



AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY

ACCI SUBMISSION

Productivity Commission

Inquiry into Default Superannuation Funds in Modern
Awards

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Productivity Commission Inquiry into Default Superannuation Funds in Modern Awards

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- § All state and territory chambers of commerce
- § 28 national industry associations
- § Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- § Operate in all industry sectors
- § Includes small, medium and large businesses
- § Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- § Federal Government Ministers & Shadow Ministers
- § Federal Parliamentarians
- § Policy Advisors
- § Commonwealth Public Servants
- § Regulatory Authorities
- § Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Productivity Commission Inquiry into Default Superannuation Funds in Modern Awards

Our specific activities include:

- § Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- § Business representation on a range of statutory and business boards and committees;
- § Representing business in national forums including Fair Work Australia, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- § Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- § Research and policy development on issues concerning Australian business;
- § The publication of leading business surveys and other information products; and
- § Providing forums for collective discussion amongst businesses on matters of law and policy.

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2. INTRODUCTION

1. On 20 January 2012 the Government announced that the Productivity Commission would conduct an inquiry into default superannuation funds in modern awards and released the terms of reference, although these were not formally referred to the Commission until 6 February.
2. On 29 February the Commission released an issues paper, *Default Superannuation Funds in Modern Awards*.
3. ACCI welcomes the opportunity to comment on a number of issues raised by the inquiry. The submission addresses general policy issues that it understands to be directly relevant to employers in their role in the superannuation system.
4. This submission is without prejudice to ACCI or its members in making submissions to this inquiry.

3. KEY ISSUES

The Inquiry

5. The Commission's inquiry would appear to mainly affect Australia's private sector employers, with the exception of unincorporated employers subject to the Western Australian industrial jurisdiction. This is because much public sector activity is regulated by state industrial jurisdictions. Contributions into many federal government funds and state government funds prescribed by the *Superannuation Guarantee (Administration) Regulations 1993* are compliant with choice.
6. The Commission's terms of reference are directed to modern award prescription of default superannuation funds. The terms of reference do not extend to nomination of funds in agreements and the question of funds in agreements is not addressed in this submission. The terms of reference seem to presuppose that modern awards should continue to nominate funds and require that the Commission should design criteria for funds for Fair Work Australia to choose from. These matters are discussed below.

Employers' Interest

7. Based on limited empirical research, employers have diverse attitudes to superannuation and relate to the superannuation system and individual funds differently. Many employers do not fully understand their superannuation obligations under the mix of industrial and guarantee obligations. In its quantitative study for the ATO Colmar Brunton found that 95% of their 1004 employer respondents felt they had sufficient information to manage their superannuation obligations, and the feeling was strongest amongst small employers (employing 6 – 19 employees).¹
8. This seems surprising and caution might be warranted. Only 51% of these respondents reported that their business had a default fund. 487 businesses said they did not have a default fund or did not know, including 10 businesses with 20 – 99 employees and one with 100+ employees. As well, in answer to a question about how they determine where a new employee's contributions should be paid, 56%

¹ P 30, *Investigating Superannuation: Quantitative Investigation with Employers – Final Quantitative Report*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 20 January 2010.

of respondents said they asked new employees to nominate a fund without mentioning the business' default.²

9. In its related qualitative research Colmar Brunton found:

All employers in the groups were aware that they are required to contribute 9% for each employee into a superannuation fund of the employee's choice. Beyond this basic information more detailed knowledge is highly variable; some employers demonstrates a high level of engagement and involvement with superannuation, yet most have only a basic understanding of the system. For those with a greater level of understanding this is resulted generally from investigation into their own personal superannuation.³

10. Many employers find dealing with the system unduly onerous, and for many there is excessive complexity and a lack of standardisation.⁴ Despite this, available evidence suggests that employers are remarkably tolerant of the superannuation system considering how it impacts them.⁵ This suggests that employers as a group accept the fact of superannuation and see the importance of people having something to retire on.⁶
11. Employers have an interest in the superannuation system working well and efficiently and providing good retirement assets for employees. They do not have an interest in increased complexity, administration requirements or higher costs. Changes of this kind do nothing to assist the legitimacy of superannuation.
12. Some employers go a lot further than is required so that their superannuation offering is something which marks them out as an employer. The capacity to do this, and how they do it, depends on the nature and market environments of the employer's operations.

² P 22, *Investigating Superannuation: Quantitative Investigation with Employers – Final Quantitative Report*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 20 January 2010.

³ P 21, *Understanding Superannuation – Preliminary Report: Qualitative Investigation with Employers, Consumers & Industry*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 25 March 2010.

⁴ P 9, *Understanding Superannuation – Preliminary Report: Qualitative Investigation with Employers, Consumers & Industry*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 25 March 2010.

⁵ *Click Super, Australian Payroll Association Employer Survey*, Rice Warner, November 2011, reports on the number of funds, differences in requirements and processing time imposed on the respondent employers. In response to the level of satisfaction with the level of service, 51.6% of respondents were "very" or "somewhat" satisfied (predominately the latter) compared to 21.9% who were "somewhat" or "very" dissatisfied (P 33). This may reflect employers' expectations about superannuation being difficult.

⁶ P 19 *Understanding Superannuation – Preliminary Report: Qualitative Investigation with Employers, Consumers & Industry*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 25 March 2010.

13. Even for employers which are able to put additional resources into their superannuation arrangements, there is no desire for superannuation to become more complicated. Complication consumes resources and any additional resource impost arising from additional complication is not justified.

Changing Default Funds

14. One of the implications of prescribing criteria for Fair Work Australia to determine which funds can be selected for modern award nomination is that some funds otherwise potentially available for nomination will not be named. For employers this raises the issue of a currently named default fund being removed from a modern award.
15. There is little publicly available empirical evidence about the extent to which employers change their default funds, but ACCI believes that it is not common. Colmar Brunton's focus group research supports the view that moving defaults is not common and not high on employers' priorities. None of the approximately 60 employers in its focus groups had considered changing their default:⁷

Most employers had not chosen the default fund; in most cases it had been inherited. For those who had been involved in choosing a superannuation fund the process was considered to be relatively straight forward, although this reflects the perceived lack of distinction between the funds rather than access to comprehensive and simple information. In fact, in many cases the superannuation system is considered very complex with plenty of variations to consider. Employers naturally evaluate funds based on the ease of contribution and processing. Some funds require employers to be members in order to contribute on behalf of their employees. This is considered to be disadvantageous if multiple funds are required. Similarly, most employers look for ease of processing and online transactions in choosing their default funds. Low fees are also important. Some employers also looked for funds that would be proactive in communicating with the employees, and anecdotally there is a lot of variation in the degree to which funds are proactive in this way.⁸

16. Colmar Brunton's quantitative research also supports the view that employers do not often change default funds. Of 1004 responding employers, 34 (3.4%) had changed their default, the main reasons being because the new fund was more beneficial to members (38%),

⁷ P 29, *Understanding Superannuation – Preliminary Report: Qualitative Investigation with Employers, Consumers & Industry*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 25 March 2010.

⁸ P 27, *Understanding Superannuation – Preliminary Report: Qualitative Investigation with Employers, Consumers & Industry*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 25 March 2010.

easier to deal with (29%), because they were changing fund type (24%) or the fund charged lower fees (21%).⁹

17. There are good reasons for this default fund “stickiness” (which is not necessarily a bad thing) apart from the relative unimportance of default fund selection to employers’ operations. One is the nature of contractual arrangements between funds and employers where the employer is a “standard employer sponsor” (there is a direct contractual arrangement between the employer and the fund). Another reason is the superannuation guarantee legislation itself.
18. Under choice legislation an employer which does not offer universal choice must nominate a fund (the default fund) in the standard choice form and contribute into it unless the employee provides a chosen fund in writing and with the proper documentation. Under workplace law contributions into a default fund must also comply with any fund nomination provision which is contained in a modern award which applies to the employer in respect of the particular employee. Where an award applies, the nominated default fund on the standard choice form must be the fund or one of the funds nominated in the modern award.
19. When an employer changes the fund into which default fund contributions are being made the employer must give the affected employees (employees who have not chosen a fund whose contributions are being paid into the former default fund) a new standard choice form which identifies the new default fund. The employer may have to enter into a standard employer sponsorship with the new default unless there is already such an arrangement in place. The employer will have to enrol all affected employees except those who return a properly completed standard form before that happens.
20. Some employees might decide to choose the former fund, perhaps because the employee has selected an investment option with that fund. Some employees might decide to exercise choice, and nominate a totally different fund, perhaps because they do not like the proposed new default. There is no particular time by which an employee must return a choice form.

⁹ P 55, *Investigating Superannuation: Quantitative Investigation with Employers – Final Quantitative Report*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 20 January 2010. Respondents’ answers may have coded into more than one reason.

21. Under the current regime employees not choosing the former default fund would end up with an additional account, although the implications of this may be reduced under SuperStream.
22. These impacts would not arise if awards did not name funds.
23. Similar issues potentially arise with the impending introduction of MySuper. To date there is no finalised legislation, and further MySuper legislation is to be tabled, so it is difficult to speak with finality. ACCI understands that most significant public offer funds, non-public offer industry funds and many corporate funds will apply for and receive authorisation to offer a MySuper product. If this is so it may be that few employers will be required to establish a new default fund. However, it is not clear the extent to which funds' current default investment options can just become the fund's MySuper product, the extent to which scale will impact the capacity to gain authorisation, nor the pace of post-MySuper amalgamations.

Nominating Funds in Modern Awards

24. Superannuation is a major fact of employment life. As at the December quarter 2011 there were 362 (non-small) APRA regulated funds with \$B863.4 in assets, an increase in all the major fund types except corporate funds. (There was another \$B442.5 of assets in other types of superannuation entity). Over the quarter to December 2011 employers paid \$B16.9 in contributions to these 362 funds, the lion's share of the \$B20.6 of contributions they received.¹⁰
25. There do not seem to be figures available on the numbers of employees with superannuation coverage. Some measure of industry size, but not of employees covered, is that at 30 June 2011 there were 386 non-small APRA regulated funds which collectively held 30.48 million accounts.¹¹ In the period April to June 2007 94% of employees had superannuation coverage.¹²
26. The origin of this near universal superannuation coverage of Australian employees, and the growth of both the industry and retail fund sectors, is the award system following the then Australian Industrial Relations Commission (AIRC) national wage decision of 1986. In that decision the AIRC rejected a 4% productivity wage claim and granted access to consent award and agreement provisions providing for

¹⁰ Pp 7, 8, *Statistics – Quarterly Superannuation Performance, December 2011*, APRA, issued 8 March 2012.

¹¹ P 25, *Statistics – Annual Superannuation Bulletin, June 2011*, APRA, issued 29 February 2012

¹² P 41, *Australian Social Trends, March 2009*, ABS Cat 4102.0, released 25 March 2009.

superannuation contributions which were no greater than 3% of ordinary time earnings and were consistent with the Commonwealth's Operational Standards for Occupational Superannuation.¹³

27. This was a contentious development and strongly opposed. The insertion of superannuation provisions into industrial instruments gave rise to disputation, a significant amount of which concerned fund nomination. In its March 1987 national wage decision the AIRC noted:

The ACTU also made clear its view that industrial action was inevitable unless employers adopted a more receptive attitude towards agreements on superannuation and ancillary matters such as the fund or funds into which new or improved contributions should be paid. If employers persisted with their present attitudes, then the ACTU would prefer a system along the lines proposed by the Commonwealth.¹⁴

28. The AIRC's March 1987 national wage decision allowed arbitration of superannuation disputes as a way of reducing the level of disputation over superannuation. In that decision the Commission also noted that any "approved" fund (a fund which had preliminary listing from the Commissioner of Occupational Superannuation) should be acceptable, multi-employer funds jointly controlled by employers and unions seemed preferable and that employers should not be required to contribute into more than one fund for their workforces.
29. The Operational standards were subsequently given the force of law with the passage of the *Occupational Superannuation Standards Act 1987* which mainly regulated the characteristics of funds which could receive occupational superannuation contributions, and dealt with matters such as preservation and vesting. The act also required equal employer and employee representation on boards of trustees.
30. Also following the March 1987 decision, superannuation provisions, including the nomination of funds, were inserted into awards to resolve probable or actual disputes between award parties – employers and unions. In some cases, particularly in some state jurisdictions, separate superannuation awards with coverage across a number of general awards, were made.
31. In both state and federal jurisdictions many award superannuation provisions were highly prescriptive. The result was that superannuation was regulated through a combination of award prescription and the

¹³ Pp 35 – 39, *National Wage Case June 1986*, Print G 3600.

¹⁴ P 23, *National Wage Case March 1987*, Print G 6800.

fund trust deeds. Awards obliged employers to enter into arrangements with funds which make them subject to the fund's trust deed. Trust deeds often regulated contribution entitlements, amounts, methods and frequency of contributions, and imposed data obligations. The industrial parties who made up the board could, and did, amend deeds as circumstances warranted.

32. The *Retail Industry (State) Superannuation Award*, an award of the NSW Industrial Commission made 8 December 1988¹⁵, shows this interconnection. The award which came into effect from 1 January 1989, applied to employers covered by any of 8 state awards. These included the *Shop Employees' (State) Award*, 4 other retail related awards, but also the *Saddlery, Leather, Canvas and Plastic Material Workers (State) Award* and the *Security Industry (State) Award* where they intersected with retail. The retail industry was a large employer.¹⁶
33. Clause 4, "Fund Membership", of this award required the employer to become a "participating employer in the fund" (a standard employer sponsor), cl 7, "Employer to Continue to Participate", prohibited withdrawal from the arrangement while the employer continued to employ, and cl 9, "Frequency of Payment", required the employer to contribute and deduct employee payments in accordance with the fund's trust deed.
34. Superannuation coverage in the private sector climbed from 32% of employees in 1987 to 68% in 1991.¹⁷
35. This direct and indirect regulation of superannuation by industrial parties was supplemented in 1992-93 by the superannuation guarantee legislation which required employers to make superannuation guarantee contributions or pay the superannuation guarantee charge. Funds and trustees became subject to the *Superannuation Industry (Supervision) Act 1993* in 1994 which started to impose greater transparency and raise obligations on trustees.
36. The coverage of the superannuation system expanded. In the period April to June 2000 91% of employees had superannuation coverage.¹⁸ The superannuation system itself also expanded generally with growing assets and diversity of offerings.

¹⁵ 257 IG 237.

¹⁶ In the November quarter 1989 there were 266,100 employees in the NSW retail industry and 271,200 in the February 1989 quarter. Table 05, ABS Cat 6291.0.55.003, *Labour Force, Australia, Detailed, Quarterly*, February 2012.

¹⁷ P 3, *Celebrating 10 years of superannuation data collection 1996 - 2006*, APRA Insight, Issue 2, 2007.

¹⁸ P 41, *Australian Social Trends, March 2009*, ABS Cat 4102.0, released 25 March 2009.

37. By June 2006 superannuation assets had risen from \$B245.3 to \$912.0 (equivalent to national GDP), with 32.1% of assets in retail funds, 16.5% in industry funds and 5.7% in corporate funds.¹⁹ In June 2006 there were 872 APRA regulated entities (not including small funds), of which 276 had assets in excess of \$M100.²⁰ These larger funds began offering a widening range of investment choices, and over the three years between June 2004 and 2006 the proportion of assets in the default investment strategy declined from 63.6% to 54.7%.²¹
38. There had been 4747 funds in June 1996²² and during this decade of growth the numbers of funds declined significantly. Most corporate funds exited and the numbers of industry and retail funds also halved.
39. The *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004* provided that the calculation of an employer's potential liability for the superannuation guarantee charge would be assessed against the definition of ordinary time earnings in the *Superannuation Guarantee (Administration) Act 1992* by removing the Act's recognition of notional earnings bases. This measure took effect on 1 July 2008. The then *Workplace Relations Act 1996* also provided that awards would no longer to contain provisions about superannuation from 1 July 2008.
40. This opportunity to reduce the multiplicity of superannuation regulation impacting employers, by removing award regulation, was lost with the enactment of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*. This Act took effect on 28 March 2008 and repealed the provision ending the preservation of superannuation terms. It also provided for making modern awards which were allowed to contain superannuation terms.
41. In its decision of December 2008 dealing with the first tranche of modern awards the AIRC issued a model superannuation clause for modern awards.²³ The model clause requires employers to comply with superannuation guarantee legislation, to deduct and remit voluntary employee contributions, and to contribute into a fund nominated in the award unless an employee has a chosen fund.

¹⁹ Table 1, *Celebrating 10 years of superannuation data collection 1996 - 2006*, APRA Insight, Issue 2, 2007.

²⁰ Table 4, *Celebrating 10 years of superannuation data collection 1996 - 2006*, APRA Insight, Issue 2, 2007.

²¹ Table 13, *Celebrating 10 years of superannuation data collection 1996 - 2006*, APRA Insight, Issue 2, 2007.

²² Table 2, *Celebrating 10 years of superannuation data collection 1996 - 2006*, APRA Insight, Issue 2, 2007.

²³ Paras 89 – 93, *Decision re making of priority modern awards*, [2008] AIRCFB 1000, 19 December 2008.

42. Most modern awards contain a superannuation clause and in most cases the provision is in the standard form. 8 modern awards do not contain a superannuation clause and a further 5 do not name a fund. 45 modern awards containing superannuation provisions also require an employer to contribute when an employee is on workers' compensation or leave which does not attract the superannuation guarantee, and some modern awards require contributions in other circumstances not attracting the superannuation guarantee.²⁴
43. Whilst superannuation has its genesis in the industrial relations system, and its regulation retains aspects of that legacy, it is now a sophisticated financial/retirement income product (offering varying degrees of investment options, insurance levels and benefits), governed by complex regulations and prudential standards. There are many complex interfaces between the fund, its members, employers and various regulators. Certainty and clarity is not assisted by the multiplicity of regulation sources. Employers support superannuation guarantee legislation governing the superannuation system in Australia, with primary oversight continuing to be by the ATO and APRA.
44. Consistent with this policy position, modern awards should not as a general rule, continue to prescribe minimum standards for superannuation matters, as this is now comprehensively regulated by the Commonwealth. Improvements on the statutory minimum standards should be left to and dealt with by local arrangements, by informal or formal local agreement.
45. If modern awards are to continue to deal with superannuation matters, awards should be as closely aligned to relevant superannuation laws to ease the regulatory and compliance burden on businesses, particularly small and medium employers. Recognising that awards will continue to deal with superannuation matters, awards should only deal with default funds and not more broader matters.

Timing and Award Prescription

46. Presuming that modern awards continue to contain superannuation terms, it seems clear that even a standard clause which is as consistent as possible with superannuation guarantee legislation, will need to be changed from its current form. The current clause does not

²⁴ For example, cl 19.5 of the *Supported Employment Services Award 2010* provides: "Where an employee with a disability is being paid less than \$450 per month in accordance with clause 14.4, contributions for such employees will be either 3% of their ordinary time earnings or \$6.00 per week whichever is the greater."

accommodate the policy objective that award prescribed default funds offer a MySuper product. Under the current MySuper timing these changed provisions will need to come into effect on 1 October 2013, and also recognise the longer transitional arrangements associated with large employer funds.

47. It is also clear that Fair Work Australia does not wish to assess the adequacy of individual funds as vehicles for retirement incomes any more than did the AIRC before it. As before, funds were and are nominated in modern awards for industrial relations reasons. Most named funds in a modern award had been nominated in one or more of the pre-modern federal and state awards which were displaced by the modern award when it commenced on 1 January 2010.

48. When it was making modern awards the AIRC decided:

[66] In our view the nomination of default funds should be made on some readily ascertainable basis and one which does not lead to any disruption. For that reason it was decided to provide for named default funds as the primary basis. The secondary basis was any fund to which the employer was making contributions before 12 September 2008. That date was chosen because it was the date on which the exposure drafts of the priority modern awards were published.

[67] A number of funds have since made applications to be included as named default funds on the basis that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award or on the basis that the representatives of the main parties covered by the award consent. In our view either basis would constitute a good reason for the fund being specified as a default fund in a modern award.²⁵

49. After 1 January 2010 some additional funds were belatedly inserted into modern awards. The AIRC principles were applied by Fair Work Australia to applications to insert an additional fund which came before it.²⁶ There are timing issues affecting award variation which these applications tend to obscure.

50. Modern awards are a safety-net of minimum terms and conditions. This makes the task of the Commission recommending criteria for the selection and ongoing assessment of superannuation funds eligible for nomination as default funds in modern awards by Fair Work Australia

²⁵ Paras 66, 67, *Decision re transitional provisions for priority and Stage 2 modern awards*, [2009] AIRCFB 800, 2 September 2009.

²⁶ *Decision regarding the Passenger Vehicle Transportation Award 2010*, [2010] FWA 6098, 19 August 2010 (a decision against a new fund), and *Decision regarding AustSafe Super Pty Ltd (as Trustee of AustSafe Super)*, [2010] FWA 3426, 18 May 2010 (a decision for a new fund).

unavoidably complex and difficult. Putting aside award wages, modern awards are not ordinarily varied unless they are being reviewed. To vary a modern award outside the review process (for example, to include the name of a new fund, or to remove a named fund), the applicant, which must have standing, must also satisfy Fair Work Australia that the application to insert or remove the named fund is necessary to meet the “modern awards objective”.²⁷

51. This condition was obscured in the post-2010 applications to insert additional named funds because applicants were arguing for the insertion of funds on the basis that the fund had been named, and had members and standard employer sponsors, within the coverage of the modern award arising from displaced pre-modern award instruments, and there was consent. The AIRC had to make modern awards to meet the modern awards objective but in missing the proposed fund the AIRC had not achieved the modern awards objective. These conditions would not be available following the Commission’s recommendations.

Section 134. The modern awards objective

What is the modern awards objective?

(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

²⁷ S. 157(1) *Fair Work Act 2009*

52. Standing to vary modern awards lies with employers or employees who are or would be covered by the modern award or organisations entitled to represent such employers or employees. Fair Work Australia can itself vary modern awards where it determines it is necessary to meet the modern awards objective, but it is difficult to see the Tribunal using that capacity for this purpose.
53. Under the *Fair Work Act 2009* (FW Act) modern awards are subject to a review each four years from 1 January 2010 to ascertain whether they meet the “modern awards objective”. While this is a more likely opportunity under the FW Act to review funds named in awards the 4 yearly review seems rather an arbitrary imposition on the different cycles of asset classes. Putting aside the difficulties of comparing features such as insurance, there are also significant issues such as the role of life cycle, and timing of access to the benefits phase, which seem unrelated to a 4 yearly review, and also unrelated to simply distinguishing defaults for naming in awards.

Choosing a default

54. One argument which is sometimes raised in favour of awards prescribing named funds is that it relieves the employer of the obligation and difficulty of selecting a default. On the available evidence, 32% of the 517 respondents reporting a default find said they had input into which fund should be selected as the business’ default,²⁸ and few awards prescribe a single fund. Most default funds continue as historical legacy:

Most employers had not chosen the default fund; in most cases it had been inherited. For those who had been involved in choosing a superannuation fund the process was considered to be relatively straight forward, although this reflects the perceived lack of distinction between the funds rather than access to comprehensive and simple information. In fact, in many cases the superannuation system is considered very complex with plenty of variations to consider. Employers naturally evaluate funds based on the ease of contribution and processing. Some funds require employers to be members in order to contribute on behalf of their employees. This is considered to be disadvantageous if multiple funds are required. Similarly, most employers look for ease of processing and online transactions in choosing their default funds. Low fees are also important.²⁹

²⁸ P 40, *Investigating Superannuation: Quantitative Investigation with Employers – Final Quantitative Report*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 20 January 2010. It seems likely that numbers of the respondents reporting there is no default also have legacy defaults.

²⁹ P 28, *Understanding Superannuation – Preliminary Report: Qualitative Investigation with Employers, Consumers & Industry*, prepared for Australian Taxation Office, Colmar Brunton Social Research, 25 March 2010.

55. Award-determination of the employer's default is not as circumscribed as it first appears. The issues paper advises that the vast majority of awards which prescribe funds prescribe at least two: 93 modern awards prescribe two or more funds (and, as noted above) a further 13 do not nominate funds at all³⁰. As suggested in the extract from the AIRC's superannuation decision in the award modernisation process (paragraph 48 above), all of the 16 modern awards which nominate a single fund also contain the standard provision:

...any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation fund is an eligible choice fund.

56. The intent of this provision was to avoid precipitating a mandatory change of default when the modern award started to apply in a workplace³¹, and to that extent the provision operates to increase the possible default funds which may be lawfully contributed into by employers for employees within the coverage of the modern award and to support historical legacy.³²
57. A second factor is the extent to which modern awards actually operate (apply) to require a nominated fund. A modern award may not apply to employees because they do not fall within its coverage, or because an agreement applies to them which suspends the operation of an award which otherwise would apply to them.
58. Ascertaining the level of award-reliance is not easy. The ABS collects data on methods of setting pay which is something of a proxy for award-reliance. Its report distinguishes between "award", "collective agreement", "individual arrangement" and "owner-manager of incorporated enterprise". Collective agreements and individual arrangements could be approved statutory agreements or informal local arrangements.

³⁰ P 5 *Default Superannuation Funds in Modern Awards*, Productivity Commission Issues Paper, February 2012.

³¹ Para 90, *Award Modernisation – Decision*, 19 December 2008, [2008] AIRCFB 1000.

³² This provision in the standard clause is found in 4 of the 5 modern awards which do not nominate a fund, and in these modern awards it operates to constrain the selection of the default to the default fund applying on 12 September 2008 for existing employers at that time, and to provide an unlimited default fund selection for new (post 12 September 2008) employers. It is not found in the 5th modern award which does not nominate any fund, the *Miscellaneous Award 2010*.

59. However, to the extent that there are informal local ways of setting pay, such as over-award rates of pay set by individual or collective arrangement, the obligation to comply with the award nominated fund(s) when selecting a default fund would persist.
60. Second, the ABS only surveys employee earnings and hours every two years and the most recent figures were published 27 January 2011 and referred to May 2010. The survey is conducted with employers and its estimates of numbers of employees do not accord with the numbers obtained from Labour Force surveys. There is no lengthy series because collection was much more intermittent before 2000 and changes mean that no long-term series can be constructed.

One limitation of using the EEH survey is that consistent data are only available from 2000. Since commencement of this survey data has been collected biannually. Prior to this, surveys were conducted in April 1954, May 1963, May 1968, May 1974, May 1983, May 1985 and May 1990. However, those surveys gave details of the incidence of industrial awards, determinations and collective agreements and not of award reliant employees paid at the award rate. Awards were once the most common method for setting employees' pay. In 1990, around 80 per cent of all employees and 86 per cent of non-managerial employees were covered by an award. Using unpublished ABS data, Buchanan and Considine (2008) found that over-award payments covered 13.4 per cent of employees in 1990, which left around 67 per cent of employees who had their pay set by an award.³³

61. It is clear that the advent of bargaining gave rise to a significant reduction in award-reliance.
62. That said, the distribution of award reliance for setting pay is quite focussed. Over 70% of employees who are award-reliant for pay are employed in five of the 18 ANZSIC industry divisions. In descending order of importance these are accommodation and food services, retail trade, health care and social assistance, administrative and support services and manufacturing, which in May 2010 employed over 970,000 of the 1.36 million award-reliant employees identified in the survey³⁴.
63. The table below shows these five industry divisions and attempts to allocate relevant modern awards to each division. This is an inexact exercise because modern award coverage was not established

³³ P 51, An overview of compositional change in the Australian labour market and award reliance, Research Report 1/2010, Fair Work Australia, February 2010.

³⁴ Table 5, *Employee Earnings and Hours*, ABS Cat 6306.0, released 27 January 2011.

having regard to ANZSIC, and an award may have coverage across more than one industry division.

64. The table does show that actual default funds were being selected within many of these award-reliant workplaces by some other mechanism than award prescription. Of the 37 identified modern awards, 30 name at least 3 funds (20 of which name 5 or more funds), 4 name 2 funds, 2 name one fund and one names no fund (and therefore continues the pre 12 September 2008 fund for employers established before that date).

Industry Division	No of award reliant employees (’000)	Modern Awards	No of named funds
Accommodation and food services	291.6	Alpine Resorts Award 2010	3 named funds
		Fast Food Industry Award 2010	2 named funds
		Hospitality Industry (General) Award 2010	6 named funds
		Registered and Licensed Clubs Award 2010	6 named funds
		Restaurant Industry Award 2010	11 named funds
Retail trade	204.9	General Retail Industry Award 2010	5 named funds
		Pharmacy Industry Award 2010	2 named funds
		Vehicle Manufacturing, Repair, Services and Retail Award 2010	8 named funds
Health care and social assistance	193.6	Aboriginal Community Controlled Health Services Award 2010	3 named funds
		Ambulance and	5 named funds

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		Patient Transport Industry Award 2010	
		Children's Services Award 2010	9 named funds
		Health Professionals and Support Services Award 2010	12 named funds
		Social, Community, Home Care and Disability Services Industry Award 2010	13 named funds
		Supported Employment Services Award 2010	1 named fund
Administrative and support services	161.0	Car Parking Award 2010	6 named funds
		Cleaning Services Award 2010	3 named funds
		Clerks—Private Sector Award 2010	11 named funds
		Contract Call Centre Award 2010	3 named funds (+ any fund under a NAPSA at 31 December 2009 or complying fund being used by employer 31 December 2009)
		Gardening and Landscaping Services Award 2010	7 named funds
		Labour Market Assistance Industry Award 2010	No named funds (contains requirement to contribute into fund being used prior to 12 September

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			2008)
		Pest Control Industry Award 2010	5 named funds
Manufacturing	120.8	Aluminium Industry Award 2010	1 named fund
		Cement and Lime Award 2010	4 named funds
		Concrete Products Award 2010	4 named funds
		Cotton Ginning Award 2010	3 named funds
		Food, Beverage and Tobacco Manufacturing Award 2010	9 named funds
		Graphic Arts, Printing and Publishing Award 2010	2 named funds
		Joinery and Building Trades Award 2010	6 named funds
		Manufacturing and Associated Industries and Occupations Award 2010	10 named funds
		Meat Industry Award 2010	9 named funds
		Oil Refining and Manufacturing Award 2010	4 named funds
		Pharmaceutical Industry Award 2010	4 named funds
		Poultry Processing Award 2010	5 named funds
		Premixed Concrete Award 2010	3 named funds
		Seafood Processing Award 2010	6 named funds
		Sugar Industry Award 2010	7 named funds
		Textile, Clothing, Footwear and Associated	2 named funds

		Industries Award 2010	
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Conclusion

65. Consistent with ACCI's longstanding public policy position of removing dual and overlapping legal obligations from the compulsory superannuation system for private sector employers, modern awards should not supplement the guarantee legislation with award prescription of general superannuation obligations.³⁵ Presuming that modern awards will continue to prescribe superannuation obligations, ACCI is of the view that there should be consideration of a generic standard clause for those awards which continue to prescribe superannuation terms which is as consistent with superannuation guarantee obligations. In this context, ACCI is not opposed to the continuing recognition of funds as a default award fund where they are (a) a compliant fund, and (b) reasonable scope exists for the award decision makers to deal, on the merits, with applications for award recognition of other funds for these purposes.
66. Should modern awards continue to name funds (for use as the default) a standard clause should be sufficiently flexible to take account of developments in MySuper funds, such as variable investment associated with life cycle, or the re-assessment of risk and return of different asset classes currently taking place as a consequence of the global financial crisis.
67. It is clear that Fair Work Australia does not wish to make the kinds of financial/member benefit decisions suggested by fund assessment, and in ACCI's view, rightly so, this is not its expertise. This suggests that a decision about whether a fund is performing sufficiently for inclusion in awards must be based on performance variables developed by APRA and information which is publicly available from APRA. This begs the question of why unsuitable default funds should not be excluded

³⁵ See ACCI's written submission (dated 30 August 2002) to the Select Committee Inquiry into the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002* and other Bills. ACCI's written submission restated its Retirement Incomes Policy and articulated its concern over the dual regulation of superannuation. At paragraph 18 of that submission, ACCI stated: *"This duality of regulatory obligations on employers (superannuation legislative obligations made by the parliament plus industrial obligations made by industrial tribunals) has been an unsatisfactory aspect of public policy with respect to superannuation for the past decade."* National system employers are currently required to comply with awards and the *Fair Work Act 2009*. Non compliance can result in penalties of up to \$33,000 for each contravention. Employers must concurrently adhere to various Commonwealth superannuation regulation and any applicable common law arrangements which may exceed minimum standards.

through the process of authorising them to offer MySuper or APRA's annual review of their authorisation.

68. Two other points should be made.
69. Currently awards name funds, not products. If MySuper defaults are to continue being named in awards this should continue, that is, funds, not particular products should be named. Under the proposed MySuper legislation the employer's obligation is to contribute to the fund, not the MySuper product. The fund trustee's obligation is to allocate the contribution into the MySuper option where the member has not advised an investment strategy.
70. Second, the standard superannuation clause which requires (non-choice) contributions to be made into one or more named funds "...or its successor". It is expected that the process of MySuper authorisation and evaluation will significantly reduce the number of funds because of the operation of the scale requirements (and perhaps heightened trustee obligations). As funds amalgamate the list of named funds will become increasingly unhelpful because the continuing entity will be the successor fund, which may or may not be specifically named in the particular award.

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