



## **Submission**

# ***'Better regulation and governance, enhanced transparency and improved competition in superannuation'* Discussion Paper**

**12 February 2014**

**Submission by:**

Unions NSW  
Trades Hall Building  
Level 3, 4 Goulburn Street  
Sydney NSW 2000  
Telephone: 02 9881 5999  
Fax: 02 9261 3505  
Contact: Emma Maiden  
Email: [emaiden@unionsnsw.org.au](mailto:emaiden@unionsnsw.org.au)

## Introduction

1. Unions NSW is the peak body for trade unions and union members in NSW. It has over 65 affiliated unions and trades and labour councils representing approximately 600 000 workers across NSW.
2. Our union affiliates cover the spectrum of the workforce, stretching from workers in finance to footwear and construction to communications.
3. Superannuation is an important issue for unions and union members.
4. In fact, it was an ACTU campaign for universal super, begun in 1984, that resulted in the rapid spread of occupational superannuation and ultimately the superannuation guarantee legislation.
5. We welcome the opportunity to provide feedback and comments on the Discussion Paper titled *'Better regulation and governance, enhanced transparency and improved competition in superannuation'* (**"the Discussion Paper"**).
6. Unions NSW supports a strong superannuation system so working Australians can provide themselves with a retirement income that is sufficient to meet their needs.
7. There has been a proliferation of legislative change regarding superannuation in recent years and Unions NSW is concerned that some of these changes may have undermined people's willingness to contribute hard-earned wages into an account that will not be accessible by them for years, in many cases decades.
8. However a desire for stability in relation to superannuation law, should never be used as an excuse to keep bad law or law that is unfair, unjust or not in the best interests of working Australians.
9. In preparing this submission, we have consulted with our affiliates.
10. We have not endeavoured to address every focus question in the Discussion Paper, but have confined our contribution to those matters of greatest interest to our affiliates and their members.
11. Unions NSW would be pleased to discuss these matters in person or provide further information if required.

**Focus question 1: What suggestions do you have for how the regulatory compliance burden can be reduced?**

12. Unions NSW supports My Super and its aims regarding the creation of simple, low cost, easily comparable superannuation products with a diversified portfolio of investments for the majority of Australian workers who have not exercised choice of fund.
13. However, it must be acknowledged that the My Super changes to the superannuation system have already dramatically increased administrative costs, substantive compliance costs and delay costs for superannuation funds.
14. Unions NSW also supports proper governance structures for superannuation funds. However we question the desire to make changes to the governance of industry superannuation funds in the absence of any evidence that members of these funds have been disadvantaged or that there have been shortcomings in the governance of these funds.
15. The evidence shows that the returns to members from industry superannuation funds have outperformed retail super funds – typically run by banks – over the past 16 years by an average of 2.3% per year according to the regulator, APRA. Similarly, according to independent ratings agency SuperRatings industry funds have outperformed retail funds over 1,3,5,7 and 10 years.
16. Unions NSW also questions the desire to align superannuation governance with corporate governance.
17. Superannuation funds, certainly industry funds, are more akin to mutuals or the not for profit sector than the corporate sector.
18. Corporate governance standards are more expensive to administer, thereby increasing costs to members and reducing returns to members.
19. Unions NSW submits that the main probity issue regarding superannuation practices in recent years has been the conflict of interest by financial advisers.
20. The introduction of the Future of Financial Advice (FoFA) reforms, which came into effect in mid-2012, put an end to this conflict and were one of the best changes to the superannuation system in recent years (along with the move to increase contributions to 12%).

21. These reforms meant financial advisers could no longer be paid fees and had to put the best interests of their client ahead of their own. Prior to these changes financial advisers could give advice that minimised the retirement incomes of workers, but maximised the kickbacks to advisers. A return to such a system is a seriously retrograde step.
22. In the absence of any identified fault with the governance of superannuation funds, other than that corrected by FoFA, Unions NSW supports the retention of the current system of regulation.

**Focus question 2: What is the most appropriate definition of independence for directors in the context of superannuation boards?**

23. The industry superannuation model was built on the idea of joint trusteeship between representatives of employees and employers, hence the model of equal employee and employer directors.
24. Generally it is representative organisations (such as unions and employer organisations) that appoint directors of industry superannuation funds. The exact processes vary for different funds. Sometimes an election is carried out to select the representative or perhaps expressions of interest are sought or other mechanisms utilised.
25. However, no matter what the process, the person appointed has a fiduciary obligation to put the interests of the members of the superannuation fund ahead of their own, or indeed the organisation that appointed them.
26. Being beholden to no one and acting only in the interests of the fund's members must be the central feature of any definition of independence.
27. The Discussion Paper refers to the APRA requirements for boards of banking and insurance entities to have a majority of independent directors<sup>1</sup>. Unions NSW notes that the boards of banks and insurance companies act to maximise the return to shareholders. They are not required to, and frequently do not, act in the best interests of their clients (the bank and insurance customers). This is completely different to industry superannuation fund trustees. They act in the best interests of their members, who are in effect the clients.

---

<sup>1</sup> Discussion Paper, page 11

28. See for example, the recently reported practices of BT, Colonial, ANZ Wealth and MLC to invest their customers' cash with their respective parent banks.<sup>2</sup>
29. The decision to place this cash in-house, rather than shop around for the best returns, cost investors a potentially higher return and added risk in the form of an absence of diversification of investments. In one example cited, a cash fund is producing a return of 1.38 per cent, well below the Reserve Bank cash rate of 2.5 per cent and the inflation rate of 2.2 per cent.<sup>3</sup>
30. The current trustee system ensures trustees are independent because of the fiduciary obligation.
31. Unions NSW rejects the implication that union appointed trustees (or employer appointed trustees for that matter) have "relationships that could materially interfere with their judgement"<sup>4</sup>. Their fiduciary obligations ensure this does not occur. They are currently "external, dispassionate... and provide a check on management"<sup>5</sup>.
32. Unions NSW rejects the notion that "appropriate provision of [so-called] independent directors on superannuation trustee boards is a vital step towards strengthening the superannuation system"<sup>6</sup>.
33. Therefore to introduce a requirement for any trustees to be independent is not only not necessary for "strengthening the superannuation system"<sup>7</sup> but completely superfluous. The existing trustees are already independent.
34. Any definition of independence should recognise this fact.
35. Therefore Unions NSW would oppose any definition of independent that listed the following factors as precluding a director from being independent:
- Being a member of a union or employer organisation that appoints trustees; or
  - Being employed by a union or employer organisation that appoints trustees.

---

<sup>2</sup> Trustee seeks inquiry into low-interest deals by Michael West, Sydney Morning Herald, 23/12/13

<sup>3</sup> Ibid.

<sup>4</sup> Discussion Paper, page 10

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Ibid

36. Unions NSW would support the inclusion of the following factors as precluding a director from being independent:

- Being employed or previously employed by the superannuation fund within the preceding 5 years;
- Being employed or previously employed by a service provider to superannuation funds (such as asset consultants, administrators, investment advisers, investment managers) within the preceding 5 years; or
- Being a member of the fund with a substantial fund balance.

37. Should the Government move to a system that requires so-called “independent” directors, Unions NSW supports the adoption of different terminology. This position was put by AIST in their 2012 paper *Independence and the Representative Trustee System*.

38. AIST recommended the term “non-associated” be used instead of the word “independent”.<sup>8</sup> Unions NSW agrees with this approach and reasoning enunciated in the AIST paper.

39. Unions NSW notes that should the Government move to substantially change the composition of industry superannuation boards, people who have served faithfully and diligently will be replaced by so-called “independent” new-comers. This will lead to substantial upheaval and uncertainty in the industry and for members.

### **Focus question 3: What is an appropriate proportion of independent directors for superannuation boards?**

40. Unions NSW reiterates the points made above regarding the fact industry superannuation board directors have a statutory obligation to put the interests of members first and therefore are already independent directors.

41. Unions NSW supports the retention of the current system whereby a board can make its own decision to change its composition to include directors that are not nominated by a union or employer organisation. Unions NSW submits that this is not an issue that requires the Government to mandate a set proportion of so-called “independent” directors.

---

<sup>8</sup> Independence and the Representative Trustee System, AIST, September 2012.

42. Should the Government persevere with any attempt to mandate a set proportion of so-called “independent” directors, Unions NSW submits the proportion should be minimal (one-third at the most) to preserve the system of joint trusteeship that has underpinned the success of the industry superannuation fund model and to reduce the upheaval that will be brought about by changing a large number of board members.

**Focus question 4: Should superannuation trustee boards have independent chairs?**

43. In short, only if they want to. Unions NSW submits that this is a matter for the boards themselves, not Government regulation. Currently superannuation boards have a mixture of so-called “independent” and internal chairs. Of course, a chair sourced from the board itself is still independent due to their fiduciary obligations.

44. Unions NSW would note there is no evidence to support the idea that one model of sourcing the board chair results in better outcomes for members than another.

45. To mandate a requirement for so-called “independent” chairs would also lead to significant disruption to the functions of a number of superannuation boards as they scrambled to find a new chair. It would also increase costs as internally sourced chairs tend to be much lower paid than ones sourced externally. The cost of the recruitment process for an external chair is also significant.

46. Should the Government mandate a proportion of so-called “independent” directors and a so-called “independent” chair, Unions NSW submits the chair should be counted as one of the “independent” directors for the purposes of determining if the mandated proportion has been met.

**Focus question 5: Given the way that directors are currently appointed varies across funds, does it matter how independent directors are appointed?**

**Focus question 6: Should the process adopted for appointing independent directors be aligned for all board appointments?**

47. Unions NSW reiterates its opposition to mandating changes to the composition of superannuation boards.

48. Should the Government persist with mandating so-called “independent” board members, Unions NSW submits the method of appointment should be as follows:

- the Board should establish the desired skills and experience required by the “independent”;
- the appointing organisations (generally unions or employer associations) should then nominate independents for the boards consideration that meet the desired skills and experience; and
- the “independent” will be chosen from those nominations by a 2/3 majority vote of the board.

49. Unions NSW submits the appointment method for so-called “independent” board members need not be aligned for all appointments.

50. As the question notes, there is wide variation in the way directors are currently appointed. Unions NSW would again note there is no evidence to support the idea that one model of appointment results in better outcomes for members than another. In fact, if anything, given the superior returns of industry funds over the years it could be argued the common method of appointment used by industry funds (appointment by unions and employer associations) is to be preferred.

**Focus question 7: Are there any other measures that would strengthen the conflict of interest regime?**

51. Unions NSW rejects the implication that the current model of appointment of board directors leads to greater conflicts of interest<sup>9</sup>.

52. On the contrary, Unions NSW submits that moving to a system of so-called “independents” could lead to a proliferation of superannuation insiders gaining seats on superannuation boards. These people will have far greater exposure to service providers and other players in the superannuation industry and therefore are more likely to have conflicts of interest.

53. As the Discussion Paper notes new measures to manage conflicts of interest came into operation from 1 July 2013. Unions NSW believes these measures, together with the fiduciary obligation currently legislated, are appropriate.

---

<sup>9</sup> Ibid, page 13

**Focus question 8: In relation to board renewal, should there be a maximum appointment term for directors? If so, what length of term is appropriate?**

**Focus question 9: Should directors on boards be subject to regular appraisals of their performance?**

54. Unions NSW notes there is no reference to the requirements for corporate directors here. It seems the Government is only seeking to apply a uniform framework for superannuation funds and companies when it suits them.

55. There are no strict term limits for directors of companies and there shouldn't be for superannuation directors either. Great benefits can arise from the experience and knowledge of long term directors.

56. Unions NSW submits the key issue is whether the directors have the skills and experience needed by the board. This is already reflected in APRA's prudential standard SPS 510 that states:

*"The Board must ensure that the directors and the senior management of the RSE licensee, collectively, have the full range of skills needed for the effective and prudent operation of the RSE licensee's business operations, and that each director has skills that allow them to make an effective contribution to Board deliberations and processes. This includes the requirement for directors, collectively, to have the necessary skills, knowledge and experience to understand the risks of the RSE licensee's business operations, including its legal and prudential obligations, and to ensure that the RSE licensee's business operations are managed in an appropriate way taking into account these risks. This does not preclude the Board from supplementing its skills and knowledge by engaging external consultants and experts."*

57. Industry superannuation boards have been leaders in this space in terms of adopting and implementing appropriate policies and procedures that ensure the board has the appropriate skill mix and that appropriate board renewal occurs. Any artificial term limit could be counter-productive by requiring directors who have the skills and experience required by the board to be turned over.

58. Generally directors of superannuation boards have terms of between 2-4 years. At the end of this time, they can be re-appointed. However, as boards need to endorse appointments of directors this allows for any concerns about performance (if they exist) to be addressed.

59. It must also be recognised that industry superannuation boards have policies regarding board renewal, skill requirements and training. In fact, industry superannuation boards have actually been industry leaders in this regard.

60. Superannuation directors also need to meet continuing professional development and education and this, together with the re-appointment process and policies referred to above, ensures on-going good performance.

**Focus question 12: Given that there will be existing directors appointed under a variety of terms and conditions, what type of transitional rules are required?**

61. Unions NSW reiterates its position that no changes to the existing composition of superannuation boards are warranted. Should changes be made, it is vital the implementation be over a significant period of time to ensure stability and to ensure the preservation of an appropriate skill mix on the board. Unions NSW submits the process should involve deed or rule changes to allow implementation of a new board structure consistent with the new requirements when vacancies arise in the normal course.

62. For example:

- If the Government legislates from 1 January 2015 that all boards have at least one-third so-called “independent” directors with a maximum phase-in equal to the period of time necessary for the terms of all current board members to expire; and
- A board with six employer association appointments and six union appointments on three year terms staggered such that the term of two of each of the appointments expires every June, the board should be able to do the following:
  - i. Decide on a new structure of 4 employer association appointments, 4 union appointments and 4 so-called “independent” directors to be implemented by July 2017;
  - ii. When the terms of the two employer and two union appointees expire in June each year, they are either re-appointed, replaced with new employer and union appointments, or replaced by so-called “independent” directors by 2/3 majority vote of the board, so

long as the new structure is reached by July 2017 (which is when the terms of all current board members will expire).

63. This process will ensure a stable transition from one structure to another and will not result in the first directors whose terms expire to be the ones that have to be replaced by so-called “independent” directors.

64. It should also be noted this is a resource intensive exercise, which will act to reduce the return to members.

**Focus question 13: Should a choice product dashboard present the same information, in the same format, as a MySuper product dashboard?**

65. Unions NSW supports measures that promote ease of comparison between superannuation products offered by different funds. Unions NSW submits this aim needs to be carefully balanced against the objective to keep costs for superannuation funds as low as possible, so as to maximise returns to members.

66. Unions NSW submits that a choice product dashboard should mirror the MySuper product dashboard. This will minimise the cost impact on superannuation funds.

**Focus question 14: Is it appropriate to use a single benchmark (CPI plus percentage return) for all choice product return targets?**

**Focus question 15: Should both net investment return and net return be used to measure a product’s investment return on the choice product dashboard?**

67. Unions NSW supports a choice product dashboard that mirrors the MySuper dashboard (see above paragraph).

68. Unions NSW supports the use of a single benchmark (CPI plus percentage return) for all choice product and MySuper return targets. Any other approach would be confusing and would not aid the objective of transparency and ease of comparison of different funds.

69. Unions NSW supports the use of net return, not net investment return, on the dashboard. Given net investment return cannot be realised without incurring administrative costs, Unions NSW submits including net investment return would be confusing and possibly misleading.

**Focus question 16: Should the choice product dashboard include both a short-term (volatility) and long-term (inflation) risk measure?**

70. In short, no. The objective is to give ordinary superannuation members something they can use to better compare and evaluate funds. A long-term (inflation) risk measure is too complex and will only create confusion.

**Focus question 18: Should a measure of liquidity be included on the choice and/or MySuper product dashboard? If so, what would a suitable measure be?**

71. In short, no. The objective is to give ordinary superannuation members something they can use to better compare and evaluate funds. A liquidity measure simply adds complexity and will only create confusion. APRA keeps a close eye on the issue of liquidity and this is sufficient protection for members.

**Focus question 19: Should the commencement date for the choice product dashboard be delayed beyond 1 July 2014?**

72. Unions NSW submits the commencement date should be extended, especially given the regulation is outstanding. Further, superannuation funds have had a series of deadlines relating to MySuper that have been a serious distraction for management and a significant cost for funds. An additional year or two is appropriate.

**Focus questions 20-26: Re portfolio holdings disclosure**

73. While Unions NSW supports transparency, we are concerned about the cost implications of portfolio holdings disclosure for superannuation funds, particularly if the disclosure requires full look through to the final asset, even for investments held by collective investment vehicles. Such a regime would be particularly onerous to administer for superannuation funds. Collective investment vehicles should be, however, required to make this information available.

74. Most super funds already disclose to their members how and where each asset class is invested. Unions NSW submits this approach is sufficient.

**Focus question 27: Does the existing model meet the objectives for a fully transparent and contestable default superannuation fund system for awards, with a minimum of red tape?**

75. Unions NSW notes that the history of the industry superannuation system in Australia has centred around a collaborative working relationship between representatives of employers and representatives of unions.
76. Unions NSW notes that employers and unions play a central role in determining a large number of terms and conditions of employment, either through individual negotiation, the award process or enterprise bargaining. Superannuation falls into this category.
77. It is not appropriate for an employer to have absolute discretion to decide how much annual leave employees are entitled to. In the same way, an employer should not have absolute discretion to decide how much additional superannuation should be paid on top of the statutory minimum or where the superannuation is paid. These matters are, rightly in our submission, things that should be included in awards or other binding instruments of employment.
78. Without this process, where an employee did not elect a particular superannuation fund to receive their payments, employers would be at large to make this not insignificant decision for them. Unions NSW is aware of numerous circumstances where employers have made the decision about where to put employees' superannuation not on the basis of what is best for their employees but because of a business relationship with a particular superannuation provider. Clearly a conflict of interest. Such a practice is to be deplored. The system of default superannuation funds in awards provides some brake on this kind of behaviour.
79. Unions NSW supports the current system in the *Fair Work Act 2009* of determining default funds. It is clearly based on the findings of the Productivity Commission, although with some differences. Unions NSW submits limiting the default list to up to 15 default funds is reasonable and manageable. Unions NSW opposes having a minimum number of default funds as each super fund that makes it onto the list should be there on their merits, rather than due to a need to fill the numbers. Unions NSW notes that Fair Work Australia (FWA) can hear submissions from superannuation funds as part of the decision-making process.

80. Unions NSW submits the FWA process is transparent and contestable in a way that minimises it becoming a free for all where every superannuation fund in the country would try and get on every default list. If this was allowed to occur, it would become self-defeating.

81. Unions NSW rejects the suggestion on page 26 of the Discussion Paper that “There is the potential for a conflict of interest where representatives of the employee or employer association (and often both) appearing before the FWC are also represented on the board of an industry superannuation board”. The union and employer association may appoint a person to the superannuation board but they do not have a “representative” on that board because their appointee has a fiduciary obligation to put the interests of members first. There might be a perceived conflict of interest if the actual person who appears before the FWC is the actual director of the superannuation fund. This situation should be avoided and it is appropriate that guidance material for directors make this clear.

**Focus question 28: If not, is the model presented by the Productivity Commission the most appropriate one for governing the selection and ongoing assessment of default superannuation funds in modern awards or should MySuper authorisation alone be sufficient?**

82. Unions NSW refers to the submissions above that support the current system of default superannuation fund selection.

**Focus question 29: If the Productivity Commission model is appropriate, which organisation is best placed to assess superannuation funds using a ‘quality filter’? For example, should this be done by an expert panel in the Fair Work Commission or is there another more suitable process?**

83. Should the Government adopt the Productivity Commission model, Unions NSW submits Fair Work Australia (FWA) is best placed to assess superannuation funds. This body, and its predecessor organisations, have a long and proud history in this area. There should be an expert panel of FWA with a chair, three other full-time members of the Commission and three part-time members who have knowledge of or experience in finance, investment management or

superannuation. Then the Full Bench should make the final decision after hearing from the parties and stakeholders.

84. Unions NSW submits that relevant matters for consideration in determining default fund status include return, choice of investment options, governance, insurance and connection to the industry the award covers.

**Focus question 30: Would a model where modern awards allow employers to choose to make contributions to any fund offering a MySuper product, but an advisory list of high quality funds is also published to assist them in their choice, improve competition in the default superannuation market while still helping employers to make a choice?**

85. There are over 100 funds offering a MySuper product. Even if an “advisory list” were published an employer would still be faced with a choice of over 100 funds.

86. Unions NSW notes the recommendations of the Productivity Commission are generally favourable to the default superannuation fund system. There is no justification to move away from this system. Simply offering a MySuper product is not a sufficient criterion for default superannuation status. This would place too much power in the hands of employers to make a decision that is not in the best interests of their employees (see submissions at paragraph 78). Such a system would also create difficulties for awards that retain defined benefit schemes.

**Focus question 31: If changes are made to the selection and assessment of default superannuation funds in modern awards, how should corporate funds be treated?**

87. There are very few corporate funds remaining. Unions NSW supports the retention of corporate funds as the default superannuation fund where it is agreed as part of an enterprise agreement.