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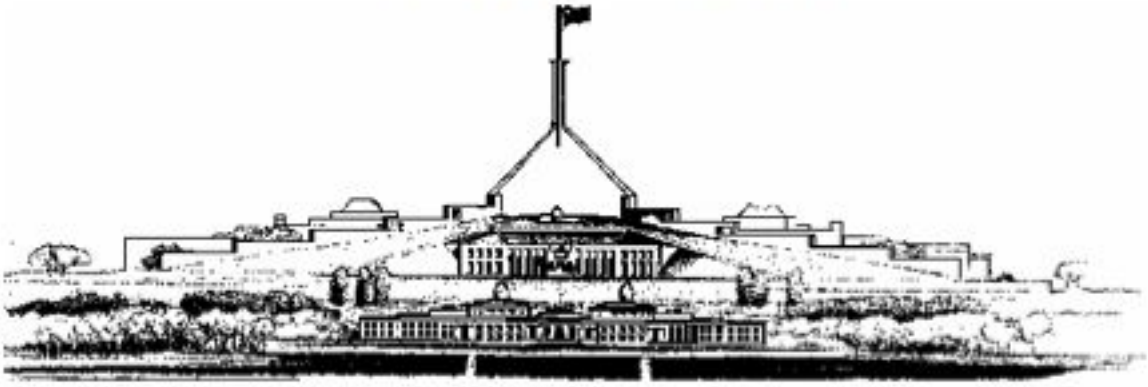

THE SENATE

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
Page	11374	**Proof**	No
Questioner		**Responder**	
Speaker	Allison, Sen Lyn	**Question No.**	

Senator ALLISON (VIC) (10.12 am)—Before commencing my speech on the second reading, I wish to declare for the record that my partner has a self-managed superannuation fund which has some investments in a unit trust and in which I also have an interest. As far as I know, this bill would restrict the activities of that fund.

This bill, the Superannuation Legislation Amendment Bill (No. 4) 1999 , deals with an extremely complex area of superannuation law governing the investment rules for small superannuation funds. As our report on this bill suggests, it has not been an easy bill for us to develop a position on. However, investment rules are designed to limit the risks to superannuation savings and to ensure that superannuation is preserved for retirement incomes. This is done by restricting investment in the employer or associates, prohibiting super funds from borrowing funds or lending them to members, preventing member assets from being acquired by the fund and requiring all transactions to be at arm's length. The ISC became concerned that a number of funds, particularly smaller funds, were getting around those tough investment rules by investing heavily in unit trusts which were then not bound by the rules, and proceeded in some cases to flout them. This opened up the prospect of a very large proportion of tax preferred superannuation assets being invested back into a person's business or heavily geared, thereby reducing their contribution to retirement savings.

A 1997 survey of excluded funds covering 1,000 of the 140,000 funds revealed that 20 per cent of funds invested in unit trusts, that 13 per cent of funds were leasing or renting assets to associated parties and that, in all, around 10 per cent of funds used unit trust or lease arrangements that circumvented investment standards. This legislation has sought to overcome these difficulties by preventing superannuation funds from investing in closely held unit trusts. The prohibitions on super funds borrowing or dealing with associ ates would also continue. Against that, the legislation provided a new concession for superannuation investment, allowing small funds to invest a greater amount of their assets into real business property. Currently only 40 per cent of assets can be invested in real business property. Under the new bill, this rises to 100 per cent.

Given the continuing prohibition on super funds' gearing, this will increase the flexibility of super funds to invest in big, lumpy but attractive real property investments. That concession will be particularly important in regional Australia. Small superannuation funds, the Senate committee was told, are an important source of finance for investment in regional areas. People want to invest in their local areas and this concession will allow for increased direct investment by small super funds in real property in their local regions.

However, it remains a tall ask for a small superannuation fund to undertake an investment in real business property off its own bat. For a fund with, say, $200,000 to $300,000 of funds, an investment in a single real property could make up 60 per cent to 70 per cent of the fund's total assets, and that is a real risk to the investment diversity of the fund and its associated risk profile. Of course, this was part of the attraction of investing in a unit trust: it allowed a super fund to spread its investment in real property across other unit holders. This bill precludes that by precluding investment in a closely held unit trust; that is, a trust with less than 20 members.

The Democrats have come to the conclusion that there are very sound reasons for super funds investing in a closely held unit trust, particularly where such a trust is investing solely for real business property. There are sound reasons for allowing the large and lumpy cost and risk of property investments to be shared by a superannuation fund with other investors, even associates, through a unit trust. However, I think that the prohibition on borrowing which applies to a superannuation fund should also apply to a closely held trust on the basis that it could affect the liquidity and the risk profile of the underlying closely associated super fund.

I understand that in the committee stage the government will be moving an amendment to ensure that small superannuation funds can continue to invest in closely held trusts where the sole asset of those closely held trusts is real business property, provided the trusts do not borrow more than the currently allowed five per cent. That extends the same investment rules for a superannuation fund to a closely held trust but allows that extra bit of flexibility by allowing a super fund to spread the cost and the risk of a real property investment. I do not think that

there is any need to allow closely held trusts to also invest in shares. Shares are much smaller unit investments than real property parcels and can and should be dealt with directly by the small superannuation fund.

Another issue raised by submissions to the Senate committee is the supposed retrospectivity of the legislation. The government's intention to introduce this legislation was first announced in the 12 May budget in 1998. An exposure draft was released more than six months later with a number of significant concessions agreed to by the government during the consultation phase. The bill was finally tabled in the parliament on 11 August of this year, some 15 months after the budget announcement.

There are two sets of transitional arrangements with this bill for assets purchased prior to May 1998. The transitional rules allow, effectively until 2009, for such funds to rearrange their affairs to comply with the new rules. For assets purchased after May 1998 and prior to royal assent of this bill, the funds will have only until July 2001 to comply with the bill. We think this is a rather tough ask particularly given that there was a 15-month period before the actual law was tabled. I think it is almost impossible to ask trustees to comply with rather vague budget press releases and then wait 15 months for legislation, particularly when the legislation ends up being rather different from the Senate announcement.

While we appreciate that this bill is designed to deal with potential tax planning through unit trust structures, it also has the effect of severely affecting what may be quite legitimate investment decisions by super funds as well. Indeed, as evidence to the committee from Cleary Hoare Solicitors, quoted in the Senate report, points out:

If a taxpayer, even with the best advice, has acted contrary to the provisions of the Bill since May 1998 in a way as to make complying superannuation funds non-complying the taxpayer on the current laws, will have 47% of the assets in the superannuation fund confiscated.

Given these sorts of concerns, the Democrats do not believe that we can retain the 12 May 1998 operative date for this bill. I understand that the government has agreed that in the committee stage it will move to make this bill operative from 11 August 1999.

The penultimate issue I want to deal with is that of the actual definition of business real property. A number of submissions to the committee suggested that the definition of business real property might need to be extended. It was suggested that leases, vacant land and other types of property might be included in the definition. A government amendment will make business real property the only allowable investment for a closely held unit trust, and I think this definition becomes very important. The Democrats will be seeking an assurance from the minister that the Treasury will be prepared to consult industry groups over enacting a regulation that might ensure that the definition of business real property is as wide as is practically possible within the risk and investment constraints intended by the law.

The Senate will be aware that for some time the Democrats have advocated and moved to see that all superannuation legislation deals with the inequitable situation that applies to same sex couples. We are advised that in the case of this bill it is technically difficult to amend the legislation. However, my colleague Senator Bartlett will be moving a second reading amendment requiring the government to prepare a report for the Senate on the technical and legislative requirements for removing the discrimination faced by same sex couples in superannuation and tax laws. With that comment I will conclude and indicate that the Democrats will be supporting the bill at the second reading.