



5 April 2012

Ms Yvette Goss
Productivity Commission
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Dear Ms Goss

Productivity Commission inquiry into default superannuation funds in modern awards

I am pleased to enclose a submission by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia on the *Productivity Commission inquiry into default superannuation funds in modern awards*.

Due to time constraints this submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely

**Margery Nicoll
Acting Secretary-General.**

Productivity Commission Issues Paper: Default Superannuation Funds in Modern Awards

Productivity Commission

Submission by the Superannuation Committee of the Legal Practice Section of the
Law Council of Australia

5 April 2012

About the Law Council of Australia, Superannuation Committee

The Law Council of Australia is the peak national representative body of the Australian legal profession, and represents about 56,000 legal practitioners nationwide.

This submission has been prepared by the Law Council of Australia's Superannuation Committee, which is a committee of the Legal Practice Section of the Law Council of Australia.

The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Committee makes submissions and provide comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The Committee's response

Many of the questions in the Productivity Commission's Paper call for expressions of opinion on matters of policy and others ask for information about questions of fact which are outside the Committee's experience. The Committee's response is confined to the very limited range of questions which the Committee considers touch upon questions of law.

Summary

The Committee does not consider that it is necessary or desirable to impose further conditions on providers in order for their MySuper products to be included as default funds in Modern Awards. The rules which will apply to MySuper products and providers under the *Superannuation Industry (Supervision) Act 1993* (Cth) are already very prescriptive. Further conditions will be applied by the Australian Prudential Regulation Authority's (APRA) Prudential Standards.

The rules and standards are the result of significant work by members of the Cooper Review, the Government's Stronger Super Working Groups, Treasury and APRA. They have been designed to ensure that each MySuper product contains features which are most likely to be suitable for the majority of employees. On this basis, it is in the Committee's view, inappropriate for Fair Work Australia (**FWA**) to impose additional requirements in order for a MySuper product to be nominated as a default fund in a Modern Award. It is also extremely unclear what additional requirements could be imposed which would benefit employees.

If the Commission is minded to impose additional conditions, the Committee is unable to identify any relevant criteria, in addition to those which will already apply to a MySuper product, which are needed to protect the interests of employees. If additional conditions were applied (assuming that these would be along the lines outlined in the Productivity Commission's Paper), the Committee queries whether FWA would be qualified to assess whether those conditions had been satisfied.

In the balance of this submission, the Committee responds to certain specific questions raised in the Commission's paper.

Part 2 - Anticipated effects of MySuper on the superannuation industry

The Committee anticipates that there will be continued consolidation of superannuation funds following the introduction of MySuper. This is likely to be driven by the increased risks and costs associated with offering interests in a superannuation fund. If funds are provided with capital gains tax relief for fund mergers, consolidation will likely occur very quickly. Committee members are aware of a significant number of funds that are actively considering merger possibilities. If capital gains tax relief is not forthcoming, or is unduly restrictive, then consolidation will most likely occur more slowly over a number of years.

Part 3 - Are the criteria for MySuper sufficient?

As noted in the summary above, the Committee is strongly of the view that the criteria for MySuper are sufficient for the selection and ongoing assessment of superannuation funds eligible for nomination as default funds in Modern Awards. As noted, the rules which will apply to MySuper products are designed to ensure that these products are able to best meet the needs of most employees. The rules which apply to a MySuper product are set out in the attachment. In addition, the trustee offering a MySuper product will have to comply with the “enhanced trustee obligations” and APRA’s Prudential Standards.

The Committee not only questions whether the imposition of further conditions would provide any benefit or value to employees but also questions whether FWA would be in a position to determine those criteria and to assess whether they had been satisfied. Depending on the criteria selected, there may also be issues in relation to the review of a fund's position in relation to these over time. For example, a named fund's position in a 'league table' in terms of fees, performance or other matters may vary widely over even relatively short periods.

The Committee notes that the potential criteria which are considered in the Commission’s paper are all matters which have been carefully considered in the design of the MySuper rules, for example, the MySuper product’s investment strategy which is adopted, fees, costs, scale, services, insurance and trustee governance. The legislation will ensure that the trustee adopts an appropriate investment strategy and insurance strategy. Government has formed the view that the content of the investment strategy and insurance strategy are matters for the trustee of the fund. The Committee questions whether FWA would have the ability or the expertise to assess the appropriateness of an investment or insurance strategy for employees covered by an award. The legislation will ensure that only the prescribed fees are charged and that costs, scale and services are monitored closely by the trustee on an ongoing basis. In addition, APRA’s Prudential Standards will apply and the trustee’s compliance with the legislation and standards will be supervised by APRA.

If additional criteria are imposed on MySuper products or if FWA is required to select the funds which are included in a particular Modern Award, the following questions will be raised:

- Would a trustee have standing to make submissions to FWA before FWA makes its decision?
- If not, would the trustee need to rely on representations of entities that do have standing such as unions and employer groups?

- How would such entities obtain the information necessary to assess or make representations to FWA on these criteria?
- What would happen if a fund objected to the information given or representations made to FWA in relation to the fund?
- What would happen if a fund objected to the information given or representations made to FWA in relation to another fund?
- What would happen if a fund disagreed with FWA's assessment? Would a fund have the right to appeal in relation to FWA's decision?

Further, if FWA were charged with applying additional criteria, consideration would need to be given to how such criteria could be applied consistently with the concepts of natural justice, rights of appeal and other administrative law principles. This is especially the case as the viability of a fund may very well depend on whether it is named as a default fund in a Modern Award.

Consideration also needs to be given to the possibility of a fund seeking judicial review of FWA's decisions and the distraction away from FWA's main functions in undertaking what could be argued to be a role traditionally played by ratings agencies.

For these reasons, the Committee submits that subjective criteria should not be used in determining which funds should be listed as default funds in modern awards.

Part 5 – Implementation issues

The Committee notes that if Modern Awards do include specific funds as default funds it will be important to allow for the consolidation of funds that is expected to occur. Consequently, reference to any fund as a nominated default fund should include reference to any successor to that fund (that is, to any fund into which members of the nominated fund have transferred by way of a successor fund transfer). Further, a nominated default fund that loses its MySuper status should cease to be a nominated default fund (or, at the least, the loss of that status should trigger a review by FWA to determine whether it continues to be appropriate for the fund to be listed).

The Committee would be pleased to provide further information or to answer queries in relation to this submission. At first instance, please contact the Chair of the Committee, Heather Gray on (03) 9274 5321, email heather.gray@dlapiper.com.

Attachment

The *Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011 No. , 2011 (the Bill)* sets out the rules which will apply to a MySuper product. They are:

29TC Characteristics of a MySuper product

- (1) *This section is satisfied in relation to a class of beneficial interest in a regulated superannuation fund if, under the governing rules of the fund:*
- (a) *a single diversified investment strategy is to be adopted in relation to assets of the fund, to the extent that they are attributed to that class of beneficial interest in the fund; and*
 - (b) *all members who hold a beneficial interest of that class in the fund are entitled to access the same options, benefits and facilities; and*
 - (c) *amounts are attributed to members in relation to their beneficial interest of that class in the fund in a way that does not stream gains or losses that relate to any assets of the fund to only some of those members, except to the extent permitted under a lifecycle exception (see subsection (2)); and*
 - (d) *the same process is to be adopted in attributing amounts to members in relation to their beneficial interest of that class in the fund, except to the extent that a different process is necessary to allow for fee subsidisation by employers; and*
 - (e) *if fee subsidisation by employers is permitted, that subsidisation does not favour one member who holds a beneficial interest of that class in the fund and is an employee of a subsidising employer over another such member who is an employee of that employer; and*
 - (f) *the only limitations imposed on the source or kind of contributions made by or on behalf of persons who hold a beneficial interest of that class in the fund are those permitted under subsection (3); and*
 - (g) *a beneficial interest of that class in the fund cannot be replaced with a beneficial interest of another class in the fund unless:*
 - (i) *the replacement is with an interest in another MySuper product within the fund; or*
 - (ii) *the person who holds the interest consents in writing to that replacement; and*
 - (h) *a beneficial interest of that class in the fund (the **old interest**) cannot be replaced with a beneficial interest (the **new interest**) in another superannuation entity unless:*
 - (i) *the new interest is a MySuper product and the replacement with the new interest is permitted under a law of the Commonwealth; or*
 - (ii) *the replacement is otherwise permitted, or is required, under a law of the Commonwealth; or*
 - (iii) *the person who holds the old interest consents in writing to the replacement with the new interest; and*

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- (i) *to the extent that assets of the fund are attributed to beneficial interests of that class, a pension is not payable out of those assets by the trustee, or trustees, of the fund on the satisfaction of a condition of release of benefits specified in a standard made under paragraph 31(2)(h) by a person who holds a beneficial interest of that class, unless the payment is derived from a benefit of the kind mentioned in subparagraph 62(1)(b)(ii) provided to the fund by an insurer.*

Note: Subparagraph 62(1)(b)(ii) is about benefits payable when a person ceases work due to ill-health.

- (2) *A **lifecycle exception** is a rule under the governing rules of the fund that allows gains and losses from different classes of asset of the fund to be streamed to different subclasses of the members of the fund who hold a MySuper product:*
 - (a) *on the basis, and only on the basis, of the age of those members; or*
 - (b) *on the basis of the age of those members and other prescribed factors; or*
 - (c) *on the basis of the age of those members and other prescribed factors in prescribed circumstances.*
- (3) *A limitation on the source or kind of contributions made by or on behalf of persons who hold a beneficial interest of a particular class in a regulated superannuation fund is permitted for the purposes of paragraph (1)(f) if:*
 - (a) *the limitation is of a prescribed kind; or*
 - (b) *the limitation is imposed by or under the general law or another law of the Commonwealth.*

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.