

Superannuation (Objective) Bill 2016

Senate Economics Legislative Committee

Submission #1

Executive Summary

Recommendations

Amend the primary objective to:

- “The primary objective of the superannuation system is to provide income in retirement to substitute or supplement the age pension whilst providing financial security in the event of unforeseen serious life events”.

Amend the secondary objectives to:

- “be administered in the best financial interests of superannuation fund beneficiaries.”
- “manage risks in retirement and the risk of unforeseen serious life events.”
- “be simple, transparent, efficient and provide safeguards”

Add secondary objectives to:

- “be administered lawfully in accordance with the general law and relevant State/Territory and Commonwealth laws.”
- “provide adequate information to fund beneficiaries (*including members*) on the administration of their fund and to provide a forum where beneficiaries (*including fund members*) can question trustees or trustee directors on the administration of their fund.
- “ensure representative fund governance by providing fund beneficiaries (*including members*) (or a party representing fund beneficiaries) with the power to remove and appoint at least one third of trustees (or trustee directors).”

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Reference is made to the Explanatory Memorandum for the *Superannuation (Objective) Bill 2016*.

Primary Objective

The primary objective of the superannuation system is to provide income in retirement to substitute or supplement the age pension (**Appendix A**).

However this objective ignores the fact that membership of a superannuation fund within the compulsory superannuation system provides more than just retirement benefits for fund members once that member has attained a certain age.

Membership of a superannuation fund should provide financial security for a member and his or her dependents at all adult stages of life.

Most superannuation funds have group life insurance policies (and in some cases self-insure) so that a member has financial security should that member be totally and permanently disabled before attaining the retirement age.

Furthermore a spouse of a member will have financial security if that member's partner dies prematurely in the form of a death benefit.

Recommendation

The primary objective be restated as follows:

“The primary objective of the superannuation system is to provide income in retirement to substitute or supplement the age pension whilst providing financial security in the event of unforeseen serious life events”.

Secondary Objective #1

In meeting this primary objective, a subsidiary objective is that a member should receive the maximum benefit commensurate with contributions made by that member or by his or her employer over the contribution phase of his or her fund membership.

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The purpose of these contributions should be to benefit the member (and his or her dependents) and no one else.

Recommendation

Therefore it is recommended that the subsidiary objective of “*be invested in the best interests of fund members*” be altered to:

- “**be administered in the best financial interests of superannuation fund members and beneficiaries.**”

One of the administrative tasks of a superannuation fund trustee is to invest funds in a prudent manner so as to achieve the highest returns for fund members without exposing the members to undue risk.

However members will not receive the full benefit from an “*invested in the best interests*” strategy if other parties such as financial planners and shareholders take a big cut out of the investment returns in a compulsory superannuation system.

Section 10 of the *Superannuation Industry (Supervision) Act 1993* defines the word “*beneficiary*” to include “*fund members*”:

“*beneficiary* ”, in relation to a fund, scheme or trust, means a person (whether described in the governing rules as a member, a depositor or otherwise) who has a beneficial interest in the fund, scheme or trust and includes, in relation to a superannuation fund, a member of the fund despite the express references in this Act to members of such funds.

Therefore this secondary objective could be simplified to:

“**Be administered in the best financial interests of superannuation fund beneficiaries.**”

With reference made to **Section 10** of the *Superannuation Industry (Supervision) Act 1993*.

A person can have a *beneficial interest* in a superannuation trust (Fund) without being a “*member*” of the fund. For example the wife of a fund member may be entitled to a benefit if her husband pre-deceases her, however if the wife pre-deceases her husband, she will obtain no benefit for the fund.

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This amended secondary objective confirms that superannuation funds in a compulsory superannuation system must be administered in the *best interests* of the beneficiaries (including members) and not in the *best interests* of third parties.

The word “*financial*” should be included to prevent the trustees of superannuation funds being subject to pressure to become “*social warriors*” and look beyond the financial interest of their members and beneficiaries and invest or refuse to invest in companies based on other issues such as perceived harm to the environment or to health {Refer to *Cowen and Scargill* below}.

Perceived environmental and health issues should be addressed by the elected Parliament and not by superannuation fund trustees by way of their investment decisions.

Secondary Objective #2

Given the comments made about the primary objective, the secondary objective of “*manage risks in retirement*” should be amended.

Recommendation

This secondary objective be amended to:

- “**manage risks in retirement and the risk of unforeseen serious life events.**”

Secondary Objective #3

There is currently excessive secrecy associated with the administration funds. This is unacceptable in a compulsory superannuation system. This is not acknowledged in the secondary objective of “be simple, efficient and provide safeguards”.

Without sufficient transparency it is not possible for fund members to determine if their fund is being administered “*efficiently*”.

Recommendation

This secondary objective be amended to include the word “*transparent*”:

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- “be simple, transparent, efficient and provide safeguards”

Secondary Objective #4

It may seem self-evident that superannuation funds should be operated lawfully. However the reality is that many superannuation funds are not operated lawfully.

Also superannuation trusts (funds) are not just subject to Commonwealth laws. This fact is often overlooked.

Recommendation

Therefore it is recommended that an additional subsidiary objective be included:

- “be administered lawfully in accordance with the general law and relevant State/Territory and Commonwealth laws.”

Secondary Objective #5

Given the sums of money involved in a compulsory superannuation system, white-collar criminals will always be seeking means of getting their hands on “*other people’s money*.”

Knowledge of their fund and how it is being administered is a member’s best protection from being ripped off either through conflicts of interest, negligent conduct or outright theft and fraudulent conduct by the fund trustee or its employees and directors.

This concept is included in the Coalition’s compensation policy which includes the “*moral hazard*” argument which is based on the principle that fund members should take an active interest in how their fund is being managed and be able to provide feedback to the trustee or trustees of their fund (as well as to regulatory authorities if necessary).

Recommendation

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Therefore it is recommended that an additional subsidiary objective be included:

- **“provide adequate information to fund beneficiaries (*including members*) on the administration of their fund and to provide a forum where *beneficiaries (including fund members)* can question trustees or trustee directors on the administration of their fund.**

Secondary Objective #6

There is no secondary objective related to fund governance which is critical to the proper administration of any superannuation fund. In some superannuation funds, fund members and beneficiaries have no say on the board of the trustee of the fund.

Members (*shareholders*) of public companies have been provided with the power to remove and appoint all the directors of that company. Direct ownership of share is not compulsory.

Recommendation

Therefore it is recommended that an additional subsidiary objective be included:

- **“ensure representative fund governance by providing fund beneficiaries (*including members*) (or a party representing fund beneficiaries) with the power to remove and appoint at least one third of trustees (or trustee directors).**

Commentary

The draft Bill makes reference to “*efficiency*” but not “*lawfully*”.

The High Court of Australia stated in *Finch v Telstra Super Pty Ltd* [2010] HCA 36:

“The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully. For that reason it has, by procuring the enactment of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“the Supervision Act”) and regulations made under it, imposed quite rigorous regulatory standards.”

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Megarry VC stated in *Cowan v Scargill* [1985] Ch 270:

“The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.”

Subsection 52(2)(c) of the *Superannuation Industry (Supervision) Act 1993* provides:

Covenants to be included in governing rules--registrable superannuation entities

Governing rules taken to contain covenants

(1) If the governing rules of a registrable superannuation entity do not contain covenants to the effect of the covenants set out in this section, those governing rules are taken to contain covenants to that effect.

General covenants

(2) The covenants referred to in subsection (1) include the following covenants by each trustee of the entity:

.....

(c) to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries;

Therefore the word “**administered**” incorporates the performance of a trustee’s duties and the exercise of the trustee’s powers, including the power of investment.

This recommendation is therefore in accordance with existing Commonwealth legislation.

The **Senate Select Committee on Superannuation** in 1993 made the following recommendation:

“The Committee in carrying out a close study of the Queensland Professional Officers Association Superannuation Fund observed the consequences when the principles of trust law are neglected and abused. It remarked on the important role government had in

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educating both trustees and members as to their respective rights and responsibilities as a means of preventing a Queensland Professional Officers Association Superannuation Fund situation.”

This recommendation was accepted and confirms the importance of transparency and the role that members have in policing the trustee of their superannuation fund.

The comments included:

“The legislation is designed to support honest and diligent trustees and give members a greater say in the management of funds “

Extract from the Senate Hansard 25 November 1993 page 3696

GOVERNMENT RESPONSE TO THE EIGHTH REPORT OF THE SENATE SELECT
COMMITTEE ON SUPERANNUATION

General Points

The Government accepts the Report and the recommendation of the Committee which is related to the Government's retirement income policy.

The Government is conscious of the need for the early implementation of legislation to increase the prudential control and supervision of superannuation funds.

The Superannuation Industry Supervisory Bills which the Government introduced into the Parliament on 27 May 1993 give effect to increasing the prudential and consumer protection arrangements for superannuation.

Recommendations	Response	Comments
The Committee in carrying out a close study of the Queensland Professional Officers Association Superannuation Fund observed the consequences when the principles of trust law are neglected and abused. It remarked on the important role government had in educating both trustees and members as to their respective rights and responsibilities as a means of preventing a Queensland Professional Officers Association Superannuation Fund situation. The Committee recommends the early implementation of legislation to increase the prudential control and supervision of superannuation funds.	Accepted	The Government welcomes the Committee's Recommendation that the Superannuation Industry Supervisory legislation be put into effect quickly. That package of legislation gives effect to the prudential and consumer protection arrangements for superannuation announced by the Government on 21 October 1992. The legislative framework includes a comprehensive system of prudential supervision. The legislation is designed to support honest and diligent trustees and give members a greater say in the management of funds. The Insurance and Superannuation Commission (ISC) will be monitoring and auditing compliance.

This submission has been lodged by Phillip Charles Sweeney

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Appendix A

Extracts from the Explanatory Memorandum

Objective of the superannuation system

1.6 Together with the age pension and private savings, savings from compulsory and voluntary contributions to superannuation are important elements of the three-pillars that underpin Australia's retirement income system. Superannuation is the second largest savings vehicle of the Australian financial sector.

1.7 Given its importance, it is essential that future superannuation policy is guided by clear objectives. To achieve this, the Government will legislate the objective of the superannuation system in the Objective Bill. Subsidiary objectives will be prescribed by regulation.

1.8 All future changes to superannuation policy will be assessed for compatibility with the primary objective and subsidiary objectives of the superannuation system.

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Detailed explanation of new law

2.10 For every Bill or regulation relating to superannuation, there must be a statement of its compatibility with the primary objective and subsidiary objectives of the superannuation system.

The objective of the superannuation system

2.11 The Objective Bill enshrines the primary objective and subsidiary objectives of the superannuation system in legislation.

2.12 The primary objective of the superannuation system is to provide income in retirement to substitute or supplement the age pension. *[Section 4, subsection 5(1)]*

2.13 This objective clarifies that the role of the superannuation system is to assist individuals to support themselves by providing income to meet their expenditure needs in retirement, rather than being a concessional investment vehicle for tax minimisation and estate planning.

2.14 Superannuation, through a combination of requiring compulsory employer superannuation guarantee contributions and allowing voluntary contributions, supports the other pillars of the retirement income system — the age pension and other savings. Its purpose is not to allow for tax minimisation or estate planning.

2.15 The subsidiary objectives of the superannuation system will be prescribed by regulation. *[Section 4, subsection 5(2)]* They are to:

- facilitate consumption smoothing over the course of an individual's life;
- manage risks in retirement;
- be invested in the best interests of superannuation fund members;
- alleviate fiscal pressures on Government from the retirement income system; and
- be simple, efficient and provide safeguards.

2.16 Enshrining the primary objective of the superannuation system in legislation, in combination with the subsidiary objectives prescribed by regulation, will provide a framework against which future superannuation policy proposals can be assessed.