



Superannuation Insurance and Governance Unit  
Member Outcomes and Governance Branch  
Retirement, Advice and Investment Division  
The Treasury (Via email: [superannuationobjective@treasury.gov.au](mailto:superannuationobjective@treasury.gov.au))

Re: Treasury Submission Regarding Enshrinement of Superannuation Objective  
28 March 2023

Dear Members of Treasury Superannuation Unit,

This submission supports enshrining the objective of superannuation in legislation in line with the proposed language: *The objective of superannuation is to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way.*

This submission discusses two specific reasons for supporting enshrinement: ensuring a superannuation system that is equitable and sustainable for Australian retirees and increasing economic benefit for Australia. The notion of equity in light of superannuation was described in the report on page 11:

*As detailed by the Retirement Income Review, 'equitable' captures the importance of a system that delivers similar outcomes to people in similar situations and targets support to those most in need. 'Sustainable' signifies that the system should be robust to demographic, economic and social change, and should be cost-effective for taxpayers in achieving retirement outcomes.<sup>1</sup>*

First, this submission addresses the benefit of enshrining the objective of superannuation for equity purposes. This submission addresses two instances where enshrining the objective of superannuation supports equity. First, including the objective in statute may lead to supporting the limited tax-neutral transfer of foreign pension funds to Australia's superannuation system from those who enter the superannuation system in the middle or end of their working life. Second, enshrining the objective of superannuation, as it relates to retirement, may clarify the tax treatment of superannuation by a foreign government, specifically the US, who tax Australian-American citizens and permanent residents living in Australia, Australian-Americans living outside either country, as well as Australians living in the United States. Clarification of taxation will lead to a more cost-effective retirement outcome for those Australians subject to US taxation. Regulatory support of both of these instances will encourage increased funding to Australia superannuation accounts which will be a direct economic benefit to Australia.

#### **Transfer of Foreign Retirement Assets to Superannuation in a Tax Neutral Manner**

As Australians benefit from a long-life expectancy, the Australian government pays high social service costs for Australians and permanent residents who do not have sufficient funding for their retirement due to underfunding of superannuation. Underfunding of superannuation occurs in differing ways, but one aspect of underfunding superannuation which is outside the control of working Australians and permanent residents is when those Australian citizens and permanent residents have a late entry to the superannuation system.



For Australians who are born and begin their working life domestically, the superannuation guarantee implemented in 1993 ensures that most workers have adequately prepared for retirement when they are consistently in the workforce.<sup>2</sup> However, over 29% of Australians are born outside Australia.<sup>3</sup> With 1 in 5 of those arriving after 2012, Australia has an increasingly high percentage of late entries to its superannuation system.<sup>4</sup> These statistics show that the majority of foreign-born Australians are migrating to Australia as adults. For example, in 2021, the Australian Bureau of Statistics showed that the highest proportion of those born overseas were aged 35-39.<sup>5</sup> This demonstrates that many Australians will have a late entry to the superannuation system, as they will begin work in Australia in their middle years. This later entry to superannuation challenges low to middle-income earners to adequately fund their superannuation when missing early years of tax-advantaged compound interest. To exacerbate the financial detriment of late entry to the superannuation system, there are very few tax-neutral methods to transfer foreign retirement funds to Australia's superannuation system.<sup>6</sup>

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<sup>2</sup> There are of course, concerns for Australians outside the workforce, in particular the gap in superannuation funds between women and men, when women spend time outside traditional employment. Only temporary visa holders can withdraw superannuation payments at the time of exit from Australia. *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007 (Cth)*; Australian Taxation Office, *Application for payment of ATO-held superannuation money* (29 November 2022) <<https://www.ato.gov.au/Forms/Application-for-payment-of-ATO-held-superannuation-money/#:~:text=Temporary%20residents%20can%20use%20our%20departing%20Australia%20superannuation,provide%20your%20TFN%20apply%20for%20your%20ATO-held%20super>>.

<sup>3</sup> Australian Bureau of Statistics, *Australia's population by country of birth* (26 March 2022) <<https://www.abs.gov.au/statistics/people/population/australias-population-country-birth/latest-release>>; Permanent residency, as well as migration in general continues to grow in Australia. Overseas migration shows a net increase of over 170,000 people in 2021-22; Australian Bureau of Statistics, *Overseas Migration* (16 December 2022) <<https://www.abs.gov.au/statistics/people/population/overseas-migration/2021-22-financial-year>>.

<sup>4</sup> Only temporary visa holders can withdraw superannuation payments at the time of exit from Australia. See *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007 (Cth)*; Australian Taxation Office, *Application for payment of ATO-held superannuation money* (29 November 2022) <<https://www.ato.gov.au/Forms/Application-for-payment-of-ATO-held-superannuation-money/#:~:text=Temporary%20residents%20can%20use%20our%20departing%20Australia%20superannuation,provide%20your%20TFN%20apply%20for%20your%20ATO-held%20super>>.

<sup>5</sup> Ibid.

<sup>6</sup> Certain UK and NZ funds can be efficiently transferred to Australian superannuation accounts. Australian Tax Office, *Tax on Transfers from Foreign Super Funds*, (28 March 2023) < *Tax on transfers from foreign super funds | Australian Taxation Office (ato.gov.au)*>.



Setting a specific objective for superannuation that supports the idea of compulsory superannuation as retirement funding or a pension-type system could allow for (and perhaps encourage) policy exploration of increased portability of retirement accounts across jurisdictions, including tax-free transfer of retirement funds from other jurisdictions to Australia.<sup>7</sup> There are two distinct benefits to allowing the transfer of certain retirement funds to Australia's superannuation system. First, Australian citizens and permanent residents who enter Australia later in life cannot realistically meet the government's superannuation goal without the efficient ability to transfer foreign funds in a tax-neutral manner to their Australian superannuation account. Allowing for a limited tax-neutral transfer of retirement funds from foreign jurisdictions would support an Australian citizen and permanent resident to properly fund their superannuation in their mid-life and is in line with existing domestic superannuation catch-up provisions. Matching transfer options to the existing superannuation provisions will prevent overuse or improper use of superannuation savings because the variety of caps (annual and total) on superannuation funds provide a basic limitation on superannuation tax advantages.

Allowing tax-neutral transfers of limited foreign retirement funds will increase the pool of superannuation funds in Australia, a benefit to both the individual as well as Australia's economy.

### Foreign Taxation of Superannuation Contributions, Growth and Distribution

As a second point, additional clarity about the objective and policy of superannuation funds as supporting Australians' retirement will positively affect taxation considerations of superannuation for Australians and Australian permanent residents subject to US taxation. Australia is a country that is home to many people who have lived and worked in other countries, as well as an Australian diaspora who are living outside Australia. Over 100,000 Australians were born in the US, and just under 100,000 Australian born people are estimated to be living in the US.<sup>8</sup> Because the treatment of superannuation under US tax law is unclear, taxpayers subject to both Australian and US tax systems are left in limbo; not only afraid of potential tax

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<sup>7</sup> The transfer and taxation of retirement funds into superannuation accounts is complex from an Australian and foreign tax perspective and requires extensive tracking. Taxpayers may request a ruling from the ATO regarding potential taxation of transfers. See, e.g., 17 January 2018 Ruling Auth # 1051304478718 citing 12 relevant legislative provisions to consider in a single transfer. See also Australian Taxation Office, *Transferring amounts to an Australian super fund* (29 November 2022) <[https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Tax-treatment-of-transfers-from-foreign-super-funds/?page=3#Transferring\\_amounts\\_to\\_an\\_Australian\\_super\\_fund](https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Tax-treatment-of-transfers-from-foreign-super-funds/?page=3#Transferring_amounts_to_an_Australian_super_fund)>. For a view on Australians subject to US taxes, see Fix the Tax Treaty, *How does Australia tax your US retirement account?* (19 March 2023) <<http://fixthetaxtreaty.org/2020/06/23/how-does-australia-tax-your-us-retirement-account/>>. It is unrealistic to expect a taxpayer to engage in this level of detail to transfer their retirement accounts to Australia.

<sup>8</sup> Australia Bureau of Statistics, *Australia's Population by Country of Birth*, (28 March 2023) <Australia's Population by Country of Birth, 2021 | Australian Bureau of Statistics (abs.gov.au)>, and just under 100,000 Australian born people estimated in the US. United States Census, B05006 Place of Birth for the Foreign-Born Population in the United States (28 March 2023) <B05006 - Census Bureau Tables>. The numbers of those affected by both US and Australia taxation will be higher due to those citizens who gain dual nationality from their parents.





liabilities and penalties but not able to invest in either US or Australian tax advantaged domestic retirement plans. This prevents effective retirement planning.

For most Australians, there are few concerns relating to foreign taxation of their retirement accounts. However, Australians subject to US taxation systems face differing concerns. Dual Australian and US citizens, Australian citizens with permanent residency in the US (green card holders), and Australians temporarily or permanently working in the US are all subject to US taxation on their worldwide income, with a system of credits for limited 'income tax' paid to a foreign government.<sup>9</sup>

For Australian citizens and permanent residents, investment in superannuation is a key component of retirement. In many ways, the compulsory contributions of superannuation are similar to a public pension program in other jurisdictions – compulsory payments tied to employment, and part of the governments plan for a social safety net for older citizens and permanent residents. To incentivise investment in pension plans, governmental tax concessions are generally available for domestic investment in tax-advantaged retirement schemes.

Similar to Australia, US statutory language provides tax concessions for domestic employer-based pension plans. Therefore, both Australia and the US have taxation concessions for retirement accounts, yet due to the United States citizen-based taxation, Australians subject to both tax systems cannot fully access the superannuation tax concessions for retirement under current law. There has been no legislative or judicial determination as to the proper treatment of Australian superannuation under US law.<sup>10</sup> The issue has been particularly problematic for those subject to US taxation since the implementation of compulsory superannuation contributions. US and Australian tax codes do not recognise tax-advantaged investment into the other country's employer funded retirement structure.

Since 1993, when Australian superannuation has become compulsory, superannuation has become similar to a defined contribution retirement plan. The US has a defined benefit plan, with compulsory contributions by employers, overseen by the social security administration. The US social security defined benefit plan is in parallel to the age pension plan in Australia.<sup>11</sup> Both social security and aged pension are

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<sup>9</sup> 26 USC § 16. Gross income includes income from whatever source derived.

<sup>10</sup> US domestic tax law looks to the later in time rule. IRC § 7852(d)(1); discussed in John Anthony Castro, 'U.S. Tax Treatment of Australian Superannuation' (2017) 2 *Nevada Law Journal Forum* 91, 92 (Castro).

<sup>11</sup> Australia, of course, had defined benefit plans for many public employees, but most have been eliminated in the past 15 years, and those public employees moved into the superannuation regime. The last existing defined benefit program may be phased out in coming years. Rachel Clun, "Outrageous hangover from a bygone era': Judge pensions costing taxpayers millions", *The Sydney Morning Herald*, 14 July 2022 <<https://www.smh.com.au/politics/federal/outrageous-hangover-from-a-bygone-era-judge-pensions-costing-taxpayers-millions-20220713-p5b17b.html>>.



considered insufficient to properly fund a retiree, so both the Australian and US government have implemented tax-incentivised models for employers and employees to engage in tax-advantaged retirement planning.

To address double taxation between countries, the US and Australia have a long-standing tax treaty relationship. Prevention of double taxation of pension plans is addressed in the tax treaty, but taxation of compulsory superannuation contributions is not addressed. The Australian/US tax treaty was implemented in 1953 and has not been amended to address the compulsory superannuation guarantee. Under the language of the current Australia-US tax treaty, superannuation is either a public or private pension as defined in article 18.<sup>12</sup> Language of Article 18 (a standard tax treaty article) specifies that the resident country will tax pensions paid to an individual in consideration of past employment, which arguably applies to guaranteed superannuation payments. The treaty language would prevent most treaty countries from taxing superannuation guaranteed growth and payments.<sup>13</sup> However, the US exerts a citizenship based tax, and through the use of the treaty's savings clause, the US can still tax pensions unless a pension is deemed a 'public pension'.<sup>14</sup> The US liberally invokes the treaty savings clause for taxation purposes, thus leaving the superannuation tax treatment question open.

Due to a lack of clarity on the taxation of superannuation, US accountants and tax professionals have called into question how to report superannuation contributions, growth and withdrawals for tax purposes. One potential reporting mechanism is to treat employer superannuation contributions as income for US tax purposes. If so treated, there is no corresponding tax credit, concession or deduction if a US citizen reports income higher than the current income tax credit.<sup>15</sup> There is little clarity on how to report or even calculate fund growth when a taxpayer cannot access or directly manage their superannuation. Further, there is no indication that taking a treaty position will prevent the US from taxation of superannuation.<sup>16</sup> If superannuation contributions or growth are not properly reported to the US, even though they are not treated as income under Australia's tax system, potential penalties and interest may accrue over a lifetime of contributions and growth within the fund.

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<sup>12</sup> *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, opened for signature 6 August 1982, [1983] ATS 16 (entered into force 31 October 1983) Art 18.

<sup>13</sup> *Ibid.*

<sup>14</sup> KE Powell, 'Preventing Pension Double Taxation: The Treatment of Australian Superannuation Guarantee under the Existing Australia-US Tax Treaty' (2020) 49 AT Rev 32, 46 (Powell).

<sup>15</sup> Castro (n 9); *Ibid.*

<sup>16</sup> *Ibid*; Fix the Tax Treaty, *Let's Fix the Australia/US Tax Treaty!* (accessed 19 March 2023) <<https://fixthetaxtreaty.org/>> (Fix the Tax Treaty).



If, in the definition of superannuation, Australian legislation denotes that superannuation fits the definition of 'social security', a 'public pension' or other public pensions', Australian citizens and permanent residents subject to US law may have clarity on US tax treatment of superannuation.<sup>17</sup> Enumerating superannuation in this definitional aspect is supported by the model OECD tax treaty and OECD definitions and commentary, US Social Security framework, the social security totalisation agreement between the US and Australia, and the related explanatory notes.<sup>18</sup>

The Australian government has the opportunity to support equity by noting that compulsory superannuation funds should not be subject to US taxation. Such reference could be entered in the definition itself, a clarifying note or other governmental acknowledgment. The Australian government should indicate that at least the post-1993 compulsorily collected superannuation funds are 'public pension' funds for purposes of international taxation. As the variety of caps (annual and total) on superannuation funds provide a basic limitation on superannuation tax advantages, there can be limited tax avoidance domestically and internationally.<sup>19</sup>

There is increasing concern that US taxpayers' failure to properly report superannuation, which is actually impossible, might lead to severe consequences including tax liabilities and loss of passport.<sup>20</sup> Due to the uncertainty of such penalties, many Australian-Americans will limit their savings through superannuation<sup>21</sup>.

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<sup>17</sup> See the 2002 Social Security Totalisation Agreement between Australia and the US, specifically Art 2: *Agreement between the Government of Australia and the Government of the United States of America on Social Security*, signed 27 September 2001, [2002] ATS 18 (entered into force 1 October 2002) Art 2; See Powell (n 14).

<sup>18</sup> Model Tax Convention on Income and on Capital: Condensed Version (10<sup>th</sup> ed, 2017) Art 18 and comments 10. See Castro (n 9), 94. Consider also the International Social Security Association's description of Australia's system as support, as well as discussion in Powell (n 14).

<sup>19</sup> The issue of SMSF is more complex, from a US tax perspective, and may be either carved out of the definition or continued to be treated as a PFIC for purposes of US taxation. The majority of Australian superannuation compulsory collections, however, should be treated as a public pension, and not limited by the SMSF issue.

<sup>20</sup> US department of State, Passports and Seriously Delinquent Tax Debt (28 March 2023)< Passports and Tax Debt (state.gov)>

<sup>21</sup> There is currently no benefit to, and a high risk for, Australian citizens and permanent residents to fund their superannuation above the compulsory superannuation payment. Nor can an Australian citizen or permanent resident safely use SMSF without risking reporting and tax requirements under the punitive tax regime applied to passive foreign investment trusts (PFIC). PFIC legislation prevents US citizens in Australia from realistically investing in Australian mutual funds, Australian domiciled exchange traded funds, and others due to the tax disadvantages of PFIC taxation. 26 USC §§ 1291 – 1298.



Further, clarification of such language will allow Australians subject to US tax law some clarity about the taxation of superannuation, encouraging proper contribution to Australian superannuation funds.

### Conclusion

Setting the definitional objective for superannuation is an opportunity for the Australian government to clarify the purpose of superannuation on behalf of its citizens and permanent residents. Clarification of purpose will lead to great equity, as all Australians will be able to harness the power of tax-advantaged superannuation.

Enshrining the definition of superannuation to include specific retirement and/or pension-based language can assist with supporting both foreign-born Australians and permanent residents, as well as those Australians overseas who are subject to foreign taxes regimes such as the United States. Many of those overseas Australians started their working life in Australia and will retire in Australia.

Therefore, for definitional purposes, Australia should define superannuation as either a 'pension or other similar remuneration' or as 'social security payments or other public pension' for tax purposes. To encourage newly arrived Australians to prepare for retirement, policy should allow for a limited transfer of tax-neutral funds from outside Australia up to the caps instituted for superannuation. The benefits for Australia include brings additional funding to Australia's superannuation system and provides certainty for Australian citizens and permanent residents to guarantee a funded retirement position.

To address the secondary question of how the objectives of superannuation could be enshrined outside of this legislative proposal, I would refer the committee to materials on superannuation and US tax.<sup>22</sup> Specifically, in renegotiating any international tax treaty or pension agreement, Australia should consider the protection of superannuation tax advantages for all citizens and permanent residents.

Thank you for your consideration.

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<sup>22</sup> Castro (n 9); Fix the Tax Treaty (n 15); KE Powell (n 14).

<sup>23</sup> Karen Powell holds both Australian and US citizenship. Powell acknowledges the conflict of interest in that Powell is directly affected by superannuation legislation, both domestically and in relation to US tax obligations.