February 2020) <https://www.theage.com.au/politics/victoria/police-checks-for-ivf-patients-to-be-scrapped-20200218-p541y2.html>.

46 *ART Act 2008* (Vic) s 99.

47 Fiona Kelly and Deborah Dempsey, 'The History of Donor Conception Records in Victoria: A Report Prepared for the Victorian Assisted Reproductive Treatment Authority (VARTA)' (Report, VARTA, February 2018) 8.

48 *ART Act 2008* (Vic) s 100(1)(a).

49 Ibid s 101(1).

50 Ibid s 100(1)(b).

51 Ibid ss 114(1)(b)(i), (iii).

52 Ibid s 114(1)(b)(ii).

accredited.[53] Other bodies also have responsibilities in ensuring other aspects of the *ART Act* are administered appropriately.[54]

C Reproductive Technology Accreditation Committee

ART providers in Victoria are also required to hold accreditation from the RTAC.[55] Importantly, an ART provider cannot receive registration unless they have RTAC accreditation.[56] Further, VARTA can impose conditions on registrations[57] and can suspend registration where there has been a contravention of RTAC requirements for accreditation.[58] In Victoria, a person cannot be a registered ART provider if the person no longer holds RTAC accreditation.[59] The RTAC of the Fertility Society of Australia has a code of practice with which fertility clinics must comply.[60] The RTAC code of practice aims to '[p]romote continuous improvement in the quality of care offered to people accessing fertility treatment'.[61] This code includes guidance on a range of matters such as record keeping, resources, quality control and accreditation.[62] There is a requirement in the code of practice that ART providers in Australia must comply with the NHMRC ethical guidelines.[63]

D National Health and Medical Research Council: Ethical Guidelines on the Use of Assisted Reproductive Technology

The NHMRC is an independent statutory agency and leading expert body in Australia in health and medical research.[64] The council identifies critical health issues and provides strategies for public health and medical research.[65] The research conducted by the council is used to inform and change clinical practice, policy and health systems.[66] Moreover, the council's functions include the implementation of ethical guidelines on matters pertaining to the improvement of healthcare, prevention of disease and ethical issues relating to health, amongst others.[67]

The NHMRC also provides ethical guidelines for conducting ART clinical practice and are designed to 'inform the conduct of clinicians' who should include

53 Ibid s 74.
54 Until 1 March 2017, these included the Victorian Registry of Births, Deaths & Marriages for registers relating to donor conception. This is now within the ambit of VARTA, and the Patient Review Panel that considers applications for surrogacy and posthumous use of gametes and embryos amongst other matters.
55 *ART Act 2008* (Vic) s 74.
56 Ibid s 74.
57 Ibid s 75.
58 Ibid ss 76–7.
59 Ibid s 78.
60 Reproductive Technology Accreditation Committee, Fertility Society of Australia (n 42).
61 Ibid 4.
62 Ibid.
63 Ibid 9.
64 *National Health and Medical Research Council Act 1992* (Cth).
65 'Who We Are', *NHMRC* (Web Page) <https://www.nhmrc.gov.au/about-us/who-we-are>.
66 Ibid.
67 *National Health and Medical Research Council Act 1992* (Cth) s 7.

the guidelines into their operating procedures.[68] All fertility clinics in Australia must comply with NHMRC guidelines to receive accreditation in order to provide ART services.[69] States or Territories that do not have any explicit legislation that regulates ART should rely on the NHMRC guidelines for advice and guidance on ART related matters.[70] Further, the guidelines are recognised in the RTAC requirements of the Fertility Society of Australia,[71] and other ART related legislation.[72] The NHMRC ethical guidelines on the use of ART also note the importance of patients' informed decision making in the ART environment. The guidelines state that matters such as obtaining patient consent for specific ART treatments must be provided 'by a professional with the appropriate training, skills, experience and competency to counsel in reproduction … in a way that avoids any undue pressure or inducement'.[73] Further, the information provided must be 'accurate and contemporary … relevant to the circumstances'.[74] Additionally, an explanation 'of all costs involved for relevant parties', including the 'likely fees and the associated out-of-pocket expenses' must be provided.[75] It is also worth noting that any conflicts of interests relating to the services provided by the clinician must also be discussed with individuals or couples.[76] The guidelines address the issue of potential conflicts of interests – this is especially significant, where fertility clinics actively encourage individuals or couples to seek early release of superannuation to fund ART.[77]

III ACCESS AND ELIGIBILITY FOR ART IN VICTORIA

For a woman to be eligible for ART, including IVF in Victoria, the treating medical practitioner must be satisfied on reasonable grounds that, in the woman's circumstances, she is unlikely to become pregnant or carry a pregnancy to birth without the treatment.[78] The Victorian ART Final Report 2019 has been significant in highlighting the shortcomings of existing ART services. This includes its current unaffordability and its impact on those wishing to conceive a child by having to resort to early release of superannuation.[79] We discuss this and other possible reform recommendations later.[80]

68 National Health and Medical Research Council, 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research' (Guidelines, 2017) 14 ('NHMRC Guidelines').
69 Ibid.
70 Ibid.
71 Ibid 113.
72 *Research Involving Human Embryos Act 2002* (Cth) s 21(4)(c).
73 'NHMRC Guidelines' (n 68) 29.
74 Ibid.
75 Ibid 30.
76 Ibid.
77 We explore this potentially unethical practice in more detail in Part V(B).
78 *ART Act 2008* (Vic) ss 10(2)(a), (b).
79 'Victorian ART Final Report 2019' (n 11) 18, 72–3.
80 See Part VI.

A Partially Medicare Subsidised ART

Since 1990, the Australian government has reimbursed individuals for some ART services through Medicare, and other associated drug therapies funded under the government Pharmaceutical Benefits Scheme ('PBS').[81] There are currently no age limitations or restrictions based on the probability of the success of ART. There is also no cap on the number of Medicare subsidised cycles of IVF. Comparatively, the UK takes a more restrictive approach. The National Institute for Health and Care Excellence ('NICE') guidelines recommend that publicly funded IVF through the National Health Service ('NHS') only be available to women under 40 years of age, for three IVF cycles. Further, an additional condition for NHS funded treatment is that the woman should have tried to conceive naturally for two years prior or have undergone 12 unsuccessful (privately funded) IVF treatment cycles.[82]

In Australia, the cost of IVF for individuals or couples has increased from approximately $3,833 per cycle in 2007 to $9,828 in 2020, an average increase of 13% per year, five times the rate of health service inflation,[83] leaving people on average $5,051 out-of-pocket per IVF cycle.[84] Additionally, there are out-of-pocket costs incurred before the commencement of an IVF cycle for supplementary and complimentary services.[85] Further, women are required to attend a range of appointments with fertility specialists and auxiliary administrators.[86] Other ancillary procedures and services associated with IVF treatments such as hospital day surgery, egg collection and frozen embryo transfer also incur out-of-pocket costs to the individual or couple.[87] There are other factors that have also been recognised as contributing to the increase in cost of ART. These include over-servicing in respect of the number of viable IVF cycles and

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81 Department of Health and Ageing (Cth), 'Australian Government Response to the Report of the Independent Review of Assisted Reproductive Technologies' (Report, 2006) 1 <https://www1.health.gov.au/internet/main/publishing.nsf/Content/79D96DD80F01073ECA257BF0001C1ABB/$File/artrc_govresponse.pdf>; Department of Health (Cth), 'Changes to Certain s100 Programs', *The Pharmaceutical Benefits Scheme* (Web Page, 23 January 2020) <https://www.pbs.gov.au/pbs/general/changes-to-certain-s100-programs>.

82 'IVF Availability', *NHS* (Web Page, 11 June 2018) <https://www.nhs.uk/conditions/ivf/availability/>.

83 Originally, the safety net had no thresholds which left it open to exploitation by medical providers such as fertility clinics. This resulted in the government introducing additional laws that in effect cap the safety net for treatments such as IVF treatments. See 'Extended Medicare Safety Net (EMSN) Benefit Caps', *The Department of Health* (Web Page, 22 February 2018) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/EMSN-extended-medicare-safety-net-EMSN-benefit-caps>. See also Julia Medew and Mark Baker, 'IVF Costs Soar as Infertility Business Booms', *The Sydney Morning Herald* (online, 18 October 2013) <https://www.smh.com.au/national/ivf-costs-soar-as-infertility-business-booms-20131018-2vryx.html>.

84 'IVF Treatment Costs', *IVF Australia* (Web Page) <https://www.ivf.com.au/ivf-cost/ivf-costs>.

85 These include holistic treatments such as acupuncture, homoeopathy and herbal medicine that some women may undergo in the hope that they will increase their chances of becoming pregnant.

86 A fertility specialist appointment, a new patient appointment, an information session with a nurse, patient liaison administrator appointment, and counselling.

87 VARTA, 'Costs of IVF' (Brochure, June 2013) 3 <https://www.varta.org.au/sites/default/files/2020-12/Costs%20of%20IVF.pdf>; see also Thomas Hvala, 'In Vital Need of Reform: Providing Certainty for Working Women Undergoing IVF Treatment' (2018) 41(3) *University of New South Wales Law Journal* 901, 906.

promoting the use of additional non-standard procedures ('add-ons') that are often costly with little proven efficacy to increase the chances of a pregnancy. We discuss these issues later in the article.[88]

B Limited (Almost) Full Medicare Subsidised ART

There are a limited number of independent fertility clinics in Victoria that take almost full payment for ART services via the Commonwealth funded Medicare rebate – leaving individuals or couples with very little out-of-pocket expenses.[89] However, fees for some medications, some treatment procedures, counselling, and day surgeries might be incurred as out-of-pocket costs.[90] Nevertheless, there is slow progress towards greater community access to more publicly funded ART services. The New South Wales government recently introduced a pre-IVF fertility-testing rebate and greater government-supported IVF clinics in three major public hospitals to assist in alleviating some of the financial burdens from those wanting to use ART to conceive a child.[91] The Victorian ART Final Report 2019 noted that there has been no change to the public subsidies regime in Victoria since 2010.[92] In the lead up to the 2018 election, the Victorian government committed to establishing public fertility services to commence in 2021.[93] However, until these reforms come into effect, ART services overwhelmingly remain costly and driven by competitive consumer markets. In an attempt to conceive a child, individuals or couples are increasingly accessing their superannuation funds early to begin or continue their fertility journey. In the following part, we discuss the mechanisms for doing so.

IV EARLY RELEASE OF SUPERANNUATION FOR ART ON COMPASSIONATE GROUNDS

In 2014, two major Australian fertility clinics were floated on the stock market. Each raised more than $300 million after markets recognised the profitability of an emotionally driven consumer industry.[94] One analyst commented 'people will pay almost anything to have a baby'.[95] Most individuals or couples are able to fund and access ART themselves through a combination of savings and Medicare rebates. However, some are compelled to turn to unconventional funding sources,

88 See Part V(F).

89 See, eg, 'IVF Costs: Victoria', *Adora Fertility* (Web Page) <https://www.adorafertility.com.au/treatments/costs/ivf-costs-melbourne/>.

90 See 'IVF Costs Victoria', *The Fertility Centre* (Web Page) <https://www.thefertilitycentre.com.au/costs/ivf-costs/vic>; ibid.

91 New South Wales Government, 'Improving Affordability and Access to IVF Services in NSW', *NSW Health* (Web Page, 4 February 2020) <https://www.health.nsw.gov.au/kidsfamilies/MCFhealth/maternity/Pages/affordable-ivf.aspx>.

92 'Victorian ART Final Report 2019' (n 11) 13.

93 Ibid 9–10.

94 Brette Blakely et al, 'Conflicts of Interest in Australia's IVF Industry: An Empirical Analysis and Call for Action' (2017) 22(4) *Human Fertility* 230, 230.

95 Han (n 15).

such as re-mortgaging their homes, increasing existing lending, or increasingly, accessing their superannuation funds early on the basis of chronic or acute mental disturbance to pay for fertility treatment.[96] The discussion below will briefly set out the purpose of superannuation in Australia, rules for its release, and explore the early release of superannuation on compassionate grounds for ART purposes. We then turn to discuss the recent Treasury 'Review of Early Release of Superannuation Benefits' paper in the context of ART.[97] The 2018 Benefits Paper makes a number of recommendations pertaining to early withdrawal of superannuation on medical grounds including a specific discussion about the eligibility criteria.

A Superannuation in Australia

In Australia, the superannuation scheme is a contributory pension program, which preserves members' contributions until retirement age[98] unless exceptional circumstances permit its early release. The scheme requires employers to make compulsory contributions into employee's pension accounts, to provide sufficient income 'in retirement to substitute or supplement the age pension'.[99] The amount that is contributed is typically a percentage of the employee's overall salary,[100] and the account can receive contributions from both the employer as well as the employee, both pre- and post-tax.

The superannuation regime was introduced in 1993 to increase the reach of existing superannuation schemes, which covered only 40% of the workforce in 1983, rising to 72% in 1991.[101] The purpose of superannuation was to 'provide an efficient method of encouraging employers to comply with their … obligations and an orderly mechanism by which employer superannuation support can be increased over time …'[102] Then Treasurer John Dawkins claimed superannuation would permit a higher standard of living in retirement than the age pension alone, and the increased pool of national savings would reduce reliance on foreign

96 See generally, Jennifer Duke, 'Australians Tap Super for $500m Outlay on IVF, Weight-Loss Surgery and Dentistry', *The Sydney Morning Herald* (online, 8 February 2021) <https://www.smh.com.au/politics/federal/australians-tap-super-for-500m-outlay-on-ivf-weight-loss-surgery-and-dentistry-20210207-p57086.html>. See also, The Treasury, Commonwealth, 'Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation' (Consultation Paper, December 2017) 2 <https://treasury.gov.au/sites/default/files/2019-03/c2017-t246586-Consultation-Paper.pdf> ('2017 Early Release of Superannuation Benefits').

97 The Treasury, Commonwealth, '2018 Super Benefits Paper' (n 31).

98 Retirement age is termed 'preservation age' in the legislation, which refers to the age, based on a member's year of birth, that they qualify to apply for release of part or all of their superannuation. This consists of a sliding scale from 55 years up to 60. See *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01 (definition of 'preservation age').

99 Superannuation (Objective) Bill 2016 (Cth) cl 5(1).

100 Most funds are known to operate on a defined contribution basis. However, some funds do operate on a defined benefit basis, where if benefits are wholly or partially determined by a member's salary at a certain date or averaged over time it is a 'defined benefit fund': *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 1.03(1).

101 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1992, 1763 (John Dawkins, Treasurer).

102 Ibid 1764.

capital,[103] against the background of an ageing population.[104] The superannuation regime aims to grow the value of funds under management by investing contributions over time in a diverse asset pool, tailored to different levels of risk appetite and exposure that generate different levels of return on investment. Since 1993, the assets invested in superannuation in Australia have grown to $2.7 trillion dollars,[105] which is forecast to grow to $9 trillion dollars by 2040.[106]

B Early Access to Superannuation on Compassionate Grounds for ART

Given that the superannuation regime in Australia might be regarded as a national bulwark against penury in old age, conditions for its early release are necessarily strict.[107] Currently, superannuation can be accessed early for a range of reasons, provided the member has satisfied a condition of early release.[108] The number and range of these conditions have expanded over time from when they were first introduced and then reproduced in the 1993 foundational legislation.[109] These have expanded from the initial requirements of reaching a minimum age, retirement from the workforce, death, a terminal medical condition, and/or permanent incapacity,[110] financial hardship (including funds released due to the COVID-19 pandemic)[111] and compassionate grounds.[112]

It is 'compassionate grounds' that form the basis for early release of superannuation funds for ART purposes.[113] Historically, release on compassionate

103 We note that complete reliance on foreign capital to support investment and economic activity carries risks. Increased domestic savings to fund investment is therefore advantageous. An important factor, along with the general health of Australia's financial system, in mitigating the risk of foreign liabilities is having sources of capital available from Australian superannuation funds. Not only does this domestic source of capital reduce the vulnerability of firms to global economic shock, it reduces the risk premium that foreign investors demand when investing or lending to Australian firms. Easier access to domestic capital for local investment projects can thus also increase investment, and result in greater long-term output and growth. Commentators have predicted that Australia's superannuation savings will result in a reversal of the current account deficit, with Australia becoming a net lender. See Association of Superannuation Funds of Australia, 'Superannuation and the Economy' (Research Report, June 2015) 13 <https://www.superannuation.asn.au/ArticleDocuments/359/1506-Super_tax_concessions_and_economy.pdf.aspx?Embed=Y>.

104 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1992, 1764 (John Dawkins, Treasurer).

105 Australian Prudential Regulation Authority, 'Statistics: Quarterly Superannuation Performance Statistics Highlights' (Report, March 2020) 3 <https://www.apra.gov.au/sites/default/files/2020-05/Quarterly superannuation performance statistics highlights March 2020.pdf>.

106 Scott Morrison and Kelly O'Dwyer, 'Productivity Commission Review into the Efficiency and Competitiveness of the Superannuation System' (Joint Media Statement, The Treasury, Australian Government, 17 February 2016) 1.

107 *Superannuation Industry (Supervision) Regulations 1994* (Cth) sch 1; James Hurwood, 'What Are Superannuation "Conditions of Release"?', *Canstar* (online, 14 April 2020) <https://www.canstar.com.au/superannuation/conditions-of-release/>.

108 *Superannuation Industry (Supervision) Regulations 1994* (Cth) sch 1.

109 The conditions articulated in *Occupational Superannuation Standards Regulations 1987* (Cth) reg 11(1) were later reproduced in *Superannuation Industry (Supervision) Regulations 1994* (Cth) sch 1 items 101–4.

110 *Occupational Superannuation Standards Regulations 1987* (Cth) regs 11(1)(a)(ii)–(iii), 11(1)(b).

111 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19B.

112 Ibid sch 1.

113 Ibid regs 6.19A(1)(a), (3)(a)–(b), sch 1 item 107.

grounds was at the discretion of the regulator, albeit under the umbrella of the 'financial hardship' provision.[114] However, these 'compassionate grounds' were later introduced and codified in an attempt to reduce the subjectivity of decision making of the regulator,[115] now regulated by the Commissioner of Taxation and the Australian Tax Office ('ATO').[116]

Typically, release requests involve satisfaction of a condition related to retirement. However, applications on compassionate grounds do not. Thus, an applicant seeking funds for ART under compassionate grounds must satisfy all of the following, but does not have to be retired, and can still be in the workforce. Firstly, an applicant must show an amount is required to pay for 'medical treatment',[117] additionally, that they lack the financial capacity to meet an expense arising from that ground,[118] and further that medical treatment is necessary to alleviate an 'acute or chronic mental disturbance'.[119] The necessity of the treatment must be based on the certified opinion of two registered medical practitioners where at least one must be a specialist.[120]

More broadly, early release on compassionate grounds for medical treatment is permitted where the treatment is necessary to treat a life-threatening illness or injury, alleviate acute or chronic, pain, and/or mental disturbance.[121] However, medical treatments provided as part of ART do not meet the first two criteria, thus a person seeking ART must access their superannuation by claiming that infertility is causing 'acute or chronic mental disturbance'. Further, they must claim that ART is required to treat that 'mental disturbance'.[122] It is noted that the legislation does not define the meaning of 'mental disturbance', leaving it open to interpretation on the part of the individual seeking early access to superannuation and/or the certifying practitioners. For those who do satisfy the conditions for the release of superannuation funds, the applicant must submit an application for early release of superannuation funds. The applicant must also include two medical reports from medical practitioners and a quote for medical treatment to the ATO.

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114 Senate Select Committee on Superannuation, Parliament of Australia, *Super: Restrictions on Early Access Small Superannuation Accounts Amendment Bill 1997 and Related Terms of Reference* (Report No 26, September 1997) [4.25].

115 Peter Costello and John Fahey, *Budget Measures 1997–98* (Budget Paper No 2 1997–98, Commonwealth, 13 May 1997) 194.

116 *Superannuation Industry (Supervision) Act 1993* (Cth) section 6(1)(g)(iii) provides that the Commissioner of Taxation has the 'general administration of regulations made under Part 3 to the extent that the regulations relate to the making and notification of determinations that an amount of benefits in a superannuation entity may be released on compassionate grounds'. Further, section 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) defines Regulator as 'the Commissioner of Taxation if the provision in which it occurs, or is being applied for the purposes of, a provision that is administered by the Commissioner of Taxation'.

117 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1)(a).

118 Ibid regs 6.19A(2)(a)–(b).

119 Ibid reg 6.19A(3)(a)(iii).

120 Ibid reg 6.19A(3)(a).

121 Ibid reg 6.19A(3); 'Eligibility for Compassionate Release of Super', *Australian Taxation Office* (Web Page, 5 February 2021) <https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Early-access-on-compassionate-grounds/?page=2#Medical__treatment_or_transport>.

122 '2017 Early Release of Superannuation Benefits' (n 96) 7.

The application and all additional documentation are valid for no more than six months.[123]

The legislation is vague on the qualifications and in relation to the specialist practitioner requirement. As noted in *Munday v Commonwealth [No 2]* ('*Munday*'),[124] the regulation is not clear that the required specialist should have relevant qualifications. Theoretically, it might be possible for an applicant to put forward the medical opinion of a specialist in an unrelated field to the medical treatment that the application relates to. Additionally, there is no clear regulatory requirement for the medical opinion to originate from a practitioner who is treating the individual. The *Regulations* also contain a potential conflict of interest, where a treating practitioner who may profit from the course of treatment prescribed to the individual is also the practitioner who is certifying the necessity of such treatment. As there is no requirement in cases of 'mental disturbance' for the specialist opinion to be related to any mental health-related field, the specialist opinion can, for example, be provided by the treating fertility doctor.

While the legislation allows early access to superannuation for medical treatment (that has included ART) to alleviate 'acute or chronic mental disturbance' that is caused by not having a child (infertility), there is no discussion as to whether this applies to medical or social infertility. We suggest that this requires closer examination.[125] The criteria for early access to superannuation on compassionate grounds appears to include single women, heterosexual couples, and same-sex female couples, where early release of superannuation is obtainable 'to pay for medical treatment or medical transport for *the person or a dependant*'[126] for the purposes of alleviating their acute or chronic mental disturbance. However, this provision may not operate favourably for single men or same-sex male couples seeking to obtain early access to superannuation for ART, as they are unlikely to be accessing the ART directly. Thus, single men or same-sex male couples may not meet the 'medical treatment' criterion.[127]

It is important to note the legislation allows for applications for 'an amount',[128] which presumably must be defined prior to the application. The applicant cannot

123 'Evidence Required for Your Application', *Australian Taxation Office* (Web Page, 5 February 2021) <https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Early-access-on-compassionate-grounds/?page=5#Evidence_required_for_your_application>.

124 (2014) 226 FCR 199, 221 [103] ('*Munday*') (Katzmann J). Despite noting this ambiguity, Katzmann J does conclude however that it is reasonable to construe the reference to a specialist in regulation 6.19A(3) to be a reference to a specialist in the relevant field: at 221 [103].

125 This is beyond the scope of this article, but we make a few comments.

126 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1)(a) (emphasis added). Section 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) defines 'dependent' as 'the spouse of [a] person … and any person with whom the person has an interdependency relationship'.

127 Single men and same-sex male couples seeking to create a family are presumably likely to access surrogacy options. In these circumstances, it is the surrogate who would be the recipient of treatment. Arguably, in these circumstances it would be necessary to determine if an interdependency relationship existed in order to allow for early release of superannuation. Under section 10A(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth), an interdependency relationship exists where two people 'have a close personal relationship *and* they live together, *and* one or each of them provides the other with financial support *and* one or each of them provides the other with domestic support and personal care' (emphasis added).

128 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1).

gain unrestricted access to their entire fund under this ground; it is for the purpose of meeting an immediate and otherwise unfunded 'expense' only.[129] This may be perceived as a welcome safeguard on the applicant's access to their funds, following the vague language and criteria discussed above. This highlights the underlying tension facing regulators and other custodians tasked with preserving the integrity of Australia's 'irreplaceable national asset'.[130] On the one hand, regulators need to preserve funds against Australia's future retirement needs, but balance this against the immediate or urgent financial needs of the fund's members.[131] An additional limb of the 'compassionate grounds' basis is sub-regulation (1)(f) where an applicant may apply to the regulator for a release of funds to meet expenses in other cases where the release is consistent with a ground mentioned in paragraphs (a) to (e). This additional ground of access would seem to permit access for ART or like procedures, again at the discretion of the regulator.[132]

There is very limited case law on the early release of superannuation for medical treatment, specifically ART. In *Munday*,[133] the Court considered an application by an applicant seeking release of superannuation funds for fertility treatment overseas. The treatment involved using donor eggs sourced in the United States ('US') to be fertilised and transplanted into the applicant, Ms Day. She required the use of donor eggs as she suffered a genetic chromosomal disorder that prevented her from producing ova. Her claims were declined and the regulator was not satisfied that the applicant met the conditions of release of superannuation. Notably, in this case, the regulator declined the application based on the applicant's *intention* for seeking early release of superannuation. Stating that the egg donor program that she intended to travel to the US to use was unlawful under Australian law – intentionally offering valuable consideration to another person for the supply of a human egg, or human embryo.[134] Additionally, she had not supplied evidence that fertility treatment would effectively treat her depression.[135] While the Court affirmed that lack of financial capacity is a necessary pre-condition for early release on compassionate grounds,[136] it was more doubtful that it was 'necessary [that the applicant] provide evidence that the proposed treatment

129 Ibid reg 6.19A(2)(b).

130 Tony Boyd, 'Paul Keating Defends Super against Conservative Critics', *The Australian Financial Review* (online, 3 September 2018) <https://www.afr.com/chanticleer/paul-keating-defends-super-against-its-conservative-critics-20180903-h14w2n>.

131 Senate Select Committee on Superannuation and Financial Services, Parliament of Australia, *Early Access to Superannuation Benefits* (Report, January 2002) 14 <https://www.aph.gov.au/~/media/wopapub/senate/committee/superfinan_ctte/completed_inquiries/1999_02/early_access/report/report_pdf.ashx>.

132 See, eg, *Flanagan v Australian Prudential Regulation Authority* (2004) 138 FCR 286, 296 [44] (Sackville J); D07-08\057 [2007] SCTA 120 (16 November 2007) (Superannuation Complaints Tribunal). The Superannuation Complaints Tribunal has now ceased operating. The relevant body to direct complaints to is now the Australian Financial Complaints Authority.

133 (2014) 226 FCR 199.

134 Ibid 205 [23] (Katzmann J).

135 Ibid.

136 Ibid 221 [105].

would in fact alleviate the mental disturbance'.[137] More generally those seeking access to superannuation funds for medical treatment (such as ART) to alleviate a 'mental disturbance' – regardless of whether the treatment would be effective are unlikely to be scrutinised by the Courts in the manner that the applicant was in *Munday*.

C Review of Early Release of Superannuation Benefits Paper

These deficiencies in the *Regulations*, the scope for significant interpretation and potentially unintended outcomes has driven the development of more detailed guidelines aimed at, among other things, better assisting decision-makers and applicants in their understanding of the scope of the *Regulations*. Key to the development of such guidelines was the 2017 Treasury paper entitled, 'Early Release of Superannuation Benefits under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation' ('2017 Victims of Crime Paper').[138] This included a broad range of submissions from stakeholders from diverse backgrounds concerning key issues on the increase of applications for early release of superannuation benefits on medical grounds (amongst other matters). As referred to earlier, a follow-up paper in 2018, '2018 Super Benefits Paper' made a number of recommendations intended to reduce the ambiguity in the *Regulations* as they are presently worded.[139]

By way of support for these recommendations, the 2018 Super Benefits Paper also noted 'the recent rapid increase in the number and type of [successful] applications' for early release on compassionate grounds for medical treatment, and also in 'the amount of funds released'.[140] Stakeholder submissions to the 2018 Super Benefits Paper included members of specialist colleges and medical practitioners amongst others.[141] Some stakeholders expressed discomfort with the current vague wording in the *Regulations*, specifically with the probity of certifying medical practitioners, and identified issues relating 'to which specialist certifies release, continuity of care, and the independence of medical practitioners'.[142] Further, concerns highlighted what items can be claimed under early release of superannuation on medical grounds, and the current eligibility criteria.[143] The 2018 Super Benefits Paper made a range of recommendations for reform, noting potential new approaches to improve the current system by which individuals are able to access superannuation early on medical grounds.

Notably, no recommendations from the 2018 Super Benefits Paper have been implemented to date. Namely: (i) tightening the eligibility criteria, especially for release on mental health grounds (and overseas treatments); (ii) ensure early access

137 Ibid 221 [104].
138 '2017 Early Release of Superannuation Benefits' (n 96).
139 The Treasury, Commonwealth, '2018 Super Benefits Paper' (n 31).
140 Ibid 6.
141 60 submissions made and 10 roundtable meetings were held to discuss key issues on the early access of superannuation. However, at the time of writing, a list of those who made submissions was unavailable on the Treasury website.
142 '2018 Super Benefits Paper' (n 31) 6.
143 Ibid.

to superannuation is a last resort; (iii) limiting the amount of expenses that are claimable; and (iv) lastly limiting the treatments that are claimable.[144] Nonetheless, the 2018 Super Benefits Paper raises a number of important issues in relation to early access to superannuation for ART that we discuss below.

1 Tightening the Eligibility Criteria

Of these recommendations, it is the first that is most relevant to the discussion pertaining to ART – tightening the eligibility criteria and early release of superannuation. In their submissions, medical practitioners and specialist stakeholders noted that the current eligibility criteria that states 'acute or chronic mental disturbance' remains largely vague and allows for a broad range of circumstances.[145] Further, it was highlighted that the term 'mental disturbance' is not clinically recognised, supporting the view that a range of treatments may be prescribed which vary considerably in nature.[146] A proposed amendment in the 2018 Super Benefits Paper stated that the term 'mental disturbance' should be amended to 'mental illness' which would be consistent with clinical terminology that is used by the medical profession and for the 'treatment of a diagnosed mental illness or behaviour disorder'.[147] Additionally, medical practitioners also noted that using the term 'mental illness' would be in line with frameworks such as DSM and ICD that are used for diagnosing mental disorders.[148]

2 Access as a 'Last Resort'

The 2018 Super Benefits Paper also considered whether there should be requirements for individuals to pay for services through superannuation rather than through public health services.[149] It was noted that superannuation might provide a 'lifeline' for individuals that are in desperate need, and for medical services to supplement those provided by the public health system.[150] However, the paper concluded that superannuation should only be accessed as a 'last resort'.[151] Importantly, the paper noted that the 'last resort' principle is difficult to enforce in practice.[152] For example, it might be difficult to prove an individual's subjective belief in relation to 'unreasonably' long wait lists for medical treatment available in the public health system that may cause an additional burden.[153] The paper proposed that the regulator should ensure that individuals are aware of alternative

144 Ibid 7.
145 Ibid.
146 Ibid.
147 This proposed change would amend the wording in *Superannuation Industry (Supervision) Regulations* 1994 (Cth) reg 6.19A(3)(iii) from 'alleviate an acute, or chronic, mental disturbance' to 'treat a diagnosed mental illness or behavioural disorder'. See '2018 Super Benefits Paper' (n 31) 7.
148 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (American Psychiatric Association, 5th ed, 2013); 'ICD-11: International Classification of Diseases 11th Revision', *World Health Organisation* (Web Page) <https://icd.who.int/en>.
149 '2018 Super Benefits Paper' (n 31) 1.
150 Ibid 9.
151 Ibid.
152 Ibid.
153 Ibid.

funding sources (other than early release of superannuation). These include private health insurance benefits and Medicare benefits.[154]

3 Limiting Expenses and Caps

There was limited support from stakeholders about placing caps on the release amounts of superannuation on medical grounds. The paper did note that the cost of medical treatment varies considerably.[155] Further, that out-of-pocket expenses for medical treatment are out of the control of the individual and the frequency with which the need for treatment arises is unpredictable.[156] The paper did not discuss this issue in much more detail, nor did it propose to introduce caps on expenses.

4 Limiting Types of Claimable Treatment to 'Clinically Relevant'

During the consultation, stakeholders generally supported the view that there should not be an exclusion on particular types of medical treatments. However, release of superannuation on medical grounds should not be permitted for lifestyle choice treatments such as tattoo removal.[157] The 2018 Super Benefits Paper acknowledged that personal circumstances may vary and it would be appropriate for such matters to require medical judgement.[158] The paper proposed that the regulation for early release of superannuation on medical grounds should be amended to 'specify that the two registered medical practitioners must each certify that the treatment is generally accepted by the medical profession as being a clinically relevant treatment option for the patient's diagnosed condition'.[159]

5 Medically Relevant Certifying Specialist in the Field of the Injury or Illness

Of relevance to ART, the law is currently ambiguous, and allows a medical specialist in an unrelated field to certify that a person should be entitled to early release of superannuation under medical grounds. One stakeholder stated that greater clarity was required as to who the appropriate specialist in cases for early access to superannuation on grounds of 'mental disturbance' for ART should be: 'should fertility treatment require a referral from an Assisted Reproductive Technology specialist, a gynaecologist or a psychologist, if claimed under the mental disturbance ground of release'?[160] Currently, the fertility clinic providing the ART can certify that the individual should be able to access their superannuation. This raises concerns of conflicts of interests, which we discuss later.[161]

The 2018 Super Benefits Paper proposed amending the regulation so that the certifying specialist must be a specialist in the field of the injury or illness that the

154 Ibid.
155 Ibid.
156 Ibid.
157 Ibid 11.
158 Ibid.
159 Ibid.
160 Ibid 12.
161 See Part V(A).

individual is suffering from (and claiming release under that particular illness ground).[162] Thus, an individual seeking release on the grounds of 'mental disturbance' for ART would be required to seek certification from a psychiatrist.[163] The proposed amendment to the regulation aimed to improve the integrity of the early release of superannuation process. However, the 2018 Super Benefits Paper did not resolve the matter of the medical practitioner providing treatment, for instance in the case of ART (the fertility clinic) being a certifying doctor.[164]

Despite the raft of 'proposed' reforms discussed in the 2018 Super Benefits Paper, the government appears to have been more nimble in its response to the financial impact of the COVID-19 global pandemic – highlighting that the overarching importance of the principles of superannuation continue to hold a tight grip on the system in Australia. The government has recently allowed a limited amount of early superannuation release for those that have been made unemployed, have been working reduced hours, as sole traders or business owners where the business has been suspended or there has been a reduction in turnover of 20% or more.[165] However, there have been some recent concerns expressed of alleged fraud in relation to early access to superannuation for COVID-19 financial hardship.[166]

V EARLY RELEASE OF SUPERANNUATION FOR ART AND THE ROLE OF THE FERTILITY INDUSTRY: ETHICALLY PROBLEMATIC PRACTICES?

We now examine a range of practices and mechanisms that facilitate the early release of superannuation for individuals or couples in order to fund, or continue to fund ART. We also scrutinise the involvement and influence of fertility clinics and third-party intermediaries in the release of superannuation. Before doing so, however, from the outset, we note that one defensible argument about the involvement of fertility clinics in an individual or couple's financial decision-making and early release of superannuation funds might simply be that they do so to assist individuals or couples to realise the chance of having a child. Nevertheless, this explanation alone, is insufficient, and does not take into consideration a broad range of issues that may give rise to ethical concerns when an individual or couple seek to release retirement funds for ART.

162 '2018 Super Benefits Paper' (n 31) 12–13.

163 Ibid.

164 Ibid 15.

165 'COVID-19 Early Release of Super', *Australian Taxation Office* (Web Page, 11 December 2020) <https://www.ato.gov.au/individuals/super/in-detail/withdrawing-and-using-your-super/covid-19-early-release-of-super/#Eligibility>.

166 Paul Karp, 'Australian Authorities Reveal Alleged Fraud of Early Access to Superannuation', *The Age* (online, 7 May 2020) <https://www.theguardian.com/australia-news/2020/may/07/australian-authorities-reveal-alleged-of-early-access-to-superannuation>.

A Potential for Conflict of Interest

As discussed earlier, the current law for certification for release of superannuation funds on the grounds of 'mental disturbance' is deficient as there is no requirement that either certifying medical practitioner must be an expert in the field of mental health.[167] A related but separate issue is arguably that it might be possible for the fertility clinic providing the ART services to potentially be one of the certifying medical practitioners.[168] This raises a potential conflict of interest as the fertility clinic is closely involved in assessing a person's legitimate needs and compassionate grounds for early release of superannuation.

Arguably, there is an inherent lack of impartiality as it is in the best commercial interests of the fertility clinic for an individual or couple to draw on their superannuation funds as the clinic will profit from the ART services it will go on to provide. If the relevant recommendations of the 2018 Super Benefits Paper discussed earlier were to be implemented and given regulatory force, this would to a large degree resolve this conflict of interest issue.[169] Specifically, the recommendations that require that the individual have a 'mental illness or behavioural disorder',[170] and that one of the certifying doctors be a specialist in the field relating to the release grounds, and the other be the individual's regular treating medical practitioner,[171] would typically prevent the fertility clinic doctor being a certifying specialist.

B The Ethically Problematic Provision of Financial Advice and Tension with the NHMRC Ethical Guidelines

The NHMRC ethical guidelines specifically discuss the potential of a 'conflict of interest' arising in the provision of ART services.[172] The guidelines state that 'the safety and wellbeing of patients takes priority over the commercial, financial, personal or other interests of the clinic'.[173] The guidelines also stipulate that clinics must ensure that there is a discussion and explanation of all costs involved to relevant parties, and 'clinics must provide individuals or couples with sufficient

167 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A.

168 The *Regulations* do not explicitly state an ART specialist can be a certifying medical practitioner. However this conclusion can be drawn given the applicant's treating IVF clinician is a medical practitioner and their opinion can therefore be relied on by the Regulator when making its determination as to the early release of superannuation. See for example, *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(3) provides:

> the Regulator cannot be satisfied that money is required for medical treatment unless two registered medical practitioners (at least one of whom is a specialist) certify that:
>
> (a) the medical treatment is necessary to:
>
> …
>
> (iii) alleviate an acute or chronic mental disturbance.

169 See Part IV.

170 '2018 Super Benefits Paper' (n 31) 7.

171 Ibid 15.

172 'NHMRC Guidelines' (n 68) s 3.9.

173 Ibid.

information regarding the likely fees and the associated out-of-pocket expenses so that they are able to make an informed financial decision'.[174]

However, fertility clinics should not provide financial advice about early release of superannuation for ART. Yet, despite this, some fertility clinics use and promote the services of third-party intermediaries that specialise in assisting individuals and couples (for a fee) in preparing their ATO applications for individuals to access their superannuation early for ART.[175] Thus, it would appear that there is some tension between the NHMRC ethical guidelines and the conduct and activities of fertility clinics in this regard. We posit that directing individuals to seek early release of superannuation and promoting the services of intermediaries to assist with such matters have, as per the NHMRC guidelines, 'the potential to bias professional judgement'.[176]

Further, proactively assisting individuals to access their retirement funds early for ART obscures objectivity and promotes and prioritises the commercial interests and profitability of the fertility clinic. Moreover, such practices may be ethically problematic when taking into consideration the potential for individuals or couples to seek access to their superannuation funds for ART that has low success rates.[177]

We note that where financial advice is being provided, there are requirements under the Australian Securities and Investments Commission ('ASIC') and the *Corporations Act 2001* (Cth) that must be met. Where a business or representative is providing financial product advice to clients it must have an Australian financial services licence ('AFS').[178] Non-compliance with the AFS licencing requirements may constitute an offence under the *Corporations Act 2001* (Cth).[179] Arguably, the above licensing considerations may be relevant considerations for fertility clinics in the context of early release of superannuation for ART. We speculate fertility clinics may need to be mindful of AFS licensing obligations where they engage in detailed discussions with individuals or couples about early access to superannuation for ART. We do note that clinics have actively promoted the services of third-party intermediaries to assist individuals or couples via their websites to access superannuation. However, these third parties, explicitly state that they are not providing financial advice. We discuss this later.[180]

C Early Release of Superannuation for ART on Grounds of 'Mental Disturbance'

In *Munday*, the regulator declined the applicant's early release of superannuation on multiple occasions. The applicant stated that she suffered from a chronic depressive disorder resulting from infertility, which could be alleviated

174 Ibid s 4.1.2.
175 See 'SuperCare Services', *SuperCare* (Web Page) <https://mysupercare.com.au/our-services/>.
176 'NHMRC Guidelines' (n 68) s 3.9.
177 Blakely et al (n 94) 230.
178 'AFS Licensees', *Australian Securities and Investments Commission* (Web Page) <https://asic.gov.au/for-finance-professionals/afs-licensees/>.
179 *Corporations Act 2001* (Cth) s 911A.
180 See Part V(D).

with ART to be undertaken in the US, via the donor egg program.[181] However, the first application was declined on the basis that: (i) she had not received any psychiatric treatment for the chronic depression; (ii) there was no evidence to suggest that psychiatric treatment had been unsuccessful to treat the chronic depression; or (iii) that IVF treatment was the most viable treatment option to alleviate her mental condition.[182] The applicant, Ms Day, experienced several unsuccessful pregnancies using donated frozen embryos in the US. She was preparing to travel overseas again, however, she made her application for early release of superannuation at the suggestion of Dr Sides, her fertility specialist. This was suggested to assist with the additional costs of the next stage of treatment and travel to the US to access frozen embryos.[183] Dr Sides had stated that she had also assisted others to access their superannuation early.[184] On her second application to APRA for early release of superannuation for grounds of mental illness, Ms Day included additional reports from Dr Sides and a psychiatrist, Dr Adams.

The fertility specialist, Dr Sides, confirmed that the chronic depression was caused by the applicant's infertility, and that treatment for the infertility through the donor egg program in the US resulting in the birth of a child would alleviate the chronic depression that Ms Day suffered.[185] Dr Adams also stated that the applicant's depression had been exacerbated by the significant inaccessibility of medical treatment in Australia.[186] Further, that 'regardless of success of the IVF treatment, "access to it and the hope that this will engender will be a significant factor in improving the applicant's depression"'.[187] These reports were commissioned by the applicant, and produced by at least one specialist with a financial interest in the outcome, thus it is correct to question the veracity and independence of the statements they contained. Notwithstanding this apparent conflict, the data and research into success rates of fertility treatment and its correlating effect on depression is worthy of a brief discussion.

For illustrative purposes, at the time of the application for early release of superannuation, Ms Day was aged forty. Available data indicates that the applicant would have had an estimated 9% (8.9%) chance of a live birth of a child at that time.[188] However, by the time the Federal Court heard the case some five years later, this chance would have diminished to almost 1% (1.4%).[189] While this data is not entirely determinative of a successful pregnancy and childbirth, it may give rise to ethical concerns about early release of superannuation for ART on grounds of 'mental disturbance'. In *Munday*, the regulator queried whether the request for early release of superannuation under the medical grounds of mental illness was

181 *Munday* (2014) 226 FCR 199, 201 [2] (Katzmann J). The IVF treatment would take place in the US as it involved a donor egg program.
182 Ibid 203 [17].
183 Ibid 202 [10].
184 Ibid.
185 Ibid 205 [25].
186 Ibid 205 [26].
187 Ibid.
188 Jade E Newman et al, 'Assisted Reproductive Technology in Australia and New Zealand 2017' (Report, September 2019) 12.
189 Ibid.

indeed the most appropriate form of treatment for the applicant.[190] Additionally, the regulator considered whether future failed treatment would in fact put the applicant's mental condition at risk of further deterioration.[191]

Some commentators have noted that women who have experienced failed IVF treatment(s) reported higher levels of depression and lower self-esteem after the failed treatment than before treatment commenced.[192] Further, women who have undergone IVF treatment reported greater depressive and obsessive-compulsive symptoms compared to those who had not undergone treatment at all.[193]

A longitudinal international study in which 348 women participated found 1 in 10 women had a delayed or chronic trajectory of anxiety and depression and these trajectories predicted serious mental health impairment 11–17 years after IVF treatment.[194] The study also found that a more prolonged maladjustment reaction may reflect individual vulnerability to infertility and IVF.[195] It has been noted that the greater the depression suffered due to infertility, the less likely an individual is to commence, and more likely that they will cease treatment after only one ART cycle.[196] Additional research has linked psychological symptoms with a negative fertility outcome[197] – the more distressed the patient prior to commencing treatment, the lower the pregnancy rates.[198]

Given that many types of ART are likely to be speculative with correspondingly low success rates, we question the ethical appropriateness of the current legal regulation that allows early release on the grounds of 'mental disturbance' for ART.[199] It is very possible that in some cases, the process of undergoing ART may exacerbate a current mental health condition, rather than alleviate it, which is what treatment ostensibly seeks to achieve. Additional risks to a vulnerable individual's mental state are posed by the pregnancy itself. IVF pregnancies carry a greater than usual risk of miscarriage[200] than normal pregnancy and childbirth related risks, including depression.[201]

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190 *Munday* (2014) 226 FCR 199, 203 [17] (Katzmann J).

191 Ibid.

192 Gloria J Hynes et al, 'The Psychological Well-Being of Infertile Women after a Failed IVF Attempt: The Effects of Coping' (1992) 65(3) *British Journal of Medical Psychology* 269, 269.

193 See, eg, J Vikström et al, 'Mental Health in Women 20–23 years after IVF treatment: A Swedish Cross-Sectional Study' (2015) 5(10) *BMJ Open* 1, 4.

194 See, eg, Sofia Gameiro et al, 'Women's Adjustment Trajectories During IVF and Impact on Mental Health 11–17 Years Later' (2016) 31(8) *Human Reproduction* 1788, 1788.

195 Ibid.

196 See, eg, Natalie M Crawford, Heather S Hoff and Jennifer E Mersereau, 'Infertile Women Who Screen Positive for Depression Are Less Likely to Initiate Fertility Treatments' (2017) 32(3) *Human Reproduction* 582, 582.

197 See, eg, Adam J Massey et al, 'Relationship between Hair and Salivary Cortisol and Pregnancy in Women Undergoing IVF' (2016) 74 *Psychoneuroendocrinology* 397.

198 See, eg, Hongmei Xu et al, 'The Effects of Anxiety and Depression on In Vitro Fertilisation Outcomes of Infertile Chinese Women' (2017) 22(1) *Psychology, Health and Medicine* 37, 42; Hillary Klonoff-Cohen et al, 'A Prospective Study of Stress among Women Undergoing In Vitro Fertilization or Gamete Intrafallopian Transfer' (2001) 76(4) *Fertility and Sterility* 675.

199 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A.

200 See, eg, Fan Qu et al, 'The Association between Psychological Stress and Miscarriage: A Systematic Review and Meta-analysis' (2017) 7 *Scientific Reports* 1731.

201 Ibid.

While controversial, we speculate that where a person seeks early release of superannuation on grounds of mental disturbance for ART, it raises ethical concerns for a person to undergo treatment if they are in a psychologically vulnerable state.

It has been noted that ART can be an emotionally, physically and financially exhaustive journey, for some more stressful than other major life events including the death of a family member.[202] Moreover, the impact and consequences of ART have been described as 'pervasive, disturbing and distressing'.[203] Others have stated that it is 'a silent hell, and [an] experience that leaves scars', 'trauma, social isolation, obsession and self-criticism'.[204] Despite being informed of extremely low chances of success, some individuals or couples accessing ART will continue to undergo treatment in the hope that they will conceive a child.[205] Those accessing ART may be described as becoming 'desperate, distressed and irrational',[206] where in such cases they find ceasing treatment an 'extremely difficult decision'.[207]

Given that these types of considerations are not part of the criteria for the assessment of suitability for fertility treatment,[208] we suggest that the regulator should be required to scrutinise the substantive appropriateness of the early release of superannuation for ART treatment under the 'mental disturbance' ground to ensure it is well founded. When taking into account considerations such as whether the uncertain nature of ART will alleviate a genuine 'mental disturbance' or heighten it, requires deeper consideration before the release of superannuation funds. At the very least, decision making for fund release ought to be informed by those who have a specialisation in psychiatry or mental health. This is especially important, where a fertility clinic may espouse views such as the following: 'if I'm not doing any harm and I may do good and *I don't know whether I'm doing good or not* … I feel comfortable in prescribing a treatment if the patient thinks that that's going to be of assistance to them'.[209]

The early release of superannuation based on a mental illness (such as depression) as a result of infertility would have a more favourable standing if it could be clearly evidenced that ART would alleviate the mental condition and could satisfy the 'clinically relevant' requirement as suggested in the 2018 Super Benefits Paper. This is likely to be challenging however. Mental illness is a

202 'Tips for Handling the Emotional Stress of IVF', *Premier Health* (Web Page, 7 March 2019) <https://www.premierhealth.com/your-health/articles/women-wisdom-wellness-/tips-for-handling-the-emotional-stress-of-ivf>.

203 Australia and New Zealand Infertility Counsellors Association, Fertility Society of Australia, 'Guidelines for Professional Standards of Practice Infertility Counselling' (Guidelines, 31 August 2018) 7.

204 'Mental Health and IVF', *Centre of Perinatal Excellence* (Web Page) <https://www.cope.org.au/planning-a-family/happening/mental-health-and-ivf/>.

205 'The IVF Roller-Coaster', *The Sydney Morning Herald* (online, 30 June 2005) <https://www.smh.com.au/national/the-ivf-roller-coaster-20050630-gdllsp.html>.

206 *Munday* (2014) 226 FCR 199, 202 [12] (Katzmann J).

207 'Deciding to Stop IVF Treatment', *VARTA* (Web Page) <https://www.varta.org.au/resources/personal-stories/deciding-stop-ivf-treatment>.

208 Australia and New Zealand Infertility Counsellors Association, Fertility Society of Australia (n 203) 5.

209 Sarah Dingle, 'IVF Doctors Misleading Women about Success Rates, Industry Experts Say', *ABC News* (online, 30 May 2016) <https://www.abc.net.au/news/2016-05-30/ivf-doctors-misleading-patients-about-success-rates-experts-say/7457750> (emphasis added).

complex health concern and absolute causal determinations are difficult to prove. This tenuous link is further underscored by the current absence of any requirement that the individual must provide a certifying report of 'mental disturbance' from a psychiatrist.[210] A fertility clinic specialist is not the most appropriately qualified to make clinical judgements about a person's state of mental health.

A more viable and rational approach would be that proposed in the 2018 Super Benefits Paper discussed earlier, that suggested that at least one certifying practitioner should be a specialist in the relevant field. In the case where early release of superannuation is based on grounds of 'mental disturbance' that specialist should be a psychiatrist.[211]

D The Role of Third-Party Intermediaries and Early Access to Superannuation

A range of third-party intermediaries play a significant role in assisting those accessing ART by advertising their services to assist them to obtain superannuation funds. The intermediaries are generally paid through such released funds.[212] Arguably, if compassionate release of superannuation funds on medical grounds had criteria that were consistently applied, simple to understand, and only potentially involved certifying doctors that had no conflict of interest, this would, to a large extent, mean that there would be little need for such intermediaries.

Further, in some cases, fertility clinics will directly refer individuals or couples to such intermediaries.[213] There has been concern expressed about the lack of transparency regarding the fees that third-party intermediaries charge, as well as the possibility of commission received from others, leading to a lack of consumer protection.[214] The 2018 Super Benefits Paper noted the significant increase in applications for early release of superannuation on medical grounds was to some degree due to third-party intermediaries' involvement.[215] One commentator, the chief executive of the Australian Institute of Superannuation Trustees, has noted that individuals need to be protected by the regulatory body, especially from 'predatory third-party operators who are looking to profit from individuals getting early access to their super'.[216]

We also note that some third-party intermediaries explicitly state that they are not providing financial advice, thus do not possess AFS licenses. Arguably, the

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210 '2018 Super Benefits Paper' (n 31) 13.

211 Ibid.

212 See, eg, 'Release My Super: For Life's Unexpected Events', *Release My Super* (Web Page) <www.releasemysuper.com.au>; 'SuperCare Services', *SuperCare* (Web Page) <https://mysupercare.com.au/our-services/>.

213 See, eg, 'Accessing Supercare', *Fertility First* (Web Page) <http://fertilityfirst.com.au/supercare>.

214 Financial Planning Association of Australia, Submission to Treasury, *Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation* (12 February 2017) 4 <https://treasury.gov.au/sites/default/files/2019-03/c2017-t246586-Financial-Planning-Association.pdf>.

215 '2018 Super Benefits Paper' (n 31) 6.

216 Joanna Mather, 'Calls for Tougher Consumer Protections for Early Release Super', *The Australian Financial Review* (online, 3 December 2018) <https://www.afr.com/personal-finance/superannuation-and-smsfs/calls-for-tougher-consumer-protections-for-early-release-super-20181128-h18h3j>.

services they provide in assisting clients in accessing superannuation funds may require closer examination in terms of AFS requirements. The ASIC Regulatory Guide 146 sets the standards of financial product advisors.[217] The training standards vary depending on the financial product, and whether the adviser is giving general or personal advice.[218] More information about the exact involvement of third-party intermediaries is required to determine whether there is a need for further examination about potential AFS obligations and training for these intermediaries.

Further, delving deeper into the relationship of third-party intermediaries with fertility clinics may lead to greater clarity and transparency as to how intermediaries and clinics operate in conjunction with one another, and determine whether there should be a requirement for financial services licences. If it is determined that third-parties should have AFS licenses, we note that the Financial Adviser Standards and Ethics Authority ('FASEA') Code of Ethics may also play a role in ensuring that intermediaries do not accept referrals from fertility clinics.[219]

E Increased Cost Associated with Funding IVF Treatment

Seeking early access of superannuation attracts additional financial detriment that those accessing ART will incur for the taxes and fees payable. There is reason for concern in circumstances where ART clinics encourage individuals or couples to seek early release of superannuation funds without making the person aware of the additional fees associated with this. For any person under the age of 60, any lump sum withdrawal from superannuation is taxed at a rate of between 17% and 22%, compared to 0% for anyone over 60.[220] Additionally, the ATO will only consider 'one IVF treatment' per application.[221] This is rather vague – we suggest 'one treatment' may refer to one IVF cycle. If this is the case and superannuation companies charge a service fee per cycle, individuals may have additional out-of-pocket expenses for each IVF cycle, making ART even more costly. Individuals seeking to access their superannuation early may be unaware of these additional costs as fertility clinic websites do not provide in-depth information concerning these additional fees.[222]

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217 Australian Securities and Investments Commission, 'Regulatory Guide 146: Licensing: Training of Financial Product Advisers' (Guide, July 2012) <https://download.asic.gov.au/media/1240766/rg146-published-26-september-2012.pdf>.

218 Ibid [146.7], [146.17], [146.18].

219 Financial Adviser Standards and Ethics Authority, *Financial Planners and Advisers Code of Ethics 2019* (at 8 February 2019) standard 3.

220 *Income Tax Assessment Act 1997* (Cth) ss 301-20, 301-35. Note that the tax-free component (which includes amounts arising from non-concessional superannuation contributions) are not subject to tax: at ss 301-15, 301-30.

221 'Application for Compassionate Release of Superannuation', (Form, Australian Taxation Office) 2 <https://financialcounsellors.org/wp-content/uploads/2018/09/super-release.pdf>; Dominic Woolrych, 'Can You Access Superannuation Early to Pay for IVF?', *Canstar* (Web Page, 11 July 2019) <https://www.canstar.com.au/superannuation/access-super-early-ivf/>.

222 See, eg, 'Accessing Super for IVF', *Monash IVF* (Web Page) <https://monashivf.com/cost/accessing-super-for-ivf/>; 'IVF Services, Advice and Funding', *Melbourne IVF* (Web Page) <https://mysupercare.com.au/our-services/ivf/melbourne-ivf/>.

F Promoting Additional Non-standard Procedures

The encouraged use and sale of unproven and unreliable add-ons have been highlighted as an example of a sharp business practice of the fertility industry.[223] These 'add-ons' include procedures such as anti-mullerian hormone testing – an unreliable marker of infertility and endometrial scratching of the uterus – also an unproven practice to increase the chance of pregnancy. These procedures amongst many others[224] are costly, with little to no proof of their efficacy.[225]

In addition to assisting and encouraging individuals to seek early release of superannuation for ART, some fertility clinics in Victoria are urging women to draw on their superannuation funds to freeze eggs for future use via IVF.[226] Yet another questionable practice whereby fertility clinics stand to benefit financially from the storage of eggs, potential embryos and future IVF treatment that has no guarantee of success.[227]

The Victorian ART Final Report 2019 highlighted that some fertility clinics potentially engage in misleading and deceptive conduct with regard to 'add-ons'. It noted that experienced clinicians have raised concerns about 'the range of treatments [and] misrepresentations of their effects'.[228] The Victorian ART Final Report 2019 suggested additional regulations to restrict the use of these practices, particularly given the lack of evidence about the efficacy of 'add-ons' broadly. In its 2019 annual report VARTA stated that clinics are required to inform individuals of the evidence of additional procedures (add-ons). Despite this, the Victorian ART Final Report 2019 wrote that clinics continue to promote potential benefits of add-on treatments and 'do not always adequately explain the research findings behind them'.[229] The 2019 Report suggested that the regulator should be empowered to investigate potential failures to comply and take the steps necessary to ensure compliance.[230] Controversially, there have been some noted instances in which the commercial interests and competitive market has driven some fertility clinics to offer fertility treatment to women who would be likely to conceive a child using less expensive or invasive treatment methods.[231] Further, it has been alleged that some women are being offered IVF despite further IVF cycles being unlikely to succeed.[232] Some commentators have attributed potential overservicing

223 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 June 2019, 2336 (Tim Read).

224 Time lapse imaging of embryos, steroids, testosterone and growth hormones, embryo glue, assisted hatching are some of the other 'add-ons' that fertility clinics offer. There is also some debate about the efficacy and appropriate use or overuse of the Intracytoplasmic Sperm Injection procedure. See also Nicolas Zech and Peter Hollands, 'IVF Add-Ons: Fact, Fiction, Fake or Fortune?' (2020) 8(1) *Journal of Fertilization: In Vitro – IVF-Worldwide, Reproductive Medicine, Genetics & Stem Cell Biology* 1.

225 'What You Need to Know about IVF Add-Ons', *VARTA* (Web Page, December 2019) <https://www.varta.org.au/resources/blogs/what-you-need-know-about-ivf-add-ons>.

226 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 June 2019, 2336 (Tim Read).

227 Ibid.

228 'Victorian ART Final Report 2019' (n 11) 49.

229 Ibid 50.

230 Ibid xi.

231 Blakely et al (n 94) 233.

232 Ibid.

due to a lack of caps on the number of procedures that can be offered and on the fees that can be charged.[233]

G Misrepresentations about ART Success Rates

Inaccurate and misleading representation about the success rates of ART might help to induce individuals or couples to withdraw superannuation funds to access treatment. This gives rise to ethical concerns, as it potentially exploits people. Fertility clinics must provide accurate information. Further, success rates and live birth rates must also be communicated in accordance with the requirements set out in the RTAC Code of Practice.[234]

In 2016, an investigation by the statutory authority, the Australian Competition and Consumer Commission ('ACCC') found that a number of fertility clinics providing IVF treatment had made claims that were published on their websites about success rates that were potentially misleading representations.[235] The ACCC found that some providers were using clinical pregnancy data rather than live birth data to compare their success rates.[236] On occasion, the data was accompanied by pictures of newborn babies, leading to further misleading impressions about successful pregnancies to those seeking to access ART.[237] VARTA acknowledged that the information was misleading and noted that it did not comply with RTAC good practice criteria.[238] In its 2016/17 annual report VARTA noted that despite assurances that the ACCC continued to monitor fertility clinics for misleading claims, a subsequent audit by VARTA found that little improvement had been made to the quality of the information provided by clinics on their websites.[239]

VI RECOMMENDATIONS FOR REFORM

We have critically examined a number of practices and mechanisms that facilitate early release of superannuation for those seeking ART. In the following discussion, we present a range of recommendations for reform to current law and practices. We re-emphasise that we do not propose a wholesale prohibition on early access to superannuation for ART. Rather, we suggest that there should be better checks and balances in place that improve the mechanisms for access to ART and superannuation that work to protect individuals or couples. We are also cognisant of the current lack of social and political appetite for further constraints to early access to superannuation. We especially note the current public debate that

233 Ibid.
234 Reproductive Technology Accreditation Committee, Fertility Society of Australia (n 42) 2.2.2.
235 Australian Competition and Consumer Commission, 'IVF "Success Rate" Claims under the Microscope' (Media Release 212/16, 14 November 2016).
236 Ibid.
237 Ibid.
238 'ACCC Finds IVF Clinics Providing Misleading Information on Success Rates, *VARTA* (Web Page, November 2016) <https://www.varta.org.au/resources/news/accc-finds-ivf-clinics-providing-misleading-information-success-rates>.
239 VARTA, 'Annual Report 2017' (Report, June 2017) 2.

calls for fewer restrictions and indeed greater early access to superannuation to assist individuals in the midst of economic downturn or recession.[240]

A Mandatory Financial Counselling

Individuals or couples preparing to undergo ART, or already undergoing ART, are making emotional decisions about uncertain treatment, often while experiencing financial pressure. Under these circumstances, we suggest that it is in their best interests to undertake mandatory impartial, financial counselling before undertaking any ART.

We note that high income earners will not be those most likely to be seeking early release of superannuation for ART. Presumably, those most likely to do so will be individuals or couples who are in an unfavourable financial position from the outset. Thus, financial counselling should be affordable and accessible to all individuals or couples accessing ART and should take into account each person's circumstances. It should allow each person to make fully informed objective financial decisions about the most appropriate funding avenue for ART in the most effective and equitable manner.[241] Most importantly, financial counselling undertaken independently of the fertility clinic will avoid any actual or perceived conflict of interest.

It has been suggested that individuals should be 'given robust completely independent financial advice, before going down a road which increases the prospect that they will be self-funding when it comes to retirement'.[242] Currently, fertility clinics appear to be inappropriately involved when individuals or couples are making financial decisions about how to fund ART, especially when deciding whether to access their superannuation early. Mandating independent financial counselling may go some way in alleviating some of this overreach. Independent financial counselling may allow individuals or couples a greater level of autonomy in decision-making before embarking on ART.

As discussed earlier, the 2018 Super Benefits Paper also stated that early release of superannuation should only be a 'last resort'. We support this view, and recommend that while those seeking to access ART undergo mandatory financial counselling, they should make a full disclosure of their assets and liabilities. This would allow for the most tailored financial advice. Further, during the counselling the individual or couple should be made aware of other financial avenues available

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240 Judith Sloan, 'Super Funds Need Reminding It's Not Their Money', *The Australian* (online, 16 June 2020) <https://www.theaustralian.com.au/commentary/super-funds-need-reminding-its-not-their-money/news-story/ae0cd4f32541d4b9975f0c798124d96d>; Adam Creighton, 'Your Super Doesn't Belong to Them', *The Australian* (online, 31 July 2020) <https://www.theaustralian.com.au/business/economics/coronavirus-do-what-you-will-with-super-says-scott-morrison/news-story/99d3548cb4be980b8a1ce92422d6d7dd>.

241 One suggestion to limit the expense of counselling would be to ensure that it is a one-off consultation and that counselling is at the same price regardless of where individuals or couples went for financial counselling. It would defeat the purpose if the counselling were overly financially burdensome.

242 Meredith Griffiths, 'Superannuation: Australians Increasingly Dipping into Super to Pay Medical Bills', *ABC News* (online, 9 January 2018) <https://www.abc.net.au/news/2018-01-09/superannuation-being-used-to-pay-for-medical-bills/9313720>.

such as private health insurance and a discussion of Medicare rebates.[243] Of relevance to ART, this is of significance to women who generally have lower balances of superannuation than those of men, due to a number of factors, including lower lifetime earnings, gendered pay gaps and career breaks.[244]

B Tightening the Criteria for Early Release of Superannuation for ART

We have previously discussed the ambiguity of the current law and the ease with which superannuation funds may be released early on grounds of alleviating a 'mental disturbance' for ART. Additionally, current criteria allow practitioners who are not experts in mental health to make clinical evaluations to certify a release of superannuation funds.[245] Moreover, these evaluations can be made by a fertility specialist at the clinic that will provide the ART, where there is a clear financial conflict of interest in doing so.[246]

By adopting the recommendations of the 2018 Super Benefits Paper these issues can largely be addressed and will go some way to resolving the ambiguity in the current law. In particular, the criteria for early release of superannuation for ART should be tightened. We support the 2018 Super Benefits Paper recommendations that:

1. 'Mental disturbance' should be amended to 'mental illness or behavioural disorder' in the legislation; and[247]
2. a requirement that one certifying medical practitioner should have expertise in mental health (psychiatry).[248]

As it stands, the criteria have the effect of excluding anyone without a mental disturbance from accessing their superannuation for ART. While these reforms would go some way to tightening the current criteria, we also suggest a wholesale review of the causal link between mental illness and infertility in relation to the early release of superannuation. At present, there is a lack of clear checks and balances to determine whether ART – based on an independent assessment that takes into account the likelihood of a successful pregnancy based on the applicant's age, or other factors – will have a reasonable chance of alleviating mental illness (severe depression).

C Greater Regulatory Oversight of ART and Less Industry Involvement

There is a need for greater regulatory oversight about the level of involvement of fertility clinics in the financial decision-making processes of individuals and couples accessing ART – including early release of superannuation. There has

243 '2018 Super Benefits Paper' (n 31) 10.
244 Senate Economics References Committee, Parliament of Australia, *'A Husband Is Not a Retirement Plan': Achieving Economic Security for Women in Retirement* (Report, 29 April 2016) 147.
245 See our discussion in Parts IV and V.
246 Ibid.
247 '2018 Super Benefits Paper' (n 31) 3.
248 Ibid.

been a call for regulators to be more attentive and to enable individuals or couples to make informed financial choices.[249]

The former President of the Australian Medical Association has also expressed concern about the increasing number of individuals seeking early release of superannuation for ART and the level of involvement of fertility clinics.[250] He stated that it is 'essential that the clinical decision making is at arm's length from the financial considerations'.[251] At present, it would appear that some fertility clinics do not merely advise individuals or couples from afar about alternative funding options for ART, rather, they are closely involved in applications to the ATO for early release of superannuation funds, including submitting treatment reports in support of the person's application.[252] Given that some individuals or couples may be vulnerable and open to exploitation – this raises ethical concerns.[253]

It would appear that some fertility clinics are operating in a seemingly 'closed-loop system' – where the fertility clinic will invariably benefit financially. Moreover, others have commented that publicly listed companies, which include fertility clinics that are obligated to make profits for shareholders, should have a corresponding obligation to provide 'affordable, high-quality healthcare, particularly when some of their profits come from Medicare reimbursements for the treatment they offer'.[254]

We recommend a clear separation in the role and involvement of fertility clinics in providing ART services to individuals or couples. Most importantly, that role should not include providing any financial advice such as matters concerning early release of superannuation funds for ART.

D Further Discussion about Publicly Funded ART and Medicare Reform

While it is beyond the scope of this article, a discussion about publicly funded ART, that leaves the individual with little out-of-pocket costs, warrants future consideration. This is inherently linked to how ART is publicly perceived. There has been some academic commentary as to whether infertility is a medical condition that in turn requires ART, including IVF treatment as a medical necessity to alleviate such a condition.[255] If there is the political and social appetite to consider more public funding for ART, then this would likely coincide with the

249 Brazier (n 16) 192.

250 The figures for early access to superannuation for medical treatment increased from AUD42 million in 2000–01 to AUD550 million in 2016–17. See Joanna Mather, 'Calls for Tougher Consumer Protections for Early Release Super', *The Australian Financial Review* (online, 3 December 2018) <https://www.afr.com/personal-finance/superannuation-and-smsfs/calls-for-tougher-consumer-protections-for-early-release-super-20181128-h18h3j>.

251 Griffiths (n 242).

252 *Munday* (2014) 226 FCR 199, 202 [10] (Katzmann J).

253 One Victorian fertility clinic provides information on their website about how those seeking ART can gain access to their superannuation. See 'SuperCare Services', *SuperCare* (Web Page) <https://mysupercare.com.au/our-services/>.

254 Julia Medew and Mark Baker, 'IVF Costs Soar as Infertility Business Booms', *The Sydney Morning Herald* (online, 18 October 2013) <https://www.smh.com.au/national/ivf-costs-soar-as-infertility-business-booms-20131018-2vryx.html>.

255 There has been some discussion as to whether infertility is a disease that requires state funded treatment. See Hane Htut Maung, 'Is Infertility a Disease and Does It Matter?' (2019) 33(1) *Bioethics* 43.

widespread perception of infertility and childbearing as primarily health concerns, rather than necessitating some people to acquire medical assistance to achieve lifestyle choices. Of particular relevance here is that should the medical treatment be available through the public health system, the requirements for early release of superannuation under compassionate grounds would no longer be met. The *Regulations* expressly state that funds can only be released if the treatment cannot be obtained publicly.[256]

As we have discussed earlier, recently various state governments have made financial investments into public hospitals for ART and related services.[257] Further utilisation of public funds to improve IVF access could be in the form of greater availability of ART in the hospital system. Another mechanism of utilising public funds to help those with limited means to access ART might be by increasing the Medicare rebates available for IVF and other ART. Although to be effective, safeguards would need to be in place to prevent the bulk of such higher rebates leading to higher clinic fees.[258]

However, in a fiscally constrained society with limited healthcare resources, access to publicly funded ART will require further public, political and policy discussion. Health care rationing is a critical factor in certain circumstances, as has been evidenced recently during the global COVID-19 pandemic. If publicly funded ART is to be considered more broadly in Australia, it is worthwhile to consider the long-term viability of this option by looking at other jurisdictional approaches and experiences. For example, the Canadian province of Quebec introduced a publicly funded IVF program in 2010, however five years later the program was abolished due to an unexpected increase in costs.[259]

Increase in public funds aimed at reducing out-of-pocket ART expenses could to some extent be paid for through savings in the form of better targeting of Medicare ART rebates. This is particularly important given that ART is an uncertain treatment that for some individuals has low success rates.[260] If Medicare subsidy reform becomes a point of discussion in the future, again it might be worth considering practices in the UK. There, the (NICE) guidelines recommend that publicly funded IVF be limited to three cycles, subject to a number of criteria, to women under 40 years of age.[261] Currently, no Medicare subsidy restrictions apply in Australia. Whether Medicare subsidy reform for ART in Australia take a similar approach is open for further discussion.

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256 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(3)(b).

257 'Improving Affordability and Access to IVF Services in NSW', *New South Wales Government Health* (Web Page, 4 February 2020) <https://www.health.nsw.gov.au/kidsfamilies/MCFhealth/maternity/Pages/affordable-ivf.aspx>.

258 The introduction of the extended Medicare Safety Net appeared to inflate the cost of reproductive treatments: Centre for Health Economics Research and Evaluation, 'Extended Medicare Safety Net: Review Report 2009' (Report, 2009) 60.

259 In Canada, Ontario provides limited coverage. Quebec, New Brunswick and Manitoba offer tax credits to help people offset some of their fertility treatment costs. In the rest of the country, people must pay for ART themselves. See Francesca Scala, 'Should We Publicly Fund IVF in Canada?', *Policy Opinions Politiques* (online, 30 April 2019) <https://policyoptions.irpp.org/magazines/april-2019/publicly-fund-ivf-canada/>.

260 Chambers et al (n 10) 117.

261 'IVF Availability', *NHS* (Web Page, 11 June 2018) <www.nhs.uk/conditions/ivf/availability>.

VII CONCLUSION

There has been continued interest and growing demand for ART in Australia. Increasingly, individuals or couples are resorting to early release of superannuation to assist to conceive a child and create a family. The current law that pertains to early release of superannuation on grounds of alleviating a 'mental disturbance' is in need of a fundamental rethink. The law is vague and allows the release of nest egg funds with little scrutiny; so much so, that there is no requirement for certification of mental illness by an expert in psychiatry. We do not argue that there should be a blanket ban on early release of superannuation for ART. Rather, we propose that the law in this area be tightened and better checks and balances be in place to ensure the best interests of individuals or couples seeking ART are considered at all times.

We have highlighted that presently, fertility clinics' involvement and overreach in individuals' or couples' financial decision-making can be excessive and there can be a conflict of interest, especially where the ART provider gains to profit. Such involvement might be ethically problematic. We make a range of recommendations, including mandatory financial counselling, independent of the ART provider. We also recommend tightening the current criteria that allows early release of superannuation to ensure it is restricted to those legitimately suffering from a mental illness or behavioural disorder that would reasonably be alleviated by ART, and that this is determined by those with the correct medical standing – in psychiatry. Such restrictions would also prevent third-party intermediaries from potentially exploiting those seeking ART. We have also highlighted the need for greater oversight to ensure that there is a distinct separation between individuals' or couples' financial decision-making and fertility clinics' involvement as such. Our recommendations in this article might go some way to mitigate against some of the questionable practices we have highlighted. Lastly, we note that the discussion about publicly funded ART and Medicare subsidy reform warrants further discussion.

The issue of early access to nest egg superannuation funds for ART is a live issue that requires the attention of regulators, policymakers and lawmakers. Making the necessary reforms in the areas that we have discussed in this article may lead to better retirement security outcomes for those accessing ART. Additionally, our suggested reforms may allow for greater public faith in the fertility industry and its practitioners.