

**Royal Commission into Misconduct in the Banking,
Superannuation and Financial Services Industry**

SUBMISSIONS BY ENERGY SUPER IN RESPECT ROUND 5 HEARINGS

1. This submission responds on behalf of Electricity Supply Industry Superannuation (Qld) Ltd (**Energy Super**) to Counsel Assisting's Closing Submissions of 24 August 2018 and the Addendum to those submissions dated 28 August 2018 (**Closing Submissions**).
2. Energy Super respectfully submits that the Closing Submissions, insofar as they relate to Energy Super, ought to be accepted by the Commissioner, and wishes to clarify the following aspects of those Closing Submissions.

Energy Super's Board Skills

3. In paragraph 241 of the Closing Submissions it was submitted that:¹

'In evidence, Mr Wilson accepted that it was reasonable to have a skills-based board, but acknowledged that Energy Super did not then, and does not now, engage in a process involving a third party to evaluate the nominees to the Board.'
4. While Energy Super does not engage a third party to evaluate nominees to the Board, it is important to add that Energy Super does evaluate the skills of nominees to the Board and has processes in place to achieve an appropriate skills based board. In evidence, Mr Wilson explained that Energy Super approaches its Board skills mix from a whole of Board perspective.²
5. To support the nomination process, the Energy Super has developed various internal policies to attempt to attract the right mix of skills, knowledge and diversity on the Board and to comply with APRA Prudential Standard requirements. Energy Super's practice is to notify the nominating parties of those policies, and consult with them, to help them identify candidates with the desired attributes to give the Board the desired mix of skills, knowledge and diversity.³
6. Under clause 14.7A(4) of Energy Super's Constitution, a person must not be appointed as a Director to the Board unless the Board has resolved that the person has satisfied the requirements of the Fit and Proper Policy.⁴ The Fit and Proper Policy contains within it Energy Super's board skills matrix,⁵ which shows the relevant experience and diversity the Board currently has and identifies gaps it is looking to fill in order to effectively fulfil its strategic plan.⁶
7. In evidence, Mr Wilson explained that the skills matrix is a tool that Energy Super uses to look at the whole Board and the collective skills of the Board and, in that context, the Board itself makes the decisions regarding new Director appointments.⁷
8. In addition, the Board's performance is analysed by a specialist third party consulting firm who focuses on organisational development, enterprise planning and performance, and effective governance.⁸ Based upon the results of the external reviews of the Board's performance, Energy Super submits that these procedures have worked effectively.⁹

¹ Counsel Assisting's Closing Submissions, 28 August 2018, 67, para 241.

² Transcript, Scott Maxwell Wilson, 10 August 2018, 4690.40-41.

³ Exhibit 5.131, Witness statement of Scott Maxwell Wilson, 26 July 2018, [WIT.0001.0083.0001 at .0014, para 72].

⁴ Exhibit 5.131.1, Exhibit SW-1 - Trustee's Constitution, [EYS.0001.0001.0005 at .0017, paras 81-85].

⁵ Exhibit 5.131.7, Exhibit SW-7 - Fit and Proper Policy, [EYS.0005.0001.0029 at .0049-.0050].

⁶ Exhibit 5.131.2, Exhibit SW-2 - Board Renewal Policy – Director Nomination, Appointment and Removal, [EYS.0005.0001.0051 at .0055, para 10.1].

⁷ Transcript, Scott Maxwell Wilson, 10 August 2018, 4676.4-7.

⁸ Exhibit 5.131, Witness statement of Scott Maxwell Wilson, 26 July 2018, [WIT.0001.0083.0001 at .0016].

⁹ Transcript, Scott Maxwell Wilson, 10 August 2018, 4690.40-43. Exhibit 5.131.10, Exh bit SW-10 - Whole of Board Evaluation 2015, [EYS.0003.0001.0017]; Exhibit 5.131.11, Exhibit SW-11 - Whole of Board Evaluation 2016, [EYS.0003.0001.0041]; Exh bit 5.131.12, Exhibit SW-12 - Whole of Board Evaluation 2017, [EYS.0003.0001.0063]; Exh bit 5.131.13, Exhibit SW-13 - Whole of Board Evaluation 2018 [EYS.0005.0001.0241].

Merger Negotiations with Equisuper

9. In paragraph 244 of the Closing Submissions it was submitted that:¹⁰
- 'Following [the KPMG] report, the funds liaised with member and employer stakeholders to ascertain their views regarding a potential merger. It was at this point that it appears that the merger negotiations were scuppered.'
10. It is important to note that the merger proposal put to Energy Super required a two-step merger process – the first being Energy Super transferring trusteeship of its fund to Equisuper with a later second step of combining Energy Super into the Equisuper fund¹¹ at which point in time the benefits to members, as outlined in KPMG's report, could be realised.¹²
11. The Energy Super was of the view that the appointment of both employer and member representative Directors to the Equisuper Board, was very important to oversee the transaction through to completion and to ensure the realisation of benefits in the best interest of our members, now and in the future. To secure this outcome, Energy Super felt it was necessary for shares in the Equisuper holding company (which would ultimately control the merged entity) to be equally held by Energy Super employer and member representative Directors appointed to the Equisuper Board – rather than being held exclusively by Equisuper employers.¹³
12. Energy Super determined to proceed with the negotiations with Equisuper in the interests of members, with this as a requirement of the proposed merger.¹⁴
13. Both parties worked together constructively to implement the proposal and, from Energy Super's perspective, this continued even after the stakeholder consultation that commenced in or about September 2016. The way this unfolded was as follows.
14. On 19 September 2016, Energy Super and Equisuper held a joint meeting in respect of the proposed merger. At the meeting it was reaffirmed that the initial Board structure for the proposed merged entity would include:
- (a) 5 Directors from Energy Super, including:
 - (i) one member Director nominated by the QSU; and
 - (ii) one member Director nominated by the ETU; and
 - (b) 5 Directors from Equisuper.¹⁵
15. The parties also agreed to a revised Equisuper holding company structure for the proposed merger, which would involve 4 shares held on trust by the Chairman for all employers and 4 shares held individually by the 4 member Directors on trust for all members.¹⁶

¹⁰ Counsel Assisting's Closing Submissions, 28 August 2018, 68, para 244.

¹¹ Exh bit 5.131.83, Exhibit SW-83 - Draft Joint Committee Paper dated 26 July 2016 [EYS.0008.0001.0935 at .0945-.0946]; Exhibit 5.131.84, Exhibit SW-84 - Minutes of the Joint Committee Meeting of 19 September 2016, [EYS.0008.0001.0751 at .0752, item 4]; Exhibit 5.131.55, Exh bit SW-55 - Energy Super Board Minutes of 27 September 2016, [EYS.0013.0001.0128 at .0130-.0131, item 6000]; Transcript, Scott Maxwell Wilson, 10 August 2018, 4697.1-14.

¹² Transcript, Scott Maxwell Wilson, 10 August 2018, 4697.1-14; Exhibit 5.133, "KPMG PROJECT POWER HIGH LEVEL ASSESSMENT, 6 SEPTEMBER '16", [EYS.0008.0003.0427 at .0453].

¹³ Exh bit 5.131.55, Exhibit SW-55 - Energy Super Board Minutes of 27 September 2016, [EYS.0013.0001.0128 at .0130-.0131, item 6000]; Transcript, Scott Maxwell Wilson, 10 August 2018, 4697.1-14.

¹⁴ Exh bit 5.131.55, Exhibit SW-55 - Energy Super Board Minutes of 27 September 2016, [EYS.0013.0001.0128 at .0130-.0131, item 6000].

¹⁵ Exh bit 5.131.84, Exhibit SW-84 - Minutes of the Joint Committee Meeting of 19 September 2016, [EYS.0008.0001.0751 at .0753, item 5].

¹⁶ Exh bit 5.131.84, Exhibit SW-84 - Minutes of the Joint Committee Meeting of 19 September 2016, [EYS.0008.0001.0751 at .0752, item 4].

16. Following that meeting, the parties liaised with member and employer stakeholders to ascertain their views regarding a potential merger.¹⁷
17. The parties continued to negotiate and, on 1 December 2016, held a further joint meeting in respect of the proposed merger. At the meeting, the parties discussed a draft implementation agreement for the proposed merger and confirmed that most issues had been dealt with. It was also agreed that Equisuper would review the final amendments to the deed and confirm their acceptance or provide further comments.¹⁸
18. The parties also discussed a draft constitution for the proposed merged entity. One of the matters raised, in that regard, was the Board appointment process and, in particular, the Fit and Proper requirements and the skills overlay which formed part Equisuper's Board appointment process. The parties identified a number of key areas of commonality between the two funds and agreed that:
 - (a) Energy Super's management would work on a principles paper that, among other things, would identify the differences between the two funds' Fit and Proper Policies and Board Appointment Rules, in order to determine further Board appointment principles for the proposed merger; and
 - (b) Equisuper's management would review the principles paper and identify potential amendments to the draft constitution and circulate those to Energy Super.¹⁹
19. On 15 December 2016, Mr Williamson sent an email to a number of Energy Super board members, including Mr Wilson, in relation to a telephone conversation he had with Mr Fairley earlier that day. The email stated that Mr Fairley advised that, out of five Equisuper employers, two were 'passively against' the proposed the merger and two were 'aggressively against' the proposed merger.²⁰
20. In addition, Mr Fairley advised that one of the employers who would aggressively oppose the proposed merger had stated that:
 - (a) one of the reasons that employer chose to stay with Equisuper is that it is very differentiated from the rest of the industry funds because it remains an employer based fund where employers have the say and control; and
 - (b) one of the reasons that employer would oppose the merger was that it would result in a dilution of their shareholding status.²¹
21. This response posed significant difficulties, in addition to the reasons set out in paragraphs 10 and 11, because Energy Super valued the engagement of unions as an important feature of its fund. In evidence, Mr Wilson explained that unions contributed significantly to the fund, including in respect of member engagement²² and representation of member's interests²³.

¹⁷ Exh bit 5.131.55, Exhibit SW-55 - Energy Super Board Minutes of 27 September 2016, [EYS.0013.0001.0128 at .0130-.0131, item 6000]; Exhibit 5.131.85, Exhibit SW-85 - Draft Minutes of the Joint Committee Meeting of 1 December 2016 [EYS.0008.0001.0761 at .0761-.0762, item 12].

¹⁸ Exh bit 5.131.85, Exhibit SW-85 - Draft Minutes of the Joint Committee Meeting of 1 December 2016, [EYS.0008.0001.0761 at .0763, item 17].

¹⁹ Exh bit 5.131.85, Exhibit SW-85 - Draft Minutes of the Joint Committee Meeting of 1 December 2016, [EYS.0008.0001.0761 at .0762-.0763, item 15].

²⁰ Exh bit 5.131.86, Exhibit SW-86 - Email from Mark Williamson to Scott Wilson, David Smith, Mr John Gerald and Mr Robyn Petrou dated 15 December 2016, [EYS.0008.0003.0019 at .0019].

²¹ Exh bit 5.131.86, Exhibit SW-86 - Email from Mark Williamson to Scott Wilson, David Smith, Mr John Gerald and Mr Robyn Petrou dated 15 December 2016, [EYS.0008.0003.0019 at .0019].

²² Transcript, Scott Maxwell Wilson, 10 August 2018, 4670.17-22.

²³ Transcript, Scott Maxwell Wilson, 10 August 2018, 4697.40-45.

22. Mr Wilson also explained that, around that time, he believed that the parties had reached an impasse, where both had outlined their non-negotiable positions.²⁴ The Board of Energy Super, nevertheless, resolved to proceed with the proposed merger discussions.²⁵
23. On 20 December 2016, Equisuper terminated the merger discussions.²⁶
24. In evidence, Mr Wilson explained that the Board of Energy Super decided to write to Equisuper to invite them to have another conversation with the Equisuper employers regarding the merits of the proposed merger. Energy Super also offered to have some of its employers engage with Equisuper's employers.²⁷
25. In that context, Mr Wilson explained that Energy Super did not operate the same way as Equisuper. Energy Super is a cooperative fund where member and employer stakeholders get along when it comes to member's best interests. In light of that, moving to a completely different model, where employer stakeholders would not allow shares to be held by directors on behalf of members would be cause for concern for Energy Super.²⁸

Equisuper's Board Skills Policy

26. In paragraph 250 of the Closing Submissions, reference is made to an email that Mr Williamson sent to a number of Energy Super board members on 15 December 2016. The email was summarised as stating that:²⁹

'... Equisuper's employer representatives "would aggressively oppose" a merger because ... Energy Super did not support Equisuper's "Board Skills Policy".'
27. The position is a little more complex because, in fact, the two funds had similar skills policies. The parties were working together to investigate what points of difference, in fact, existed and to try and develop an aligned Board appointment process for the purpose of the proposed merger. This was not a course opposed by Energy Super. The way this unfolded was as follows.
28. On 15 June 2016, Mr Fairley wrote to Energy Super saying that:
 - (a) it is important to the Equisuper Board that there be a commitment from Energy Super to adopt a skills-based Board; and
 - (a) a process would need to be developed, based on objective criteria, using arm's length parties to make judgments about the skill levels of individuals concerned.³⁰
29. In evidence, Mr Wilson explained that Equisuper had not provided any details around what that process would be.³¹
30. At their joint meeting on 19 September 2016, the parties agreed that there was a commitment to a skills based board.³²
31. At their joint meeting on 1 December 2016, the parties agreed that:
 - (a) there are a number of commonalities between the Board appointment processes of the two funds;

²⁴ Transcript, Scott Maxwell Wilson, 10 August 2018, 4697.21-24.

²⁵ Exh bit 5.131.59, Exhibit SW-59 - Energy Super Board Minutes of 20 December 2016, [EYS.0013.0001.0149 at .0153-.0154, item 6068].

²⁶ Exh bit 5.131.51, Exhibit SW-51 - Equisuper letter to Energy Super dated 20 December 2016 [EYS.0008.0003.0364].

²⁷ Transcript, Scott Maxwell Wilson, 10 August 2018, 4698.30-32.

²⁸ Transcript, Scott Maxwell Wilson, 10 August 2018, 4698.34-39.

²⁹ See Counsel Assisting's Closing Submissions, 28 August 2018, 69, para 250.

³⁰ Exh bit 5.131.81, Exhibit SW-81 - Letter from Mr Andrew Fairley to Mr Mark Williamson dated 15 June 2016, - [EYS.0014.0001.3075 at.3076].

³¹ Transcript, Scott Maxwell Wilson, 10 August 2018, 4690.28-30.

³² Exh bit 5.131.84, Exhibit SW-84 - Minutes of the Joint Committee Meeting of 19 September 2016, [EYS.0008.0001.0751 at .0753, item 5].

- (b) Energy Super's management would work on aligning the Board appointment processes and policies of the two funds, in order to develop a Board appointment process for the purpose of the proposed merger; and
- (c) Equisuper would be given an opportunity to review that work and propose relevant amendments to the draft constitution for the proposed merger.³³

32. In light of that, it cannot be said that Energy Super did not support Equisuper's Board Skills Policy.

Dated: 31 August 2018

³³ See paragraph 18 above.