



Law Council
OF AUSTRALIA

Superannuation reform package

Exposure draft legislation: Superannuation (Objective) Bill 2016; Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016; and Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulation 2016

**Submission by the Superannuation Committee of the Legal Practice Section of the
Law Council of Australia**

16 September 2016

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Table of Contents

About the Law Council of Australia’s Superannuation Committee	3
Superannuation (Objective) Bill 2016	3
Background.....	3
Key issues.....	3
Practical aspects of subsidiary objectives appearing in the explanatory memorandum.....	4
Breadth of primary and subsidiary objectives	5
Attachment A: Profile of the Law Council of Australia	7

About the Law Council of Australia's Superannuation Committee

1. The Law Council of Australia is the peak national representative body of the Australian legal profession; it represents some 60,000 legal practitioners nationwide. **Attachment A** outlines further details in this regard.
2. This submission has been prepared by the Law Council of Australia's Superannuation Committee (the **Committee**), which is a committee of the Legal Practice Section of the Law Council of Australia.
3. The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Committee makes submissions and provides comments on the legal aspects of proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.
4. The Committee generally does not comment on matters of policy, and in any event the policy aspects of the announcements are a matter for Government. The Committee therefore limits its comments below to issues that it considers may be significant in planning for the administration of the measures.

Superannuation (Objective) Bill 2016

Background

5. The exposure draft of the *Superannuation (Objective) Bill 2016 (Objective Bill)* follows the Government's response to a recommendation made by the Financial System Inquiry (**FSI**) to enshrine the objective of the superannuation system in legislation.
6. The Committee notes that a number of the recommendations made in the Committee's submission lodged on 6 April 2016 have been accepted and are addressed by the Objective Bill.

Key issues

7. The Committee has identified two key concerns with the Objective Bill:
 - (a) The subsidiary objectives should form part of the Bill or other legislative instrument. The subsidiary objectives appearing only in the explanatory memorandum will mean that they have no legal force and give rise to uncertain application of the "Statement of Compatibility" if as a strict matter it is only expressed to relate to the primary objective.
 - (b) Whether the primary objective taken together with the subsidiary objectives provide adequate breadth for future policy development in the superannuation system.
8. Each of these concerns is addressed in more detail below. The Committee has no comments on the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 exposure draft (FSS Bill) or draft Regulations.

Practical aspects of subsidiary objectives appearing in the explanatory memorandum

9. The exposure draft explanatory memorandum (**EM**) states that the subsidiary objectives provide a framework for assessing the compatibility of a Bill or regulation with the primary objective of the superannuation system and notes that there may be tensions between the subsidiary objectives.¹
10. It is the Committee's view that the appearance of the subsidiary objectives in the EM will, at best, offer uncertain guidance and, at worst, will not have any force in shaping future policy for the superannuation system.
11. The High Court has stated that the text of the legislation itself is the key to statutory interpretation. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 it was noted:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.²
12. The Objective Bill sets out clearly the procedure for the preparation of the "Statement of Compatibility". The member of Parliament or rule-maker must include an assessment of whether the relevant proposed bill or regulation is compatible with the "primary objective of the superannuation system". There is no reference to the subsidiary objectives or to any matter or thing extrinsic to the primary objective. As such, there is unlikely to be any need to consider extrinsic materials in construing the Objective Bill.
13. If the subsidiary objectives merely appear in the EM they will have no force of law and the legislature will not be bound to take account of these subsidiary objectives. On the other hand, future policy development may be constrained without a Member of Parliament or rule-maker being expressly permitted to make reference to the subsidiary objectives under the terms of the Objective Bill.
14. Further, the statement in the EM to the effect that it would be best practice to also address the subsidiary objectives in the statement of compatibility has little, if no, force.³
15. Accordingly, the Committee is concerned that the proposed legislative framework for embedding the purpose of the superannuation system in legislation is deficient.
16. The Committee recommends that the subsidiary objectives either be incorporated under the Objective Bill or by reference to regulations or a statutory instrument in which the subsidiary objectives are set out.
17. As a general point, the Committee has concerns about the appropriateness of including substantive material in an explanatory memorandum that goes beyond the

¹ See paragraph 1.17 of the EM.

² At paragraph [47] per Hayne, Heydon, Crennan and Kiefel JJ.

³ See paragraph 1.28 of the EM.

material that is included in the Bill itself. Such an approach ignores the principles of statutory interpretation mentioned above, and risks creating confusion.

Breadth of primary and subsidiary objectives

18. The text of the primary objective under the Objective Bill and the subsidiary objectives under the EM mirrors the precise terms of the objectives set out in chapter 2 of the FSI recommendations (with one exception⁴).
19. The Committee has previously raised its concerns with these objectives being used as a guide or framework for future policy development in the superannuation system to the extent that the objectives do not adequately recognise:
 - (a) insured benefits available to members on permanent and temporary invalidity and which are often paid many years before the member reaches retirement age;
 - (b) death benefits paid to dependants and legal personal representatives of deceased members either prior to the member's retirement or later after a member has retired and may be in receipt of a pension; and
 - (c) the possibility of limited benefits being released on grounds of financial hardship or compassionate grounds.
20. The EM does make a small reference to a range of other benefits being provided through superannuation, including insurance; and notes that these are to be considered as "auxiliary" to the primary objective of superannuation.⁵ For the reasons mentioned above, the Committee considers that these references to other auxiliary benefits in the EM are inadequate. The Committee recommends that express reference be made amongst the subsidiary objectives to the above kinds of benefits being made available through the superannuation system.
21. In relation to the provision of death benefits via superannuation funds the Committee also has a concern with the statements made in the EM to the effect that superannuation is not for "estate planning purposes". Such statements may be misunderstood in a way that limits policy development for superannuation death benefits more generally. The provision of death benefits to surviving spouses, children and other dependants or to a member's deceased estate is a core element of the superannuation system as it currently stands.
22. Death benefits have long been recognised as a mechanism by which those who have been dependent upon a member for income and financial support during their lifetime may be compensated to some extent for the loss of that income and support on the member's death. It is mistaken to then consider that members who complete binding death benefit nominations or make arrangements for superannuation to be dealt with as part of their deceased estate are somehow acting outside the purpose of superannuation. Such steps are entirely appropriate and prudent for the purpose of ensuring that adequate provision is made for the dependants of the member. Further, there will be members who die with significant death benefits because they have sought to address longevity risk and increased medical and other costs in retirement by maintaining a higher account balance. The objectives should be

⁴ The subsidiary objective of "be fully funded from savings" was not adopted by the Government.

⁵ See paragraph 1.28 of the EM.

framed so that superannuation policy development does not restrict funds from facilitating the making by members of such genuine death benefit arrangements.

23. The Committee considers that without these matters being adequately addressed it may be problematic to provide statements of compatibility for reforms dealing with provisions under the *Superannuation (Industry) Supervision Act 1993 (Cth)*, the *Income Tax Assessment Act 1997 (Cth)* and related legislation with respect to matters such as:

- the deductibility of death and disability insurance premiums by superannuation funds;
- the making of binding death benefit nominations;
- the taxation of death benefits and insured benefits;
- management of terminal illness benefits;
- reviewing the categories of dependants entitled to tax-free death benefits; and
- reforms to the grounds for early release of benefits for hardship.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.