



Law Council
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Legal Practice Section

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Director
Superannuation Insurance and Governance Unit
Member Outcomes and Governance Branch
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

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Dear Director

LEGISLATING THE OBJECTIVE OF SUPERANNUATION

This submission has been prepared by the Superannuation Committee of the Law Council of Australia's Legal Practice Section (**the Committee**). The Committee welcomes the opportunity to make a submission to the Treasury in relation to 'Legislating the objective of superannuation'.

As you will be aware, the Committee is a committee of experienced superannuation lawyers who, outside of the Committee, advise a broad cross section of Australia's large superannuation funds. It endeavours to comment on almost every proposed reform to superannuation law. The Committee focuses on legal rather than policy issues with a view to ensuring that superannuation law is demonstrably clear and operates without unintended consequences.

Several years ago, the Committee made a lengthier submission when comments were last sought on a proposal to legislate the purpose of superannuation.¹ On this occasion, it confines its submission to several targeted issues.

Introductory remarks

The thrust of this submission can be summarised as follows:

- Given that the proposed objective of superannuation would not represent a legally binding constraint on its intended audience (i.e. Parliament), it is unnecessary to introduce the objective by way of legislation.
- Since it is not intended to operate as a law, it is not necessary to implement the objective via law reform. A non-statutory solution would be preferable, since that would also avoid numerous possible unintended consequences such as those outlined below.

¹ https://www.lawcouncil.asn.au/publicassets/3ac9cc26-f0bc-e611-80d2-005056be66b1/3183_-_Superannuation_reform_package.pdf

- However, if the objective of superannuation is to be legislated notwithstanding these concerns, then there are good reasons (outlined below) why:
 - stand-alone legislation should be utilised (rather than incorporating the objective into existing superannuation legislation);
 - sensible provisions should be included in the same legislation to clarify how the so-called ‘yardstick’ should be applied in assessing future superannuation reforms and by whom (for example, what sort of compatibility with the objective would be required and whether all or only some components of the objective need to be fulfilled); and
 - certain words (such as ‘equitable’ and ‘sustainable’) should either be avoided, replaced with synonyms that do not compete with trust law concepts, and/or clearly defined and limited in their application.

These matters are explored in greater detail below.

Constitutional power query

At the outset, the Committee query whether consideration has been given to the question of whether or not there is Constitutional power to legislate the objective of superannuation. The proposal makes it clear that the legislated objective would be directed at government and not at other industry participants (such as trustees). That being the case, it ought not be assumed that the usual sources of Constitutional power can be relied upon in this context—for example, it seems that legislating the objective of superannuation may not be a proper exercise of the corporations, taxation or pensions powers.

A legislated purpose will not constrain future Parliaments and, therefore, only represents a political rather than a legal restraint on future reforms

The Committee reiterates its previously expressed view that legislating the objective of superannuation will not provide the degree of future certainty that some stakeholders may be assuming. It will provide little by way of legally enforceable certainty and, at best, creates potential for a restraint on future reforms.

Future parliaments would be able to change the legislated objective were there ever to be a desire to pass legislation that was inconsistent with whatever objective was enshrined in the legislation at the relevant time (and perhaps the schema will be that legislation could be passed even if it is inconsistent with the legislated objective). In other words, future parliaments would only ever be constrained by the legislated objective to the extent that they exercise the self-restraint not to alter or override the legislated objective. Under the doctrine of parliamentary supremacy, a parliament cannot bind a future parliament.

That said, the Committee accepts the possibility that—politically—a future government might be more constrained in modifying or overriding an objective which is set out in legislation as opposed to an objective which is set out in some other less-formal document (even though, legally speaking, both would be equally susceptible to alteration or override).

At the same time, the Committee accepts that there is merit in having a ‘compass’ to guide the direction of future reforms, even if it is not legally binding. The point here is simply that, given that the objective is not intended to be legally binding (and cannot be legally binding) on future Parliaments, there seems to be no particular need for it to be set out in legislation. The objective could be set out somewhere other than legislation.

Suggestions on how to legislate the objective

If a legislated objective were to be enacted (despite the above submission that it need not be set out in legislation at all and could instead be set out outside legislation), the Committee suggests that the following drafting principles should be taken into account.

3.1 Standalone legislation would be preferable

If the objective were to be set out in legislation, the Committee would suggest that it be contained within standalone legislation.

The *Superannuation Industry (Supervision) Act 1993 (Cth)* (**SIS Act**) is, as its name suggests, concerned with the supervision of the superannuation industry. The consultation paper clearly suggests that the legislated objective would only be targeted at government and would not be directed at trustee conduct.

That being the case, it makes sense not to incorporate the objective (which would be targeted at government) within legislation that is concerned with the supervision of trustees. Doing so would conflict with section 3 of the SIS Act, which already sets out the objective of this particular legislation, and would create potential for conflict with the sole purpose test to the extent that 'objective' and 'purpose' are synonyms.

Further, the Federal Court's decision in *Australian Prudential Regulation Authority v Kelaheer*² shows how general statements of principle in the SIS Act can have dramatic impacts on the rights and liabilities of trustees. In that case, the Federal Court decided (amongst other things) that section 7 of the SIS Act meant that a trustee was not able to exercise its rights of indemnification under the trust deed for innocent breaches of trust. That was remarkable because section 7 does little more than set out the general intention that the SIS Act should apply to trustees notwithstanding the provisions of their trust deed. The chain of reasoning is somewhat contentious. Nevertheless, this is a salient reminder of how high-level statements of general intention within the SIS Act (like a legislated objective of superannuation) can have unintended consequences, which impact the rights and liabilities of trustees in unexpected ways. This is another reason why the SIS Act should not be used to legislate the objective of superannuation.

3.2 Ancillary sections needed to maintain certainty of laws

Even though the legislated objective would only be directed at government, other stakeholders (such as trustees, members and regulators) could be indirectly affected if there were any potential for statutory provisions applying to those stakeholders to be invalidated if the relevant statutory provision were subsequently found to be inconsistent with the legislated objective. To the extent that existing superannuation legislation permits trustees to make particular discretionary decisions, or permits the governing rules of a fund to contain certain provisions (for example, to release lump sum benefits upon satisfying a condition of release), a question could arise whether a trustee could continue exercising those existing discretions or permitting those existing governing rules to remain in effect in circumstances where they were inconsistent with the new legislated objective. Similarly, there is a real risk that bodies like the Australian Financial Complaints Authority could take the legislated objective of superannuation into account in determining whether a trustee's decisions are 'fair and reasonable' (especially if the objective incorporates qualitative concepts like 'sustainable' and 'equitable').

² 2019 FCA 1521.

To ensure there is absolute regulatory certainty, if the objective is to be legislated, the legislation should clearly stipulate that:

- (a) any inconsistency between the legislated objective and the provisions of any other Act, regulations, prudential standards or governing rules of a fund would not affect the validity of those other provisions; and
- (b) the legislated objective is not to affect the interpretation or application of any such other provisions, nor is it to be taken into account in assessing the conduct or liability of a trustee or any other person.

The above suggestions are important because, otherwise, there is a very real risk that (even if the objective were to be set out in a standalone instrument) a court could well view superannuation legislation as a suite of legislation which should be interpreted harmoniously as a whole. If that were to occur, even if the objective were set out in a standalone instrument, the interpretation and application of other statutes could be unintentionally impacted.

Provisions along these lines would also serve an important grandfathering function, ensuring the ongoing legitimacy of existing statutory provisions, governing rules and existing trustee discretions and powers which might prospectively be at odds with the new legislated objective. For example, existing provisions dealing with conditions of release (such as compassionate grounds and severe financial hardship) sit uncomfortably with an objective of providing income in retirement, as do all the conditions of release that have no cashing restrictions and which therefore allow for immediate lump sum payments of a member's entire account balance.

3.3 Drafting should make it clear whether new laws must further the objective

If the objective of superannuation is to be documented by way of legislation (despite the concerns outlined above) and/or if the intention is for the objective to be used as a 'yardstick' for assessing future reforms, then it would be useful if the legislation made it clear how the yardstick would be applied. Specifically, there should be drafting which makes it clear whether, in applying the yardstick, the imperative is for a proposed law reform:

- (a) to be consistent with the objective; or
- (b) not to be inconsistent with the objective.

This is important to clarify because the Committee suspects many law reform proposals might, on the one hand, do nothing to further the objective of superannuation but, on the other hand, they might do nothing that impedes the objective either. The question will be whether such a reform offends the new schema.

For example, consider the existing provisions of the SIS Act that confer power on APRA to make prudential standards. Those provisions do nothing to directly further the objective of delivering income for a dignified retirement. Similarly, the linkage between APRA's prudential standard power and providing income in an equitable and sustainable way involves a forced and strained reading of the objective at best. On the other hand, APRA's prudential standards-making power is not inconsistent with the objective. In creating a yardstick, there should be clarity about how the yardstick is to be applied.

The Committee suspects that it would be more workable if the focus were on future reforms not being inconsistent with the legislated objective (rather than requiring positive direct consistency).

3.4 Drafting should make it clear whether all limbs of the objective must be met

While a legislated objective clearly cannot constrain future Parliaments, to the extent that it will be used as a yardstick it is important for the legislation to be clear about how the yardstick is intended to operate. It is unclear from the draft objective whether it introduces multiple limbs, all of which must be fulfilled in order for a new reform to be consistent with the legislated objective, or whether it is enough for just one of the limbs to be fulfilled.

If all the limbs have to be fulfilled in order for a law reform to be considered consistent with the legislated objective, that would mean every new candidate for law reform would require a connection with:

- preserving savings; and
- delivering income for a dignified retirement; and
- in an equitable way; and
- in a sustainable way

Requiring all limbs to be fulfilled would be an onerous test. The practical reality is that many superannuation law reforms will not have a direct connection to all of those topics. The above example of APRA's prudential standard-making power is a case in point, as are the best financial interests duty and the RSE licensing regime—just to mention a few.

On the other hand, if only one of those limbs needs to be fulfilled in order for a proposed law reform to be considered consistent with the legislated objective, this substantially dilutes the comfort that stands to be derived from legislating an objective. For example, under that approach, a law reform which improves sustainability of the system could pass the test even if it were directly inconsistent with preserving savings or delivering income for a dignified retirement.

If the parts of the objective concerned with preserving savings and delivering income for a dignified retirement can be overridden on grounds of equitability and sustainability, then much will turn on how those terms are defined and invoked in debates on future reform proposals.

3.5 Retrospectivity concerns

The Committee points out that the legislated objective of superannuation could potentially be improved (i.e. by including extra wording) by making changes that address concerns that future law reforms (even reforms consistent with the objective) could infringe the premises on which Australians have previously forgone salary and wages, and submitted to those moneys being preserved until retirement. Additional wording could address concerns about retrospectivity of future laws.

3.6 Concerns regarding use of the word 'sustainable'

The consultation paper contemplates including the word 'sustainable' in the legislated purpose. The Committee notes that this is a contentious word at present, with ASIC having a public stance that the use of that word can amount to greenwashing without adequate disclosure about what is meant by that word. This is because the word, which once might have plainly referred to pursuits not coming at a cost that exceeds what can be affordably carried on indefinitely, now has an environmental connotation, too. Indeed, the presence of that word gives rise to a question whether it is being proposed that part of the purpose of superannuation is to finance a transition to an economy with reduced or net zero carbon emissions. If so, that is likely to be contentious amongst some stakeholders, especially if

there was an intention to rely on this aspect of the objective to make it compulsory for trustees to invest in green investments (or to prohibit certain categories of investment).

Therefore, the word 'sustainable' should either be avoided or clearly defined to ensure stakeholders are not misled to assume it has an environmental connotation.

3.7 Concerns regarding use of the word 'equitable'

Several of the Committee's above comments are focussed on ensuring that the legislative objective is implemented in a way which is directed at government (as seems to be the intention) and avoids unintended consequences for other participants in the superannuation industry.

Consistent with those concerns, it should be noted that using the word 'equitable' in the legislated objective could set the scene for future difficulties for trustees. This is because trust law already requires trustees to act equitably, as defined by trust law. In that context, 'equitable' is assessed having regard to equity between the members of the relevant fund—for example, equity between members within a class of members, equity between different classes of members, and so forth. If the legislated objective creates a focus on pursuing outcomes that are equitable in a different sense (for example, what is equitable for society or as between taxpayers), that potentially creates a catalyst for the passage of future law reforms that contradict or conflict with longstanding and well-understood trust law principles.

The Committee therefore suggests avoiding that word ('equitable') or, alternatively, avoiding this risk by adopting the other suggestions that we have outlined above.

3.8 Ambiguity concerning application of the objective

It is currently unclear what provisions would accompany the objective in order to clarify details such as:

- Who would administer or apply the so-called 'yardstick' which the legislated objective is intended to represent: for example, by conducting assessments of whether law reforms were consistent (or not inconsistent) with the objective—for example, would a new statutory body be established or would this function be delegated to a Minister or parliamentary committee? (Compare, for example, the role of the Parliamentary Joint Committee on Human Rights pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).³)
- Who would be able to enforce the legislation, what would be the effect or consequence (if any) if a proposed reform to superannuation law was inconsistent with the legislated objective, and who (if anybody) would have standing to commence proceedings in court to seek declarations or other orders in connection with the legislation?

³ <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny>

Alternative ideas for enshrining the objective of superannuation

Given that the objective seems intended to moderate the activities of Parliament, without impacting other entities or the operation of other laws and possibly without any prospect of enforcement for non-compliance, the Committee queries whether a better approach would be to document the objective of superannuation in standing orders which regulate one or both of the houses of parliament (as opposed to legislation). For example, while this may well be a novel application of standing orders, a mandatory procedure could be established which requires all superannuation legislation to be assessed by a designated individual or committee for compatibility with the proposed objective (similar to how bills are reviewed from a human rights perspective). This would then be an administrative or procedural matter and would avoid many of the potential unintended consequences that could arise if the objective were implemented by way of legislation. Given the role that the Senate plays in overseeing legislation approved by the government of the day, the Senate may be the appropriate house to select for this purpose.

This would mitigate or reduce several of the risks referred to above. To the extent that a report of, say, a parliamentary committee on consistency with the objective was included in the explanatory memorandum, that would be subject to existing principles of statutory interpretation which regulate reliance on extrinsic materials like explanatory memoranda. It would ring-fence all existing statutory provisions which pre-date the objective. Nevertheless, for clarity, we would advocate for the drafting of the standing order to take into account the various drafting suggestions set out in the previous section.

The Committee would welcome the opportunity to discuss this submission with the Department.

Yours sincerely

A handwritten signature in dark ink, appearing to be 'G. Provis', written in a cursive style.

Geoff Provis
Chair
Legal Practice Section