31 March 2023

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

By email: superannuationobjective@treasury.gov.au

Dear Madam/Sir,

We welcome the opportunity to provide feedback in response to Treasury's consultation paper on Legislating the Objective of Superannuation.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 34 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, abuse law, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Maurice Blackburn congratulates the Government and Treasury for commencing this important public policy discussion. We are grateful for the genuine commitment to consultation and engagement.

We agree with the statement in the Consultation Paper which reads:

> *Clarification of the objective of superannuation in law will provide a shared understanding of the role of the superannuation system and anchor any future superannuation policy settings to a meaningful base. It will enshrine the core goal of supporting delivery of retirement incomes in law. Haphazard or inconsistent changes in superannuation system policy undermine the community's trust in the system and increase costs to trustees, regulators, and ultimately members.* (p.4)

Maurice Blackburn fully supports the introduction of a legislated objective of superannuation. The absence of an agreed, legislated objective has led to unnecessary confusion around its purpose, and a profusion of actions which test the boundaries of its use. It is impossible to argue that actions are contrary to an objective if that objective is not clearly articulated. Having the objective articulated in legislation is an appropriate means for achieving stability, as well as reducing confusion and defining proper and improper use.

The Consultation Paper contains four Consultation Questions. On the following pages, Maurice Blackburn offers responses to three of those questions.

Consultation Question 1:

What do you see as the practical benefits or risks associated with legislating an objective of Australia's superannuation system?

Risks:

Maurice Blackburn believes that the only practical risk associated with legislating an objective of Australia's superannuation system is the risk that the agreed and legislated objective proves ineffective or unusable.

In our experience, if a definition in law is too broad, it becomes meaningless. Conversely, if the definition is too prescriptive, then those who seek to sidestep that definition will be able to draw sufficient distinction to achieve their aims.

Maurice Blackburn believes that the proposed definition is workable, and should not be watered down to appease conflicted interests.

The larger risk, we believe, lies in not legislating an objective.

Benefits:

Maurice Blackburn believes that the main benefits associated with legislating an objective of Australia's superannuation system are that:

- Australians' retirement savings will be robustly safeguarded against uses that are incongruent with the generation and preservation of retirement savings, and

- The superannuation system will no longer be used for purposes other than the generation and preservation of retirement savings.

We also believe that it will help articulate the fundamental difference between superannuation and other forms of saving. Superannuation represents a social contract made between the government, employers and the community to put aside a regular employer-provided payment into a fund, and to forego tax revenue, specifically to provide for future retirement income. The legislating of an objective represents an important education piece to remind the community of that social contract.

The Retirement Income Review concluded that:

> *A clear objective for the system, agreed by the Australian community through the Government, is needed to guide policy, improve understanding and provide a framework for assessing performance of the system.* (p.17)

We agree that a legislated objective will achieve these beneficial objectives.

The importance of an articulated objective on policy guidance, as noted by the Retirement Income Review, is a pivotal element of this discussion. Constant ideological changes to superannuation policy are frustrating for consumers and aggravating for Trustees and employers. Greater policy certainty would mean that:

- Australian workers can confidently plan retirement in a stable framework;
- Corporate Australia can confidently plan for future needs based, for example, on consistency in the Super Guarantee rate; and

- Government can confidently plan around consistent approaches to taxation, revenue and other fiscal considerations.

Consultation Question 2: Does the proposed objective meet your understanding of the objective of the superannuation system in Australia?

Maurice Blackburn notes the proposed objective, as articulated in the Consultation Paper:

> *The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way*. (p.9)

The above definition meets our understanding of the objective of the superannuation system in Australia. Maurice Blackburn supports the adoption of this definition in full.

Below we provide some commentary around certain components of the proposed objective, which demonstrate how it would be beneficial to the clients we serve.

1. **'Preserve savings'**

Maurice Blackburn believes that it is right that superannuation savings are preserved for a person's retirement only.[1]

There has been much public discussion around the impact of recent public policy decisions which have allowed (or even encouraged) superannuation savings to be used for purposes other than providing for retirement. Two examples are discussed below:

i. Early access to superannuation funds during COVID

Early access to superannuation funds during COVID had dreadful, yet entirely predictable consequences on members' future retirement incomes.

When describing this initiative in his second reading speech, the then Treasurer made the following comments:[2]

> *We're establishing a new temporary compassionate ground of early release of superannuation for individuals and sole traders impacted by the economic consequences of the coronavirus. This will allow impacted individuals to access up to $10,000 of their superannuation, tax free in 2019-20, and up to a further $10,000 in 2021.*

Systematic evaluation of that public policy stance[3] has revealed that:

- One in six working-age people withdrew a total of $38 billion from their super
- The likelihood that an individual would access the scheme was predicted strongly by poor financial health and younger age

[1] Maurice Blackburn believes that current exceptions to the prohibition on early access to super - for compassionate grounds, financial hardship, medical condition, temporary and permanent incapacity - are important, appropriate and well understood.

[2] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fbead2837-76c9-4ce9-952b-eafe8e2d614f%2F0019%22

[3] See for example: https://iiep.gwu.edu/2023/03/15/early-pension-withdrawal-as-stimulus/

- Gambling increased amongst those who accessed the scheme
- Those who accessed the maximum amount through the scheme have deprived themselves of $120,000 in retirement.

Testimony provided to the Select Committee on COVID-19 by Treasury officials on 21 May 2020[4] included that, at that time (3 months into the pandemic):

- The JobKeeper had paid out $8.1bil,
- The JobSeeker program had paid out $5.3bil in additional $750 payments, and
- Superannuation withdrawals had reached $13.2bil.

Australians were effectively funding, from their retirement savings, what government safety nets should have been providing. Making Australians feel like they had to raid retirement savings to pay bills or pay down debt is wrong minded, when other supports should have been made available in that time of crisis.

Estimates show that close to 100,000 superannuation accounts were drained completely through the early access program.[5]

ii. Proposed early access to superannuation funds for housing

There remains a narrowly held but persistent view in some quarters that people should be able to access their superannuation savings to assist with the purchase of property.

This represents poor public policy, not only because it undermines the role of superannuation in preserving savings for retirement, but also because it would exacerbate the existing problems with housing affordability, making the already overinflated property market more out of reach for those the policy is designed to assist.[6] It would also have a negative impact on the retirement savings of other fund members.[7]

Governments have other levers available to them to make housing more affordable and attainable, without everyday Australians feeling like they need to endure reduced retirement income in order to enter the property market.

Recent research has shown that not only is this policy idea a poor potential response to a larger problem, it is also unpopular with the community.[8]

Both of the above examples have potential real life impacts for our clients – especially those who, often through no fault of their own, experience a periodic or permanent incapacity to derive income.

[4] https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/f63b426d-5d7e-4840-922e-ec307fb3b530/toc_pdf/Senate%20Select%20Committee%20on%20COVID-19_2020_05_21_7729.pdf;fileType=application%2Fpdf#search=%22committees/commsen/f63b426d-5d7e-4840-922e-ec307fb3b530/0000%22; p.19
[5] https://www.afr.com/companies/financial-services/almost-100-000-drained-super-accounts-to-spark-fee-hikes-20200512-p54s6s
[6] See for example: https://www.theguardian.com/australia-news/2022/may/16/coalition-super-housing-policy-likely-to-inflate-prices-by-increasing-demand-analysts-say;
[7] See for example: https://www.smh.com.au/politics/federal/coalition-s-super-for-housing-policy-would-cost-all-fund-holders-industry-20220519-p5amm7.html
[8] Ref: https://www.smh.com.au/politics/federal/health-crisis-yes-home-deposit-not-so-much-what-voters-think-super-should-be-used-for-20230321-p5ctun.html

Protecting default insurance within super as a retirement savings safety net

We encourage Treasury to keep in mind the original purpose of insurance in superannuation – that is, to insure against the loss of contributions to retirement income that occurs when someone becomes unable to work.[9]

TPD (Total and Permanent Disability) insurance coverage became a default setting for all MySuper funds in 2012, as a result of the then government's Stronger Super reforms. Under those reforms, all MySuper products were required to include a minimum level of life insurance cover, including TPD insurance.

The purpose of this requirement was to ensure that all Australians, regardless of their socioeconomic circumstances, occupation or health status had access to basic insurance cover that would protect them, and their capacity for a dignified retirement, in the event they were no longer able to work.

Insurance within super provides an important offset against Australia's well documented underinsurance problem, further exacerbated by the rising cost of financial advice which has seen tens of thousands of retail insurance clients drop out of their advice services.[10]

In addition, uninsured people who become unable to work will be reliant on the various social security safety nets in order to survive. The provision of affordable insurances through superannuation alleviates this burden.

Failure to preserve superannuation savings, when viewed alongside the previous Government's Putting Members' Interests First legislation[11], means that many Australians (including those in high risk occupations) have been left (or risk being left) without affordable insurance because it will no longer be provided by their superannuation fund due to the low balance in their account.

This issue of risking insurance coverage due to failing to preserve retirement savings is an important, but under-addressed facet of this discussion.

A legislated objective which includes 'preserve savings' will also, by design, preserve insurance coverage.

2. 'Equitable'

The Consultation Paper tells us that:

> *…..'equitable' captures the importance of a system that delivers similar outcomes to people in similar situations and targets support to those most in need*. (p.11)

It is well documented that the superannuation system is currently heavily skewed against women. The inclusion of a documented objective requiring that policy choices be demonstrably equitable may go some way to alleviating that situation.

[9] See for example: https://www.superannuation.asn.au/ArticleDocuments/359/1709_Insurance_through_superannuation.pdf.aspx?Embed=Y

[10] Rice Warner Underinsurance in Australia 2015 found the median level of life cover met just 61 per cent of basic needs and 37 per cent of the income replacement level. See also *http://www.ricewarner.com/australias-relentless-underinsurance-gap/*; and https://www.afr.com/companies/financial-services/100-000-quit-financial-advice-as-fees-jump-another-8pc-20220418-p5ae5t

[11] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6331

For example, if the proposed legislated objective was in place at the time, the policy decision to allow early access to superannuation savings during COVID would have had to be shown to be equitable, in order to be acceptable.

Analysis by the Australian Institute of Super Trustees found that:

> *While more men than women made an early release application, women withdrew more than men on average, accounting for a higher portion of their already lower balance. In fact, women aged 25-34 withdrew 34% of the average balance, while men in the same age bracket withdrew 31% of the average balance. In all age brackets, women on average withdrew a greater proportion of their account balance when compared to men in the same age cohort.*[12]

Clearly early access to superannuation savings under these circumstances would not pass the 'equitable' test.

Industry Super Australia (ISA) in its Policy Priorities December 2021[13] outlined as one of its key recommendations that tackling inequity in super is important. It noted that women are retiring with about 30% less super than men.[14] The report sets out some potential causes:

> *Women spend more time out of the workforce than men and earn less than men while they are working. This has caused a gap in super balances at retirement, where women retire with a super balance that is about 30 per cent less than men. On average, women retire with about $67,000 less than men. One in three women retire with no super at all.*[15]

Advocacy Group Women in Super propose five reasons why women have less super than men:[16]

i. The gender pay gap – women receive less pay for the same work, hence they receive less super
ii. Workforce participation – more women are in low paying part time and casual employment, hence they receive less super,
iii. Motherhood and caring responsibilities – women are more likely to have a fractured work history due to caring responsibilities for children, elderly relatives etc.
iv. Super inequalities - women are further penalised during maternity leave because no superannuation payments are made while on parental leave.
v. Taxation policy – the taxation system for superannuation favours those who are paid more.

Legislating an objective of superannuation which incorporates a requirement to ensure equitability would mean that all public policy discussions on changes to the super system would need to consider the impacts on gender equity. In relation to the above, this would mean policy discussions on the following topics would have to, by legislation, have a focus on equality:

- Exemptions to the Super Guarantee rate
- Early access provisions

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[12] Ibid: p.23
[13] https://www.industrysuper.com/media/policy-priorities-december-2021/
[14] Ibid: p.7
[15] Ibid: p.7
[16] Derived from: https://www.womeninsuper.com.au/content/5-reasons-why-women-have-less-super-than-men-and-how-to-even-the-scales/gjktnc

- Pay equity, including how female dominated industries are valued
- Requirement to pay super on parental leave
- Taxation policy related to superannuation

Maurice Blackburn believes that imposing an ‘equitable test’ on policy decision making through having this part of the legislated objective is both desirable and long overdue.

Consultation Question 3:

Is the proposed approach to enshrining the objective in legislation appropriate? Are there any alternative ways the objective could be enshrined?

The Consultation Paper tells us that:

> *It is proposed that the objective of superannuation would be established in legislation. This is to ensure the stability of the objective and provide certainty to regulators, policy makers, and Government of the longevity of the objective.* (p.12)

Maurice Blackburn agrees with this proposal, and the reasons underpinning it. Enshrining the objective in legislation would reduce the likelihood that it becomes subject to constant change due to political or ideological whim.

The Consultation Paper goes on to say:

> *The location of the objective in legislation could be in a new stand-alone Act or in existing superannuation legislation, such as the Superannuation Industry (Supervision) Act 1993.*

Maurice Blackburn recommends that Treasury investigate the ease by which the objective could be written into the SIS Act, before exploring the need for a new stand-alone Act.

Consequences for a breach of the objective would need to be clearly articulated in the Act.

Once again, Maurice Blackburn congratulates the Government on commencing this important and long-overdue policy discussion. We urge Treasury to recommend the adoption of the proposed legislated objective in full.

Please do not hesitate to contact me and my colleagues via my Executive Assistant Minouche Wojciechowski at MWojciechowski@mauriceblackburn.com.au or via 03 9605 2663 if we can further assist with Treasury’s important work.

Yours faithfully,

Principal Lawyer
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