

Chapter 2

Views on the bill

2.1 The Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017 (Measures No. 2 bill) amends the *Superannuation Guarantee (Administration) Act 1992* (SGAA) to extend choice of fund provisions for employees (schedule 1); and remove the capacity of employers to use salary sacrifice contributions to reduce minimum superannuation guarantee contributions (schedule 2).

2.2 This chapter discusses the specific schedules and examines the related issues raised by the inquiry.

Schedule 1—Choice of fund for workplace determinations and enterprise agreements

2.3 Schedule 1 amends the SGAA to ensure employees under workplace determinations or enterprise agreements have an opportunity to choose the superannuation fund for their compulsory employer contributions. This measure applies to new workplace determinations and enterprise agreements made on or after 1 July 2018.

2.4 The 2014 Financial Systems Inquiry (FSI) found that a 'significant minority of employees cannot choose the superannuation fund that receives their Superannuation Guarantee (SG) contributions'. The report noted that this is particularly the case for those employees who have a superannuation fund nominated in the enterprise agreement, workplace determination or state-based award.¹

2.5 Both the Productivity Commission (PC) and the Australian Superannuation Funds of Australia (ASFA) have noted that approximately 20 per cent of superannuation members have been unable to exercise genuine choice due to such restrictions, supporting the FSI findings.²

2.6 Given the importance of compulsory superannuation contributions to individuals' retirement incomes, the bill states that individuals should be able to decide where their compulsory superannuation goes. Lack of choice of fund for all workers has a potential to disadvantage some Australians and may contribute to employees having multiple superannuation accounts and paying multiple sets of fees and insurance premiums, which can reduce their retirement income.

1 *The Financial System Inquiry 2014 (Murray), Final Report*, p. 131, http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf (accessed 27 October 2017).

2 Productivity Commission, *Superannuation: Alternative Default Models, Draft Report*, March 2017, p. 33 and Clare, R 2010, *Choosing to choose*, Association of Superannuation Funds of Australia, paper presented at the 18th Annual Colloquium of Superannuation Researchers, Sydney, 12–13 July, p. 9.

Support for the measure

2.7 Not surprisingly, many submitters support the general intent of the bill and the amendments to the SGAA.

2.8 Mr John Maroney, CEO of Self Managed Super Fund Association (SMSFA), told the committee that SMSFA was generally supportive of the bill's provisions noting that it is particularly focused on the issue of choice and competition. Mr Maroney stated that 'giving all employees the option to select their own superannuation fund is an essential element in promoting an efficient and competitive superannuation sector'.³

2.9 In specific regard to SMSFA trustees, he noted that:

...about 60 per cent are aged 55 or older...working in part-time jobs under an enterprise agreement while transitioning to retirement.

The fact they can be employed under an enterprise agreement can dictate where their superannuation guarantee contributions go. We believe this is unfair and inefficient and that it needs to be changed. It's not just the self-managed super funds that are affected by lack of choice. Arrangements that fail to give employers or employees any choice as to where their super guarantee contributions go may have widespread negative consequences, of which the most significant is accounts proliferation, resulting in multiple sets of fees and insurance premiums, both of which can erode superannuation balances unnecessarily.⁴

Improving competition

2.10 CHOICE in its submission highlighted the issue of lack of competition as a driver for change. CHOICE recounted an individual who had tried to consolidate her contributions into one fund only to see it whittled away by fees. The individual, CHOICE stated, would have preferred to place all her contributions into a non-default scheme she has, as she prefers the customer experience she receives even though the two funds 'perform comparatively well against the market'.⁵

2.11 The recent PC draft report examining the superannuation industry, notes that it:

...is a timely opportunity to look at potential ways to introduce more competition into a system that benefits from a large flow of mandated superannuation contributions, and much of that from disengaged members.⁶

3 Mr John Maroney, Chief Executive Officer, Self Managed Super Fund Association, *Proof Committee Hansard*, 9 October 2017, p. 1.

4 Mr John Maroney, Chief Executive Officer, Self Managed Super Fund Association, *Proof Committee Hansard*, 9 October 2017, p. 1.

5 CHOICE, *Submission 24*, pp. 9–10.

6 Productivity Commission, *Superannuation: Alternative Default Models, Draft Report*, March 2017, p. 3.

2.12 The Financial Planning Association of Australia⁷ supports both amendments to the SGAA as does the Association of Financial Advisors (AFA). In its submission in support of the provision of choice to employees working under workplace determinations and enterprise agreements, AFA noted that the lack of choice has a detrimental impact in a number of scenarios, including the following:

- Employees with two or more part time jobs that are covered under an enterprise agreement where they would be forced to contribute to separate funds and pay fees to each fund.
- Situations where an employee has moved from one employer to another and is forced to commence contributing to a new fund. It may be in the best interests of the employee to continue paying into the previous fund. One example would be where they have insurance in the old fund that they do not want to give up. This might include circumstances where they have implemented tailored insurance arrangements that may have been put in place as a result of financial advice and required medical underwriting. It may also be the case that the previous fund provides better terms and more suitable investment options than the new fund.
- Another situation might arise where the employee was previously self-employed and had set up their own SMSF, which they want to retain and don't want their contributions to go into a new fund.⁸

Reducing duplication of processes and fees

2.13 Likewise Dixon Advisory offered that allowing individuals to choose the funds which they contribute into will reduce duplicity of accounts, especially for individuals who change jobs on a regular basis. It would also reduce duplication of insurance and administration fees from having multiple accounts, and it would also provide sufficient flexibility for individuals to keep their superannuation consolidated making it easier for them to track balances and ensure compliance against rules, such as the total superannuation balance cap.⁹

2.14 In commenting about a suggested proliferation in the number of super fund accounts as a result of choice, Mr John Maroney of SMSFA, stated:

I think the history would reflect that it was quite difficult to aggregate accounts. So choice would have led people having more accounts, with a quite involved manual process to combine accounts. But with improved technology in recent years and issues such as [Australian Taxation Office (ATO)] SuperStream, it's now much more efficient and convenient for people to aggregate their accounts. So if one chooses to use a particular fund for future contributions one can go to the MyGov site, tick a few

7 Financial Planning Association of Australia, *Submission 13*, p. 1.

8 Association of Financial Advisors, *Submission 19*, p. 2.

9 Dixon Advisory, *Submission 5*, pp. 1–2.

boxes and essentially have an account aggregation happen fairly efficiently and without a lot of paperwork.¹⁰

2.15 A number of industry bodies noted the benefits of improvements to MyGov and the ATO's SuperStream, for example the Australian Chamber of Commerce and Industry (ACCI) in expressing its support for both provisions in the bill stated that:

Reducing the incidence of multiple account holding and account consolidation has been a major focus of superannuation policy and reform actions over the last few years. Changes to the lost small accounts rules, the use of the TFN as an identifier, SuperStream, and the structure and functionality of MyGov, have all been directed at reducing the incidence of multiple account holding and supporting account consolidation.¹¹

2.16 While recommending passage of schedule 1 as introduced, ACCI made the following suggested amendment:

The effect of item 6 of Schedule 1 appears to be that not only new employees commencing on or after the day which a new agreement (made after 30 June 2018) starts to apply should be given standard choice forms, but so should those which have commenced with the employer within the previous 28 days. The Australian Chamber encourages the Committee to consider whether this might be addressed by publicity or an amended transitional provision clearly excluding employees in employment with the employer on the day that the new agreement commences.¹²

Choice with consequence

2.17 The Australian Institute of Superannuation Trustees (AIST), a non-profit organisation, supports both schedules in the bill. However, in providing its support for choice of fund it noted that:

AIST supports the principle of choice in superannuation but argues this has to be provided in a way that does not leave consumers worse off, and operates in an environment of meaningful disclosure and consumer protections.¹³

2.18 Likewise, a number of submissions noted cautious support for the bill, calling for parallel consumer protection measures to be enacted to safe guard those vulnerable members in the workforce. The Construction, Forestry, Mining and Energy Union (CFMEU) stated that:

It should not be assumed that employees will be completely free to choose the fund/s that best meets their interests if these measures are approved. The reality of the workplace applies here. The opening up of access to the full range of superannuation funds on an individual basis will expose employees

10 Mr John Maroney, Chief Executive Officer, Self Managed Super Fund Association, *Proof Committee Hansard*, 9 October 2017, p. 4.

11 Australian Chamber of Commerce and Industry, *Submission 16*, p. 6.

12 Australian Chamber of Commerce and Industry, *Submission 16*, p. 3.

13 Australian Institute of Superannuation Trustees, *Submission 9*, p. 3.

to considerable pressure from both employers and superannuation funds to direct their superannuation contributions to a particular fund which favours them.¹⁴

2.19 Thirteen of the 32 submissions received by the inquiry were from union organisations that unanimously rejected the bill. Fundamental to their reasoning was that the very nature and collective value derived from enterprise bargaining agreements for their members, who in many cases will not have the wherewithal to understand and make informed choices on such an important issue is reason enough for the continuation of the status quo.

2.20 The Queensland Nurses and Midwives' Union explain the extension of the role union representatives contribute in providing effective super funds to their members:

Union trustee representatives on superannuation fund boards undertake a critical extension of their everyday activism on behalf of members. It is imperative unions continue to advocate for members across their lifespan by promoting strategies that provide dignity in retirement. This includes the optimisation of retirement savings through superannuation and campaigning for the maintenance and enhancement of non-superannuation related factors that contribute to secure retirement such as health care and housing.¹⁵

2.21 In pressing the point that many workers lack understanding regarding super funds, ISA states that:

...the propensity of consumers to make complex financial decisions is not likely to improve in the near future. It is therefore not surprising that a considerable number, in the order of two thirds of fund members, rely on default arrangements in enterprise agreements and modern awards.¹⁶

2.22 The PC in its 2015 report, *Superannuation Policy for Post-Retirement* remarked that financial literacy in Australia is generally well-developed and improving, but certain groups namely the relatively poor, women and Aboriginal and Torres Strait Islander peoples have been identified as being more likely to have poor financial literacy. In regard to superannuation, the PC reported that:

Broadly speaking, Australians are less financially literate in matters relating to superannuation and retirement planning than financial matters in general. A shift from defined benefit to defined contribution plans for some along with a demographic shift caused by the retirement of the 'baby boomers', longer life expectancies and increased immigration of those who may be unfamiliar with Australian financial systems, means that many require a

14 Construction, Forestry, Mining and Energy Union, *Submission 9*, p. 10.

15 Queensland Nurses and Midwives' Union, *Submission 7*, p. 1.

16 Industry Super Australia, *Supplementary Submission 20.1*, p. 15.

greater level of financial literacy when it comes to making plans for their retirement.¹⁷

Removal of exemptions

2.23 A number of submitters raised the issue of the removal of exemptions from the measure, for example they do not allow the continuance of the choice of fund exemptions where additional superannuation benefits are provided (such as, automatic group insurance).

2.24 ISA also argues that a clear benefit extends from the choice of fund exemption to allow the inclusion of specific named funds within enterprise agreements in certain industries. These, ISA stated, are often driven by the inclusion of automatic group insurance to members of the fund, which for many employees, particularly those in high-risk industries, will be the only insurance coverage they will be able to obtain. Therefore, ISA stated, that they should remain an allowable exemption.¹⁸

2.25 Furthermore AIST also argues the case for existing exemptions from choice of fund to remain in some cases, noting that:

...in the event the Government decides to proceed with this legislation, AIST proposes that the existing exemption remain for enterprise agreements where superannuation benefits in excess of the community standard [similar to ISA's insurance issue] are negotiated between the employer and their employees.¹⁹

Defined benefit schemes

2.26 Division 4 of Part 3A of the Measures No. 2 bill sets out a process to be followed when an employee is choosing a fund. Proposed subsection 32F(3) ensures that employees who are existing members of certain defined benefit schemes cannot choose another fund. These are schemes where a member's retirement, resignation or retrenchment benefit in the fund would remain unchanged if the employer made contributions to another fund under the choice of fund arrangements.

2.27 The purpose of this section is to address those employees who are by default, at commencement of employment, members in a defined benefit superannuation scheme and who cannot exercise choice of fund. With respect to this section, the Law Council of Australia (LCA) have expressed a concern that there may be potential that someone could by commencement become an automatic member in a defined benefit scheme by default; but because of the potential time delays in registration could see an individual register in an alternative fund leaving the employer liable for final defined benefits. The LCA states that:

17 Productivity Commission, *Superannuation Policy for Post-Retirement, Research Paper, Volume 2: Supplementary Papers*, July 2015, p. 183.

18 Industry Super Australia, *Submission 20*, pp. 13–14.

19 Australian Institute of Superannuation Trustees, *Submission 9*, p. 3.

[It] strongly recommends that this provision should also contemplate employees who are eligible to be, and will become, a defined benefit member because the employer is bound by an agreement to put its members into a defined benefit fund. Otherwise, there is an issue if the employer is bound by an industrial arrangement to put new employees in a defined benefit fund, but there is (as is inevitable) a delay between commencing employment and the employer sending the first contribution to the defined benefit scheme (which is when the new employee actually becomes a member).²⁰

2.28 The LCA further explained that:

New s 20(3A) proposed in the bill, together with existing s 32NA(9)(b), indicate an intention that in this situation the employer should not be subject to 'double jeopardy' of the employee choosing another fund but while also being entitled to defined benefits. However, the threshold for s 32NA(9) is the wording in sub-section (1) that the employee is (in the present tense) already a defined benefit fund member. This in turn leads to a heightened risk of adverse selection against an 'open' defined benefit fund.²¹

Schedule 2—Salary sacrifice integrity

2.29 Schedule 2 amends the SGAA to improve the integrity of the superannuation system by ensuring that an individual's salary sacrifice contributions cannot be used to reduce an employer's minimum SG contributions.

2.30 The amendment would implement the Superannuation Guarantee Cross-Agency Working Group's recommendations to prevent contributions made as part of a salary sacrifice arrangement from satisfying an employer's SG obligations (Recommendation 8); and specifically include salary or wages sacrificed to superannuation in the base for calculating an employer's SG obligations.

2.31 Under a salary sacrifice arrangement an employee agrees to forego part of their future salary or wages in return for their employer providing benefits of a similar value. Employees are also able to salary sacrifice amounts of their future salary and wages to be paid by their employer to a superannuation fund as superannuation contributions. These contributions are deductible for the employer and are not included in the assessable income of the employee (subject to concessional contributions caps). Instead, these contributions are included in the assessable income of the superannuation fund and generally taxed concessional at a rate of 15 per cent.

2.32 Currently, salary sacrificed amounts count towards employer contributions that reduce an employer's mandated SG contributions. In addition, employers can calculate SG obligations on a (lower) post salary sacrifice earnings base. While employees salary sacrificing may obtain other taxation benefits, employees who salary sacrifice to boost their superannuation savings may end up with lower superannuation contributions than they expect.

20 Law Council of Australia, *Submission 32*. pp. 2–3.

21 Law Council of Australia, *Submission 32*. pp. 2–3.

Support for the measure

2.33 The measure improves the integrity of the superannuation system by ensuring that an individual's salary sacrifice contributions cannot be used to reduce an employer's minimum SG contributions. Possibly because of the past reviews and inquiries, this schedule was a non-controversial issue with submitters unanimous in their strong support for the proposed salary sacrifice measures.

2.34 While the AIST,²² CHOICE²³ and ISA,²⁴ all welcomed the proposed changes, they did suggest that the government could further improve the proposed approach.

2.35 AIST argued that while the proposed measures will ensure that members are not short-changed when entering into salary sacrifice arrangements with their employers, the measures could be enhanced by two changes:

- making the SG payable on gross remuneration, to avoid complex formulae and ensure that employees' mandated retirement savings are calculated the way intended; and
- removing generic labelling of concessional contributions and ensuring the source of all concessional contributions are cleanly labelled.²⁵

2.36 Mr Alan Kirkland, CEO of CHOICE commented on the benefit of closing the present salary sacrifice loophole:

Shutting down the salary sacrifice loophole, which has seen an estimated \$1 billion stripped from retirement savings by unscrupulous employers, is also a great outcome for consumers. It's a common sense reform which Choice fully supports.²⁶

2.37 ISA argued that while the bill closes the salary sacrifice loophole, this only addresses 16 per cent of the unpaid super problem.²⁷

2.38 Treasury provided evidence to the committee noting further measures already announced by the government to further improve the unpaid super problem:

The measure in this bill, I would say, was a downpayment on other measures the government proposes to introduce. I think two of the most important measures the government has announced are intended to provide much greater visibility to the tax office and substantially strengthen its capacity to undertake enforcement activities in relation to non-payment of SG. The first one will be implementation and extension of single-touch payroll. That will provide more information on SG entitlements and enhanced, more frequent fund reporting. The ATO will have a much more

22 Australian Institute of Superannuation Trustees, *Submission 9*, p. 3.

23 CHOICE, *Submission 24*, p. 10.

24 Industry Super Australia, *Submission 20*, p. 2.

25 Australian Institute of Superannuation Trustees, *Submission 9*, p. 3.

26 Mr Alan Kirkland CEO of CHOICE, *Proof Committee Hansard*, 10 October 2017, p. 25.

27 Industry Super Australia, *Submission 20*, p. 8.

accurate and real-time picture of what funds are owed by employers and what money has been received by funds. There are some other changes as well, but they are the most important changes in terms of improving the ATO's capacity to detect and remedy non-payment of SG.²⁸

2.39 While the LCA is supportive of the salary sacrifice measure, it is concerned that the operation of the bill in relation to some types of 'Total remuneration' or 'Total Package arrangements' is uncertain and may have unintended consequence that requires further examination:

[T]he salary sacrifice integrity provisions in the Bill could be interpreted as requiring that all superannuation contributions made under such arrangements are considered to be made under a 'salary sacrifice arrangement', because all superannuation contributions are agreed by the employee and reduce the amount of their package that is received in cash. The effect would be that for these employees their total package is 'ordinary time earnings' and superannuation guarantee would then have to be calculated on the total package and paid in addition.²⁹

2.40 While opposing the choice of fund measures in the Measures No. 2 bill, the Australian Council of Trade Unions offered its full support for the passage of the salary sacrifice measures.³⁰

Committee view

2.41 Superannuation is perhaps the most important investment that a person makes in the course of their working life. Confidence in the investment and those who manage it is paramount for the future welfare and security of millions of Australians; not to mention the reduction in reliance on the public purse.

2.42 The committee notes that the majority of submitters are in favour of the bill and the impact that it may have on the choice and competition in the market. Evidence presented to the committee established the current low engagement rates when it comes to choosing a superannuation fund, and that most simply take what is provided to them. The committee observes that the central premise of the bill is to give more employees choice in deciding their super fund, to promote greater engagement. In addition, the upshot of implementing 'choice of fund' is the potential for greater competition on fees and services and the possibility to make it easier for members to track balances and SG compliance.

2.43 The committee notes the potential for greater market power in regard to information asymmetry among different players in the market—buyers, sellers and the intended beneficiaries of services—all who have the potential to distort the availability and flow of information about the quality and needs of products in the

28 Mr Ian Beckett, Principal Advisor, Retirement Income Policy Division, Department of the Treasury, *Proof Committee Hansard*, 10 October 2017, p. 81.

29 Law Council of Australia, *Submission 32*, p. 3.

30 Australian Council of Trade Unions, *Submission 29*, p. 3.

future marketplace. The committee encourages industry leaders to be open and forthright about their products and services to assist people make informed choices.

2.44 The committee acknowledges that a number of submitters have called for exemptions to be retained, noting that the legislation does not allow their continuance under 'choice of fund'. The committee is not supportive of this suggestion. The committee is cognisant that benefits accrued from the economies of scale of super funds can go both ways—benefits have flowed in the past providing large automatic group insurance to members—and quite possibly in the future equal benefits might be forthcoming. However, the committee does consider that issues pertaining to defined benefits deserve closer examination.

2.45 In regards to the salary sacrifice measure, the committee welcomes the unanimous support of the amendment by submitters and notes the comments made by Treasury officials about other related government measures to be pursued.

2.46 The committee notes that the Australian Government asked the Productivity Commission (PC) to review the competitiveness and efficiency of the Australia's superannuation system, which will be finalised in 2018. The committee has considered the views put forward by submitters who argued that any 'choice of fund' changes should be made after the PC report has been finalised. The committee believe that this report and the PC final report will help inform any evaluation of how the amendments proposed in the Measures No. 2 bill are performing into the future. The committee consider that the effectiveness of the measures should be evaluated in two financial years from implementation on 1 July 2018.

Recommendation 1

2.47 The committee recommends that the bill be passed.

Senator Jane Hume
Chair