Australian Government

Department of Education, Employment and Workplace Relations

Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into Fair Work Amendment Bill 2012

Department of Education, Employment and Workplace Relations Submission

Contents

1. Introduction

1.1. On 30 October 2012, the Hon Bill Shorten MP, Minister for Employment and Workplace Relations, Financial Services and Superannuation, introduced the Fair Work Amendment Bill 2012 (the Bill) into the Parliament.

1.2. The Bill implements a number of recommendations of the independent Fair Work Act Review Panel (Review Panel), and other changes arising from the Minister's consultation with stakeholders on the Review Panel's report. These stakeholders include state and territory governments, members of the National Workplace Relations Consultative Council (NWRCC), unions, employers, small business representatives, the Fair Work Ombudsman and Fair Work Australia.

1.3. The Bill also implements the Government's response to the Productivity Commission Inquiry into Default Superannuation Funds in Modern Awards, following consultation with members of the superannuation industry and members of the NWRCC.

1.4. The Bill includes four main elements:

- changes to the unfair dismissal provisions to improve the integrity of the application and hearing process and to align the timeframes for making unfair dismissal claims and general protections dismissal claims at 21 days;
- changes to the structure and operation of Fair Work Australia (FWA) as recommended by the Review Panel and proposed by the President of FWA, including changing the name of FWA to the Fair Work Commission (FWC);
- other technical and clarifying amendments in relation to modern awards, enterprise agreements and industrial action recommended by the Review Panel; and
- a process for determining which superannuation funds should be listed as default funds in modern awards that is workable and best meets the needs of employers and employees.

1.5. This submission to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Bill outlines the review processes leading to this Bill, the measures included in the Bill, how those measures impact relevant stakeholders and stakeholder views on the measures outlined during the Government's consultations.

2. Fair Work Act Review

2.1. The *Fair Work Act 2009* (FW Act) gave effect to the Government's commitment to implement a fair and flexible workplace relations system for Australia, as outlined in the Forward with Fairness policy documents. In 2009 the Government committed to undertake a review of the FW Act within two years after its full implementation.

2.2. On 20 December 2011, the Minister for Employment and Workplace Relations announced the appointment of a three-member panel to conduct the review the FW Act (the Review). The Review Panel comprised Reserve Bank Board Member John Edwards, former Federal Court Judge, the Honourable Michael Moore and noted legal and workplace relations academic Professor Emeritus Ron McCallum AO.

2.3. The terms of reference for the Review requested the Review Panel to conduct an evidence based assessment of whether the FW Act is operating as intended, and the extent to which its effects have been consistent with the object set out in section 3 of the FW Act. The terms of reference also required the Review Panel to examine and report on areas where evidence indicates that the operation of the FW Act could be improved consistent with the objectives of the legislation. The terms of reference excluded consideration of the content of modern awards, which are the subject of a separate review process conducted by FWA that is still underway. The terms of reference were agreed with the Office of Best Practice Regulation (OBPR).

2.4. The Review Panel received over 250 written submissions (207 initial submissions and a further 47 supplementary submissions). To supplement the written submission process, the Review Panel held a series of meetings and roundtable discussions with a large number of stakeholders between February and March 2012. Individual meetings were held with peak employer and employee associations, as well as with some individual entities, including state and territory government representatives.

2.5. The Panel's final report – *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* – was released on 2 August 2012. The OBPR assessed the final report as meeting the requirements of a post implementation review. In the report, the Panel found that the FW Act was operating as intended, consistent with the objects of the legislation. The Panel also found that important economic outcomes such as wages growth, industrial disputation, the responsiveness of wages to supply and demand, the rate of employment growth and the flexibility of work patterns have been favourable to Australia's continuing prosperity under the FW Act.

2.6. The Panel did not recommend wholesale changes, but instead made 53 mainly technical recommendations to further promote productivity, improve equity or correct anomalies with the FW Act.

Government response to the Fair Work Act Review

2.7. Since the release of the report, the Minister for Employment and Workplace Relations has consulted extensively with employers, employer organisations, unions, state and territory governments and other parties.

2.8. These consultations included two roundtable discussions with small business representatives.

2.9. As a result of these consultations it was clear there is broad support for around one third of the recommendations. These recommendations are reflected in the Bill.

2.10. The Minister has committed to continue to work with stakeholders on the remaining recommendations with a view to introducing further legislation in the new year. In doing so, the Minister has publicly stated that he has neither ruled in nor out any of the Panel's remaining recommendations.

Changes to the operation of the Fair Work Act

Unfair dismissal and general protections

2.11. The Review Panel found that the unfair dismissal and general protections provisions of the FW Act are working well, providing a good balance between the needs for employers to manage their employees and employees' right to be treated fairly in the workplace. However, the Panel did acknowledge that from time to time some people will act unreasonably in pursuit of a dismissal claim. The Panel made several recommendations to discourage this practice.

2.12. Schedules 5 and 6 to the Bill respond to these recommendations.

2.13. The amendments in Schedules 5 and 6 enable costs orders to be more easily made in the case of unreasonable conduct but will not prevent genuine claims from being pursued. They will discourage frivolous and speculative claims and assist in the efficient resolution of claims by encouraging all parties to approach proceedings in a reasonable manner. They also empower the FWC to dismiss applications in certain circumstances. These measures are reasonable and proportionate to address the time and expense that an unreasonable conduct by a participant and/or their representative may cause another party to incur. Importantly, these amendments still allow a party to robustly pursue a genuine claim.

2.14. Aligning the timeframes for applications at 21 days reflects Panel recommendations 40 and 49, which were made in response to concerns raised by both employers and unions. Employers raised concerns that many general protections dismissal claims were in fact more properly characterised as out of time unfair dismissal claims and that different timeframes allow employees to withdraw an unfair dismissal claim after an unfavourable conciliation and lodge a general protections dismissal claim instead. These practices undermine the intent of the provisions and downplay the seriousness of general protections claims. Unions argued that the current 14 day time frame for unfair dismissal applications did not allow for sufficient time for dismissed employees to seek advice.

2.15. Several unions also suggested in submissions to the Review that unfair dismissal applications often reflect disputes about a final pay out of entitlements rather than the dismissal itself. In these circumstances parties will generally work to resolve these disputes without the need to resort to unfair dismissal claims. However, given the short time frame, dismissed employees will sometimes make a claim simply to protect their rights or seek monetary compensation where entitlements are unpaid.

2.16. Aligning the timeframes will ensure that:

- dismissed employees make the right claim in the right jurisdiction;
- employees have an appropriate timeframe to seek advice about a dismissal so they can make this choice in an informed way; and
- employers will respond to one claim in respect of a dismissal, not an unfair dismissal claim and later a general protections claim.

2.17. Alignment of the timeframes will likely result in a shift between unfair dismissals claims and dismissal-related general protections claims. Some claims that would be pursued through the general protections provisions under current settings are instead likely to be pursued under the unfair dismissal provisions.

2.18. While the suggestion that timeframes be aligned was raised by both employers and unions during the course of the review, parties had differing views about what the time limit should be. For example, the ACTU argued that the time limit for lodging an unfair dismissal claim should be extended from 14 days to the current time limit for general protections dismissal claims at 60 days. Similarly, in consultations on the Bill, some employers opposed any increase in the current 14 day time limit to lodge an unfair dismissal claim, suggesting instead that the timeframe to lodge a general protections dismissal claim should be reduced. The Government believes the Panel recommendation of a 21 day time limit is the most equitable approach, providing time for employees to seek advice while still providing greater certainty to employers.

2.19. Part 3 of Schedule 6 to the Bill contains amendments to enable the FWC to order costs against a party to an unfair dismissal matter (the first party) if it is satisfied that the first party caused the other party to the matter to incur costs by an unreasonable act or omission. This amendment responds to Panel recommendation 45 and reflects the Panel's concern that unscrupulous lawyers or agents are encouraging dismissed employees to pursue unfair dismissal claims without merit on a no-win no-fee basis. These amendments would enable costs orders to be made against a person or their legal representative when they have unreasonably pursued or defended a claim but importantly will not stop a party from robustly pursuing a genuine claim.

2.20. Similarly, Part 2 of Schedule 6 to the Bill establishes a new power for the FWC to dismiss unfair dismissal applications in certain circumstances, such as when the applicant, without any reasonable explanation or excuse, fails to attend a hearing or comply with an order made by the Commission or has unreasonably failed to discontinue an application after a settlement agreement has been concluded. This amendment responds to Panel recommendation 42.

2.21. These amendments are intended to provide cost consequences for applications without merit and for actions taken during proceedings that are unreasonable. However they still ensure that employees with a genuine claim can pursue an unfair dismissal remedy.

2.22. The overall impact of the amendments to the unfair dismissal provisions is likely to be positive through moving more claims into the unfair dismissal stream, reducing the costs of claims for

both employers and employees, and reducing unfair dismissal claims that are without merit or relate to unpaid entitlements instead of unfair treatment.

2.23. A number of small business representatives have been particularly supportive of these recommendations.

2.24. The Government has announced that it also supports Panel recommendation 44, which suggests that additional information should be required to be provided in applications about the circumstances of the dismissal. The Government will work with the FWC to implement this recommendation administratively as it does not require legislative change.

Technical and clarifying amendments

Modern awards

2.25. Schedule 3 to the Bill makes two technical amendments to Part 2-3 of the FW Act in relation to the variation of modern awards.

2.26. The first of these amendments ensures that organisations entitled to represent the industrial interests of employees or employers covered by a modern award (which are entitled to bring an application to make, vary or revoke a modern award under section 158 of the FW Act), can also apply to the FWC to vary a modern award to remove an ambiguity or uncertainty under section 160. This amendment implements Panel recommendation 15.

2.27. The second of these amendments inserts a note that highlights the FWC's power to dismiss a modern award application if it is frivolous or vexatious or has no reasonable prospect of success. This amendment responds to Panel recommendation 14.

Enterprise agreements and industrial action

2.28. Schedules 4 and 7 to the Bill implement several technical and clarifying recommendations made by the Review Panel in relation to enterprise agreements and industrial action.

2.29. Amendments in Parts 1 and 3 of Schedule 4 to the Bill clarify that collective enterprise agreements cannot be made with a single employee. The amendments also clarify the operation of the FW Act, consistent with recent FWA Full Bench authority,[1] by prohibiting terms which enable employees to opt out of an enterprise agreement. These amendments give effect to Panel recommendations 23 and 26 respectively.

2.30. Schedule 4 also makes amendments to implement Panel recommendations in respect of the notification requirements for scope order applications and clarify what may be included in a notice of employee representational rights.

2.31. Under the FW Act employees are entitled to be represented in bargaining by a representative of their choice, including an employee organisation (i.e. a union) of which they are a member.

[1] See *Construction, Forestry, Mining, and Energy Union v Queensland Bulk Handling Pty Ltd* [2012] FWAFB 7551 (3 September 2012); *Aldi Foods Pty Ltd v Transport Workers' Union of Australia; National Union of Workers, NSW Branch* [2012] FWAFB 9398 (1 November 2012).

Employers are required to give notice to each employee of their right to be represented in bargaining for an enterprise agreement by a bargaining representative.

2.32. Amendments in Part 2 of Schedule 4 to the Bill clarifies that an official of an employee organisation cannot be a bargaining representative for an employee unless that organisation is itself entitled to represent the industrial interests of the employee in relation to work that will be performed under the proposed enterprise agreement. 'Official' is defined in section 12 of the FW Act to mean a person who holds office in, or is an employee of, an industrial association. This amendment responds to Panel recommendation 21.

2.33. Part 5 of Schedule 4 to the Bill clarifies that a notice of employee representational rights must comply with form and content requirements set out in the Fair Work Regulations 2009 (the Regulations). These amendments respond to Panel recommendation 19 and are intended to eliminate confusion about the required content and form of notices of employee representational rights. The amendment makes clear that the notice must contain only the content prescribed by the Regulations - including any content that the Regulations require an employer to insert or omit.

2.34. Amendments in Part 4 of Schedule 4 to the Bill require an applicant for a scope order to take reasonable steps to inform other bargaining representatives of concerns about the progress of bargaining for the proposed agreement. This amendment responds to Panel recommendation 16.

2.35. Schedule 7 to the Bill makes amendments that promote the efficient and effective conduct of protected action ballots for industrial action.

2.36. Part 1 of Schedule 7 amends the FW Act to confirm that protected action ballots can be conducted by electronic voting, consistent with Panel recommendation 32(a). Part 3 of Schedule 7 inserts provisions to require the expeditious conduct of protected action ballots, consistent with Panel recommendation 32(d).

2.37. Amendments in Part 2 of Schedule 7 enable employees who represent themselves in bargaining to vote on and take protected industrial action if they are members of a union that has applied for a protected action ballot order. These amendments also enable an employee to be included on the roll of voters for a protected action ballot after the ballot order was made, but before the close of the roll of voters, if they are otherwise eligible to vote in the ballot. These amendments respond to Panel recommendations 32(b) and 32(c).

Changes to Fair Work Australia

2.38. The Review Panel also examined the operation of FWA during the Review. The Panel found that FWA is taking a practical approach to administering the FW Act and in most instances is dealing with matters expeditiously. The Panel noted in particular that FWA had implemented more efficient processes for approving agreements and conciliating unfair dismissal, as well as disposing of various other matters. The Panel did make four recommendations (50-53) specifically relating to FWA, which are reflected in the Bill.

2.39. The Bill also contains amendments that arose from consultations with stakeholders and FWA President Justice Iain Ross AO. These amendments have been discussed at a number of

forums including the NWRCC and its subcommittee, the Committee on Industrial Legislation, as well as with state and territory governments. The Minister also discussed these measures individually with some stakeholders.

2.40. Most of the additional measures are technical in nature and limited to the way the tribunal conducts itself. As a result, they were not generally raised by stakeholders with the Panel during the course of the review. One technical issue, however, was raised by the Shop, Distributive and Allied Employees Association (SDA) with the Panel. In the SDA's submission to the Review, they called for the reinstatement of the ability to refer a matter to a Full Bench on public interest grounds. This was generally supported by stakeholders when raised during consultations and is included in the Bill.

2.41. While not reflected in the Panel's recommendations, these additional measures will improve the way the tribunal operates and are generally supported by stakeholders.

Changing the name of Fair Work Australia

2.42. The Review Panel recommended that the name of FWA be changed 'to a title that more aptly denotes its functions'. The Panel recommended that the new title contain the word 'Commission' but that it no longer contain the words 'Fair Work'.

2.43. In consultations with stakeholders on this recommendation, it is clear that there is broad support for changing the name of the tribunal to include the word 'Commission'. However, stakeholder views differ on what the remaining elements of the name should be.[2]

2.44. The Bill changes the name of FWA to the FWC.

2.45. The Government considers using the word "Commission" more accurately reflects the functions of this body. Stakeholders have generally been supportive of this change.

2.46. In respect of the words "Fair Work" the Government considers this is consistent with the establishment and role of the Commission within the Fair Work system - in particular because the Commission administers and takes its functions and powers from the provisions of the Fair Work Act.

2.47. The Government is also confident that the Fair Work Ombudsman, FWA and Fair Work Building & Construction have suitable arrangements in place to ensure matters are dealt with by the correct body and are transferred between them to the correct agency as appropriate.

Vice Presidents

2.48. The FW Act currently provides for the appointment of a President, Deputy Presidents and Commissioners to FWA.

2.49. FWA currently has two Members who were appointed as Vice Presidents and a number of Members who were appointed as Senior Deputy Presidents under the *Workplace Relations Act 1996*.

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[2] For a summary of stakeholder views, see Australian Government 2012, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, pp. 249-250

2.50. Under transitional arrangements, these members retain their status as Vice Presidents or Senior Deputy Presidents, but were taken to be appointed to the designation of Deputy Presidents of FWA by the *Fair Work (Transitional and Consequential Provisions) Act 2009* (the FW(T&C) Act).

2.51. During consultations, Justice Ross proposed that two Vice President positions be created in order to attract senior legal specialists with high level expertise and to assist him in the administration and management of the tribunal.

2.52. FWA deals with important and complex matters of industrial law and is undertaking a broad range of functions and program of stakeholder engagement, including for example the new Road Safety Remuneration Tribunal jurisdiction, the Major Projects Panel and a new and comprehensive stakeholder engagement model.

2.53. Creating two senior positions within the tribunal will both deepen the overall expertise of the Commission and provide assistance to the President in managing the work of the Commission as required.

2.54. The process for selecting the two new Vice Presidents will be merit based, consistent with the Government's policy for the appointment of tribunal Members.

Complaints process and conflicts of interest

2.55. An effective complaint mechanism is an important element of public confidence in any tribunal. As the head of the tribunal, the President is responsible for ensuring that FWA performs its functions and exercises its powers in a manner that is efficient, and adequately serves the needs of employers and employees throughout Australia (section 581 FW Act).

2.56. Earlier this year the President published a Member Conduct Guide on FWA's website, substantially based on the Australian Institute of Judicial Administration's "Guide to Judicial Conduct" (second edition). FWA Members were consulted in the development of the Guide. Information has also been included on the FWA website for members of the public who may have a complaint about the way in which a Member has dealt with a matter.

2.57. In order to further strengthen the complaints process the Bill provides a framework to deal with complaints against Members. The framework is modelled on measures for the Federal Courts contained in the Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Judicial Complaints Bill), which is currently before the Parliament and is objective and transparent.

2.58. Section 641 of the FW Act currently provides for the termination of a Member's appointment in certain limited and serious circumstances. However, the FW Act (and its predecessor legislation) does not provide for a system for resolving complaints about Members prior to consideration by the Parliament or in circumstances where the complaint is not sufficiently serious to warrant Parliamentary review.

2.59. The Bill provides a flexible framework that enables the President to deal with a complaint regarding a Member as the President considers appropriate. The President would have discretion to appoint an independent person or body to investigate a complaint. Options available include establishing a Conduct Committee to investigate a complaint. The President

may also take any measure that the President believes reasonably necessary to maintain public confidence in the FWC.

2.60. The amendments also provide that if the President finds that a serious complaint against a Member has been substantiated, and is of the view that the Parliament should consider the termination of the Member's appointment under existing section 641 of the FW Act, the President must refer the complaint to the Minister. If a complaint is referred to the Minister by the President, the Minister must consider whether to refer the matter to the Parliament for consideration.

2.61. The framework does not limit Parliament's ability to consider at any time a complaint which may warrant the removal of a Member from office and clarifies that the Minister may also consider a complaint about a Member for the purpose of considering whether to refer the matter to the Parliament under the existing provisions of the FW Act. The Minister may arrange for an independent inquiry into a complaint made about the President or another Member if the Minister has a belief that circumstances giving rise to a complaint may, if substantiated, justify consideration of the termination of the appointment of the Member.

2.62. The Bill also contains amendments to the current provisions relating to conflict of interest as recommended by Justice Ross. The amendments require a Member who is dealing or will deal with a matter to disclose any conflicts of interest to persons making submissions in a matter as well as to the President. If the President believes that the Member should not deal with the matter due to the conflict, then the President must direct the Member not to deal with the matter.

2.63. The amendments present a clear and transparent process for handling complaints against members and for dealing with conflicts of interest. The changes are intended to reinforce public confidence in the tribunal.

Technical changes

2.64. The remaining amendments in the Bill relating to the Commission deal with technical changes to the operation of the tribunal. These amendments reflect Panel recommendations and suggestions from Justice Ross and give the tribunal more flexibility to resolve matters effectively and efficiently.

2.65. The first of these is to allow any Presidential Member of the FWC to stay a decision or order that is the subject of an appeal or review, in circumstances where the senior Member of the Full Bench hearing the matter may be unavailable. This implements Panel recommendation 52.

2.66. The Bill also reinstates powers previously available to the tribunal to refer matters directly to a Full Bench if it is in the public interest to do so and to allow the President to take over matters. These changes allow matters before the FWC to be escalated in significant cases and potentially save the parties time and further expense on later appeals. The inclusion of such a measure received broad support from stakeholders during consultation on the Bill.

2.67. The Bill also allows for the appointment of acting Commissioners for a specific period, such as where there is a short term vacancy arising from the absence of another Commissioner. This

would also enable the appointment of an acting Commissioner when the Commission is experiencing an abnormally high level of work. The FW Act already provides for the appointment of acting Deputy Presidents. This amendment gives effect to Panel recommendation 53.

2.68. The Bill also implements Panel recommendation 51, that the General Manager should be appointed by the Governor-General on the nomination of the President. These amendments bring the procedure for the appointment of the General Manager in line with the procedure for the appointment of the Registrar of the Federal Court.

3. Default superannuation funds in modern awards

Background

3.1. Superannuation is a critical part of the industrial, economic and social safety net in Australia. It provides income for working Australians in their retirement, allowing Australians to retire in comfort and with dignity.

3.2. The Government introduced Stronger Super reforms legislation this year aimed at making Australia's superannuation system stronger and more efficient. A key aspect of the legislation is the introduction of MySuper.

3.3. MySuper products will have a simple set of product features, irrespective of who provides them. This simplification will enable members to compare funds more easily based on a few key differences — cost, investment performance and the level of insurance coverage. The standards that a MySuper product must meet will be set out in legislation and enforced by the Australian Prudential Regulation Authority. Superannuation funds will be allowed to provide MySuper products from 1 July 2013.

3.4. The reforms also include amendments to the Fair Work legislation, particularly in relation to modern awards and enterprise agreements such that from 1 January 2014 it will be mandatory, except in some specific circumstances, for employers to make contributions to a fund that offers a MySuper product for any employee that has not chosen a fund.

3.5. While MySuper aims to improve the standard of default fund products, it is still important that employers choose appropriate default products for those employees who fail to choose their own fund.

3.6. In May 2009, the Government commissioned a comprehensive and independent review into the governance, efficiency, structure and operation of Australia's superannuation system (the Cooper Review). The Cooper Review's terms of reference required its work to be *"conducted around the concepts of the best interests of the member and the maximising of retirement incomes for Australians"*.[3]

3.7. The Cooper Review provided its final report to Government on 30 June 2010 and made 177 recommendations. A key finding of the Cooper Review was that many consumers do not have the interest, information or expertise required to make informed choices about their superannuation. These consumers rely heavily on the default superannuation system to act on their behalf. The Cooper Review recommended that the processes by which default funds are nominated for inclusion in modern awards be reviewed to assess whether they are sufficiently open and competitive.

3.8. As part of the Government's response to the Cooper Review, on 20 January 2012, the Government asked the Productivity Commission to undertake an inquiry into the selection and ongoing assessment of default superannuation funds in modern awards. The scope of the

[3] http://www.supersystemreview.gov.au/content/terms_of_reference.aspx

inquiry included the development of transparent and objective criteria for selection and assessment of default funds nominated in modern awards.

3.9. The Productivity Commission (PC) commenced its inquiry in February 2012. A draft report was released for comment on 29 June 2012. The draft PC report outlined four options for reforming the process for the selection and ongoing assessment of superannuation funds for listing as default funds in modern awards. The PC sought feedback from participants on the relative merits its two preferred options:

- having the process undertaken by an Expert Panel established within FWA (option 3); or
- having the process undertaken by a new independent body (option 4).

3.10. The Government received the Productivity Commission's final report on 5 October 2012. The report was tabled and publicly released on 12 October 2012. The final report made 21 recommendations on the criteria for selecting default funds in modern awards and the process for the selection and ongoing assessment of superannuation products for listing as default funds in modern awards.

Default Funds in Modern Awards

3.11. Most modern awards specify a particular fund or funds to which employers are required to make compulsory superannuation contributions for the benefit of employees to whom the modern award applies and who have not chosen a fund ('default funds').

3.12. Of the 122 modern awards, 109 list a default superannuation fund or funds. The other 13 awards do not list a default superannuation fund. In eight of the modern awards that do not list a default fund, there is no reference to superannuation.[4]

3.13. In total, there are 103 superannuation funds named as default funds in at least one modern award. Of the 103 funds listed in at least one award, 42 are named in only one award, 47 are named in between two and nine awards and 14 are named in 10 or more awards. Although there are 103 funds named in awards, there are now only 66 distinct funds, as several have merged, changed their name, or closed since they were first listed. This is about one quarter of the funds regulated by APRA.[5]

3.14. There are a variety of estimates of how many employees actively choose their superannuation fund in any given year. Latest available data from the ABS indicates that about 70 per cent of all employees (employed under a range of different industrial instruments, not just awards) are members of the default fund selected by their employer.[6]

3.15. For superannuation funds, being listed as a default fund in a modern award provides a stable and predictable flow of employees' contributions. The Productivity Commission estimated that at least $6 billion, and potentially more than $9 billion, in superannuation contributions

[4] Productivity Commission inquiry Default Superannuation Funds in Modern Awards, p.40

[5] Ibid, p.41

[6] ABS (Australian Bureau of Statistics), *Employment Arrangements, Retirement and Superannuation, Australia, Apr to Jul 2007* (Cat. No. 6361.0)

were made to default funds in modern awards in 2010.[7] The PC also found that over the eight years to 2011, default funds in modern awards averaged an after-tax return of 6.4 per cent, compared with 5.5 per cent for non-default funds.

Productivity Commission's recommendations and reformed selection process

3.16. The Bill implements the Government's response to the Productivity Commission's inquiry into default superannuation funds in modern awards as part of a new system for the selection of default funds in modern awards. The amendments ensure a transparent and contestable process that results in only those superannuation funds which are in the best interests of employees being included as default funds in modern awards.

3.17. The amendments will operate in addition to the framework under which default funds are authorised by the Australian Prudential Regulation Authority (APRA) to offer a MySuper product.

Establishing the Panel

3.18. In its final report the Productivity Commission recommended that a Default Superannuation Panel should be established within FWA to make decisions about which products are listed in awards. The Default Superannuation Panel should be made up of the FWA President (or delegate), and an equal number of full-time members of the tribunal and part-time independent members appointed for their expertise in finance, investment management or superannuation.

3.19. Schedule 2 to the Bill implements this recommendation by amending the FW Act to provide for the constitution of an Expert Panel within to exercise functions in relation to the assessment of default superannuation funds for inclusion in modern awards.

3.20. The Bill provides that, for the purpose of default superannuation funds assessment, the Expert Panel will consist of seven FWC members and must include the President (or delegate) and three Expert Panel members with suitable experience in superannuation, finance or investment management.

3.21. An Expert Panel will also perform the functions currently undertaken by the Minimum Wage Panel. However, the Bill ensures that only experts with appropriate expertise are used for particular functions. In respect of the annual wage review, that experience will continue to be workplace relations, economics, social policy or finance, business or commerce.

3.22. Six Expert Panel Members will be appointed to the FWC on a part-time basis for a specified period not exceeding 5 years. A person can be reappointed as an Expert Panel Member. The Expert Panel Members will be appointed by the Governor-General on the recommendation of the responsible Minister following a merit based selection process. Minimum Wage Panel Members will be invited to apply for appointment as an Expert Panel Member.

[7] Productivity Commission inquiry Default Superannuation Funds in Modern Awards, p.8

Selection Process

3.23. Schedule 1 to the Bill amends the FW Act to introduce new requirements in relation to terms of modern awards dealing with default superannuation arrangements, and a process under which the FWC will review default fund terms of modern awards every 4 years, at the same time as the 4 yearly review of modern awards. The first review will occur as soon as practicable after 1 January 2014.

3.24. Four yearly reviews of default fund terms in modern awards will be conducted by the FWC in two stages. In the first stage, any superannuation fund that offers a generic MySuper product may apply to the Expert Panel to have that product considered. This will bring greater contestability to the system.

3.25. In order for an application to be successful, the Expert Panel must be satisfied, having regard to information provided in the application, taking into account relevant criteria and submissions made in relation to the application, that including the product on the 'Default Superannuation List' is in the best interest of default fund employees to whom modern awards apply or a particular class of those employees.

3.26. The Bill sets out the criteria that the Expert Panel must take into account when determining applications to include a generic MySuper product on the Default Superannuation List. The criteria largely reflect those recommended by the Productivity Commission and concern the performance of a product in areas such as investment return, fees and costs, governance practices, insurance offered and administrative efficiency. The Expert Panel will also be able to have regard to any other matters it considers relevant, including, for example, administrative impacts on employers.

3.27. In the second stage, a Full Bench of the FWC will review the default fund term in each modern award and ensure that each modern award specifies at least two, but no more than ten, superannuation funds from those included on the 'Default Superannuation List' and which the Full Bench is satisfied are in the best interests of default fund employees to whom the particular modern award applies. The Full Bench may include more than ten funds if satisfied that it is warranted, having regard to the range of occupations of employees covered by the modern award.

3.28. The FWC must conduct the second stage in an open and transparent way and have regard to the views of employees and employers covered by the modern award, and organisations entitled to represent the industrial interests of those employees or employers.

3.29. The selection of a limited number of default funds in modern awards by a FWC Full Bench is a departure from the Productivity Commission's recommendations. The Productivity Commission recommended that for each modern award, all suitable MySuper products be listed as default funds, with a subset of particularly suitable funds highlighted in the award. The Productivity Commission also recommended that the assessment and selection of default funds be done entirely by the Expert Panel.

3.30. Limiting the number of default funds in modern awards to between two and ten funds will ensure that each modern award remains simple, relevant and workable for the employers and

employees in the particular industry each award covers. It would take up a significant amount of time and resources for an employer to choose a fund from a large list of funds, with no indication about whether a particular fund is more suited to their industry or workforce than another. Employees will also want reassurance that the default funds used for their contributions most appropriately reflect their particular characteristics and needs as workers in a particular industry.

3.31. In general, employers strongly supported the approach taken by the Government in their submissions to the Productivity Commission inquiry and in consultations with the Government through the Committee on Industrial Legislation. Many employers, especially smaller employers, prefer the simplicity of selecting from a limited number of funds specified in a modern award because they do not have the time or expertise to compare potentially dozens of different superannuation funds.

3.32. This approach is appropriate as the Expert Panel, with detailed knowledge of and experience in the superannuation and finance industries, would conduct an assessment of funds against the legislated criteria, however a Full Bench of the FWC is the appropriate decision maker to determine and list funds in the relevant award given the FWC's responsibility for making, varying or revoking modern awards.

3.33. The FWC Full Bench process is also consistent with existing framework for the four yearly review of modern awards, which must also be undertaken every four years by a Full Bench.

Payment of Default Superannuation Contributions

3.34. Employers who rely on modern awards to set the pay and conditions of their employees will only be able to direct their employees' default superannuation contributions to a default fund listed in a modern award, a defined benefit scheme (where the employee is a defined benefit member), a Public Sector Superannuation Scheme (where there is a requirement to do so under State law), an Exempt Public Sector Superannuation Scheme, or to a transitionally authorised superannuation fund.

3.35. These changes to the process for listing default superannuation funds in modern awards do not affect the ability of an employee to choose a fund, or employers and employees to agree to include a particular default fund in an enterprise agreement, whether or not that fund is included in the modern award they are covered by.

3.36. The Bill provides that FWC may make transitional arrangements authorising the payment of employees' default superannuation contributions to a particular fund currently listed in a modern award for a limited period of time, for example where a default fund is removed from a modern award as part of a four yearly review of default funds.

Impacts on Stakeholders

Superannuation Funds

3.37. There are several types of superannuation funds recognised by the Australian Prudential Regulation Authority, including, Public Sector Superannuation Schemes (and Exempt Public Sector Superannuation Schemes), defined benefit schemes and industry and retail funds

including corporate and tailored funds. How the different types of funds will operate under the new process for selecting default funds in modern awards is outlined below.

3.38. Industry and retail funds are able to have their generic MySuper products listed as default funds in modern awards by applying to the FWC as part of the four yearly review process. Industry and retail funds will be able to apply to the FWC on an equal basis, improving the contestability of the selection of default funds in modern awards. The Expert Panel will then make and publish a Default Superannuation List and a FWC Full Bench will then decide which funds from this Default Superannuation List will be listed as default funds in each modern award.

3.39. Under the new process, defined benefit schemes, public sector superannuation schemes and exempt public sector superannuation schemes will not be able to have their products listed as specified default funds in modern awards. However, they will still be able to receive employees' default superannuation contributions without having to apply to the FWC. Superannuation terms in modern awards will be required to permit contributions for default fund employees to a defined benefit scheme in respect of a defined benefit member, an Exempt Public Sector Superannuation Scheme, or a Public Sector Superannuation Scheme (provided a State law requires the contributions to be made to the Public Sector Superannuation Scheme for the benefit of the employee).

3.40. Corporate and tailored MySuper products will not be included as default funds in modern awards since only generic products suitable for use by a range of employers can be included. For employees to whom a modern award applies, superannuation contributions may only be directed to a corporate or tailored MySuper product if that product is specified as the default fund for that employer in an enterprise agreement, or if employees choose to have their contributions directed to that fund.

Employees

3.41. Where an employee's default superannuation contributions are being directed to a default fund listed in the relevant modern award, and that fund is included in the modern award in the four yearly review process, there will be no change for the employee.

3.42. If the employee's contributions are being directed to a fund that is not selected as a default fund in the relevant modern award by the FWC in the four yearly review process, the employer will be required to change the fund into which their employees' contributions are paid. Affected employees can either accept a new default fund selected by their employer or make their own choice of superannuation fund. The FWC may make a transitional authorisation to allow a reasonable transitional period for such employers and employees.

3.43. Where an employee's superannuation contributions are directed to a different fund as a result of the FWC assessment process, the employee can either choose to consolidate their accounts into a single fund or maintain separate accounts with different funds.

3.44. The Government has adopted this approach as it provides the greatest benefits to Australian workers in the long-term. This approach will ensure that the default funds listed in modern awards are the best performing MySuper funds and best meet the needs of employees

covered by those awards. Employees will benefit in the long-term from greater competition among superannuation funds for listing of their MySuper products as default funds in modern awards, which will drive continued improvements in the quality of MySuper products.

Employers

With an enterprise agreement

3.45. The Government's changes to the selection of default superannuation funds in modern awards will not generally affect employers and employees to whom an enterprise agreement applies. Many enterprise agreements identify a default superannuation fund for that enterprise. That fund will continue to be the default fund for that enterprise, irrespective of whether the fund is included as a default fund in a modern award covering the relevant employer and employees.

3.46. The only employers with enterprise agreements affected by the changes will be those whose enterprise agreement defers to the relevant modern award for the selection of a default fund.

3.47. Under the Government's MySuper reforms, default superannuation funds nominated in enterprise agreements approved on or after 1 January 2014 must offer a MySuper product, be a defined benefit scheme in respect of the relevant employees, or be an exempt public sector superannuation scheme.

Without an enterprise agreement

3.48. All employers without an enterprise agreement who rely on a modern award to set the pay and conditions of their employees are potentially affected by the new process for selecting default funds in modern awards.

3.49. If the fund that an employer is paying their employees' default superannuation contributions into is selected by the FWC as a default fund for the relevant modern award, the employer may continue to pay their employees' default contributions into that fund and no changes will be required.

3.50. If the fund used by the employer is not selected as a default fund for that modern award after the four yearly review of default funds (and is not a Public Sector Superannuation Scheme, Exempt Public Sector Superannuation Scheme or defined benefit scheme in respect of the relevant employees), the employer will be required to direct their employees' default contributions to another default fund in the modern award. The FWC may make a transitional authorisation to allow a reasonable transitional period for such employers and employees.

3.51. An alternative option for employers in this situation is to make an enterprise agreement with their employees that specifies a different default fund. The scope of the enterprise agreement can be limited to nominating a particular default fund for that enterprise. The interests of the employees are protected because an employer can't make an enterprise agreement without the agreement of their employees and enterprise agreements are subject to the better off overall test.

3.52. The Government's approach provides significant benefits to employers. The approach ensures that modern awards continue to be simple and stable instruments. This approach will ensure

that the default funds listed in modern awards best meet the needs of employers and employees covered those awards. Employers will be able to select from among MySuper products that offer better administrative systems and/or are more efficient at responding to their needs. Employers will benefit in the long-term from greater competition among superannuation funds for listing of their MySuper products as default funds in modern awards, which will drive continued improvements in both the quality of MySuper products and the service to employers delivered by their providers.

Stakeholder Comments

3.53. Options 3 (having the selection process undertaken by an Expert Panel established within FWA) and 4 (having the process undertaken by a new independent body) were the Productivity Commission's preferred options in its draft report. Many participants, including the ACTU and Ai Group, favoured option 3 while other stakeholders put forward option 4 as an alternative if option 1 (each employer choosing a fund from all of those that offer a MySuper or other approved default product) didn't proceed.

3.54. Stakeholders presented varying views on the review process proposed in the Productivity Commission's draft report, which was a reassessment of the default funds listed in modern awards every eight years. The Corporate Super Specialist Alliance suggested that a three-yearly reassessment would be more appropriate. Many participants opposed restricting new applications to the eight-yearly reassessment, believing that it would prevent employees accessing new and improved products (Association of Financial Advisers, Corporate Super Specialist Alliance), or that it would prevent adding to the list in the event that the number of products in an award dropped too low (ACCI). Suncorp supported the Productivity Commission's proposed timing of reassessment.[8]

3.55. The Government's view is that an eight-year cycle may not provide sufficient opportunity for new funds to apply but an ongoing assessment that allows for funds to apply at any time may be too onerous a process. Consequently the proposed approach collapses the interim and wholesale assessment processes proposed by the Productivity Commission into one process which aligns with the timing of the four yearly review of modern awards. This would coincide with the Productivity Commission's recommendation that the reassessment should be conducted no more often than every four years and no less often than every eight years.

3.56. On the application process, some stakeholders suggested that any fund offering an authorised MySuper product should be able to apply to have it listed in awards, consistent with the Productivity Commission's and Government's preferred approaches (Australian Hotels Association, Industry Funds Forum, Industry Super Network (ISN), Transport Industry Superannuation Fund).[9]

3.57. On the placement of the Expert Panel (or Default Superannuation Panel, as it was referred to by the Productivity Commission), many stakeholders favoured the Productivity Commission's option that closely resembles the Government's preferred option, in particular the placement of a Default Superannuation Panel (or Expert Panel) within FWA (Australian Council of Trade

[8] Productivity Commission inquiry Default Superannuation Funds in Modern Awards, p.182

[9] Ibid, p.178

Unions , Australian Industry Group, the Australian Institute of Superannuation Trustees, Community and Public Sector Union, Eldercare, ISN, National Union of Workers, Queensland Nurses' Union, Unions NSW). They viewed superannuation contributions as deferred wages and inherently an industrial matter and, on that basis, considered FWA to be the most appropriate body for the task of listing products in modern awards.[10]

3.58. On the number of default funds listed in modern awards, the Productivity Commission found that many smaller employers prefer the simplicity of selecting a fund specified in a modern award, rather than selecting from potentially hundreds of funds in the market.[11] This point was put strongly by some employers. For example, in its submission to the Productivity Commission's inquiry, the Australian Hotels Association argued that "it is important that the number of funds listed in awards remains limited to prevent overwhelming employers with excessive options for default funds. It is unrealistic to expect employers to spend the time examining the relative merits of potentially dozens of different superannuation funds."[12]

3.59. These views support the Government's decision to limit the number of default funds listed in modern awards to between two and ten funds. Responding to the Government's announcement of its approach, the ISN noted that the assessment of funds by the FWA "will not place undue burden on employers to make their own judgements on such an important issue."[13]

[10] Ibid, p.184

[11] Ibid, p.143

[12] Australian Hotels Association Submission in relation to Default Superannuation Funds in Modern Awards, p.9

[13] Media Release, ISN welcomes Government announcement regarding Productivity Commission inquiry into default super system, 31 October 2012