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17 January 2020

Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Email: [Economics.Sen@aph.gov.au](mailto:Economics.Sen@aph.gov.au)

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

**In brief:**

AIST supports the principle of choice in superannuation but highlights evidence that members in the choice segment are at risk of having materially lower retirement incomes. Choice must only be provided in a way that does not leave consumers worse off and must operate in an environment of meaningful disclosure and consumer protections.

In the event the Government decides to proceed with this legislation, AIST proposes that the existing exemption remain for enterprise agreements where superannuation benefits in excess of the community standard are negotiated between the employer and their employees.

**Introduction and context**

The Australian Institute of Superannuation Trustees (AIST) would like to thank the Senate Economics Legislation Committee for reviewing our submission on the Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019.

On September 29, 2017 AIST provided the Committee with a submission to the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017, preceded by our submission to Treasury detailing our views on recommendation 12 of the Financial System Inquiry (FSI) Final Report in 2016. Both submissions clearly state our opinions on the proposed framework for member Choice of Fund. The measures outlined in this Bill are in effect identical to those outlined in the 2017 Bill.

Since the measures were previously introduced in 2017, a significant amount of evidence has found underperformance in the choice segment. In 2018, the Productivity Commission Inquiry into Superannuation: Assessing Efficiency and Competitiveness found that:

*“In the choice segment, a proliferation of little used and complex products — some tens of thousands — increases fees without boosting net returns, and makes effective decision making elusive for most members. There is evidence that some members who use these*

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*products are unwittingly buying a degree of control over their super at the price of materially lower retirement incomes.”*

Today, our position remains unchanged and we restate our previously made points outlining choice for members must be in their best interests and our proposal that if the Government decides to proceed with the legislation that an exemption remain for enterprise agreements where superannuation benefits in excess of the community standard are negotiated between their employer and employees.

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### **Performance of default funds offered by industrial agreements is generally higher than average**

The Productivity Commission Inquiry into Superannuation: Assessing Efficiency and Competitiveness<sup>1</sup> found that default MySuper not-for-profit funds generally outperform the benchmark (Figure 6). In contrast the Productivity Commission stated that *‘Across a range of indicators, the evidence suggests that competition in the choice segment has not always delivered better long-term outcomes for members in terms of performance, products and services.’* This inquiry found that 36% of the choice products sampled underperformed their benchmark and noted that this is likely a conservative estimate of underperformance in the whole choice segment. It is for this reason that naming choice as a member’s right is not necessarily in their best interest.

The Productivity Commission found that across 53 MySuper products, 32 performed above benchmark generating a median net return of 5.5 per cent a year, amounting to \$440 billion in assets<sup>2</sup>.

The proposed legislation continues some exemptions from an employer being required to offer employees a choice of fund, while removing the exemption where contributions are made in accordance with enterprise agreements or workplace determinations.

Neither the Government nor the Financial System Inquiry (FSI) 2014 Final Report provided a compelling case in support of this recommendation which is especially significant given it has been established (and submitted to the FSI by AIST) that the performance of superannuation funds nominated in industrial instruments is higher than that of the average performance super funds generally.

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1 Productivity Commission, Superannuation: Assessing Efficiency and Competitiveness (2018). Report No. 91, Productivity Commission Inquiry Report, p. 11.

<https://tinyurl.com/vghevqdu> [Accessed December 17, 2019]

2 Productivity Commission as stated in a previous footnote, p. 11





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Figure 6 **Default products: vastly different net returns, with 1.6 million member accounts in underperforming default products**

Performance relative to individual products' benchmark portfolios, 2008–2018  
Size of circles indicates the size of each product's assets under management



Sources: PC analysis of APRA (2018a, 2018k), financial market index data (various providers), and SuperRatings data

### Choice, fees and disengagement not correlative

In ASIC's initial 2014 submission to the FSI, they found that Choice of Fund did not reduce the number of multiple funds held by members, and in fact there were still 2.5 accounts per employed person in Australia.<sup>3</sup> Member engagement was described in the Productivity Commission report no. 91 as being harder than it ought to be, as a result of complex products and information.<sup>4</sup> Hence, choice does not in itself initiate member engagement and furthermore the issue of multiple accounts is unrelated to choice.

3 ASIC, (2014). Financial System Inquiry: Submission by the Australian Securities and Investments Commission. April 2014. [pdf] Canberra: Australian Securities & Investments Commission, p.227. Available at <https://tinyurl.com/yekabk9y> [Accessed on 18 December 2019]

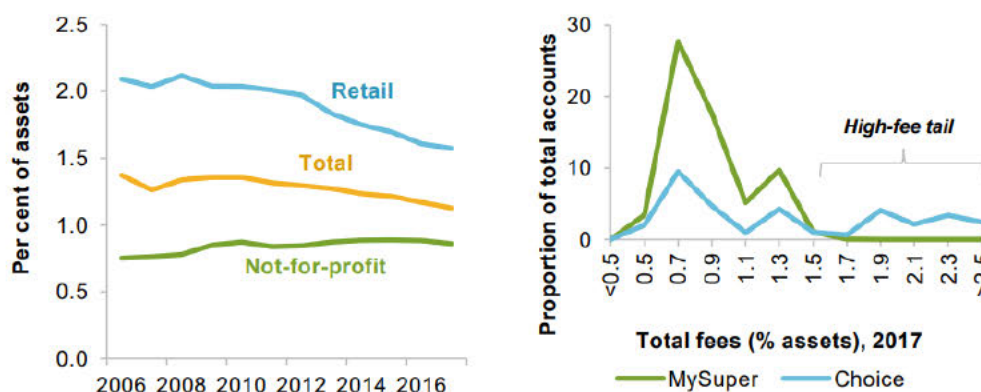
4 Productivity Commission (2018). As cited in a previous footnote, p. 21



The proposed legislation to enforce choice in employment agreements does not protect members with measures that ensure the most beneficial product is offered. Members struggle to find the right product for them, due to a large diversity and range of quality.<sup>5</sup> By allowing all members Choice of Fund, it is assumed they are informed investors and employ interest in their investment strategies, which the Super System Review found for many members is not the case.<sup>6</sup>

Also stated by the Super System Review, Choice of Fund has not reduced fees for members through greater competition since its introduction through the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004*.<sup>7</sup> Choice products continue to have higher fees than MySuper products (figure 7) and often lower returns. The argument of choice correlating with competition and fees is therefore not proven.

**Figure 7 Products by segment: retail and choice products have materially higher fees**



Source: PC analysis of SuperRatings data. Coverage 362 products covering 78% of total assets and 76% of member accounts across all APRA-regulated funds in 2017. Factored for Survivor bias and Selection bias.

**Better disclosure is fundamental for meeting members best interest around choice**

AIST welcomes measures to improve meaningful disclosure which enable members to make more informed decisions about their super. This is particularly important given Essential research

5 Productivity Report (2018) as cited in a previous footnote, p. 18

6 Cooper, J., Casey, K., Evans, G., Grant, S., Gruen, D., Heffron, M., Martin, I. and Wilson, B. (2012). Super System Review Final Report Part One Overview and Recommendations. [online] Canberra: Commonwealth of Australia, Attorney-General's Department, p.8. Available at: <https://tinyurl.com/rmgatfv> [Accessed on 18 December 2019]

7 Super System Review (2012) as cited in a previous footnote, p.8





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that highlights a large cohort of Australians are still misinformed about how their super fund is performing and what type of fund they are in<sup>8</sup>.

In addition, AIST strongly supports the greater alignment of MySuper and Choice disclosure and remain concerned regarding the numerous exemptions for Choice products. Appendix 1 details the inconsistent treatment between MySuper and Choice products.

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Alignment of MySuper and Choice is needed to protect members and ensure greater superannuation system efficiency. The extension of Choice of Fund proposed by the Government should be accompanied by more and not less disclosure.

### **Minimise disruption to employers**

Changing enterprise agreements can be contentious and costly. Changes to the rules governing enterprise agreements may be unnecessarily disruptive. This is especially the case as superannuation is a remuneration-related entitlement, and wage-related matters are generally central to the success or otherwise of enterprise-level negotiations. Furthermore, in current circumstances when there is a single superannuation fund for the organisation, there is less of an administrative burden and a single point of contact.

### **Removing the EBA exemption from Choice of Fund may result in employees losing benefits.**

A common characteristic of many of the environments not providing choice of fund is that they often provide benefits in excess of that provided by the Superannuation Guarantee (Administration) Act 1992. AIST strongly argue that benefits provided to members of enterprise agreements above the Superannuation Guarantee (Administration) Act 1992 should remain an exemption to compulsory choice. These benefits include additional insurances or employer contributions and Defined Benefit funds.

As previously stated, choice does not encourage member engagement which fundamentally challenges the case for removing the EBA exemption from Choice of Fund. For those disengaged members, they are at risk of being negatively impacted by moving to a fund of their choosing. There is no evidence that the Government's proposed extension of the Choice of Fund regime to enterprise agreements will improve outcomes for the affected. Rather, some Australian employees could be worse off as a result of the proposed changes losing benefits such as additional employer contributions, enhanced insurance arrangements and guaranteed retirement benefits.

These additional benefits arise as a result of enterprise bargaining, where the respective claims of

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<sup>8</sup> Essential Research, Understanding the decision-making process of retail fund members (2019). Available from: <https://tinyurl.com/s85wcc1>





employees and their representatives and the employer are negotiated. These negotiations may involve the removal of existing conditions and the addition of new conditions. It is the outcome of these negotiations, and the trade-offs they may entail, that are voted on in enterprise agreements.

On a collective basis, enterprise agreements allow employees to decide which super fund(s) – the recipient(s) of their deferred wages – are best for their circumstances. This is particularly important where the outcome involves the provision of additional superannuation benefits.

AIST proposes that the provision of additional superannuation benefits should be protected, and that these be allowable as circumstances that satisfy the Choice of Fund requirements. We have identified a range of specific additional benefits that are provided under enterprise agreements and proposes that this list of additional matters be listed in section 32C (Contributions that satisfy the choice of fund requirements) as the other circumstances that meet the requirements for the exemption. AIST proposes the insertion of the following after proposed subsection 32C (6AA):

*Contributions under a workplace determination or enterprise agreement on or after 1 July 2020 which prescribes additional benefits for employees*

(6AB) A contribution to a fund by an employer for the benefit of an employee under a workplace determination or enterprise agreement made on or after 1 July 2020 is also made in compliance with the choice of fund requirements in circumstances where a term of the workplace determination or workplace agreement provides that:

- (a) employer contributions paid to the fund are in excess of those required under section 19(2) of the *Superannuation Guarantee (Administration) Act 1992* from time to time; or
- (b) employer contributions are payable to the fund during prescribed periods of paid or unpaid leave where such payments are not normally required; or
- (c) fees, costs, or spreads charged by the fund are paid either in full or in part by the employer in addition to or independently of employer contributions to the fund that already satisfy section 19(2) of the *Superannuation Guarantee (Administration) Act 1992*; or
- (d) any part of a premium intended to pay for insurance benefits available to employees as a result of membership of the fund is paid either in full or in part by the employer in addition to or independently of employer contributions to the fund that already satisfy section 19(2) of the *Superannuation Guarantee (Administration) Act 1992*; or
- (e) under an arrangement between the employer and the fund:





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- (i) fees, costs or spreads charged by the fund are discounted by the fund, either in full or in part; or
- (ii) insurance benefits available to employees are improved relative to ordinary membership eligibility; or
- (iii) normal underwriting, assessment or policy limitations are waived or reduced; or
- (iv) normal underwriting, assessment or policy restrictions are improved or increased; or
- (v) specified discounts or other entitlements are available with respect to other goods or services provided by third parties other than the employer or the fund; or
- (vi) any other benefit is available to an employee in excess of ordinary superannuation benefits;

as a result of membership of the fund under an arrangement between the employer and the fund made either in addition to or independently of employer contributions to the fund that already satisfy section 19(2) of the Superannuation Guarantee (Administration) Act 1992; regardless of whether the fund is chosen for the employee.

For the purposes of paragraph (e)(iii), normal underwriting, assessment or policy limitations for insurance benefits include (but are not limited to) limitations such as waiting periods for income protection benefits, qualifying periods for benefits, occupational limitations, total and permanent disability criteria, policy loadings and policy exclusions.

For the purposes of paragraph (e)(iv), normal underwriting, assessment or policy restrictions for insurance benefits include (but are not limited to) restrictions such as benefit periods for income protection benefits, default levels of coverage for new fund members, automatic acceptance limits for new fund members, and maximum levels of coverage available.

In the alternative, AIST proposes a more general formulation to the effect that a contribution to a fund for the benefit of an employee is made in compliance with the choice of fund requirements if the employer contributions paid to the fund are in excess of:

- (a) those required under section 19(2) of the Superannuation Guarantee (Administration) Act 1992 from time to time, or
- (b) the minimum requirements for a MySuper product.





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### Unpaid employer super contributions

The ATO estimate that the gross super guarantee gap for 2016-2017 to be \$2.875 billion. This is an estimate of the difference between the value of super guarantee contributions required to be paid under law and the actual super guarantee contributions made. The proposed Bill may make it harder to track unpaid super and needs to be accompanied by further efforts to address the issue of unpaid super.

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### The Choice of Fund regime must be supported by a process for the selection of default Funds

This submission has already identified the disconnect between the extension of Choice of Fund by the Bill, and the diminution of comprehensive disclosure requirements.

The other and related area of policy imbalance is between this legislation and the processes for the selection of default super funds. It is reasonable to suggest that an extension of Choice of Fund arrangements should be preceded by the implementation of a process for the selection of default funds that safeguards members' interests.

AIST confirms our support for the implementation and operation of the legislated (but not operational) Fair Work Commission processes for the selection of default funds.

For further information regarding our submission, please contact [REDACTED]

Yours sincerely,

[REDACTED]

Eva Scheerlinck

Chief Executive Officer

*The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.*

*As the principal advocate and peak representative body for the \$1.4 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.*

*AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.*

[REDACTED]

[REDACTED]

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**Appendix 1 – Inconsistent Treatment Between MySuper and Choice Products**

The following table summarises the numerous exemptions, gaps and inconsistencies afforded through the legislative environment to choice superannuation products. As at September 2019 superannuation assets totaled \$2.9 trillion of which total assets in MySuper products were \$779.2 billion.

**Table 1 – Overview of exemptions from regulatory framework**

Different treatment	Explanation	Impact on consumers
<p><b>One – annual outcomes assessment</b></p> <p>In Prudential Practice Guidance (SPG516), APRA has deferred the comparison component of the outcomes assessment for Choice products.</p> <p>In contrast for MySuper products APRA has prescribed comparison metrics methodology.</p>	<p>The legislated annual outcomes assessment requires super funds to promote the financial interests of the beneficiaries of the fund who hold a MySuper or Choice product, and to annually assess and compare the appropriateness of such, including how each product continues to promote the financial interests of members.</p>	<p>According to the Productivity Commission 36% of the Choice investment options (\$24.2 billion) underperformed<sup>9</sup>. Notably almost all of these underperforming options are offered by retail funds</p> <p>Not requiring trustees to compare underperforming Choice funds to benchmarks (and other funds) will result in members continuing to remain in underperforming funds.</p>
<p><b>Two – product dashboards</b></p> <p>Requirements for Choice super product disclosure dashboards were meant to apply from 1 July 2015; however, ASIC delayed the start date until 2016, then 2017, then 2019 and now until 1 July 2023.</p> <p>Furthermore, when implemented they will not include platforms or legacy products.</p>	<p>The product dashboard is intended to provide members with key information about the product.</p> <p>The Productivity Commission has recommended ASIC prioritise the implementation of these dashboards for Choice investment options to achieve full compliance by the end of 2019 and only grant an exemption for an option or set of options from the dashboard requirement on the basis of evidence under the principle of ‘if not, why not’</p>	<p>Members of Choice products/ investment options do not have a dashboard and so cannot easily compare their returns, fees or costs with MySuper products.</p>
<p><b>Three – data collection</b></p> <p>APRA does not currently collect or publish statistics on Choice products/investment options,</p>	<p>AIST has advocated that sufficient data should be collected to enable the regulators (APRA at system and fund level and ASIC at product level)</p>	<p>Members rely on APRA, employers, advisers, Government, researchers, commentators and trustees</p>

<sup>9</sup> Productivity Commission (2018) as cited in a previous footnote p. 203-4





platforms or legacy products equivalent to the comprehensive statistical collection derived from the MySuper reporting standards.	to benchmark whether good value is being delivered to members and to identify adverse impacts of conflicts of interest.	to analyse the characteristics and performance of Choice products/ investment options. Lack of data hampers this.
<p><b>Four - APRA Performance heatmap</b> APRA released the first report this year for MySuper products only. Although APRA intend to extend the heatmap to Choice products no date has yet been provided.</p>	<p>The heatmap is a comparison of performance across three key areas:</p> <ul style="list-style-type: none"> <li>• Investments</li> <li>• Fees and costs</li> <li>• Sustainability</li> </ul>	Persistent underperformance of Choice sector will continue to go unnoticed due to lack of transparency.
<p><b>Five – Selling superannuation</b> No requirement to ensure switching funds is in the best interests of the member when giving general advice or under no-advice business models.</p> <p>Share hawking has long been prohibited because it too readily allows the fraudulent or the unscrupulous to prey upon the unsuspecting but recommendations to ban superannuation hawking yet to be implemented.</p>	<p>ASIC accepts EUs from CBA and ANZ regarding distribution of super products through branches.<sup>10</sup></p> <p>Hawking of superannuation was highlighted during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry resulting in a recommendation to ban hawking of superannuation.</p>	Members are switched from a MySuper product to an inferior Choice product/investment option, when it is not in the best interests of the member.
<p><b>Six – Commissions</b> Conflicted remuneration is banned for most of the financial services industry, but there is an exemption for advice about retail life insurance.</p>	<p>Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended that ASIC conduct a review of conflicted remuneration relating to life risk insurance products and consider further reducing the cap on commissions in respect of life risk insurance products. Unless there is a clear justification for retaining those commissions, the cap should ultimately be reduced to zero.</p> <p>ASIC review not due to take place until 2021.</p>	Consumers are at significant risk of being recommended a life insurance policy that is not in their best interests.

<sup>10</sup> ASIC, 18-206MR ASIC accepts court enforceable undertakings from CBA and ANZ over superannuation product distribution (Media release, 18 July 2018) Available at: <https://tinyurl.com/wew5mmn> [Accessed on 19 Dec 2019]





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<p><b>Seven – fee and cost disclosure</b> New fees and costs disclosure under Regulatory Guide 97 do not apply to superannuation held via a platform.</p>	<p>Independent report by Mr Darren McShane<sup>4</sup> recommends changes to help members understand platform aggregated costs and undertaking a review of platforms to determine if value is being delivered (similar to UK).</p> <p>According to Rainmaker, over 70 per cent of retail superannuation assets in Australia are held via platforms. According to the UK Financial Conduct Authority, platforms add 20-90 basis points to costs.</p>	<p>Disclosure for superannuation held via a platform understates fees and costs paid by the member.</p> <p>ASIC admits it would be misleading to compare the fees and costs of platforms and non-platform superannuation funds.</p> <p>The compounding effect of higher costs over long term reduces retirement incomes for members.</p>
<p><b>Eight – Shorter disclosure documents</b> No requirement to produce a shorter PDS for legacy products.</p>	<p>According to Rice Warner, around 30% of personal superannuation assets are held in legacy products.</p>	<p>This makes it difficult for members in legacy products to compare the performance, fees or costs of the product with a contemporary product, understand the exit costs and assess whether they would be better off switching to a contemporary product.</p>

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