
Draft Report – Default Superannuation Funds in Modern Awards

To Productivity Commission

3 August 2012

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Introduction

1. The Law Council of Australia is the peak national representative body of the Australian legal profession, and represents about 56,000 legal practitioners nationwide.
2. This submission has been prepared by the Superannuation Committee, which is a committee of the Legal Practice Section of the Law Council of Australia.
3. 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 provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.
4. Many of the questions in the Productivity Commission's Draft Report on Default Superannuation Funds in Modern Awards (Draft Report) call for expressions of opinion on matters of policy and 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. The Committee has also included comments regarding the practical implications of some proposals based on Committee members' experience with the superannuation industry.

Response to the Draft Report

5. The Committee's response to the draft report can be summarised as follows.
6. The Committee does not consider it is necessary or desirable for a MySuper product to be assessed against any additional factors in order to be a default fund under a Modern Award. This is because:
 - (a) the proposed additional criteria overlap with the legislative requirements of all MySuper products and their imposition would effectively duplicate the Australian Prudential Regulation Authority's (APRA) role in assessing funds that are authorised to accept Superannuation Guarantee contributions;
 - (b) recent and ongoing consolidation within the superannuation industry, and the legislative requirement for MySuper products to have sufficient scale, is likely to result in a considerable reduction in the number of funds, simplifying the default fund selection process for employers;
 - (c) placing a limit on the number of funds that are to be selected as default funds, will have a significant impact on the viability of a fund which is not selected, thus reducing competition.
7. Accordingly, Option 1 remains the Committee's suggested option in relation to the selection by an employer of a default fund. To assist employers select a default fund, other measures could be adopted, for example:
 - (a) including a section on the APRA website setting out relevant quantitative and qualitative material available to APRA; or

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- (b) including in Modern Awards a non-exhaustive list of 'preferred' MySuper products to which an employer could (but was not obliged to) contribute if the employer did not want to select a default fund.
8. The Committee notes the Commission's proposal for Options 3 or 4. If a MySuper product is to be assessed against any additional factors in order to be a default fund (assuming that these would be along the lines outlined in the Draft Report), the Committee queries whether Fair Work Australia (FWA) or any expert panel could ever accurately assess funds against these factors given:
- (i) the high level nature of those factors;
 - (ii) the need to access information and expert input to enable FWA to understand the peculiarities or relevant characteristics of the relevant industry;
 - (iii) the number of funds that are likely to seek default fund status for each Modern Award, and the corresponding workload involved in making assessments for each;
 - (iv) the significant volume and specialised nature of the information required (and that is likely to be provided) to FWA or the expert panel to assess each fund's application.
9. The Committee also notes that APRA is currently responsible for undertaking similar assessments, and is only able to carry out that responsibility utilising dedicated resources committed to the task on an on-going basis. The Committee queries whether it is realistic to expect that FWA will be provided with a similar level of resourcing to enable it to carry out corresponding work.
10. Consideration also needs to be given to the distraction that the carrying out of such assessments is likely to cause to FWA's main functions given the matters set out above.
11. Consistently with the principle of transparency and accountability, FWA's decisions, and any expert panel's assessment, ought to be published. Consideration also needs to be given to the possibility of:
- (i) a fund seeking judicial review of the decision; and
 - (ii) exposure to legal actions (in the form of individual or class actions) for compensation to:
 - (A) a fund that is excluded from an approved 'default MySuper' list as a result of an error made in the assessment process;
 - (B) a fund that has suffered a loss as a result of something published by FWA or the expert panel that is incorrect; or
 - (C) employers or employees for loss suffered as a result of contributing to MySuper products selected by FWA or the expert panel on its approved 'default MySuper' product list.
12. Ordinarily, the assessment of a fund against factors such as the ones set out in the Draft Report is carried out for an employer or an employee by a qualified licensed financial adviser (who will be subject to statutory and general law duties). Under Options 3 and 4, FWA or the expert panel would in effect take on the role ordinarily conducted by a ratings agency or even a financial adviser and create its own
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approved 'default MySuper' product list (much like a financial adviser's approved product list).

13. Even if FWA or the expert panel was exempted from liability, consideration needs to be given to the 'moral hazard' that this creates for the Government to make good any losses borne by an employer or employee who contributed to a MySuper product selected by FWA or the expert panel for inclusion on its approved 'default MySuper' product list.
14. Consideration needs to be given to the legislation that would need to be put in place to ensure that FWA or the expert panel applies the criteria for its approved 'default MySuper' product list consistently with other Commonwealth legislation (ie. the *Corporations Act 2001* (Cth) and the Future of Financial Advice (FOFA) legislation).
15. It is the Committee's view that an employer should be able to select a default fund that is not listed in a Modern Award without needing to have to demonstrate that its employees will not be worse off.
16. In the Committee's opinion, the possibility of an employer having to defend its decision to select a fund at the request of an employee, a union or FWA will itself discourage many employers from exercising their discretion in the first place. This is especially the case where there are legal or other consequences for an employer that is not later able to demonstrate that employees would not be worse off.
17. Nonetheless, the Committee notes the Commission's preference for a test to be applied where an employer exercises its discretion to select a default fund that is not on the approved 'default MySuper' product list. If the Commission is minded to maintain that proposal, the Committee is strongly of the view that:
 - (a) The test should **not** be whether the employer can demonstrate that its employees are at least no worse off than if a listed default fund was selected as this effectively means the employer is guaranteeing the future performance of the fund selected by it. That cannot, in the Committee's view, be the intended result. Rather, the test should be that the employer can demonstrate that it had a reasonable basis for believing that its employees would not be worse off than if a listed default fund was selected.
 - (b) The Commission should prescribe a standard document (such as a certificate from a qualified licensed financial adviser) that the employer can rely on to demonstrate that the employer had a reasonable basis for believing that its employees would not be worse off than if a listed default fund was selected.
 - (c) Where an employer cannot demonstrate that it had a reasonable basis for believing that its employees would not be worse off than if a listed default fund was selected, the employer should not be exposed to liability except where the employer acted in bad faith. Instead, the employer might perhaps be exposed to an order from FWA to make future contributions to one of the listed default funds.
18. The Committee is strongly of the view that the grand-parenting provisions should not be removed. Removal of grand-parenting provisions is likely to cause significant disruptions and potential for employees to suffer loss if their superannuation is unilaterally moved to new default funds from current default funds in which they have been members for many years. This may have a significant effect on employees' insurance cover, and may give rise to additional fees and charges payable by employees who acquire multiple accounts.

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19. The Committee also considers that the Commission would need to consider the effect of moving funds on and off the approved 'default MySuper' product list, including:
- (a) the disruption and potential for employees to suffer loss as a result of their superannuation arrangements being moved to new default funds from current default funds;
 - (b) the effect on decision-making by funds in relation to longer term investments (such as infrastructure) where there must be some level of certainty as regards expected contribution in-flows and out-flows, neither of which is promoted by proposed Options 3 or 4.
20. The Committee suggests that not only should the current grand-parenting regime continue, but it should be extended in the event that Option 3 or 4 is chosen to ensure that the removal of a fund from the approved 'default MySuper' product list does not result in loss to employees or an impact on long term investments by superannuation funds.
21. 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

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.