# Treasury Laws Amendment (Your Super, Your Choice) Bill 2019

*Submission by:*
*National Tertiary Education Union*
*to the*
*Senate Standing Committee on Economics*

National Tertiary Education Union

## EXECUTIVE SUMMARY

1. The proposed Treasury Laws Amendment (Your Super, Your Choice) Bill 2019 will have adverse effects on the approximately 220,000 employees of universities and the 400,000 members of UniSuper.

2. UniSuper offers a unique product which was developed to remove barriers to the exchange of labour, particularly academic expert labour by allowing seamless transition between employers in the sector.

3. All employees in the higher education sector are covered by enterprise agreements negotiated by NTEU, which provide for 17% employer contribution to all ongoing and fixed term staff and that specify fund arrangements.

4. Employees covered by these collective agreements can access choice of fund through the participation agreements negotiated between the employers and the Fund, and within the Fund can make choices about their contribution levels and investment options.

5. The legislation allows for protection of defined benefits funds from mandated choice but it appears not to provide protection to the UniSuper defined benefit fund which is a formula based scheme that many university workers rely on throughout their entire university career.

6. The Bill may force the UniSuper defined benefits scheme to close and will result in higher fees for university workers.

7. The Bill cuts across the wider review of retirement incomes that the Government has commissioned and should be delayed to allow it to be coordinated with any outcomes of that review.

8. If the Parliament sees fit to continue with the Bill, the unique nature of the higher education industry, UniSuper, and the choices already offered to employees, require that it be specifically excluded from the effects of the Bill.

9. NTEU supports the ALP amendment which would allow the Fair Work Commission to determine whether the collective choice to include a specified fund in an enterprise agreement is in the best interests of the workers concerned.

## ABOUT NTEU

NTEU is the union that provides industrial and professional representation and advocacy for employees employed in, or in association with tertiary education, including universities and other public vocational and training institutes (VET), private and for-profit entities in higher education, and research institutes.

NTEU has 28,000 members, the majority of which are employed in higher education in universities. Many of the university employees are members of the UniSuper Defined Benefit Division.

## EMPLOYMENT REGULATION AND SUPERANNUATION

All workers in universities (with the limited exception of some senior managers) have their employment conditions regulated by enterprise agreements negotiated by NTEU. These are comprehensive agreements that provide for all standard conditions such as rates of pay, hours of work, leave entitlements, and performance and disciplinary provisions as well as industry specific conditions related to academic work.

All NTEU negotiated agreements in Australian public universities contain a provision that provides for an employer contribution of 17% to superannuation for all on-going employees, and will by the end of the term of the agreement also provide for 17% for all fixed term employees that do not receive it now. Most casual employees receive the Superannuation Guarantee Charge (SGC) rate of 9.5% with the proviso that some agreements specify for payment above the SGC charge through the elimination of the minimum hours provision.

Almost all university enterprise agreements specify UniSuper as the fund for employees with the option for a proportion of employees to access choice of fund. The percentage of employees eligible to access choice of fund is in the range of 5-10% depending upon the negotiated participation agreement between UniSuper and the employer. The failure of most, if not all, universities to reach their quota for fund choice is an important indicator that demand for choice of fund amongst university workers is able to be comfortably accommodated within existing arrangements.

A typical university enterprise agreement will contain a clause such as the following from The University of Tasmania:

> ***29 SUPERANNUATION***
> *(a) On commencement of employment, the University will provide new Employees information regarding UniSuper and subject to clauses 29(e) and (f) below:*
>
> *(b) Employer contributions for each eligible Employee will be made to UniSuper in accordance with the superannuation guarantee legislation and relevant superannuation arrangements between the University and the superannuation fund.*
>
> *(c) From the Commencement Date, the University will make employer contributions as follows:*
>
>> *(i)For Continuing Employees, 17% Employer superannuation contributions;*
>>
>> *(ii) For fixed term Employees employed on a discrete appointment of 2 years' duration or more, 17% Employer superannuation contributions;*
>>
>> *(iii) For a Fixed-term Employee appointed for continuous fixed terms of more than four (4) Years - 17% Employer superannuation contributions from the beginning of the fifth (5) year; and*

*(iv) For a Fixed-term Employee with less than five (5) years of consecutive fixed-term employment, compulsory employer contributions as required by the applicable Superannuation Guarantee Charge rate (currently 9.5%).*

*(v) For all Casual Employees - compulsory employer contributions as required by the applicable Superannuation Guarantee Charge rate – currently 9.5%.*

*(d) On or after the first full pay period beginning 1 June 2021:*

*(i) All fixed term and continuing staff will receive 17% employer contributions; And*

*(ii) All casual staff will continue to receive compulsory employer contributions as required by the applicable Superannuation Guarantee Charge rate – currently 9.5%.*

*(e) Subject to the rules of the Employee's superannuation fund, an Employee may elect to reduce their Employer superannuation contribution, and increase their Salary by the same amount, provided that their superannuation contribution is not less than the Superannuation Guarantee Charge rate at all relevant times. An Employee may terminate or vary their election once per year.*

*(f) Nothing in this clause limits the University from exercising flexibilities in the superannuation arrangements and contribution rates where those flexibilities are provided for in the UniSuper Superannuation Trust Deed as amended from time to time and/or the 5% flexibility in coverage and contribution level under which the University may permit up to 5% of its Employees to not join UniSuper or to be enrolled in Division D only of UniSuper and receive Superannuation Guarantee contributions, notwithstanding they are eligible to enrol in Division C of UniSuper.*

*(g) Notwithstanding anything to the contrary in this clause, an Employee who is seconded from the Tasmanian State Service or a related entity and who is a member of TasPlan Super (or a fund incorporated into TasPlan Super) is not required to become a member of the UniSuper Superannuation Fund.*

There are multiple variations of this clause across the sector but the key elements in common are:

1. The rate of employer contribution (17%, or 9.5% for casual staff)
2. UniSuper as the designated fund
3. Flexibility options including the capacity to nominate a different fund as determined by the Participation Agreement (sometimes referred to as a Deed).

Superannuation was a key issue during the recent round of negotiations for agreements within the sector, with NTEU members supporting a claim for increases in the employer contribution for fixed term employees. As such the clauses were closely scrutinised by all employees who voted on the agreements. NTEU is not aware of any significant commentary or objection to the stipulation of one common fund across the industry.

## ABOUT UNISUPER

### History and Overview of UniSuper

UniSuper is not a typical 'industry fund' which it predates by decades. The existing defined benefit scheme (which is the flagship offering of UniSuper) predates the SGC by about a decade and commenced in its earliest form in 1982. The scheme was then administered by a Trustee company called Superannuation Scheme for Australian Universities (SSAU) and each employee contributed 7% of salary while the employer contributed 14% of salary. In the early 1990's a separate scheme was established called the Tertiary Education Superannuation Scheme (TESS) to provide additional contributions of 3% per eligible employee to an accumulation fund in compliance with SGC requirements.

In 2000, SSAU and TESS merged to form UniSuper with a default employer contribution rate of 17% of salary.

Unlike many industry funds, UniSuper is not owned by employers and employees. It is instead totally owned by 37 Australian universities who are the principal employers in the higher education sector. The Union has no ownership of UniSuper.

In 1982, UniSuper (and SSAU before it) was established by agreement of all the employers in the university sector to provide a fully portable uniform scheme, thereby removing a significant barrier which inhibited the free flow of academic labour between higher education institutions.

The governance arrangements for UniSuper are unlike most industry funds, with a Board of eleven members, including three independent members (one of whom is the Chair) while the remaining eight positions are shared between employer and employee nominees and elected representatives. The NTEU nominates one person to be a Director of the fund.

UniSuper has 400,000 members and is a very large fund, with $86 billion under management. Within the on-going sector of the workforce around 80% are members of the Defined Benefit Scheme.

The performance of UniSuper has been exemplary – it is consistently rated as one of the top performing funds on short and long term measures (1, 5 and 10 years), and it's fees are amongst the lowest in the industry. One of the reasons that UniSuper is able to charge low fees to its members is that it is established solely for the purpose of providing superannuation to university employees and does not need to engage in competitive behaviours and wasteful marketing as it would do if exposed to further competition.

UniSuper returns no resources to NTEU or any other union by way of provision of services such as training or other arrangements.

## WHY UNISUPER DEFINED BENEFIT IS UNIQUE

The UniSuper Defined Benefit Scheme is formula based pooled scheme; in other words, the employer and employee contribute a set proportion of the employee's ordinary earnings (usually 17% and 7% respectively) during their lifetime of employment in the higher education sector and the retirement pay-out is determined by formula. As described above, the seamless portability of the superannuation arrangements facilitates the exchange of staff and pursuit of career development opportunities.

The pay-out on retirement for each employee is calculated by a formula based on their years of membership of the fund, their average service fraction over their lifetime of employment (which serves in part to reduce the gap in superannuation experienced by women who take career breaks for child-rearing), and the average of their final 5 years of salary.

There is no cap in UniSuper Defined Benefit scheme and unlike almost all other defined benefit funds the actual retirement pay-out figure, although predictable, is not known. This predictability offers employees the benefit of not having their retirement income being subject to the vagaries of the investment market at the time of their retirement and provides certainty and the capacity to develop long-term retirement plans.

Finally, UniSuper is not guaranteed by the employers or government. The security and health of the Fund is dependent on the size of the pool of members, the relative stability of the sector, and a stable flow of new entrants to the Fund.

Our interpretation of the Bill is that UniSuper Defined Benefit Scheme may not meet the requirements for exemption from the choice of funds provisions.

## EXISTING ARRANGEMENTS AND FACILITATION OF CHOICE

The fund's 40-year history is testament to the support it enjoys among academic and professional staff in universities. While the fund is specified in the enterprise agreements that cover the approximately 220,000 employees in the sector, choice is provided in a number of ways.

1. Those who do not wish their superannuation to be paid into UniSuper and instead choose another fund, can do so via the flexibility quota that each university has negotiated with UniSuper. All employers have a flexibility quota which can be used by up to 10% of the workforce. These flexibility arrangements have the force of law as they are embedded in the enterprise agreements (e.g. the example from The University of Tasmania enterprise agreement).
2. Those who wish to convert some of their employer 17% contribution can do so via the flexibility arrangements.
3. Those who do not wish to put their superannuation in the Defined Benefit Scheme can choose to place it in a standard accumulation plan.
4. Those who are in the accumulation fund can choose from a variety of plans, or combination of plans, that offer different investment profiles and degree of risk.

As already noted, the actual number of enquiries received by the NTEU from members who may not believe that they are offered adequate choice or flexibility is minimal. Of those very few queries that have been received, any concerns are primarily related to the accumulation fund options. NTEU is not aware of many, if any, universities reaching the limit of their negotiated flexibility quota.

In other words, UniSuper already has a flexible contribution and membership model which enables it to continue to offer a viable defined benefit fund while simultaneously satisfying the choice of fund preferences of some members. It is strongly supported by the higher education workforce.

## IMPACT OF THE PROPOSED LEGISLATION

### Threat to viability of the Defined Benefit Scheme and loss of diversity

The proposed Bill would severely jeopardise the capacity of UniSuper to continue to be able to offer a defined benefit scheme in the future as it would threaten the flow of new members into the scheme. It is highly likely that the Bill would force UniSuper to close the scheme to new members. If the scheme was closed, the on-going capacity to produce the projected pay-out would be threatened, putting employees in the position that their retirement income, while no longer certain, may have been prejudiced by their 'failure' to add contributions to an accumulation scheme prior to this legislation coming into force. Should this Bill be adopted in its present form, it is inconceivable that new defined benefit funds would emerge anywhere. This would not only represent the loss of one specific high performing and popular fund but would also diminish the range and diversity of product types available in the superannuation sector.

**Diversion to other funds- costs to members**

As described above, part of the reason that UniSuper can charge lower fees is that it does need to engage in intensive competitive behaviours and marketing. If this was to change the cost would be borne in their members retirement income.

UniSuper is a consistently high performing fund and is a secure and stable fund to manage the retirement incomes of university workers. The same cannot be said of the many competitors which may seek, through aggressive marketing, to divert contributions into their own funds. The banking Royal Commission indicated that there is a considerable way to go before many other retail funds can provide the reliable and ethical treatment of members that is provided by UniSuper.

Further, although the public universities are the owners of the Fund, NTEU believes that it is likely that some employers may seek to elect that a commercial fund become the default fund for their employees, based on the capacity to leverage the superannuation contributions against credit charges for the employer, either explicitly or implicitly. This would further undermine the capacity of UniSuper to continue to offer the current diversity of products and excellent services that employees currently experience.

**Policing choice and penalties**

Large industry-based funds such as UniSuper have the capacity to effectively police the payment of superannuation contributions by the employers. It also allows unions such as NTEU to ensure that payments are being made on time. In effect mandating a single fund for most of the workforce of a large employer such as universities is a powerful tool for compliance. The diversion of the contributions from these large employers into multiple funds would make such policing highly problematic.

In addition, the penalties within the Act are a formula-based increase in the SGC rate for employers who breach certain provisions. In the case of universities *these penalties will have no effect* on employer behaviour given that they currently make payments considerably above the SGC for all but their casual employees.

## INTERACTION WITH THE INQUIRY INTO RETIREMENT INCOMES

On 27 September 2019, the Commonwealth Government announced an independent review of the retirement income system. The Review, which is to report to the Government by June 2020, is to examine the three pillars of retirement income, of which superannuation is a crucial element.

The purpose of the Review is to “establish a fact base of the current retirement income system that will improve understanding of its operation and the outcomes it is delivering for Australians”[1]. Specifically, the Review will identify (inter-alia) how the retirement income system supports Australians in retirement and the role of each pillar in supporting Australians through retirement.

The NTEU submits that as this Review will report by June 2020 (a mere 4 to 5 months away), there is little purpose served in making significant, but non-urgent adjustment to superannuation

---

[1] Australian Government (The Treasury) *Retirement Income Review - Terms of Reference* https://treasury.gov.au/review/retirement-income-review/TOR Accessed 01.02.2020

legislation at this time. In this context, the timing of the current Bill is akin to making public policy in a piecemeal and ad hoc fashion, which is a sub-optimal process not consistent with the public interest.

It is sensible and logical to reconsider this Bill having regard to the outcomes of the independent Review, rather than changing facts on the ground while the Review is in progress.

NTEU made a considerable contribution to the Retirement Income Review via the ACTU submission which is available at: https://treasury.gov.au/review/retirement-income-review

## GENERAL COMMENTS

### Flawed basis

Apart from the specific deleterious effects on our members identified in this submission we are concerned that the basis of the Bill is flawed and premised on assumptions that are not sustainable.

The fundamental principle being espoused is that choice should be forced to be individual and that workers are prevented from making a choice on a collective basis through a highly regulated system (enterprise bargaining).

In the Explanatory Memorandum the claim is made at several points that lack of a choice of fund contributes to employees having multiple superannuation accounts and multiple sets of fees and insurance premiums. NTEU disputes this statement in regard to the university sector where the employee's account is seamlessly portable across employers, and where fees are exceptionally low, but we also dispute it more generally. The Government has set up a number of initiatives to allow employees to quickly and easily transfer their entitlements into a single active fund at no cost. Any contribution to multiple accounts need only be short-term and is under the control of the employee.

The Memorandum also states that lack of choice of fund results in member disengagement with their superannuation. NTEU does not believe that this is the case in the university sector and has observed that members take a keen interest in their superannuation fund whether that be the performance of the fund or its investment profile. The general lack of engagement of employees with the superannuation arrangements will not be solved by preventing workers choosing their fund through a collective process such as enterprise bargaining.

The Memorandum also claims that competition will reduce fees. The evidence from the banking Royal Commission was in fact the opposite. Excessive fees, including fees for no service, was rampant in the retail sector. We contend that in fact fees would increase for many employees as funds divert more and more expenditure into non-productive marketing and competitive behaviours.

### ALP amendment

The effect of the ALP amendment would be to allow funds to be specified in enterprise agreements if the Fair Work Commission determines that doing so would be in the best interest of the workers. The Fair Work Commission would need to develop tests on this matter, as it has on other matters such as the better off overall provisions. NTEU supports this proposal on the basis that the Fair Work Commission, which has expertise in determining the relative benefit to employees of negotiated terms, is the appropriate body to do so and that a one-size fits all solution legislated by the Parliament will prevent genuine enterprise based solutions that genuinely benefit the specific employees.

## CONCLUSION

NTEU does not believe the Bill is necessary to protect our members, and rather, due to the unique nature of both the higher education industry and the current industry-wide superannuation arrangements will potentially result in reduced choice and higher costs for our members and their employers.

## RECOMMENDATIONS

NTEU recommends

1. Due to the clear and obvious overlap, consideration of the proposed legislation should be deferred until the completion of the current inquiry into retirement incomes.

2. That enterprise agreements or other industrial instruments that provide for payment of employers at greater than the SGC rate be exempt from the legislation

3. Failing point 2. above, the unique character of the higher education industry, fund, and products requires UniSuper to be explicitly excluded from this Bill (by the addition of the following words at 32C (1):

   *(b) ;or*

   *(c ) if the employee is an employee of a university.*

4. NTEU supports the proposed ALP amendment which would provide for the Fair Work Commission to apply a test as to whether the specification of a fund in an industrial instrument is in the best interests of the employees.