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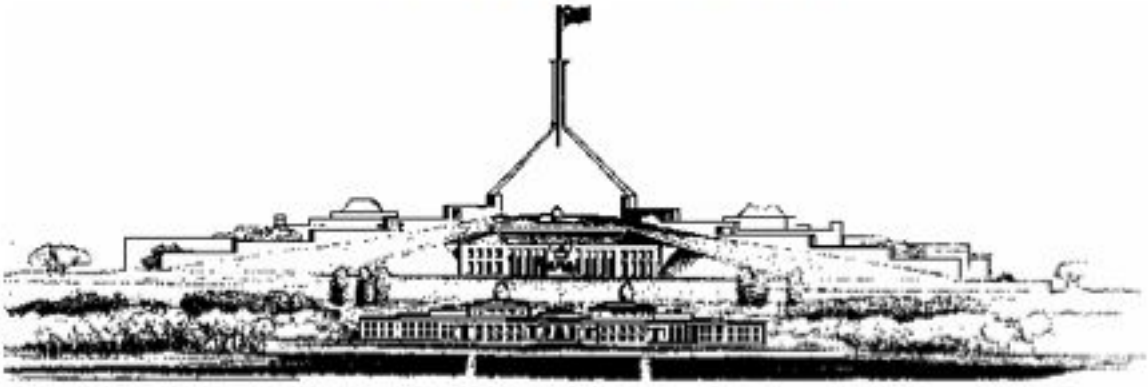

THE SENATE

SUPERANNUATION LEGISLATION AMENDMENT BILL (No. 3) 1999

Second Reading

SPEECH

Monday, 20 September 1999

BY AUTHORITY OF THE SENATE

SPEECH

Date	Monday, 20 September 1999	**Source**	Senate
Page	8420	**Proof**	No
Questioner		**Responder**	
Speaker	Sherry, Sen Nick	**Question No.**	

Senator SHERRY (TAS) (6.11 pm)—The legislation we are dealing with, Superannuation Legislation Amendment Bill (No. 3) 1999 , can be summarised by the theme that it deals with the structures of investment for the regulation of self-managed superannuation funds, particularly important for small business. It should be examined in conjunction with Superannuation Legislation Amendment Bill (No. 4) 1999 , which deals with the way in which superannuation moneys can be invested. That is an issue for another debate, but it is related.

There are two schedules to this legislation. The first establishes a new category of small superannuation fund with fewer than five members. It also transfers the regulation of self-managed superannuation funds from the Australian Prudential Regulation Authority, known as APRA, to the Australian Taxation Office, known as the ATO. There is a new definition of an excluded superannuation fund. In addition to requiring the fund to have fewer than five members, all members of the fund will be required to have a business or family relationship to the trustees of the fund.

The ATO will have responsibility for ensuring that self-managed superannuation funds comply with the non-prudential requirements of superannuation law. A fund that has fewer than five members and that is not self-managed will continue to be subject to prudential supervision of APRA and will be required to appoint an independent trustee.

The second schedule of the legislation provides for a reduced supervisory levy for self-managed funds. By way of background, there are 180,000 excluded funds. Sixteen per cent, or about 30,000 of them, have armslength members. The majority of excluded funds consist of one or two members. There is $42 billion in assets. This comprises 97 per cent of the total number of superannuation funds but represents only—although it is a substantial only in monetary terms—12 per cent of the total assets in superannuation funds and 1.8 per cent of fund members.

A fund is self-managed if it satisfies a number of criteria. Firstly, it has to have fewer than five members. Secondly, all members of the fund must be trustees and there can be no other trustees. Thirdly, there must be a family or business link between each member of the fund.

In the report of the Senate Economics Legislation Committee, which considered this legislation, a number of adverse impacts are highlighted by several expert witnesses. There will be a number of unfortunate impositions as a consequence of this legislation. They can be broadly categorised into four main concerns. Firstly, there will be increased complexity and confusion by introducing the ATO as a third superannuation regulator. Secondly, there will be increased costs to excluded funds, who will need expert advice on the impact of this bill as a minimum, and may need to restructure—obviously leading to further flow-on costs. Thirdly, there will possibly be a triggering of the capital gains tax liability and the possibility of stamp duty liability. Fourthly, there is discrimination against some relationships, such as of friends; but in particular we should take note that same-sex couples who are currently legitimate members or trustees of an excluded superannuation fund will have to cease the trustee relationship.

For the record, we were disappointed in the evidence given by Treasury and, in particular once again, in that given by the Assistant Treasurer, Senator Kemp. There clearly was side-stepping and evasiveness once again about the tax liabilities that in particular may be triggered by this legislation. If we look at the government's proposed case for change, the case that is put for changes to the regulation of excluded funds is that arms-length members of excluded funds are not able to best protect their interests in their fund, because it is not regulated by APRA or an approved trustee. There has been little evidence provided for this argument to suggest that arms-length members are not able to best protect their interests in excluded funds. There is a theoretical case that can be put in support of this argument from the Liberal government, but it did not, as usual, present any evidence.

Similarly, the government did not provide evidence in support of the need to transfer the regulation of excluded superannuation funds from APRA to the ATO. It seems that the main reasons for the transfer are twofold. I quote from the evidence given to the committee:

The tax office is better geared and more experienced than APRA in dealing with the large number of returns that would be expected from the small funds. It has the electronic lodgement arrangements and so on that APRA is yet to develop. The facts that, firstly, they do not require prudential supervision—and APRA is a prudential supervisor—and, secondly, the fit in efficiency and processing suggest that the tax office would be a better regulator of these particular funds than what APRA would be.

That is the evidence in support. This evidence does raise some significant concerns. APRA and the Insurance and Superannuation Commission, its predecessor, seem to be admitting that they have not been very successful in regulating, in either prudential or compliance terms, excluded superannuation funds in the past.

If this is the case—and there is evidence that excluded funds require further regulation—the transfer of the regulation to the ATO may be—`may be'—prudent public policy. This policy is, however, likely to cause a number of adverse impacts on superannuation funds and their members which must be balanced against any perceived public policy benefits arising from the proposed changes.

There was a range of evidence about adverse impacts on superannuation funds. A number of witnesses suggested that this bill would add to the already enormous complexity and confusion surrounding superannuation regulation in Australia. The Association of Superannuation Funds of Australia told the committee that the transfer of regulation from APRA to the ATO would create a third regulator where there were previously only two. Superannuation originally had only one regulator, the ISC. This will cause increased confusion among superannuation members, trustees and administrators. Employers are also likely to be confused by the addition of a third regulator—particularly small business will be confused, hurt and hit with increased regulatory complexity yet again.

The Australian Society of Certified Practising Accountants suggested to the committee that the introduction of a third regulator for superannuation was anti-Wallis, in that it contradicts the spirit of regulatory consistency and competitive neutrality that was at the heart of the Wallis financial sector inquiry reforms. This evidence directly contradicts Senator Kemp's claim that it is implementing a recommendation of the Wallis report.

ASFA also suggests that having three regulators is likely to result in an inconsistent philosophy applied to the regulation of superannuation. It can be no more inconsistent than the current government's approach philosophically and practically to superannuation matters. If this does occur and the regulators do apply different interpretations to superannuation laws and regulations, greater confusion will occur, to the detriment of retirement incomes policy. The Liberal government has consistently chopped and changed the superannuation rules since it introduced the administratively complex and costly superannuation so-called surcharge—in effect, a tax.

Senator Kemp—I knew it. I won my bet.

Senator SHERRY—Senator Kemp can laugh about what is a very serious issue, the superannuation surcharge tax. We tabled a report today about the abolition of the advance instalment. The retirement incomes policy of the country has been a continuous casualty of the constant confusion caused by these sorts of changes. Further confusion is more likely to occur under the government's legislation, as some small superannuation funds may move between regulators as their circumstances change.

Senator Kemp interjecting—

Senator SHERRY—Senator Kemp would be better advised to go back down to Victoria and chase up the former Treasurer who retired at the last election—and, in fact, to chase up the Premier, who may be retiring—and just see what they have done about collecting that super tax. As I understand it, nothing has been done about it by Senator Kemp; and he should better concentrate his energies on that particular sort of problem.

I would like to comment now on some aspects of increased costs. One of the alleged purposes of this bill is to reduce the cost of supervision for excluded superannuation funds. Many of the expert witnesses who presented evidence before the committee or made submissions argued that costs are likely to increase, at least in the short term. The answer of the Assistant Treasurer, Senator Kemp, to a question on notice from the committee chair, Senator Ferguson—not from Labor—was that the costs could be between $300 and 1.5 per cent of the fund assets. What Senator Kemp in his obfuscation was very careful to avoid—and I think it was a deliberate evasion yet again—and what he did not say in his answer was that, in order to be cost effective, accountants and superannuation consultants generally only recommend excluded superannuation funds to persons with more than $100,000 to

invest in the fund. One point five per cent of a fund with a minimum balance of $100,000 would result in a fee of at least $1,500 to appoint an approved trustee.

We should also have a look at the increase in fines for contravention. There can be inadvertent contraventions of the legislation. It is certainly not to be condoned, but it can happen, particularly when you have a government that is chopping and changing superannuation regulations so frequently and then having to review the changes it makes. The fine of 100 penalty units in the event of contravention is a doubling of the current maximum fine of 50 penalty units. The survey by the National Institute of Accountants also stated that the creation of a distinct class of small superannuation funds is likely to in crease the cost of establishing a small fund as members seek extra professional advice.

It is also clear to everyone but the government—in particular, Senator Kemp—that there may be adverse tax consequences due to the application of this bill, particularly in the area of capital gains tax, which we hear so much about from the government. This liability can be borne by the superannuation fund and fund members. So we have, on the one hand, the government waxing lyrical about doing something about capital gains tax; on the other hand, in respect of this legislation, members may in fact incur a capital gains tax obligation—I see Senator McGauran listening very intently—on small business.

Senator Kemp—I think you are struggling, Nick.

Senator SHERRY—If you want to see a real struggle, you should see Senator Kemp try to perform before a Senate committee answering these questions. But I did refer a direct question to Senator Kemp and asked him to provide a detailed answer. He avoided the practical applications with respect to the possible tax liabilities of the proposed change. The argument that a fund would not necessarily have to restructure in a way which would trigger a tax liability is spurious at best and actually goes against the stated aim of the government's bill.

I want to refer also to very impressive questioning from the other side. Again, the chair, Senator Ferguson, and Senator Watson—one of the few in the government who know anything about these issues—directly raised the issue of the sale of assets with the Treasurer and the Assistant Treasurer, Senator Kemp, and received a very unsatisfactory answer. I quote:

Senator WATSON —I think this question is for the minister:—

that is, Senator Kemp—

given the difficulties of funds which may have to change because of the new rules, is there any possibility of capital gains rollover relief?

Senator KEMP —My understanding is that the current rules provide sufficient capacity to deal with the issues where capital gains may occur. The legislation which exists at the moment provides relief.

Senator WATSON —Where, for example, a fixed asset has to be sold?

Senator KEMP —We are unconvinced that we need new rules to cover that. Obviously if there were particular views put forward we would listen to them, but I would have to say that the government's position coming to this hearing is that—

CHAIR —

this is Senator Ferguson intervening—

For example, say you have some real estate and you have to sell it—wouldn't there be capital gains tax under that situation?

Ms Lejins dashes in to intervene to assist the minister and says:

If the underlying fund actually disposes of an asset and, in the case of the disposal of that asset, a capital gain is realised, that fund will be liable for capital gains tax.

I emphasise that again:

. . . that fund will be liable for capital gains tax.

And the chair finally declares:

So there will be capital gains tax?

All of this is despite Senator Kemp's elusive and evasive evidence about that issue.

I briefly mention some aspects of concern about discrimination. This legislation, by requiring members of the funds to be family members but excluding same sex families or people in a business relationship, will force excluded funds to restructure and it will be no longer possible to ensure benefits that are directed to a same sex partner in the event of death. We see that as an absurd contraction of the existing rights and entitlements of persons. It may not be a same sex partner, as was indicated in some of the evidence before the committee. It may just be that a person does not want a relative or a person with whom they have a business relationship as a trustee —they may want a friend. In this particular case, I do not think the witness was willing to trust the relative being a trustee of the fund—for perfectly good and legitimate reasons. That is their choice.

Finally, this bill again reinforces the perception and the fact that this government has little or no regard for a coherent retirement incomes policy. Several aspects of this bill contradict the Liberal government's own retirement income principles—alleged principles, I should say. Firstly, they increase complexity and undermine public confidence in superannuation. People are less likely to invest additional contributions in superannuation if they do not understand—or have confidence in—the regulatory environment surrounding their retirement nest egg. Secondly, increased costs will result in lower retirement incomes. Simple arithmetic suggests that increased compliance costs must come out of the retirement income of fund members. Finally, the potential for capital gains tax liabilities triggered as a result of complying with this bill will further erode retirement incomes.

Sitting suspended from 6.29 p.m. to 7.30 p.m.