30 December 2016

SUBMISSION TO SENATE ECONOMICS LEGISLATION COMMITTEE ON SUPERANNUATION(OBJECTIVE) BILL 2016
Terrence O'Brien and Jack Hammond QC,
on behalf of themselves and Save Our Super

The superannuation objective is fundamentally flawed, according to Industry Superannuation Australia's submission to this Committee:

> *….. the primary objective is flawed because it would not provide a basis for comparing and evaluating future superannuation policy proposals. For example, the proposed objective would provide no guidance in relation to competing proposals to increase – or to decrease – the Superannuation Guarantee: both proposals would be consistent with the proposed objective, because superannuation would continue to provide income in retirement to supplement or substitute the Age Pension. Eliminating all tax concessions, or increasing the tax concessions in superannuation, would both be consistent with the objective.*[i] (Industry Superannuation Australia's submission, p1)

The Bill should be rejected:

> *The Committee should reject the Bill in its present form and recommend consultation on a primary objective and secondary objectives that would achieve the stated purpose of this endeavour.* (Industry Superannuation Australia's submission, p4*)*

The Institute of Public Affairs' submission to this Committee argues (as does Save Our Super's submission) for a better, practically useful objective:

> *The objective of the superannuation system is to ensure that as many Australians as possible take personal responsibility to save for their own retirement. The age pension provides a safety net for those who are unable to provide for themselves in retirement.*[ii]

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2. Key points: an objective to build trust and certainty in super reform

Treasurer Scott Morrison and the Minister for Revenue and Financial Services, Kelly O'Dwyer, have said the *Superannuation (Objective) Bill 2016* (hereafter, the *Objective Bill*) anchored the formation of the 2016 Budget's superannuation measures.[iii] Those Budget measures, slightly modified, were passed by Parliament on 23 November 2016, assented to on 29 November 2016 and are now law: the *Superannuation (Excess Transfer Balance Tax) Imposition Act* 2016 (C'th) (No 80 of 2016) and the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act* 2016) (C'th) (No 81 of 2016). These two Acts are subsequently referred to as the *2016 Acts*.

The *Objective Bill*, has been referred to the Senate Economics Legislation Committee to report to the Senate by 14 February 2017.

It is perverse for the Senate Committee on Economics Legislation and Parliament to be considering the *Objective Bill* a few months after the hurried passage of the *2016 Acts,* which were allegedly shaped by it. The *2016 Acts* implement the largest super changes in a decade. The changes reverse strategic direction from the 2006-07 simplification exercise, massively re-complicate the superannuation framework, penalize high superannuation balances and hinder accumulating large savings in superannuation. They also create new, costly super incentives of debatable worth.

The *Objective Bill* is only partly a backward-looking rationalisation of the *2016 Acts*. It is also intended to provide a stable, confidence-building, legislatively-secure framework to reassure savers about how future superannuation policy changes will be formulated.

The *Objective Bill's* stated primary objective, "to provide income in retirement to substitute or supplement the Age Pension", is fatally flawed, and incapable of helping discriminate between good and bad policies. Our submission of 17 November 2016[iv] to this Committee's earlier Inquiry into what are now the *2016 Acts*, explained why the super changes were bad policy.

The five subordinate super objectives (created by regulation under the *Objective Bill*) make matters worse, as the six objectives taken together will often be in conflict among themselves. The *Objective Bill* offers no guide on how to resolve conflicts or trade-offs between objectives.

For example, the *2016 Acts* hugely re-complicate super taxation (in contradiction of subordinate objective (5) that favours simplicity, efficiency and safeguards for savers). It takes Treasurer Morrison and Minister O'Dwyer about 90% more verbiage to explain the re-complication of the taxation of retirement income than it took Treasurer Costello to explain simplification of the *status quo ante*, and the *2016 Acts* require consequential change in at least 16 other Acts.[v] But that complexity is apparently outweighed by allegedly alleviating fiscal pressures on Government (subordinate objective (4)).

The *2016 Acts* are 'effectively retrospective' in Treasurer Morrison's useful terminology[vi], and damage trust and certainty in superannuation, which apparently contradicts the primary objective and subordinate objectives (1) and (2) – facilitating consumption smoothing over the course of an individual's life, and managing risks in retirement – but that is apparently again outweighed by allegedly alleviating fiscal pressures on Government (subordinate objective (4)). We do not take up here the *Objective Bill's* structural problems, noted by the Law Council of Australia, in which the subsidiary objectives and the primary objective seem to be caught in an illogical, self-referential loop of 'statements of compatibility' of one with the others.[vii]

So it seems for the Government, more revenue from super within the forward estimates period trumps all other considerations, whatever the longer-term damage to the retirement income framework or the budget implications beyond the forward estimates.

The primary objective lacks a clear recognition of the moral and economic imperatives for more Australians to enjoy higher, self-supported retirement living standards, and for fewer to be dependent on Australia's biggest 'unfunded defined benefit scheme', the age pension.

As other submissions to this Inquiry show, the primary objective is widely opposed by many thoughtful and professionally well-informed critics, but the Government has ignored their criticisms. It has used the old bureaucratic ploy of claiming there was no spontaneous consensus for any one alternative to its own approach, so the Government will plough ahead with its own original preference. But a fatally flawed and heavily contested objective cannot be an anchor for good policy. As the Tax Institute has noted in its submission to this Inquiry, legislating a bad objective is more likely to further reduce trust in the future of superannuation than increase it.

It is ever-clearer why the Government has proceeded with this *Objective Bill* and the *2016 Acts* that it claims the objectives rationalise: its erroneous belief that more revenue can be extracted from super savers within the forward estimates period, without adverse consequences showing up within that period for trust and certainty in super, for retirement living standards, and for public expenditure on the age pension. They are all problems kicked down the road for another government.

But it is not too late to draw back and think again. On the hurried consultation with Treasury on the second tranche release of exposure drafts, industry groups and professionals such as the Australian Institute of Superannuation Trustees, the Tax Institute and the Association of Superannuation Funds of Australia have submitted that it will be very costly and difficult, if not impossible, for the complex new measures to be implemented by the start-up date of 1 July 2017. The Government has been formally advised that some key back office developments in super funds and the ATO necessary for implementing the complex new concepts and rules of the Government measures are more likely to take 2 years to implement than the available 6 months.[viii] Equally, it will probably not be feasible for super savers to obtain the necessary specialist advice in time to modify their own arrangements.

The Government should make a virtue out of the inevitable delay, and properly re-consider the many submissions critical of the measures it received during its rushed consultations.

It is not too late to include appropriate grandfathering provisions in the 2016 super measures, to minimize damage to trust and certainty in super. The Government should maintain the sound grandfathering policy practice of at least the last forty years[ix]: policy changes adverse to super saving should only be applied prospectively in accord with the Asprey principles (summarised again at Box 2 on page 18).

Finally, it is not too late to adopt a useful and sensible objective for superannuation, to reduce the risk of further damage to superannuation by future bad policy. Save Our Super supports the objective proposed by the Institute for Public Affairs:

> *The objective of the superannuation system is to ensure that as many Australians as possible take personal responsibility to save for their own retirement. The age pension provides a safety net for those who are unable to provide for themselves in retirement.*[x]

3. Save Our Super's warnings on the inappropriate superannuation objective

On 7 September 2016, Treasury released the first tranche of exposure drafts of the 2016 superannuation changes, including the draft *Objective Bill* which is now before the Committee in largely unchanged form.

We commented critically on that exposure draft of the *Objective Bill* by the arbitrarily hurried deadline for submissions, 16 September 2016. Those submissions are available online.[xi]

This further submission is to place on the Parliamentary record our criticism of the *Objective Bill*, and show how the *2016 Acts* that are allegedly in conformity with it ought fail a more reasonable and practical objective for superannuation within the retirement income system.

Our earlier comments argued that the statement of one primary and five subordinate objective were meaningless and unworkable, and suggested an improved statement of objectives. We supported the alternative primary objective suggested by the Institute of Public Affairs:

> *"The objective of the superannuation system is to ensure that as many Australians as possible take personal responsibility for funding their own retirement. The Age Pension provides a safety net for those who are unable to provide for themselves in retirement."*[xii]

Our comments also noted that the *Objective Bill* did not require statements of super change to be accompanied by a statement of consistency with objectives until the first 1 January, 1 April, 1 July or 1 October to occur after the day the *Superannuation (Objective) Act* receives the Royal Assent (presumably in 2017), but that it was wrong to exempt the *2016 Acts'* super changes, the biggest in a decade, from the *Objective Bill's* processes.

We argued that the Government should illustrate the use of its objectives to provide clear and quantified illustrations of the estimated effects of its legislative proposals on self-sufficiency in retirement, and in numbers on the age pension.

The Government, to its credit, has since offered a statement relating the *2016 Acts* to the *Objective Bill*, in Chapter 13 of its *Explanatory Memorandum*.[xiii] In this Memorandum issued on the authority of Treasurer Morrison and Minister O'Dwyer, it is asserted the *2016 Acts* are, indeed, in conformity with all objectives of the *Objective Bill* (p 265, para 13.1).

4. The statement of objective for superannuation is unworkable

There have long been statements of objective for superannuation. For example, the Howard-Costello era objective for superannuation simplification was very clear:

> *The policy objective is to assist and encourage people to achieve a higher standard of living in retirement than would be possible from the age pension alone*.[xiv]

Putting any statement of objective into legislation is not an end in itself. The aspiration behind the legislation of a clear, widely accepted objective is that it would improve confidence in super, helping savers who have to build their life savings over 40 years within the super framework, and need to live on those savings for up to 30 years of retirement. The Murray *Financial System Inquiry* argued that:

> *A clear statement of the system's objectives is necessary to target policy settings better and make them more stable. Clearly articulated objectives that have broad community support would help to align policy settings, industry initiatives and community expectations*.[xv]

The *Objective Bill's* proposed primary objective for Government policies toward superannuation is that super is "to provide income in retirement to substitute or supplement the age pension" (s5(1)). This is a peculiarly diffident and ambivalent statement of what should be a crystal-clear strategic direction. It is as if the government stated the objective for labour market law was that paid employment should 'substitute or supplement government income support such as the Newstart Allowance'.[xvi]

The Government's intended super objective loses sight of the fundamental economic and moral imperatives for increasing savings in super and decreasing reliance on the age pension:

- Living standards are rising over time.
- Australians are living longer with more 'quality-adjusted life years' of active retirement.[xvii]
- People are more capable of saving for their own retirement than ever before, and might reasonably aspire to larger super balances and higher retirement living standards than ever before.
- The population is ageing.

- Because of this demographic ageing, the largest 'unfunded defined benefit scheme' of all, the age pension, will require higher expenditure from taxes bearing on proportionately fewer working age Australians.
- The income tax system – a progressive tax on nominal income - and the age pension continue to constitute large disincentives to long-term saving;
- Reducing the tax and pension disincentives to saving and supporting thrift, will increase savings and secure efficient allocation of private savings through capital markets to the highest value investments. In contrast, reliance on a government age pension invites inefficient political allocation of tax revenues that need to rise ever-higher, with all the dead-weight costs of taxation.

These insights were applied through 30 years of super reforms during the Hawke-Keating[xviii] and Howard-Costello years[xix].

The Government seems to have turned its back on these insights. As Robert Menzies rightly observed as long ago as 1942 in his speech *The Forgotten People*:

> *The great vice of democracy - a vice which is exacting a bitter retribution from it at this moment - is that for a generation we have been busy getting ourselves on to the list of beneficiaries and removing ourselves from the list of contributors, as if somewhere there was somebody else's wealth and somebody else's effort on which we could thrive. ….*
>
> *Now, have we realised and recognised these things, or is most of our policy designed to discourage or penalise thrift, to encourage dependence on the State, to bring about a dull equality on a fantastic idea that all men are equal in mind and needs and deserts: to level down by taking the mountains out of the landscape, to weigh men according to their political organisations and power - as votes and not as human beings? …..*
>
> *We have talked of income from savings as if it possessed a somewhat discreditable character. We have taxed it more and more heavily. We have spoken slightingly of the earning of interest at the very moment when we have advocated new pensions and social schemes. I have myself heard a minister of power and influence declare that no deprivation is suffered by a man if he still has the means to fill his stomach, clothe his body and keep a roof over his head. And yet the truth is, as I have endeavoured to show, that frugal people who strive for and obtain the margin above these materially necessary things are the whole foundation of a really active and developing national life.*[xx]

In addition to the primary objective in the *Objective Bill*, there are five more subsidiary objectives to be prescribed by regulation (s5(2)). They are to:

1. facilitate consumption smoothing over the course of an individual's life;
2. manage risks in retirement;
3. be invested in the best interests of superannuation fund members;
4. alleviate fiscal pressures on Government from the retirement income system; and

5. be simple, efficient and provide safeguards.

As at least some of the six objectives will often be in conflict with each other, they will require weightings or trade-offs to arrive at a decision about whether any particular reform meets the objectives, on balance. The *Objective Bill* is silent on how these conflicts are to be resolved. Conflicts are apparently to be subject to unspecified, case-by-case 'balancing'. This destroys any coherent guidance for policy.

The message to super savers is that anything could happen to the future taxation of their life savings.

Moreover, the interaction between superannuation law and the aged pension is inescapably an empirical and quantitative issue, not one that can be navigated by qualitative assertion. Does a mix of new incentives and penalties increase super saving, or reduce it? By how much? Does the evolution of super saving decrease reliance on the age pension, or increase it? By how much? What is the net impact on the retirement living standards of Australians over time? How does the revenue cost of changes to the super taxation affect the cost of the aged pension, after people change their behavior to adjust to a different pattern of tax and regulatory incentives?

In contrast to these obvious empirical and quantitative questions, the *Objective Bill* does not prescribe any form, or content, for the statement of compliance of super changes to the six objectives. Mere assertion will do, and no legal consequence flow from any assertion (s6(4)). Even if a Minister can't be bothered to make an assertion of compliance, no consequence flows from ignoring the *Objective Bill* (s6(5)). It is mildly surprising the full title of the Bill is not the *Superannuation Objective (Much Ado About Nothing) Bill 2016*.

The Chapter 13 statement in the *Explanatory Memorandum* alleging conformity of the *2016 Acts* with the *Objective Bill* is essentially qualitative. It merely asserts compatibility, sometimes using palpably misleading claims (such as that only 1% of super savers will be adversely affected by the $1.6m cap: see Box 1 on following page). It asserts that super saving will increase overall (because of new concessions to lower income savers) rather than fall (because of penalties or obstruction to higher income savers, and loss of trust in super rule-making for all super savers). It acknowledges an increase in complexity (contrary to subordinate objective (5)) but uses unspecified weighting to conclude that the increase in complexity — a massive increase because of transfer balance structures that more than reverse the Costello simplification measure of a decade ago — is less important than the measures' asserted contribution to other objectives.

Box 1: Fact check: Will less than 1% of fund members be affected by the $1.6 m cap? Trish Power, SuperGuide, 22 October 2016

The Coalition government claim "very few people will be affected by this proposal. The average superannuation balance for a 60-year old Australian nearing retirement is $285,000 and less than one per cent of fund members will be affected by the balance cap."

This claim is very misleading and is simply propaganda. The fact that the Coalition doesn't state the numbers of Australians immediately affected by this policy, and doesn't state the hundreds of thousands of Australians who will be affected by this cap over the next 25 to 30 years is dishonest, and the millions of Australian retirees who will now need to monitor their transfer balance cap (for periodic indexed increases of the cap), and monitor their transfer balance account for new money going into pension phase, or existing money being removed from pension phase (commuting pensions into lump sums) is irresponsible.

As super balances increase, and the cost of a reasonable lifestyle in retirement increases, the $1.6 million cap (indexed for inflation in $100,000 increments), will be potentially within the reach of a hefty percentage of middle-aged and younger Australians currently in the workforce. Not only will millions of retirees have two lifetime amounts that they may need to be mindful of, but an increasing number of older Australians will have to monitor these figures for the rest of their lives.[xxi]

5. Anti-thrift rhetoric

Paul Keating once observed (perhaps recalling Menzies' *Forgotten People* speech):

> *You do not expect much from conservative governments, but you do expect them to believe in thrift.*[xxii]

The Government's rhetoric in support of its *2016 Acts* is now anti-thrift.

The Government cites the Grattan Institute as its choice among 'think tanks' for the claim that current super incentives (which sees super savings pay over $6 billion in tax a year) are "poorly targeted and unsustainable" (*Explanatory Memorandum*, p 275, para 14.12 and footnote 2).

The Grattan Institute view referenced in the *Explanatory Memorandum* is the Press Release for its proposals in *Super Tax Targeting* (cover pictured below) to tax super much more heavily in the retirement phase, and restrict concessional and non-concessional contributions — all measures adopted (though to a lesser degree) in the Government's subsequent *2016 Acts*. The Grattan Press Release claims:

The proposed reforms are fair. They would only apply to future contributions and earnings. Younger and low-income people would not have to pay so much in other taxes if super tax breaks for rich old men were wound back.[xxiii]

The Grattan Institute: Super tax targeting
by John Daley and Brendan Coates

If Treasurer Morrison and Minister O'Dwyer are aware of contrary think tank analyses from the Institute of Public Affairs[xxiv], or the Centre for Independent Studies[xxv], there is no evidence of it. Instead, they have signed the Turnbull Government on to a strongly contested view of superannuation tax concessions and the distributional value judgements surrounding the alleged inequity of the distribution of those concessions.[xxvi]

As a further example of current rhetoric, the *Explanatory Memorandum,* authorized by Treasurer Morrison and Minister O'Dwyer, claims of one measure:

> *Capping concessional contributions at $25,000 per year (indexed in $2,500 increments in line with AWOTE) would still* ***allow individuals to contribute more than is needed for an adequate retirement income if they have the ability to do so****, without providing excessive access to the concessional superannuation environment.* (p 283, para 14.54, emphasis added)

Government pontification on 'adequate retirement income' from private saving is surely an unwelcome new frontier for Australian superannuation policy.

In 2007, the Costello reforms focused super tax like the tax on bank accounts: taxed on contribution, taxed on accumulation, but no third layer of tax at the withdrawal stage. That exercise was well-researched, subject to extended consultation and carefully costed [xxvii], unlike the processes surrounding the *2016 Acts.*

Now, barely 10 years later, the Turnbull Coalition Government claims that the Howard-Costello simplification "disproportionately benefits people with high account balances, providing significant incentives for wealthy individuals to use earnings tax exempt retirement phase accounts as a tax minimisation vehicle to accumulate excessive amounts of wealth." (*Explanatory Memorandum*, p 280, para 14.35) Of course high income earners get more tax relief from tax concessions, because they pay more tax. So the worth of the concession is inversely related to income, but remarkably proportionate to income tax paid. (See Figures 1 and 2 on page 13.)[xxviii] Treasurer Morrison and Minister O'Dwyer have fallen for the Duncan Storrar fallacy.[xxix]

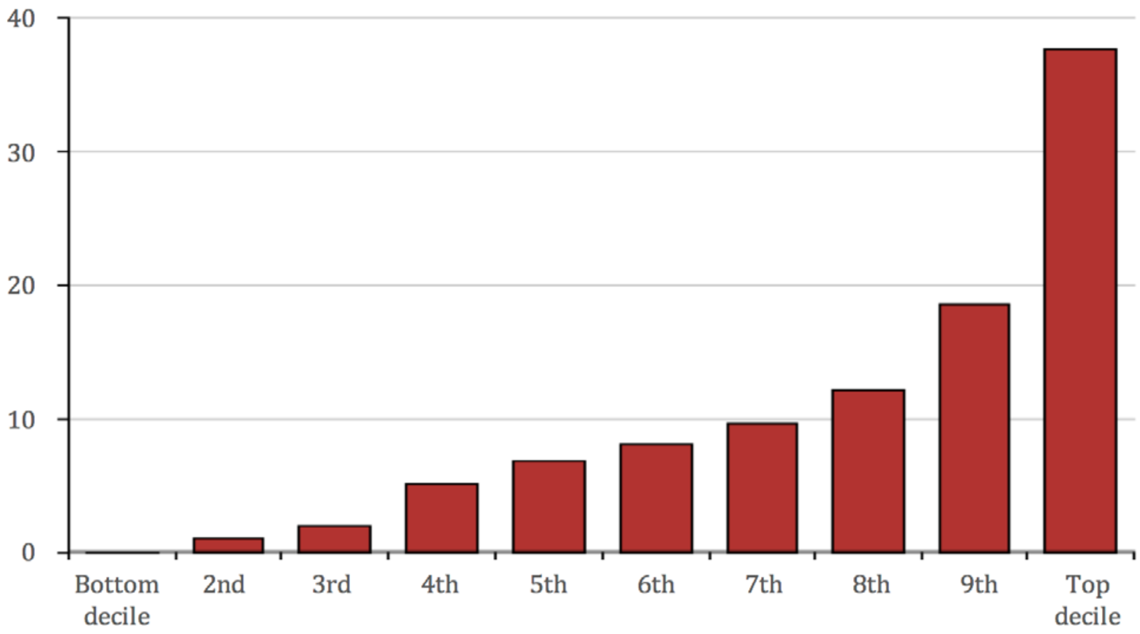
The lawful use of the simplified tax structure introduced by Howard and Costello is said repeatedly in the *Explanatory Memorandum* to amount to "tax minimization and estate planning" (p 9 and passim). Thus Menzies' 'forgotten people' have become today's tax minimisers, estate planners and indeed the greedy pigs immortalized in the Grattan Institute Report that the Government references.

But from the Government's perspective in its *Explanatory Memorandum*, some taxpayers are proving annoyingly slow to get the message:

> *Some individuals (mainly high wealth individuals) may consider that* ***some of the measures limit their ability to save for their retirement and obtain no or concessional tax rates to the same extent to which they had wished*** *notwithstanding the fiscal pressures such desires place on the taxpayer.* (p 294, para 14.111, emphasis added)

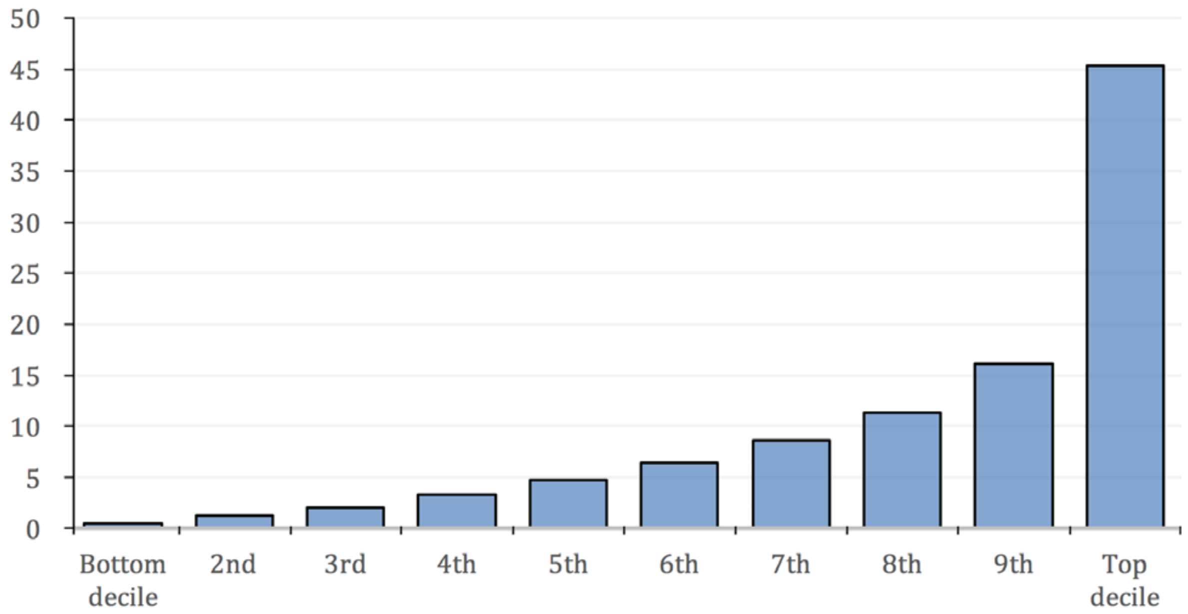
This *Explanatory Memorandum* view expresses an extraordinary sentiment: Parliament passed laws to limit the disincentive to save in super from progressive income tax on nominal income and a free age pension. Australians responded to those lawful incentives as politicians intended, to lock away their savings in super for 40 years. But those savers are wrong to 'wish' for the law to be applied now that they have retired, because of the pressure their 'desires' place on the taxpayer! It is hard to believe Treasurer Morrison and Minster O'Dwyer could put their names to such nonsense.

Figure 1: Percentage of total value of super tax concessions utilized by each decile, sorted by 2011-2012 taxable income



Note: the estimated total value of the concession uses the Treasury's comprehensive income tax benchmark, which yields by far the highest estimate of the cost of the super concessions. Other valid benchmarks yield much lower cost estimates. See Robert Carling, Right or Rort? Dissecting Australia Tax Concessions, CIS Research Report, April 2015, pp 14-16.

Figure 2: Net tax paid by taxable income decile, % of total, 2013-14



Sources: Treasury and ATO data, as reported in Robert Carling, How should super be taxed?, CIS Policy, Volume 32 No 3, Spring 2016, p 17.

6. The Government's stated objectives and effects of the *2016 Acts*

Treasurer Morrison and Minister O'Dwyer assert that the *Objective Bill* has "guided the development of the Government's reforms".[xxx]

We argued in Save Our Super's joint submission of 17 November 2016 to the Committee on the two substantive super Bills, now legislated, that the measures will reduce self-reliance in retirement and increase reliance on the age pension. [xxxi]

In contrast, the *Explanatory Memorandum*'s Chapter 13 asserts, qualitatively, that the measures meet the *Objective Bill's* test of compatibility with the six objectives.

It asserts that only 4% of super savers will be affected by the measures (p 266, para13.5). This ignores the much greater percentage that will face significantly higher costs of compliance because the extraordinarily complex balance cap system and the discouragement to saving from the reduced contribution limits. It makes no allowance for the consequences for super saving from the destruction of trust by effectively retrospective tax and rule changes. Low income super savers are asserted to save more (but without quantification: p 267, para 13.8). High-balance super savers are said to not save less in super, and 'the majority' (otherwise unquantified) of the 4 % acknowledged to be affected are asserted to be unlikely to increase their call on the age pension (p 266, para 13.5).

The effect of the measures on the vast terrain of middle-income super savers above those encouraged by the Low Income Superannuation Tax Offset and below those directly discouraged by the concessional and non-concessional contribution caps and the $1.6 million general transfer balance cap is not addressed. But the *Explanatory Memorandum* somehow arrives at the judgement (unsupported and unquantified) that the measures will increase income in retirement and reduce reliance on the age pension (p266, para 13.7)

7. The Government rejected widespread criticisms of its objectives

Many who have lodged submissions on the *Objective Bill's* primary objective (together with its five subordinate objectives in regulation) have concluded that the objectives are variously unworkable, unenforceable, and/or ineffective. The *Objective Bill* could justify extending super concessions, or scrapping them; increasing the Super Guarantee, or cutting it; simplifying the law, or complicating it.

As summarized by Industry Super Australia,

> *Among other reasons, the primary objective is flawed because it would not provide a basis for comparing and evaluating future superannuation policy proposals. For example, the proposed objective would provide no guidance in relation to competing proposals to increase – or to decrease – the Superannuation Guarantee: both proposals would be consistent with the proposed objective, because superannuation would continue to provide income in retirement to supplement or substitute the Age Pension. Eliminating all tax*

> *concessions, or increasing the tax concessions in superannuation, would both be consistent with the objective. (p1) ....*
>
> *The consultation initiated by Treasury in February 2016 received 100 submissions by the time it closed in April. Many of these submissions opposed the objective that is before the Committee. Criticism came from a diverse range of stakeholders, ranging from the Australian Bankers Association to the Australian Council of Social Service.*
>
> *The superannuation industry uniformly opposed the objective before the Committee, as indicated in a joint letter to the Minister for Revenue & Financial Services from the Association of Superannuation Funds of Australia (ASFA), the Australian Institute of Superannuation Trustees (AIST), Industry Super Australia (ISA) and the SMSF Association issued in August 2016*. (p 2) ....
>
> *The proposed objective before the Committee does not enjoy widespread confidence and support. It is the result of a superficial consultation process in which the Government has failed to secure the 'broad agreement' recommended by the Financial System Inquiry, and has not responded to the many criticisms contained in the 100 submissions received by Treasury. Regrettably the Minister has not engaged with or sought agreement on a proposed objective that enjoys broad industry and stakeholder support.* (p 3) [xxxii]

Legislating such a fatally flawed objective is, as noted by the Tax Institute, more likely to reduce confidence in super rule making than to increase it.[xxxiii]

Why has the Government rejected these widespread criticisms, ploughed ahead with its *Objective Bill*, and used it to rationalise its *2016 Acts'* restrictions on super?

In her second reading speech in support of the *Objective Bill*, Senator Fierravanti-Wells noted that there was widespread support for legislating an objective for super, if not for the particular objective the Government proposed. She claimed there was no consensus on any one alternative objective, but noted that some "wanted the objective to go further, to include concepts like the system being geared towards achieving 'adequacy' or 'comfort' in retirement." She said the Government opposed such language, citing David Murray's claim that its use in the objective would open the way to "constant political interference".[xxxiv]

In Save Our Super's view, language concerning 'adequacy' or 'comfort' of private savings for retirement has no place in super legislation, any more than the definition of measures "more than sufficient for an adequate retirement income" (see p 11 above). The adequacy or comfort of super savings should be a matter for determination by how much individual savers are prepared to work and save. What is necessary is not some Government prescription of adequacy, but a commitment to the direction of necessary change, towards facilitating higher living standards in retirement, more reliance on self-provision, and less reliance on the age pension. Those key strategic directions are all absent from the Government's six objectives.

While the *Objective Bill's* six objectives provide no guidance at all to the direction of the next change in super law, Labor's policy intentions are clear from amendments to Government super bills moved recently, and the [Dissenting Report by Labor Members of the Senate Committee on Economics Legislation](). Those changes could be taken to the next election (potentially as early as August 2018). Labor would raise an additional $1.4 billion to 2019-20, including by: reversing new concessions by the Government 'costing more than $12 billion over the decade' that Labor already describes as 'super loopholes'; further lowering the limit on non-concessional contributions to super; and further lowering the income threshold at which concessional super contributions attract 30% tax rather than 15% tax.[xxxv] (We note this threat of reversal already casts a cloud over the new concessions, which further increases the probability that savers will place no trust in them surviving and will not change their savings behaviour.)

Given the incoherency of the six objectives and Government assertions that its own measures meet the legislated objectives, Labor and the Greens could certainly claim their additional taxes and restrictions meet the objectives too.

As the Institute of Public Affairs has noted in its submission to the Committee,

> *Once the principle has been established that superannuation taxes can be increased to pay for government spending* [eg under subordinate principle 4, 'alleviate pressures on Government from the retirement income system'], *that all major parties have voted for it, and that it doesn't even contradict the objectives of the system, then there will be little to stop future governments*.
>
> *As future governments continue to struggle to find the money to pay for their own promises, superannuation tax rates will continue to go up and the applicable thresholds will continue to come down.* (square-bracketed comment added).[xxxvi]

8. 'Effective retrospectivity' is not discouraged by the Government objectives

In February 2016, Treasurer Morrison coined the useful term 'effective retrospectivity':

> *One of our key drivers when contemplating potential superannuation reforms is stability and certainty, especially in the retirement phase. That is good for people who are looking 30 years down the track and saying is superannuation a good idea for me? If they are going to change the rules at the other end when you are going to be living off it then it is understandable that they might get spooked out of that as an appropriate channel for their investment. That is why **I fear that the approach of taxing in that retirement phase penalises Australians who have put money into superannuation under the current rules – under the deal that they thought was there. It may not be technical retrospectivity but it certainly feels that way. It is effective retrospectivity,** the tax technicians and superannuation tax technicians may say differently. But when you just look at it that is the great risk* (emphasis added).[xxxvii]

Save Our Super has been centrally concerned with the damage done by 'effective retrospectivity' in changes to super law. To us, the *2016 Acts* are not just changing the rules after the game has started; they are changing them well into the fourth quarter. So we were especially interested to observe how the Government used the *Objective Bill* and its 6 objectives to address the issue of 'effectively retrospective' adverse changes to super law.

Potentially, the principal objective and two of the subordinate objectives are relevant to this issue:

- Super has to "provide income in retirement to substitute or supplement the age pension", which can only happen if savers can trust they will receive the tax treatment in retirement that induced them lock away their savings in super in the first place.
- Super has to "facilitate consumption smoothing over the course of an individual's life", which can only happen if the living standards in retirement saved for during working life are secured by stability in the promised tax treatment on super.
- Super has to "manage risks in retirement", which includes the risk of policy instability. Increased taxes on those already retired should not become a government-created risk.

'Effectively retrospective' adverse changes destroy trust and certainty in the super framework and destroy confidence that savers can enjoy the living standards in retirement they have worked and saved to achieve.

The challenges of facilitating any increases in super taxes while not destroying confidence in super were addressed most thoughtfully by the late Justice Kenneth Asprey, whose 1975 report outlined the case for grandfathering significant super tax increases, and developed principles for how to do that while preserving necessary policy flexibility to respond to changing circumstances. (See Box 2 on page 18 on the Asprey principles.)

The Committee will, we hope, be aware from our earlier submission of the role of grandfathering in preserving confidence in super through the changes of the Hawke-Keating and Howard-Costello years.[xxxviii] Further details showing how grandfathering adverse changes to superannuation and related retirement income parameters has been used over the last 40 years are contained in Terrence O'Brien's paper for the Centre for Independent Studies, *Grandfathering super tax increases*.[xxxix]

Disappointingly, Treasurer Morrison's and Minister O'Dwyer's statement of compliance of the *2016 Acts* with the *Objective Bill* has nothing to say on the issue of 'effective retrospectivity'. Savers must now fear the 40 year tradition of grandfathering adverse changes so as not to damage trust and certainty in superannuation is now a dead letter.

Box 2: Grandfathering principles: Asprey Taxation Review, Chapter 21, 1975

Principle 1

21.9. Finally, and most importantly, it must be borne in mind that the matters with which the Committee is here dealing involve long-term commitments entered into by taxpayers on the basis of the existing taxation structure. It would be unfair to such persons if a significantly different taxation structure were to be introduced without adequate and reasonable transitional arrangements. ....

Principle 2

21.61. .....Many people, particularly those nearing retirement, have made their plans for the future on the assumption that the amounts they receive on retirement would continue to be taxed on the present basis. The legitimate expectations of such people deserve the utmost consideration. To change suddenly to a harsher basis of taxing such receipts would generate justifiable complaints that the legislation was retrospective in nature, since the amounts concerned would normally have accrued over a considerable period—possibly over the entire working life of the person concerned. .....

Principle 3

21.64. There is nonetheless a limit to the extent to which concern over such retrospectivity can be allowed to influence recommendations for a fundamental change in the tax structure. Pushed to its extreme such an argument leads to a legislative straitjacket where it is impossible to make changes to any revenue law for fear of disadvantaging those who have made their plans on the basis of the existing legislation. .....

Principle 4

21.81. .... [I]t is necessary to distinguish legitimate expectations from mere hopes. A person who is one day from retirement obviously has a legitimate expectation that his retiring allowance or superannuation benefit which may have accrued over forty years or more will be accorded the present treatment. On the other hand, it is unrealistic and unnecessary to give much weight to the expectations of the twenty-year-old as to the tax treatment of his ultimate retirement benefits.

Principle 5

21.82. In theory the approach might be that only amounts which can be regarded as accruing after the date of the legislation should be subject to the new treatment. This would prevent radically different treatment of the man who retires one day after that date and the man who retires one day before. It would also largely remove any complaints about retroactivity in the new legislation ....

9. More super saving, or less? Fewer age pensioners, or more?

The Government apparently believes that its measures will produce a blossoming of super saving and a decline in reliance on the age pension. We are asked to believe that low income earners, second-income spouses with interrupted employment history and those desiring insurance against longevity risk through innovative 'deferred products' will save significantly more in super, while richer savers continue saving in super even with reduced super incentives, or at least keep saving within the financial sector. It assumes any saving displaced from super by a 15% tax will not be spent (often yielding GST revenue at 10%), but will be placed in other financial products that are generally higher-taxed than super. It is as if richer savers are assumed to have an incurable addiction to saving regardless of the general tax system discrimination against it, and are unlikely ever to access the pension. See, for example, *Explanatory Memorandum* p 274, para 14.10:

> *At present, a number of superannuation tax concessions are poorly targeted — a significant proportion of these go to people who will save for their retirement regardless of the concessions, and who will never depend on the age pension.*

Our assessment is the opposite of the Government's on the foregoing points.

The difference arises mainly because we consider the dominant response to the un-grandfathered super tax increases and contribution restrictions will be a sense that that politicians have torn up the rules of the game for effecting super tax increases. There will be:

- a resultant destruction of trust and certainty in superannuation itself;
- a destruction of trust and certainty in how super law will be changed in future;
- a departure of funds from super (in part triggered by complexity, higher compliance costs, fear of future changes, and by the $1.6m transfer balance cap);
- a drought in new 'personal contributions' into super (i.e. concessional and non-concessional contributions beyond the Superannuation Guarantee's compulsion); and
- a displacement of saving effort outside the financial sector and into other tax-efficient savings vehicles such as the principal residence and its furnishings, negatively geared real estate, discretionary family trusts and so on.

The Government's tax increases discourage high saving in super by those who are affluent enough to save appreciable amounts, while its new tax expenditures on super try to encourage super for those whose lower incomes mean they can't save much (and perhaps nothing that they can afford to lock away for 40 years in super). Moreover, the effectiveness of the new incentives for the relatively poor will also be damaged by the overall loss of trust in super and super law-making. When the Turnbull Coalition Government reverses the strategic direction of the Howard-Costello simplification reforms of less than 10 years ago, branding those who lawfully followed those simplification incentives as tax minimisers and estate planners, who could be confident that the same fate will not befall any who follow new incentives within the next 10 years?

How will we know which of the above two perspectives is nearer the mark?

One important piece of evidence will be the quarterly reporting by Australian Prudential Regulation Authority on personal contributions to super funds with more than four members, and the Australian Taxation Office reporting on funds with four or fewer members (essentially, the self-managed super funds).[xl] If, as we suspect, those personal contribution flows diminish over time as is already apparent in data for the June and September quarters of 2016, one could conclude the net effect of the Government measures has been adverse to confidence in super and has limited super's ability to reduce resort to the age pension and to support higher retirement living standards.[xli] By the time that evidence is confirmed, the damage to confidence in super and its rule-making will have been done. Rebuilding trust will be difficult without a considerable reform to super law-making processes, perhaps of the form recommended by the Cooper Charter Group.[xlii]

As for the age pension dimension, events will unfold more slowly, and any increase in resort to the pension will be even more politically difficult to reverse than a destruction of trust in super. But Save Our Super believes use of the part pension will rise despite the Government's incentives, as there is now a very widespread realization in super, financial advisory and media circles that the 'sweet spot' in super saving strategy is to save about $340,000 and access a part age pension. According to Tony Negline, that will yield about the same retirement income as $1million in super (and of course, no part pension).[xliii] That $1 million will then need to be depleted in the face of economic risk, longevity risk and the risk of further adverse super changes – all risks that are non-existent or smaller with the age pension.

So the Government has a deal for you: save about $600,000 more in super — six years' heavy lifting at the new maximum annual non-concessional super contribution limit — and get the same retirement income as if you hadn't bothered, and at higher risk.

10. Conclusions

The Government's six-objective approach to super policy is incoherent, impossible to apply consistently, and can give no guidance to future super changes. With unspecified and varied weightings to the six objectives, the *Objective Bill* could rationalise virtually any conceivable mix of increases or decreases in concessions to super. There is no requirement in the *Objective Bill* that a statement of compliance with its content deal meaningfully and quantifiably with the interactions between super and the age pension.

The Government asserts (qualitatively, without any numerical modelling of trends in super saving, age pension uptake or retirement living standards) that the Budget's super measures are in accord with the *Objective Bill's* stated objectives. But Save Our Super considers that the measures discourage high use of super by those who are affluent enough to save appreciable amounts, while its new tax expenditures on super try to encourage super for those whose lower incomes mean they can't save much (and perhaps nothing that they can afford to lock away for 40 years in super). Moreover, the effectiveness of the new incentives for those on lower incomes will also be damaged by the overall loss of trust and certainty in super and super law-making.

We judge that Labor's and the Greens' proposals for further tax increases and contribution restrictions could equally be asserted to comply with some weighting of the six objectives.

But all the major Parties' approaches destroy confidence in super through 'effectively retrospective' changes, and re-weight Australians' retirement planning towards smaller super balances and higher reliance on a part age pension. Such measures should not survive assessment against any sensible statement of super objectives.

On the evidence of industry professionals, it will not be possible for the some of the complex changes to be implemented by the super industry, or super savers, by the intended commencement date of 1 July 2017. Delay is inevitable. On the most optimistic assumption, delay in implementation and compliance might be accommodated by discretionary adjustment by the Commissioner of Taxation for taxpayers, super funds, and self-managed super funds in breach of the new laws. [xliv] Such reliance on assumed kindness in administrative discretion is a sure sign of poor legislation and inadequate consultation.

It is not too late to learn from proper consultation, rather that the derisory, absurdly rushed excuses for consultation that have taken place so far. We include in this criticism the original February 2016 Treasury consultation with the super industry on the objectives for superannuation; the Treasury consultations on the three tranches of exposure drafts of the Budget super measures; and the Senate Committee on Economics Legislation's consideration of the *2016 Acts*.[xlv]

It is not too late to include appropriate grandfathering provisions in the Budget super measures. That would maintain the sound practice of at least the last 40 years of changes in Australian super law, and limit the loss of trust in superannuation and the processes by which its rules are changed.

Finally, it is not too late to adopt a better objective for superannuation that would usefully guide current and future super policy choice. The Government' present principal objective should be rejected. The Institute for Public Affairs has suggested a better objective, which Save Our Super supports and recommends to the Committee:

> *The objective of the superannuation system is to ensure that as many Australians as possible take personal responsibility to save for their own retirement. The age pension provides a safety net for those who are unable to provide for themselves in retirement.*[xlvi]

11. Further steps

Save Our Super would welcome the opportunity to appear before the Committee to discuss its submission further. We consider the Committee should also call Ministers and officials to question them on their quantitative estimates of interactions between super changes in the two *2016 Acts*, the numbers accessing the part age pension, and overall budget impacts beyond the forward estimates period.

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[i] Zachary May, *Superannuation (Objective) Bill 2016*, Industry Super Australia, 16 December 2016.

[ii] John Roskam, *The Turnbull Government Backs An Unprincipled Purpose Of Super*, Institute of Public Affairs, 9 September 2016.

[iii] Scott Morrison and Kelly O'Dwyer, "The objective has been an important anchor for the development of the superannuation changes included in the Budget." See *A More Sustainable Superannuation System*, 3 May 2016.

[iv] Terry O'Brien and Jack Hammond QC on behalf of Save Our Super, *Submission on Superannuation Bills to Senate Economics Legislation Committee*, 17 November 2016.

[v] On the implications for other Acts, see http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5760 . On the 'verbiage index', see http://saveoursuper.org.au/submission-second-tranche-superannuation-exposure-drafts/ , section 5.

[vi] Scott Morrison, *Address to the SMSF 2016 National Conference, Adelaide*, 18 February 2016.

[vii] Jonathan Smithers, Law Council of Australia, *Submission on Superannuation (Objective) Bill 2016*, 22 December 2016.

[viii] The Tax Institute, *Superannuation Reform Package — tranche two*, 10 October 2016; Australian Institute of Superannuation Trustees, *Superannuation Reform Package — Tranche Two*, 10 October 2016; and the Association of Superannuation Funds of Australia, *Superannuation Reform Package: Tranche Two*, 14 October 2016.

[ix] In a 2015 study, *Superannuation Policy for Post-Retirement*, the Productivity Commission noted:

> *Australia's superannuation system has been subject to regular policy change since its inception, and those people significantly affected by major rule changes have generally been afforded grandfathering provisions that maintain their previous entitlements.*

Reserve Bank of Australia research also observed, in a 1996 discussion paper *Australia's Retirement Income System: Implications for Saving and Capital Markets*:

> *Important changes to the tax rules were made in 1983, 1988, 1992, and 1996, which generally reduced the tax benefits to superannuation, although the treatment remained concessional. ... Changes were generally grandfathered at each stage, so that retirees would receive benefits taxed under a variety of rules depending on when contributions were made.*

[x] John Roskam, *The Turnbull Government Backs An Unprincipled Purpose Of Super*, Institute of Public Affairs, 9 September 2016.

[xi] See Jack Hammond, QC, *Save Our Super's Submission to Australian Treasury on the Australian Government's First Tranche of Exposure Drafts of Proposed Superannuation Changes*, and Terrence O'Brien, *Submission On First Tranche Of Superannuation Exposure Drafts.*

[xii] Brett Hogan, *Submission on Exposure Draft of Superannuation Legislation*, Institute of Public Affairs, 16 September 2016.

[xiii] The *Explanatory Memorandum* is an omnibus document authorized by Treasurer Morrison and Minister O'Dwyer for the *Superannuation (Objective Bill) 2016*, the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016* and the *Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016*.

[xiv] Peter Costello, *A Plan to Simplify and Streamline Superannuation: Detailed Outline*, Canberra, May 2006, p 1

[xv] David Murray *et al*, *Financial System Inquiry Final Report, Chapter 2, Superannuation and Retirement Incomes*, 7 December 2014.

[xvi] We owe this analogy to John Roskam (cited below) and Rebecca Weiser and Henry Ergas, *Strangling the goose with the golden egg: why we need to cut superannuation taxes on Middle Australia* , September 2016, IPA Research Essay, http://ipa.org.au/publications/2545/strangling-the-goose-with-the-golden-egg .
While 80% of age-eligible people receive some age pension, and only about 20% of those of workforce age receive government income support, the analogy still holds: no one thinks a citizen should be indifferent between being employed and receiving welfare.

[xvii] A *'quality-adjusted life year'* of one is a year of perfect health.
A year in poorer health is scored between zero and 1depending on the extent of bad health.

[xviii] Paul Keating, The Story of Modern Superannuation , Australian Pensions and Investment Summit, Sanctuary Cove, Queensland, 31 October 2007

[xix] Peter Costello, *Address to the Investment and Financial Services Association*, Tuesday, 13 June 2006, http://www.petercostello.com.au/speeches/2006/2105-address-to-the-investment-and-financial-services-association-canberra

[xx] Robert Menzies, *The Forgotten People*, 22 May 1942 http://www.liberals.net/theforgottenpeople.htm

[xxi] Trish Power, *Burden for retirees: Monitoring $1.6 million transfer balance cap,* SuperGuide, 25 October 2016.

[xxii] Paul Keating, *The Story of Modern Superannuation", Address to Australian Pensions and Investment Summit, 31 October 2007

[xxiii] John Daley, *For fairness and a stronger budget, it is time to target super tax breaks*, Grattan Institute Press Release of 24 November 2015. This is the press release launching the report *Super tax targeting*, whose cover is pictured. The Press Release is the only example cited in the Government's *Explanatory Memorandum*, p 275 , footnote 2 of 'think tanks' critical of super tax breaks.

[xxiv] Rebecca Weiser and Henry Ergas, *Strangling the goose with the golden egg: why we need to cut superannuation taxes on Middle Australia* , September 2016, IPA Research Essay.

[xxv] Robert Carling, *How should super be taxed?*, Centre for Independent Studies, Policy, Vol. 32 No. 3 (Spring, 2016), pp13-18.

[xxvi] Our evidence that the cost, fairness and sustainability of super concessions are strongly contested is briefly summarized in http://saveoursuper.org.au/submission-second-tranche-superannuation-exposure-drafts/ , section 7. See also Grace Collier, *Superannuation: Coalition guided by the leftie Grattan Institute*, The Australian, 20 August 2016.

[xxvii] A substantial discussion paper was issued with the May 2006 Budget announcement of the measures, with an extended consultation over four months until September 2006. There was keen interest to comment: more than 1,500 written submissions and more than 3,500 phone calls from across the community. Modest revisions to the original ideas were incorporated into revised costing for the forward estimates period and incorporated into legislation introduced by end 2006, with effect from 1 July 2007. See Peter Costello, *Simplified Superannuation – Final Decisions, Press Release 093* , 5 September 2006

[xxviii] Robert Carling, *How should super be taxed?*, Centre for Independent Studies, Policy, Vol. 32 No. 3 (Spring, 2016), pp13-18.

[xxix] Mark Day, *Tax cuts: A lesson for Duncan Storrar and Q&A*, The Australian, 16 May 2016.

[xxx] Scott Morrison, *Superannuation reforms: first tranche of Exposure Drafts*, Media Release 7 September 2016. http://sjm.ministers.treasury.gov.au/media-release/094-2016/

[xxxi] Terry O'Brien and Jack Hammond QC on behalf of Save Our Super, *Submission on Superannuation Bills to Senate Economics Legislation Committee*, 17 November 2016.

[xxxii] Industry Super Australia, *Submission to Senate Standing Committee on Economics on Superannuation (Objective) Bill 2016*.

[xxxiii] The Tax Institute, *Submission to Inquiry into the Superannuation (Objective Bill 2016*, 16 December 2016, p 2.

[xxxiv] Senator Fierravanti-Wells, *Second Reading Speech, Superannuation (Objective) Bill 2016*, Senate Hansard, 23 November 2016, p 90.

[xxxv] Senate Economics Legislation Committee, *Report into Superannuation (Excess Transfer Balance Tax) Bill 2016 and Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016*, 23 November 2016.

[xxxvi] Brett Hogan, *Submission to the Senate Economics Committee Inquiry into the Superannuation (Objective) Bill 2016 [Provisions]*, Institute of Public Affairs, December 2016.

[xxxvii] Scott Morrison, *Address to the SMSF 2016 National Conference, Adelaide*, 18 February 2016.

[xxxviii] Terry O'Brien and Jack Hammond QC on behalf of Save Our Super, *Submission on Superannuation Bills to Senate Economics Legislation Committee*, 17 November 2016.

[xxxix] Terrence O'Brien, *Grandfathering super tax increases*, Centre for Independent Studies, Policy, Vol. 32 No. 3 (Spring, 2016), pp3-12.

[xl] APRA, *Quarterly Superannuation Performance*. There will likely be several quarters of high turbulence in the data around 1 July 2017 as couples rearrange super balances to minimise increased taxes from the Budget measures (and thereby reduce or eliminate the revenue the Government hopes to get from them). But over time, the net effect on voluntary contributions to super is likely to be markedly negative

[xli] Save Our Super has sought to alert all Coalition members of Parliament to the messages in this data, by correspondence of 23 November 2016 now *posted on the SOS website*. The website at www.saveoursuper.org.au is a convenient source of all the SOS submissions to the consultation process and correspondence with Coalition members.

[xlii] Jeremy Cooper, *A Super Charter: Fewer Changes, Better Outcomes: A report to the Treasurer and Minister Assisting for Financial Services and Superannuation*, Canberra, 5 July 2013, p 4 and Chapter 5.

[xliii] Tony Negline*,* *Saving or slaving: find the sweet spot for super*, The Australian, 4 October 2016, and *Save more, get less: how the new super system discriminates*, The Australian, 26 November 2016

[xliv] On the Commissioner's discretionary powers, see Scott Morrison and Kelly O'Dwyer, *Explanatory Memorandum: Superannuation (Objective) Bill 2016; Treasury Laws Amendment (Fair and Sustainable Superannuation) bill 2016; Superannuation (Excess Transfer Balance Tax Imposition Bill 2016*, *passim.* A search of the document for reference to the role of the Commissioner of Taxation identifies some 270 mentions.

[xlv] The very truncated timelines for these last two exercises are documented in Save Our Super's four submissions, available at the SOS website.

[xlvi] John Roskam, *The Turnbull Government Backs An Unprincipled Purpose Of Super*, Institute of Public Affairs, 9 September 2016.