

The Senate

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Economics  
Legislation Committee

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Treasury Laws Amendment (Improving  
Accountability and Member Outcomes in  
Superannuation Measures No. 2) Bill 2017  
[Provisions]

October 2017

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# Senate Economics Legislation Committee

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# Chapter 1

## Introduction

1.1 On 14 September 2017, the Senate referred the provisions of the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017 (Measures No. 2 bill) to the Senate Economics Legislation Committee for inquiry and report by 23 October 2017.<sup>1</sup> The Measures No. 2 bill is part of a broad package of reforms focused on protecting members' money, prioritising members' interests and strengthening the foundations of the superannuation system.<sup>2</sup>

1.2 As part of this package of reforms, the Senate also referred the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 and the Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017, separately to the committee for inquiry and report by 23 October 2017.<sup>3</sup>

1.3 The Measures No. 2 bill, the focus of this report, would amend the *Superannuation Guarantee (Administration) Act 1992* (SGAA) to strengthen accountability of superannuation funds and improve outcomes for members. The measures contained in the bill are aimed at ensuring that choice of fund is provided to over one million more Australians and that salary sacrifice contributions are reflected in members' retirement savings.<sup>4</sup>

1.4 The Minister for Revenue and Financial Services, The Hon. Kelly O'Dwyer MP, noted in her Second Reading Speech that the measures in this bill would 'deliver on the findings of the 2014 Financial Systems Inquiry (FSI) and address issues identified in the Government's Superannuation Guarantee Cross-Agency Working Group report Superannuation Guarantee Non-compliance'.<sup>5</sup>

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1 *Journals of the Senate*, No. 63, 14 September 2017, pp. 2007–2009.

2 The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Second Reading Speech, *House of Representatives Hansard*, 14 September 2017, p. 10424.

3 The Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 contains eight measures, which propose to amend the *Superannuation Industry (Supervision) Act 1993*, the *Corporations Act 2001* and the *Financial Sector (Collection of Data) Act 2001* in order to 'modernise and increase confidence within the superannuation system'. The Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 seeks to introduce a definition of independence and to legislate a requirement that superannuation funds regulated by the Australian Prudential Regulation Authority have a minimum of one-third independent directors as well as an independent Chair.

4 The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Second Reading Speech, *House of Representatives Hansard*, 14 September 2017, p. 10424.

5 The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Second Reading Speech, *House of Representatives Hansard*, 14 September 2017, p. 10425.

## **Conduct of the inquiry**

1.5 The committee advertised the inquiry on its website and wrote to relevant stakeholders and interested parties inviting submissions by 29 September 2017. The committee received 32 submissions, which are listed at Appendix 1.

1.6 Public hearings for the inquiry were held in Canberra on 9 October 2017 and in Sydney on 10 October 2017. The witnesses who gave evidence are listed at Appendix 2.

1.7 The committee appreciates the efforts of all stakeholders who contributed to the inquiry.

## **Overview of the bill**

1.8 The Measures No. 2 bill extends choice of fund provisions for employees (schedule 1) and removes the capacity of employers to use salary sacrifice contributions to reduce minimum superannuation guarantee contributions (schedule 2).

### ***Schedule 1—Choice of Fund***

1.9 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.

#### *Summary of new law*

1.10 This schedule implements the 2014 FSI's Recommendation 12 to:

Provide all employees with the ability to choose the fund into which their Superannuation Guarantee contributions are paid.<sup>6</sup>

1.11 The FSI recommended removing the barriers to members engaging with their superannuation by ensuring all employees, to the extent possible, have the right to choose their superannuation fund. To this end, it was suggested the government should remove provisions in the SGAA that deny some employees the ability to choose the fund that receives their superannuation guarantee (SG) contributions due to the exclusions given to enterprise agreements, workplace determinations and some awards.<sup>7</sup>

1.12 Given the importance of compulsory superannuation contributions to individuals' retirement incomes, individuals should be able to decide where their compulsory superannuation goes. The government states that expanding choice of fund will also reduce the need for multiple accounts involving multiple fees and insurance premiums which can erode retirement savings.

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6 *The Financial System Inquiry 2014 (Murray), Final Report*, p. 131, [http://fsi.gov.au/files/2014/12/FSI\\_Final\\_Report\\_Consolidated20141210.pdf](http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf) (accessed 27 October 2017).

7 *The Financial System Inquiry 2014 (Murray), Final Report*, p. 131, [http://fsi.gov.au/files/2014/12/FSI\\_Final\\_Report\\_Consolidated20141210.pdf](http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf) (accessed 27 October 2017).

1.13 In addition, giving more employees choice of fund would also promote member engagement and reduce fees through increased competition.

### ***Schedule 2—Salary sacrifice integrity***

1.14 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.

#### *Summary of new law*

1.15 This schedule implements 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.

1.16 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.

1.17 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.

### **Financial savings, regulatory impact and human rights issues**

1.18 The explanatory memorandum notes that schedule 1 has no financial impact nor does it raise any human rights issues. However, the regulatory impact will result in a total annual average regulatory cost of \$5.646 million; \$2.245 million for business and superannuation funds; and \$3.401 million for individuals.<sup>8</sup>

1.19 The date of effect for schedule 1 is 1 July 2018 for all new workplace determinations and enterprise agreements.

1.20 Schedule 2 notes that the measure has a small but unquantifiable impact on the fiscal and underlying cash balances. It is also compatible with human rights and does not raise any human rights issues. The date of effect for schedule 2 is also 1 July 2018.<sup>9</sup>

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8 Explanatory Memorandum, p. 3.

9 Explanatory Memorandum, p. 5.

**Structure of this report**

1.21 The report is structured in two chapters—this introductory chapter, which provides a brief overview of the Measures No. 2 bill and the context; and chapter two which discusses the schedules and the related issues raised by submissions.

**Acknowledgements**

1.22 The committee would like to thank all individuals and organisations that participated in the inquiry, particularly given the tight timeframes requested for submissions and the hearing.

## 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.<sup>1</sup>

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.<sup>2</sup>

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.

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1 *The Financial System Inquiry 2014 (Murray), Final Report*, p. 131, [http://fsi.gov.au/files/2014/12/FSI\\_Final\\_Report\\_Consolidated20141210.pdf](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'.<sup>3</sup>

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.<sup>4</sup>

## *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'.<sup>5</sup>

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.<sup>6</sup>

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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.

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2.12 The Financial Planning Association of Australia<sup>7</sup> 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.<sup>8</sup>

### ***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.<sup>9</sup>

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

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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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup>

### ***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.<sup>13</sup>

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

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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.

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

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.<sup>15</sup>

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.<sup>16</sup>

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

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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.<sup>17</sup>

### ***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.<sup>18</sup>

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.<sup>19</sup>

### ***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:

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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.

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[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).<sup>20</sup>

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.<sup>21</sup>

### **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.

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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,<sup>22</sup> CHOICE<sup>23</sup> and ISA,<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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

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

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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.

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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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup>

### **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

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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**

## **Additional Comments by Labor Senators**

### **Consultation Process**

1.1 Labor Senators wish to make the same points about the consultation process as set out in the dissenting report for the bills Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 and the Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017.

1.2 At the outset, Labor Senators express their disappointment that these bills were introduced into Parliament on 14th September, on a Thursday morning on the last day of a two week sitting period. This was made worse when very short reporting dates were set for not only this bill and the bills mentioned previously, but also the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017.

1.3 Labor Senators also note Senator Gallagher's request in the Senate to extend the reporting date for the three superannuation bills given the complexity of the reforms and note that this motion was voted down by the Senate.

1.4 Labor Senators are concerned that these bills, which claim to improve governance in the superannuation sector, are being rushed through the committee by this Government. What is worse, no clear explanation of the short reporting date was even offered by the Government as a concession. As this report is tabled, it will be three weeks before the legislation can be debated in the Senate. These three weeks could have been put to good use.

1.5 Labor Senators thank the Chair of the Committee for allowing two days of hearings to cover the four bills mentioned previously. Labor Senators want to thank Senator Hume and her office for being cooperative despite the unreasonable timeframes set by the Government

### **Schedule 1—'Choice of fund', the role of collective bargaining and the call for greater consumer protections**

1.6 Labor Senators wish to make comments on two principles that inform this proposed policy. The first is that the collective bargaining of workers has been able to lift superannuation services beyond community standards. The second is that when workers are offered “choice” in a mandatory financial service such as superannuation, there must be adequate safeguards so that workers are not left worse off.

#### **Collective bargaining and going beyond current community standards**

1.7 Superannuation is inextricably linked to the package of salary, wages and other benefits in workplace negotiations. Superannuation is a part of industrial bargaining and arguments that cast superannuation as a 'financial product' outside of workplace bargaining misrepresents the situation.

1.8 Collective bargaining by workers played an important role in establishing superannuation schemes well before there was a compulsory employer contribution scheme. Collective bargaining since 1993 has been able to lift superannuation contributions beyond the minimum rate in many workplaces, improve the provision of insurance within superannuation and to put safeguards in place to minimise superannuation guarantee non-payments.

1.9 As part of these negotiations between employers and employees, many industries determined that there would be benefits to both employers and employees in having all employees contribute to a single fund, often an industry fund.

1.10 For employers, the administrative costs of making contributions were lowered. In addition, industry, public sector and corporate funds (most likely to be receiving all contributions) on average have outperformed retail funds and so employers, by using these funds, would be likely to face a smaller risk of workplace disruption should workers become concerned about the management of their retirement savings.

1.11 For employees, single fund arrangements often had stronger safeguards to minimise superannuation guarantee non-compliance and would likely have easier access to staff who managed the fund (through workplace visits). Employees who used corporate, public sector or industry funds, on average, would also see higher returns from their contributions.

1.12 Where efficiencies were gained through a single fund arrangement, any savings would be apportioned through negotiations to both employers, via reduced administration expenses and employees, via mechanisms such as a higher contribution rate or an insurance product with greater risk coverage.

1.13 This schedule would disrupt these long standing arrangements and the Senate needs to be mindful of all the consequences of this bill should it be passed by the Senate.

1.14 As one example, the Senate should be made aware of UniSuper's submission which notes its open defined benefit plan for non-casual employees. Contributions are made at levels well above the superannuation guarantee rate. Opening up choice of fund could undermine the benefits that all members could receive:

In collectively-pooled arrangements, such as defined benefit schemes, the decisions of some members can have an effect on many members. By their very nature, defined benefit schemes are subject to adverse selection risks and have rules in place that, once a member has made a decision to remain in the defined benefit scheme, employers are then bound to fund that member's benefit for the duration of that member's employment.<sup>1</sup>

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1 Unisuper, *Submission 21*, p. 5.

1.15 Superannuation remains an evolving industry, and Labor Senators believe that careful consideration should be given to how opening up choice of fund might preclude other innovative product offerings if the risk pooling of membership cannot be achieved.

1.16 Labor Senators acknowledge the concerns raised about the consequences of limiting choice for employees in some circumstances. It is a valid concern when a worker faces the situation of not receiving contributions to their existing fund (even a well-performing industry fund) and has to either open a new separate account or consolidate to the new single fund.

1.17 On the argument of multiple accounts, Labor Senators thank AIST for raising ASIC's submission to the Financial Systems Inquiry which cast doubt on whether choice of fund was the appropriate policy solution to the problem of multiple accounts:

These [choice of superannuation fund] changes also made it possible for members with multiple accounts to more easily consolidate these accounts and reduce the amount of fees they pay for maintaining multiple accounts. However, in practice, this consolidation did not lead to a decrease in the number of accounts in the industry. The number of accounts continued to grow to more than 30 million, even though the number of employed persons in Australia is roughly 40% of this number. This means that for every employed person there are approximately 2.5 accounts. A large number of these accounts are small, unclaimed or lost and some are for retirees receiving superannuation in the form of a pension.<sup>2</sup>

1.18 Labor Senators also acknowledge that the introduction of SuperStream should significantly reduce the administrative costs of paying to multiple superannuation funds.

1.19 Given the nature of this proposed change, Labor Senators also find it strange that these arrangements are being debated while the Productivity Commission is reviewing the efficiency and competitiveness of the superannuation system, and includes in its scope default superannuation arrangements.

1.20 Labor Senators also note that the Superannuation Guarantee is scheduled to rise to 12%, with some stakeholders calling for rises beyond 12%.<sup>3</sup>

1.21 Labor Senators believe that workplace negotiations are an important mechanism for lifting superannuation contributions beyond the community standards where it is in the interests of workers in that industry. Care needs to be given to how this schedule might limit negotiations that could make workers better off.

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2 Australian Institute of Superannuation Trustees, *Submission 20*, p. 11 (citing ASIC).

3 <http://www.actu.org.au/media/599617/retirement-incomes-superannuation-and-workers-capital-final.pdf>

## Consumer protections

1.22 Choice of fund needs to be considered in a context where decision making is not always a rational evaluation of options. Marketing, sales techniques and other messaging can influence a person's choice away from the best rational choice. There need to be adequate safeguards when choice is exercised, particularly in the case of superannuation, where the benefits of additional net returns can accrue to substantial sums of money over a long time horizon.

1.23 The Rice Warner report commissioned by Industry Super Australia<sup>4</sup> shows that the assumption of rational decision making needs to be questioned. In the case of costs, Rice Warner found that:

Members are unlikely to have used fee levels as a primary reason for switching between funds, as many members are charged a higher fee after switching.

20% of members pay lower fees after switching funds, while 49% of members pay higher fees. 31% of members did not have a notable increase or decrease in fees paid (with a margin of \$10 either way).

The aggregate fee outcomes from switching activity reveals a net increase of \$137 million in fees. The major component of this is a \$170 million increase in fees as a result of switching into funds with higher fees. Retail funds account for 92% of this increase in fees. This is modestly offset by a \$33 million saving in fees.

1.24 And on net returns, it was found that:

When comparing performance of funds (using a 4 year period to 20 June 2015) before and after a member switch, we observe that:

Members are unlikely to have used past performance as a proxy for their investment decision as the data shows on average that historical returns for the incumbent and successor fund tend to be similar.

36% of members would have received higher returns over the period, while 56% of members would have received lower returns. 8% of members did not see a notable increase or decrease in investment performance (with a margin of 0.05% either way).

The aggregate estimated impact on investment returns reveals a net decrease of \$284 million annually. This is largely driven by a \$373 million decrease in returns annually for members rolling into funds with lower returns. Retail funds accounted for 87% of this decrease in returns. This is offset by an \$89 million increase in annual returns for those members switching into higher performing funds. 52% of this increase is accounted for by industry funds, while only 33% is by retail funds.

1.25 Concerns have also been raised that some superannuation funds might offer bundled incentives to an employer in return for default fund status in that workplace.<sup>5</sup>

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4 Industry Super Australia, *Submission 20, supplementary submission 1*, pp. 30–31.

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1.26 The Construction, Forestry, Mining and Energy Union also raised these same concerns:

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 to considerable pressure from both employers and superannuation funds to direct their superannuation contributions to a particular fund which favours them.<sup>6</sup>

1.27 Labor Senators note concerns raised in submissions about the impacts of this change on women. With so many women employed in part-time and casual work, often in low paid and insecure industries, a number of submissions explain that 'retail and industry funds are not equal options, and workers must not be positioned to consider them as if they were.'<sup>7</sup>

1.28 The ACTU for example, is particularly concerned about any regulatory measure which might have a further detrimental effect on the superannuation gender gap. A number of enterprise agreements exist in female dominated industries (the service sector, nursing, health, hospitality and the like) which include superannuation provisions which are better for women workers than alternative arrangements which would exist in an uncontrolled choice environment.<sup>8</sup>

1.29 Moving away from the current provisions may damage investment earnings potential for women workers, default insurance arrangements, and supportive mechanisms such as those which pursue unpaid superannuation. The ACTU argue that women's superannuation entitlements will be advantaged only by the retention of the current arrangements.

1.30 Labor Senators also note the Government's deferral of choice product dashboards, when these dashboards exist for MySuper products. To enable proper comparison of all choices available to a worker, these dashboards should be required across the industry. This is also endorsed by the FSC:

...the FSC supports extending product dashboards to choice products as well.<sup>9</sup>

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5 <http://www.abc.net.au/news/2017-02-13/banks-to-secure-management-of-employees-superannuation-funds/8263844>

6 Construction, Forestry, Mining and Energy Union (CFMEU), *Submission 25*, p. 10.

7 Victorian Trades Hall Council, *Submission 3*, p. 3.

8 Australian Council of Trade Unions, *Submission 29*, p. 2.

9 Mr Blake Briggs, Senior Policy Manager, Financial Services Council, *Proof Committee Hansard*, p. 23.

1.31 Regarding questions of fee disclosure and portfolio disclosure, which would assist in evaluating the total fees charged for the asset allocation held, Labor Senators note problems raised by ISA about RG97<sup>10</sup> and the concern regarding the carve-out of platform products in portfolio disclosure.<sup>11</sup>

1.32 These disclosure problems, coupled with the current decision making of workers, raises concerns that there are insufficient current protections to ensure that choice of fund will leave workers better off.

## **Schedule 2—Closure of the salary sacrifice loophole and the Government's lacklustre approach to superannuation guarantee compliance**

1.33 There was universal support in this inquiry for the closure of this salary sacrifice loophole.

1.34 Labor Senators believe that the closure of this loophole, while important, is only one small component of address the problem of superannuation guarantee non-payment.

1.35 Labor Senators have led the way in investigating superannuation guarantee non-payment. Labor Senators once again draw the Senate's attention to the Economics References Committee's report *Superbad—Wage theft and non-compliance of the Superannuation Guarantee* and its recommendations.

1.36 The Government has been dragged into addressing superannuation guarantee non-compliance. Labor Senators believe that the decision taken by the Minister for Revenue and Financial Services to establish a secret interdepartmental working group was in response to the Senate inquiry.

1.37 Labor Senators found out that this group existed through the media on the morning of the first public hearing of the Senate inquiry. This is an unsuitable way to approach such an important issue.

1.38 Labor Senator's welcome the interdepartmental report, but believe that it was constrained by Government in making more far-reaching recommendations.

1.39 The Government can take strong action on unpaid super. Closing the salary sacrifice loophole is not enough. Labor Senators call on the government to adopt the 32 recommendations in the Senate Economics References committee report, including:

- (a) Making it easier to calculate SG liability, by considering the removal of the \$450 threshold and reviewing the definition of ordinary time earnings (OTE);

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10 Industry Super Australia, *Submission 20, supplementary submission 1*, p. 23.

11 Industry Super Australia, *Submission 8* (Economics Legislation Committee, Inquiry into the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 and the Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 to the Economics Legislation Committee), p. 21

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- (b) Consider requiring the payment of SG on a monthly frequency, rather than quarterly (especially given the administrative burden of making payments is reduced with SuperStream);
  - (c) Notifying employees when the ATO enters a payment plan with a business for superannuation obligations;
  - (d) Moving compliance to a data driven, proactive model rather than a reactive, complaints drive process;
  - (e) That default funds have a rigorous arrears collection process;
  - (f) Taking strong action on the use of insolvency to avoid superannuation obligations;
  - (g) Applying single touch payroll to all businesses, covering all employees and contractors on payroll.

1.40 Labor Senators believe that the Government should act with haste on this issue and see no reason to delay. The interdepartmental report was issued on 31 March 2017, the Senate Economics References Committee report was released on 2 May 2017 and the end of the year is fast approaching. Given that superannuation underpayment is exacerbated by foregone investment earnings and compound interest, it is important that action is taken quickly to preserve retirement balances and to reduce the long term pressure on the Federal budget.

### **Labor Senators position on this bill**

1.41 Labor Senators welcome the closure of the salary sacrifice loophole, but it is only one important small step in taking significant action on unpaid super

1.42 Labor Senators reiterate the recommendations made in the Senate Economics References Committee report “Superannuation Guarantee non-payment”. There is a pressing need to consider unpaid super as seriously as unpaid wages, bring superannuation guarantee reporting from the paper age to the digital age and shift the compliance model from a reactive complaints based approach to a proactive data driven one.

1.43 Labor Senators support the principle of collective bargaining and also support the principle that workers should be able to exercise choice of fund if there are sufficient safeguards. Given the difficulty of this policy problem, Labor Senators will seek to find amendments that support the principles of collective bargaining that seeks to lift superannuation arrangements beyond the community standard and fund choice where it can be exercised in an environment where there are adequate consumer safeguards.

1.44 Labor Senators also believe a better approach on Schedule 1 would be to await the results of the Productivity Commission inquiry before debating this bill in the Senate.

**Recommendation 1**

**1.45 To amend the bill in the Senate so as to:**

- **Ensure that there are no impediments to collective bargaining that would lift superannuation arrangements beyond the community standard; and**
- **Ensure that sufficient safeguards exist when workers exercise choice of fund.**

**1.46 Labor Senators reserve their final voting position on the bill depending on the outcome of such amendments.**

**Senator Chris Ketter**  
**Deputy Chair**

**Senator Jenny McAllister**  
**Senator for New South Wales**

# Appendix 1

## Submissions and additional documents received

### *Submissions*

1. Tasmanian Association of State Superannuants (TASS)
2. SCOA Australia
3. Victorian Trades Hall Council (VTHC)
4. Transport Workers' Union of Australia (TWU)
5. Dixon Advisory
6. Unions Tasmania
7. Queensland Nurses and Midwives' Union (QNMU)
8. UnionsWA
9. Australian Institute of Superannuation Trustees
10. Electrical Trades Union of Australia
11. BT Financial Group
12. Australian Council of Public Sector Retiree Organisations (ACPSRO)
13. Financial Planning Association of Australia
14. Australian Services Union (ASU)
15. United Voice
16. Australian Chamber of Commerce and Industry
17. Council of State Retirees' Associations Victoria Inc. (COSRAV)
18. National Foundation for Australian Women (NFAW)
19. Association of Financial Advisers
20. Industry Super Australia  
Supplementary submission
21. UniSuper
22. Health Services Union Western Australia (HSUWA)
23. Australian Manufacturing Workers' Union (AMWU)
24. CHOICE
25. Construction, Forestry, Mining and Energy Union (CFMEU)
26. Association of Superannuation Funds of Australia Limited (ASFA)
27. Financial Services Council
28. SMSF Association  
Supplementary submission

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29. Australian Council of Trade Unions (ACTU)
  30. Professionals Australia
  31. Australian Workers' Union (AWU)
  32. Law Council of Australia

***Answers to Questions on Notice***

1. Menzies Research Centre: Answers to questions taken on notice from a public hearing on 10 October 2017 (received 13 October 2017).
2. The Treasury: Answers to questions taken on notice from a public hearing on 10 October 2017 (received 16 October 2017).
3. Australian Institute of Superannuation Trustees: Answers to questions taken on notice from a public hearing on 10 October 2017 (received 17 October 2017).
4. Industry Super Australia: Answers to questions taken on notice from a public hearing on 10 October 2017 (received 17 October 2017).
5. Australian Securities and Investments Commission: Answer to questions taken on notice from a public hearing on 10 October 2017 (received 20 October 2017).

***Tabled Documents***

1. Document tabled by Mr Jeremy Cooper at a public hearing in Sydney on 10 October 2017.
2. Document tabled by Industry Super Australia at a public hearing in Sydney on 10 October 2017.
3. Document tabled by Industry Super Australia at a public hearing in Sydney on 10 October 2017.
4. Document tabled by ACTU at a public hearing in Sydney on 10 October 2017.
5. Document tabled by ASIC at a public hearing in Sydney on 10 October 2017.
6. Document tabled by APRA at a public hearing in Sydney on 10 October 2017.

## **Appendix 2**

### **Public hearings and witnesses**

*9 October 2017, Canberra ACT*

**Members in attendance:** Senators Bushby, Hume, Ketter, Paterson

**Witnesses**

MARONEY, Mr John, Chief Executive Officer, Self Managed Super Fund Association

*10 October 2017, Sydney NSW*

**Members in attendance:** Senators Bushby, Hume, Ketter, Williams

**Witnesses**

BECKETT, Mr Ian, Principal Adviser, Retirement Income Policy Division, Department of the Treasury

BEYDOUN, Mr Maan, Senior Specialist, Investment Managers and Superannuation, Australian Securities and Investments Commission

BRIGGS, Mr Blake, Senior Policy Manager, Financial Services Council

CABARRUS, Mr Julian, Director of External Affairs and Strategy, Association of Superannuation Funds of Australia

COOPER, Mr Jeremy, Private capacity

DALEY, Mr Brian, Capital Stewardship Officer, Australian Council of Trade Unions

FAHY, Dr Martin, Chief Executive Officer, Association of Superannuation Funds of Australia

FITZPATRICK, Mr Ged, Senior Executive Leader, Investment Managers and Superannuation, Australian Securities and Investments Commission

FOGARTY, Mr Wayne, Senior Adviser, Retirement Income Policy Division, Department of the Treasury

FRASER, Mr Bernie, Private capacity KIRKLAND, Mr Alan, Chief Executive Officer, Choice

LINDEN, Mr Matthew, Director of Public Affairs, Industry Super Australia

McCREA, Mr Glen, Chief Policy Officer, Association of Superannuation Funds of Australia

McGIRR, Mr Matthew, Policy Adviser, Australian Institute of Company Directors

MITCHELL, Mr Joseph, Strategic Organising Officer, Australian Council of Trade Unions

MORRIS, Ms Carolyn, Senior Manager, Policy Development, Australian Prudential Regulation Authority

MURRAY, Mr David, AO, Private capacity

O'HALLORAN, Mr Xavier, Policy and Campaigns Advisor, Choice

PETSCHLER, Ms Louise, General Manager, Advocacy, Australian Institute of Company Directors

PREMETIS, Mr Spyridon, Director of Policy and Research, Menzies Research Centre

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PRZYDACZ, Mr Jonathan, Policy Analyst, Retirement Income Policy Division, Department of the Treasury

PURVIS, Ms Alex, Senior Manager, Australian Securities and Investments Commission

ROWELL, Mrs Helen, Deputy Chairman, Australian Prudential Regulation Authority

SAMUEL, Professor Graeme AC, Private capacity

SCHEERLINCK, Ms Eva, Chief Executive Officer, Australian Institute of Superannuation Trustees

TSITSIS, Ms Litsa, General Counsel and Senior Policy Manager, Industry Super Australia

VOLPATO, Ms Karen, Senior Policy Adviser, Australian Institute of Superannuation Trustees