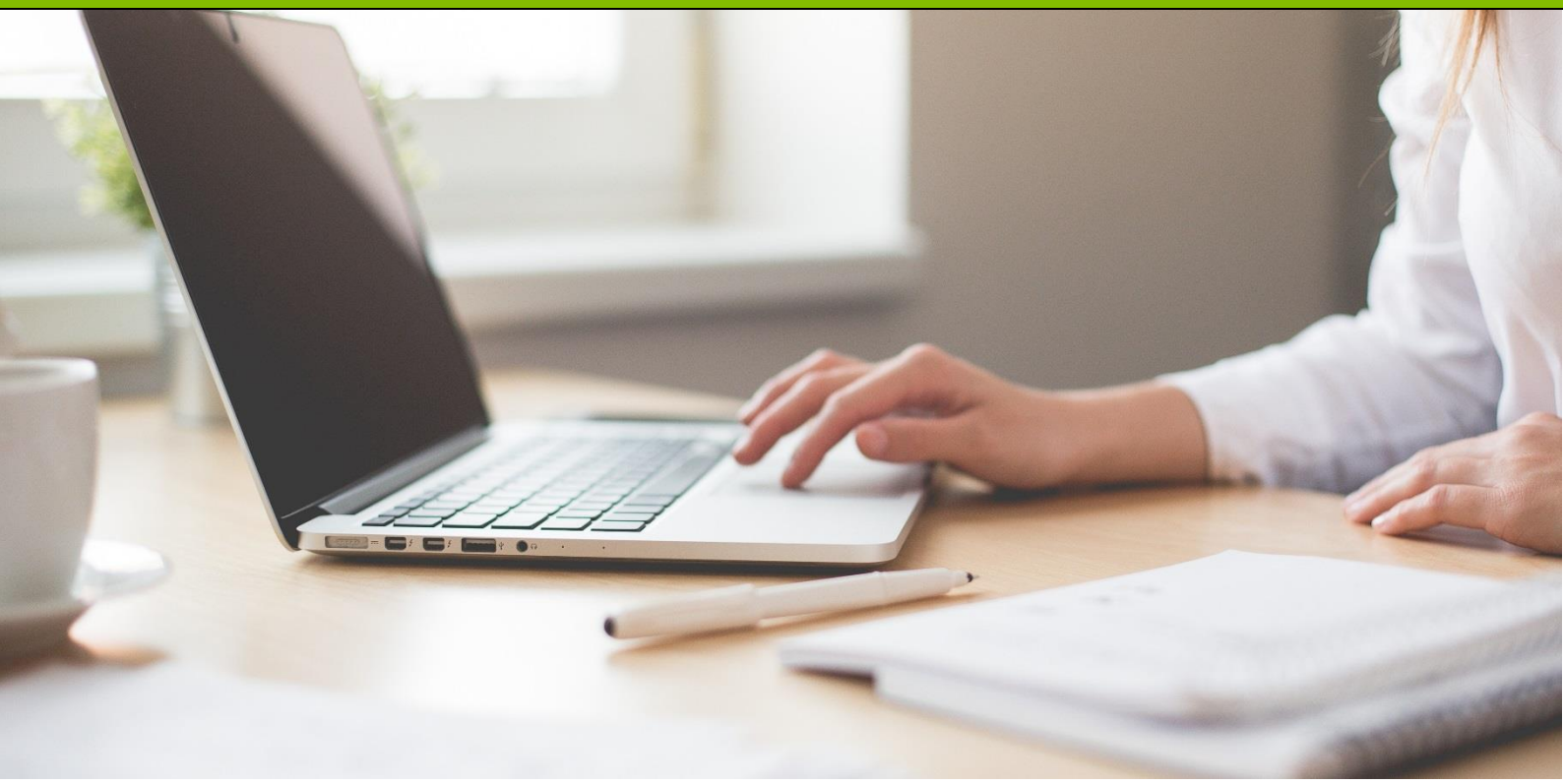
FSC FINANCIAL SERVICES COUNCIL

Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019

Submission to Senate Economics Committee

17 January 2020



FSC FINANCIAL SERVICES COUNCIL

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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Recommendations

The FSC recommends:

- Parliament support passage of the Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019.
- the Bill be amended so that all employees on existing or expired agreements must be granted choice of fund by a certain date, for example one year after royal assent, to provide certainty to employers and ensure workers are not disadvantaged.

3. Overview comments

The FSC welcomes the opportunity to make a submission on the *Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019* (**The Bill**).

Currently, workplace agreements are permitted to prevent superannuation fund choice for employees covered by the agreement.

Workplace agreements including this restrictive clause specify that all superannuation guarantee (**SG**) contributions on behalf of employees must go to a particular superanuation fund and prescribe that this fund is the exclusion of all other funds. These requirements prevent the employer from making contributions to any other fund, even where an employee wishes to choose a different fund or attempts to lodge a 'choice of fund' form.

The Government estimates about one million Australians are prevented from exercising choice of superannuation fund under current laws (see Section 4.1 below).

The FSC is a long-standing supporter of choice in superannuation, and has for some time strongly advocated for the removal of these restrictions on superannuation choice in workplace agreements. We supported previous versions of this legislation, including Schedule 1 in the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017* (**the 2017 Bill**).

Consistent with this approach, the FSC is strongly supportive of the measures contained in the Bill.

FSC Recommendation: Parliament should support passage of the Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019.

A recommendation to expand the scope of the Bill is in Section 0 below.

We note this Bill does not affect superannuation default arrangements – employees who do not choose a superannuationfund are unaffected. The Bill also should not affect agreements that provide greater superannuation benefits to some or all employees – nothing in the Bill prevents employers and employees from agreeing to boost employee superannuation, and FSC members regularly provide tailored corporate plans for employers without requiring any restriction of choice.[1]

Finally, the Bill should not affect the detection of unpaid superannuation, as other reforms underway, particularly Single Touch Payroll, are likely to cause the greatest detection of unpaid super.

3.1. Recommendations of previous inquiries

Removing the ability for workplace agreements to restrict superannuation choice has been supported by a number of independent inquiries, including:

Productivity Commission Inquiry into Superannuation – Assessing Efficiency and Competitiveness, Final Report:

> **FINDING 5.2 [excerpt]**
>
> *Proposed legislative changes to prohibit restrictive clauses in workplace agreements on members' choice of fund are much needed. (page 266).*
>
> *…the current set-up has egregiously permitted enterprise and workplace agreements to restrict an estimated 1 million individuals from exercising their own choice of fund.* (page 578).
>
> **RECOMMENDATION 2 [excerpt]**
>
> *Members should not be prevented from choosing any other fund (including an SMSF). Terms in enterprise and workplace agreements that restrict member choice should be invalidated.* (page 580)

Financial Systems Inquiry (**FSI**) Final Report, pages 131–2:

> *Government should remove provisions in the Superannuation Guarantee (Administration) Act 1992 that deny some employees the ability to choose the fund*

[1] And it is unclear why greater superannuation benefits require restrictions on choice. See EM to the 2017 Bill at 1.75 and 1.151.

> *that receives their SG contributions due to the exclusions given to enterprise agreements, workplace determinations and some awards.*
>
> *…These exemptions [from choice of fund] contribute to employees having multiple superannuation accounts and paying multiple sets of fees and insurance premiums, which reduces retirement income…For some individuals, lack of choice contributes to disengagement with superannuation.*
>
> *When legislation was introduced to allow employees to choose their superannuation fund, concerns were raised about the compliance costs to employers from having to make contributions to multiple funds. However, changes in technology and the introduction of SuperStream are reducing these costs. Many employers use clearing houses to make payments to multiple superannuation funds, and Government already provides a free clearing house service for small businesses.*

The Royal Commission into Trade Union Governance and Corruption or Trade Union Royal Commission (**TURC**) Final Report, pages 343–5:

> *The arguments raised concerning the burden of administrative costs to employers in administering employee default fund choices are increasingly less relevant for the reasons identified in the Murray Report [the FSI Final Report, see above]…*
>
> *Other arguments against allowing choice of fund for all Australian employees are outweighed by the benefits choice provides such as increased competition and member engagement in the superannuation system.*
>
> *Two other arguments require consideration. The first is the contention that the proposed amendments are unnecessary because employees are effectively exercising choice by voting for an enterprise agreement, or because it is open to them to raise their choice of fund requirements during negotiations for an enterprise agreement. A related notion is that the proposed amendments are unnecessary because many employees do not, in fact, exercise their choice of fund rights.*
>
> *These arguments are unsound. As to the first, the need for the tyranny of the majority to prevail has not been established. Further, not every employee votes on an enterprise agreement. In particular, employees that commence employment on existing enterprise agreements, or on greenfields agreements, will not have an opportunity to vote or to raise any concerns regarding their choice of fund. As to the second, the reality is that some employees do wish to exercise a choice in relation to their super fund. The stories of Peter Bracegirdle and Katherine Coles are examples of some that did, for sound reasons [see Section 0 below].*
>
> *In short, none of the arguments made against freedom of choice are compelling.*
>
> ***Recommendation 51***
>
> *Sections 32C(6), (6A), (6B), (7) and (8) of the Superannuation Guarantee (Administration) Act 1992 (Cth) be repealed, and all other necessary amendments be adopted to ensure all employees have freedom of choice of superannuation fund.*

3.2. Recent Fair Work Commission decision re Kmart

A recent decision in the Fair Work Commission has emphasised the problems with workplace agreements that restrict superannuation choice. The decision by Deputy President Mansini objected to the restrictions on superannuation choice proposed in a Kmart workplace agreement, arguing the restriction had material costs to employees; on appeal the Full Bench of FWC raised new concerns with the restriction of superannuation choice in the agreement. Kmart addressed these concerns by removing the restriction on choice for all employees.

The relevant excerpts from the decisions are below.

Decision of Deputy President Mansini on 2 September 2019 [2019] FWC 6105:[2]

> *[131] The Award itself describes the choice that may be made under the superannuation legislation (preserved by its terms) as an "opportunity" strongly suggesting a benefit in the ability to exercise that choice.*
>
> *[132] The Financial System Inquiry included a recommendation to "provide all employees with the ability to choose the fund into which their Superannuation Guarantee contributions are paid" based on its findings of the detrimental impacts of restrictions on choice of fund including additional fees through maintenance of multiple funds, the longer term impact on superannuation savings and the particular vulnerabilities of casual employees to restrictions on choice.*
>
> *[133] On the materials before the Commission regarding the superannuation provision in the Agreement, I am only able to objectively conclude that the Agreement's restriction on the choice of superannuation fund that would otherwise exist under the Award is a less beneficial term. On one view this may be non-monetary and accordingly difficult to quantify. It may be monetary to the extent that the performance of the REST fund is less than what an employee might otherwise prefer or that employees required to have multiple funds are required to pay multiple fund fees. Whether the detriment is properly characterised as monetary or non-monetary, the potential for a class of employee or prospective employee to suffer it as against the Award is real notwithstanding the difficulty in its quantification. (paragraph 133)*

Full Bench decision on 11 November 2019 [2019] FWCFB 7599:[3]

> *[56]…our concern arises from the particular circumstances of Kmart's workforce, two-thirds of which are casual employees. Our assessment, having regard to the general characteristics of employment in the retail industry, is that it is likely that a significant proportion of such casual employees have previously had other casual employment or have a second job. In that context, a choice of funds may be a benefit so that the casual employee can seamlessly remain in a single superannuation fund rather than*

[2] https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc6105.htm
[3] https://www.fwc.gov.au/documents/decisionssigned/html/2019fwcfb7599.htm

> *having two or more funds arising from different jobs with all the inconvenience and additional administration costs that this involves. To this extent, we agree with the some of the matters [raised in Decision [2019] FWC 6105 of Deputy President Mansini].*

The Full Bench then noted that Kmart proposed amending the agreement to allow choice for all employees, and stated:

> *[59] Our provisional view is that the proposed undertaking would address our concern and not be likely to cause financial detriment to any employee covered by the Agreement or result in substantial changes to the Agreement.*

The above decisions confirm that restrictions on superannuation choice have real and detrimental impacts on employees. Importantly, the FWC did not find there were any offsetting benefits from restricting choice.

The Kmart decision may mean fewer enterprise agreements in future restrict choice of fund, but this does not mean the Bill is redundant – an enterprise agreement can still be approved with restrictions on superannuation choice if there are offsetting wage increases; and the FWC may not reject an agreement with restrictions on superannuation choice if there are no applications for the agreement to be rejected.

3.3. Details of the Bill

The FSC supports the details of the Bill, including:

- Employers being required to provide choice of fund forms to employees under new agreements from the start date.
- The changes not applying to certain defined benefit funds.

Consistent with the FWC decision in relation to Kmart, however, the FSC also submits that the Bill should be amended to also apply to existing enterprise agreements. It should not be acceptable for employees to continue to be disadvantaged by allowing existing agreements to remove employees' right to choose a superannuation fund.

The FSC is concerned that the grandfathering of existing workplace agreements in the Bill is open ended, particularly as enterprise agreements are entitled to continue to operate beyond their nominal expiry date. All employees covered by agreements should be entitled to prospectively exercise choice.

Note that this recommendation to enable employees currently covered by an enterprise agreement to exercise choice of fund is only intended to apply prospectively. Further, only a subset of employees will take up this option, those who have been wanting to change funds but until now have been prevented from doing so.

Recommendation: the Bill be amended so that all employees on existing or expired agreements must be granted choice of fund by a certain date, for example one year after royal assent, to provide certainty to employers and ensure workers are not disadvantaged.

4. Impact of restricted choice

4.1. Choice

Removing choice violates the key principle that individuals should be allowed to choose where and how their savings are invested, if they wish to do so.

Most Australians can exercise choice in superannuation. However, a significant minority cannot, estimated at about 1 million in 2018.[4]

There are no clear reasons why the group without choice cannot exercise the rights that the remainder of Australians can exercise.

The prevention of choice under the current arrangements forces many Australians into new funds that they did not choose and creates particular problems for individuals who:

- have chosen a self-managed super fund (SMSF) or investor-directed product;
- made specific investment choices in their existing fund;
- had chosen insurance levels (either increasing or decreasing the level of cover);
- made death benefit nominations; or
- prefer their existing fund for a particular reason, for example due to their investment philosophy.

We note some have argued the number of employees unable to exercise choice is much lower than 1 million,[5] but if this is the case then the costs of the change will be smaller, and the reasons for opposing the change are diminished.

4.2. Competition

Restricting choice also reduces the competition between superannuation funds. While the Productivity Commission argues many superannuation fund members are not substantially engaged with their superannuation (see Final Report in Section 5.1), a significant minority are engaged, and these members act as a competitive constraint on funds. The restrictions on choice in workplace agreements directly prevent competition, but also restrict engagement (see Section 4.6 below) which also discourages competitive pressures on funds.

The FSC also understands that some superannuation funds inappropriately rely on terms in enterprise agreements as a basis for rejecting rollover requests from competing superannuation funds. In effect, a consumer has chosen to leave their workplace's default fund and lodged a rollover request with a new fund, but the incumbent fund has rejected that

[4] See: Kelly O'Dwyer 'Building Wealth and Self-Reliance – A Liberal Legacy', Address to the AFR Banking and Wealth Summit, Sydney, 4 April 2018. The EM to 2017 Bill at 1.92 estimated the number of individuals that cannot exercise choice was 1.05 million at that time – and this figure did not include people on expired enterprise agreements waiting to be renegotiated.
[5] See ISA submission to 2017 Bill, pages 7ff.

request on the basis that they continue to be employed by the employer covered by the enterprise agreement.

Whilst it is the FSC's view that this conduct is inconsistent with obligations on trustees under superannuation legislation it has nonetheless gone unchecked. Implementing the Bill to existing and future agreements would ensure that trustees can no longer use this basis to reject legitimate rollover requests.

There are a number of other superannuation policies in place or being implemented, such as displaying superannuation balances on my.gov.au accounts, which are assisting in increasing superannuation engagement. Failing to remove choice restrictions in workplace agreements would reduce the benefits from these other policies.

4.3. Multiple accounts

The current superannuation arrangements allowing workplace agreements to restrict choice increase the likelihood of duplicate super accounts.

The Productivity Commission has found "The primary source of balance erosion lies in multiple accounts" (Final Report, page 295). Productivity Commission modelling suggests an individual with two accounts for their whole working life will be 6 per cent worse off at retirement (or $51,000 worse off) compared to an individual with only one account (Final Report, page 532).

Other policies are helping to address this problem, particularly the processes to transfer inactive superannuation accounts to active accounts through Protecting Your Super.

However, these processes do not address the *creation* of additional, new multiple accounts, which occurs due to the existing superannuation default model and the restrictions on choice in enterprise agreements.

In the first case, the default arrangements can mean a new employee is automatically provided with a new superannuation account if they take no action. Employees who can exercise choice can avoid the creation of new accounts simply by specifying SG contributions should go to their existing account.

In the second case, where employees who are prevented from exercising choice, the creation of a new account is mandatory. The workplace agreement is *forcing* the employee to create a new account whether or not they wanted one. If the employee rolls their existing superannuation balances into the new account, this is an unnecessary process that:

- Would particularly harm employees who made specific investment choices in their old fund, had chosen insurance, made death benefit nominations, preferred their old fund due to investment philosophy, or preferred the consumer relationship with their old fund – see Section 4.1 above.
- Would impose unnecessary costs on the superannuation system. The Productivity Commissions found mandatory rollover of superannuation balances when employees changed jobs would lead to about 0.5 million extra rollovers per year and cost the superannuation system (and hence members) $45 million per year (final report, page

303). It would also mean reduced ability for funds to invest in illiquid assets or for insurers to offer favourable rates (see PC Final Report, page 304).
- Adds an unnecessary time and cost burden to members who need to do the rollover, provide personal details to the new fund, and re-learn how to contact their fund, login to their account, and how to comprehend their new fund's statements (see PC Final Report, page 304).
- Increases confusion of members about which fund they are in, also decreasing member engagement.
- Would not deal with individuals with multiple jobs – see Section 4.5 below.

The employee has three other options, all of which are sub-optimal:

- They could maintain their old account and continually roll over the contributions from the new account to the old account – but this is very cumbersome and completely unnecessary process. The individual is still likely to be levied with administration fees from both accounts, resulting in a substantial reduction in retirement balances (see Productivity Commission estimates earlier in this section).
- The employee could close their existing preferred fund and roll money over into the new fund, which would clearly be detrimental to the individual and may result in the loss of tailored investment and insurance settings;
- The employee could retain both funds, but then the problems of account proliferation are not being addressed and the costs discussed earlier in this section will occur.

The consumer body Choice provided the following case study illustrating this problem:[6]

> *…we were contacted be a consumer who was forced to maintain an account with UniSuper against her wishes because it was the nominated default fund in the industrial agreement under which she was casually employed with a university. Initially she had taken to consolidating her UniSuper account into QSuper every few months in order to follow the conventional logic that paying two sets of fees was wasteful. However, she was continuing to be charged fees for the first month with UniSuper before she was able to enact a transfer. This was a sizable proportion of her balance given she was employed for limited hours on a casual basis. She had eventually resolved to maintain two accounts but take up a cash investment option with UniSuper to minimise the fees on her small balance.*
>
> *Her chosen fund was with QSuper, which she had chosen because she preferred the customer service experience. In terms of net returns performance, the default UniSuper and QSuper funds perform comparatively well against the market, so either would have been a sound choice.[7] However, this consumer had gone to the extra effort of exercising choice based on her customer service experience. Under a properly functioning market she would have been able to exercise this choice and QSuper would have been rewarded for its superior customer service in the customer's eyes.*

[6] Choice submission to Senate Economics Committee on the 2017 Bill, pages 9–10.

4.4. Mandatory contributions to poor performing funds

The restrictions on choice in some workplace agreements mean contributions are required to be made to poorer performing funds. We refer to a sample study undertaken by the Attorney-General's Department showing that there are at least 290 agreements that restrict choice in some way to an underperforming fund. At least 14,000 employees are forced to contribute to one of seven funds identified by Super Consumers Australia as the worst performing funds as a result of the restrictions.[7] The total numbers of workers forced into the funds grew to 16,639 once expired agreements that had not been terminated or replaced were included. For four of these funds, the three and five-year net returns have been below the median more than 50 per cent of the time and for two funds, the returns are consistently ranked in the bottom quartile.[8]

The Productivity Commission's Inquiry into Superannuation found:

> *One of the main drivers of subpar outcomes is the way default funds are tied to employers and the workplace relations system, with employer choice constrained by lists of funds in modern awards and enterprise bargaining agreements.*
>
> *Employers are not always well placed to navigate this maze and make decisions on behalf of their workers. Any system in which employers play such a central role in choosing defaults will always be hostage to constraints on employers' time, expertise and even goodwill to find the best super product for their workers. While some employers are highly capable and make much effort (sometimes using corporate tenders), many others (especially smaller businesses) put in limited effort or struggle to compare products. And there is evidence that some funds offer benefits to influence employers' choices — a problem that is both hard to observe and to regulate.* (Final Report, page 24).

The Productivity Commission reviewed the performance of MySuper or predecessor products over the 11 years to 2018 and found 17 MySuper products (representing 1.6 million members and $57 billion in assets) underperformed their tailored benchmark by more than 0.25 percentage points and returned a median return of 3.8 per cent a year to their members. Of these 17 underperforming MySuper products, 11 are offered by funds that appear in at least one award, and underperforming funds were from all segments – industry, retail and public sector (see Final Report, page 531).[9] While this result is for products nominated in awards, it would likely be broadly reflective of performance of products specified in workplace agreements.

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[7] See House of Representatives second reading speech on the Bill.
[8] See: https://www.afr.com/work-and-careers/workplace/agreements-lock-thousands-into-underperforming-super-funds-20191205-p53h3o
[9] Note the FSC has previously raised concerns that the MySuper performance data across 11 years may incorrectly match products over time. See an FSC supplementary submission to the Productivity Commission's inquiry into super: https://www.pc.gov.au/__data/assets/pdf_file/0004/232861/subdr218-superannuation-assessment.pdf

A report by Deloitte Access Economics for the FSC in 2017 found there was a 5 per cent gap in net returns between the best and worst performing funds in enterprise agreements; and a 100 basis point gap in the fees charged between the cheapest and most expensive funds in enterprise agreements. More details of this work is in the Appendix to this submission.

The FSC considers poor performing products should improve their performance or exit the system, no matter which segment of the industry they come from (and whether they are included in workplace agreements or not).

4.5. Individuals with multiple jobs

The impact of the restriction on choice is particularly problematic for individuals who have more than one job. This is not just working multiple jobs simultaneously, but also only have one job at a time but change jobs frequently. The latest ABS data on multiple jobs for 2016−17 shows:[10]

- There were 2.1 million Australians holding multiple jobs, an increase of 0.3 million since 2011–12.
- The proportion of employees with multiple jobs has increased over the same time period from 14.4 per cent in 2011–12 to 15.6 per cent in 2016–17.
- Women are more likely to hold multiple jobs, with 17.5 per cent of women holding more than one job during the 2017 financial year, compared to 13.8 per cent of men.
- One in four people under the age of 30 held more than one job, with the rate highest around age 19.
- While 26 per cent of multiple job holders worked all of their jobs in the same industry, the large majority (74 per cent) worked across multiple industries – meaning they are more likely to have accounts in two or more different default super funds and pay duplicate fees and charges as a result.
- 409,100 people held three jobs concurrently in the 2017 financial year; and 166,700 people held four or more concurrent jobs.
- The median employment income for people with multiple jobs was $40,491, which is well below the median of $48,908 for people with only one job.

This demonstrates the potential extent of the problem is significant.

4.6. Member engagement

Restrictions on choice are likely to discourage member engagement. This was a finding of the Productivity Commission: “Further discouraging engagement, a proportion of members may be constrained from making an active choice” (Final Report, page 248). The FSI similarly argued its recommendations to allow employees to exercise choice would increase member engagement (see FSI Final Report, page 115 and quotes in Section 3.1 above).

[10] See: https://fsc.org.au/resources/1828-growing-number-of-multiple-job-holders-emphasises-need-to-fix-superannuation-defaults/file

4.7. Impact on employers

We note the restrictions on choice in workplace agreements do reduce costs to some businesses. However:

- The estimated cost to business of allowing choice is very small at $2.245 million per year (see EM to the Bill at page 4). This figure includes the impact on superannuation funds.
- In many cases, this cost would be borne by larger businesses which are much more likely to have enterprise agreements, as shown in Table 1 below. Larger businesses are better placed than small businesses to implement this type of change.

Table 1 – Proportion of employees covered by workplace agreements, by employer size, 2018

Employer size	Proportion covered by agreements
Under 20 employees	2.4%
20 - 49 employees	13.9%
50 - 99 employees	19.0%
100 - 999 employees	42.2%
1,000 and over employees	70.6%
Total	38.4%

Source: ABS Employee Earnings and Hours, Australia, May 2018, Data Cube 7.[11]

- Similarly, the overwhelming majority of small and medium sized employers already are required to provide choice of fund as shown by the data in Table 1 above. The Bill extends this obligation to the larger businesses that currently do not have this requirement.
- The Australian Chamber of Commerce and Industry (ACCI) supported the policy in the 2017 Bill, noting SuperStream has significantly reduced the costs of implementing choice for employers.[12]
- Some argue the number of agreements restricting choice are smaller than the 1 million estimate noted earlier (see Section 4.1 above). If this is true, then the costs of implementing this change are also even smaller than the $2.245m estimate.

[11] The 'under 20 employees' proportion in the table has a high standard error, but this would only affect the figures by a couple of percentage points either way.
[12] See ACCI submission to Senate Inquiry into the 2017 Bill, page 7.

5. Conflicts of interest

Trade unions and employers (or employer associations) who negotiate workplace agreements also have representatives on the boards of industry superannuation funds. This creates a clear conflict of interest if the unions and employers agree to nominate 'their' fund at the expense of a better performing fund. Specifically:

- the union that receives board remuneration from a super fund also nominates that same fund to receive employer SG contributions – and nominates that SG contributions to other funds be prevented; and
- the employer association that receives board remuneration from a super fund also nominates that same fund to receive employer SG contributions – and nominates that SG contributions to other funds be prevented.

There is no requirement that the fund nominated be shown to perform well relative to other funds, and no requirement for the employer to run a tender to encourage competition between trustees in order to secure fee reductions or superior servicing for their consumers.

There is also no evidence that this exclusivity is required in order to secure a tailored arrangement for employees.

The TURC revealed examples of unions using anti-competitive clauses in enterprise agreements to prevent employees from being able to switch out of poorly performing industry funds, which were cited in the TURC final report in justifying the recommendation to remove restrictions on superannuation choice, see excerpts in Section 3.1 above.

The TURC heard evidence that this occurs:

1. For individuals at the workplace level; and
2. At the industry level, through template agreements negotiated by the relevant union and employer organisations that also sit on the board of the industry fund.

Details of these examples are below.

5.1. Removal of choice at an individual workplace – TWUSuper

In 1984, the Transport Workers' Union (**TWU**) established TWUSuper.[13] TWUSuper is a $4.5 billion industry fund with 120 000 members.

TWUSuper has an 'equal representation' board with four employer representatives, four representatives of the TWU and an independent chair.

The TURC examined TWUSuper and concluded that the TWU in certain enterprise negotiations insisted that employers pay contributions to TWUSuper only, whether the

[13] Chapter 6.2 TURC Interim Report, page 902

particular employee agrees or not. The TURC concluded that "It is a practice that has no real justification."[14]

The TURC details the specific example of a truck driver for Toll Holdings, Paul Bracegirdle, who attempted to choose his own superannuation fund but had his efforts rejected by a TWU official.

One TWU official even told Mr Bracegirdle "f*** off. No one cares, Paul. Go away".[15]

Mr Bracegirdle explained his motivation to switch to a new fund as being based on a desire to boost his savings to adequately provide for his daughter:

> *I think you should be able to look into which super funds offer the best rates of return, the least fees – various things. And I just didn't think that TWUSuper was stacking up as well as some of the commercial organisations...*[16]

Mr Bracegirdle also explained a common sense objection:

> *I just thought it was wrong. You know, I just couldn't believe it, that, you know, we could be told where to put 10 per cent of our income. I was shocked*.[17]

Mr Bracegirdle wrote to his member of parliament and, in return, received confirmation from the then Minister for Superannuation that it was lawful for an employee's right to choose a fund to be removed through an enterprise agreement.

Toll advised Mr Bracegirdle that it has "received requests from a number of employees seeking to exercise choice as to their superannuation fund" and that Toll's "preferred position is to allow every employee the ability to choose their own superannuation fund."[18]

Toll confirmed, however, that this issue was "sensitive" to the TWU and that Toll will continue to comply with the obligations in enterprise agreements negotiated with the TWU to only make payments to TWUSuper.[19] TWUSuper provided evidence to the TURC that the requirement that employers only contribute to TWUSuper was, in part, to protect their "collective strength".[20]

The TURC concluded, however, that the conflicted relationship between TWUSuper and the union resulted in both parties acting in the interest of the TWU, not fund members. The self-interest of the union is put ahead of the interests of fund members due to the "income stream which flows back to the TWU."[21]

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[14] Chapter 6.2 TURC Interim Report, page 903
[15] Chapter 6.2 TURC Interim Report, page 918
[16] Chapter 6.2 TURC Interim Report, page 905
[17] Chapter 6.2 TURC Interim Report, page 905
[18] Chapter 6.2 TURC Interim Report, page 909
[19] Chapter 6.2 TURC Interim Report, page 909
[20] Chapter 6.2 TURC Interim Report, page 922
[21] Chapter 6.2 TURC Interim Report, page 938

The TURC concluded that "there are strong grounds for repealing" the sections of superannuation legislation that prevents employees from exercising choice of fund when covered by an enterprise agreement.[22]

5.2. Removal of choice at an industry level - LUCRF and Association of Market and Social Research Organisations

LUCRF is a $5.6 billion superannuation fund with 162 000 members. LUCRF has an equal representation board with five directors, including the chair, appointed by the National Union of Workers (**NUW**), five directors from various employers and two independent directors.[23]

The NUW periodically negotiates enterprise agreements with the Association of Market and Social Research Organisations (**AMSRO**). AMSRO is also the peak employer body covering 70 per cent of the employers in that industry.[24] These agreements follow a template that requires employers to make superannuation contributions on behalf of employees into LUCRF and only that superannuation fund.

AMSRO employees sought the ability to choose their own fund. AMSRO sought in negotiations with the NUW to provide that right for senior staff, but not junior staff.

AMSRO explained that based on their "experience in negotiations with the NUW, a clause providing full choice of superannuation fund to all employees of AMSRO's members would have been resisted by the NUW and would have required AMSRO to make other concessions to the NUW."[25]

Katherine Cole was an employee covered by one such agreement. Ms Cole was in her 60s and advised the TURC that she wished to have her contributions paid to her and her husband's SMSF. Ms Cole's husband was retired and payments of Ms Cole's superannuation to LUCRF, not the SMSF, would impact the age pension Mr Cole received and result in them being financially worse off.[26]

If Ms Cole withdrew her contributions from LUCRF each month, of the $64 per month in contributions she received, LUCRF would charge her fees and $60 per withdrawal.[27]

Ms Cole subsequently restricted her working hours to fewer than 18 hours per month to ensure that she is below the $450 per month threshold so her employer does not make contributions on her behalf. Ms Cole would like to work more but there is no financial incentive for her to do so.[28]

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[22] Chapter 6.2 TURC Interim Report, page 943
[23] https://lucrf.com.au/about-lucrf/our-people
[24] Chapter 6.3 TURC Interim Report, page 959
[25] Chapter 6.3 TURC Interim Report, page 963
[26] Chapter 6.3 TURC, page 964
[27] Chapter 6.3 TURC, page 964
[28] Chapter 6.3 TURC, page 965

Ms Coles' employer gave evidence to the TURC that she is approached by employees around every six months with requests to change superannuation funds that she must reject because of the agreement with the NUW.[29]

[29] Chapter 6.3 TURC, page 965-6

Appendix: Summary of previous research by Deloitte Access Economics

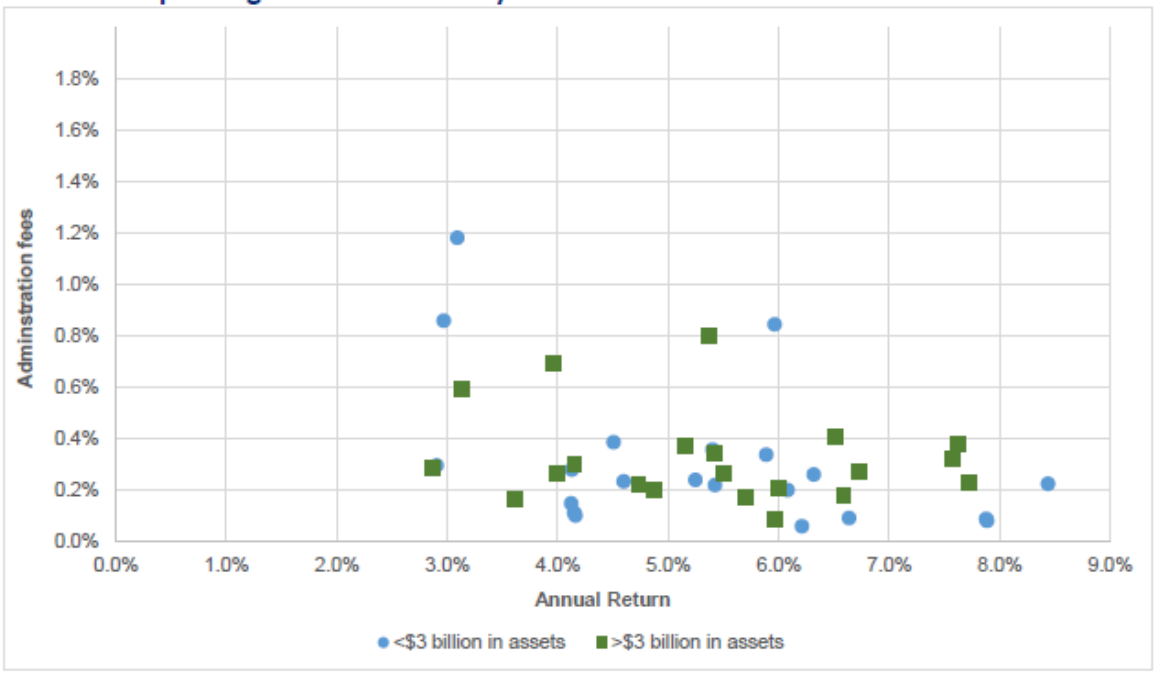
Research by Deloitte Access Economics (**DAE**) in 2017 demonstrated the prevalence of enterprise agreements restricting choice of fund in the Australian economy.[30] DAE concluded:

- 41% of all employees are covered by enterprise agreements;
- 67% of all agreements nominated a default fund; and
- 19% of agreements completely removed a consumer's right to choose an alternate fund.

The DAE research demonstrates that if an employee is defaulted into an underperforming fund chosen by the union and their employer they can be materially worse off. In particular:

- A 5% gap in net returns between the best and worst performing funds in enterprise agreements; and
- A 100 basis point gap in the fees charged between the cheapest and most expensive funds in enterprise agreements.

Figure 2.5: Average annual administration fees and returns for MySuper products offered across Enterprise Agreements from July 2014 to June 2016



Source: APRA Annual MySuper Statistics back series (issued 1 February 2017) and DAE analysis of a sample of EA entered into in 2015. The data chosen corresponds with the two full years since the commencement of the MySuper regime.

[30] See: https://www.fsc.org.au/resources-category/publication/869-2017-0704-dae-competition-in-superannuation-july-2017/file

The significant dispersion in fees and performance amongst the funds listed in enterprise agreements would materially impact the retirement incomes of Australian employees. A consumer should be entitled to leave a poorly performing or expensive fund and choose a better performing fund. A consumer should not be prevented from doing so by any conflicted arrangements.