INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

29 September 2023

Director
Superannuation Insurance and Governance Unit
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600
superannuationobjective@treasury.gov.au

Dear Sir/Madam,

Submission on legislating the objective of superannuation – exposure draft legislation

The Institute of Financial Professionals Australia welcomes the opportunity to provide this submission on the objective of superannuation exposure draft legislation.

While we fully support consistency in future policy making around superannuation, which should broadly be aimed at providing income/benefits for individuals and their dependents in retirement, we do not support legislating the objective of superannuation. Our reasons for reaching this conclusion remain the same as our earlier submission made to Treasury on 28 March 2023 (see **Appendix A**) but with additional items for your consideration. These concerns are discussed below.

Issues with the terms 'equitable and sustainable'

In our view, the key words 'equitable' and 'sustainable' could be a flag post for future changes to the superannuation system. The exposure draft states:

1.53 Superannuation plays an important role in enabling Australians to save for their retirement, reducing reliance on the Age Pension. Tax concessions have a role in incentivising Australians to save for retirement but come at a significant and growing cost to the revenue required to fund services, so they need to be targeted at where they are needed most. Policy-makers will need to weigh up these types of factors when assessing future superannuation policies against the objective of superannuation.

This wording strongly implies that the sustainability of the superannuation system will be subject to the broader budgetary and fiscal position of the Commonwealth at any given time. This may be considered as 'fair game' for policy makers, using the proposed objective as a means to make changes to superannuation by making it less generous to individuals planning for their retirement. The proposed objective is already being used by the government through its proposed extra 15% tax to reduce tax concessions on superannuation balances. Such action

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not only targets retirement savings but promotes instability and uncertainty in the sector, which in turn may discourage investment.

It is our view that the objective will therefore not be beneficial for superannuation members, rather the main purpose of the objective is for regulators, policy makers, and the government, as it will allow them to continue tinkering with the system in the future.

Objective will not be enforceable

We welcome the introduction of the statement of compatibility in the exposure draft legislation but do have concerns about its operation and enforceability.

The exposure draft legislation states that the Bill "does not create any rights or duties that are enforceable in judicial or other proceedings[1]" meaning the Bill will not do anything enforceable. Failing to prepare or table a statement of compatibility will also "not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth[2]". Lastly, even if a statement of compatibility is prepared, it will not be "binding on any court or tribunal[3]". In the end, if the objective is legislated, there will be an obligation to prepare and lodge a statement of compatibility but it will not be binding on anyone, it will provide no rights and will have no consequences for failure to comply with that obligation. In other words, the legislation will be ineffective for everything due to its lack of enforceability.

There is also a risk that the objective will be used by regulators against superannuation funds in the future. For example, regulators may argue that a superannuation fund is acting inconsistently with the objective of superannuation because they may be carrying on property development or may have alternative investments and/or has too large a balance. Although the explanatory materials state the objective is not intended to enforce the objective against superannuation fund trustees, we believe the legislation should specifically prohibit regulators from using the objective in situations like this, otherwise regulators could state that a trustee's actions are not consistent with the objective of superannuation. Whilst the Bill creates no "rights", the draft explanatory materials state the objective is intended to serve as a "true north" for regulators. For this reason, we believe it could therefore influence how regulators enforce other regulatory and taxation laws on superannuation funds. Thus, if the objective is legislated, we believe it should be codified in the legislation to prevent situations like this from happening.

[1] Paragraph 1.80 of the exposure draft explanatory materials
[2] Paragraph 1.79 of the exposure draft explanatory materials
[3] Paragraph 1.78 of the exposure draft explanatory materials

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Closing comments

Please find the details of our previous March 2023 objective of superannuation submission which includes our recommended/suggested legislative changes at Appendix A.

Our association has also collaborated with Chartered Accountants Australia and New Zealand (CA ANZ) and the Institute of Public Accountants (IPA) on a joint submission on the objective of superannuation, which can be read alongside this submission.

If you have any questions in relation to this submission, please contact Phil Broderick on (03) 9611 0163 or pbroderick@sladen.com.au or Natasha Panagis on (03) 8851 4535 or n.panagis@ifpa.com.au.

Yours faithfully,

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Board Member
Chair, Superannuation Technical & Policy Committee

Natasha Panagis
Head of Superannuation and Financial Services

About the Institute of Financial Professionals Australia

The Institute of Financial Professionals Australia is a not-for-profit membership association (originally known as Taxpayers Australia, then more recently Tax & Super Australia) and has been serving members for over 100 years. With a membership and subscriber base of over 15,000 practitioners, our association is at the forefront of educating and advocating on behalf of independent tax, superannuation and financial services professionals.

This submission is made by us on behalf of our members' interests.

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INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

Appendix A

28 March 2023

Superannuation Insurance and Governance Unit
Member Outcomes and Governance Branch
Retirement, Advice and Investment Division
The Treasury
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Dear Sir/Madam,

Submission on the consultation paper: legislating the objective of superannuation

The Institute of Financial Professionals Australia is a not-for-profit membership association (originally known as Taxpayers Australia, then more recently Tax & Super Australia) and has been serving members for over 100 years. With a membership and subscriber base of over 15,000 practitioners, our association is at the forefront of educating and advocating on behalf of independent tax, superannuation and financial services professionals. Hence our interest in the consultation paper.

This submission is made by us on behalf of our members' interests.

Our association does not support legislating the objective of superannuation

While we fully support consistency in future policy making around superannuation, which should broadly be aimed at providing income/benefits for individuals and their dependents in retirement, for reasons set out below we do not support legislating the objective of superannuation as proposed in the consultation paper.

Firstly, we don't believe legislating the objective will achieve any real purpose. The proposed objective would not in any way be binding on current or future policy makers / governments. The consultation paper notes that:

> *Legislating an objective of superannuation will provide stability and confidence to policy makers, regulators, industry, and the community that changes to superannuation policy will be aligned with the purpose of the superannuation system.*[4]

[4] Legislating the objective of superannuation – consultation paper, page 4

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However, there is no accompanying legislative architecture that compels future governments to have any regard to the proposed objective, or even make compulsory a statement of compatibility around how any new superannuation legislation aligns with the new objective[5]. Statements of compatibility will at least ensure that governments turn their mind to how any new legislation aligns with the objective of superannuation and justify how this is the case. In short, this would provide at least some form of accountability.

Further, the proposed legislation of enshrining an objective is not binding. That said, we query whether the current parliament can even constitutionally bind a future parliament. This further supports the futile nature of the proposed purpose.

All told, we do not believe the proposed objective will achieve the above purpose (that future changes to the law will align with the legislated purpose of superannuation) and therefore question the utility of the exercise in the first place.

Secondly, legislating the proposed objective comes with risk. The proposed objective is in our view loaded with terms that are open to interpretation or manipulation by future governments. For example, a 'dignified retirement' means different things to different people depending on the lifestyle to which they are accustomed. Further, whether the superannuation system is 'sustainable' may be subject to the broader budgetary and fiscal position of the Commonwealth at any given time. If an objective is to be legislated, it should be tightly drafted, and less open to interpretation than the objective proposed.

When legislating an objective of superannuation was first proposed in the 2014 Financial System Inquiry (FSI) chaired by David Murray, it was to act as a shield against future policy changes that ran counter to that objective. By contrast, it is arguable that the proposed objective contained in the consultation paper may be used as a sword by policy makers – effectively granting them licence to make changes to the system to make it less generous to individuals in retirement.

To this end, we note the close proximity of the release of the consultation paper (20 February 2023) and the 28 February announcement by the government that it will increase the tax rate for superannuation fund earnings from 15% to 30% for individuals with account balances above $3 million. In the announcement of the new proposed tax, the Prime Minister linked it to the paying back of the 'trillion dollars of debt' currently owed by the government and to making the superannuation system more 'sustainable' (a term contained in the proposed objective).[6] To be

[5] For example, each piece of Commonwealth legislation must contain a statement of compatibility with human rights

[6] Joint press conference of the Prime Minister and Treasurer, Parliament House, Canberra, 28 February 2023

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clear, this is not a criticism of the new proposed tax or a commentary on its merits, but rather an objective observation.

Moving forward, there are concerns that amounts in superannuation that provide for a retirement that is more than 'dignified' or provide for concessions that are not 'sustainable' when measured against the fiscal position of the Commonwealth at any given time, may be considered as fair game for policy makers, using the proposed objective as cover (in that sense, using the objective as a sword rather than a shield). Such action not only targets retirement savings but promotes instability and uncertainty in the sector, which in turn may discourage investment.

We are also of the view that it's undesirable to legislate the objective of superannuation in isolation. As observed in the Retirement Income Review in 2020, Australia's retirement income system consists of three key pillars – superannuation, a means-tested and publicly funded Age Pension, and voluntary savings (including home ownership). These pillars interact and are inextricable. For example, as noted in the Retirement Income Review, an individual relying on the Age Pension and/or superannuation in retirement will have a better financial quality of life if they own their own home (and are therefore not paying rent or mortgage repayments). To reiterate, any legislated superannuation objective aimed at influencing policy makers moving forward, must be considered in the context of the overall retirement income system encompassing these other pillars – it should not be formulated in isolation.

Enshrining the objective into legislation will also limit flexibility to regularly review that objective every few years to account for changing circumstances such as the rapidly aging population, other demography changes, or catastrophic disasters/pandemics/wars.

Stepping back, if one of the motivations in legislating an objective of superannuation is that the government is concerned that current conditions of release provided for in schedule 1 of the *Superannuation Industry (Supervision) Regulations 1994* (**SISR**) are too loose and are not aligned with providing for an individual's retirement, then a simple mechanism already exists for change. The government can simply amend the regulations to tighten the conditions of release if it so chooses without the need to legislate an objective.

While we acknowledge the consultation paper is aimed at legislating the main objective of superannuation, there are other very important subsidiary objectives of the superannuation system which there is no acknowledgement of in the consultation paper, such as delivering income for death benefit pensions. Also, if a superannuation fund has a relatively small balance and a member still has a mortgage on the family home on foot, then the individual may be better off taking a lump sum and paying down their mortgage rather than having a superannuation income stream to use to pay down that mortgage (noting that, as identified in

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the 2020 Retirement Income Review, home ownership is a key differentiator between a comfortable retirement and a not so comfortable one).

More broadly, and as a general observation, much of the impetus in this year's debate around limiting tax concessions in superannuation has been fuelled by some extraordinarily large balances held by individuals, with the media latching onto a lucky individual who had a balance of $544 million and 27 SMSFs with more than $100 million in assets. These large balances are very much the exception, however, with only 0.5% of individuals having a superannuation balance of $3 million or more. While these balances are extraordinarily high, most are a legacy of rules that no longer exist. Having tens of millions in superannuation is unlikely to be possible under current rules that limit contributions and transfers. But this was not always the case. Up until 2006, Australians could make unlimited contributions and transfers/rollovers to their superannuation accounts, with limits at the time only imposed on how much could be withdrawn tax-free, known as the reasonable benefit limit. That year, however, the Coalition government imposed restrictions on contributions people could put into their funds. Tighter contribution restrictions were then imposed in 2017.

The key take-out is that massive balances that still exist are in most cases a legacy of much more generous contribution and transfer rules that no longer exist and are therefore simply not possible to amass under the current system. Further, they will be rectified by the passage of time as each of these members pass, their large superannuation balances will leave the superannuation system.

The sole purpose test already exists

We believe the answer to what the objective of superannuation is for already exists by way of the sole purpose test.[7]

The sole purpose test requires that superannuation funds are maintained for the purpose of providing retirement benefits to its members, or to their dependents if a member dies before retirement. It also means that fund trustees must make decisions that are in the best retirement interests of their members, not their current interests (or those of related parties).

As the sole purpose test already exists, it could be revisited to tighten up existing preservation rules if access to superannuation is currently thought to be "too easy".

The phrase 'preserve savings' in the proposed definition aims to restrict access to superannuation savings for a person's retirement savings only. As such, if early access to superannuation is a key concern, amending the preservation and condition of release rules will

[7] Section 62 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**)

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stop members from accessing their benefits to pay for discretionary items, such as cosmetic medical procedures.

However, if 'preserve savings' means that superannuation will be restricted to a person's retirement only, we question whether such a narrow definition will impact the other condition of release rules that allow members to access their benefits for 'non-retirement' or 'ancillary purposes', such as permanent incapacity, temporary incapacity, severe financial hardship, compassionate grounds, or where a release authority is given to a fund by the member or the ATO, such as a Division 293 or excess concessional or non-concessional contributions release authority. We hope this is not the case.

We have seen superannuation used for non-retirement or ancillary purposes in the past, such as the COVID-19 early-release scheme at the peak of the pandemic, and was proposed to be accessed under the former government's first homebuyer program. However, if the objective of superannuation is aligned with the sole purpose test, which requires funds to be maintained to pay benefits to members for core and/or ancillary purposes, then a potential solution is to revisit and place further limitations the preservation and condition of release rules to ensure we have a more targeted measure that stops access to early access schemes.

Trustees should not be pressured to invest in 'nation-building investments'

The consultation paper states the purpose of superannuation must reflect that the system needs to fit within the broader fiscal policy. It also indicates that the phrase 'equitable and sustainable' aims to ensure:

- The retirement income system provides "similar outcomes for people in similar circumstances" and that government support should be targeted to those in need, and
- The system should be 'sustainable' in the sense that it is "robust to demographic, social and economic change".

This view links up to the government's position that trustees of superannuation funds should make investments in 'nation-building investments' so that it provides good opportunities to those who need it otherwise without this investment, it may be to the detriment of a good and 'dignified retirement' for many Australians.

We believe that trustees of superannuation funds should not be pressured to invest their members monies into nation-building investment projects that the government may have on its agenda, such as boosting housing supply, investing in aged care, climate change and renewable energy, to name a few.

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Rather, trustees have a legal duty to act in the best interests[8] of their members, which means they should not put their members' retirement savings into potentially risky projects that may have uncertain or sub-par investments returns. Trustees are responsible to identify good investments for their members and must make sure they're diversified and that their investment decisions are delivering strong returns and the best financial outcome for members. It is up to trustees to determine whether they wish to participate in nation-building projects where it is consistent with their members' best interests, which means getting the best financial returns possible for their members.

Ultimately, superannuation is a pool of capital held on behalf of Australians who have their own retirement needs and objectives. It should not be used to help the government fund its nation-building projects, despite the fact these may be equitable and socially worthy projects that may benefit Australians and the government's budget bottom line.

We now consider the questions contained in the consultation paper:

Consultation question 1: What do you see as the practical benefits or risks associated with legislating an objective of Australia's superannuation system?

While in its proposed form the risks outweigh the benefits, we do acknowledge the upside of legislating a binding objective of superannuation, principally that a binding objective may prevent governments from capriciously tinkering with the superannuation rules, and making changes that run counter to the objective. This in turn would help promote certainty in the sector and encourage investment. A legislated objective may also limit the government's ability to use the system as a honey pot or a part solution to paying off government debt, by further reducing concessions.

For the reasons outlined above, we do not believe the purpose of superannuation will achieve that outcome. Rather, legislating the proposed objective carries with it certain risks, namely that:

- A broad objective such as that proposed is open to interpretation and may be used as a sword to weaponize policy makers to make changes to superannuation that do not align with helping to provide for an individual's retirement
- Enshrining the objective into legislation will also allow less flexibility to regularly review that objective every few years to account for changing circumstances
- Formulating an objective in isolation without factoring in the other key pillars of the retirement income system is flawed.

[8] Section 52(2) SIS Act

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For those reasons, we oppose the purpose of superannuation and believe it should not be legislated as proposed.

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

As noted, in our view the proposed objective is too lengthy/broad, contains too many terms that are open to interpretation, which in turn may arm future governments to make changes to superannuation rather than the objective acting as a shield to protect the system from political interference which is unrelated or is in conflict with the objective.

To that end, it goes without saying that the superannuation system needs to be 'sustainable' (just like the childcare system, the NDIS, the family tax benefit system, defence spending, etc – sustainability is not unique to superannuation), while terms such as 'dignified retirement' are open to interpretation and have a different meaning to each individual depending on the lifestyle to which they are accustomed.

Any proposed objective should be tightly drafted, and less open to interpretation. As stated, if an objective is needed, it should be based around the existing sole purpose test. In our view the core objective of superannuation is better captured by this existing test (see earlier) which simply requires that superannuation funds are maintained for the purpose of providing retirement benefits to its members, or to their dependents if a member dies before retirement.

Consultation question 3: Is the proposed approach to enshrining the objective in legislation appropriate? Are there any alternative ways the objective could be enshrined?

For the foregoing reasons, enshrining the objective in superannuation would achieve no real purpose, in the sense that it would not be binding on future governments and indeed could be completely ignored. The only way it could be made truly binding would be if it was hardwired into the Constitution (which we accept is unrealistic).

As noted earlier, enshrining the objective into legislation will also limit flexibility to regularly review that objective every few years to account for changing circumstances such as the rapidly aging population or catastrophic disasters. A broad definition is open to interpretation and can be used as a sword to weaponize policy makers to make changes to superannuation that do not align with helping to provide for an individual's retirement.

As stated, alternative pathways could take the form of legislating a compulsory statement of compatibility for any future superannuation legislation (forcing governments to justify, or at least turn its mind to, how that legislation aligns with the sole purpose test).

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While the sole purpose test is a stripped back objective, it at least forces legislators to turn their mind to a core, objective purpose of superannuation; providing a shield against future adverse changes to superannuation and some accountability for future legislators.

If the objective of superannuation is to be enshrined into legislation (which we oppose), given the reasonably broad scope of various pieces of superannuation legislation, including the *Superannuation (Industry) Supervision Act 1993* (Cth), *Corporations Act 2001* (Cth), *Income Tax Assessment Act 1997* (Cth) and various other Acts including those governing the Australian Financial Complaints Authority and family law matters, it may be preferable that a separate stand-alone Act govern the objective of superannuation.

Consultation question 4: What are the practical costs and benefits of any alternative accountability mechanisms to the one proposed?

Our alternative accountability mechanism of legislating a compulsory statement of compatibility for any future superannuation legislation (forcing governments to justify, or at least turn its mind to, how that legislation aligns with the sole purpose test) has zero cost attached to it. The benefits lie in genuine government accountability, if only in a limited way.

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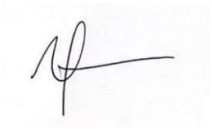
If you have any questions in relation to this submission, please contact Phil Broderick on (03) 9611 0163 or pbroderick@sladen.com.au or Natasha Panagis on (03) 8851 4535 or n.panagis@ifpa.com.au.

Yours faithfully,



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