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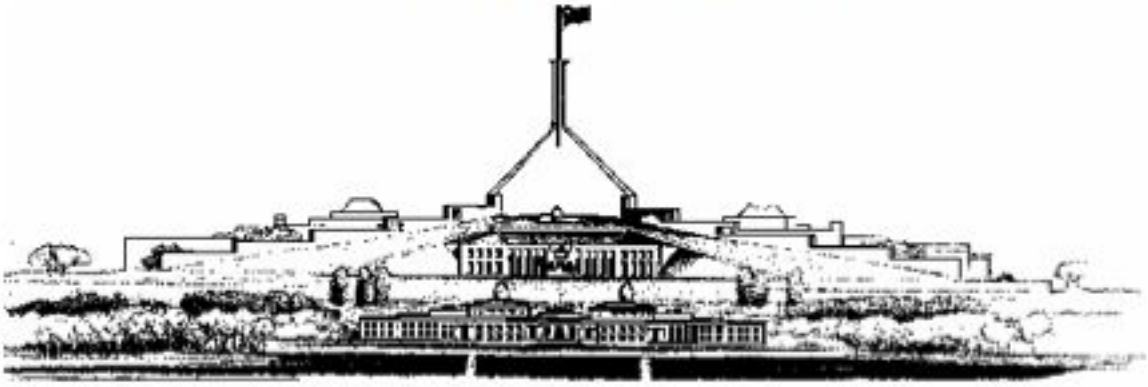

THE SENATE

SUPERANNUATION LEGISLATION AMENDMENT BILL (No. 4) 1999

Second Reading

SPEECH

Wednesday, 8 December 1999

BY AUTHORITY OF THE SENATE

SPEECH

Date	Wednesday, 8 December 1999	**Source**	Senate
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Questioner		**Responder**	
Speaker	Sherry, Sen Nick	**Question No.**	

Senator SHERRY (TAS) (9.51 am)—We are dealing with Superannuation Legislation Amendment Bill (No. 4) 1999 . The stated policy objective of this bill is to ensure that superannuation savings are invested prudently, consistent with the requirements of the Superannuation Industry Supervision Act 1993 for the purpose of providing retirement income and not for providing current day benefits. This is a policy objective that Labor established when in government. It is an objective that we still support. However, it is precisely because we support this objective that we cannot support this bill, which by the admission of the Assistant Treasurer, Senator Kemp, extends the opportunity for superannuation funds to be invested for current day benefits.

Labor will be opposing this bill based on five key criteria. Firstly, the government has provided no substantive evidence of a systemic abuse of the current investment rules by what are known as do-it-yourself superannuation funds that would require the proposed changes as they are drafted. Secondly, the changes contained in the Superannuation Legislation Amendment (No. 3) Bill, which passed the parliament with the support of the Labor opposition, should begin to address many of the problems where they may exist. Thirdly, there are other ways of tightening the existing laws that will better address the perceived problems where they may exist. Fourthly, this legislation, if passed, will make it tougher for small business. It will increase restrictions, red tape and costs. Fifthly, it does have some adverse implications for people living in rural and regional Australia.

The government has argued that some self-managed superannuation funds, SMFs, are not complying with the spirit of the current laws, which are designed to prohibit superannuation funds from borrowing. The government claims that, where this practice is occurring, it increases the risks associated with superannuation fund investments and is contrary to a retirement income policy designed to ensure that superannuation savings are preserved until retirement and not accessed for current use.

Labor in determining its position on this bill, and on just about every bill that comes before the Senate that amends legislation established by a Labor government, asks itself: how will this improve the operation of the superannuation law for the benefit of all Australians? A threshold issue for Labor is whether, as the government claims, the practice of superannuation funds borrowing and using retirement income for current day use is so widespread and constitutes such a systemic threat to retirement incomes policy and to the retirement incomes of fund members that it needs to be significantly changed. In addition, Labor has been required to make a judgment on whether the government's legislation actually achieves what it claims it is designed to achieve. To Labor, the obvious answer to all of these questions is no, the government fails the tests.

To ensure that our legislation was based on the widest possible evidence, Labor referred this legislation to the Senate Select Committee on Superannuation and Financial Services. The decision to refer the bill to a specialist committee for examination was also taken to allow the government the opportunity to present its case in support of the bill. The usual materials supporting the bill—the explanatory memorandum, budget announcement and various press releases—did not present an appropriate supporting case. Disappointingly, the government did not provide adequate evidence in support of its bill.

According to the evidence presented to the committee, the opposition is not convinced that there is a widespread practice of inappropriate use of superannuation funds. The committee did not receive convincing evidence that the retirement income of fund members is at high risk. However, where the government can show that unusual investment practices which place retirement incomes at unacceptable risk are occurring, Labor will support appropriate measures to crack down on this type of behaviour.

Firstly, is there a need for change? The Insurance and Superannuation Commission, or ISC, as it was known, carried out a survey in support of its claims for the need for this legislation. The government drew upon a random survey of 1,000 excluded funds conducted by the ISC in 1997. The survey found that around 20 per cent of excluded funds were investing in unit trusts that were effectively controlled by the fund members or the employer. It appears that one-half of these unit trusts were undertaking geared investments. Around 13 per cent of superannuation funds were leasing or renting assets to associated parties such as members or employers.

The ISC conducted follow-up fieldwork of 100 selected funds which provided an example of superannuation funds investing in unit trusts which, in turn, invested with the employer sponsor, made loans to members and employer sponsors, and leased assets to employer sponsors. The government claims, based on the evidence of the ISC survey and fieldwork, that these practices affect the integrity of the SIS investment rules.

The majority of the evidence provided to the committee roundly criticised the data provided by the government in support of the bill, in particular the fieldwork conducted by the ISC on which the bill seems primarily based. Much of the evidence to the committee argued that the ISC's fieldwork, while identifying problems with the investment practices of some of the 100 chosen funds, did not consist of a representative sample of excluded funds. In addition, evidence from the Australian Society of Certified Practising Accountants pointed out that the research was now three years old and was undertaken by a different regulator to the Australian Taxation Office, which now regulates SMFs as a consequence of the recent legislation in the No. 3 bill that I referred to earlier.

The Assistant Treasurer provided a response to questions taken on notice during the committee hearings which included some additional information about a small sample of 145 funds conducted in 1998-99 based on funds' historical activities. The sample found that around seven per cent invested in geared trusts compared to a total of around 30 per cent that invested in related trusts. Where breaches of the existing law were identified, APRA put in place enforcement or rectification action. It would have been more useful for the committee to have had access to this information at an earlier stage and in a fully disclosed format. The opposition referred this bill to the committee on the premise that it was incumbent on the government to provide more substantial evidence of the need for the measures contained in the bill.

The additional survey conducted by APRA does not provide any substantive support for the legislation. Even assuming that the survey was both representative and robust, the information provided by the Assistant Treasurer actually supports the retention of the existing legislation. If breaches of the current laws were identified and APRA were able to take corrective action, that would support the view expressed by many at the hearings that there is little need for changes as contained in this SLAB 4 legislation. I emphasise that point. Where some abuse has been taking place, the regulator, APRA, has been able to enforce the law as it now stands. The Australian Taxation Office, which now regulates this area, will, I suspect from evidence we have received, be a more efficient regulator in this regard.

The committee received little, if any, convincing evidence of SMFs failing. The Small Independent Superannuation Funds Association argued that, where SMFs had invested in a small business, the success or failure of the business itself did not necessarily equate to the success or failure of the SMF. This is because not all SMFs invest in small business or property. In addition, the government did not provide any conclusive evidence of SMF fund members losing their retirement incomes as a result of poor investment practices and becoming fully or partly dependent on the government.

I will make some comments about self-managed superannuation fund investment returns. One would expect that, if self-managed superannuation funds are conducting some sort of risky investment practices, this would be reflected in the investment returns of these funds. However, evidence provided by the Australian Society of Certified Practising Accountants citing an article from the *Personal Investment* magazine stated that, according to research conducted by Rainmaker Information Services and Rice-Kachor Research, SMFs actually earned better than average investment returns in the three years up to 1997. The government was unable to refute this evidence, which does not support the need for this bill to be passed.

There is now a significant doubt about the tax concessionality of superannuation. Currently, higher income earners pay tax on superannuation at 45 per cent. With the new income tax rates to apply from 1 July next year, most middle income earners will be on the 30 per cent tax rate, which is the same rate for superannuation. Lower income earners pay tax on superannuation at a rate higher than their marginal tax rate. Thus, it can be argued that superannuation for a significant number of people is no longer taxed concessionally. But it can be argued that, if it is, it should not be used for current day purposes or investment practices which place the generous tax concessions at undue risk. In answer to a question on notice from the shadow Assistant Treasurer, Kelvin Thomson, the government was unable to provide evidence of the extent of tax concessions used by SMFs.

In addition, the government has contradicted its own claims that superannuation funds should not be invested in assets with the intent of using them for current day purposes. In a speech in Brisbane on 28 May 1999, the Assistant Treasurer, Senator Kemp, said in commenting on the SLAB 4 changes:

Funds with fewer than five members will be able to invest up to 100 per cent of their assets in business premises leased to members or the employer-sponsor of the fund. This will enhance the ability of small business owners to use their superannuation savings to invest in their own business premises.

If the government has admitted that it is extending the opportunities for small business owners to invest their superannuation savings in their business premises, surely that is in conflict with the claim that superannuation funds should not be used for current day benefits.

In addition, deliberately permitting—in fact, encouraging—a superannuation fund to invest all its assets in one asset, as opposed to one asset class, is hardly consistent with what is generally considered to be an appropriately diversified investment strategy that balances risk and return. While there are a few investment restrictions on trustees of super funds, they are required to ensure that the funds' investments as a whole are diversified and do not expose the fund to risks from inadequate diversification. A strong case could be argued that the extension of the business real property rule to 100 per cent does not allow for appropriate diversification.

As was the case with fund returns, one would expect that, where the government has identified an alleged abuse of the investment rules, this legislation would result in revenue savings. However, in both the explanatory memorandum of the bill and evidence before the committee, the government was unable to provide any substantial evidence of a risk to revenue that the existing investment rules pose. Neither was a strong case mounted that additional revenue will flow or that the existing revenue base will be preserved as a result of the passage of the bill. In response to a question on the revenue impact of the bill, Mr Painton from the Treasury said:

As presented in the 1998-99 budget, it was in terms of not having a revenue effect within the forward estimates years. But the understanding is that, over time, these measures will improve the integrity and investment rules, and that is expected to have a positive effect on the budget. But there is no identified budget effect within the forward estimates . . .

It is the prerogative of governments to ask the parliament to pass legislation which relies on an understanding rather than on cold hard facts. But it is the responsibility of opposition parties to scrutinise the evidence presented by a government and, where it does not measure up, to reject the legislation it purports to support.

We have an existing investment rules regime and it should be possible for the government to substantiate its claims with existing experience or robust statistical modelling and analysis. The government does have available to it the resources of the highly respected Retirement Incomes Modelling Unit in Treasury which is able, given the availability of appropriate data, to model the longer term effects of government retirement incomes policies. It would have greatly supported the government's case if it had provided some analysis of the government's proposed changes through the RIM Unit. The facts are that there is little substantial evidence supporting the government's bill: SMFs are not in crisis, retirement incomes are not being jeopardised and there is little evidence to support that the alleged high risk investment practices the government claims are occurring are causing a systemic breakdown in the retirement incomes system.

Is the existing law adequate? The Australian Society of Certified Practising Accountants claimed that the provisions of the existing laws regulating investment practices are adequate and that existing abuses, where they occurred, are minimal. They also argue that the government's proposed changes were like using a sledgehammer to crack a walnut and were not the most effective way of meeting the government's stated policy objective.

The association also argued that the changes implemented as a result of the recent passage of the SLAB No. 3, which require all SMF fund managers to be trustees of the fund and transfer regulation of SMFs to the Australian Taxation Office, go a long way to ensuring that advertent or inadvertent breaches of the existing investment rules were remedied. We had similar evidence from Mr Murray Wyatt from the CPAs.

I would now like to turn to the issue of a unit trust look-through requirement. Evidence to the committee raised the issue of whether there should be a look-through requirement for auditors to require them to look through the fund and into any unit trusts that the fund operates to ensure that the unit trusts are also complying with the spirit of the legislation and not conducting risky or non-commercial practices. This would seem to be a sensible suggestion and is something that Labor would encourage the government to consider as an alternative to what is being proposed here. In support of the argument that the transfer of the regulation of SMFs to the tax office will result in better compliance than occurred previously is the additional $6 million in resources the ATO will be putting into its role as SMF regulator.

A range of other issues which this bill raised have convinced the opposition that it would not be good public policy to support this bill. Many of the witnesses appearing before the Senate committee examining the bill claimed that the proposed bill will increase the complexity of operating an SMF. This is disturbing, as the parliament should be acting to simplify the operation of superannuation, not make it more complex, particularly for small business. Increased cost is usually commensurate with increased complexity. The evidence before the committee suggests that the passage of the bill will increase costs by at least $2,000, depending on the complexity of the fund. In some cases the fund might just be wound up and the money put into a master trust.

I mentioned the impact on rural and regional Australia as an important principle. Most disturbingly, Labor is concerned about the negative impact this bill is likely to have in these areas, particularly by restricting small business investment. Mr David Coogan, chairman of the superannuation task force for the Institute of Chartered Accountants, said in evidence to the committee that there will be areas of the market, for example the rural sector, where it could have a negative impact. The Small Independent Superannuation Funds Association also supported this view. It must come as a great shock to National Party senators in this chamber, given the enormous problems National Party members have been having recently, particularly in Victoria, that yet again a piece of legislation has come before this chamber supported by this coalition, dominated by the Liberal Party, which will negatively impact on regional and rural Australia. But where is the National Party?

There has been a significant time delay with this legislation, some 18 months between the initial 1998 budget announcement and introduction of the bill, which means that some superannuation funds which acted in accordance with the announcement may be in breach of provisions of the bill. The Senate has a non-binding procedural order that recommends that the Senate not pass any tax legislation that comes before it more than six months from the time it was announced. There seems little doubt that if this bill is passed by the Senate it should operate prospectively rather than retrospectively.

On the issue of the choice of funds, the government has asked the Senate to support its choice of funds legislation, which surprisingly, given the government's apparent support for it, has yet to be debated in the Senate and has been pulled from the list of bills to be debated this year. The government's approach in respect of this legislation for small business is inconsistent with its so-called choice of funds philosophy.

Labor will not be supporting this bill in its current form. Where there is evidence that the existing law is being abused, Labor will support reasonable changes that crack down on that abuse. It is clear that more evidence is required to accurately ascertain the extent of the problems that the government claims are occurring and which this bill claims to address. Labor will not be a party to compli cated, difficult changes to superannuation which make it tougher for small business, add to cost and add to problems in regional and rural Australia.