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Federal election 2016: super waffle can't disguise retrospective changes

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During this first week of the election campaign, Malcolm Turnbull and his ministers have lined up day in, day out to swear that the superannuation changes are most definitely not retrospective. That's the first clue that retrospective laws are wicked.

The problem for the government is that some of the super changes are plainly retrospective. Its second problem is that we're not dopes and we don't much like being treated as dopes.

The Prime Minister's constant assertions that the super changes introduced on budget night are not retrospective hark back to when his predecessor, Tony Abbott, tried to convince us that the 2014 budget deficit levy was not a tax. If it wasn't a tax, then Abbott couldn't be accused of breaking his promise of no new taxes. The government peddled that nonsense in the face of the bleeding obvious. The levy was a tax. Therefore, it was a broken promise.

The Abbott government would have done far better fessing up and spending every political breath explaining why the new tax was a necessary part of budget reform. Abbott's tax con only irked voters more. It exasperated not just those hit by the tax but those who wanted more honesty from politicians.

Turnbull is faced with a bigger problem than squabbling about a levy being a tax. Retrospective laws are anathema to a well-functioning and free democracy because they are a fundamental breach of the rule of law. This is not some esoteric debate for academics. The rule of law allows people to know what the law is so they can behave in accordance with it, so they can plan their affairs in full knowledge of those laws. The rule of law demands that laws should be prospective and clear.

That said, there is nothing that legally prevents a government in this country from enacting a retrospective law. But it has long been accepted that changing laws retrospectively should be done only in exceptional circumstances.

Consider the backlash against John Howard when, as treasurer in the Fraser government, he introduced laws to recoup unpaid tax from so-called "bottom of the harbour" tax schemes. These schemes involved people stripping assets out of companies to avoid tax liabilities.

As Howard said at the time, the "normal and general reluctance to introduce legislation having any retrospective element has, on this occasion, been tempered by the competing consideration of overall perceptions as to the equity and fairness of our taxation system and the distribution of the tax burden". Alas, not even egregious tax evasion prevented 14 Liberal and National Party members from crossing the floor to vote against the retrospective law.

In 2004 Howard wouldn't countenance enacting retrospective anti-terrorism laws so David Hicks could be tried in Australia. He said while these kinds of laws might be justified to close tax loopholes, they shouldn't be used to backdate criminal laws.

Last week, Labor made political hay out of Turnbull's super changes. Opposition Treasury spokesman Chris Bowen said opposing retrospective laws "is a matter of principle for us". In fact, just a few years ago this wasn't a matter of principle for Labor. In August 2011, the Gillard government backdated laws in the Social Security (Administration) Act to catch a welfare cheat who had escaped conviction in the courts based on what the law was at the time of her arrest.

Similarly, in November 2011 the Gillard government's Deterring People Smuggling Bill was aimed at retrospectively catching an Indonesian man who allegedly arranged for 49 asylum-seekers to reach Christmas Island in 2010.

Principles against retrospective laws dissolve when you want to catch a welfare cheat, a people-smuggler or a tax cheat. Turnbull's problem is that his retrospective super laws aren't aimed at any of these devious characters. The super changes aren't even about closing tax loopholes. They are an unadulterated tax grab on people with high super balances. That in itself doesn't make them wrong, but hiding from the retrospective parts of the new super regime is absolutely wrong.

Take the Turnbull government's proposed laws around the new non-concessional $500,000 lifetime cap on tax-free super. These laws will be backdated to cover money deposited into a person's super fund since July 1, 2007.

Between July 1, 2007, and May 3 this year, people deposited money into their super funds in good faith on the basis of the existing laws. Backdating the super changes to July 1, 2007, alters not just the law but the legal nature of money people put into their super funds under earlier laws.

To make this simple for government ministers, from 7.30pm on May 3, the legal status of people's superannuation contributions going back to July 1, 2007, was changed under the Turnbull government's budget changes. That's retrospective law-making. And no amount of pollywaffle to the contrary will alter that fact.

Retrospective laws around super are especially wrong for this reason: investing money in your super fund isn't like putting your money directly into shares or property.

If you don't like new tax laws around certain investments, you can move your money elsewhere. Not with super.

Once money is deposited into super funds, it can't be withdrawn until you enter the transition to retirement phase or you have reached the preservation age under superannuation rules.

Again, to make this simple for the Turnbull government, that means people have put money into super funds in good faith on the basis of the laws being A, B and C. The government has changed the laws to D, E and F, but people can't take the money out. That's why retrospective laws on superannuation are especially wicked.

The Turnbull government hasn't grandfathered these budget measures because it wants a hefty boost to the budget bottom line. And there's nothing easier than sticking the knife into those with high super balances.

At the very least, it should come clean and then do the hard yards about explaining why the tax changes are still a good deal for retirees.

Even better, after hitting up the rich for more taxes, the Turnbull government might want to show a deeper commitment to the much harder task of reining in government spending.

There wasn't much solace in the budget. Spending is forecast to fall from 25.8 per cent of gross domestic product this financial year (it was 26 per cent during the 2009 financial crisis) to 25.2 per cent by 2020. That's not much better than the 25.6 per cent in Wayne Swan's last budget.

The other great furphy from the Turnbull government is that these changes affect only the top 1 per cent of well-heeled Australians. In fact, anyone who aspires to a higher superannuation balance to fund their retirement must now ask: what's next and who's next? The top 10 per cent? The top 15 per cent? That's the problem with retrospective laws. No amount of political discombobulation by the Turnbull government can settle those questions.

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