

20 January 2016

Division Head
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

BY EMAIL: superannuation@treasury.gov.au

Dear Division Head

Superannuation Legislation Amendment (Governance) Bill 2015: Extending superannuation choice to enterprise agreements

The Financial Services Council welcomes the opportunity to make a submission to exposure draft legislation that proposes extending the right of an Australian consumer to choose their own superannuation fund.

The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees. The FSC has over 125 members who are responsible for investing more than \$2.5 trillion on behalf of 11 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 third largest pool of managed funds in the world.

The FSC is a strong supporter of reforms that increase competition and consumer choice in the superannuation industry. This submission raises only technical issues in relation to the exposure draft, but is otherwise supportive of the passage of the legislation.

Please contact me with any questions in relation to this submission on (02) 9299 3022.

Yours sincerely,



Blake Briggs
Senior Policy Manager

EXTENDING CHOICE OF SUPERANNUATION FUND

1. CLAUSES OF AGREEMENTS THAT REMOVE CHOICE

The FSC submits that enterprise agreements restrict choice of fund to varying degrees and through various formulations of words that restrict the rights of either the consumer, the employer or both.

These different formulations are important to understand as it allows parliament to test whether the policy objective of extending choice of fund to enterprise agreements and determinations will be achieved. The proposed legislation will be effective at addressing the most egregious examples of removing consumer choice and therefore preventing the effective operation of a competitive market.

The broad categories of clauses include:

- a. Agreements that require an employer to make contributions into only the fund, typically an industry fund, named in the agreement that was negotiated with the union that owns that fund; or
- b. Agreements that purport to prevent a consumer from choosing another fund;
- c. Agreements that name a default fund, into which future contributions for consumers will be made unless that consumer chooses a different fund; and
- d. Agreements that are silent on default fund arrangements.

The FSC understands that this exposure draft legislation is only intended to extend choice of fund to categories (a) and (b) above, that is, where agreements restrict the capacity of consumers to choose any other fund or have the effect of a choice nullified by preventing an employer from making contributions into the fund they have chosen. The FSC provides examples of category (a) and (b) clauses from enterprise agreements below.

Removing employer authority to contribute to a non-union fund

Clause 5.2.5 in Part 5 of the *Woolworths Limited Brisbane Liquor Distribution Centre Enterprise Agreement 2013* specifically provides that the enterprise agreement satisfies the choice of fund requirements as currently set out in law, and therefore a consumer is not currently protected from the legislative entitlement to choose their own superannuation fund.

Woolworths Limited Brisbane Liquor Distribution Centre Enterprise Agreement 2013

Choice of fund

5.2.5. Choice of fund is not available to eligible employees because the terms of this Agreement satisfy the requirement to provide employees with a choice of superannuation fund under the Superannuation Guarantee (Administration) Act 1992.

It is useful to note that superannuation funds that oppose consumers having the right to choose their own fund, on the basis that such employees would be unlikely to choose their own fund if afforded the right to do so, also make use of these terms to make it clear the employee is not entitled to choice.

There is clearly an inconsistency between submissions that consumers will not choose a fund even if that choice is given to them, and the needed to include clauses that specifically prohibit consumers from choosing a fund. Surely if the former were true such clauses would be unnecessary?

An additional example relates to Clause 10 of the *Toll Logistics Multi User Warehouse Western Australia Enterprise Agreement 2008* prevents an employer from making a contribution into any

other fund, including a fund that a consumer may have sought to choose by submitting a choice form, otherwise the employer would be in breach of the agreement and potentially subject to civil penalties.

Toll Logistics Multi User Warehouse Western Australia Enterprise Agreement 2008

10.1. Superannuation

10.1.1. The Company shall pay contributions in accordance with the Superannuation Legislation on behalf of each eligible Employee to the TWU Superannuation Fund.

Opponents of a consumer's right to choose their own fund have also advocated that a consumer can participate in enterprise bargaining to help determine the fund named in the agreement, or approach their union to request that the union agrees that in future agreements the right to choose a fund be included. The FSC submits, however, that the well understood financial and ideological interrelation between trade unions and industry superannuation funds would severely diminish the capacity for an individual to secure such an agreement from a union official, even where this would be in the best interest of the consumer.

Removing consumer right to choose another fund

There are a range of clauses that are styled to suggest that an employee will choose a fund named in the enterprise agreement, rather than default into that fund, but that they have no choice other than the union backed fund in question.

Appendix G of the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011*, for example, requires the employer to provide a consumer with the application form for the default fund, rather than create an account when contributions are received through the default channel. The employer, however, cannot make contributions into any other fund, and the agreement letter explains that the consumer has no choice.

Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011

Appendix G - Superannuation

1.1.3 The Company shall provide each team member upon commencement of employment with the appropriate membership application form(s) of REST and shall forward the completed form(s) to REST within 14 days of the team member returning completed forms to the Company.

1.1.4 (f) The ability to opt in and out of the fund as provided within the Superannuation Guarantee (Administration) Act 1992 (as amended) and the applicable regulations shall not apply.

The FSC submits that the proposed draft should ensure that, regardless of the formulation of words used by trade unions when negotiating enterprise agreements, a consumer's right to choose a superannuation fund should be protected and such clauses should not be effective.

2. DATE OF OPERATION AND SUNSETTING OF RESTRICTIVE CLAUSES IN AGREEMENTS

The FSC supports the proposed legislation having effect from 1 July 2016 so as to prevent uncertainty for existing enterprise agreements and those agreements currently being negotiated.

The FSC submits, however, that there is a significant number of enterprise agreements that continue to have effect after their nominal expiry date, either because they provide terms and conditions of employment, including wage increases, to which all parties continue to agree should have effect without the need for a new agreement to be negotiated, or because the parties are unable to reach

agreement and form a new enterprise agreement, and so continue to be covered by the old agreement.

As a result there are currently in the system a number of ongoing agreements that are unlikely to be renegotiated after the 1 July 2016 date. This creates complexity for employees and employers as it will result in some agreements being required to comply with the enhanced choice of fund provisions, and other agreements not being required to comply, potentially for many years into the future.

The FSC submits a preferable policy outcome that removes uncertainty and extends choice of fund to as many consumers as possible would be to set a date after which any clauses in agreements that purport to remove consumer choice have no effect. The FSC submits that the most appropriate date would be the nominal expiry date of the agreement in question, but that an alternate date would be 1 July 2018.

Recommendation: Provide a date after which all clauses of enterprise agreements, both current and future agreements, that purport to remove a consumer's right to choose a fund do not have effect.