2

Issues in the Bill

2.1 The committee received evidence in relation to Schedule 1 (definition of a documentary), Schedule 5 (merging multiple superannuation accounts), and Schedule 6 (superannuation co-contributions), of the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013 (the Bill). The key issues raised in relation to these schedules are discussed below.

Schedule 1—Definition of a documentary

Background

2.2 Schedule 1 amends the *Income Tax Assessment Act 1997* (ITAA 1997) to define a 'documentary', which will apply to determining programs' eligibility for the Producer Offset scheme. The amendments will also explicitly exclude games shows, as light entertainment programs, from eligibility for film tax offsets.

2.3 Screen Australia is the 'film authority' for the purposes of the Producer Offset in the ITAA 1997. It is responsible for certifying whether a program is eligible for certain tax concessions aimed at encouraging the production of Australian feature films, television and other projects. To be eligible for the Producer Offset, the program must satisfy certain criteria in Division 376–65 of the ITAA 1997.

2.4 The ITAA 1997 does not include a definition of the term 'documentary'. Prior to the *Lush House* case,[1] in making its decisions Screen Australia referred to the Explanatory Memorandum (EM) on the introduction of the offsets legislation, and the Australia Communications and Media Authority's (ACMA) Guidelines that define a documentary as 'a creative treatment of actuality other than a news, current affairs, sports coverage, magazine, infotainment or light entertainment program'.[2]

2.5 As of April 2013, Screen Australia had issued 350 provisional certificates to documentary projects and 335 final certificates.[3] On receipt of an application for provisional or final certification of a program that the applicant claims is a documentary, Screen Australia undertakes 'an initial and preliminary assessment to determine whether the project is *clearly* a documentary or not'. Screen Australia maintained that while the vast majority of applications are usually straightforward, in a small minority of cases it may need to seek further information from the applicant.[4]

Lush House case

2.6 One of the programs refused certification as a documentary was *Lush House*, which follows a household management expert, Shannon Lush, who works with a different family or household, in each of the ten episodes, to improve their household management. The program satisfied the other conditions in Division 376-65 of the ITAA for the offset, but failed in respect to the documentary requirement.[5] Screen Australia decided that *Lush House* was an infotainment program and not a documentary, and so was ineligible for the Producer Offset.

2.7 Essential Media and Entertainment (EME) Productions, the makers of *Lush House*, sought an Administrative Appeals Tribunal (AAT) review of Screen Australia's decision. The AAT set aside Screen Australia's decision and found that *Lush House* is entitled to a Producer Offset certificate under Division 376-65(1) pursuant to Section 376-65(6) item 6. The AAT judgment stated:

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1 *EME Productions No. 1 Pty Ltd v Screen Australia* [2011] AATA 439.

2 Explanatory Memorandum (EM), Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 12.

3 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 1.

4 Screen Australia, Submission to the Treasury consultation on *Film tax offsets - definition of a 'documentary'*, p. [5], available at <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Film-tax-offsets--definition-of-a-documentary>, viewed 11 April 2013.

5 See *EME Productions No. 1 Pty Ltd v Screen Australia* [2011] AATA 439, paragraphs 6-7.

> In the result, we accept that *Lush House* does not present the clearest of cases of a documentary. It is close to the line. Nevertheless, we conclude, for the reasons we have given, that it does represent sufficient of the elements of a documentary to warrant it having that overall description.[6]

2.8 Screen Australia appealed the AAT's decision on *Lush House*, stating that it was 'the first case concerning the definition of documentary and we believe it is important to differentiate between documentary and lifestyle/infotainment programming'.[7] The Full Federal Court dismissed Screen Australia's appeal. Screen Australia noted in a media release on the case that both the Tribunal and the Court 'have found that the term "documentary" as used in the Producer Offset legislation is uncertain, ambiguous and obscure'.[8]

2.9 Since the *Lush House* proceedings the AAT's definition applies when determining whether a program is a documentary.

Analysis

Defining a documentary

2.10 Screen Australia supported the changes proposed in Schedule 1 of the Bill. However, a number of industry stakeholders objected to the amendments, arguing that the Government should not proceed with the changes.[9]

2.11 Screen Australia argued that the AAT's finding in the *Lush House* case extends the definition of documentary beyond the original policy intent, and may have financial implications. Screen Australia explained that the category of documentary 'provides the privilege of a lower threshold not extended to other programs':

6 *EME Productions No. 1 Pty Ltd v Screen Australia* [2011] AATA 439, paragraph 41.

7 Screen Australia, *Lush House appealed*, 22 July 2011, available at <http://www.screenaustralia.gov.au/news_and_events/2011/mr_110722_lushhouse.aspx>, viewed 11 April 2013.

8 Screen Australia, *Public Statement: Lush House Decision*, 8 March 2012, available at <http://www.screenaustralia.gov.au/news_and_events/2012/ps_120308_lushhouse.aspx>, viewed 11 April 2013.

9 Screen Producers Association of Australia (SPAA), *Submission 3*, pp. 1-2. See also Australian Subscription Television and Radio Association, *Submission 7*; Essential Media and Entertainment, *Submission 8;* Beyond International Limited, *Submission 9*; Prospero Productions, *Submission 10*; Electric Pictures, *Submission 11*; and Cordell Jigsaw Zapruder, *Submission 12*.

> By virtue of their special conditions documentaries do not have to meet [the] half a million dollar per hour threshold that most other programs have to meet. In fact, the threshold to documentary is 250,000 per hour. Regardless of format, if a program meets the half a million dollar threshold, it may be eligible for the offset. So, in fact, infotainment and magazine programs can be eligible if they meet that threshold.[10]

2.12 Screen Australia claims that the AAT definition of a documentary allows the industry 'to receive an unintended benefit', with infotainment and magazines programs previously ineligible now able to come under the documentary category. In expressing its support for Schedule 1, Screen Australia maintained that:

> Schedule 1 of the bill seeks to remedy that situation and uphold the original intention of the act to provide support for projects which the market by itself could not otherwise support. The offset was not designed to replace industry or marketplace funds but to supplement such funding. The offset is a hugely valuable resource for the industry and has enabled producers to retain more equity in their projects and develop more viable production companies. Screen Australia is keen to preserve the offset to continue to fulfil these objectives.[11]

2.13 As the administrator of the Producer Offset, Screen Australia advocated for clarity in determining what programs are documentaries. It observed that it had used the EM of the original offset legislation and the ACMA Guidelines in its determinations. However, in the *Lush House* proceedings, Screen Australia commented that the AAT found: 'It is not legislated for; we will make up our own definition of documentary'.[12] Screen Australia takes the view that including a definition of a documentary in the ITAA 1997 will provide greater certainty moving forward.

2.14 Industry participants at the hearing supported the AAT's definition, and did not see the need for further changes. Arguments made to the committee were twofold:

- The proposed definition in Schedule 1 of the Bill is too restrictive and will hamper industry flexibility as documentaries are an evolving genre; and

10 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 1.

11 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 2.

12 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 11.

- *Lush House* should have been found to be a documentary under the previous guidelines.

2.15 The Screen Producers Association of Australia (SPAA) argued that documentaries are 'the most dynamic, and financially vulnerable, genre in screen production', and as such, any definition used must have the flexibility to allow the genre to evolve. It is concerned that 'calcifying definitions in legislation' will be damaging to the sector as it does not allow for the documentary genre to adapt to new approaches and in line with the tastes of contemporary audiences.[13] SPAA asserted that:

> It is the industry's view that documentary is an evolving craft and its supporting mechanisms must be able to respond to change and adapt accordingly or run the risk of being ineffectual and retarding growth.[14]

2.16 Similarly, Electric Pictures, one of the producers directly affected by the changes, submitted that the amendments in Schedule 1 would 'lock down' the definition of a documentary, and stated:

> There must be flexibility in guidelines to reasonably reflect changes in audience demand. If not, the policy intent of the Producer Offset to build stable and sustainable production companies will be undermined and will potentially be rendered inefficient as a market-driven financing mechanism.[15]

2.17 The Australian Subscription Television and Radio Association suggested that the ACMA definition, on which the proposed definition is based, may be out of date, and commented that:

> The proposed definition is derived from a definition in the Australian Content Standard, which was developed over 15 years ago specifically for the purposes of regulating content on one particular platform (commercial free-to-air (FTA) television)—there has been little subsequent examination of its continued appropriateness or relevance.[16]

2.18 In discussing the aims of the Producer Offset, SPAA noted that while there is targeted government support for certain projects through grants and investments of Screen Australia, the Producer Offset 'lessens the need for direct subsidy by offering leverage to finance documentaries via the

13 SPAA, *Submission 3*, p. 2.

14 Mr Matthew Deaner, SPAA, *Committee Hansard*, Canberra, 18 April 2013, p. 2.

15 Electric Pictures, *Submisson 11*, p. 1.

16 Australian Subscription Television and Radio Association, *Submission 7*, p. 1.

market'. SPAA argued that the amendment will hamper the industry by restricting which programs are regarded as a documentary.[17]

2.19 SPAA sought legal advice on the Exposure Draft of Schedule 1 from Maurice Byers Chambers, who were counsel to EME Productions in the *Lush House* litigation.[18] SPAA claimed that the advice indicated that the changes in Schedule 1 'will not rule out similar challenges in the future'.[19]

2.20 In its advice, Maurice Byers Chambers contended that ACMA Guidelines are 'imprecise and ambiguous', and that the proposed definition of a documentary is 'a formula used for an administrative decision'.[20] It stated:

> A properly drafted definitional clause should state with clarity the meaning of the word. The proposed definition, however, requires a court to 'have regard to' the factors set out. It provides no assistance as to what weight is to be given to each matter by the court … The task proposed has the effect of not providing a common definition but rather inviting a different definition depending on the film concerned. One may expect that the proposed definition will confuse the application of the term not clarify it.[21]

2.21 Screen Australia stated that the proposed definition in Schedule 1:

> … defines 'documentary' consistently with the Broadcasting Services Act and the Australian communications and media guidelines. Those guidelines have very recently been endorsed by the industry as fit and appropriate. The definition is in fact very flexible. It is nimble. It allows us to accept that documentaries evolve. I wanted to make the point, responding to your point, that documentaries do evolve and the definition gives us that flexibility.[22]

17 SPAA, *Submission 3*, p. 2.

18 EME Productions is the group that brought the *Lush House* case to the Administrative Appeals Tribunal when Screen Australia determined that the show was not a documentary.

19 SPAA, *Submission 3*, pp. 1-2.

20 SPAA, *Submission 3*, pp. 7, 5.

21 SPAA, *Submission 3*, p. 5, Attachment A.

22 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 5.

2.22 The proposed definition of a documentary in Schedule 1 excludes infotainment and lifestyle programs, as provided for in the *Broadcasting Services Act 1992*, which sets out the following definition:

> ***infotainment or lifestyle program*** means a program the sole or dominant purpose of which is to present factual information in an entertaining way, where there is a heavy emphasis on entertainment value.[23]

2.23 At the hearing participants discussed whether a focus on the excluded categories might address industry concerns about the definition. However, industry representatives also expressed concern about the definition of the infotainment category in the Broadcasting Services Act, and suggested that this definition needs updating.[24]

2.24 Industry participants maintained that the AAT decision has not opened the floodgates to every program, and that the Government should take time to ensure that it is delivering a workable solution for Screen Australia and the industry. SPAA called for further consultation on the definition of a documentary in the ITAA 1997. It stated:

> We acknowledge that finding a line between one form and another is an ongoing challenge, yet to stop the possibility of change by calcifying what we see as a very flawed definition in legislation is deeply concerning. There can be no doubt that the producer offset has been a great success—it has assisted the growth of many production companies over the last few years— … [However] in order to achieve the policy intent of the legislation, [producers] must be able to react to changing trends and shifts in market demands. Pragmatically, to ensure that we have reasonable parameters to provide certainty to both production companies and government processes, we are urging you to set aside these amendments pending further consultation with industry.[25]

Retrospectivity

2.25 SPAA raised industry concerns about the retrospective application of the definition, which will apply to films that commence principal photography on, or after, 1 July 2012. It stated:

23 *Broadcasting Services Act 1992*, Schedule 6: Definitions.

24 Mr Peter Tehan, Beyond International, *Committee Hansard*, Canberra, 18 April 2013, p. 10.

25 Mr Matthew Deaner, SPAA, *Committee Hansard*, Canberra, 18 April 2013, p. 2.

> Because this is retrospective to 1 July 2012, it means that, depending on where this legislation goes, there may or may not be a number of documentaries which if the legislation is amended may or may not sit within the reading of the producer offset view as to whether it may or may not be eligible.[26]

2.26 Screen Australia advised the committee that because the application of the proposed definition will be retrospective to 1 July 2012, when it provides provisional certificates for applications, it includes advice on eligibility in relation to the AAT definition and if the proposed amendments are enacted.[27] It indicated that there are no preliminary letters advising that any projects would become ineligible once the amendments are enacted. Screen Australia stated:

> It might provide the committee with comfort to know that every letter we have provided subsequent to that date has not had any issue with reference to this legislation. In other words, there is no letter out there that says, 'Your provisional certificate would be overturned if this legislation were to be passed, in our opinion.' That should provide the certainty that the industry is looking for.[28]

2.27 Screen Australia argued that the retrospective application of the definition was appropriate, because in addition to providing the legislative basis for it to make decisions on what constitutes a documentary, the Schedule 1 changes also aim to uphold the original policy intent; that the Producer Offset was not intended to 'stand in the shoes of the market' and to subsidise programs that would have been produced without assistance.[29] The EM stated that as the planned change was announced in the 2012-13 Budget:

> It follows that film makers would have embarked on making their films fully aware of the amendments that were proposed and of the consequences of those amendments for their film.[30]

26 Mr Matthew Deaner, SPAA, *Committee Hansard*, Canberra, 18 April 2013, p. 4.

27 Mr Alex Sangston, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 4.

28 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 4.

29 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 9.

30 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 19.

Conclusion

2.28 Prior to the *Lush House* case in 2011, Screen Australia referred to the ACMA Guidelines and the Explanatory Memorandum of the legislation that introduced the relevant tax offsets to determine whether a program is a documentary for the purposes of the Producer Offset. When Screen Australia's determination about the program *Lush House* was challenged—in the absence of a definition of a documentary in the *Income Tax Assessment Act 1997* (ITAA 1997)—the Administrative Appeals Tribunal created a new definition that seems to expand the types of programs that can be regarded as documentaries.

2.29 Schedule 1 aims to introduce a definition of a documentary into the ITAA 1997. It inserts a definition of a documentary based on the ACMA Guidelines, as was used by Screen Australia prior to the *Lush House* case. In the committee's view this is a reasonable response by the Australian Government to reinstate the definition that Screen Australia had previously used in administering the Producer Offset.

2.30 Screen Australia supports the definition of a documentary in Schedule 1, as it will provide greater clarity in determining whether a program is a documentary. However, the Screen Producers Association of Australia and some industry representatives prefer the AAT definition, and argued that the proposed definition lacked flexibility for the evolving documentary genre.

2.31 The committee noted industry stakeholder concerns about flexibility and suggests there is a need for ongoing dialogue between Screen Australia and industry to ensure that the application of the definition in Schedule 1 remains responsive to the evolving documentary genre.

Schedule 5—Merging multiple superannuation accounts

Background

2.32 Schedule 5 amends the *Superannuation Industry (Supervision) Act 1993* to task trustees of particular superannuation funds with identifying if a member has multiple accounts within a fund and considering whether it is in the member's best interest to merge accounts.[31] This schedule aims to reduce the number of unnecessary multiple accounts within the same

31 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 39, 41.

superannuation fund by merging these accounts. This will reduce the amount affected members pay in multiple sets of administration fees and insurance premiums.[32]

2.33 The Treasury advised that many funds are currently undertaking measures to consolidate multiple funds and that the schedule aims to make this process an industry wide initiative.[33]

Analysis

2.34 Submitters to the inquiry supported the intent of the schedule to identify, with a view to consolidating, multiple super accounts within a fund. The Australian Institute of Superannuation Trustees (AIST) told the committee that the schedule provided a flexible legislative framework for processes that are already in operation 'within the overwhelming majority of superannuation funds'.[34]

2.35 During the hearing the Treasury provided justification for the schedule and the process that lead to its current form:

> In our mind, this is more than just removing unnecessary fees. A lot of people lose their super, a lot of money gets lost … It is part of helping people to be engaged with their super and making sure they ultimately get their super when they retire, so it is a broader issue than just fees, otherwise I guess we would have just done a provision legislating on fees. We originally started off with something very detailed, saying, 'These are the accounts you should only legislate,' and the strong message back from industry was that that would be undesirable and would actually not adequately address the 15 million or so accounts out there that potentially could be picked up.[35]

32 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 49.

33 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, p. 20.

34 Mr David Haynes, Australian Institute of Superannuation Trustees (AIST), *Committee Hansard*, Canberra, 18 April 2013, p. 15.

35 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, pp. 20-21.

2.36 In the submissions a number of individual amendments were suggested.[36] During the hearing witnesses focused on proposed Section 108A of Schedule 5, which outlines a trustee's duty in relation to multiple superannuation accounts of their members. Proposed subsection 108A(1) provides:

> 108A **Trustee's duty to identify etc. multiple superannuation accounts of members**
>
> (1) Each trustee of a superannuation entity (other than the trustee of a pooled superannuation trust or a self managed superannuation fund) must ensure that rules are established, which:
>
> (a) set out a procedure for identifying when a member of the superannuation entity has more than one superannuation account in the superannuation entity; and
>
> (b) require the trustee to carry out the procedure to identify such members at least once each financial year; and
>
> (c) if the member has 2 or more superannuation accounts in the superannuation entity—require the trustee to merge the accounts so that the member has only one account balance in respect of those accounts, if the trustee reasonably believes that it is in the best interests of the member to do so; and
>
> (d) provide that fees are not payable (other than a buy sell spread) for any merger of superannuation accounts that occurs as a result of paragraphs (a) to (c).

2.37 Discussion at the hearing covered the fiduciary relationship between trustees and members, the liability of trustees, cases where merges would not be in a member's best interest and the exclusion of an explicit directive to merge accounts.

2.38 As a general principle, some witnesses were concerned that the schedule misconstrued the role of trustees and their fiduciary obligations. According to the Association of Superannuation Funds of Australia (ASFA):

36 Law Council of Australia, *Submission 1*, pp. [2]-[3]; AIST, *Submission 2*, pp. [2]-[3].

> … our major concern is the test in the legislation about applying the best interest test at an individual member level as opposed to the general trust fiduciary law basis, which is acting in the collective best interest of members. It has both legal implications and very much practical implications. This is an exercise that would be done en masse and it really is not feasible for a trustee to apply that test against each and every individual member ...[37]

2.39 UniSuper and the Law Council of Australia supported ASFA's concern and explained:

> Trustees have long been obliged to act in the best interests of their members … that is a duty to act in the best interests of members on the whole. It is a duty which is concerned with the manner and the way in which trustees go about making their decisions. It has never been construed as a duty to ensure that the consequences of those decisions are positive or favourable or to the liking of the member. To the extent to which the bill requires a decision about what is in the best interests of individual members it involves a departure from that well-understood principle.[38]

2.40 Specifically UniSuper, the Law Council of Australia and ASFA were concerned that the wording of subsection 108A(c) suggests that trustees should work on a case-by-case basis when merging funds. According to UniSuper and the Law Council of Australia:

> The concern arises from that proviso at the end: 'if the trustee reasonably believes that it is in the best interests of the member to do so'. That lies at the heart of the issue. It requires the trustee to form an opinion that it is in the best interests of members. Trustees cannot go about forming ill-informed opinions. They are just guesses.[39]

2.41 AIST responded to this concern, and argued that what was proposed in the Schedule 5 replicated current fiduciary transactions undertaken by trustees.[40] Later in the hearing, AIST reiterated this sentiment:

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37 Ms Fiona Galbraith, Association of Superannuation Funds of Australia (ASFA), *Committee Hansard,* Canberra, 18 April 2013, p. 13.

38 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 13.

39 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 18.

40 Mr Richard Webb, AIST, *Committee Hansard,* Canberra, 18 April 2013, p. 18.

> Every day in every way a trustee puts themselves in the shoes of a member and makes decisions which impact on the superannuation benefit of the member, and they need to do that on a reasonable basis, having regard to all of the facts that they need to consider, and to gather further information. We do not see this as being qualitatively different from those other circumstances.[41]

2.42 UniSuper and the Law Council of Australia countered by stating:

> It is simply a case of paragraph (c) positively requiring the formulation of a reasonable belief. Ninety per cent of mergers happen automatically, at the press of a button. No-one is formulating a reasonable belief. No-one is making any inquiries to form the belief.[42]

2.43 UniSuper and the Law Council of Australia contented that in practice the current wording of subsection 108A(c) would dictate how the schedule was implemented:

> The choice to make is: is this intended to be done in an automated fashion in the vast majority of cases or is it intended to be an entirely manual process in every case? Once we accept that there is an efficiency in doing it substantially on an automated basis, paragraph (c) needs to yield.[43]

2.44 UniSuper and the Law Council of Australia provided an alternative formulation of subsection 108A(c) which would contain the requirement to 'merge accounts in all cases, unless there were reasonable grounds to suspect that it were not be in their interests'.[44]

2.45 Under questioning by the committee, the Treasury indicated that they would be willing to review the wording of subsection 108A(c):

> We are happy to consider it because we are trying to find ways to balance what ultimately is a shared policy intent. We would need to work through whether there are any unintended consequences.[45]

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41 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 18 April 2013, p. 22.

42 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 16.

43 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 22.

44 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 18.

45 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, p. 23.

2.46 The Treasury did note that the schedule should have some reference to the individual's 'best interests':

> … ultimately the accounts are held by the individual, so deciding something collectively without some reference to the individual would seem a bit arbitrary without having considered it at least at a broad level.[46]

2.47 The issue of trustee liability becomes salient because merging accounts could result in a material disadvantage for a member and there is a level of discretion implied in the legislation. Unisuper and the Law Council of Australia outlined a number of circumstances in which merging accounts would not benefit a member.[47] In its submission UniSuper argued that the schedule 'unnecessarily and sub-optimally increases the burden on superannuation trustees and their administrators':

> … by requiring trustees to merge accounts which, although within the same superannuation fund, may be markedly different and pertain to quite different financial products with distinct characteristics.[48]

2.48 In its submission, AIST highlighted a number of situations where the merger of accounts might not be beneficial. For example, AIST was concerned that the focus on insurance was one-sided, as it considered the cost or insurance premiums, but not the level of insurance coverage. AIST noted that under-insurance is a well-documented problem, and argued that 'additional consideration be explicitly given to this part of insurance, as well as any other benefits that may be affected in the event of the merging of accounts'.[49]

2.49 In relation to tax considerations, AIST noted that changes in 2007 removed the right of superannuation members to choose the tax component from which that they could draw benefits. Prior to that change, some superannuation members moved tax-free, or significantly tax-free, amounts into separate accounts to preserve these monies tax-free status. AIST proposed that this example be added to paragraph 5.27 of the EM to provide members who would be affected in this way with an 'opt-out'.[50]

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46 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, p. 22.

47 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, pp. 18-19.

48 UniSuper, *Submission 4*, p. 1.

49 AIST, *Submission 2*, p. [2].

50 AIST, *Submission 2*, p. [2].

2.50 It was generally accepted that automated processes should be established by funds to identify multiple accounts and subsequently merge them.[51] During the hearing ASFA stated that funds 'will develop their own procedures about how they identify which accounts they should merge automatically and which accounts they should advise the member that they intend to merge the accounts and ask the member to respond'.[52] ASFA went on to acknowledge that additional guidance for industry on a criteria for merging may be of assistance:

> When I was listening to Mr Barrett going through all of his issues and the things which might cause you to not merge, it appeared to me that each one of those items, whether it be insurance or size of cash balance, are all pieces of information which the trustee knows about the member and would more than likely trigger, in the case of the funds I am talking to, the decision that that would fall into the class of cases which should be referred out to the member. At the same time I support what my colleague Fiona was saying that it would probably assist in the clarity of how this should be implemented if there were a provision that, in addition to having procedures as to how to identify multiple accounts, funds should also establish procedures for how they would go through the process of merging multiple accounts.[53]

2.51 UniSuper and the Law Council of Australia commented that the legislation does not oblige trustees to merge accounts rather it relies on their discretion:

> The trustee carries the can, so to speak. The risk for trustees is that some members may complain if their accounts are merged; others may complain if their accounts are not merged.[54]

2.52 ASFA reframed the issue of trustee liability in relation to mergers and proposed a solution. It suggested that an additional subsection be inserted into the legislation which would explicitly give trustees direction on mergers:

> I think what is missing here is a link between paragraphs (b) and (c) and that is probably where the test needs to be at a collective level … the policy would be at a fund-wide level and in forming

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51 Mr David Haynes, AIST, *Committee Hansard,* Canberra, 18 April 2013, p. 14; Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 16.

52 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 18 April 2013, p. 20.

53 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 18 April 2013, p. 20.

54 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 13.

> that policy the trustees would have regard to what is likely to be in the best interests of members collectively by setting criteria about when they will merge and when they will not merge. I think that is probably the missing link in this, which is why we have a concern, because that is not there, and it kicks straight down virtually at a member-by-member level. Legally that is problematic, and particularly practically that is problematic.[55]

2.53 While the Treasury did not rule out amending the legislation to address witnesses concerns, it did state that the Australian Prudential Regulation Authority would be able to issue prudential rules which would provide guidance on the operation of the legislation.[56] AIST supported the Treasury's decision to provide funds with a flexible, rather than prescriptive, approach to implementation.[57] Furthermore, AIST argued that the schedule in fact provided trustees with additional legal protection:

> If there is an issue with funds being exposed to litigation as a result of this legislation, how much more are they currently being exposed when there is not the sort of legislative requirement that is required by this bill?[58]

2.54 Finally witnesses appeared to have been satisfied with the way the Treasury had consulted with industry and refined the schedule.[59] At the hearing ASFA acknowledged the 'very consultative approach' adopted by the Treasury:

> We started in a position that was totally untenable from the industry perspective and we have moved to a piece of legislation which, with the small exception of maybe a rewording of paragraph (c), the industry is more than comfortable with. We thank Treasury for their consultative approach in getting to that position.[60]

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55 Ms Fiona Galbraith, ASFA, *Committee Hansard,* Canberra, 18 April 2013, pp. 17-18.

56 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, p. 20.

57 Mr David Haynes, AIST, *Committee Hansard,* Canberra, 18 April 2013, p. 15.

58 Mr David Haynes, AIST, *Committee Hansard,* Canberra, 18 April 2013, p. 22.

59 Financial Services Council, *Submission 6*, p. 1; Association of Superannuation Funds of Australia (ASFA), *Submission 5*, p. 2.

60 Mr Robert Hodge, ASFA, *Committee Hansard,* Canberra, 18 April 2013, p. 23.

Conclusion

2.55 Witnesses to the committee unanimously supported the intent of Schedule 5, to improve fund members' superannuation position at retirement by facilitating within fund consolidation measures. After examination of the schedule and consideration of the evidence received, the committee recommends that the Treasury consult with industry groups to ensure that undue liability is not being inadvertently placed on trustees who are working in good faith for the benefit of their members.

2.56 The committee understands that given the breadth of the task proposed, automated processes will need to be judiciously employed by funds. Funds will need to develop procedures to assist them to identify members whose needs are best served by the individual consideration of their circumstances. To this end the committee urges the Australian Prudential Regulation Authority to provide funds with guidance on circumstances which should trigger individual consideration of what constitutes a member's 'best interest'. Where funds are dealing with complex cases, the committee believes trustees should seek input from the affected members.

Schedule 6—Superannuation co-contributions

Background

2.57 The superannuation co-contribution initiative involves the Government making co-contributions to help eligible low and middle income earners boost their super savings. Schedule 6 amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* by:

- reducing the rate of payment for the superannuation co-contribution from 100 per cent to 50 per cent;
- decreasing the maximum amount payable from $1,000 to $500;
- extending the freeze on the indexation of the lower income threshold for the 2012-13 income year; and
- setting the higher income threshold at $15,000 above the lower income threshold (down from $30,000).[61]

61 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 51.

Analysis

2.58 While groups expressed regret at the reduction of government super co-contributions, they acknowledged that the decision was made in the context of overall budgetary considerations and is part of wider superannuation reforms.[62]

2.59 Only 20 per cent of eligible people currently take advantage of the scheme.[63] The low income superannuation contribution (LISC) was put forward as a more accessible scheme for low income earners. The EM stated that:

> The LISC is a better targeted payment, covering over an estimated five times as many individuals as the superannuation co-contribution as a result of these amendments. It also does not require that low income individuals make eligible personal superannuation contributions to their superannuation fund, which increases the coverage of assistance available to low income earners.[64]

2.60 The LISC was announced in the 2010-11 Budget and applies from the 2012-13 income year, with the first payments to be made in 2013-14. The scheme—provided for by the *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012*—involves a new super contribution payment of up to $500 (not-indexed) annually from low income earners.

2.61 The payment amount will be 15 per cent of concessional contributions (including employer contributions) made by, or for, individuals with an adjustable taxable income that does not exceed $37,000. The Government describes the rationale for the scheme as follows:

> Currently, as a result of the flat tax rate for all superannuation concessional contributions, low-income earners receive little or no concession.
>
> This measure will improve the equity of superannuation taxation arrangements by effectively returning the tax payable on superannuation guarantee contributions made for low-income earners.[65]

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62 Ms Fiona Galbraith, ASFA, *Committee Hansard*, Canberra, 18 April 2013, p. 24.

63 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 52.

64 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 52.

65 Australian Government, *Fact Sheet: Superannuation – Low Income Earners Government Contribution*, 26 July 2011, available at <http://www.futuretax.gov.au/content/Content.aspx?doc=FactSheets/low_income_earners_govt_contribution.htm>, viewed 10 April 2013.

2.62 In its submission, ASFA proposed that the changes in Schedule 6 should 'not be considered in isolation but in conjunction with the low income superannuation (LISC) measure'.[66] AIST expressed concern at the hearing about the Opposition's announced intention to abolish the LISC benefit.[67] ASFA argued that the LISC should be retained in its current form, as the scheme:

> … compensates low income earners for the fact that the contribution tax paid from their superannuation account is levied at a rate higher than their effective marginal tax rate, which has the effect that, for these members, superannuation is not concessionally taxed but is actually taxed punitively.[68]

2.63 AIST agreed with the Government and ASFA that the LISC is a better targeted program and 'will benefit more Australians and does not require discretionary income, which many Australians do not have'.[69]

Conclusion

2.64 Providing assistance to low income earners to build their superannuation balances is important. The government co-contribution scheme will remain, albeit at a reduced rate, for people that are in a position to make super contributions from their net pay. The 50 per cent contribution rate is still a generous matching rate of return for extra contributions made.

2.65 Evidence indicated that many low income earners are not in a position to make that additional contribution, with only 20 per cent of eligible people taking up the scheme. Further, the program statistics show that it is generally those earners that have a spouse with greater earning capacity that access the scheme.

2.66 The Government and industry groups agree that the low income superannuation contribution (LISC) measure is better targeted, as it helps build super balances and does not require the low income earner to make additional contributions.

66 ASFA, *Submission 5*, p. 3.

67 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 18 April 2013, p. 24.

68 ASFA, *Submission 5*, p. 3.

69 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 18 April 2013, p. 24.

2.67 The committee supports the changes in Schedule 6 which scale down the operation of the government super co-contribution, as part of wider superannuation reforms to ensure that schemes are well targeted and effective. The LISC will reach more low income earners and help to build their super balances.

Recommendation 1

2.68 **The House of Representatives pass Schedules 1, 2, 3, 4, 6, 7 and 8 of the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013. In relation to Schedule 5, the Australian Government should consult with industry groups to ensure that undue liability is not being inadvertently placed on trustees who are working in good faith for the benefit of their members.**

Julie Owens MP
Chair
7 May 2013